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Particularities of the Exonerating Causes of Liability of the Ship-Owner or the Maritime Carrier according to the Brussels Convention

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Abstract: The specificity of maritime trade confers a particular feature on exonerating liability of the carrier, the physiognomy of the causes that exclude the existence of liability is, as a result of the "sea risks", an entirely original one. Their regulation by the provisions of the International Convention for the Unification of Certain Rules of Mortgages concluded in Brussels in 1924 and the United Nations Convention on the Carriage of Goods at Sea, concluded at Hamburg in 1978, is characterized, despite similarities, non-unitary and non-systemic approach; if the provisions of art. 4 point 2, letters (a-q) of the Brussels Convention contain only a limited listing of 17 "exempt cases", the text of Article 5 (4) of the Hamburg Rules narrows the scope of the Brussels Convention by laying down four circumstances that hinder the employment responsibility of the carrier.

Keywords: shipping; liability of ship-owner and carrier; exonerating causes; Brussels Convention

1. Introduction

The Brussels Convention, known as the "Hague Rules", was amended by the Brussels Protocols in 1968 and 1979, becoming the "Hague-Visby Rules". After article 4 of the Convention where it provides that "the carrier nor the ship shall be liable for damage resulting from the lack of airworthiness unless this is due to a lack of reasonable diligence on the part of the carrier to make the ship navigable (...)", art. 4, pt. 2 indicates the following exonerating hypotheses: "a) the acts, negligence or mistake of the commander, sailors, pilot or caretaker of the carrier in navigation or in the administration of the ship; b) fire, unless it is caused by the fault of the carrier, c) dangers, jeopardy or accidents of the sea or other navigable waters, d) natural phenomena ("acts of God" in the metaphorical formula of the authors), e) states of war, f) acts of public enemies, g) decision or coercion of the state, authorities or people, respectively prosecution, h) quarantine restrictions, i) act or omission the name of the shipper or the owner of the goods or their agents or representatives; j) strikes, lockouts or impediments to work, in part or in full, regardless of the cause; k) riots or civil unrest; 1) rescuing or attempting to save lives or property at sea; m) decreases in volume or weight, hidden defect, special nature or own defect of the goods; n) insufficiency of packaging; o) insufficiency or imperfection of the marks; p) the hidden defect

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that escapes a reasonable diligence; q) any other cause not arising from the act or fault of the carrier or his agents”.

The text of art. 5, point 4 of the Hamburg Rules, however, restricts their scope, establishing the following circumstances that do not attract the liability of the shipping carrier: fire, unless it is proved that the carrier has not “taken all measures that can reasonably be claimed to extinguish the fire and to avoid or limit its consequences”; in the case of the transport of live animals, “the special risks inherent in this type of transport”; damage resulting from “measures taken to save lives or reasonable measures taken to save goods at sea”; the existence of “other causes of loss, damage or delay in delivery”.

2. The Specifics of the Exemption Regime Established in the Brussels Convention

Under what conditions does the presumption of liability take place? The Anglo-Saxon-inspired Brussels Convention established a true presumption of liability on the part of the shipping carrier for loss or damage to delivery, but paradoxically set a trap behind it in favour of the carrier, when invoking the benefit of exemption[1]. In order to remove the effects of the presumption, the absence of the fault of the carrier was insufficient, being required, necessarily, the administration of the proof of the existence of one of the exempted cases regulated by art. 4 of the Convention. Practically, in probative terms, the presumption of liability could be challenged subject to the fulfilment of two conditions: the existence of one of the exonerating causes allowed by the convention and the proof of the causal link between the invoked circumstance and the suffered damages[2].

Obstructing the carrier's success in relying on his disclaimer is, in fact, apparent, as the potential difficulties of proof are offset by the more than generous range of “exempt cases”, the interests of the carrier being ultimately protected. Subsequently, the Hamburg Rules established a more balanced regime of liability, with the interests of the owners-shippers claiming their legitimate defence.

For reasons of rigor and legal accuracy, we preferred to adopt in our approach the French-inspired doctrinal concept that proceeds to the analysis of all exonerating causes by redistribution into three categories: exempt cases closely related to ship traffic and safety, except cases in connection with the cargo and, finally, that of cases in which the exemption is connected with external events, having their origin neither in the field of activity of the ship nor of the expedition. It should be noted that by their nature and content, conventions are less convincing legal documents, because they describe desirable obligations and not obligations of result and behaviour. (Cornea & Costache, 2018, pp. 72-90)

2.1. Excepted Cases closely related to the Ship

The circumstances belonging to this category are: the state of non-navigability and the hidden defect of the ship, insofar as they are not the consequence of the guilty attitude of the ship-owner, respectively of

[1] Curious enough is the fate of the Hague Rules, from a historical perspective; although their wording was born out of a desire to reconcile the interests of shippers with those of English ship-owners who dominated the maritime market, their content remained more faithful to the carriers, thanks to the extensive list of exonerating causes reproduced above. For details on the international conferences that preceded the elaboration of the Hague Rules, the subsequent implications of the application of the regulation and the need for amendments to the protocols of 1968 and 1979, respectively, see (Bibicescu, 1986, p. 398 and the next)

[2] C.A. Aix-en-Provence, 4 May 2004, Lamyline in the case brought before the court, the court notes that there is no causal link between the fire in the engine room of the ship and the damage suffered by the cargo during the voyage). The rule of double probation is reaffirmed in other more recent judgments, see Cass. com., July 10, 2001, in B.T.L. 2001, pp. 544, C.A. Versailles, April 5, 2001, *op. cit*., pp. 570.

the carrier, in the execution of his specific obligations; the fault of the captain, the sailors or of other agents in the performance of the technical operations imposed by the normal development of the navigation activity; finally, the carrier may invoke the removal of liability for damage caused by acts committed to save lives or endangered property at sea, as well as justified deviations from the usual route for the purpose of providing assistance at sea.

a) The notion of navigability. Under what conditions can non-navigability constitute as an exonerating ground of liability for the ship-owner, respectively the sea carrier? The navigability status of the ship must be analysed both from the perspective of the nautical skills involved in the safe maritime expedition (in the sense that the ship must have a solid and watertight structure to withstand without danger the specific natural conditions, respectively accidents inevitable to travel by sea, as well as to be equipped with adequate means of propulsion) as well as from the perspective of commercial requirements related to the adaptation and interior design of the means of transport depending on the type of transported goods.

In judicial practice, it was noted that the classification certificates do not always constitute irrefutable evidence, entailing only a relative presumption that the charterer has made all the necessary diligences in fulfilling his contractual obligations[1]. Thus, in a case-by-case decision, it was considered that the technical certificate issued a few months before the disputed transport and attesting to the verification of the ship's propulsion devices does not fully prove the good navigability of the ship, especially from the administered evidence it turned out that the deficiencies are the consequence of a failure of the engine of the means of transport[2]. As navigability is not necessarily an objective quality of the ship but the result of due diligence by the ship-owner, its existence being a matter of fact which can be proved by any means of proof, the purely technical documents issued by the specialized institutions may be corroborated, as evidence, and with other facts likely to provide objective indications as to the nautical qualities of the ship[3].

The exonerating effect is conditioned by the fact that the carrier is required to prove the fortuitous nature of the way in which the ship lost its navigability, the courts severely investigating the existence of conditions in the presence of which the removal of liability can be considered legitimate. Thus, judiciously, it was found that the damages were not the consequence of the events of the sea likely to determine the non-navigability but the consequence of the poor maintenance of the ship whose technical parameters are exceeded[4]; at the same time, it was considered that the prolonged interruption of the operation of the refrigeration system due to a malfunction of the control panel does not exempt the carrier from being liable for damages as long as the evidence shows that the deficiency could have been found, under due diligence. Even more so, even on the occasion of the usual checks that the ship-owner, in the exercise of the technical management on the means of transport, can undertake[5]. On the other hand, the circumstance in which a ship, traveling from Italy to Algeria, risked sinking while crossing the calm waters of the Mediterranean, being flooded in less than half an hour, at the limit of the physical possibilities of keeping afloat, was of a nature to conclude that the non-navigability occurred in

[1] Under the German law, the inability of the ship to carry out the contracted transport is a cause of nullity of the contract for the “objective impossibility” of execution, which can be invoked by the shipper under Article 306 BGB, see CA Hamm, 16 February 1995, cited after (Veriotti & Voicu, 2003, p. 200).
[2] C.A. Rouen, 15 November 2001, in B.T.L. 2002, p. 257.
[3] C.A. Rouen, 30 June 1972, in Gaz. Pal. 26-28 November, 1972, p. 7.
[4] C.A. Douai, 31 January 2002, in B.T.L. 2002, p. 151.
[5] C.A. Rouen, 20 June 1985, in D.M.F. 1986, p. 694.

fortuitous conditions, the solution of the carrier's exemption being justified by the argument that, prior to the event, the ship was no longer involved in incidents that would call into question its nautical skills[1].

b) The hidden defect of the ship is analysed as an exonerating case distinct from the one deriving from the inability of the ship to sail, the reason for its establishment being inextricably linked to the technical complexity that currently characterizes the modern shipbuilding industry. The above-mentioned differentiation sometimes appears in the doctrine as the consequence of the different contractual forms in which the transport of goods by sea is carried out, the legal regime of charter contracts (which, traditionally, is the specific legal instrument used to make occasional movements of goods by sea) being the particular value compared to that of the maritime transport contract actually practiced in regular transports. If the obligation to ensure the use of a ship fit for the voyage in good condition is specific to the ship-owner, regardless of whether he also combines the quality of owner of the means of transport, the classic obligation of the carrier[2], also known in land transport, is to do all due reasonable diligence so that the means of used transport corresponds to the specifics of the consignment (of course of interest to the ship's adaptation to the nature and weight of the goods transported as well as to other particular conditions required by the agreed itinerary).

Exemption is possible subject to the fulfilment, from a probative point of view, of two conditions: that of the existence of the "hidden" feature of the defect, the carrier being required to prove that the detection of the deficiency was impossible despite careful checks which, taking into account the degree of wear, understood to perform them periodically, as well as the fact that the hidden defect is the direct and necessary cause of the damages suffered by the cargo.

It has been established in jurisprudence that safety certificates issued to the ship-owner when the ship leaves and attesting good navigability do not release the carrier, when the ship-owner is not also the carrier of the transported goods, from the obligation to exercise proper supervision and maintenance of the means of transport and, consequently, he was held liable for the damage caused by thawing the goods as a result of the malfunction of the refrigeration systems[3]. The claim, even proven, that the ship is newly manufactured, complying with modern standards in the field, can only lead to a simple assumption that, at the time of departure, the technical installations were in working order and the defect could "escape" a vigilant control.

The case law retained the exonerating effect of the hidden defect in the following factual situations: interruption of the electrical supply in the refrigeration devices due to the dysfunction of an internal part, although during its disassembly no signs of premature wear or unsatisfactory maintenance[4] were found; cracking of a tank intended for the transport of wine in bulk which, being masked by a protective layer, could not be detected before the leakage occurred; thermal system malfunctions which, prior to departure, had just been checked by Veritas Bureau experts[5]. The carrier's defences were not received, keeping in mind that the leak that allowed water to enter the hold of the ship did not constitute a hidden defect since the proof of the technical aptitudes of the ship was not made by the carrier nor by the control certificates normally issued by the specialized personnel of the Veritas Bureau, nor by any checks it may undertake to test the ship's ability to navigate the rough seas; the corrosion of a refrigeration pipe due to

[1] C.A. Paris, 25 March 1993, Cass. corn., 27 June 1995, Lamyline.
[2] When the charterer concludes a contract of carriage with third parties, he and not the ship-owner is the carrier, a hypothesis in which we witness a dissociation between the role of ship-owner (in the sense of operator of the ship, i.e. the person in charge of nautical management) and carrier. In this sense see (Bibicescu, 1986, p. 128).
[3] T. corn. Marseille, 9 September, 1975, in Revue SCAPEL, 1975, p. 54.
[4] T. com. Seine, 21 April 1952, in D.M.F. 1953, p. 51, quoted by (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 377)
[5] C. A. Rouen, 8 November 1952, idem, p. 377.

the leakage of the Freon which, covering the entire cooling installation, could not be ignored by the ship's personnel[1]; damage to a part due to negligence with which the ship's engine maintenance operations were performed.

c) nautical fault, i.e. the mistakes of the captain, sailors or other transport agents committed in the performance of professional duties regarding the safe operation and movement of the ship is perhaps the most eloquent case in highlighting the particular features of the exoneration regime of liability of the carrier in maritime transport. The originality lies in the fact that the carrier is allowed, in defence, to invoke, practically, its own fault (!), which also explains the controversial debates that, over time, have led to the legitimacy of recognizing nautical fault as the ground for exemption.

Thus, if the set of “exempt cases” listed in the provisions of the Brussels Convention includes it, being expressly established in some national laws[2], the authors of the Hamburg Rules no longer understood to retain in the sphere of exonerating causes and nautical fault. Moreover, that is the reason why states representative for maritime trade, prefer not to denounce the Brussels Convention (in its original form or amended according to the Protocols of 1968 and 1979, respectively), they did not understand to ratify them.[3]

In the classical sense of the notion, the exonerating effect of nautical fault occurs only with respect to damages that are the consequence of the guilty behaviour of the commander of the ship in the execution of technical navigation operations, not for those committed in defective fulfilment of cargo obligations (related to maintenance, preservation and delivery of goods) and which are limited to the notion of commercial fault.[4]

To the doctrinal criterion of differentiating the nautical fault from the commercial one from the perspective of “locating” the damage, an additional condition has been added by jurisprudence, which establishes a restrictive conception of its scope. Thus invoking the exonerating character of the nautical fault will not be successful unless the navigator's misconduct was liable to endanger the ship's safety; so it is insufficient to prove the nautical fault as the cause of the damage to the goods, but it is necessary to establish with certainty that the same nautical error endangered[5] the ship, in the interpretation of this rule it was held that the delay due to a navigational error and consequent advanced deterioration of perishable goods cannot justify the exoneration of liability of the carrier under nautical fault.

The mistakes caused by the operations of handling the transported goods carried out on behalf of the sea carrier remain in the sphere of commercial fault, but the consequences regarding the involvement of his liability in the hypothesis in which the committed deeds may have the character of nautical fault by compromising the stability of the ship. Although the courts have ruled that even the fault of the carrier in the commercial management of the ship can be assimilated to nautical fault if its safety is endangered[6],

[1] C.A. Paris, 22 October 1986, Lamyline.
[2] See art. 27 letter b) of the French Law n ° 66-420 of June 18, 1966 regarding the chartering and maritime transport contracts.
[3] In comparison, we will list the states that have acceded to the Hamburg Rules, the economic potential of many of them being modest compared to the maritime powers found in the previous list: Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Czech Republic, Chile, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lesotho, Lebanon, Malawi, Morocco, Nigeria, Uganda, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syria, Tanzania, Tunisia, Zambia.
[4] We note the opinion expressed by Prof. Dr. R. Rodiere who, in a suggestive wording, stated that “what matters is which part of the ship is subject to the adverse consequences of fault (...) If it is a part of the ship intended for cargo, the fault is commercial. If it is a ship in terms of its technical operation, the fault is nautical”, quoted after (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 378).
[5] In the sense shown see (Paulin, 2005, p. 256).
[6] As an example, regarding the faulty stacking of cargo which is usually qualified as a commercial fault, it was held that it takes the form of nautical fault when it results in compromising the stability of the ship, see C.A. Paris, November 29, 1978, in D.M.F. 1979, pp. 80, Cass. com., July 17, 1980, in B.T. 1980, pp. 567.

recent trends are against such an orientation, emphasizing that we will maintain in the sphere of commercial fault any negligence committed in fulfilling obligations relating to the loading (loading, stowage, securing or unloading of goods) whether or not it involved a risk to the security of the ship. In considering the delimitation of the scope of commercial fault, we list some circumstances that we consider eloquent for the correct acquisition of its meanings: the use by the carrier of a ship in which, in the absence of a bridge, the goods were practically piled on the entire height to the bottom of the track, failure to supervise the shipment during the stationary occasion of the repair operations of the ship's technical devices, negligence committed by loading on deck - against the instructions of the shipper - of fragile goods and damaged, transport being damaged in December[1].

However, the coexistence of commercial fault with nautical error is not excluded, the hypothesis being characterized, from the aspect of interpreting the legal consequences that it entails, by an inconstant approach of the judicial practice; thus, in a decision of this case[2], the decision of the lower court was quashed, which, although it attributed to the captain's deed (consisting in the omission not to order the operation of the pumps at maximum capacity and favouring the failure of the ship) both nautical and commercial fault, obliged the ship-owner to fully repair the damage; The recent case solves the competition between nautical error and commercial fault in the way in which both the exonerating effect that nautical fault (materialized in the collision of a wreck) produces in favour of the carrier, and his responsibility for the commercial mistake of not taking all the necessary measures that could be taken to avoid aggravation of the damage; Specifically, through the pronounced solution, the ship-owner was obliged to repair a part of 60% of the entire damage, correlative part to the commercial fault, for the difference of 40% no longer being liable, given the nautical fault of the captain.

Judicial practice considered that the recognition of the exonerating nature of nautical fault was well-founded in various situations, of which, by way of example, we report the following: the failure of a ship due to an error of interpretation of geographical maps, the fact of deciding - after production on board the ship of a fire whose origins could not be established - the resumption of the voyage at sea, the total loss of a load of sugar which occurred during the piloting of the ship.[3]

In a general assessment, we can say that nowadays the reluctance to apply the exonerating effect of nautical fault becomes more and more evident; after the Hamburg Rules and the Geneva Convention on International Multimodal Transport (1980) understood to remove this ground for exemption; however, we cannot fail to point out that its prospects for entry into force feel far from optimistic, one of the reasons why it has not yet obtained the necessary number of accessions is that maritime nations have refused to ratify it precisely because of the elimination of nautical error among the exonerating causes. More recently, the 2001 task force established by the United Nations Commission on International Trade Law to draft the international rules on the carriage of goods by sea decided not to include nautical fault among the exonerating causes of liability of the shipping carrier.

However, this current of opinion formed in the international legal circles "cohabits" with a certain reaffirmation of the institution by pronouncing court decisions that understand to give it efficiency. Eloquent is, in the sense shown, the solution pronounced by the Court of Appeal of Aix-en -Provence in the Al Hoceima affair by which the nautical fault of the captain was retained, who, after the ship took refuge in the harbour, decided to resume the voyage at sea despite the "exceptionally serious" conditions, being engaged his personal responsibility, the ship-owner, who had also assumed execution of the

[1] C.A. Paris, 22 June 1987, Lamyline¸ C.A. Paris, 14 March 1985, Cass. Com., 2 June 1987, idem.
[2] Cass., 6 July 1954, in B.T. 1954, p. 627, quoted by (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 379).
[3] C.A. Aix-en-Provence, 23 September 1999, in B.T.L. 2000, p. 257.

transport, no longer being held liable[1]. The Paris Arbitration Court also ruled that we were in the realm of nautical error in the event that the master of the ship was traveling at excessive speed in bad weather, the danger being doubled by the accidental change of route, which placed the ship in the direction of the storm.

We list a number of situations in which judicial practice has held that nautical fault cannot be invoked: in the case of known damage to the ship's propulsion devices, the natural attitude of the carrier is to seek refuge in the ship as soon as possible in the closer port; malfunction of the control panel of the ship, due to a short circuit that was possible in conditions of inadequate maintenance of the ship, modification by the commander of the ship of destination against the instructions given by the transport commissioner due to the fact that anchoring in the agreed port of destination was more difficult, although not proven to be impossible; the loss, due to a very strong gust of wind, of some containerized goods as a result of the uninspired choice of the route by the commander who had also adopted an excessive speed of movement. Finally, the collision of two ships (the approach) does not constitute by the simple fact of the occurrence of the event a cause likely to allow the exemption of the maritime carrier on the basis of nautical fault.[2]

d) acts of assistance and rescue at sea justify the exoneration of liability of the carrier for the damage caused by them, stating that the maritime carrier is not liable for any loss or damage and an attempt to save lives or property by sea. The rule derives from the qualification of the legal nature of the obligation to provide assistance at sea, its application being nuanced in the situation where the ship-owner receives a correlative indemnity by the fact that shippers whose goods have suffered damage are still recognized the right to bring an action based on the principle of enrichment without just cause.

e) deviations from the initially agreed route may be invoked by the carrier in his defence under the condition of proving their justified character; whereas the text of the Hague Rules makes reasonable the deviation from the road which is committed for the rescue of human life or property at sea and in any other case where the interests of the sea expedition so require[3], the case law has extended the legitimate possibility of invoking the exemption in the following situations: modification of the maritime route to Barcelona bypassing the agreed port of destination (Sete) whose entry had been blocked by incidents arising from the actions of fishermen claiming simultaneously and in other nearby ports, diversion justified by the avoidance of passage through dangerous areas due to the Gulf War or civil disputes in the port of destination so as not to endanger the “ship, crew or expedition”[4]. The carrier will be held liable if the diversion became necessary due to the known nautical inability of the ship and occurred before it is to leave the previous port of unloading in spite of its defences according to which in this way the risk of damage or even loss of human life has been avoided.

2.2. Excepted Cases closely related to the Load

In a systematic interpretation of the provisions of the Brussels Convention on the Exemption from Liability of Sea Carriers, we find that the exonerating effect of liability can also be invoked in a number

[1] C.A. Aix-en-Provence, 14 May 2004, in B.T.L. 2004, p. 486.

[2] Ch. Arb. Paris, January 14, 2005, in D.M.F. 2005, pp. 562. C.A. Paris, March 14, 1985, in D.M.F. 1987, pp. 364. Cass. com., October 24, 1989, quoted by (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 379). C.A. Aix-en-Provence, January 19, 2001, in D.M.F. 2001, pp. 820. Cass. com., Feb. 14, 1983, in D.M.F. 1983, pp. 654.

[3] Doctrinally, the deviations committed in the consideration of assistance and rescue at sea are qualified as “legal deviations”, while the rest of the deviations from the usual route supported on reasonable grounds are called “justified deviations”, see (Bibicescu, 1986, p. 419)

[4] Cass. com., 13 June 1989, in B.T. 1989, p. 539. C.A. Paris, 8 March 1996, Lamyline. C.A. Paris, 29 September 1995, idem.

of circumstances having in common the influence of facts on the carried goods: “the hidden defect, the special nature or the own defect of the goods”, the insufficiency or the defect of the packaging, respectively of the marking signs imputable to the loader[1]:

a) the existence of its own defect in the goods, in the field of maritime transport, has been recognized by jurisprudence in the following situations: the advanced state of ripening of fresh fruits, although the carrier has complied with the instructions on permanent air ventilation at 11°C, o disease specific to citrus grown in Florida caused by a pathogenic development of a species of fungus and favoured by the high temperatures common in tropical areas[2]. On the other hand, the carrier's defences in the sense of the existence of its own defect in the goods were not received with reference to the defect of fixing the transported vehicles since the lack of devices that would have ensured the stability of the shipment was found in most of the transported goods; the mere fact of harvesting the fruit at the end of the season cannot constitute a circumstance likely to lead to the carrier's exemption, just as the loading of the goods at the end of the recommended period is not sufficient to note that the goods were already damaged at the time of receipt of the transport.

The proof of the hidden defect is the responsibility of the carrier, the courts considering that the proof of the hidden defect cannot undoubtedly result from simple suppositions or hypotheses, especially in the hypothesis in which they are formulated on the basis of findings made after a relatively long period in relation to that written in the bill of lading or if it takes the form of conjuncture assumptions resulting from debates between experts who had found the damage of the expedition (exotic fruits). We note, in view of the pertinent arguments formulated, the solution in this case in which the court[3] considered the carrier's defences to be insufficient, mainly based on the conclusion from the expert report that the damages were mainly the result of the “heterogeneity of the fruits given for transport”; thus the extensive judicial investigation and other significant elements for the correct retention of the facts (abnormal prolongation of the journey in relation to the travelled distance, interruptions of electricity supply ordered as a result of transhipment of goods without periodically recording in the logbook the temperature differences) removed as unconvincing the superficial claims of the experts and, implicitly, of the carrier.

In maritime transport, the reserves registered by the carrier in the bill of lading on the occasion of receiving the goods have a special role in the evidentiary plan. Although, theoretically, the lack of reservations does not prevent the carrier from proving his own vice, in practice probation becomes very difficult and sometimes even impossible; in the sense shown, in judicial practice it was noted that the absence of reserves, the abnormal development of transport performed without respecting the contractual temperatures “make inadmissible the invocation of its own defect.”[4] In the absence of reservations, the existence of its own defect cannot be deduced only because the goods (pineapple) was not accompanied by phytosanitary certificates, because such a “formal irregularity cannot mask the inconclusiveness of the evidence administered by the carrier” in proving its defect and, consequently, the presumption of the normal state of shipment cannot be ruled out.

b) the carrier will not be liable for weight or volume losses of goods which by their nature are exposed to losses. Courts must relate to the tolerances allowed in the port of destination[5] or to those required by

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[1] See art. 4, point .2 letter m) of Haga-Visby Rules.
[2] C.A. Paris, 11 January, 1995, Lamyline.
[3] C.A. Rouen, 19 October 1995, idem.
[4] C.A. Aix-en-Provence, 19 January 2001, in D.M.F. 2001, p. 820.
[5] Thus, coffee is a product sensitive to air humidity, not excluding the finding of a different mass in relation to that entered in the bill of lading during delivery, taking into account the geographical area where it was harvested (tropical regions) or the atmospheric conditions suffered during travel. See T.com. Marseille, July 13, 1979, in Revue SCAPEL 1980, p.l. The normal

the practice of customs; the withholding or not of the exonerating effect is the exclusive attribute of the courts, which are granted the freedom to assess the circumstance that the damage was or was not the cause of some natural losses.

Moreover, quantitative tolerances and weight loss of the expedition were assimilated as a result of the breaking of more or less fragile objects, an orientation that we do not understand to share, based on a confusion: whether natural weight loss due to traits the goods themselves are a phenomenon as a result of which the goods remain intact, the breaking of an object is equivalent to the damage of the goods resulting from an accidental fact produced during transport (shock, brutal handling operations), the damage not necessarily involving changes in the mass of the object.

c) beyond the natural events that are usually assimilated to force majeure and produce exonerating effects regardless of the nature of the transport, we also remember events inextricably linked to the particular conditions in which a voyage takes place; is the case of "hold steam" that occurs by condensation of water on the walls of the ship or in the inner compartments of the hold, causing an increase in humidity and may result in damage. The phenomenon, usually associated with the passage of the ship from a warm area in a cold or sudden change in atmospheric parameters, it may lead to the exoneration of the carrier when it manifests itself as an extension of the effects of the goods' own defect or as a direct consequence of a sea event or other exonerating circumstance[1]. The carrier will not be able to be exempted from the effects of liability if the mentioned phenomenon is the result of a foreseeable decrease of temperature, of the sealing defect that allowed the water to enter the hold or of an inadequate ventilation system.

d) the lack or defect of the packaging as well as any other culpable act committed by the shipper in the execution of his contractual obligations: errors in the composition and distribution of consignments of goods, loading time too long in relation to the ripening period of transported fruits, non-adaptation of packaging conditions, respectively containerization, to the nature of the goods. On the other hand, the act of the shipper not informing the last carrier of the findings of the ship's hygrometric condition made by the first carrier did not preclude liability from being incurred as long as it was clear that the instructions regarding the temperature indicated during the voyage were not followed by the carrier[2].

e) the act attributable to the addressee, although not expressly provided for by the provisions of Article 4 of the Convention, may be limited to the "unnamed" exemption from the uniform rules consisting of "any other cause not arising from the act or fault of the carrier or his agents"[3].

3. Peculiarities of Exonerating Causes in the Conception of the Hamburg Rules[4]

If the provisions of the Brussels Convention established a true presumption of liability of the sea carrier for losses or damages found on delivery, the authors of the United Nations Convention on the Carriage of Goods by Sea signed in Hamburg in 1978, in an innovative desire to conceptually place the

percentage limits within which perishables can be established by conventional or expert means, see C.A. Rennes, October 10, 1985, in D.M.F. 1987, pp. 46, C.A. Rouen, November 24, 1988, in D.M.F. 1991, pp. 365.

[1] T.com. Seine, 4 July 1952, in D.M.F. 1953, p. 164 quoted by (Kerguelen- Neyrolles, Chatail, Renard, & Thomas, 2006, p. 387)

[2] C.A. Fort-de-France, 19 March 2004, in B.T.L. 2004, p. 266.

[3] Therefore, we do not understand the view expressed in French judicial practice that the fault of the consignee cannot be held as a cause for exoneration of liability of the shipping carrier only in view of the fact that it is not subject to explicit regulation as in other "cases of exemption".

[4] The Convention, ratified by our country by Decree no. 343/1981 (Official Monitor no. 95 of 28 November 1981), makes the status of State party conditional on the denunciation of the above-mentioned Brussels Convention.

responsibility of the sea carrier existing trends and in land transport, have nuanced the subjective basis of the liability of the sea carrier and have substantially “suppressed” the excepted cases established in the provisions of the Brussels Convention (Rodiere, 1978, p. 451). The relative presumption of guilt can be removed by proving by the carrier that he has submitted all reasonable measures to avoid the event and its consequences.

Conclusions

The Hamburg Rules System restricts the categories of exonerating causes, lays down particular rules for certain forms of transport and, finally, expressly stablishes the rule of “responsibility sharing” in the hypothesis, set out in a general wording with other causes (emphasis added) of loss, damage or delay in delivery; we should highlight, assuming the risk of repetition, the elimination of nautical fault and the reserve with which, as a result of this restriction of the exonerating regime, the convention was received[1].

Of the excepted cases listed in the Brussels Convention, the Hamburg Rules explicitly refer only to the consequences of a fire on board; the burden of proof is reversed, in the sense that according to the provisions of Article 5 paragraph 4 of the Convention, the shipper is required to prove that the carrier has not “taken all measures that can reasonably be required to extinguish the fire and avoid or limit its consequences.”

In the case of the movement of live animals, it will not be possible for the sea carrier to be held liable for loss, damage or delay in delivery, as long as it is proved that, despite the fact that the carrier has complied with the shipper's instructions, the damage is due to the “special risks” of these transports. The carrier is exonerated for the damages appeared as a result of the transport on deck of the expedition since he had the express consent of the loader, found as such in the content of the bill of lading. Except in cases of common damage, the sea carrier shall not be liable for damage resulting from measures taken to save lives or property at sea. Finally, in the event that the fault of the carrier or his agents is competing with other causes of damage, he will not be liable unless the damages are imputable to him provided that the amount of loss, damage and delay to delivery that cannot be attributed to his fault or negligence.

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[1] See the numbering of those important states in the maritime trade scene that have not ratified it above.