Whether exclusion clauses practically limit the liability of the carriers of goods by sea under the UK jurisdiction

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Abstract

The main purpose of this study is to identify the extent to which the English statutory definitions of perils of the sea, arrest or restraints of princes, and negligence are interpreted by English courts as to whether the exclusion clause in contracts of carriage of goods by sea is applicable to exempt the carriers from liability to the losses or damages to the ships or the goods. The main observation drawn from this study is that the courts’ interpretation of exclusion clause has been circumspect in nature. On this ground, this study also aims at informing carriers of potential risks and liabilities which are not covered under the immunity of exclusion clauses embedded in contracts of carriage of goods by sea. In addition, this potential risks may be highlighted by addressing a lack of mutual understanding between common law countries and non-common law ones and the inconsistency between domestic and international laws regarding the issues of exclusion clauses and liabilities of carriers in contracts of delivery of goods by sea.

I. Introduction

1. Identifying the research issue

In international sea trade, many carriers often insert an exclusion clause in their contracts of carriage of goods by sea to limit their liabilities in cases of losses or damages occasioned to the ships or the goods. However, carriers are also often unaware that whether this type of limitation clauses is effectively applicable depends very much on the nature of each subject matter under the question and the legal circumstances of each case under the UK jurisdiction. Thus, as far as the rights and interests of the carrier concerned, it is necessary to make an inquiry into the some of the most pertinent legal instances upon which carrier’s liability is interpreted as to be exempted or not. In the UK’s common law, four sources of law govern how the limitation clause shall be construed, which are: the Hague-Visby Rules 1968, the UK’s Carriage of Goods by Sea Act 1971, English Marine Insurance Act 1906, and case law. Basically, the first three bodies of
law share one common feature: *providing a set of legal well-defined concepts, on which, a wide range of exclusions to the carrier’s liability is determined.* Article IV of The Hague-Visby Rules 1968 and the Carriage of Goods by Sea Act 1971 (UK) provide the carriers with exemptions where loss or damages to goods are caused by: ‘Act of God’, ‘act of war’, ‘perils of the sea’, and ‘fire’. In addition, section 3(2)(c) of the Marine Insurance Act 1906 (UK) specifically categorises what kinds of perils causing losses or damages to the ships or the goods which do not render liability to carriers, including: natural corrosion of the ship, breakage of goods, inherent vice, death of animal on board due to natural course, loss by delay, and loss by rats and vermin. On the other hand, Section 2(e) of the English Marine Insurance Act 1963 (UK) also clearly identifies losses or damages caused by reasons covered by the meaning of the very special term of ‘perils of and on the sea’ are not insurable, hence, the carriers shall not be held liable. Accordingly, perils of the sea included: founding at sea (missing), ship wrecks, stranding, and collision; and perils on the sea cover: fire, man of war, enemies, pirates/rovers/thieves, jettison, barratry, restraints and detainment, war, explosion, strikes/riots/civil commotion, and all other perils similar in kind to the perils already defined. As such, the application of these conceptual framework into interpreting and deciding the issues under concern involves the central question of whether the losses or damages to goods or ships are proximately caused by fortuitous accidents which is not attributable to human being’s free will and want. It is in answering this question that the limitation to carrier’s liability is to be determined.

2. **Scope and method of study**

   a. **Scope of study**

   In order to make the study feasible, the scope of study is narrowed as follows. First, the issue of carrier liability is studied within the territory of the UK jurisdiction. However, at some instances, several cases under Canadian and Australian jurisdictions are also referred on the ground that these jurisdictions are similar to that of the UK in the same common law system. Second, this study greatly emphasizes on English case law as the main source for considering the liability of

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2 *English Marine Insurance Act 1963 (UK) s 2(e).*
carriers. The reason for this is that, though statutory laws provides basic principles governing the practice of carriage of goods by sea, these principles shall be interpreted by courts as applicable to the issues emerged from the real situations, whereby carrier’s liability is practically limited. Third, from an endless list of cases relating to the area of carriage of goods by sea, the chosen cases are those remarked by the courts’ decisions serving as corner stones in legal precedents of liability borne by all parties involved, including carriers. This may help providing carriers with a wide range of practical possibilities in which their liability shall be exempted or not.

b. Method of study
First, this study employs the legal doctrinal-based method to examine the issue of carrier liability in carriage of goods by sea. This means that the issue of carrier liability is inquired on the basis of the law as it is, not in the sense that the law as it should be. However, since the law, as it is, often exposes to disputes, it is rational to draw suggestions for further adjustment. Second, the cases cited in this study are mainly selected from English maritime case law. Third, of the cases cited in this study, many ones did not directly discuss carrier liability. But since the practice of carriage of goods by sea involves many other parties, carrier liability is in fact examined in the sense that whether other parties’ liability shall be limited.

II. ‘Perils of the sea’
At law, the concept of ‘perils of the sea’\(^3\) denotes a very important issue in statutory law where the insured’s property is put at marine risks which are subject to indemnification as agreed by the insurer. However, in order to satisfy the legal definition of ‘perils of the sea’, accidents happen to a ship or to the goods must meet two basic criteria: a/ they must be fortuitous accidents and; b/they are not ordinary action of winds and waves.\(^5\)

I. What does the word ‘fortuitous’ mean?
Lord Bramwell’s judgment provided a comprehensive definition of the term ‘fortuitous accidents’ which basically refers to the circumstance caused damages and loss to the insured

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\(^3\) Marine Insurance Act 1906 (UK) r 7.
\(^4\) Ibid.
\(^5\) Ibid.
goods, but not as a consequence of the assured’s actions or the ordinary wear and tear in the ship’s route of delivering the goods.\(^6\)

This definition can be seen as an approval of Lopes LJ’s judgment in *Hamilton* when Lopes LJ held that a peril of the sea could be considered as the sea’s action which causes damages but not connects to anyone’s fault.\(^7\) On this legal ground, the meaning of the expression ‘fortuitous’ does not contain elements attributed to misconduct of the assured, natural corrosion, delay, inherent vice, and unseaworthiness. Nevertheless, in practice, it is observed that the application of the rule of fortuity is circumspect\(^8\). The followings are some legal issues involved in several cases, which are of significance as to understand what kinds of accidents fall under the category of ‘perils of the sea’ as interpreted by the courts.

First, it is the issue of *whether a collision is classified as a peril of the sea* that raises a lot of concern among both carriers and cargo owners. In *Xantho*\(^9\), the main legal issue to be decided was that whether this collision was a peril of the sea. The Court of Appeal’s argument was that: a/ drawing on the conclusions made by the courts in previous cases of *Wooley*\(^10\), *The Hellen*\(^11\) and *The Norway*\(^12\), it is well established that the burden of proof rests on the ship-owner to prove that the collision was caused by extraordinary and unexpected action of the sea, not by the negligence committed by one or both crew and masters on the ship; b/ the mere fact that the Xantho collided with another ship could not allow one to infer that the collision was caused by perils of the sea; and c/ hence, the court’s judgment must be made in favour of the cargo owner\(^13\). However, Lord Herschell of the House of Lords rejected this decision of the Court of Appeal and held that collision is a ‘peril of the sea’ on the ground that, following ordinary reasoning and interpretation of common law, not all accidents happened to the insured goods will fall under the canopy of the terms ‘perils of the sea’.\(^14\)

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\(^6\) *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser and Co* (1887) 12 AC 484, 492 (‘Inchmaree’).

\(^7\) *Hamilton, Fraser & Co. v Pandorf & Co.* 12 AC 518, 526-527 (1887).


\(^9\) *Wilson, Sons and Co v Owners of Cargo* (1887) 12 App Cas 503 (‘Xantho’).

\(^10\) *Wooley v Michell* (1883) 11 QBD 47.

\(^11\) *Orhloff v Briscall* (1866) LR 1 PC 231 (‘The Helene’).

\(^12\) *The Norway* (1865) 3 Moo. P.C. (N.S.) 245.

\(^13\) Above n 9, 279.

\(^14\) *Xantho* (1887) 12 App Cas 503, 509.
Second, there was an issue of whether the loss caused by a wilful scuttling committed by the assured is considered as a loss caused by perils of the sea. It is obvious that, in Maritime Insurance Act 1906, the loss caused by deliberate misconduct of the assured is excluded and unrecoverable.\textsuperscript{15} In \textit{Samuel} \textsuperscript{16}, in upholding the Court of Appeal’s decision, the majority of The House of Lords ruled that the seawater ingress could not be considered as isolated from the human conduct causing it, therefore, the sinking was an intentional or wilful act, and the loss is unrecoverable.\textsuperscript{17}

In this regard, it is necessary to note that, in the early precedent of \textit{Small}\textsuperscript{18}, the Court of Appeal concluded that the loss caused by a wilful scuttling by the ship-owner was recoverable under the meaning of ‘peril of the sea’ because though this act was essentially a barratry, it was fortuitous or incidental to the insured claimant’s prejudice.\textsuperscript{19} In \textit{Small}\textsuperscript{20}, the expression of fortuity was assessed \textit{in relation to the claimant}, not to the ship-owner acting as the master, while in \textit{Samuel}\textsuperscript{21}, this principle was overruled on the basis that the scuttling was the owner’s fraudulent conduct and not caused by a peril of the sea\textsuperscript{22}. As one scholar observed, fortuity should be considered as an independent concept, not related to the claim made by the assured, and hence scuttling, even in the absence of the owner’s connivance, is not a fortuitous accident.\textsuperscript{23}

Third, \textit{accidents on board ship} raises a question of whether the losses caused by this type of accidents is indemnified according to the meaning of ‘peril of the sea’.\textsuperscript{24} The principle set out for this test was established in \textit{Inchmaree}\textsuperscript{25} on the basis that winds, sea water, and waves had no substantial connection to the damages to the engine and boilers because the same damages could had been made on land as a result of the same management mistake.\textsuperscript{26}

\textsuperscript{15} \textit{Maritime Insurance Act} (1906) s 55(2)(a).
\textsuperscript{16} \textit{Samuel v Dumas} (1924) 18 LIL Rep 211 (‘Samuel’).
\textsuperscript{17} Ibid 217.
\textsuperscript{18} \textit{Small v United Kingdom Marine Mutual Insurance Association} (1897) 2 QB 311, CA (‘Small’).
\textsuperscript{20} \textit{Small} (1897) 2 QB 311, CA.
\textsuperscript{21} \textit{Samuel} (1924) 18 LIL Rep 211.
\textsuperscript{22} Ibid 217.
\textsuperscript{23} Above n 19, 325.
\textsuperscript{24} \textit{Inchmaree} [1887] 12 App Cas 484, 493.
\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
Applying the same principle, in *Stott*\(^{27}\), the House of Lords concluded that the fall of a boiler on the shipboard during the loading process could not be seen as a peculiar incident to the ship, hence, the damage was not recoverable under the terms of peril of the sea.\(^{28}\) Similarly, in *Sassoon*\(^{29}\), the court also held that if there was no incidental factors involving in the cause of water entrance into the ship, it is inappropriate and unreasonable to employ the expression of perils of the sea to refer to this occurrence.\(^{30}\) However, it is interesting to observe that in *Cullen*\(^{31}\), the fact that a ship was sunk because of another ship’s gunfire was interpreted as covered by the term ‘all other perils’ included in an insurance policy.\(^{32}\)

Fourth, *a ship’s unseaworthiness contains no fortuitous elements* which can be employed to invoke a defence for losses by a ‘peril of the sea’.\(^{33}\) In *Merchants Trading*\(^{34}\), it was the inherent weakness of the ship Golden Fleece that made it unfit to carry a cargo, leading to the sudden seawater ingress that caused the sinking of the ship. As the court interpreted, the word ‘unseaworthiness’ refers to original defects and construction of the ship leading to her sinking even in ordinary condition of the winds and waves: the unseaworthiness of a ship becomes evident in the circumstance where, in ordinary weather condition, the ship’s sinking still happens.\(^{35}\)

Much in the same line of reasoning, the court in *Sassoon*\(^{36}\) shared a common conclusion contending that the seawater ingress that caused the sinking of the ship cannot be separated from the fact that these ships were ill designed and decayed, and ruled that it is not ‘a peril of the sea’ which directly and indirectly ‘caused the loss’, even though the goods was damaged by the seawater ingress.\(^{37}\) However, in *Miss Jay Jay*\(^{38}\), where the loss was caused by both the poor structure of the ship and adverse weather condition combined, the court held that even though the

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\(^{27}\) *Stott (Baltic) Steamers Ltd v Marten and Others* [1916] AC 304.

\(^{28}\) Ibid 311.

\(^{29}\) *ED Sassoon and Co v Western Assurance Co* [1912] AC 561 (‘Sassoon’).

\(^{30}\) Ibid 563.

\(^{31}\) *Cullen v Butler* (1816) 5 M&S 461.

\(^{32}\) Ibid 464.

\(^{33}\) *Merchants Trading Co v Universal Marine Insurance Co* (1870) CP 431.

\(^{34}\) Ibid 431.

\(^{35}\) Ibid 431.

\(^{36}\) *Sassoon* [1912] AC 561.

\(^{37}\) Ibid 563.

\(^{38}\) *Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* [1985] 1 Lloyd’s Rep 264 (‘Miss Jay Jay’).
ship was unseaworthy, sank by the direct extraordinary force of severe weather, therefore, the accident was considered as resulted from a peril of the sea.\textsuperscript{39}

2. What does the phrase of ‘ordinary action of the winds and waves’\textsuperscript{40} mean?

The term ‘perils of the sea’, under r 7 of the UK MIA 1906\textsuperscript{40}, is defined as not including ‘ordinary action of winds and waves’.\textsuperscript{41} However, as the word ‘ordinary’ is an adjective supplement to the noun ‘action’, not to nouns ‘waves’ and ‘winds’, a question raised as to whether the action of winds and waves must be extraordinarily violent to amount to perils of the sea.

In Skoljarev\textsuperscript{42}, in normal sea conditions, for unknown reason, seawater flooded the Zadar ship’s engine room and sank the ship. The ship-owner claimed for the loss under the head of perils of the sea, which was rejected by the insurer. The High Court of Australia held in favour of the ship-owner, stating that the loss was caused by seawater ingress which was fortuitous or incidental in nature, even in the calmness of the sea and smoothness of weather, and affirmed that abnormal weather and seawater conditions are not the prerequisite of fortuitous marine risks.\textsuperscript{43} But in Wadsworth\textsuperscript{44}, the calm conditions of the sea could not be attributed to sinking of the ship, rather, it was the ‘ordinary wear and tear’\textsuperscript{45}, or the natural decay of the ship after a long time of operating, that caused the accident.\textsuperscript{46} The court ruled that it was due to the ‘inherent weaknesses’ of the ship that allowed the entrance of seawater, and the entrance of seawater a peril of the sea by itself, hence, the insurer was exempted from liability for loss caused by wear and tear reason.\textsuperscript{47}

In addition, there was a situation in which a loss resulted from the sinking of a ship which was allegedly caused by perils of the sea, but it was impossible for the claimant to identify what

\begin{itemize}
\item \textsuperscript{39} Ibid 272.
\item \textsuperscript{40} Marine Insurance Act 1906 (UK) r 7.
\item \textsuperscript{41} Ibid.
\item \textsuperscript{42} Skandia Insurance Co. v Skoljarev [1979] 142 CLR 375.
\item \textsuperscript{43} Ibid 384.
\item \textsuperscript{44} Wadsworth Lighterage and Coaling Co v Sea Insurance Co [1929] 15 Com Cas 1.
\item \textsuperscript{45} Ibid 5.
\item \textsuperscript{46} Ibid.
\item \textsuperscript{47} Ibid.
\end{itemize}
exactly the cause of the loss was. In *Marel*\(^4\), the court ruled that if there was an unidentified ‘peril of the sea’, it could not be held that the accident was caused by this unidentified reason where the normal conditions of the waves and winds did not damage the ship or caused the loss on that ship, even that ship sailed in an unseaworthy condition.\(^4\) But because the claimant failed to prove that ‘a peril of the sea’\(^5\) was the immediate cause of the loss, it is not possible to recover the loss.\(^5\)

III. Arrests or restraints of princes

Carriers often insert a clause exempting them from liability to losses or damages caused by arrest or restraints of princes. However, the court’s application of this expression can be addressed in the following instances.

First, where the arrest or restraint of princes was just the apprehension of the claimant, the claimant would fail in his defence. In *Forrestal*\(^5\), due to the outbreak of war, obeying the orders made by the German authorities, a German carrier had to unload the cargo at a neutral port. The cargo owner made a claim on the basis that since his cargo was put at a place out of the direct control of the German government, not only was he barred from claiming his possession of the cargo, but also was the carrier not in the entitled position to make a defence under the head of restraint of princes. The court concluded that: a/ there was no real and direct threat to the cargo; b/ the carrier must obey his government order to unload the cargo, and this act effectively resulted in the restraint of the goods as an exception.\(^5\)

Second, it has been well established by the courts that ‘*force*’ is not prerequisite of arrest, restraint and detention of princes, and the two words *detention* and *detainment* have the same meaning as employed in the exclusion clause. In *Miller*\(^5\), a cargo of cattle was insured against arrests, restraints, and *detainments* of princes under an insurance contract which also inserted a

\(^4\) *Lamb Head Shipping Co Ltd v Jennings* [1992] 1 Lloyd’s Rep 402 (‘Marel’).
\(^4\) Ibid 425.
\(^5\) Ibid.
\(^5\) Ibid.
\(^5\) Ibid 281.
\(^5\) Ibid 281.
\(^5\) *Miller v Law Accident Insurance Co* [1903] 1 KB 712.
‘free of capture and seizure clause (‘f c and s clause’),\textsuperscript{55} aiming at excluding the insurer from liability to losses or damages caused by war and strikes.\textsuperscript{56} This clause stated that the policy is free of capture, seizure, or \textit{detention}. Due to the fact that the cattle were diseased, the Buenos Aires sea port’s authority did not allow the cargo owner to unload the cargo and transport the cattle into the country. Therefore, the cargo owner had to put his cattle on another ship heading for another destination where he sold the cattle at loss. The cargo owner claimed for the loss under the head of detention of princes, which was objected by the carrier on the basis that, since there was no force had been used, the accident could not be categorised under the head of arrests, restraint and detainments of princes. At the Court of Appeal, Mathew LJ contended that the carrier must ‘submitted to the order of the administration’, hence, the absence of direct forcible means could not be used as the test for judging that the loss was not under the covered risks of arrest or restraint of princes.\textsuperscript{57} In addition, since the insurance contract between the insurer and the cargo owner also contained the f c and s clause, the court ruled that the insurer was not exempted from the liability on the basis that: a/ the word ‘detainment’ in the first part of the insurance contract has the same meaning with the word ‘detention’ in the f c and s clause; b/ hence, the loss fell within the insured risks and the insurer was liable to the loss.\textsuperscript{58}

Third, there were several instances in which, much of concern raised as to the question of \textit{what is the extent to which the carrier, in the situation where his ship was actually restrained by a foreign power, could claim for the resulted loss under the head of arrests or restraints of princes}. On one hand, in \textit{Ciampa}\textsuperscript{59}, since the ship took a voyage from a plague-exposing area, it had to be restrained at Marseilles port for a compulsory pest control, the carrier was unable to plead an exemption by citing the clause of restraints of princes. On the other hand, however, in \textit{Samuel Sunday}\textsuperscript{60}, in the situation when World War I was declared, the voyage to Hamburg port made by

\textsuperscript{55} Ibid 721.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Ibid.
\textsuperscript{59} \textit{Ciampa v British India steam Navigation Co Ltd} [1915] 2 KB 774.
\textsuperscript{60} \textit{British and Foreign Marine Insurance Co Ltd v Samuel Sunday and Co} [1916] P 650.
two British ships was deemed illegal, and thus the consequent loss fell within the head of restraints of princes.⁶¹

Fourth, the situation as shown in Wondrous⁶² raised an interesting issue of the extent to which the expression of detainment of princes was construed as falling into the meaning of recoverable war risks. In this case, a ship named Wondrous was detained for 18 months at an Iran’s port because the ship’s charterers failed to pay the port due and freight tax. The cargo owner claimed for the loss resulted from the 18-month delay under the head of recoverable war risks, while the insurer objected. In the Court of Appeal, different lines of arguments were made by the judges. McCowan LJ argued that since the detainment, resulted from the charterers’ violation of trading customs, was the immediate cause of the loss, the loss in anyway had no connections with any element of war risk, and thus, the insurer was free of liability to the loss.⁶³ In contrast, Hobhouse J and Lloyd LJ shared a contention that the detainment of Wondrous ship ‘was conditional’ in the sense that if she had left the port without having her duty cleared as required by the trading customs, she would have been detained by force.⁶⁴ It was in this conditional situation, the detainment fell into the excluded war risks because it resulted from the infringement of trading customs.⁶⁵

Fifth, since there were cases in which arrests, restraints or detainments occurred as a result of enforcing decisions made by special courts, there has been a commonly-shared concern regarding to whether these decisions are genuine or not. In principle, as provided by cl 1.2 of the IWSH 1995⁶⁶, if a judicial decision is made by a pawn court for political purposes, the resulted arrest, restraint or detainment fall into excluded war risks and; b/ as provided by cl 4.1.5 of the IWSH⁶⁷, if a judicial decision is made by a genuine court, a claimant may seek a defense for exemption from liability. This principle, in fact, was initiated long before the establishment of these clauses. In Anita⁶⁸, during the period of Vietnam War, upon her arrival at Saigon seaport,

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⁶¹ Ibid 672.
⁶² Ikerigi Compania Naviera SA and Others v Palmer and Others [1991] 1 Lloyd’s Rep 400 (‘Wondrous’).
⁶³ Ibid 577.
⁶⁴ Ibid 417, 572.
⁶⁵ Ibid 572.
⁶⁶ Institute of War and Strikes Clause Hull (1995) cl 1.2.
⁶⁷ Ibid cl 4.1.5.
⁶⁸ Panamanian Oriental Steamship Corporation v Wright [1971] 2 All ER 1028 (‘Anita’).
the ship Anita was confiscated by a court of Saigon government due to the fact that there was a large amount of prohibited goods inspected on the ship. The plaintiff claimed for recovery under the head of war risks, which was objected by the insurer on the ground that, because the ship infringed local regulations, the insurer would be exempted from liability to the loss. At the Court of Appeal, Lord Denning MR held that, as the plaintiff cargo owner was unable to provide evidence to prove that the court of Saigon government did not make the decision on its own genuine jurisdiction but on political guidance, it was argued for the defendant insurer to seek for an exemption from liability.69

IV. Negligence

It has been well established that ‘negligence of the assured personally, of his master, or of his mariners’ does not fall under the head of perils of the sea as an insurable risk.70 This principle of negligence is now incorporated in cl 6.2 of the ITCH 199571 and in cl 4.2 of the IVCH 199572, known as Negligence or Inchmaree Clause.73 The underlying idea for inserting this clause in insurance contracts is that the underwriters and carriers tend to seek for exemption from liability to losses caused by the crew’s or the master’s negligence, unless this negligence amounted to barratry or wishful misconduct.74 However, one of the most pertinent issues to be decided by the courts is that: if ‘a peril of the sea’75 was the immediate cause of the loss and connected to the master’s or the crew’s negligence which did not amount to barratry, whether or not the underwriter would be held liable.76 In this situation, two basic approaches have been adopted by the courts: ‘causa proxima non remota spectatur’77 and ‘contra proferentem’78.

69 Ibid 1032.
74 Ibid.
76 Ibid.
78 Above n 8, 284.
1. ‘Causa proxima non remota spectator’ approach

This Latin maxim was first mentioned in Hodgson\(^79\) when the judges pointed out that there must be a proximate cause assigned to the loss, and then officially used by Lord Ellenborough in Livie\(^80\) in its full version.\(^81\) Basically, this approach involves the main idea of determining whether or not ‘a peril of the sea’ was the immediate cause of a loss, which contains a double meaning: a/ if the answer is no, and the master’s or the crew’s negligence is directly referable but not developed into barratry, then the underwriters are exempted from liability to the loss and; b/ if the answer is yes, even though the crew’s or the master’s negligence is unintended, the underwriters may still be held liable.\(^82\) The following cases may help to understand some most pertinent instances at which this approach was adopted by courts.

First, in Sherwood\(^83\), the ship Emily collided with another ship named Virginian, and this collision was caused by the negligence of the first mate of the Emily ship, resulting in losses to both ships. The Emily’s owner sued against the insurance company, claiming for a recovery for both losses, but the underwriter contended that it was the gross negligence of the Emily’s first mate, not any peril of the sea, that solely caused the losses, thus the losses were not covered under the insurance policy. The court’s decision was double: a/ the insurer was liable to the loss of the Emily ship because collision was the proximate cause, though this collision was remotely caused by negligence and; b/ the insurer was not liable for the loss of the Virginian ship because this loss was not caused by the collision, but by the negligence of the Emily’s first mate.\(^84\)

Second, both carrier and cargo owners commonly encounter with the issue of whether a negligence committed by a third party resulting in damage to goods or the ship falls under the category of fortuitous accident.\(^85\) In La Pointe\(^86\), the owners of La Pointe ship had it repaired upon discovering some technical faults of the ship.\(^87\) However, due to the fact that the repairers used a wrong type of bolts screwing some valve flanges, the seawater flooded the ship and made

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\(^80\) Livie v Jansen [1810] 12 East, 684 (‘Livie’).
\(^81\) Above n 77, 226.
\(^82\) Ibid 225.
\(^83\) General Mutual Insurance Co v Sherwood, 55 U.S. 14 How.351 (1852).
\(^84\) Ibid 355.
\(^85\) CCR Fishing Ltd and Others v Tomenson Inc and Others [1991] 1 Lloyd’s Rep 89 (‘La Pointe’).
\(^86\) Ibid.
\(^87\) Ibid 91.
it sunk.\textsuperscript{88} The ship-owner took a litigation claiming that it is the repairers’ negligence that caused the loss, which could be seen as a fortuitous incident to the natural condition of the ship, while the underwriter contended that it was the ‘ordinary wear and tear’, or natural corrosion of the ship, caused the loss.\textsuperscript{89} The Supreme Court of Canada held that it was not the poor quality of the ship, but the negligence of the repairers constituted the direct cause of the sinking.\textsuperscript{90}

This legal issue was already addressed in \textit{Hamilton}\textsuperscript{91}, where a cargo of rice in a ship was damaged because a pipe was broken by rats resulting in seawater ingress. The court held that it was the seawater ingress that proximately caused the loss, but this seawater ingress was remotely resulted from the rats’ action, and was ‘unforeseen’ and ‘fortuitous’.\textsuperscript{92} Therefore, the exclusion clause on perils of the sea was applicable and the carrier was exempted from liability.

\textit{Third}, one of the most common problem encountered by both carriers and cargo owners is that of whether \textit{negligence of the master and crew is classified as a fortuitous ‘peril of the sea’}.\textsuperscript{93} In \textit{Walker}\textsuperscript{94}, in order to load a cargo of sugar into a ship, the cargo owner employed a sloop to carry the cargo from shore to the ship. During this loading operation, the crew of the sloop fell asleep, resulting in the fact that the sloop was blown back to the shore and destructed, causing loss and damage to the cargo of sugar. The ship-owner made a claim contending that it is ‘a peril of the sea’ that was the main cause of the loss.\textsuperscript{95} At the court, Bayley J held that, though remotely caused by the neglect of the sloop’s crew, the loss was directly caused by the effects of the forcible sea conditions, and the ship-owner ‘is not responsible’ for this negligence, and therefore, ‘the underwriter were liable’.\textsuperscript{96} Essentially, this approach regarding the crew’s and the master’s negligence was upheld in many later cases such as \textit{Dixon}\textsuperscript{97}, \textit{Davidson}\textsuperscript{98}, and \textit{The Stranna}\textsuperscript{99}, providing that if the assured has done all what he has to do to make sure that the ship’s

\begin{itemize}
\item \textsuperscript{88} Ibid.
\item \textsuperscript{89} Ibid.
\item \textsuperscript{90} Ibid.
\item \textsuperscript{91} \textit{Hamilton, Fraser and Co v Pandorf and Co} (1887) 12 App Cas 518.
\item \textsuperscript{92} Ibid 528.
\item \textsuperscript{93} \textit{Walker v Maitland} (1821) 5 B&Ald 171.
\item \textsuperscript{94} Ibid.
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} Ibid 175.
\item \textsuperscript{97} \textit{Dixon v Sadler} (1839) 5 M&W 405 (‘Sadler’).
\item \textsuperscript{98} \textit{Davidson and Others v Burnard} (1868) LR 4 CP 117 (‘Davidson’).
\item \textsuperscript{99} \textit{The Stranna} [1938] 1 All ER 458 CA.
\end{itemize}
seaworthy is sufficient, then he is discharged from responsibility for the neglect of the master or crew.\textsuperscript{100}

However, there were still cases in which the negligence was on the part of the assured who also acted as the master of his own insured ship. In \textit{Westport Coal}\textsuperscript{101}, The Gainsborough ship, partly owned by a man who also served as the master of the ship, during her cargo-transportation voyage, stuck on a jagged rock as the result of the master’s negligent navigation. The question was, as the cargo owner claimed, whether the ship-owner was exempted from liability for the negligence. The Court of Appeal made a decision in favour of the ship-owner, stating that it was the negligence peculiarly attributed to the agent acting in the role of a master, not in the role of the ship-owner, therefore, this negligence fell within the exclusion clause.\textsuperscript{102}

2. ‘\textit{Contra proferentem}’ approach

This Latin maxim refers to a legal rule stating that if a clause of a contract is ambiguous, this clause will be interpreted against the party who uses it as the defence for claiming his own interests. The application of this rule was instructively taken in \textit{Burton}\textsuperscript{103}. In this case, Bowen LJ held that the wording of the exclusion clause inserted in an insurance policy should not be construed as exceeding over the necessary nature of the legal circumstance in which the party who wishes to protect themselves from liability used unambiguous words in the drafting of the contract, and the court needs to make judgment on who will bear the liability.\textsuperscript{104} The followings are important instances showing how this approach was applied.

First, there was a concerned issue as to whether the expression ‘errors of navigation’ must be construed to cover the meaning of negligence as a defence for excluding the claimant’s liability. In \textit{Emmanuel}\textsuperscript{105}, the ship Emmanuel was chartered under a time charter contract containing an exclusion clause providing that the ship-owner shall be exempted from liability for loss caused by errors of navigation. On her voyage, the ship was grounded due to the negligent errors, resulting in the loss in term of all expense necessary for her re-floating. The ship-owner

\begin{thebibliography}{99}
\bibitem{100} Sadler (1839) 5 M&W 405; Davidson (1868) LR 4 CP 117; The Stranna [1938] 1 All ER 458 CA.
\bibitem{101} \textit{Westport Coal Co v McPhail} [1898] 2 QB 130.
\bibitem{102} Ibid 133.
\bibitem{103} \textit{Burton & Co v English} [1883] 12 Q.B.D. 218.
\bibitem{104} Ibid 265.
\end{thebibliography}
submitted that the term *errors of navigation*, as used in the contract, covered the meaning of negligence, hence, he was not liable for the loss caused by this negligence. At the court, however, Bingham J held that since the word *errors of navigation* was ambiguous in the sense that it might cover either negligence or non-negligent elements, the exclusion clause was neutral in essence, thus, the party relying on the exemption clause shall take the disadvantage of having the clause interpreted by the court against them.\(^{106}\)

Second, there was also a controversial issue regarding the claimant’s misconception of the two words: negligence and incompetence. In *Lemar*\(^ {107}\), the ship was insured under the Inchmearie Clause providing that loss caused by negligence of master, crew or pilot is recoverable. During her voyage, due to some errors of navigation, the ship sailed into a wrong direction, encountered with bad weather and sank. The ship-owner made a claim for the loss covered under the Inchmearie Clause, but the insurer rejected on the ground that it was the incompetence of the crew, not their negligence, that constituted the ship’s unseaworthy as the proximate cause of the loss. Indeed, the crew’s incompetence, as held by the court, constituted to the ship’s unseaworthiness resulting in the loss, and therefore, it is not reasonable to apply the Inchmearie Clause.\(^ {108}\)

Third, it is not always the case that the negligence amounting to a wishful conduct committed by the shipmaster can be used as a defence for the ship-owner to claim for covered losses. In *Cory*\(^ {109}\), the ship Rosslyn’s master loaded on board a large quantity of tobacco with the intention of smuggling, resulting in its arrest by Spanish authority. The ship-owner, in order to save the ship, faced no choice but to make some payment in cash, then contended that the insurer was liable to recover the expense on the ground that the loss fell within the category of wilful act by the master as an insured risk. The House of Lords, in upholding the lower court’s decision, ruled that it was the seizure that constituted the direct cause of the loss, not the wilful misconduct of the master, thus, the insurer was not liable.\(^ {110}\)

\(^{106}\) Ibid.


\(^{108}\) Ibid.

\(^{109}\) *Cory v Burr* [1883] 8 AC 393.

\(^{110}\) Ibid 395, 399, 400.
V. Highlight of risks often encountered by carriers in their use of exclusion clauses

From all the above discussion, the limitations to the carrier’s exemption of liability in applying the exclusion clause can be summarized in the following table. This table highlights 14 real situations most often encountered by carriers, whereby they were held liable or conditionally excluded. It should be noted that, in more than a two third of the cases, the carrier was obviously not exempted from liability, and in the rest of the cases, they were facing with the risks of being held liable if certain conditions were not satisfied.

*Table of limitations to carriers’ exemption of liability to losses or damages to goods (All the cases listed in this table are already mentioned in the discussion above)*

<table>
<thead>
<tr>
<th>ISSUE (s)</th>
<th>CASE (s)</th>
<th>Carrier’s Liability</th>
<th>NOTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Wilful Scuttling</td>
<td><em>Small v UK</em></td>
<td>Liable</td>
<td>The assured is the carrier who is also the ship-owner</td>
</tr>
<tr>
<td></td>
<td><em>Samuel v Dumas</em></td>
<td>Liable</td>
<td>The claimant is the cargo owner</td>
</tr>
<tr>
<td>2 Accidents on board ship</td>
<td><em>Thames v Hamilton</em></td>
<td>Liable</td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Scott v Martin</em></td>
<td>Excluded</td>
<td>Only if accident on board ship caused by human act originated from sources other than the ship</td>
</tr>
<tr>
<td></td>
<td><em>Cullen v Butler</em></td>
<td>Excluded</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Un-seaworthiness</td>
<td>Merchants v Universal</td>
<td>Carrier/ship-owner Liable</td>
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<tr>
<td>3</td>
<td>Miss Jay Jay</td>
<td>Excluded</td>
<td>Only if there is also an approximate cause of extraordinary sea condition</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Abnormal weather &amp; ordinary sea conditions are not prerequisite of fortuity</th>
<th>Lamb v Jennings</th>
<th>Liable</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Skandia v Skoljarev</td>
<td>Excluded</td>
<td>Alleged fortuity is not valid</td>
</tr>
</tbody>
</table>

|   | Wadsworth v Sea Insurance                                              | Excluded        | Only if the cause of loss is unknown or unidentifiable |

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<thead>
<tr>
<th></th>
<th>Alleged apprehension of an arrest/restraint</th>
<th>Richards v Forrestal</th>
<th>Excluded</th>
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<tbody>
<tr>
<td>5</td>
<td></td>
<td>Only if the carrier has to obey the government’ order which results in the restraint</td>
<td></td>
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</tbody>
</table>

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<thead>
<tr>
<th></th>
<th>Force is not prerequisite of arrest/restraint; detention &amp; detainment have</th>
<th>Miller v Law Accident Insurance</th>
<th>Excluded</th>
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</thead>
<tbody>
<tr>
<td>6</td>
<td></td>
<td>Only if the insurance contract between the cargo owner and the insurer contains f c &amp; s clause</td>
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<tr>
<td>7</td>
<td>Containing plague/disease elements</td>
<td><strong>Ciampa v British India Steam Navigation</strong></td>
<td>Liable</td>
</tr>
<tr>
<td>8</td>
<td>War risks</td>
<td><strong>British &amp; Marine Insurance v Samuel Co.</strong></td>
<td>Excluded</td>
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<td></td>
<td></td>
<td><strong>Wondrous</strong></td>
<td>Excluded</td>
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<tr>
<td>9</td>
<td>Arrest/restraint by judicial decisions</td>
<td><strong>Anita</strong></td>
<td>Excluded</td>
</tr>
<tr>
<td>10</td>
<td>Approximate cause of loss</td>
<td><strong>General Mutual Insurance v Sherwood</strong></td>
<td>Excluded</td>
</tr>
<tr>
<td>11</td>
<td>Negligence</td>
<td><strong>CCR Fishing v Tomeson</strong></td>
<td>Excluded</td>
</tr>
<tr>
<td></td>
<td></td>
<td><strong>Walker v Maitland</strong></td>
<td>Excluded</td>
</tr>
<tr>
<td>12</td>
<td>Error of</td>
<td><strong>Emmanuel C</strong></td>
<td>Liable</td>
</tr>
<tr>
<td>navigation</td>
<td>may contain elements other than negligence</td>
<td></td>
<td></td>
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<tr>
<td>---</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>13 Negligence or Incompetence</td>
<td>Lemer Towing v Fireman Fund Insurance</td>
<td>Liable</td>
<td>Incompetence of the crew constitutes the ship’s un-seaworthiness.</td>
</tr>
<tr>
<td>14 Negligence amounting to wishful conduct the ship’s master</td>
<td>Cory v Burr</td>
<td>Excluded</td>
<td>If the loss is directly caused by a seizure which remotely caused by the ship’s master wilful misconduct</td>
</tr>
</tbody>
</table>

The above limitations to the carrier exoneration of liability can be also highlighted by considering the lack of mutual understanding between common and non-common law countries on exclusion clauses. From all the cases mentioned, it is observable that carrier liability is essentially determined by drawing a line between what seen as fortuitous accidents incidental to carriers’ due diligence of care and what seen as wilful misconduct of the carriers. But it is in establishing this line, the courts’ interpretations vary significantly between common law system and non-common law ones. Therefore, as the practice of carriage by sea has been international in essence, carriers may face the risk of being subjected to an inconsistency between common law system and non-common law ones regarding to the issue of how their liability shall be interpreted by different jurisdictions. For instance, regarding to determining what constitute substantial content of fortuity, interpretations provided by courts in England, France and Greece, though sharing some common elements, are differentiated from one another in a significant way. Under English common law, the notion of *fortuitous accidents* is by and large defined in terms of *unforeseeable* or reasonably unavoidable incidents. Under French law, on the other hand, as the Hague-Visby Rules have been incorporated in the domestic law, the term ‘perils of the sea’ was transformed into the French traditional concept of *force majeure*, which specifically puts a strong emphasis on the *irresistible*, rather than *unforeseeable*, element peculiarly attributed to the
nature of a peril of the sea. At another stance of judicial view, Greek law considers ‘a peril of the sea’ under the meaning of domestic legal concept of superior force, which stresses heavily on a subjective standard of ‘utmost diligence and care’ that makes an accident fortuitous or not. As such, it may be argued that the sharpest difference between common and non-common law systems regarding the issue of exclusion clauses lies the fact that, in non-common law countries, carrier defence for exemption of liability mainly rests on the ground of force majeure interpretation, while in common law system, force majeure–based approach is not the common judicial trend. In this situation of inconsistency, international carriers may face with a wide range of judicial interpretations as they plead for perils of the sea exemption, not to mention that the chance of a successful defence is but very low.

VI. Summary and a critical view for adjustment

1. Summary

From the above discussions, some conclusion remarks could be drawn as follows. First, regarding to the exclusion of perils of the sea, it seems clear that there is no constant legal principle ruling whether every single accident falls into the canopy of ‘perils of the sea’. It is likely that the term ‘perils of the sea’ would be construed within the scope and meaning as the marine insurer understand it in accordance with the English Marine Insurance Act 1906. Second, the exclusion of arrests and restraints of princes is applicable only to orders made by political and executive governmental powers or by genuine judicial process. It is important to note that direct forcible means is not prerequisite for such arrests and restraints to be considered as incident or fortuitous to the will of the carriers, ship-owners and cargo-owners. On the other hand, though it is the claimant who bears the ‘onus of proof’, orders of arrests and restraints made by puppet courts under the direct manipulation of political power do not fall into the category of ‘perils of the sea’. In contrast, if the cargo of goods is insured against perils of

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112 Ibid 352.
113 Ibid 354.
114 Ibid 353.
117 Anita [1971] 2 All ER 1028, 1032.
arrests, restraints or detainment of a foreign power, and even an exclusion clause is inserted in the insurance policy, the insurer shall not be free from liability owed to the carrier regarding the damages to and the loss of the goods caused by these perils.

Third, since the term ‘negligence’ encompasses a variety of complicated meanings, the question of whether or not the carriers are exempted from liability to losses or damages to goods or ships is addressed by courts on the case-by-case basis. Though two general principles of ‘causa proxima non remota spectatur’ and ‘contra proferentem’ are adopted, the limitation of carriers’ liability are construed contingently upon the subject matters involved in the cases, producing outcomes which might be both pros and cons to the carriers.

2. A critical view for adjustment

It could be noted that the core idea built into the exclusion clause regarding the carriers’ liability is to draw a clear line between accidents which fall under the head of perils of the sea and accidents which do not fall under this head. In practice, however, the application of the statutory definitions of perils of the sea as provided by international conventions into actual cases do not proceed without difficulties, due to the inconsistency between domestic and international laws.

However, several studies have been devoting on proposing a reconciliation between domestic and international laws. As far as the carrier interests concerned, Katsivela suggests that, instead of considering unpredictability as the core condition constituting a peril of the sea, it is more valuable in the sense of justice to construe a peril of the sea as an accident occurred beyond human reasonable care. Accordingly, it is suggested that there should be a due diligent process taken by courts regarding to all elements falling into the expression of negligence before applying the exclusion clause. Much in the same line of argument, another scholar proposed that, three basic concepts of seaworthiness, care of goods and the exemptions, as embedded in international conventions including the Hamburg Rules, Hague-Visby Rules, and Rotterdam Rules, should be seen as a fundamental framework for a new unified regime regulating carrier liability. Nikaki and Soyer observed that, since carriers have been insistently included exclusion clauses in their carriage contracts that relieve them from their liabilities under common

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118 Above n 111, 353-354.
law and since domestic statutory and case laws seemed not sufficient to hinder such unrestricted freedom of carriers, international legal instruments may be more efficient.\footnote{120} However, domestic ratification of international conventions has been very often turned into the process of decision making involving with many groups of interested stakeholders, of which, the outcome seems never be satisfactory to all the parties concerned.\footnote{121} For instance, the recent Rotterdam Rules\footnote{122} has been remaining in debates within major shipping nations, suggesting that the reconciliation between domestic and international laws, though desirable, is far from being well established in the short term.\footnote{123}

\footnote{121} Ibid 306.  
\footnote{123} Above n 120, 348.