QUALIFYING THE HAGUE AND VISBY RULES' SEA PERIL EXCEPTION UNDER ENGLISH, CANADIAN, UNITED STATES, FRENCH, ITALIAN, AND GREEK LAW

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INTRODUCTION

From at least the time of the Phoenicians to the present day, sea perils have been dreaded by mariners worldwide. Storms, rough seas, typhoons, icebergs, and collisions are examples of such perils. Traditionally, these have exempted ocean carriers of goods from liability for damage or loss of cargo. The exemption is sanctioned by article 4.2.c of the Hague and the Hague-Visby Rules ("Visby Rules"), which proclaims the carrier's exoneration in the presence of "perils, dangers and accidents of the sea or other navigable waters" ("sea peril(s)" or "perils of the seas").[1] At the time of the adoption of the Hague Rules, international policy makers planned to propose a minimum set of liability standards that the carriers could not contract out of.[2] In fact, both the Hague and the Visby Rules maintain a balance between shippers and carriers.[3] Shippers benefit from a liability regime imposed on carriers including an obligation to care, carry, and keep the transported goods and an obligation to exercise due diligence to provide a seaworthy vessel (Articles III and IV). Carriers benefit from seventeen liability exceptions as well as a liability limitation amount in case of damage or loss

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[1] The *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 25 August 1924, 120 LNTS 155 (entered into force 2 June 1931) [Hague Rules]. The Hague-Visby Rules [Visby Rules] refer to the Hague Rules as amended by two protocols. The first protocol—*Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (commonly known as the "Visby Protocol 1968")—was adopted at Brussels on 23 February 1968 and entered into force on 23 June 1977. The second protocol—*Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968)* (commonly known as the "SDR Visby Protocol 1979")—was adopted at Brussels on 21 December 1979 and entered into force on 14 February 1984. Even though some of the cases referred to herein predate the Hague and the Visby Rules, they reflect the same principles and will, therefore, be cited.

[2] Indira Carr, *International Trade Law*, 5th ed (London: Routledge, 2014) at 218. This is due to the fact that during the 19th century and until the adoption of the said rules ocean carriers were routinely including all embracing exoneration clauses in their contacts of carriage escaping liability not only for sea perils, decay, strikes, etc., but also for their own negligence. See Carr at 217.

[3] Comité Maritime International, *The Travaux Préparatoires of the Hague and of the Hague Visby Rules* (Antwerp: Comité Maritime International, 1997) at 163, online: <www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoires%20of%20the%20Hague%20Rules%20and%20of%20the%20Hague-Visby%20Rules.pdf> [*travaux*]. The carrier liability limitation amount differs in the Hague and the Visby Rules.

of the transported goods (Article IV).[4] The sea perils defence constitutes one of the seventeen liability defences that the carrier can invoke. It is not further defined by the Hague and the Visby rules. Domestic laws and/or case law are, therefore, invited to define their components.

The question that naturally arises is how domestic laws and/or courts qualify a sea peril: what are its conditions of application and its main characteristics? These questions are of interest to the present study.[5] The laws, case law, and doctrines of leading maritime nations will be considered in this regard: the common law jurisdictions of the United Kingdom (UK) ("English law"), Canada, and the United States (US), as well as the civil law jurisdictions of France, Italy, and Greece.[6] With the exception of the US having adopted the Hague Rules, the rest of the countries in question apply the Visby Rules.[7]

The civil law and common law traditions of the jurisdictions under examination are important elements underlying our analysis. In civil law, legislation, codes, and generally, written laws are the primary source of law – with case law being an increasingly important interpretive source.[8] Civil law judges do not habitually

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[4] *Ibid.*

[5] Although we will not exhaustively examine all the different aspects of these questions, we will address important issues that fall under their scope. Subsidiary issues such as the vessel's seaworthiness, the carrier's and the claimant's burden of proof, other similar exemptions (such as the act of God one), causality, etc., will either not be touched upon or will not be commented on in detail.

[6] Although Canada has a bijural tradition (common law and civil law), Canadian maritime law is largely inspired by common law principles, is uniform throughout the country and does not include provincial law: see *ITO – International Terminal Operators Ltd v Miida Electronics Inc*, [1986] 1 SCR 752. We intent to analyse this exoneration cause under the laws of other jurisdictions (Australia, United States, etc.) in future articles.

[7] For the US, UK, France, Italy, and Greece, see Comité Maritime International (CMI), "Status of ratifications to Maritime Conventions" in CMI, *Yearbook 2009 Annuaire* (2009), online: CMI <comitemaritime.org/Uploads/pdf/CMI-SRMC.pdf>. The UK adopted the Visby Rules by the *Carriage of Goods by Sea Act 1971* (UK), c 19, online: <www.legislation.gov.uk/ukpga/1971/19>. The US has adopted the Hague Rules by enacting the *Carriage of Goods by Sea Act* ("COGSA"), which is now a note to 46 USC § 30701 (2006) (formerly at 46 USC app § 1304). For France see *infra* note 19 and accompanying text. Italy incorporated the Visby Rules into its law by Legge 12 giugno 1984, n 243, 244. Greece ratified the Visby Rules in 1992 with the adoption of Nomos 2107/1992, FEK A 203, online: NOMOS <lawdb.intrasoftnet.com/nomos/nomos_frame.html>. Canada gives effect to the Visby Rules through domestic legislation: Part 5 of the Canadian *Marine Liability Act*, SC 2001, c 6, online: <laws-lois.justice.gc.ca/eng/acts/M-0.7/page-11.html>. Part 5 of that Act re-enacted and revised provisions of the *Carriage of Goods by Water Act*, SC 1993, c 21. The author has examined the sea perils exception in some of the jurisdictions under examination in a previous article: M Katsivela, "Perils of the Sea Peril under English, French and Greek Law; a Perilous Venture?" (2014) 20:5 J Intl Maritime L 343-355. Despite the application of the Visby Rules in most of the countries in question, we will also examine Hague Rules case law since the sea peril exemption remained unchanged in the two sets of rules.

[8] France: Guy Canivet, "Is There still Room for the Coexistence of Legal Systems in Today's Global Economy?" (2012) 79 Def Couns J 254 at 261. Italy : Nicolo Lipari & Pietro Rescigno, *Fonti, Soggetti, Famiglia* (Italy: Giuffrè Editore, 2009) at 124-125. Greece: Milona Aikaterini, "Η Νομολογία ως Πηγή του Δικαίου" (2006), online: GreekLaws.com <www.greeklaws.com/pubs/uploads/1963.pdf> at 3, 11.

create law, but interpret written laws declaring the intent of the legislator.[9] On the contrary, the role of judges in common law is not limited to declaring the rules contained in written laws. It also involves creating law on a case-by-case basis through the formulation of precedents.[10] These precedents are binding upon the parties involved in the specific dispute and are also binding upon the judges in deciding future cases based on similar facts. Further, doctrinal views (for example, expert scholarly opinion, treatises, and case commentary) are not attributed the same importance in common law as in civil law. Although it is not clear whether doctrine is a direct source of law in civil law, it clearly carries more weight than in common law.[11]

The seventeen carrier liability exemptions contained in the Hague and the Visby Rules are based on English common law. They were developed in England and have been accepted by ship owners and shippers in other countries.[12] As we are going to see later, the interpretation of the sea perils exemption in common law is based primarily on precedent. Reference to domestic laws and doctrine is present but not stressed upon by the courts. In civil law, the domestic legislator has often codified the Hague and the Visby Rules exoneration clauses and judges have been influenced by the terms employed in these codes as well as by civil law reasoning and doctrine in interpreting them. Thus, when commenting on civil law and the sea perils defence in this article, legal provisions and doctrinal opinion will be more emphasized than in common law.[13]

The first glimpse at the difference in perspective between civil law and common law traditions is taken when we look, in greater detail, at the legal treatment of the sea perils defence in the six countries. The US, UK, and Canadian domestic laws applying the Hague (US) or the Visby rules (UK, Canada) maintain the seventeen

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[9] As Montesquieu notes: "domestic judges are no more than the mouth that pronounces the words of the law" ("Mais les juges de la nation ne sont […] que la bouche qui prononce les paroles de la loi"). Charles de Secondat, Baron de Montesquieu, *L'Esprit des Lois* vol 1 (Livre XI, c VI, 1768) at 327.

[10] Stephen Waddams, *The Study of the Law*, 7th ed (Toronto: Carswell, 2010) at 17, 79; Donald Poirier, "La common law : une culture, une histoire et un droit procédural" in Aline Grenon & Louise Bélanger Hardy, eds, *Éléments de common law canadienne : comparaison avec le droit civil québécois* (Toronto: Thompson Carswell, 2008) 25 at 48ff [Poirier, "La common law"]. It should be noted that the differences between the two traditions described herein are less present today due to the proliferation of legislation in common law jurisdictions and the rising importance of case law in civil law countries.

[11] For the importance of doctrine in civil law, see: France: Kelly Buchanan, "The Role of the 'Doctrine' as a Source of Law in France" (20 December 2010), online: Library of Congress <blogs.loc.gov/law/2010/12/the-role-of-the-doctrine-as-a-source-of-law-in-france/>. Italy: John Henry Merryman, "The Italian Style I: Doctrine" (1965) 18:1 Stan L Rev 39 at 42-43 and note 18; Guido Alpa, *Manuale di diritto private* [Manual of Private Law], 4th ed (Milan: CEDAM, 2005) at 59. Greece: Athena Debbie Efraim, Book Review of *Introduction to Greek Law* by Konstantinos D Kerameus & P John Kozyris, eds, (1994) 42:1 Am J Comp L 219 at 220. For common law see Donald Poirier & Anne Françoise Debruche, *Introduction générale à la common law*, 3d ed (Cowansville, Canada: Yvon Blais Inc, 2005) at 130-132.

[12] *Travaux*, *supra* note 3 at 375.

[13] In both cases, however, extensive reference will be made to case law. Also, due to the fact that other languages than English are involved in the present study, direct quotes from cases will be used mostly with respect to the common law English speaking countries.

carrier defences, including the sea perils exemption.[14] Former UK and Canadian legislation enacting the Hague Rules did the same.[15] The French text of the Hague and the Visby Rules regards sea perils ("Des périls, dangers ou accidents de la mer ou d'autres eaux navigables") as a separate carrier exoneration cause.[16] By an ordinance of 28 October 2010, France adopted a new transport code (*Code des transports*).[17] The Code proclaims the respect of international conventions and law regarding maritime transport.[18] Its article L5422-12(3) groups several Hague and Visby Rules liability exceptions – acts of war, acts of God, sea perils, acts of public enemies, the arrest or restraint of princes, and quarantines – under the following exoneration cause: "[…] event[s] non attributable to the carrier" ("[…] événement[s] non imputable au transporteur") commonly referred to by case law. This instrument codified the French Law of 18 June 1966, which, through amendments, had adopted the Visby Rules at the domestic level.[19] In its article 27(d), the 1966 legislation maintained a similar provision to the transport code's article L5422-12(3).[20] Interestingly, the formerly applicable domestic law of 2 April 1936 enacting the Hague Rules in France, qualified the above-mentioned liability exceptions as "fortuitous event(s) or force majeure" ("cas fortuit ou de force majeure"—article 4.3).[21]

In Italy, the liability of the international ocean carrier of goods is regulated by the Visby Rules and the Code of Navigation (*Codice della navigazzione*).[22] The

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[14] *Supra* note 7 for the respective domestic acts.

[15] We refer here to the UK *Carriage of Goods by Sea Act 1924*, 14 & 15 Geo 5, c 22, and the Canadian *Water Carriage of Goods Act, 1936*, SC 1936, c 49.

[16] The Hague Rules were drafted in French whereas the Visby Protocols were drafted in French and English, both being equally authoritative in nature.

[17] *Code des transports*, JO, 3 November 2010, online: <www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000023086525&dateTexte=20101202>. This code regulates all modes of transport in France replacing numerous legislative enactments formerly present.

[18] See e.g. articles 5000-3 and 5422-13 of the Code. Although the Hague and the Visby Rules take precedence over national law, we will comment on the code's provisions and case law interpreting the sea perils defence in order to understand how domestic law perceives this liability exception.

[19] *Loi n° 66-420 du 18 juin 1966 sur les contrats d'affrètement et de transport maritimes*, online: <www.legifrance.gouv.fr/affichTexte.do;jsessionid=4376BC8E267D2BAA67EDE3703F01A3AA.tpdjo10v_2?cidTexte=JORFTEXT000000692464&dateTexte=20101103>. The law is often referred to by French case law. See Pierre Bonassies & Christian Scapel, *Droit maritime*, 2d ed (Paris: LGDJ, 2010) at 605 on the amendments of the law.

[20] *Ibid*. Article 27(d) referred to "événement non imputable au transporteur" like the 2010 Code's corresponding provision.

[21] *Loi du 2 avril 1936 relative aux transports des marchandises par mer*, online: <www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070992&dateTexte=vig>. The law of 2 April 1936 did not faithfully incorporate the Hague Rules. See also Bonassies & Scapel, *supra* note 19 at 604-605.

[22] Antonio Lefebvre D'Ovidio, Gabrielle Pescatore & Leopoldo Tullio, *Manuale di diritto della navigazione* [Navigation Law Manual], 12th ed (Milan: Giuffrè Editore, 2011) at 496. See also *Codice della navigazione*, RD 327/1942, online: <www.fog.it/legislaz/cn-0376-0468.htm>. The Italian Code of Navigation came into effect in 1942 and regulates maritime, inland, and air navigation at the domestic level. The provisions of the code that are of interest to our study are based on the Hague Rules.

Visby Rules take precedence over the Code; the latter has a residual role of application.[23] Whereas, under the Hague and the Visby Rules, sea perils is a separate liability exception from acts of God (noted in the Italian conforming translation of the rules as "rischi, pericoli e infortuni del mare o di altre acque navigabili*"* and "forza maggiore (atto di Dio)*",* respectively), article 422 of the Italian Code of Navigation treats the two exceptions as one using the following expression: "fortuna o pericoli di mare." [24] While case law commonly refers to the latter, doctrine laments the assimilation of the two Hague and Visby Rules exoneration causes into one as non-conforming to these rules.[25]

Finally, the Greek translation of the sea perils liability exception contained in the Visby Rules is similarly phrased: "κινδύνους η ατυχήματα στη θάλασσα η σε άλλα πλεύσιμα νερά" (this can be translated as "perils or accidents at sea or in other navigable waters").[26] Prior to the adoption of the Visby Rules, the domestic *Kodikas Idiotikou Nautikou Dikaiou* of 1958 (Code of Private Maritime Law; "CPML") had adapted its provisions to the 1924 Hague Rules and exonerated the ocean carrier of goods for "events emanating from the sea" ("εκ θαλασσίων εν γένει συμβεβηκότων" – article 144), a wording very similar to the one present under article 4.2(c).[27] When the Visby Rules were enacted in Greece, the provisions of the CPML falling under the

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[23] D'Ovidio, Pescatore & Tullio, *ibid* at 497.

[24] For the Italian Code of Navigation see *supra* note 22. For the Italian translation of the Visby Rules sea perils/act of God exceptions see *Regole dell'Aja*, online: <www.fog.it/convenzioni/italiano/bruxelles-1924.htm#NR4>. On this assimilation, see also Giorgio Righetti, *Trattato di diritto marittimo* [Maritime Law Treatise], (Italy: Giuffrè Editore, 1990) vol 2 at 741ff; Leopoldo Tullio & Massimo Deiana, *Codice dei trasporti* (Transportation Code) (Italy: Giuffrè Editore, 2011) at 675; and Corte di Cassazione (Court of Cassation), 10 May 1995, n 5123, online: <www.fog.it/giurisprud/ca-95-05123.htm>.

[25] See Righetti, *ibid*; Tullio & Deiana, *ibid*. See also *infra* notes 119, 120, and accompanying text. Although the Hague and the Visby Rules take precedence over national law as above-stated, we will comment on the code's provisions and case law interpreting them in order to understand how domestic law perceives this liability exception.

[26] For the Greek translation of the Visby Rules exception see Giorgos Gioggaras, *Kanones Chages-Bismpy Ambourgou* [Hague-Visby Hamburg Rules] (Kifisia, Greece: Bookstars-Gioggaras, 2007) at 93 as well as the domestic 1992 legislation (*supra* note 7) adopting the Visby Rules. This legislation maintains the seventeen carrier defences of the Visby Rules. Authors argue, however, that the Greek translation of the defence is not very precise because a peril "at sea" may include an event that is simply encountered at sea and which is not due specifically to the nature and action of the sea. See e.g. Aliki Kiantou-Pampouki, *Nautiko Dikaio II* [Maritime Law II], 6th ed (Thessaloniki, Greece: Sakkoulas Editions, 2007) at 542. As we are going to see later, this is not the direction generally taken by Greek case law. See *infra* note 70 and accompanying text.

[27] Kiantou-Pampouki, *ibid* at 8, 519, 536. Contrary to the Visby Rules, article 144 of the CPML does not refer to "other navigable waters", probably because Greece does not have other noteworthy navigable waters than the sea. See Kiantou-Pampouki, *ibid* at 536. The CPML was signed in 1948 in Greece and entered into force in 1958. It contains fifteen titles covering all areas of maritime law such as collisions, maritime salvage, maritime liens, charter parties, ship ownership, crew members, carriage of goods by sea, etc. Its article 144 consolidates some of the ocean carrier's excepted perils contained in the Hague and the Visby Rules. For the CPML, see The Hellenic Ministry of Justice, Transparency and Human Rights, *Kodikas Idiotikou Nautikou Dikaiou* [Code of Private Maritime Law], online: Greek Ministry of Justice <www.ministryofjustice.gr/site/kodikes/>.

scope of these rules were abolished.[28] In practice, however, Greek case law and doctrine after 1992 continued to refer to the CPML sea perils liability exception, a judicial trend that is still noted today.[29]

The divergent domestic law provisions suggest that similarities as well as differences may exist in qualifying a sea peril in the six jurisdictions. Our intent is to describe, in greater detail, case law, domestic laws, and doctrine on this point,[30] and to determine the extent to which uniformity of the applicable principles exists or is possible. If uniformity exists, the intent of the drafters of the Hague and the Visby Rules would be honoured.[31] In the absence of uniformity, we will seek to determine ways to approximate the divergent domestic law principles.

The complexity of the comparative analysis is not negligible. We will be commenting on laws and case law of different jurisdictions regarding the Hague and the Visby Rules sea peril ocean carrier exoneration cause. The common law and civil law traditions of the mentioned jurisdictions add to the richness but also to the complexity of the analysis. We will also seek to determine the extent to which uniformity of domestic laws and case law is present or possible. These considerations involve a cross-country comparative legal study and research of various legal issues, which constitutes quite a challenging task.

In developing our ideas, we privilege the theoretical approach that favours uniformity of the law, thereby following the intention of the drafters of the Hague and the Visby Rules. Unlike the eminent comparativist Pierre Legrand, we do not think that universalism in law is a delusion. On the contrary, international conventions, such

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[28] For a very good analysis of the relation of the Hague and the Visby Rules to the CPML see Kiantou-Pampouki, *ibid* at 10-14.

[29] This is probably due to the similar wording of the exception in the two sets of rules. See Kiantou-Pampouki, *ibid* at 537. The author notes, however, that after the adoption of the Visby Rules the sea perils should have been the field of application of these rules rather than the CPML. Case law and doctrine referred to in this article comment on the Visby Rules and/or article 144 of the CPML.

[30] The present study focuses primarily on case law in order to determine how this exception is treated in the different jurisdictions. Doctrinal arguments and/or legal provisions regarding sea perils will also be commented on. Our analysis will refer primarily to carriage of goods and secondarily to insurance case law on sea perils. Even though this exception is defined similarly in both these fields, the reader should bear in mind that in the context of marine insurance sea perils operate regardless of fault on the part of the carrier or his agents. In contrast, in carriage of goods cases such negligence disallows the carrier the benefit of the defence. English law: Sir Richard Aikens, Richard Lord & Michael Bools, *Bills of Lading* (London: Informa Maritime & Transport, 2006) at 273; Guenter Treitel & Fancis MB Reynolds, eds, *Carver on Bills of Lading*, 3d ed (London: Sweet & Maxwell, 2011) at 710 [*Carver*]. For the similar definition of sea perils in the two fields see *The Xantho* (1887), 12 AC 503 (HL) [*The Xantho*]; *Hamilton, Fraser & Co v Pandorf & Co* (1887), 12 AP 518 (HL) [*Pandorf*]. Canada: William Tetley, *Marine Cargo Claims*, 4th ed (Cowansville: Yvon Blais, 2008) at 1050ff (referring to English doctrine); *Parrish & Heimbecker Ltd v Burke Towing & Salvage Co*, [1943] SCR 179, 1943 CarswellNat 39 at para 10 [*Parrish*]; *Charles Goodfellow Lumber Sales Ltd v Verreault*, [1971] SCR 522 at 527-528, 1970 CarswellNat 350 [*Goodfellow*] (referring to English case law). In our analysis, the terms "fault" and "negligence" will be used interchangeably.

[31] In effect, in devising these Rules, the idea of its drafters was to adopt uniform regulations regarding the carrier's obligations and his exemptions from liability. See *Travaux, supra* note 3 at 27.

as the Hague and the Visby Rules are, to a large extent, an example of uniformity and universalism in law. Accordingly, we agree with the renowned comparativist Rodolfo Sacco who notes that multinational conventions make private law uniform, thus preventing legal relationships from being regulated in a contradictory way. [32] Uniformity in the qualification of the sea peril exception in the six jurisdictions will be the guiding principle of the present study.

The article is divided into three sections: Sections I and II describe the sea perils defence in the mentioned common law and civil law jurisdictions, respectively. Section III compares and analyzes the applicable principles.

Section I: Qualifying a Sea Peril under English, Canadian, and US Law

Under English, Canadian, and US law, perils of the seas is a carrier defence that includes events peculiar to the sea or to a ship at sea such as an accidental incursion of sea-water, currents, storms, a vessel striking a sunken rock or an iceberg, collisions, tides, and stranding.[33] Among the diverse occurrences that may qualify under this exception, the action of the weather constitutes the principal cause of cargo damage or loss and is the main focus of the present study.[34] Incidents that may occur "on the sea" (perils *on* the seas, not *of* the seas) but which are not peculiar to the sea or to the ship at sea – for example, lightening, rain, explosion, rats damaging the cargo, or theft of cargo – do not amount to sea perils.[35]

What qualifies as a sea peril in the said common law jurisdictions is examined on a case-by-case basis considering all the relevant circumstances: the nature of the event, its duration, the location and the time of the year it takes place, the condition of the sea, the intensity of the winds and of the waves, the duration of the voyage, the type of transported goods, the damage to the vessel and the goods, etc.[36] Under no

[32] Rodolfo Sacco, "Diversity and Uniformity in the Law" (2001) 49:2 Am J Comp L 171 at 179. On the opinion of Pierre Legrand, see Pierre Legrand, "Brèves réflexions sur l'utopie unitaire en droit" (2000) 3: 1 RCLF 111 at 111.

[33] English law: *Pandorf*, *supra* note 30; *The Xantho* (collision), *supra* note 30. The closing of the ventilators in heavy weather resulting in the cargo heating has also been qualified as a sea peril: see *Canada Rice Mills Ltd v Union Marine and General Insurance Co Ltd* (1940), 67 Ll LR 549 (PC) [*Rice Mills*] (an insurance case). See also Stewart C Boyd et al, *Scrutton on Charterparties and Bills of Lading*, 21st ed (London: Sweet & Maxwell, 2008) at 206-209 [*Scrutton*]. Canada: *Canadian National Steamships v Bayliss*, [1937] SCR 261 at 263 [*Bayliss*]; *Keystone Transports Ltd v Dominion Steel & Coal Corp*, [1942] SCR 495, 1942 CarswellQue 36 at para 26 [*Keystone*] (referring to English case law and/or doctrine). US: Thomas J Schoenbaum, *Admiralty and Maritime Law*, 5th ed (St Paul, MN: West, 2011) vol 1 at 908-909; *The Giulia*, 218 Fed 744 at 746 (2d Cir 1914) [*The Giulia*].

[34] See Aikens, Lord & Bools, *supra* note 30 at 274; Tetley, *supra* note 30 at 1060 (regarding US law).

[35] For English law, see *Carver*, *supra* note 30 at 710 (lists some of the examples noted above); *Scrutton*, *supra* note 33 at 207-208; *The Inchmaree* (1887), 12 AC 484 (HL) (boiler explosions). Canada: *Bayliss*, *Keystone*, *supra* note 33 (referring to English case law and/or doctrine); *566935 BC Ltd (cob West Coast Resorts) v Allianz Insurance Co of Canada*, 2006 BCCA 469 at para 8, [2006] BCJ No. 2754. US: Schoenbaum, *supra* note 33; *The Giulia*, *supra* note 33.

[36] For some of these elements under English law, see *The Inchmaree*, *ibid*; *Rice Mills*, *supra* note 33. For some of these elements under Canadian law, see *Keystone*, *supra* note 33; *Bruck Mills Ltd v Black Sea Steamship Co*, [1973] FC 387 (FCC), 1973 CarswellNat 32, [*Bruck Mills*]; *The Washington* (1976), 2

circumstances, however, will cargo damage or loss resulting from "wear and tear" – the natural and inevitable action of winds and waves – qualify under the defence.[37] The exception does not frequently succeed before the courts.[38]

Following US case law, sea perils need to be extraordinary in nature. An "extraordinary" peril is an event arising from an irresistible force or an overwhelming power, something "so catastrophic as to triumph over the safeguards by which skillful and vigilant seamen usually bring ship and cargo safely to port."[39] Although no exact Beaufort scale wind force can be referred to as the dividing line that will determine those cases in which a peril may be extraordinary in nature, there seem to be few cases in which winds of force 9 or below have been found to constitute a sea peril, whereas there are many cases qualifying winds of force 11 or above as a sea peril.[40] However, this is a rough measure and other criteria such as the location, duration, time of the year, the presence of cross-seas, etc., will also be taken into account in determining if a sea peril is present.[41] On the contrary, English law and Canadian cases do not require that sea perils be extraordinary.[42] In this way, a storm whose force is not exceptional may qualify under this exception. It is probably for this reason, and in order to avoid confusion in qualifying this exception, that English doctrine specifically suggests that the term "extraordinary" or "violent" should be replaced by an "unexpected" or "out of the ordinary course of the adventure" occurrence.[43]

Leading English cases have noted that for this exception to apply: "[t]here must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure."[44] The foreseeability of the sea peril is generally based on

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Lloyd's Rep 453 (FCC) [*The Washington*]. (For the sea perils exception in general under Canadian law see William Tetley, *supra* note 30 at 1065-1066, 1040-1042.) For US law, see *J Gerber & Co v SS Sabine-Howaldt*, 437 F (2d) 580 at 596 (2d Cir 1971) [*Gerber*], a case often cited by subsequent US case law on this point.

[37] English law: *The Xantho, supra* note 30; *Pandorf, supra* note 30 at 509. Canada: *Keystone, supra* note 33 at para 27; *Parrish, supra* note 30 at para 10 (referring to English case law). US: *Ceballos v The Warren Adams*, 74 F 413 at 415 (2d Cir 1896).

[38] English law: Aikens, Lord & Bools, *supra* note 30 at 275. Canada: Most of the Canadian (authority) cases herein examined (i.e., *Kruger, Goodfellow, Bayliss, Bruck Mills, Falconbridge, The Washington*), did not give effect to this defence. US: *The Arakan*, 11 F (2d) 791 at 791 (D Cal 1926) (noting that the defence constitutes the carrier's "best but least dependable friend").

[39] *The Rosalia*, 264 F 285 at 288 (2d Cir 1920); *The Giulia, supra* note 33; Schoenbaum, *supra* note 33 at 909. We remind the reader that we mostly focus on weather conditions as sea perils in the present study.

[40] As reported by *Gerber*, *supra* note 36.

[41] *Ibid*.

[42] English law: *Rice Mills, supra* note 33; *The Xantho, supra* note 30*; The Stranna*, [1937] 2 All ER 383 (Admlty), aff'd [1938] 1 All ER 458 (CA). See also *Scrutton, supra* note 33 at 208. Canada: *Keystone, supra* note 33 at para 34-35 and also *infra* note 60 and accompanying text (winds described in the ship's logbook as "fresh" and "strong" may constitute a sea peril). Tetley, *supra* note 30 at 1065.

[43] *Scrutton, supra* note 33 at 208.

[44] *The Xantho, supra* note 30 at 509 (per Lord Herschell). See also *Pandorf, supra* note 30 (per Lords Herschell and Macnaghten).

the efforts exerted by a reasonable carrier. In *The Tilia Gorthon*, a cargo of timber was lost overboard due to adverse weather conditions (rough seas and winds of force 10 in the Atlantic Ocean) encountered in transit.[45] The court disallowed the sea peril defence due to the foreseeability of the weather conditions:

> [T]he evidence as to the weather has not satisfied me that the conditions encountered were such as could not and should not have been contemplated by the shipowners […] winds of […] force 10 […] are by no means so exceptional in the North Atlantic in the autumn and winter that the possibility of encountering them can be ignored.[46]

The requirement for an unforeseeable sea peril is not shared by all judges or authors. In the mentioned English *Pandorf* case, Judge Fitzgerald agreed with the majority opinion describing the incursion of seawater damaging the cargo due to rats gnawing through a pipe as "fortuitous, unforeseen, and actually unknown." He added, nonetheless, that this does not mean that "to constitute a peril of the sea the accident or calamity should have been of an unforeseen character."[47] Eminent English author Thomas Gilbert Carver also suggests that the unforeseeability of the sea peril should not be stressed upon: "even abnormal weather conditions can be foreseen: the test really seems to be how practicable it would have been to guard against them […] it seems therefore that the emphasis should really be on the phrase 'guarded against' rather than on the word 'foreseen'".[48] Other authors have also expressed the view that unforeseeability of a sea peril is merely a "point of view" and not a "decisive factor" in determining its presence.[49]

Under Canadian and US case law, foreseeable supervening events cannot qualify as sea perils and do not exonerate the carrier. In *Goodfellow* – Canada's leading case – the carrier invoked in vain the sea peril exoneration cause when the vessel carrying a shipment of creosoted timber encountered a gross swell and winds at sea.[50] The Supreme Court of Canada found that the weather was foreseeable and the vessel was unseaworthy at the beginning of the journey:

> In order to constitute a peril of the sea there must be something which could not have been foreseen or guarded against as one of the probable incidents of the voyage. The weather encountered was such as should have been foreseen as one of the probable

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[45] *The Tilia Gorthon* (1985), 1 Lloyd's Rep 552 (QB) [*The Tilia Gorthon*].

[46] *Ibid* at 555. See also Aikens, Lord & Bools, *supra* note 30 at 274-275.

[47] *Pandorf*, *supra* note 30 at 528. *Rice Mills*, *supra* note 33 at 557, has also been cited in support of this argument.

[48] *Carver*, *supra* note 30 at 709-710. Carver supports the holding of the Australian case *The Bunga Seroja* (1998), [1999] 4 LRC 50 (HCA) where the court argued that the foreseeability of the peril does not preclude the carrier from relying on the sea perils exception. See *Carver*, *supra* note 30 at 709-710, 712. In the present study, the terms "event that cannot be guarded against", "unavoidable event" and "irresistible event" (the latter based on French law) will be used interchangeably.

[49] NJ Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen, Netherlands: Paris Legal Publishers, 2008) at 140. Among other arguments supporting their view, the authors note the above-mentioned statement of Judge Fitzgerald in the *Pandorf* case and Carver's opinion.

[50] *Supra* note 30. See also Edgar Gold, Aldo E Chircop & Hugh M Kindred, *Maritime Law* (Toronto: Irwin Law, 2003) at 459; and Tetley, *supra* note 30 at 1065-1066, 1040-1042.

> incidents of a voyage in the waters in question. The damage to the cargo arose from the fact that the hull was not sufficiently strong to withstand the weather encountered. The incursion of water increased steadily as the weather worsened, but the evidence called by the respondents did not discharge the onus of proving that the loss was occasioned by perils of the sea. The evidence discloses that the ship was unseaworthy.[51]

Later cases have followed this holding. In *Kruger Inc v Baltic Shipping Co*, winds of 50-70 knots (force 10-12 in the Beaufort scale) and large waves in the North Atlantic during winter months did not qualify under this defence.[52] Citing *Goodfellow* the Court stated that "it is abundantly clear that the weather could and should have been foreseen and that it could have been guarded against."[53]

Similarly, in the US *Thyssen, Inc v S/S Eurounity* case, a particular kind of severe storm, called an "ultra-bomb", characterized by winds of force 10-11 and waves between 10 and 11.5 metres high as well as heavy cross-seas was not qualified as a sea peril.[54] The Second Circuit Court found that these conditions were not unusual in the North Atlantic during winter and could not, therefore, exonerate the carrier:

> Given that severe storms occur on a regular basis in the North Atlantic and that the winds, waves and cross-seas experienced by the [v]essel were to be expected, we conclude that the [v]essel has not proven that it is entitled to exoneration based on a peril of the sea.[55]

Canadian Professor William Tetley agrees with the view that sea perils need to be unforeseeable occurrences.[56] He argues that rejecting unforeseeability as a condition of application of this exception does not lead to uniformity at the international level, does not conform to the overall scheme of the Hague and the Visby Rules, and encourages ship owners and charterers to venture forth into anticipated stormy weather or press on into a storm once encountered, secure in the knowledge that they will escape liability for storm-related damage to cargo.[57]

Finally, for a sea peril to exonerate the carrier under English, Canadian, and US law it must be proven that the incident cannot be guarded against by the exercise

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[51] *Ibid* at 523. See *The Washington*, *supra* note 36 at 459 for a similar holding. See also *Bayliss*, *supra* note 33 at 263. We will not further comment on the vessel's unseaworthiness as this is not the object of the present study (*supra* note 5). However, we note that the vessel's unseaworthiness denotes negligence on the part of the carrier and renders him liable for the consequent loss or damage to the transported goods.

[52] [1988] 1 FC 262, 1987 CarswellNat 200 (FCC) [*Kruger*], aff'd [1989] FCJ No 229, 1989 CarswellNat 896 (FCA).

[53] *Ibid* at para 41.

[54] 21 F (3d) 533 at 539 (2d Cir 1994) [*Thyssen*]. See also *Tecomar*, 765 F Supp 1150 (SD NY 1991); *RT Jones Lumber Co v Roen SS Co (The Hilda II)*, 270 F (2d) 456 (2d Cir 1959) [*The Hilda II*]; *Gerald Metals, Inc v M/V Gur Master*, 1997 WL 466919 (ED La).

[55] *Thyssen*, *ibid* at 539.

[56] Tetley, *supra* note 30 at 1045. His opinion was expressed with regards to the Australian *The Bunga Seroja*, *supra* note 48.

[57] *Ibid.*

of reasonable care. If the carrier or his agents are negligent in this regard, the defence will not apply. In the English case *Pandorf*, a cargo of rice was damaged while travelling between Burma and Germany.[58] It was discovered that rats had gnawed through a pipe connected with a bathroom in the ship, leading to the escape of seawater and subsequent damage to the cargo. In agreeing that this incident constituted a sea peril, Lord Macnaghten stated:

> Under these circumstances it seems to me that the accident which caused the damage was one of the excepted perils or accidents and that there is no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care.[59]

A similar conclusion was reached in *Keystone* – a case of the Canadian Supreme Court – where a cargo of nails, staples, and wire was shipped from Sydney, Nova Scotia, to Ontario.[60] In transit, the vessel encountered strong winds – described as "fresh" and "strong" in the log book – and waves covering the bridge of the vessel. This resulted in an infiltration of sea water into the vessel, damaging the cargo due to the loosening of the tarpaulins covering the hatches. In the action that followed, the carrier invoked the sea perils defence. The Court held that sea perils do not need to be extraordinary in nature in order to exonerate the carrier and that the negligence of the carrier or his agents was not established.[61] Justice Taschereau specifically noted:[62]

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[58] *Supra* note 30. In this case—cited by Canadian case law—the court quotes the following definition of a sea peril: "Sea damage occurring at sea and nobody's fault". Even if the case predates the Hague and the Visby Rules, it reflects the judicial status quo today on this point. It is a leading case. See also *Carver*, *supra* note 30 at 710.

[59] *Pandorf*, *supra* note 30 at 530. See also Aikens, Lord & Bools, *supra* note 30 at 274 on this requirement. In other cases, however, the defence did not succeed on this ground. In *The Glendarroch*, [1891-94] All ER Rep 484 (CA), the negligent navigation of the carrier's agents caused the vessel to be stranded on rocks. The sea perils defence did not exonerate the carrier. In *The Oquendo* (1877), 38 LT 151, this defence was rejected since the damage to the cargo by salt water was due to improper stowage. We should note that guarding against the supervening occurrence—i.e., weather conditions—includes taking precautions to guard against its damaging consequences to the cargo. There is some doubt under English law on whether the absence of negligence of the carrier or his agents is an element of the sea peril exception or whether it makes part of Article III.2 of the Hague and the Visby Rules. *Carver*, *supra* note 30 at 710-711.

[60] *Keystone*, *supra* note 33 at paras 33, 25 (citing English case law including the above-mentioned *Pandorf* case).

[61] In other cases, however, the defence did not succeed. In *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*, [1969] 2 Ex CR 261 (Can Ex Ct), 1969 CarswellNat 362 at para 76 [*Falconbridge*], aff'd [1974] SCR 933, 1973 CarswellNat 363, the defence failed due to the fact that "the wind and waves […] could have been guarded against by the ship's crew by the exercise of reasonable care and precautions. The loss is attributable to negligence". Likewise in *The Washington*, *supra* note 36 at 459. On the carrier's absence of negligence in guarding against the event, see also *Kruger*, *supra* note 52 at para 41-42; and Tetley, *supra* note 30 at 1065-1066, 1040-1042. According to Canadian cases *Keystone*, *Goodfellow*, and *Kruger*, the burden of proof in establishing a sea peril (unforeseeability, unavoidability) falls on the carrier. It is the claimant who may, subsequently, prove the carrier's negligence in causing the damage or loss of the goods.

[62] *Keystone*, *supra* note 33 at paras 33, 37, 38. We should note that guarding against the supervening occurrence (weather) in this case includes taking reasonable precautions to guard against its damaging consequences such as the loosening of the tarpaulins.

> From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence. […] Under these circumstances, no negligence can be imputed to the officers and crew who were watchful and alert […]. They were not bound to take all the precautions that would inevitably prevent the accident and make its occurrence impossible. They were required to exercise the care that reasonably prudent men would exercise in similar circumstances. It has been argued that the crew did not discover immediately the damaged condition of the tarpaulins. The failure to make such an immediate discovery does not amount to negligence under prevailing conditions of the weather […].

Negligence on the part of the carrier or his agents will also disallow the operation of the defence in the US. In *Royal Insurance Co Ltd v SS Maracaibo (The Maracaibo)* a suit was brought against the vessel and its owners for damage to a shipment of pickup trucks after the vessel passed through a hurricane.[63] The carrier invoked in vain the sea perils defence. The Court found that the proximate cause of damage was not the weather, but rather the negligent stowage of the trucks. The vessel and its owners were held liable:

> Although we find for defendants that on October 2, 1975, the Maracaibo passed through a storm sufficiently severe to constitute a peril of the sea within the meaning of section 4(2)(c) of COGSA, 46 U.S.C. s 1304(2)(c),[…] we find for Royal Insurance that the jeeps were negligently stowed because of the aburton stowage and stowage on top of plywood flooring resting on other cargo[…].[64]

One final observation has to be made regarding this exoneration cause. Under English, Canadian, and US law, the sea peril and the act of God exemptions remain two separate liability defences despite their common characteristics.[65] Following English case law – cited by Canadian and US decisions – an act of God involves an occurrence "due to natural causes directly and exclusively, without human intervention, […] that […] could not have been prevented by any amount of foresight and pains and care reasonably to be expected from [the carrier]."[66] Based on this definition, both sea perils and acts of God are events that cannot be foreseen or guarded

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[63] 488 F Supp 514 (SD NY 1980). See also *New Rotterdam Insurance Co v SS Loppersum*, 215 F Supp 563 (SD NY 1963); Schoenbaum, *supra* note 33 at 910.

[64] *Ibid* at 520-521.

[65] *Supra* notes 7, 14, 15, and accompanying text for the respective domestic laws giving effect to the Hague and the Visby Rules.

[66] English law: *Nugent v Smith* (1876), 1 CPD 423 (CA) at 444 [*Nugent*], cited by the Canadian case *Falconbridge*, *supra* note 61 at para 73 and by the US case *Mamiye Bros v Barber SS Lines, Inc*, 241 F Supp 99 (SD NY 1965) [*Mamiye*], aff'd 360 F (2d) 774 (2d Cir 1966). Both the Canadian and the US cases are leading cases.

against by ordinary exertions of human skill and prudence.[67] However, acts of God are exclusively due to natural causes excluding any human intervention whereas sea perils are confined to a limited part of natural causes specifically due to the sea and may include losses or damages brought about by human intervention (such as a collision between vessels).[68] Doctrine speaks, in this regard, about some potential overlap between the two excepted perils, which remain independent from one another.[69]

Overall, sea perils under English, Canadian, and US case law are occurrences peculiar to the sea or to a ship at sea that are not frequently sanctioned by courts. They are distinct from the act of God exoneration cause despite the common characteristics the two may present. A great variety of relevant circumstances (i.e., nature of the event, its duration, the location in which it takes place, its intensity, etc.) may play an important role in qualifying a sea peril. In all common law jurisdictions under examination the excepted peril refers to reasonably unavoidable events. The unforeseeability of the occurrence is an element to which Canadian and US case law seem to accord greater importance than their English counterpart. Contrary to English and Canadian decisions, US cases also require that sea perils be extraordinary in nature.

Section II: Qualifying a Sea Peril Under French, Italian, and Greek Law

Following French and Greek case law as well as Italian doctrine, sea perils are events attributed to the sea and to the specific conditions of sea navigation such as an incursion of sea water into the vessel, rough seas, storms, large waves, collisions, damage by icebergs or reefs, fog, currents, tides, stranding on shoals or coastal rocks, etc.[70] Although frequently invoked by carriers, the sea peril exception does not often

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[67] English law: *Nugent*, *ibid* at 437, 438. Canada: *Kruger*, *supra* note 52 at paras 43-44 (citing English doctrine). US: *Mamiye*, *ibid* at 109; *Skandia Insurance Co, Ltd v Star Shipping AS*, 173 F Supp (2d) 1228 at 1243 (SD Ala 2001).

[68] See the Canadian case *Kruger*, *ibid* at para 44 (referring to English doctrine, specifically *Carver*). English law: see *Scrutton*, *supra* note 33 at 207-208. US: *Mamiye*, *ibid* at 108, 109 (referring to English doctrine); Schoenbaum, *supra* note 33 at 911, although the author states that US case law does not distinguish clearly between sea perils and acts of God.

[69] Aikens, Lord & Bools, *supra* note 30 at 275. See also Francesco Berlingieri, *International Maritime Conventions* (London: Routledge, 2014) vol 1 at 33 [Berlingieri, *Conventions*] (commenting on this exception in common law).

[70] France: see CA Paris, 2 February 1971, (1971) DMF 222 at 227, 230 (Annotation René Rodière) [*The Armorique*]; Bonassies & Scapel, *supra* note 19 at 734. Italy: see Righetti, *supra* note 24. For doctrinal references, see also Francesco Paolo Costa, "Fortuna di mare" (1991) Digesto VI Diritto privato Sezione commerciale 294 at 294ff. **(**Case law in Italy does not seem to insist on this characteristic of sea perils.) Greece: Kiantou-Pampouki, *supra* note 26 at 178 (also referring to foreign doctrine). See also CA Piraeus, 121/2003 (377944); CA Piraeus, 259/1990 (3375). Unless otherwise stated, all Greek cases referred to herein can be found online using the Greek law database NOMOS, online: <lawdb.intrasoftnet.com/nomos/nomos_frame.html>. In this part of our study, we will usually cite first French, then Italian, and, lastly, Greek authorities. The order chosen does not reflect any specific consideration. The sea perils on which we will mostly focus in this section relate to weather conditions. These are most frequently commented on by case law and doctrine.

succeed in court.[71] French doctrine suggests that this is due to the fact that modern vessels are capable of surmounting rough weather and storms.[72]

French, Italian, and Greek case law often refer to sea perils as exceptional events or events involving extreme weather conditions.[73] This could be the case for winds of force 10-12 and waves of 6-8 metres or an exceptional wave, similar to what mariners call a *freak wave* (*vagues monstrueuses*).[74] However, there are cases and doctrine that suggest that common winds or sea storms (i.e., winds of force 7 and rough seas in the Mediterranean during winter months) may constitute sea perils if they seriously compromise the maritime venture.[75] Various factors are considered in determining the presence of a sea peril: the force of the wind, the condition of the sea, their duration, the season and location in which they take place, their effect on the vessel, the size of the vessel, etc.[76] Cargo damage due to wear and tear caused by the ordinary action of the winds and the waves does not qualify under this defence.[77]

The traditional case law trend in France, Italy, and Greece has been the assimilation of sea perils and other exoneration causes (such as acts of God) to force majeure events.[78] This judicial view represents a well-established position in France

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[71] France: Bonassies & Scapel, *supra* note 19 at 734-735. Italy: CA Messina, 25 January 1980, (1980) Diritto marittimo 632 at 639. France/Italy: The author also interviewed a maritime law professor in France and a law practitioner in Italy. Greece: CA Piraeus, 603/1988 (61220); CA Piraeus, 289/2005 (382874).

[72] Bonassies & Scapel, *ibid*.

[73] France: Trib com Paris, 14 March 1973, (1974) DMF 161 at 161, 163 [*The Normania*]; Cass com, 1 December 2009, (2010) DMF 19 at 27 [*The Carima*]. Italy: CA Trieste, 3 December 1982, (1983) Diritto marittimo 540 at 543-544; Corte di Cassazione, 4 April 1957, (1958) Diritto marittimo 67 at 70. Greece: CA Piraeus, 801/1992 (64113); CA Piraeus, 603/1988, *supra* note 71.

[74] France: Bonassies & Scapel, *supra* note 19 at 735; CA Rouen, 8 September 1988, (1991) DMF 360 at 361-364 (winds of force 10-12); interview by the author of a maritime law professor from France. Italy: CA Messina, 25 January 1980, *supra* note 71 at 639; Francesco Berlingieri, *Conventions*, *supra* note 69 at 30, 31 (also referring to case law). Greece: it has been held that winds of force 8-12 accompanied by rough seas lasting several days may fall under the scope of this defence. See CA Piraeus, 259/1990, *supra* note 70.

[75] France: Cass com, 25 June 1991, (1992) DMF 627 at 628 [*The Tolga*]; *The Armorique*, *supra* note 70 at 227. Italy: Pretore di Genova, 22 September 1970, (1970) Diritto marittimo 541 at 543 ("any" adverse meteorological condition that compromises the maritime venture may qualify as a sea peril); for a similar reasoning, see Tribunale Trieste, 9 October 1972, (1973) Diritto marittimo 70 at 77 [Trieste 1972]. See also Righetti, *supra* note 24 at 744, n 134 (referring to English doctrine and case law). Greece: as reported by Kiantou-Pampouki, *supra* note 26 at 178 (also referring to case law).

[76] *Ibid* for examples of such factors.

[77] France: Professor Yves Tassel, Trib com Marseille, 5 October 2004, (2005) DMF 894 at 897, 905 [*Canaille*]. Italy: Tribunale Trieste, 9 October 1972, (1973) Diritto marittimo 70 at 73 (Note Giorgio G Dorfles). Greece: Kiantou-Pampouki, *supra* note 26 at 543 (also referring to English doctrine).

[78] France: Cass com, 16 January 1973, *Cap Bon* (1973) DMF 399 at 401, 403 [*Cap Bon*]; C Aix-en-Provence, 19 June 2008, (2009) BTL 579-580; C Bordeaux, 9 October 1985, (1986) 2201 BTL 410; *Juris-classeur responsabilité civile et assurances*, "Force majeure au regard du péril de mer", fasc 465-20 by Antoine Vialard and Cécile Navarre-Laroche, No 31 [*Juris-classeur*]. See also *supra* note 21 and accompanying text (on sea perils, acts of God). Italy: Corte di Cassazione, 4 April 1957, (1958) Diritto marittimo 67, No 1150 at 70; CA Messina, 25 January 1980, *supra* note 71 at 639; CA Trieste, 29 April 1957, (1957) Diritto marittimo 200 at 202. For doctrinal references to this judicial trend see: Tribunale

and Greece, but currently appears to be outdated in Italy.[79] Force majeure constitutes a domestic law defence for the debtor in the area of contractual and extra-contractual liability (the latter term corresponds to common law torts).[80] It refers to unforeseeable and irresistible events – natural or man-made incidents – that lead to the impossibility to perform an obligation and the subsequent exoneration of the debtor.[81] It is the person invoking this defence who has to establish its presence. In assimilating sea perils to force majeure events the defendant carrier must therefore prove the unforeseeability and irresistibility of the supervening occurrence. Following this view, foreseeable weather conditions cannot constitute a sea peril and do not exonerate the carrier.[82]

Despite the seemingly common elements of the domestic force majeure concepts, differences in the definition of the defence exist in the three civil law jurisdictions. French law, for example, requires that a force majeure event (i.e., a sea peril) be reasonably unforeseeable and irresistible in order to exonerate the debtor (carrier).[83] The reasonableness standard in guarding against the supervening event is shared by some force majeure cases and some authors in Italy, while others adopt a higher standard.[84] Greek law favours the subjective force majeure theory regarding sea

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Trieste, 9 October 1972, *ibid* at 71ff (Note Giorgio G Dorfles); Tribunale Napoli, 18 November 1983, (1983) Diritto marittimo 185 at 185-186, n 1 (Note CR); CA Messina, 25 January 1980, *supra* note 71 at n 1 (Note Marco Lopez de Gonzalo). See also Righetti, *supra* note 24 at 741-742 and *supra* notes 24, 25, and accompanying text on sea perils and acts of God. Greece: CA Piraeus, 603/1988, *supra* note 71; CA Piraeus, 68/1982 (281009). See also Kiantou-Pampouki, *supra* note 26 at 179 and 539. On the act of God exception and force majeure see *infra* note 99. The term "force majeure" is referred to in Italian and Greek as "forza maggiore" and "ανωτέρα βια," respectively.

[79] France: René Rodière & Emmanuel du Pontavice, *Droit maritime*, 12th ed (Paris: Éditions Dalloz, 1997) at 348; *Juris-classeur*, *ibid*; interview of the author with a maritime law professor in France. Italy: Tullio & Deiana, *supra* note 24 at 676, who state the following with regards to the sea perils/force majeure stance: "questa giurisprudenza (peraltro copiosa ma piu risalente)". See also Tribunale Trieste, 9 October 1972, *ibid* at 71 (Note Giorgio G Dorfles), where the following is noted: "tale perfetta equiparazione della fortuna di mare alla forza maggiore, constituisce un concetto astratto, assoluto […] e va ormai respinto e superato". Information confirmed in interview with a maritime law professor in Italy. Greece: Kiantou-Pampouki, *supra* note 26 at 179 and 539, where the author states that this position gains ground in case law.

[80] France: see e.g. article 1148 of the French *Code civil* on this concept. The *Code* is available online: < www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>. Greece: see e.g. articles 336, 338, and 342 of the *Astikos Kodikas* (Civil Code). The *Astikos Kodikas* is available online: <lawdb.intrasoftnet.com/nomos/nomos_frame.html>. Italy: articles 1218 and 1256 are two examples of articles in the *Codice civile* (Civil Code) that deal with this concept. The *Codice Civile* is available online: <www.altalex.com/index.php?idnot=34794>.

[81] On the notion of the domestic force majeure concept in the three countries, see (France) François Terré, Philippe Simler & Yves Lequette, *Droit civil : les obligations*, 10th ed (France: Dalloz, 2009) at 585-587; (Italy) Francesco Galgano, *Trattato di diritto civile* [Civil Law Treatise] (Italy: CEDAM, 2009) vol 2 at 54-55; and (Greece) Michael P Stathopoulos, *Geniko Enochiko Dikaio* [Civil Liability] (Athens, Greece: Sakkoulas Editions, 2004) at 307-311.

[82] France: C Bordeaux, 9 October 1985, (1986) 2201 BTL 410. Italy: CA Trieste, 3 December 1982, (1983) Diritto marittimo 540 at 543-544. Greece: CA Piraeus, 603/1988, *supra* note 71.

[83] On the French force majeure in general, see Terré, Simler & Lequette, *supra* note 81 at 586-587; *Cap Bon*, *supra* note 78 at 400-401 (sea perils/force majeure).

[84] Case law and doctrine adopting a higher standard of care than ordinary diligence (reasonable care) in avoiding the supervening event: Corte di Cassazione, 6 February, 1985, n 864; Corte di Cassazione, 14

perils and exonerates the debtor/carrier in the presence of measures of "utmost diligence and care" ("μέτρα άκρας επιμέλειας και σύνεσης" – a higher standard than reasonableness) in guarding against an occurrence.[85]

In all cases, the force majeure defence is strictly construed by courts. The carrier rarely escapes liability based on the sea perils/force majeure judicial stance. Following this view, it has been held that only extreme weather conditions (such as a hurricane, a cyclone, or their effects) may exonerate the carrier.[86] It is probably for this reason that less rigid force majeure/sea perils case law has developed in France, and partly in Italy, holding that foreseeable but irresistible sea perils may constitute force majeure events.[87]

A more recent judicial trend dissociates the sea peril exception from the force majeure concept.[88] Italian case law and doctrine favours this trend, while in France it is only one of the judicial views present. Some recent Greek cases also sanction the trend.[89]

May 2014, n 23532; Galgano *supra* note 81 at 55 (force majeure in general); and CA Trieste, 3 December 1982, (1983) Diritto marittimo 540 at 543 (sea perils-force majeure). Case law and doctrine adopting a reasonableness standard with regards to the irresistibility of the force majeure event: Consiglio di Stato, sezione IV, 11 April 2014, n 1750; Massimiliano di Piro, *Responsabilità civile* [Civil Liability] (Naples: Simone, 2007) at 148 (force majeure in general); CA Trieste, 29 April 1957, (1957) Diritto marittimo 200 at 202; CA Messina, 25 January 1980, *supra* note 71 at 639 (sea perils-force majeure).

[85] As reported by Stathopoulos, *supra* note 81 at 310-311 (force majeure in general), and Kiantou-Pampouki, *supra* note 26 at 540 (force majeure-sea perils).

[86] France: CA Paris, 27 June 2013, (2013) 3473 BTL 543 at 543-544. Italy: Tribunale Trieste, 9 October 1972, *supra* note 75 at 71 (Note Giorgio G Dorfles); CA Messina, 25 January 1980, *supra* note 71 at 639; Atilio Malvagni, "La forza maggiore nel diritto civile e la fortuna di mare nella convenzione di Bruxelles del 1924, relativa a talune clausole delle polizze di carico" (1954) Diritto marittimo 148 at 151.

[87] France: Cass com, 28 April 1998, (1998) DMF 919 at 923 [*Bisk et Alyn*] (a maritime but not a sea peril case); see also *Juris-classeur*, *supra* note 78. Some French authors favour this stance. Italy: Corte di Cassazione, 24 January 1957, (1957) Diritto marittimo 514 at 515, also referred to by Francesco Berlingieri, *Le convenzioni internationali di diritto marittimo e il codice della navigazione* [International Conventions of Maritime Law and the Navigation Code] (Milan: Giuffrè Editore, 2009) at 86.

[88] France: Cass com, 1 December 1992, (1993) DMF 45, No 90-20083, online: <www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007030064> [*The Houtmangracht*]; *The Armorique*, *supra* note 70 at 227, 231; CA Rouen, 30 June 1972, (1972) DMF 722 at 725 [*Ville d'Anvers*], aff'd Cass com, 2 April 1974, No 72-14430, online: <www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000006992092>; CA Aix-en-Provence, 23 February 1993, (1994) DMF 370 at 372 [*Saint-Louis*]; and *Juris-classeur*, *ibid*. Italy: Corte di Cassazione, 21 June 1974, (1975) Diritto marittimo 348, No 1837 at 351, 352; Tribunale Trieste, 9 October 1972, (1973) Diritto marittimo 70 at 77; Pretore di Genova, 22 September 1970, (1970) Diritto marittimo 541 at 543. For doctrinal references to this judicial trend, see Tribunale Trieste, 9 October 1972, *supra* note 75 at 71f (Note Giorgio G Dorfles); Tribunale Napoli, 18 November 1983, (1983) Diritto marittimo 185 at 185-186 at n 1 (Note CR); CA Messina, 25 January 1980, *supra* note 71 at n 1 (Note Marco Lopez de Gonzalo). See also Righetti *supra* note 24 at 744; Tullio & Deiana, *supra* note 24 at 676; Sergio M Carbone, *Contratto di trasporto marittimo di cose* [Contract of Maritime Transport Goods], 2d ed (Milan: Giuffrè Editore, 2010) at 351. Greece: CA Piraeus, 259/1990, *supra* note 70; CA Piraeus, 289/2005, *supra* note 71; CA Piraeus, 373/1997 (182353). See also Kiantou-Pampouki, *supra* note 26 at 179-180, 540-541,for this doctrinal/judicial view.

[89] Italy: Tullio & Deiana, *ibid*; Dorfles, *ibid*; Carbone, *ibid.* Information confirmed in interview by the author with a maritime law professor in Italy. France: *Juris-classeur*, *ibid;* and interview of the author with a maritime law professor in France. Greece: Kiantou-Pampouki, *ibid*.

Following this position in France, a sea peril constitutes an abnormally harsh occurrence that results from the combined presence of different factors such as the force of the winds, the waves, and the condition of the sea.[90] Case law further explains this view. In *Ville d'Anvers*, bags of flour were being transported from Dunkerque to Damman when very rough seas and winds vacillating from force 3 to force 10 were encountered in transit, causing the vessel to heave aback and navigate at different speeds while following various routes.[91] The carrier invoked the sea perils defence in order to be exonerated from liability for the resulting cargo damage. The respondents argued that prevailing weather conditions were foreseeable and not irresistible. The court of appeal sided with the carrier noting that the sea perils exoneration cause does not need to present the characteristics of a force majeure event and is evaluated less strictly under the Hague Rules than under domestic law.[92] The weather conditions in this case and their effect on the vessel (navigation at different speeds while following various routes, deterioration of parts of the vessel) justified the presence of a sea peril. In another case – the *Saint-Louis* of the Court of Appeal of Aix – the court adopted similar reasoning, but concluded against the carrier.[93] Here, a cargo of trailers laden with dates was being transported from Algeria to Marseilles during winter months. Due to rough weather conditions along the voyage (winds of force 6-9, rough seas, and a gust of wind of force 10 causing the vessel to remain idle during thirty hours), the merchandise arrived damaged at destination. The carrier invoked the sea perils exception in order to escape liability. The Court of Appeal noted that the Hague Rules do not require a sea peril to be unforeseeable and irresistible.[94] Despite this fact, the mentioned weather conditions were not found abnormally harsh or causing unusual difficulties for the time of the year during which the voyage took place, especially for a carrier who had often followed the same itinerary. According to the Court, it was the carrier that should have taken more appropriate measures – such as strengthening the lashing of the merchandise – against the weather conditions.[95] The carrier could not, therefore, escape liability.

In Greece, the corresponding judicial stance declares that sea perils have a broader scope of application than the domestic force majeure concept because they require a carrier to act as a reasonable person and not with the utmost diligence and care under the circumstances. Further, contrary to the force majeure concept, sea perils

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[90] CA Rouen, 6 July 2004, No 03/04692 (QL-Jurisdata).

[91] *Ville d'Anvers*, *supra* note 88 at 722.

[92] *Ibid* at 725. See also René Rodière, *The Armorique*, *supra* note 70 at 231. Other authors add that it is the act of God Hague and Visby Rules liability exception that approximates the domestic French force majeure concept. See CA Aix-en-Province, 19 January 2001, (2001) DMF 820 at 833 (Note Antoine Vialard).

[93] *Saint-Louis*, *supra* note 88 at 370.

[94] *Ibid* at 372.

[95] *Ibid* at 373.

do not need to be unforeseeable.[96] They simply need to manifest themselves under conditions unusually intense and dangerous considering that, in all cases, the maritime venture should be ready to confront probable difficulties encountered in transit whose damaging consequences can be avoided by the exercise of reasonable care.[97]

An illustration of this more recent case law trend is offered by the 1990 Court of Appeal of Piraeus case that involved a cargo of milk transported from France to Piraeus.[98] In transit, the vessel encountered rough seas and strong winds of force 8-12 that obliged the captain to change route and anchor the ship for several days. After its departure, the vessel again encountered winds of force 8-10 and large waves causing it to pitch and roll. Both the cargo and the ship suffered damage due to the severe weather conditions. In the trial that followed, the court found that the event constituted a sea peril because of its unusual intensity, its effect on the maritime venture, and because the captain had exercised reasonable care in adequately securing and attaching the cargo.[99] It did not question whether the event was reasonably foreseeable by the carrier. On the contrary, it distinguished the concept of sea perils from that of force majeure stating that the former does not need to be unforeseeable and does not require the carrier to act with utmost diligence and care. In a more recent case of the Court of Appeal of Piraeus, the Court followed the reasoning of its 1990 holding but reached the opposite conclusion.[100] In this case, a cargo of containers and vehicles was being transported between Gioggia, Italy, and Piraeus, Greece, during winter months when it encountered rough seas and winds of force 6-8 in the North Adriatic Sea. The cargo was damaged in transit. In the action that followed, the Court dissociated this carrier exoneration cause from the domestic force majeure concept noting that the former does not need to be unforeseeable and does not require the carrier to act with utmost diligence and care. It reiterated the definition of sea perils as stated above.[101] The Court found, justifiably so, that the prevailing weather conditions were not of unusual intensity and danger for the region and time of the year during which they occurred.

[96] For these two arguments see CA Piraeus, 289/2005, *supra* note 71; CA Piraeus, 259/1990, *supra* note 70. See also Kiantou-Pampouki, *supra* note 26 at 179, 541.

[97] CA Piraeus, *ibid*.

[98] CA Piraeus, 259/1990, *supra* note 70.

[99] *Ibid*. The court reiterated the definition of sea perils as stated above (*supra* note 97and accompanying text) and argued that if sea perils are force majeure events, there is no need for a specific force majeure exception under the Visby Rules and CPML, article 144. In effect, the Greek translated version of the Visby Rules uses the term force majeure in the place of the "act of God" exemption, whereas article 144 of the CPML also refers to this liability defence. What is, therefore, the point of using the force majeure term under two different exoneration causes of these instruments? For the translation of the Visby Rules in Greek, see Giorgos Gioggaras, *supra* note 26 at 93, and the domestic 1992 legislation, *supra* note 7, giving effect to the Visby Rules. For article 144 of the CPML, see Kiantou-Pampouki, *supra* note 26 at 536-537.

[100] CA Piraeus, 289/2005, *supra* note 71.

[101] *Supra* note 97 and accompanying text.

Further, there was negligence of the carrier in loading, stowing, and securing the cargo on board the vessel.[102] Thus, the sea perils liability exception could not be applied.

Finally, in Italy, the modern, well-established judicial position dissociates sea perils from the domestic force majeure concept and refers to the former as events that the carrier could not avoid by the exercise of ordinary diligence, taking into account the type of vessel, the voyage undertaken, the time of the year during which it takes place, the nature of the transported goods, etc.[103] The exercise of ordinary diligence in avoiding the supervening event – that the mentioned cases declare as being a less rigid requirement than the prerequisites of force majeure – must be proven by the carrier.[104] Thus, following this stance, an event that does not qualify as force majeure may still constitute a sea peril and exonerate the carrier if he proves that he could not have avoided it by the exercise of ordinary diligence taking into account the type of vessel, the nature of the goods, the voyage in question, etc.[105]

This occurred in the 1972 Court of Trieste case, where, during a voyage between Italy and Singapore, part of the cargo (marble slabs) was damaged due to adverse weather conditions.[106] The winds prevailing in transit were attaining force 9-10 causing the vessel to pitch and roll violently, creating shocks and vibrations to the rotating propellers as well as displacement and damage of the cargo. These circumstances created extraordinary difficulty in governing the vessel. In the action that followed the court upheld the sea perils exoneration noting that this liability exception should not be assimilated to the domestic force majeure concept but should include, instead, events that the carrier could not avoid by the exercise of ordinary diligence considering the type of the vessel involved, the type of navigation it is destined to, the location and time of the year the voyage takes place, as well as the type of goods transported.[107] Since the carrier had taken all reasonable measures to guard against the event, he could not be held liable for the damage to the goods. In a 1974 Supreme Court case, the highest court in Italy followed the reasoning of the

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[102] The court specifically stated that the sea perils exception exonerates *prima facie* the carrier; however, the claimant can prove his or his agents negligence in causing the damage and render him liable.

[103] Corte di Cassazione, 21 June 1974, *supra* note 88 at 351, 352; Trieste 1972 *supra* note 75 at 77; Pretore di Genova, 22 September 1970, (1970) Diritto marittimo 541 at 543. See also Carbone, *supra* note 88 at 350-352. The author also notes that the unavoidability of the event also refers to its reasonable unforeseeability. In practice, however, Italian case law does not comment often on the unforeseeability of the supervening occurrence.

[104] Corte di Cassazione, 21 June 1974, *ibid* at 351-352 (regarding the burden of proof and regarding case law commenting on force majeure and the ordinary diligence standard).

[105] In Pretore di Genova, 22 September 1970, (1970) Diritto marittimo 541 at 543, it was specifically stated that "any" adverse weather condition that compromises the maritime venture taking into account the type of vessel and nature of transported goods may qualify under this exemption. We remind the reader that in the Italian translation of the Hague and the Visby Rules the act of God defence—not the sea perils one—is referred to as: "forza maggiore (atto di Dio)" (see *supra* note 24). Doctrine argues that the act of God liability exception approximates—without being identical to—the civil law force majeure concept. See Righetti, *supra* note 24 at 743; Tullio & Deiana, *supra* note 24 at 675.

[106] Trieste 1972, *supra* note 75.

[107] See *ibid* at 77.

Trieste holding but rejected the sea perils defence.[108] In this case, winds of force 7 and rough seas prevailing *en route* caused damage to the transported goods. The Court did not exonerate the carrier on the basis of the sea perils exception. In distinguishing it from the force majeure concept, it stated that the prevailing weather conditions did not cause serious damage to the vessel and the carrier could have guarded against the event by exercising ordinary diligence in better stowing the cargo.[109]

The modern judicial position in the three civil law jurisdictions is more flexible and broader in scope than the strict and variably defined force majeure concept. It does not require the carrier to act with utmost diligence and care in guarding against the event and does not insist on the unforeseeability of the supervening occurrence. However, if the carrier is negligent in not adequately securing, caring for, loading the cargo, etc., he will be held liable. Case law and doctrine supporting this view opine that the Hague and Visby Rules as well as international case law do not equate sea perils to the domestic force majeure concept.[110]

Overall, sea perils under French and Greek case law and Italian doctrine are referred to as occurrences peculiar to sea navigation. These may not always be of an exceptional force or extraordinary in nature. A variety of relevant circumstances play an important role in qualifying an event as a sea peril. Despite this fact, the defence does not frequently succeed before civil law courts. Traditionally, sea perils have been assimilated to the domestic concept of force majeure, which is not identically defined in the three jurisdictions. More recent case law, however, dissociates this exoneration cause from domestic notions. Depending on the judicial position adopted, this defence may or may not be treated as distinct from the act of God exoneration cause.

Section III: Findings and Comparative Analysis

In this part of our study we will attempt to compare and analyse the applicable principles relating to the qualification of the sea perils Hague and Visby Rules defence in the jurisdictions examined. Our analysis will lead to a proposal guided by the domestic case law principles reviewed. We are also inspired by the letter and spirit of the said rules as well as the need to attain uniformity.

In all jurisdictions under examination, courts and/or doctrine view sea perils as events specific to sea navigation, peculiar to the sea or to the ship at sea such as storms, tides, collisions, and incursion of sea-water. Their presence is determined on a case-by-case basis taking into account highly diversified but relevant factors: the type of occurrence, the condition of the winds and of the sea, their duration, their

[108] Corte di Cassazione, 21 June 1974, *supra* note 88.

[109] *Ibid* at 352.

[110] France : *Ville d'Anvers*, *supra* note 88; *The Armorique*, *supra* note 70 at 231 (Note René Rodière). Italy: Tribunale Trieste, 9 October 1972, (1973) Diritto marittimo 70 at 77. See also Righetti, *supra* note 24 at 741. Greece: CA Piraeus, 289/2005, *supra* note 71. During the negotiation of the Hague Rules, the sea perils exception was phrased as follows: "perils, dangers and accidents of the sea or other navigable waters". This phrasing was finally agreed upon with no reference made to the unforeseeability and the irresistibility of these events. See *travaux*, *supra* note 3 at 369-370, 397, 404-405.

location and the time of year during which they take place, the presence of currents, the length of the voyage, etc. This leaves a considerable margin of appreciation to the judges in determining the presence of the defence. What is certain is that cargo damage or loss due to "wear and tear" does not qualify as a sea peril.

Further, what seems to be a common preoccupation of civil law and common law cases examined herein is that the carrier should act with reasonable care in guarding against the supervening occurrence. His or his agents' negligence, for example, in not better securing, stowing, or caring for the cargo disallows the operation of the exemption.[111] This requirement conforms to the *travaux* of the Hague and Visby Rules, which seem to suggest that the carrier should not be liable in the absence of negligence on his part or on the part of his agents regarding the sea perils exception.[112]

Finally, in all the countries in question, the exception is not frequently sanctioned by courts. Following French doctrine, this is probably due to the fact that modern vessels are capable of surmounting rough weather and storms.[113] As captain MacWhirr says in Joseph Conrad's sea novel *Typhoon*, "a gale is a gale, […] and a full-powered steamship has got to face it."[114]

Even though the Hague and the Visby Rules maintain two separate carrier liability exceptions – the sea perils and the act of God – domestic legislation does not always follow suit. English, US, and Canadian domestic laws and case law as well as the Greek CPML follow the example of the said rules and maintain two distinct carrier exoneration causes.[115] This is not the case, however, in French and Italian law, and partly Greek case law, which have grouped the two exceptions together and treat them alike, either as force majeure events or otherwise.[116]

The tendency to group together Hague and Visby Rules exoneration causes observed under French and Italian law, and to a certain degree Greek case law, reflects

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[111] *Supra* notes 58-64, 95, 102, 109, and accompanying text. Avoiding the supervening occurrence does not only refer to changing route, reducing the vessel's speed, or not sailing in particularly adverse weather, but also to guarding against the consequences of such an event, for example, by adequately securing, stowing, caring for the transported goods in anticipated adverse weather conditions. This is what the terms mean following case law in the mentioned jurisdictions. Negligence may also refer to the vessel's unseaworthiness at the beginning of the voyage. However, the latter does not make the object of the present study.

[112] *Travaux*, *supra* note 3 at 389-390 (Mr Louis Franck, Chairman, 7th Plenary Session, 9 October 1923, commenting on Hague and Visby Article 4.2 following the proposal of the English delegation). As stated, English law inspired the list of the ocean carrier exoneration causes.

[113] Bonassies & Scapel, *supra* note 72 and accompanying text.

[114] Joseph Conrad, *Typhoon* (New York: Doubleday, Page & Company, 1919) at 65.

[115] *Supra* notes 14-15, 27, and accompanying text.

[116] *Supra* notes 20, 24, and accompanying text. (French law uses the group exception: "événement[s] non imputable au transporteur", while Italian law refers to "fortuna o pericoli di mare" in combining the two exoneration causes.) For Greek case law, see *supra* notes 78 and accompanying text, 99.

the civil law style of codifying rules.[117] In effect, one of the main characteristics of civil law is the structuring of legal rules under general categories and their phrasing in an abstract manner. In this way, domestic codes are divided into books, chapters, sections, etc., and their provisions are drafted in general terms so that different factual situations fall under their scope. It is, therefore, not surprising that French and Italian legislators as well as certain Greek judges group what they deem as similar Hague and Visby Rules liability exceptions – i.e., including acts of God and sea perils – into more encompassing legal categories. Following civil law reasoning, this is a normal practice. This practice, however, contrasts the common law approach, which avoids establishing extremely general principles or well-structured, predetermined legal categories. Common law jurists prefer reasoning on a case-by-case basis following specific factual situations and procedural rules. Consequently, they feel more at ease with the long list of specific carrier exoneration causes contained in the Hague and the Visby Rules rather than with the consolidation of liability exemptions.

As mentioned earlier, in establishing the "litany" of liability exceptions in Article 4.2, the drafters of the Hague and the Visby Rules were influenced by common law reasoning.[118] Thus, the civil law approach of categorisation of excepted perils into combined or general legal categories does not adhere to the prescriptions of the Hague and the Visby Rules that maintain two separate carrier liability exceptions: the sea peril and the act of God. Civil law doctrine has also criticized the continental practice of consolidation of exoneration causes and the ensuing judicial tendency of treating these as force majeure events.[119] Authors and case law specifically note that neither the act of God nor the sea peril liability exceptions identify with the civil law force majeure defence: sea perils do not need to present the characteristics of force majeure while acts of God only refer to natural causes of damage and not to actions due to man-made incidents the way force majeure does.[120] Further, based on the above-mentioned analysis, the domestic force majeure concept is not uniformly defined in the three civil law countries and cannot, therefore, advance a uniform interpretation of either or both liability exceptions: we have seen, for example, that Greek case law favours the subjective theory of force majeure with respect to sea perils referring to unavoidable events by measures of utmost diligence and care, while the corresponding French judicial concept does not adopt such a high standard of care, and Italian case law and

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[117] For some of the elements in the following paragraph, see *Galgano*, *supra* note 81 at 51-52; Fabio Morosini, "Globalisation & Law: Beyond Traditional Methodology of Comparative Legal Studies and an Example of Private International Law" (2005) 13:2 Cardozo J Int'l & Comp L 541 at 550-551; Sylvio Normand, "An Introduction to Québec Civil Law" in Aline Grenon & Louise Bélanger Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thompson Carswell, 2008) at 56-65; and Poirier, "La common law", *supra* note 10 at 35-41, 78-86. The analysis in this paragraph complements our commentary on the sources of civil law and common law, *supra* notes 8-11 and accompanying text.

[118] *Supra* note 12 and accompanying text.

[119] Righetti, *supra* note 24 at 741ff.

[120] *Ibid*; CA Piraeus, 259/1990, *supra* note 70 (regarding sea perils and force majeure). However, the act of God exception has been said to approximate more the civil law force majeure defence in the three civil law countries. See *supra* notes 92, 99, 105.

doctrine are not clear on this point.[121] How can the Hague and the Visby Rules uniformity objective be achieved if domestic law clings to parochial qualifications of the terms of international conventions, variably perceived from one country to another?

Finally, during the negotiations of the Hague and the Visby Rules a decision was taken not to use the term force majeure in order to qualify the two exoneration causes. The drafters of the rules were conscious of the fact that a number of excepted perils proposed – including the one under examination – correspond to the French and other civil law jurisdictions force majeure concept, which contains the elements of unforeseeability and irresistibility.[122] They refused, however, to refer to this civil law concept in the rules because there is no exact common law counterpart of the civil law defence in this context, and the carrier's excepted perils had to be phrased in a way that could be understood in common law and in civil law alike.[123] In other words, the drafters chose to distance themselves from the use of domestic law terms – such as force majeure – favouring in this way the objective of uniformity pursued by the rules. From different points of view, creating legal categories for the Hague and the Visby Rules liability exceptions and labelling them following domestic law concepts, like force majeure, promotes lack of uniformity in their application.

The lack of uniformity in the application of the sea peril exoneration cause does not only stem from the use of general categories in classifying specific Hague and Visby Rules exoneration causes in civil law countries or their qualification as force majeure events. It also resides in the variety of case law qualifications of this exception in civil law and in common law countries. Apart from the assimilation of sea perils to force majeure, other trends are also observed in France, Italy, and Greece. These tend to dissociate sea perils from the force majeure concept and stress the efforts of a reasonable carrier in avoiding the supervening occurrence or its damaging consequences. They disallow, for example, the operation of the exemption in case of negligence of the carrier or his agents in properly securing, stowing, or caring for the cargo.[124] Further, they either exclude or do not stress the unforeseeability of a sea peril as a condition of its application, contrary to the sea perils/force majeure general judicial stance.[125] To the divergent civil law views regarding the qualification of this exception we should add the applicable common law standards. English, Canadian, and US case law refer to sea perils as reasonably unforeseeable and unavoidable occurrences. However, the unforeseeability requirement is perceived less strictly under English than under Canadian and US case law. Further, US case law requires that sea perils be extraordinary, contrary to its English, Canadian, and civil law

[121] *Supra* notes 83-85 and accompanying text.

[122] *Travaux*, *supra* note 3 at 376-377.

[123] *Ibid.*

[124] *Supra* notes 95, 102, 109, and accompanying text.

[125] *Supra* notes 88ff and accompanying text.

counterparts.[126] In this way, the US maintains an extremely restrictive view of the defence. Not only does the supervening event need to be unforeseeable and unavoidable, it must also be extraordinary. The strict US stance regarding sea perils may be explained by the fact that the US is a cargo country, depending therefore, on cargo owners trading their goods internationally. In order to promote cargo interests the scope of the liability exemption should be narrowly construed, rarely exonerating carriers.[127]

The variety of applicable criteria in qualifying this exception does not achieve the uniformity pursued by the drafters of the Hague and the Visby Rules. One cannot but wonder: what is the way forward if we want to achieve a uniform qualification of this exemption in the six jurisdictions? In other words, how can the aim of the Hague and the Visby Rules be achieved with respect to the sea perils exception?

In advancing a uniform qualification of sea perils in the above-mentioned jurisdictions, we are guided by the letter and the spirit of the Hague and the Visby Rules. Further, we adopt common case law principles and certain doctrinal views in the countries examined. We agree, for example, with the stated case law and doctrinal positions describing sea perils as events specific to sea navigation, peculiar to the sea or to the ship at sea such as storms, tides, collisions, incursion of sea-water, etc., whose presence is established on a case-by-case basis taking into account a variety of factors. We also deem that guarding against the supervening occurrence by exercising reasonable care considering all the circumstances of the case (nature of weather conditions, their duration, effect on the vessel, etc.) should be an important element to consider in allowing this exemption to benefit the carrier since it constitutes a common preoccupation in the countries in question. In this regard, negligence of the carrier, for example, in not adequately caring or keeping the cargo should disallow the defence. Finally, sea perils should be strictly construed by courts since they constitute an exception to the principle of the carrier's liability and because modern vessels are deemed able to withstand rough weather and storms.[128]

As far as the qualification of sea perils as force majeure events is concerned, we will not use it within the context of our uniformity proposal. Apart from the fact that there is no exact counterpart for this notion in common law in this context, we have seen that the civil law defence is variably defined from country to country (France, Italy, and Greece). As stated, domestic law concepts adapt with difficulty to internationally uniform solutions. Moreover, the sea peril/force majeure view does not

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[126] *Supra* notes 39-42, 75, and accompanying text. We disagree, in this regard, with the Australian *Bunga Seroja* holding stating that under United-States/Canadian law sea perils need to be extraordinary in nature (*supra* note 48 at paras 39-40). As we have seen, Canadian law does not require sea perils to be extraordinary in nature. See also Margetson, *supra* note 49 at 148-149 (sharing our view).

[127] Harry Apostolakopoulos, "Navigating in Perilous Waters: Examining the 'Peril of the Sea' Exception to Carrier's Liability Under COGSA for Cargo Loss Resulting from Severe Weather Conditions" (2000) 41:4 S Texas L Rev 1439 at 1454, 1455 (arguing that the scope of the exception should not be widened). A similar reasoning can be applied to Canada, also a cargo country, with respect to the sea peril's unforeseeability requirement.

[128] *Supra* notes 113, 114, and accompanying text.

always represent the dominant judicial stance regarding the qualification of sea perils in the civil law jurisdictions under examination. A uniform qualification of this exception cannot, therefore, be based on the civil law notion.

Commenting on the unforeseeability of the supervening occurrence, we argue that sea perils should not be qualified as unforeseeable events. For example, adverse weather conditions known or anticipated by a carrier should not, in principle, exclude the application of this defence.[129] An important consideration, in this regard, is that the unforeseeability of a sea peril is not always regarded as a requirement for its application. As stated, English law, in part, and recent civil law decisions discard it as a determining factor in qualifying the exception. Further, as Carver notes, even abnormal weather conditions can be foreseen today.[130] For example, adverse weather conditions – winds of force 8-12 and high waves in the Atlantic Ocean during winter – are predictable. How can a carrier always be regarded as wrong in setting out or in continuing to sail in the presence of foreseeable perils? Pragmatism in the solution adopted suggests that the sea peril's unforeseeability should not be a determining factor of the defence.

Following our suggestion, the carrier should be able to (continue to) sail in anticipated adverse weather and be exempted from liability if a reasonable carrier would have done so. If, therefore, a carrier sails in foreseeable adverse weather conditions but reasonably does so considering all relevant circumstances (size of the vessel, intensity, duration, location of the weather conditions, type of cargo transported, etc.) and takes reasonable measures to guard against the weather (for example, by well securing the cargo, reducing the vessel's speed, etc.), he should be exonerated from liability in case of cargo damage or loss. If, however, the carrier sails (or continues to sail) in foreseeable adverse weather conditions where a reasonable carrier would not have done so based on the circumstances of the case or if the carrier fails to take reasonable measures to guard against foreseeable weather, negligence in guarding against the event may exist, and, in such a case, the exemption should not operate. Under these circumstances, guarding against the event and the carrier's or his agent's negligence and not the unforeseeability of the supervening occurrence become the main focus in seeking the carrier's exoneration.

Exonerating the carrier in the presence of foreseeable events may have the effect of widening the scope of the defence in the US and Canada, two cargo nations that insist on the sea peril's unforeseeability to favour their shippers' interests.[131] However, the protection of cargo interests does not necessarily require that an event be unforeseeable. Rather, the former may be safeguarded by a strict construction of the requirement to guard against the supervening occurrence.

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[129] We refer here to foreseeable events (i.e., weather conditions) that do not normally prevent a carrier from setting sail/continuing to sail and not the case, for example, of foreseen or foreseeable hurricanes that could discourage a reasonable carrier from setting out to sea or continuing to sail. The latter scenario could constitute a case of carrier's negligence under our proposal which is explained as follows.

[130] *Supra* note 48 and accompanying text.

[131] In this regard, see the opinion of Professor Tetley, *supra* notes 56, 57, and accompanying text.

In effect, under our proposal, guarding against the supervening occurrence should not be sanctioned lightly by courts but, rather, be the object of a detailed and rigorous examination. As mentioned, modern vessels are capable of guarding against high seas and adverse winds so that the carrier's negligence in providing a seaworthy vessel and/or caring for and keeping the goods should be thoroughly examined before exonerating him. For example, the fact that cargo on board a vessel is damaged as a result of a foreseeable peril (winds of force 10-11 and high seas in the North Atlantic) may suggest that the carrier did not exercise due diligence in providing a seaworthy ship at the beginning of the voyage, or that he did not properly and carefully keep and carry the cargo. In such cases, courts should consistently and rigorously examine the carrier's negligence in guarding against the event based on all the relevant circumstances and not easily allow the defence to operate on this ground. Although such considerations are taken into account by existing case law in the mentioned jurisdictions, the novelty of the proposal resides in the emphasis put on a rigorous application of the unavoidability of the event rather than on the sea peril's unforeseeability. In this way, we maintain a balance between carrier and cargo interests: the sea peril foreseeability offers greater protection for carriers by allowing for the carrier's exoneration, but a strict construction of the unavoidability of the event requirement favours cargo interests.

If sea perils are qualified as foreseeable events that cannot be guarded against by reasonable efforts, the US requirement of an "extraordinary" event cannot be maintained. In effect, foreseeable occurrences are not usually deemed extraordinary.[132] This does not mean that all events peculiar to the sea should exonerate the carrier. As Scrutton notes, a sea peril is an "out of the ordinary course of the adventure' occurrence".[133] Thus, non-extraordinary events (such as winds lower than force 9 and high seas in the Atlantic) that present uncommon characteristics – for example, a very long duration causing significant damage to the vessel and the cargo – may constitute a sea peril under our proposal if the rest of the conditions of the exception are fulfilled. On the contrary, damage to cargo by wear and tear cannot exonerate the carrier since it takes place in the "ordinary course of the adventure."

Such reasoning may conform to the principles applicable in the rest of the five jurisdictions examined; which do not require that sea perils be extraordinary. From this perspective our proposal promotes uniformity in the implementation of the defence. It contrasts, however, current US case law that insists on the extraordinary nature of a sea peril in an effort to restrictively apply the liability exception. In reality, exonerating the carrier in the presence of non-extraordinary perils does not necessarily lead to the liberal application of the defence. Following our proposal the carrier still needs to justify not being able to guard against such perils, which, as stated, may not be easily established. Further, in the countries where non-extraordinary perils may exonerate the carrier (for example, the UK, France, and Canada) the defence is not

[132] On the link between the extraordinary nature of a sea peril and its unforeseeability, see Schoenbaum, *supra* note 33 at 909.

[133] *Supra* note 43 and accompanying text.

frequently sanctioned in practice. Thus, the strict construction of the defence does not necessarily require that a sea peril be extraordinary in nature.[134]

Finally, under our proposal sea perils are dissociated from the act of God exoneration cause and therefore do not appear under a group exemption as is the case following French and Italian domestic laws. The separation advances clarity in the applicable law by stressing the specificity of the former to the sea navigation (perils *of* the seas) and by avoiding the tendency – especially present in France – to view acts of God and, consequently, sea perils as force majeure events.[135] It is also conforming to the wording of the Hague and the Visby Rules that do regard these as independent exoneration causes.[136] Considering that the French version and Italian translation of the rules distinguish sea perils from other liability exceptions, the separation of the two defences should not be difficult to attain, at least at the judicial level. Greek domestic law already maintains a separate sea perils exception in both the domestic law of 1992 and CPML, article 144. English, Canadian, and US domestic laws do the same so there is no need for such a change in the law within these jurisdictions. Case law in these countries should also distinguish the two exceptions.

Qualifying sea perils as occurrences specific to the sea element, of strict construction, that cannot be guarded against on the part of the carrier or his agents presents several advantages. It detaches the sea perils defence from domestic law concepts and criteria (i.e., force majeure concept in civil law jurisdictions, unforeseeability), which offers the best guarantee for its adaptability and its uniform application at the international level. It also proposes a pragmatic solution by exonerating the carrier in the presence of foreseeable occurrences considering that weather conditions are, today, more often than not, predicted or predictable. It further advances uniformity in the law by adopting the unavoidability of the event – a common case law requirement in the said jurisdictions – as a determining factor establishing its presence. Finally, it forwards suggestions that conform to the wording and the spirit of the Hague and the Visby Rules. As with our proposal, the said rules separate sea perils from the acts of God exception and do not require that the former be extraordinary or unforeseeable. Rather, they suggest, in their *travaux*, that the carrier's or his agents' negligence may disallow the operation of the defence.

CONCLUSION

[134] See *supra* note 113 and accompanying text on French doctrine stating that the strict construction of the defence is attributed to the fact that modern vessels are capable of surmounting rough weather and storms. This remark emphasizes the sea peril's (un)avoidability like our proposal does.

[135] *Supra* notes 21, 78, and accompanying text. For doctrinal criticism regarding the consolidation of the two exceptions, see also Righetti, *supra* note 24 at 741ff. As Professor Berlingieri notes, the act of God exoneration cause originates from a common law text. Its meaning must, therefore, be found in common law. Francesco Berlingieri, *Conventions*, *supra* note 69 at 33.

[136] During the *travaux* of the Hague and the Visby Rules the act of God liability exception was adopted as a distinct exoneration cause from the sea perils one without much discussion. *Travaux*, *supra* note 3 at 404-406.

Even though the Hague and the Visby Rules sea perils exception has been applied by courts for decades, it has not become the object of a uniform application at the international level. Our analysis has proven that similarities but also differences in the qualification of this defence exist under English, Canadian, US, French, Italian and Greek law. Inspired by the similarities identified which promote uniformity in its application, we qualified sea perils without regard to their unforeseeability or extraordinary nature, insisting more on the unavoidability of the occurrence. We hope that courts in the respective countries and worldwide realize the advantages of a uniform application of the excepted peril and work towards this end.