COMMENTS

COMPARATIVE NEGLIGENCE SAILS THE HIGH SEAS: HAVE THE RECOVERY RIGHTS OF CARGO OWNERS BEEN JEOPARDIZED?

Breaking with a century old precedent, the United States Supreme Court in *United States v. Reliable Transfer Co.*[1] unanimously announced that the longstanding rule of divided damages[2] in mutual fault maritime collisions is to be replaced by a rule of proportional fault.[3] The old rule required that in cases of collisions between vessels[4] the

1. 421 U.S. 397 (1975).

2. The origins of the divided damages rule are shrouded in the fog of antiquity. The rule emerged in British admiralty law in the early nineteenth century. *See* United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 401-02 n.3 (1975). In the *Woodrop-Sims*, 2 Dods. 83, 165 Eng. Rep. 1422 (1815), Lord Stowell stated in dictum that an equal division of damages was appropriate where both vessels were at fault. 165 Eng. Rep. at 1423. Nine years later, this dictum became the law of England when the House of Lords held that in a mutual fault collision, damages must be divided equally. Hay v. LeNeve, 2 Shaw Sc. Ap. Cas. 395 (1824).

In *Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1854), the rule of divided damages was established in United States admiralty law. When the case came before the Supreme Court in 1854, the divided damages rule was well established in the English courts. Recognizing that the English law had become entrenched as the majority view in the lower federal courts, the Supreme Court unanimously adopted the rule of equal division of damages. *Id.* at 177.

However, England has since abandoned the rule, and now apportions damages on the basis of fault whenever possible. Maritime Conventions Act, 1 & 2 Geo. 5, c. 57, § 1, at 454 (1911). For an excellent discussion of the historical development of the divided damages rule in England, see 4 BRITISH SHIPPING LAWS, THE LAW OF COLLISIONS AT SEA 108-12 (11th ed. 1961); in the United States, see Sprague, *Divided Damages*, 6 N.Y.U.L. REV. 15 (1928); Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 CALIF. L. REV. 304 (1957).

3. Speaking for the Court, Mr. Justice Stewart stated:

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975).

There is a significant distinction between the proportional fault rule appearing in the Collision Convention and the rule adopted by the Supreme Court. While the Collision Convention applies only to maritime collisions, the United States law governs both maritime collisions and strandings.

4. To simplify discussion, it is assumed that a maritime collision involves two

negligent parties shared equally in liability for property damage, regardless of degrees of fault.[5] The proportional rule, on the other hand, allocates liability for damage in accordance with each vessel's degree of fault. The adoption of the proportional rule brings United States admiralty law into line with a similar provision of the Brussels Liability Collision Convention of 1910 (Collision Convention),[6] which is followed by the principal maritime nations of the world.[7]

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vessels, both of which are mutually at fault, and cargo aboard one or both of the vessels is lost or damaged.

It should be noted that in addition to mutual fault collisions, the divided damages rule applied when the collision or grounding was caused by the contributing fault of a nonvessel party. Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874) (barge struck a pier because of the joint negligence of the barge and the pier owner).

5. United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975).

6. International Convention for the Purpose of Establishing Uniformity in Certain Rules Regarding Collisions, *opened for signature* September 23, 1910, 4 AM. J. INT'L L. 121 (1910) [hereinafter cited as Collision Convention].

Article 4, paragraph 1 of the Collision Convention provides:

> If both are at fault, the responsibility of each of the vessels shall be in proportion to the gravity of the faults respectively committed; however, if, according to the circumstances, the proportion cannot be established or if the faults appear to be equal, the responsibility shall be shared equally.

Id. at 122.

The Collision Convention was signed by representatives of 24 principal maritime nations, including the United States. Letter from Secretary of State to Senator Pittman (June 13, 1939), *reprinted in* [1939] A.M.C. 1068-069. For a brief discussion of the historical background of the Collision Convention, see 6 KNAUTH'S, BENEDICT ON ADMIRALTY 38 (7th ed. 1969) [hereinafter cited as BENEDICT ON ADMIRALTY]. The purpose of the Convention was to establish internationally recognized maritime principles which would govern the shipowners' rights and liabilities upon collision in reference to one another as well as to the cargo owner. Letter from Secretary of State to Senator Pittman, *supra.* However, because of the outbreak of World War I and vigorous opposition from those with cargo interests, the Collision Convention was not submitted to the Senate for its advice and consent until 1937. *Hearings on S. 555, S. 556 Before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce,* 88th Cong., 1st Sess., 136 (1963) [hereinafter cited as 1963 *Hearings*].

After receiving a favorable report from the Senate Subcommittee on Foreign Relations, the Collision Convention was sent to the full Foreign Relations Committee where it was endorsed and recommended for Senate ratification. 1963 *Hearings, supra* at 136. However, the 76th Congress never took action on the Foreign Relations Committee's request for advice and consent. *Id.* at 132. In 1947, the Collision Convention was among several unratified treaties removed from the Senate calendar by President Truman. 16 Dep't State Bull. 726 (1947).

In 1962, hearings were held before the Merchant Marine and Fisheries Subcommittee of the Senate Committee on Commerce. The hearings were designed to implement adoption of the Collision Convention through domestic legislation. Although the committee reported favorably on the legislation and recommended its passage, the 87th Congress adjourned without taking action. In 1963, similar legislation was introduced, hearings were held, but it died in committee. Note, *Shipowners' Limited Liability*, 3 COLUM. SOC. & L.J. 105, 110 (1967).

7. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 529 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

Although United States law now conforms to the Collision Convention provisions on the apportionment of liability for vessel damage between negligent parties involved in a collision, it continues to differ significantly with respect to the recovery rights of cargo owners whose goods are damaged or destroyed. Under article 4, paragraph 2 (Convention rule)[8] of the Collision Convention, the cargo owner is entitled to recover damages from the negligent shipowners only in proportion to their respective degrees of fault.[9] There is no joint and several liability.

Traditionally, United States law has held those in control of negligent vessels jointly and severally liable such that a cargo owner may elect to sue either vessel for the entire amount of his damages.[10] *Reliable Transfer* does not alter this rule.

The conflict between these two rules for distributing cargo damage liability is significant in those cases in which both vessels are contributorily at fault for the collision, but where the carrying vessel[11] enjoys immunity from responsibility for its own cargo.[12] In such cases, the Convention rule permits the cargo owner to recover from the non-carrying vessel[13] only to the extent that the non-carrying vessel contributed to the collision. Thus, the cargo owner always stands to lose

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The following countries have ratified or adhered to the Collision Convention: Argentina, Australia, Austria, Belgium, Brazil, Canada, Danzig, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Mexico, Newfoundland, New Zealand, Netherlands, Nicaragua, Norway, Poland, Portugal, Romania, U.S.S.R., Sweden, Switzerland, Turkey, Uruguay, and Yugoslavia. BENEDICT ON ADMIRALTY, *supra* note 6, at 38-39.

8. Article 4, paragraph 2 of the Collision Convention [hereinafter cited as Convention rule] provides:

> Injuries caused to the vessels, to their cargo, or to the personal effects or other property of the crew, passengers, or other persons on board, shall be borne by the vessels at fault in the aforesaid proportion [article 4, paragraph 1], without any joint responsibility on the part of third parties.

Collision Convention, *supra* note 6, at 122.

9. *Hearings on S. 2313, S. 2314 Before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce*, 87 Cong., 2d Sess., 36 (1962) [hereinafter cited as 1962 *Hearings*]. *See* G. SUNDSTROM, FOREIGN SHIPS AND FOREIGN WATERS 94 (1971) [hereinafter cited as SUNDSTROM]. For application of this rule in England, see *The Umora*, 12 Mar. L. Cas. (n.s.) 527 (1914); *The Drumlanrig*, 11 Mar. L. Cas. (n.s.) 451 (1910).

10. The Alabama and the Game-Cock, 92 U.S. 695 (1875); *see also* The Atlas, 93 U.S. 302 (1876). The common law rule of joint and several liability requires each negligent party to assume full responsibility to the innocent party who has been injured. Generally, the injured party chooses to sue the most solvent person rather than the person who did the most wrong. The Milan, 167 Eng. Rep. 167, 170-71 (1861).

11. The carrying vessel is the ship on which the goods are being transported.

12. In certain instances, the provisions of the Harter Act exempt the shipowner from liability for damage to cargo on board his vessel. *See* notes 21-23, *infra*, and accompanying text.

13. The non-carrying vessel is the other ship involved in a collision.

that portion of damages corresponding to the carrying vessel's percentage of fault, which must be borne by the cargo owner or his underwriter.[14] United States law, however, would still allow the cargo owner to recover in *full* against the non-carrying vessel irrespective of that shipowner's percentage of fault,[15] provided that the non-carrying vessel is solvent and cannot limit its liability.[16]

An inevitable result of these disparate approaches is forum shopping.[17] Shipowners and cargo owners alike seek haven in a forum where the law most advantageous to their interests will apply. Shipowners attempting to avoid liability seek refuge in a state where the Convention rule applies. The cargo owners, on the other hand, attempt to litigate in United States courts to take advantage of their right to full recovery from the non-carrying vessel. United States adoption of the Convention rule would establish both uniformity of results in international maritime disputes by reducing the incentive to forum shop, and uniformity in the United States law of maritime collision liability distribution, regardless of whether the interests at stake were those of the vessel owners or cargo owners.

This comment will explore the potential impact of *Reliable Transfer* on the liabilities of negligent shipowners to the owners of damaged cargo. The historical development of United States law will first be analyzed. This will include a brief discussion of a shipowner's statutory right to limit his liability. The current international rules governing collision liability will then be examined and a hypothetical example given to illustrate the causes underlying transoceanic forum shopping. Finally, reasons will be offered supporting the proposal that United States maritime collision law be brought into harmony with that of the international maritime community, thereby eliminating the incentive for forum shopping, and relieving the vessel owners from the jeopardy of being exposed to liability grossly disproportionate to their fault.

14. Note, *The Difficult Quest for a Uniform Maritime Law: Failure of the Brussels Conventions to Achieve International Agreement on Collision Liability, Liens, and Mortgages*, 64 YALE L.J. 878, 882 (1955) [hereinafter cited as *Uniform Maritime Law*]. It is for this reason that those with cargo interests have bitterly fought to prevent United States ratification of the Collision Convention. 1962 *Hearings*, *supra* note 9, at 42.

15. The non-carrying vessel's percentage of fault appears meaningless since that vessel is made the object of the entire claim for damage to the carrying vessel's cargo. However, the non-carrying vessel's degree of fault becomes extremely significant when it seeks contribution from the carrying vessel. *See* text accompanying note 76, *infra*.

16. When a cargo owner seeks full recovery against one of the vessels at fault, his recovery is subject to that vessel owner's statutory right to limit liability. *See* notes 39-43, 55-56, *infra*, and accompanying text.

17. 1963 *Hearings*, *supra* note 6, at 132. *See* text accompanying notes 57-68, *infra*.

I. PRESENT SITUATION

In the international maritime community, a shipowner has available to him two statutory defenses which may reduce the quantum of recovery available to the owner of damaged cargo. First, carrying vessel owners may be immune to all liability for damage resulting from negligent navigation or management of the ship. Second, regardless of whether a shipowner is permitted to invoke this defense, he may be entitled to establish a "limitation fund" which sets an absolute maximum to his possible liability and from which all claims must be satisfied. If the shipowner is permitted to limit his liability, the cargo owner's recovery may be substantially diminished. The limitation of liability concept applies to the owners of both carrying and non-carrying vessels.

A. United States Law

Prior to 1893, shipowners were ordinarily held liable for any damage to cargo aboard their vessel.[18] In a collision where both vessels bore a degree of responsibility for the accident, the cargo owner was entitled to recover half his damages from each vessel.[19] If, however, one ship was unable to pay its share, the cargo owner was entitled to a judgment against the other vessel for the full sum of his damages.[20] Thus, owners of cargo enjoyed a high degree of protection for cargo loss or damage arising from a collision.

Because of the burden that this exposure to liability imposed on United States shipowners, they successfully lobbied for passage of the Harter Act, adopted in 1893.[21] This Act provided that the owner of a

18. *See* The Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7 (1858), wherein the Supreme Court stated:

> Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause of accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Id. at 23.

19. The Alabama and the Game-Cock, 92 U.S. 695 (1875); *see also* The Atlas, 93 U.S. 302 (1876).

20. *Id.; cf.* The Milan, 167 Eng. Rpt. 167 (1861). Under the English rule of divided damages, the owner of cargo could only recover one-half from each vessel irrespective of one vessel's inability to pay its share, because the liability of each vessel was several, but not joint.

21. 46 U.S.C. §§ 190-96 (1974). The Harter Act was designed to solve the problem resulting when shipowners of other maritime nations were permitted to contract away liability for property damage by placing exculpatory clauses in bills of lading. GILMORE & BLACK, *supra* note 7, at 142. These clauses exempted the shipowners from their own negligence. Although valid in England, *The Xantho*, 6 Mar. L. Cas. (n.s.) 8 (1886),

carrying vessel who exercised due diligence in furnishing a seaworthy ship,[22] would be exempt from liability for damage to cargo on board his vessel resulting from negligent navigation or management of the ship.[23]

Following enactment of the Harter Act, two questions arose with regard to a shipowner's liability for damage to cargo resulting from a collision. First, since the owner of the carrying vessel in certain instances was immune from direct liability for its cargo, would the owner of cargo on board his vessel be entitled to a full recovery against the non-carrying vessel? Secondly, if the owner of the non-carrying vessel was required to pay 100 percent of the damages, did he have any recourse against the carrying vessel to recover a portion of this amount?

The issues were resolved by *The Chattahoochee*.[24] That case involved a collision between an American steamship, *Chattahoochee*, and a Canadian schooner, *Golden Rule*. As a result of the collision, the *Golden Rule*, together with her cargo, became a total loss. The *Golden Rule* exempted itself from liability for the cargo owner's loss by invoking the Harter Act.[25] Under these facts the Supreme Court held that the cargo owner could recover his full losses from the non-carrying vessel.[26] Further, the Court permitted the non-carrying vessel to include

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exculpatory clauses were against public policy and therefore void in the United States. Liverpool and Great Western S.S. Co. v. Phenix Ins. Co., 129 U.S. 397 (1889).

Passage of the Harter Act resulted in a compromise between the cargo interests who wanted the vessel to bear absolute responsibility for acts of negligence and the shipping interests who sought almost complete exoneration from liability arising from its negligence. GILMORE & BLACK, *supra* note 7, at 142-43. *See* Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 11 (2d. Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). This compromise appears in section 3 of the Harter Act which states:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, *neither the vessel, or her owner or owners' agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.* . . .

46 U.S.C. § 192 (1974) (emphasis added).

22. As stated by the Supreme Court, "[t]he test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." The Silvia, 171 U.S. 462, 464 (1898).

23. 46 U.S.C. § 192 (1974).

24. 173 U.S. 540 (1899).

25. Although the *Golden Rule* was a foreign-flag vessel, the Supreme Court permitted the owner to invoke the defense of error in navigation or management. Relying on the language in section 3 of the Harter Act which states that this section applies to "any vessel transporting merchandise or property to or from any port in the United States," 46 U.S.C. § 192 (1974), the Court stated: "we know of no reason why a foreign vessel like the Golden Rule, engaged in carrying a cargo from a foreign port to Boston, is not entitled to the benefit of this provision." The Chattahoochee, 173 U.S. 540, 550 (1899).

26. "Since the negligence of the carrying vessel is not imputed to its cargo," and since the Harter Act does not protect the non-carrying vessel, there is no obstacle barring

in its damages all payments made to the owner of the cargo. The non-carrying vessel was then allowed through contribution[27] to recoup one-half[28] this amount from the carrying vessel.[29]

The Chattahoochee resulted in a "curious anomaly."[30] When a carrying vessel complied with the provisions of the Harter Act and was entirely at fault, the owner of cargo was precluded from recovery against that vessel.[31] If, however, the carrying vessel were only partially at fault, it could be found indirectly liable for at most half of any damage to its own cargo, even though the Harter Act exempted it from such liability.[32] Thus, under certain circumstances, it might be in the ship-

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the owner of cargo from recovering in full from the non-carrying vessel as a joint tort-feasor. Read, *The Recovery Rights of Cargo in Marine Collisions Under the Major-Minor Fault Doctrine*, 11 LOY. L. REV. 231, 232 (1963).

27. At common law, one of the two negligent tort-feasors who was compelled to pay the innocent victim in full had no redress against the other wrongdoer. There was no right of contribution from the other person. W. PROSSER, THE LAW OF TORTS 305 (4th ed. 1971).

In admiralty, the negligent shipowner is in a more favorable position than most tort-feasors in that he may recover contribution from the joint tort-feasor. *See* Erie R.R. Co. v. Erie & W. Trans. Co., 204 U.S. 220 (1907); The Ira M. Hedges, 218 U.S. 264 (1910). However, under the rule of divided damages, the right to contribution applied only where the other tort-feasor had paid more than one-half of the third party's damages. The Juniata, 93 U.S. 337 (1876).

28. The method used to calculate damages resulting from a maritime collision under the divided damages rule was exemplified in *The Sapphire*, 85 U.S. (18 Wall.) 51, 56 (1873) wherein the Court stated:

> It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. . . . If one in fault has sutained no injury, it is liable for half the damages sustained by the other, though that other was also in fault.

For example, if ship A sustains damages of $50,000 and ship B, $25,000, A is entitled to recover one-half the difference, $12,500. *See* The North Star, 106 U.S. 17 (1882). For a thorough examination of the economic consequences resulting from an application of the divided damages rule and the proportional fault rule, see Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 CORNELL L.Q. 531 (1928) [hereinafter cited as Huger].

29. The Court held that the non-carrying vessel was entitled to contribution because the Harter Act was not intended to increase the liabilities as between the negligent vessels. The Chattahoochee, 173 U.S. 549, 555 (1899). Even though a vessel sustains cargo damages, the total damages suffered by each vessel must be shared equally. *Id. See also* The North Star, 106 U.S. 17, 22 (1882).

30. A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 211 (4th ed. 1953) [hereinafter cited as KNAUTH]. It has been argued that an anomaly does not exist since the Harter Act was designed to govern only the relationship between the cargo owner and the carrying vessel. The Delaware, 161 U.S. 459, 471 (1896). Consequently, because the liability of the carrying vessel to the non-carrying vessel is not affected by the Harter Act, *id.*, it has no application as between the negligent vessels in dividing collision damages. *See* Green, *The Harter Act*, 16 HARV. L. REV. 157 (1903).

31. Waesche, *Cargo's Rights in Collision Cases*, 45 TUL. L. REV. 781, 786 (1971) [hereinafter cited as Waesche]. *See 1962 Hearings, supra* note 9, at 42.

32. SUNDSTROM, *supra* note 9, at 94-95.

owner's interest to plead that it was solely at fault because if successful, the shipowner would likely escape indirect liability to his own cargo.[33]

During the 1930's, shipowners attempted to correct this inconsistency by inserting a "Both-To-Blame Clause" in their bills of lading.[34] This clause required the owner of cargo to indemnify the carrying vessel for its losses arising from indirect liability.[35] The cargo owner, after recovering in full from the non-carrying vessel, was obligated to pay half of this recovery to the carrying vessel.[36] However, the Supreme Court in *United States v. Atlantic Mutual Ins. Co.*[37] held such clauses invalid,[38] thereby denying to shipowners any relief from the inconsistencies of *The Chattahoochee.*

The immunity extended by the Harter Act permits a carrying vessel owner, meeting certain criteria, to escape liability in part or *in toto.* Independent of whether a shipowner is able to invoke this immunity in a given circumstance, the Limitation Act of 1851[39] permits *any* shipowner to establish a monetary fund representing an absolute maximum to his possible liability.[40] This statutory provision, which is still the law

33. In *O/Y Finlayson-Forssa A/B v. Pan Atlantic S.S. Corp.*, 259 F.2d 11 (5th Cir. 1958), *cert. denied*, 361 U.S. 882 (1959), the court refused to allow a shipowner to take advantage of this plea.

34. The ocean bill of lading as a commercial document serves three purposes: First, it is a receipt for goods; second, it is a document of title; third, it represents a contract for carriage of goods. This contract establishes the liability of the shipowner to the cargo owner. W. POOR, AMERICAN LAW OF CHARTER PARTIES AND OCEAN BILLS OF LADING 134 (5th ed. 1968).

35. In *United States v. Atlantic Mutual Ins. Co.*, 343 U.S. 236 (1952), the Court stated: "[T]he very purpose of exacting this bill of lading stipulation is to enable one ship to escape its equal share of [collision damages] by shifting a part of its burden to its cargo owners." *Id.* at 242. *See* 1963 *Hearings, supra* note 6, at 34.

36. For a discussion of the mechanics of the "Both-To-Blame Clause", see GILMORE & BLACK, *supra* note 7, at 173-76.

37. 343 U.S. 236 (1952).

38. The Court stated that if the rule against allowing shipowners to "stipulate against their own negligence" in bills of lading "is to be changed, the Congress, not the shipowners, should change it." *Id.* at 242.

39. 46 U.S.C. §§ 181-89 (1974) [hereinafter cited as Limitation Act]. For a thorough discussion of the concept of limitation of liability, see GILMORE & BLACK, *supra* note 7, at 818-957.

The underlying policy of the Act was expressed by Mr. Justice Frankfurter in *Maryland Casualty Co. v. Cushing*, wherein he stated:

> Legislation limiting shipowners liability was first enacted in 1851 to provide assistance to American shipowners [by encouraging investment in American vessels] and thereby place them in a favorable position in the competition for world trade. . . . The legislation was designed to induce the heavy financial commitments the shipping industry requires by mitigating the threat of a multitude of suits and the hazards of vast, unlimited liability as a result of a maritime disaster.

347 U.S. 409, 413-14 (1954).

40. Section 3 of the Limitation Act provides in relevant part:

today as regards liability to cargo,[41] permits a shipowner to limit his liability for cargo damage to the value of his interest in what remains of the vessel and its freight after the accident.[42] A shipowner can invoke this defense if he can show that the losses have occurred without his "privity and knowledge."[43]

The Limitation Act is tantamount to exculpation of the shipowner from liability to the cargo owners. This statutory right can have an even more pronounced effect upon the interests of cargo owners than the immunity extended by the Harter Act to the carrying vessel from cargo claims.[44] For example, consider a collision in which the carrying vessel were exonerated from liability to its own cargo, and the non-carrying vessel became a total or near total loss. Further, assume that circumstances permit the non-carrying vessel to invoke the protection of the Limitation Act. In such a case, the cargo owner's recovery would be limited to any residual value of the non-carrying vessel.[45] The present limitation statute therefore subjects the cargo owners to the gamble of the non-carrying vessel's survival.[46]

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or occurred, without the privity or knowledge of such owner or owners, *shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.*

46 U.S.C. § 183(a) (1974) (emphasis added).

41. There have been no significant changes regarding the shipowner's liability to cargo since the inception of the Limitation Act. 46 U.S.C. §§ 181, 182, 183(a) (1974). It should be noted, however, that an important change has occurred with respect to personal injury and loss of life claims. When the limitation fund is insufficient to pay personal injury and death claimants, a fund of at least $60 for each ton of the ship's total tonnage must be made available to settle such claims. 46 U.S.C. § 183(b)-(f) (1974).

42. 46 U.S.C. § 183(a) (1974). Although this section does not state that the value of the shipowner's interest is determined after the collision, the Supreme Court has given it this interpretation. Norwich and N.Y. Transp. v. Wright, 80 U.S. (13 Wall.) 104, 126-27 (1881). This interest is not computed until the voyage is completed or when the final loss has occurred. The City of Norwich, 118 U.S. 468, 490-93 (1886). In addition, the insurance carried by the vessel does not constitute part of the shipowner's interest in the vessel and freight pending. The shipowner is not liable to cargo claimants for any amount that he receives as insurance payments. The City of Norwich, *supra* at 504-05.

43. Privity means a negligent act attributable to the owner, whereas knowledge indicates failure on the part of the owner to take proper precautions where he knows or should have known that his inaction would result in loss or damage. Lord v. Goodall, 15 F. Cas. 884, 887 (No. 8506) (C.C.D. Cal. 1877), *aff'd*, 102 U.S. 541 (1881).

44. *See* notes 21-23, *supra*, and accompanying text.

45. In a recent case, a United States federal district court approved a shipowner's petition to limit his liability to the value of a $50 life boat, which was the only item salvaged after the sinking of his vessel. In Re Barracuda Tanker Corp. (The *Torrey Canyon* case), 281 F. Supp. 228 (S.D.N.Y. 1968).

46. Kloeckner Reederi und Kohlenhandel G.M.B.H. v. A/S Hakedal (The *Western Farmer* case), 210 F.2d 754 (2d Cir. 1954).

B. The International Rule

In the last quarter of the 19th century, the need to harmonize the divergent views of the maritime nations into a set of uniform international rules regarding collision liability became evident. As a result, the Comité Maritime International[47] was organized for the purpose of achieving this goal. After several years of preliminary work, the Comité brought the representatives of the leading maritime nations together in Brussels in 1910. Their effort culminated in the drafting of the Collision Convention.

In contrast to the United States law under which negligent vessels are jointly and severally liable for the cargo owner's loss, the Convention rule holds the ships severally liable. The owner of cargo is entitled to recover in proportion to each ship's fault and cannot look to one vessel for full recovery. Since the non-carrying vessel's liability is limited to its proportional share of cargo damage, it has no recourse against the carrying vessel. Contribution is thereby eliminated.[48] Accordingly, the Convention rule cures the anomaly of *The Chattahoochee* in which the carrying vessel is held indirectly responsible for damage to its own cargo, but is exempted from direct liability under the Harter Act.[49]

Application of the Convention rule has tremendous importance to both shipowners and cargo owners in situations where the carrying vessel can invoke the Hague Rules[50] as a defense. These Rules represent, in effect, an international codification of the Harter Act provisions, as they insulate the owner of the carrying vessel from liability for damage to his cargo resulting from errors in navigation or manage-

47. The Comité Maritime International, which consisted of lawyers, shipowners and underwriters from several countries, was created in 1896. KNAUTH, *supra* note 30, at 123-24; Huger, *supra* note 28, at 531.

48. 1962 *Hearings, supra* note 9, at 86. *See also* J. GRIFFIN, THE AMERICAN LAW OF COLLISION 562 (1949).

49. In discussing the advantages of the Convention rule at the 1962 Hearings, Charles S. Haight, chief advocate of the Collision Convention, stated:

> The abolishment of the joint and several liability so far as cargo is concerned, will make effective in all cases the provisions of the Harter Act. . . . It will provide that where there is no direct liability of the carrying ship to his cargo, there will be no indirect liability. . . . This rule makes fully effective the intent of the Harter Act . . . as to the carrying ship, and imposes no undue burden on the non-carrying ship.

1962 *Hearings, supra* note 9, at 86.

50. International Convention for the Unification of certain Rules relating to Bills of Lading, *done* Aug. 25, 1924, 120 L.N.T.S. 155 (1931-32) [hereinafter cited as Hague Rules]. The primary objective of the Hague Rules was to balance the competing interests between the shipowners and cargo owners by "effectuat[ing] a standard and uniform set of provisions for ocean bills of lading." Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 11 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970). *See also* GILMORE & BLACK, *supra* note 7, at 143.

ment.[51] When the Convention rule applies and the carrying vessel is shielded from liability to its cargo by the Hague Rules, the cargo owner's recovery against the non-carrying vessel is limited to that vessel's percentage of fault.[52] If, however, the carrying vessel fails to comply with the terms of the Hague Rules, the cargo owner will be allowed to recover from the carrying vessel in proportion to that vessel's percentage of fault.[53]

Just as the United States allows for the limitation of a shipowner's liability,[54] other maritime nations supplement their collision recovery rules with limitation regulations. However, in contrast to the United States system which fixes liability at the salvage value of the vessel and its cargo after the collision,[55] the procedure followed by other states limits a shipowner's potential exposure to an amount based solely on the vessel's gross tonnage.[56] No consideration is given either to the actual value of the vessel or to its cargo.

C. Forum Shopping

The absence of international uniformity as regards a cargo owner's right to recovery encourages international forum shopping. Both shipping interests and cargo interests attempt to select a forum where the

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51. Article 4, section 1 of the Hague Rules states in part:

> Neither the carrier nor the ship shall be liable for loss or damage arising from or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped, and supplied. . . .

Hague Rules, *supra* note 49, at 165.

Article 4, section 2 provides in part:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, marine, pilot, or the servants of the carrier in the navigation or in the management of the ship.

Id. at 167.

In 1936, the United States enacted the Carriage of Goods by Sea Act, 46 U.S.C. 1300-15 (1975) [hereinafter cited as COGSA], which was an amended version of the Hague Rules. While there are some minor alterations between the Hague Rules and COGSA, the protection available to shipowners for errors in navigation or management remains unchanged. 46 U.S.C. § 1304(2)(a) (1975).

52. A hypothetical illustrates the situation. Assume a collision in which ship A and ship B were at fault 25 percent and 75 percent, respectively, and B's cargo sustains $500,000 in damages. Ship B's cargo owner would recover only $125,000 (25 percent of $500,000) from A. The cargo owner would have no right of recourse against B for the remaining $375,000. *See* note 14, *supra*, and accompanying text.

53. 1962 *Hearings, supra* note 9, at 8.

54. 46 U.S.C. §§ 181-89 (1974).

55. *See* note 42, *supra.*

56. SUNDSTROM, *supra* note 9, at 91-92. A limitation fund based on the tonnage of the vessel was introduced by Great Britain in 1854, and "is now applied almost everywhere except in the United States." *Id.*

legal principles most favorable to their interests will apply. Unless the non-carrying vessel is rendered valueless and the owner can limit his liability, the cargo owner will seek to pursue his claims in United States courts in order to take advantage of this right to full recovery.[57] Shipowners, on the other hand, ordinarily prefer a forum where the Convention rule applies.[58] However, their ability to limit liability will also influence their preference of forum.

The attractiveness of forum shopping for both shipowners and cargo owners is illustrated by the following hypothetical. Assume a collision in which vessel A were 25 percent at fault and vessel B were 75 percent at fault. As a result of the accident, the damage to A's vessel is $500,000 and B's damage totals $1,500,000. The cargo on board each vessel sustains the identical amount of damages, $500,000. Further, assume the owners of both A and B are to be immune in all forums from liability for damage to cargo on board their respective vessels by virtue of their compliance with both the Harter Act and the Hague Rules.[59]

Under the prevailing United States law, the cargo owners could recover in full from the non-carrying vessel, provided that vessel were solvent and could not limit its liability. A's cargo owner could therefore recover $500,000 from B, and the owner of cargo on board B could

57. Whether American or foreign cargo interests are granted access to pursue their claims in a United States court depends on issues involving conflicts of laws and *forum non conveniens*. *See* SUNDSTROM, *supra* note 9, at 108-21. An American cargo owner can usually litigate his claim in a United States court because of the doctrine of *forum non conveniens*, and thereby recover in full from the non-carrying vessel. However, should the cargo interests be foreign, United States courts will generally apply foreign law or not assume jurisdiction. *See* The Mandu, 102 F.2d 459 (2d Cir. 1939), *cert. denied*, 311 U.S. 715 (1940); The Eagle Point, 142 F. 453 (2d Cir. 1906), *cert. denied*, 201 U.S. 644 (1906). Both cases involved collisions outside United States territorial waters between vessels flying foreign flags; the cargo owners and their underwriters were denied the right of full recovery from either vessel.

An exception to the rule that foreign cargo interests cannot litigate their claims in a United States court occurred in *Kloeckener Reederei und Kohlenhandel v. A/S Hakedal* (The *Western Farmer* case), 210 F.2d 754 (2d Cir. 1954). In that case, an American ship collided with a Norwegian vessel in the English Channel. The negligent shipowners settled in an English court. Thereafter, the owner of cargo on board the American ship, a German corporation, sought to recover damages against the Norwegian shipowner in the United States. Against this background, the court held that the owner of cargo on board the American ship was not precluded from prosecuting his claim in a United States court because it was determined to be the most convenient forum.

58. *See* Waesche, *supra* note 31, at 788.

59. In this hypothetical, ships A and B are classified as "carrying" vessels as well as "non-carrying" vessels. Reference will be made to the ships as "carrying" vessels when their negligence causes damage to their own cargo. The ships will be designated as "non-carrying" vessels when their negligence has contributed to cargo damage on board the other vessel.

recover $500,000 from A. The non-carrying vessel in turn could add the payment made to the carrying vessel's cargo owner ($500,000) to its own damages and then recoup from the carrying vessel according to that vessel's percentage of fault. Therefore, since the damages total $3,000,000, A would be responsible for $750,000 and B $2,250,000.

If the Convention rule applies, the amounts of recovery would differ greatly. Neither A nor B would be liable to the owners of cargo on board their vessels. The cargo owner could recover from the non-carrying vessel, but only in proportion to that ship's fault (A's cargo owner would recover $375,000, whereas B's cargo owner would recover $125,000).[60]

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60. The chart below will help crystallize the disparity between United States law and the Convention rule.

U.S. Law

A's Liability:	
A is liable for 25% of the total damages ($3,000,000) to the vessels and cargo	$ 750,000
B's Liability:	
B is liable for 75% of the total damages ($3,000,000) to the vessels and cargo	$2,250,000
Cargo Owners' Account:	
The owners of cargo on board A and B bear no liability for damage to their cargo and are entitled to recover in full from the non-carrying vessel	-0-
Total	$3,000,000

Convention Rule

A's Liability:	
A is liable for 25% of total vessel damages ($2,000,000) and 25% of the damages to cargo on board B ($500,000)	$ 625,000
B's Liability:	
B is liable for 75% of total vessel damages ($2,000,000) and 75% of the damages to cargo on board B ($500,000)	$1,875,000
Cargo Owners' Account:	
A's cargo:	
Total loss resulting from collision	$ 500,000
A's cargo recovers 75% of its losses from B	$ 375,000
That portion of loss for which the cargo owner cannot recover from either vessel	$ 125,000
B's cargo:	
Total loss resulting from collision	$ 500,000
B's cargo recovers 25% of its losses from A	$ 125,000
That portion of loss for which the cargo owner cannot recover from either ship	$ 375,000
Total	$3,000,000

For further analysis of the economic consequences resulting from an application of both the United States law and the Convention rule where only one vessel sustains cargo damage in a mutual fault collision, see Healy & Koster, *Reliable Transfer Co. v. United States: Proportional Fault Rule*, 7 J. MAR. L. & COMM. 293, 299, 300 (1975) [hereinafter cited as Healy & Koster].

The results of the hypothetical suggest that the owners of cargo would attempt to bring suit in a United States court in order to maximize the possibility of recovery, while the shipowners would seek a forum outside the United States in order to minimize their liability.

The lack of an internationally accepted limitation of liability system creates an added element inducing both shipowners and cargo owners to forum shop. The addition of two factors to the above hypothetical will help illustrate this point. Suppose that ship A and ship B could limit their liability, each owner being "without privity or knowledge"[61] of the act causing the loss. Further, ship A and her cargo become a total loss, whereas ship B's value is not substantially impaired.

Because of vessel B's immunity, the owner of cargo on board B would have to look to vessel A for recovery. However, if A has complied with the criteria for liability limitation, then under United States law, the owner of B's cargo would be limited in his damage recovery to the residual value of A and her cargo. If vessel A and her freight were completely destroyed, B's cargo owner would be blocked from all recovery,[62] a circumstance plainly inducive to ship A's owner seeking a United States court.[63] Conversely, the owner of ship B would be required to establish a limitation fund for the owner of cargo aboard A, regardless of forum, since a substantial value of his vessel would have been retained. In determining which forum would result in the greatest reduction of his exposure to the claims brought by A's cargo owner, B's owner would weigh the value of B and any salvaged freight against the amount derived from the application of the tonnage formula[64] to ship B's total displacement.[65]

The shipowner's right to limit liability is an important factor to the cargo owner. This issue must be carefully considered by him before choosing a forum. Since the value of vessel B were not seriously diminished, A's cargo owner would press his claim in the United States and recover most of his damages. Ship B's cargo owner would be in quite a different position, however. He would have to seek a forum

61. *See* note 43, *supra.*

62. There would be no limitation fund available to satisfy B's cargo owner, and recovery therefore would be denied even though ship B stayed afloat. SUNDSTROM, *supra* note 9, at 95-96.

63. A shipowner who is entitled to limit his liability will attempt deliberately to litigate in a United States court "only if the ship becomes a total or nearly total loss." *Id.* at 101.

64. *See* note 56 *supra*, and accompanying text.

65. *See* note 109, *infra.*

requiring a limitation fund based on the tonnage of the vessel in order to be assured at least a partial recovery.[66]

The foregoing discussion dramatizes the unsatisfactory results and economic hardships that arise from disparity of outcome in different forums. In addition, it serves to point up why forum shopping is dependent on so many different factors.[67] One writer has aptly summarized the situation as follows:

> [The] striking difference between the law of the United States and the law of other shipping nations has sometimes led shipowners to adopt extraordinary precautions to avoid being sued in the United States, and has also given rise to some remarkable efforts by cargo [owners] to maintain suits in the United States in order to gain the advantage of the American rule.[68]

II. THE EFFECT OF RELIABLE TRANSFER

The controversy in *Reliable Transfer* arose when a coastal tanker became lost in waters outside New York harbor and ran aground on a sandbar.[69] The stranding of the vessel caused damages in excess of $100,000. There was no damage to cargo. The district court found that

66. *See Uniform Maritime Law, supra* note 14, at 891 n.71.

67. The complexities that can arise when two negligent vessels collide on the high seas and cargo is damaged is exemplified in *Petition of Bloomfield Steamship Co.*, 422 F.2d 728 (2d Cir. 1970). In that case, a United States ship and a Norwegian flag vessel collided outside the port of Le Havre, France. The Norwegian vessel sank shortly after the collision, resulting in the total loss of that vessel and all her cargo. The owner of the Norwegian ship brought suit against the United States vessel in England and tried to take advantage of the proportional fault rule. The owners of damaged cargo filed claims in the United States. Both shipowners filed petitions in a United States court to limit their liability. In addition, the French government brought suit in their courts for wreckage removal costs. Addressing itself to the labyrinth of problems created by the lack of uniformity in international maritime collision law, the Court stated:

> That interested parties here have engaged in extensive far-flung litigation is not surprising. The owners of ships moving in international trade and colliding in international waters may well expect to be involved in legal proceedings in more than one country. Forum shopping in this context is not a term of opprobrium but a way of life and each party seeks what appears to be the best legal haven.

Id. at 736.

68. KNAUTH, *supra* note 30, at 211-12.

69. On the night of December 23, 1968, the coastal tanker *Mary A. Whalen*, owned by Reliable Transfer Co., embarked for Island Park, New York. As the *Whalen* was proceeding across Rockaway Inlet in heavy seas, the captain noticed that the breakwater light maintained by the United States Coast Guard was not operating. In spite of this, the captain attempted to pass a barge traveling ahead of his vessel. When this proved impossible, the captain made a 180 degree turn, passed behind the barge and headed on an easterly course towards what he thought was the open sea. Moments after completing this maneuver, however, the breakwater came into view and to avoid colliding with the rocks, he ran the *Whalen* aground.

the Coast Guard's failure to maintain a breakwater light contributed 25 percent to the grounding. The remaining 75 percent of fault was attributed to the captain's negligence in failing to take proper precautions to determine his position. However, in accordance with the United States rule of divided damages, the government was held liable for 50 percent of the vessel's damages.[70] The Second Circuit Court of Appeals affirmed[71] but recognized that a "division of damages in proportion to the degree of fault may be more equitable"[72] than dividing the damages equally. The Supreme Court granted certiorari[73] to reconsider the divided damages rule.[74] Recognizing that every other major maritime country adheres to the proportional fault rule and, moreover, that it provides the most equitable remedy, the Court unanimously adopted this doctrine.

United States adoption of the proportional fault rule[75] significantly unifies international maritime collision law as regards apportionment of damages between negligent vessels involved in a collision. However, since *Reliable Transfer* did not involve damage to cargo, it seems to have little impact on the liability of shipowners to the owners of damaged cargo.

It appears that the owner of cargo will still be entitled to a full recovery against the non-carrying vessel. However, the non-carrying vessel will no longer recoup an arbitrary 50 percent from the carrying vessel for payment made to the carrying vessel's cargo owner. Rather, the non-carrying vessel will receive contribution in proportion to the carrying vessel owner's fault.[76] Therefore, *Reliable Transfer* does not affect the inconsistencies created by *The Chattahoochee*. The question that remains is whether the courts or Congress will use *Reliable Transfer* as a springboard to complete the process of bringing United States admiralty law into conformity with the world maritime community regarding the rights of cargo owners to recover against the negligent vessel owners.

70. The memorandum and order of the District Court is unreported. Brief for Petitioner at 1, United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975).

71. 497 F.2d 1036 (2d Cir. 1974).

72. *Id.* at 1038.

73. 419 U.S. 1018 (1974).

74. United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975). In its decision the Court stated:

> [W]e are called upon to decide whether this country's admiralty rule of divided damages should be replaced by a rule requiring when possible, the allocation of liability for damages in proportion to the relative fault of each party.

Id. at 398.

75. *See* note 3, *supra.*

76. Healy & Koster, *supra* note 60, at 298. *See* Brief for Petitioner at 33, United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975).

III. ALTERNATIVE SOLUTIONS

A. Apportionment of Damages

1. *Congressional Action.* Implementation of the Convention rule through domestic legislation is one means by which the United States can effectuate harmony in international collision law. Although the Senate has failed to ratify the Convention rule on two previous occasions,[77] *Reliable Transfer* now provides Congress with the impetus necessary to finish the job initiated by the Supreme Court.

For many years the United States shipowners have vigorously urged adoption of the Collision Convention and particularly the Convention rule.[78] They contend that the Convention rule would establish greater predictability and uniformity of results, thus eliminating the most important element inducing forum shopping.[79] It is further argued by the shipowners that this uniformity would create better worldwide trade conditions, and thereby stimulate international commerce.[80]

In addition to worldwide uniformity in maritime collision laws, shipowners favor the Convention rule because it would eliminate the windfall profit that cargo underwriters currently enjoy under United States law.[81] Insurance premiums for cargo presuppose the application of the internationally accepted Convention rule.[82] The cargo owners are charged the same premiums whether any loss of their goods is litigated in a United States forum or in a foreign court.[83] Thus, the cargo underwriter receives premiums insuring against losses determined under the Convention rule which prohibits full recovery against the non-carrying vessel.[84] Yet in the United States, the underwriter has the

77. *See* note 6, *supra*. To date, Congress has no plans involving the ratification of the Collision Convention or the enactment of domestic legislation giving full effect to the Convention rule. Letter from Robert Blackwell, Assistant Secretary for Maritime Affairs, U.S. Dept. of Commerce (Nov. 12, 1975) [copy on file at CALIF. W. INT'L L.J.].

78. Waesche, *supra* note 31, at 786.

79. Letter from Secretary of State to President Roosevelt (April 27, 1937), *reprinted in Hearings before Senate Subcomm. on Rules to Govern the Liability of Vessels when Collisions Occur Between Them of the Senate Comm. on Foreign Affairs*, 75th Cong., 3d Sess., 5-6 (1939) [hereinafter cited as 1939 *Hearings*].

As stated by Leavenworth Colby of the Department of Justice: "Uniformity will dispel uncertainties as to the rights and liabilities of litigants, decrease their tendency to shop for the most favorable country in which to sue, and promote the just and prompt resolution of maritime controversies." 1963 *Hearings, supra* note 6, at 12.

80. 1939 *Hearings, supra* note 79 at 191-92. *See* 1963 *Hearings, supra* note 6, at 12.

81. 1962 *Hearings, supra* note 9, at 240 (statement of Terrence Burke).

82. *Id.*

83. *Id.* at 40 (remarks of Arthur M. Boal).

84. *Id.* at 240.

advantage of recovering in full, and thereby obtains additional profit which is denied him in every other major maritime state.[85]

One major obstacle to congressional adoption of the Convention rule has been the strenuous opposition raised by cargo owners and their underwriters. They claim that adherence to this rule would result in exorbitant increases in their insurance rates since they would be denied full recovery against the non-carrying vessel.[86] It is argued by cargo owners that their insurance rates are based on the underwriter's recovery record. In cases where the carrying vessel has complied with the provisions of the Harter Act, implementation of the Convention rule would significantly reduce cargo recoveries.[87] Cargo owners contend, therefore, that their insurance premiums would increase in order to compensate the underwriter for his losses.[88] To counter this argument, it has been shown that cargo insurance rates set and governed by a worldwide market have not increased in countries that have ratified or adhered to the Convention rule.[89] It would appear, therefore, that United States adoption of the Convention rule would have little, if any, effect on cargo insurance premiums since the premiums charged by cargo underwriters already take into account application of the Convention rule.[90]

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85. *Id.* at 40, 42.

86. *Id.* at 42.

87. *See* Huger, *supra* note 28, at 552.

88. Leonard J. Matteson, a past president of the Maritime Law Association Committee on Collision Liability, has stated:

> [I]t is impossible to pinpoint exactly what happens to the insurance premiums as a result of the changes in the law. . . . But this much is true, that cargo recoveries are part of the loss record and anything that serves to reduce the recoveries serves to worsen the loss record and consequently in the long run the premiums have got to go up . . . because the underwriters can't afford to do business at a loss.

1963 Hearings, supra note 6, at 123.

89. *1939 Hearings, supra* note 79, at 6. The Secretary of State indicated he had been advised that maritime countries adopting the Collision Convention did not experience an increase in the premiums charged by cargo underwriters. *See* 1962 *Hearings, supra* note 9, at 40, 42.

Statistics released in a recent governmental study on cargo liability further support the view that cargo insurance premiums will probably remain unaffected by the United States adhering to the Convention rule. U.S. DEP'T OF TRANSPORTATION, CARGO LIABILITY STUDY: FINAL REPORT 68-86 (1975). The findings revealed that when costs associated with cargo loss and damage for shipowners and cargo owners are combined, the total costs related to export goods amounts to only one-quarter of one percent of the goods value. *Id.* at 86. The total costs of import goods are equivalent to approximately one-half of one percent of the goods value. *Id.* Because of these relatively small percentages of loss and damage costs, it appears that the Convention rule would have a minimal effect on the marine insurance market.

90. *See* text accompanying notes 82-83, *supra*. However, until there has been some underwriting experience under the Convention rule, it is difficult to project the extent to which this rule would affect either cargo or shipowner's liability insurance. Letter from

2. *Court Action.* The judicial inauguration of comparative negligence in mutual fault collisions, and the heavy emphasis placed upon assessing liability between the negligent shipowners in direct proportion to fault, strongly suggest that the United States is ripe for an overhaul of its treatment of cargo owners recovery rights as well. The Court in *Reliable Transfer* appeared willing to take on the responsibility of extending the proportional fault rule to include cargo claims when it stated that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'"[91] Had damage to cargo been an issue in *Reliable Transfer*, it would not have been inconsistent for the Court to embrace fully the policy of the Convention rule holding the vessel owners severally but not jointly liable. Unless Congress acts, it must remain for the courts, acting in a situation similar to that presented in *Reliable Transfer* but also involving cargo damage, to continue to change the ways of the waves.[92]

3. *Draft Convention on Carriage of Goods by Sea.* A recent development, if brought to completion, may effectively neutralize the opposition of the cargo owners to adoption of the Convention rule. In February, 1975, after four years of painstaking effort, a final text of a Draft Convention on the Carriage of Goods by Sea[93] was adopted by the

Mr. Walter Maloney, senior partner at Bigham, Englar, Jones & Houston (Nov. 25, 1975) [copy on file at CALIF. W. INT'L L.J.]. It is evident that adoption of the Convention rule would reduce the quantum of recovery by cargo interests against the non-carrying vessel. In the same respect, the underwriter providing liability insurance for the shipowner would have partially reduced exposure. There can be no assurance, however,"that the increased cost of cargo insurance, resulting from the convention, would be matched by a decrease in the cost of the shipowner's liability coverage." *Id.*

It is important to note that insurance premiums did not increase when the "Both-To-Blame Clause" was placed in United States bills of lading. *See* notes, 35-38, *supra*, and accompanying text. That clause had the same effect as the Convention rule. It prohibited indirect recovery by the owner of cargo against the carrying vessel. 1962 *Hearings, supra* note 9, at 241.

91. United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 409 (1975), *quoting* Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963). *See also* Moragne v. States Marine Lines, 398 U.S. 405 n.17 (1970) (the Court recognized an action under general maritime law for death caused by a violation of maritime duties.

92. At least one court has held that the proportional fault rule announced in *Reliable Transfer* "has no application to an action between innocent cargo and one of the vessels involved in a collision." Mitsubishi International Corp. et al. v. Malaysia Overseas Lines, Ltd. (*Oriental Hero*), No. 71 Civ. 4606 (S.D.N.Y., motion for reargument denied, June 22, 1976). *See* [1976] A.M.C. 1287, 1306. It is unlikely that the court's ruling will be appealed because of favorable progress in settlement negotiations. Interview with David C. Wood, Counsel for Malaysia Overseas Lines, Ltd. (Dec. 23, 1976).

93. Draft Convention on the Carriage of Goods by Sea, U.N. Doc. A/CN. 91195, Annex (1975) [hereinafter cited as the Draft Convention]. At its ninth session, concluded

Working Group on Merchant Shipping Legislation of the United Nations Commission on International Trade (UNCITRAL).[94] The Draft Convention was designed to replace the existing Hague Rules by establishing new guidelines for liability arising from cargo loss or damage.[95] The importance of the Draft Convention is that it eliminates the negligent navigation or management defense that the shipowners currently enjoy under the Hague Rules.[96] The abolition of this defense is strongly advocated by the United States.[97]

Approval of a Convention on the Carriage of Goods by Sea concluded by a Conference of Plenipotentiaries at the United Nations and subsequent international acceptance could provide the impetus needed for United States adoption of the Convention rule. Because the owner of the carrying vessel would no longer be shielded from liability for damage to cargo aboard his own vessel, it appears that the most equitable remedy for apportionment of damages between shipowners and cargo owners is to apply the Convention rule. The owners of cargo still would be entitled to recover their full damages by receiving

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in May 1976, UNCITRAL recommended "that the General Assembly should convene an international conference of plenipotentiaries as early as practicable to conclude, on the basis of the [D]raft Convention approved by the Commission, a Convention on the Carriage of Goods by Sea." U.N. Doc. A/CN. 9/1x (1976). For a summary of work done at the ninth session, see Report of the Working Group on the work of its ninth session, U.N. Doc. A/CN. 31/17, Annex (1976).

94. For a discussion of the historical background of the Draft Convention, see Kimball, *Shipowner's Liability and the Proposed Revision of the Hague Rules*, 7 J. MAR. L. & COMM. 217, 232-35 (1975) [hereinafter cited as Kimball].

95. *See* Report of the Working Group on the work of its seventh session, U.N. Doc. A/CN. 9/96 (1974).

96. Article 5 of the proposed Draft Convention provides in pertinent part:

> 1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
>
> 7. Where fault or neglect on the part of the carrier, his servants, or agents, combines with another cause to produce loss, damage or delay in delivery the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of loss, damage or delay in delivery not attributable thereto.

31 U.N. GOAR, Supp. 17, at 76, 82, U.N. Doc. A/31/17 (1976).

Before adopting article 5, paragraph 7, the Committee considered a proposal submitted by the representatives of the Federal Republic of Germany, Japan, the United Kingdom and the Union of Soviet Socialist Republics to add a paragraph to article 5 that would retain the shipowner's defense for negligent navigation. It is interesting to note that the defense for negligent management of a ship was not included. After considerable deliberation, the proposal was rejected. For an account of the arguments made against and in support of this proposal, see *id.* at 82-83.

97. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods By Sea (Part 1)*, 7 J. MAR. L. & COMM. 69, 116 (1975).

payments from each ship in proportion to their respective degrees of fault, unless one or more of the shipowners could limit their liability. Further, the non-carrying vessel would no longer be subjected to 100 percent liability for damage to the cargo aboard the carrying vessel.[98]

B. Limitation of Liability

Even if the United States were to adopt the Convention rule, cargo owners could argue that international uniformity with respect to collision liability would not result.[99] For when the non-carrying vessel becomes a total or near total loss and the owner is entitled to limit his liability, the recovery accorded to cargo owners in the United States would still differ from that of other maritime nations.[100] Cargo owners and their underwriters might be more amenable to adoption of the Convention rule if they were guaranteed a fund from which cargo damage claims could be partially satisfied.[101]

The limitation of liability concept embodied in the Brussels Convention of 1957[102] assures the cargo owner of such a fund. This Convention establishes a limitation fund of approximately[103] $67 for each ton of the ship's total tonnage in cases involving only damage to property.[104] When a collision results in property damage and personal injury or death claims, the fund is fixed at $207 per ton.[105] The first $140

98. It should be noted that under the terms of the Draft Convention, a shipowner still would be entitled to limit his liability to cargo claimants if he complied with the terms of the limitation of liability statute. Kimball, *supra* note 94, at 240, 252. For a discussion of the potential impact on marine insurance if the Draft Convention is adopted, see *id.* at 240-43.

99. *Uniform Maritime Law, supra* note 14, at 887.

100. *See* text accompanying notes 54-56, *supra*.

101. *See Uniform Maritime Law, supra* note 14, at 886-87.

102. International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships, *done* Oct. 10, 1957, *reprinted in* BENEDICT ON ADMIRALTY, *supra* note 6, at 634 [hereinafter cited as Brussels Convention of 1957]. Although the United States is not a party, the Convention has been ratified or followed by more than thirty nations. For a list of those countries who have adopted the Convention, see *id.* at 635-36. For a comprehensive discussion of the treaty provisions, see Comment, *Limitation of Shipowner's Liability—The Brussels Convention at 1957*, 68 YALE L.J. 1676 (1959) [hereinafter cited as *Shipowner's Liability*].

103. The fund provisions of the Convention are expressed in Poincaré gold francs. Because of wide fluctuation in the free market value of gold and currency devaluations during the past few years, the dollar equivalents of the funds can only be approximated. See Asser, *Golden Limitations of Liability in International Transport Conventions and Currency Crisis*, 5 J. MAR. L. & COMM. 645 (1974).

104. Brussels Convention of 1957, *supra* note 102, art. 3(1)(a) wherein the treaty provides:

> The amounts to which the owner of a ship may limit his liability under Article 1 shall be: (a) Where the occurrence has only given rise to property claims, an aggregate amount of 1000 francs for each ton of the ship's tonnage.

105. *Id.* art. 3(1)(b) which states: "Where the occurrence has only given rise to personal claims an aggregate amount of 3100 francs for each ton of the ship's tonnage."

is allocated to personal injury and death claims. The remaining $67 must be divided ratably among property loss claims and personal injury and death claimants whose claims are not satisfied by the $140 per ton fund.[106] Although the Brussels Convention of 1957 is considered a "dead letter"[107] because it has not been ratified by a sufficient number of maritime nations to give it operative effect, the limitation system it introduced has been adopted by several leading maritime countries through domestic legislation.[108]

There are several benefits that would result from adoption of the limitation system contained in the Brussels Convention of 1957.[109] First, it guarantees a fund, even when the ship and cargo become a total loss, enabling the cargo claimants to receive some measure of compensation for their losses[110] without exposing the shipowner to unreasonable risks.[111] Second, the limitation proceedings will be simplified, thereby relieving the courts and parties of the monumental task of determining the ships' value after the collision.[112] Thirdly, a fund established by a tonnage formula would promote uniformity which would alleviate a considerable amount of forum shopping.[113]

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106. *Id.* art. 3(1)(c) which provides:

> Where the occurrence has given rise both to personal claims and property claims an aggregate amount of 3100 francs for each ton of the ship's tonnage, of which a first portion amounting to 2100 francs for each ton of the ship's tonnage shall be exclusively appropriated to the payment of personal claims and of which a second portion amounting to 1000 francs for each ton of the ship's tonnage shall be appropriated to the payment of property claims, provided however that in cases where the first portion is insufficient to pay the personal claims in full, the unpaid balance of such claims shall rank rateably with the property claims for payment against the second portion of the fund. (footnote omitted).

107. GILMORE & BLACK, *supra* note 7, at 824 n.13j.

108. SUNDSTROM, *supra* note 9, at 90.

109. The Brussels Convention of 1957 does have two inherent weaknesses. First, it results in an unfair recovery for cargo owners when the vessel's tonnage is low and the value of cargo is high. 1963 *Hearings, supra* note 6, at 94 (statement of Leonard J. Matteson). Second, in certain circumstances, the limitation fund of $207 per ton could work to the distinct advantage of the owners of large ships. When a vessel is not substantially injured as the result of a collision and its value exceeds $207 per ton, the shipowner's liability would be less than under the method of computation used in the United States. *Id.* at 145 (statement of Abraham E. Freeman).

110. *See Uniform Maritime Law, supra* note 14, at 888.

111. The shipowner's risk of loss has been significantly reduced with the arrival of limited liability of incorporation and marine insurance. Eyer, *Shipowner's Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370, 389 (1964) [hereinafter cited as Eyer]. *See Shipowner's Liability, supra* note 102, at 1713.

112. 1962 *Hearings, supra* note 9, at 36. For a discussion of the problems encountered in determining the value of a ship in limitation proceedings, see *id.* at 136-37; *Shipowner's Liability, supra* note 102, at 1697.

113. It has been stated that the uniformity created by adoption of the Brussels

IV. CONCLUSION

The elusive goal of international harmony in maritime collision law has been brought a step closer by the United States' adoption of the proportional fault rule in *Reliable Transfer*. This new standard, which apportions damages between the negligent vessels on the basis of fault, has eliminated an important factor involved in transoceanic forum shopping.[114] However, when a collision involves cargo damage, striking discrepancies still exist.

These differences can be eliminated. The United States should adopt the Convention rule, which holds negligent vessel owners severally but not jointly liable, and apply the doctrine of proportional fault to recovery for damage to cargo. The uniformity created by adoption of the Convention rule would eliminate the expense and hardship involved in seeking a forum that will apply the most advantageous legal principle. The Draft Convention, if adopted, provides an added incentive for United States adherence to the Convention rule. With the elimination of the defense of mere error in navigation or management, the more equitable remedy of apportioning damages between the shipowners and cargo owners would be realized by holding each shipowner responsible in proportion to his degree of fault.

Although adoption of the Convention rule would bring about a substantial degree of uniformity in international maritime law, the United States method of computing the shipowners' limitation of liability continues to differ from the procedure used by the major maritime states. Thus, as the final step in achieving international unity in this area, the United States should adopt the tonnage formula limitation concept provided in the Brussels Convention of 1957.[115] The

Convention of 1957, standing by itself, "is sufficient to warrant support by the United States." *1963 Hearings, supra* note 6, at 60 (statement of Raymond Greene).

114. The problem of forum shopping influenced the Court's adoption of the proportional fault rule when it stated: "Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault—a fact that encourages transoceanic forum shopping." United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 403-04 (1975).

115. The uniformity created by a limitation concept based on a tonnage formula is a desired goal among cargo owners and their underwriters. If, however, the United States adopts the Convention rule and the Draft Convention replaces the presently existing Hague Rules, then strong consideration should be given to abandoning the limitation of liability concept. The completion of these three steps would result in a *total* proportional liability system. Such a system would provide a fair distribution of loss among the shipowners without infringing upon the cargo owners right to recover. For example, in a collision involving $3 million in ship and cargo damages, a shipowner who is two-thirds at fault would be liable for $2,000,000. The other vessel owner would be responsible for the remaining $1,000,000. Cargo owners would be completely compensated for their losses.

adoption of the Convention rule and the limitation theory embodied in the Brussels Convention of 1957 will complete the voyage embarked on by *Reliable Transfer* in conforming United States law with current international standards where there is a mutual fault maritime collision involving cargo damage.

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Shipowners could reduce their exposure to unlimited liability by adjusting the freight rates charged to their customers according to the value of cargo shipped. In addition, these rates could be fixed to reflect the degree of risk involved in transporting different types of cargoes. Thus, a more expensive cargo or a hazardous trip could be charged at a higher rate.

It is recognized that unilateral action by the United States to abolish the shipowners' right to limit liability might place United States interests at a competitive disadvantage in international maritime commerce. *See Shipowner's Liability, supra* note 102, at 1713; Eyer, *supra* note 111, at 390. However, it is hoped that the major maritime nations of the world would follow the United States' initiative of promoting a more equitable and efficient method of apportioning damages between the shipowners and the cargo owners.