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Maritime Collision Under UAE Maritime Law A Comparative Study

A Hassan M
a.hassan@uaeu.ac.ae

MARITIME COLLISION UNDER UAE MARITIME LAW

A COMPARATIVE STUDY•

Dr. Abdulla Hassan Mohamed•

Abstract:

There are many collisions between ships under way on the high sea. When two ships collide, the accident usually causes enormous financial loss, claims human lives, and leads to protracted legal wrangling. The legal issues involved in a collision have proved to be quite complicated as well because many parties tend to be involved each with different interests and risks. Foremost, it must be determined who should be held responsible for the collision and how the loss should be apportioned between the owners of two colliding ships. Owners of the cargo on board the ships will attempt to recover damages resulting from the collision, and persons suffering personal injuries will seek compensation as well. In the accident, hull underwriters and cargo insurers have interest as damage insurers, and hull underwriters and P & I Clubs are involved as liability insurers. Third parties with property in the vicinity may also suffer some damages, a general average may be declared, and a salvage operation may be called in.

The purpose of this paper is to examine the maritime collision under UAE Maritime Code in the following structure:

1. Application of the collision provisions
2. Elements of collision liability
3. Evaluation of fault
4. The divided damage rule
5. Determination of damages

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• Head of Private Law, Assistant Professor of Law, UAE University, College of Law..

1. INRODUCTION

Sea seems big enough that one would expect collision to be something of a rarity. But vessels steam at night, and in all weather, and the combination of their huge momentum and limited braking power makes the averting of collision a matter of constant vigilance and proper and timely action; there is human failure on all these points. Crowded harbors and narrow channels remain perilous, and in some cases are growing more so. Although standardized lights and sound signals have been in use for a long time, and radar and other electronic aids have come into importance in recent decades, the marine collision is still a phenomenon of frequent incidence.(1)

When two vessels collide, even at low speeds, severe damage to the vessels involved and other consequential losses are generally the result. They often include death and personal injury, marine pollution, fire, explosion, cargo loss, and damage. The legal issues involved in a collision have proved to be quite complicated as well because many parties tend to be involved each with different interests and risks. Foremost, it must be determined who should be held

(1) G. Gilmore & C. Black, The Law of Admiralty, 2nd ed 1975, at p. 485.

responsible for the collision and how the loss should be apportioned between the owners of two colliding vessels. Owners of the cargo on board the vessels will attempt to recover damages resulting from the collision, and persons suffering personal injuries will seek compensation as well.

Attempts to accomplish uniform rules of law applicable to vessel collisions have historically been made, resulting in several international conventions.(2) The need for uniform rules is particularly acute when a collision takes place on the high sea between two vessels flying different flags. The 1910 International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels (the Collision Convention 1910) sets out basic rules of law relating to civil liabilities of the parties involved in a vessel collision. United Arab Emirates (the UAE) is not a party to the Convention. Yet, adopts many core provisions from the Convention into its Federal Maritime Code 1984 (the Maritime Code).

The object of this paper is to highlights the significant areas of marine collision law, including collision fault, liability and recoverable damages. An effort has been made to point out the variety of legal issues that arise from a collision and to call attention to numerous problems that may require the consideration of UAE courts in collision cases.

Because of the lack of decided cases in collision matters in the UAE, reference will be made in the present study to courts' decisions of the traditional maritime countries.

2. APPLICATION OF THE COLLISION PROVISIONS

2.1. Scope of Application

Provisions covering collisions are contained in arts.318 to 326 of the *Maritime Code*. The *Code* provisions for collisions at sea, however, do not apply to all collisions at sea, but only apply to collisions falling within a definition set out in the art.318 of the *Code*. The definition encompasses most, but not all collisions. For those collisions not covered, the *Civil Code* provisions regarding torts come into play. Given the two sets of rules on collisions, it is imperative to define the scope within which the *Maritime Code* provisions apply.

(2) Convention on the International regulations for Preventing Collisions at Sea 1972 and; International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels 1910; International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952; International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation 1952; Draft Rules for the Assessment of Damages in Maritime Collisions 1988, known as the "Lisbon Rules."

2.2. Collision between Vessels

The *Maritime Code* provisions apply to "a collision between vessels", so we must determine what is meant by a "collision", as well as the meaning of "vessel" in this context.

2.2.1. Concept of vessel

The term "vessel" is easy to define. As a starting point, we can take the ordinary meaning of the term "vessel", as presented in art.11 which defines the vessel as[3] *"(Rough translation) any structure[4] which is normally working or prepared to be working in maritime navigation irrespective of its power, tonnage or the purposes for its navigation."*[5]

A vessel colliding with a vessel owned by the government or any other public agency engaged in public service is regarded as being involved in collision referred to in the *Maritime Code*.[6]

Although the *Maritime Code* provisions generally do not apply to vessels of inland navigation, they do apply to collisions between a sea-going vessel and a vessel of inland navigation.[7]

(3) " السفينة هل كل منشأة تعمل عادة أو تكون معدة للعمل في الملاحة البحرية وذلك دون اعتبـــار لقوتهـــا أو حمولتها أو الغرض من ملاحتها"

(4) In American Law the term "vessel" is applied to floating structures capable of transporting something over the water; see *Pleason v Gulfport Shipbuilding Corp.*, 1955 AMC 794 (5th Cir. 1955). In English Law the term 'ship' includes every description of vessel used in navigation; see *Merchant Shipping Act 1995* s. 313 (1).

(5) In *R v Goodwin* [2006] 1 Lloyd's Rep 432 (CA), the Court of Appeal said that: "A 'vessel used in navigation'…..was confined to a vessel which was used to make ordered progression over the water from one place to another, although it was not a necessary requirement that it should be used in transporting persons or property by water to an intended destination. Craft that were simply used for having fun on the water without the object of going anywhere, such as jet skis, were not "used in navigation" and were accordingly excluded from the definition of ship or vessel".

(6) *Maritime Code*, art. 318/2. provides that:
"وتسري أحكام التصادم البحري ولو كانت إحدى السفن المتصادمة مخصصة للخدمة العامة من قبل الدولة أو إحدى هيئاتها أو مؤسساتها العامة ".
"(Rough translation) *The provisions of maritime collision shall be applied even though one of the collided vessels is allocated to public service by the state or any of its public institutions or bodies".*

(7) See art. 318/1 of the *Maritime Code* which states that:
"إذا وقع تصادم بين سفينة بحرية أو بينها وبين مراكب تقوم بالملاحة في المياه الداخلية تسوى التعويضات المستحقة عن الأضرار التي تلحق بالسفن و الأشياء والأشخاص الموجودين على السفينة طبقا للأحكام الواردة في هذا الفصل دون اعتبار للنظام القانوني للمياه التي حصل فيها التصادم. وباستثناء العائمات المقيدة بمرسى ثابت تعتبر كل عائمة في حكم هذه المادة سفينة بحرية أو مركب ملاحة الداخلية على حسب الأحوال".
"(Rough translation) *Where a collision occurs between sea-going vessels or between sea-going vessels and vessels of inland navigation, the compensation due for damages caused to*

2.2.2. Concept of collision

A collision occurs when there is actual physical contact between two vessels, i.e. a direct collision.(8) The contact may take place between vessel bodies, equipment on board the vessels or cargo carried by the vessels. It is irrelevant whether the vessels are both underway or one of them is moored

Art. 318/2 of the *Maritime Code* (Collision Convention 1910, art. 13) expands the meaning of collision by applying the rules to cases "when a vessel by its maneuvers or in similar ways causes damage to another vessel or to persons or goods on board although no collision takes place between the vessels", i.e. an indirect collision.(9) An indirect collision occurs when one vessel violates navigation rules and causes damage to another vessel as, for example, by proceeding at excessive speed causing her to sink,(10) or compelling her to go out of the fairway and run aground,(11) or negligently dragging down on her so as to compel her to slip her anchor and chain and put to sea to avoid collision,(12) or causing a collision between her and a third vessel.

Somewhat unusual circumstances involving damage to a vessel without any contact arose in the English case of *The Carnival*(13).Shortly after the vessel Danilovgrad was alongside the Setramar berth, north of the port of Ravenna but before she was securely moored, another vessel, Carnival, proceeded along the canal assisted by two tugs. When the Carnival passed the Danilovgrad, her headway caused movement of the water and the vessel Danilovgrad surged and

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the vessels, or to any things or persons on board thereof, shall be settled in accordance with the provisions contained in this section without regard to the legal system of the water in which the collision takes place"; See also Collision Convention 1910, art.1.

(8) The term "collision" technically means "the violent encounter of moving body with another" see Oxford English Dictionary, 1991, s.v. "collision"; Impact of two vessels without damage gives no right of action, see *The Margaret* (1881) 6 PD 76, 4 Asp MLC 375, CA.

(9) Art. 318/2 states:
"وتسري الأحكام المذكورة –ولو لم يقع ارتطام مادي– على تعويض الأضرار التي تسببها سفينة لأخرى أو للأشياء أو الأشخاص الموجودين على ظهرها إذا كانت هذه الأضرار ناشئة عن قيام السفينة بحركة أو إهمال القيام بحركة أو عدم مراعاة الأحكام التي يقررها التشريع الوطني أو الاتفاقيات الدولية المصادق عليها بشأن تنظيم السير في البحار".
"(Rough translation) *The said provision (i.e. art. 318/1) shall apply -even if there has been no physical contact - to compensation for damage which a vessel has caused to another vessel, or to goods or persons on board, either by the execution or non-execution of a manoeuvre or by the non-observance of the national regulations or international conventions regulating sea travel*."

(10) See *The Royal Eagle* (1950) 84 Ll L Rep. 543.

(11) See *The Bow Spring and The Manzanillo II* ([2004] 1 Lloyds Rep. 647),where the vessel *Bow Spring* deliberately beached herself just outside the eastern edge of the Northern By-pass channel in the Suez Canal in order to avoid a risk of collision with the *Manzanillo II* which appeared to be shaping to enter the channel. Steel J. held that *Manzanillo II* was 50 per cent to blame for the grounding of Bow Spring .

(12) *The Port Victoria* [1902] 9 Asp MLC 314.

(13) [1994] 2 Lloyd's Rep. 14 (CA).

came into contact with the edge of the quay. The shell plating of the vessel Dani1ovgrad pressed against a fender and the edge of the end plate pierced the vessel's shell plating. Water flowed into the Hold No.7, damaging the vessel's cargo. The owners of Danilovgrad claimed damages from the owners of Carnival on the ground that the latter vessel was negligently navigated and caused damage.

The Court of Appeal decided that the Carnival was negligent in passing Danilovgrad before the latter was securely moored and all lines were out and made fast. And that it was unlikely that the Danilovgrad would have suffered such damage if the Carnival had not passed too early. The defendants' argument that the damage was too remote was rejected. The Court of Appeal decided that the true test was whether it was foreseeable that, as a result of negligence on the part of Carnival (if proved), Danilovgrad would suffer damage to her hull and it was unnecessary to pinpoint foreseeability by reference to the actual damage suffered.

2.3. Third Party Damage

The *Maritime Code* adopts the principle that the party responsible for a collision is also liable to a third party(14) damage caused by the collision.

Broadly speaking, the third-party liability can be divided into two categories: liability for the personal injury and property damage and liability for damaged shore structures.

2.3.1. Personal injury and property damage(15)

Article 321 of the *Maritime Code*(16) (Collision Convention 1910, art.4) holds vessels at fault to be jointly liable for a third party. But there appears to be some subtle difference between the parties' liabilities to the third party's property damages and their liabilities to the third party's personal injuries.

(14) The *Maritime Code* does not define the meaning of third party. Generally speaking, a third party is a person who is not employed by any party engaged in the collision.

(15) Article 321 of the *Maritime Code* requires a responsible party to compensate four types of damages: damage to the other vessel, damage to cargo and other property on board the other vessel, damage to a third party's property, and personal injuries of a third party.

(16) *Maritime Code*, art. 321/2 states:
"وتسأل السفن (المتورطة في التصادم) في حدود النسبة المشار إليها في (المادة 321/1) بدون تضامن بينها قبل الغير وذلك عن الأضرار التي تلحق بالسفن أو البضائع أو الأمتعة أو الأموال الأخرى الخاصة بالبحارة أو بأي شخص آخر موجود على السفينة".
"(Rough translation) *Vessels (involved in the collision) shall be liable (in proportion to the degree of the faults respectively committed) referred to in (art. 321/1) without joint liability as between them with regard to third parties for damage suffered by vessels, goods, chattels or other property belonging to the crew or to any person on board the vessel."*

The second paragraph of Article 321 requires the parties at fault to share liability to third party's damage in proportion to the ratio between their faults. The paragraph also states that the duty of a vessel to compensate a third party's damage cannot exceed its share of fault. For comparison, paragraph three of Article 321 expressly provides that the parties at fault have a joint liability to the personal injuries suffered by a third party and that the parties have right of recourse against each other if any of them has compensated the third party for more than their share of fault. In light of those two paragraphs, it may be that the parties in fault do not have a joint liability to the property damage of a third party. This provision requires a third party to sue the relevant vessels individually or collectively for the property injury he has sustained.

2.3.2. Collisions with other structures

The *Maritime Code* provisions apply only when there is a collision between vessels. A vessel colliding with structure such as platform, dock, bridge, piers, cranes, shore installations and equipment, pipelines, or storage facilities, is not regarded as "collision" under the *Code*. Such accident falls under the category of tortious liability. If a shore structure or an underwater device is damaged by the impact of two vessels colliding with each other the colliding vessels are liable for the damaged so caused. However, as far as the damage to the shore structure or underwater device is concerned there is no indirect collision between any vessels concerned and the facility or device in the sense of art.318 of the *Maritime Code*. Even though the responsible vessels must be liable to the damages sustained by shore structures or under-water devices their liability is not determined under the provisions applicable to collision.

2.4. Loss or Damage

The *Maritime Code* provisions apply to loss or damage caused to a vessel and to any things or persons on board a vessel whether involved in the collision or not.(17) Thus, persons on board or whose cargo was on board a colliding vessel or an innocent third vessel are entitled to recover loss and damages under the provisions against both shipowners. As discussed earlier, they are also entitled to claim damages for breach of contract against the shipowner with whom they entered a contract of affreightment. A shipowner who has compensated for breach of contract is entitled to recover from the other shipowner at fault the loss resulting from such compensation as a part of his damages.

(17) *See Maritime Code*, art. 321/2.

3. ELEMENTS OF COLLISION LIABILITY

A collision is an accident that must be caused by some reason. In law, reasons for a collision may be classified into three categories: fault of one vessel, fault of both vessels and a *force majeure (irresistible force)* or an external cause that cannot be contributed to the fault of any colliding vessels.(18)

3.1. Collision caused by the Fault of One Vessel

Art.320 of the *Maritime Code*(19) (Collision Convention 1910, art.3) holds the party in fault to be liable for damages arising from a collision. It is meant to apply to the situation where one vessel is solely liable for the collision. The same rule was applied under English law. Thus in *The Troll River*,(20) the vessel sheriff collided with the Troll River in the fairway leading to Nagoya harbour. In 1969 the fairway was extended to seaward for about a mile, with its new extremity marked by a buoy. This new fairway was shown on the new edition of the Admiralty Chart 2960 of April 1970. It was found that the Shariff, had been using the 1967 edition of the chart of Nagoya harbour which did not show the 1969 extension of the fairway. When the Shariff approached Nagoya harbour channel her master had seen the outward-bound Troll River pass the buoys marking what on his chart was the end of the channel; he naturally, but mistakenly, thought that the Troll River would soon turn to seaward. She did not turn, but continued on towards the end of the fairway and collided at speed with the Shariff which was proceeding to enter across the fairway.

Held: that the Shariff was solely to blame for the collision. Her master had been misled as to the extent of the fairway by using an out-of-date chart.

3.2. Collision caused by Joint Fault

A collision may be caused by fault of all vessels involved in the collision

(18) In 1815 Lord Stowell's in his decision in *The Woodrop–Sims*, 165 E.R. 1422 (Adm. 1815) set forth four classic principles of ship collision law: 1) each vessel bears its own loss in cases of inevitable accident; 2) damages are divided equally when both vessels are to blame; 3) there is no right of recovery when the damaged vessel is alone to blame; and 4) the damaged vessel is entitled to a full recovery when the other is solely at fault. The first, third and fourth principles apply almost universally today, pursuant to either the Collision Convention 1910 or to national law.

(19) *Maritime Code*, art 320 provides:
"إذا نشأ التصادم عن خطأ إحدى السفن التزمت هذه السفينة بتعويض الضرر الناشئ عن التصادم" .
"(Rough translation) *If the collision is caused by the fault of one of the vessels, liability to make good the damages which has resulted from the collision attaches to that vessel*."

(20) [1974] 2 Lloyd's Rep. 181.

.i.e. a so-called both-to-blame collision.[21] In such cases, the losses will be allocated in proportion to the amount of blame accorded to each vessel,[22] or to use the formulation in the *Maritime Code*, art. 321 (Collision Convention 1910, art.4): "*in proportion to the faults committed on each side*". Thus, the total loss caused by the collision is determined and this loss is allocated based on the amount to which each vessel is to blame. For example, if vessel A has suffered damage of 100, and vessel B of 200, and both are considered equally at fault, then each vessel bears a loss of (l00 + 200) : 2 = 150; i.e. A, in addition to bearing its own loss, must pay 50 of B's loss. If in the example B is 2/3 to blame, the result will be that A will carry 100, and B 200, of the total loss; i.e. there will be no transfer of money from one vessel to the other.

When, however, the degree of relative faults cannot reasonably be ascertained, the vessels involved in the collision will share equally the liability.[23] There are two main situations to which the principle of sharing equal liability applies. The first situation is that in which the evidence is so incomplete that, while it justifies a finding that both vessels involved in a collision or other casualty were in fault, it is insufficient to establish any difference in the degree of fault between them.[24] Such a situation will most often arise when the collision or other casualty concerned causes the death of all or most of the material witnesses to it. The second situation arises when, although the evidence

(21) Where both vessels have been simultaneously negligent at or up to the last moment before the collision, the usual question is whether the act of negligence on each side was in itself so substantial! and so related to the damage by the collision as to amount to a cause of it. When both vessels have thus been simultaneously negligent at or up to the last moment, and when the negligent act of each is substantial and directly related to the collision damage, each vessel is held to have partly caused the damage, and the judgment is that both are to blame.

(22) Where more than two ships have been in collision, and they have all been in fault, the liability to make good the damage or loss will be distributed among them in proportion to the degree in which each ship was in fault; see *Trishna (Owners, Master and Crew) v. Panther (Owners), The Panther and The Ericbank*, [1957] 1 Lloyd's Rep 57 (tug and third vessel damaged; tow and third vessel each to blame to the extent of one-quarter and tug to blame to extent of one-half).

(23) See *Maritime Code*, art. 319/1 which provides:
"إذا نشأ التصادم عن قوة قاهرة أو قام شك حول أسبابه أو لم تعرف هذه الأسباب تحملت كل سفينة ما أصابها من ضرر".
"(Rough translation) *If the collision is caused by force majeure, or if the cause of the collision is left in doubt or not known, each vessel shall bear the damages which it has su*ffered". See also Collision Convention 1910, art.2.

(24) See *The Peter Benoit*, (1915) 84 L.J. 87 (C.A.), upheld (1915) 13 Asp. M.L.C. 203 (H.L.), where a collision occurred between two vessels off the mouth of the River Tees. The trial court found that both vessels were at fault and apportioned the blame at one-fifth and four-fifths respectively. On appeal, however, the Court of Appeal considered that the evidence was not clear enough to determine blame so accurately, and apportioned the blame equally between the two vessels. The principle on which this decision was based was that the conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at and sufficiently made out.

is reasonably complete, it does not enable the court, approaching the matter judicially, to say that there is a clear preponderance of fault as between the vessels concerned. In either of these two situations the duty of the court under the Code is to apportion liability equally.

The proportionate fault rule was also adopted by English courts.(25) See for example *The Statue of Liberty*,(26) which involving a night-time collision between a vessel of that name, and the Andulo. The Andulo sighted the Statue of Liberty's green light on her port bow, and as the stand-on vessel in a crossing situation should have maintained course and speed. Instead, she turned to port. The Statue of Liberty, as the give-way vessel, failed to take steps to keep out of the Andulo's way. The Court of Appeal held her liable on that account and also for failure to maintain a proper look-out and to signal on altering course to starboard. The Court also held the Andulo to blame for her inadequate look-out and failure to take compass bearings of the Statue of Liberty, as well as for failure to maintain her course. The Court found that the faults of both vessels were causative, but that the Statue of Liberty's failure to keep out of the Andulo's way was "the most causative fault." The Court apportioned the damages 85% against the Statue of Liberty and 15% against the Andulo.

Equally divided damages would apply by English courts only where the respective degrees of fault of the parties involved could not be determined(27) or where the faults were found to have been equal.(28)In *The Pearl and Jahre Venture*,(29) two vessel were collided in the Fujairah "B" anchorage in the Gulf of Oman. The court found that there were serious faults in respect of each vessel causative of the collision; each of the vessels dragged her anchor without appreciating it and failed to take appropriate action even after such dragging came to be appreciated. Accordingly the court held that both vessels were

(25) See *Boy Andrew (Owners) v St Rognvald (owners)*, (1947) 80 Ll.L Rep. 559 (HL); *The Sea Star* [1976] 2 Lloyd's Rep. 477, CA.; see *The "Iran Abad" and "Merawi"* [1999] 1 Lloyd's Rep. 818 where the court apportioned the fault 40% *Iran Abad* and 60% *Merawi*

(26) [1970] 2 Lloyd's Rep. 151(CA).

(27) For a U.K. decision apportioning fault equally because of the impossibility of establishing the respective degrees of fault, see *The Glaucus*, (1946) 79 Ll. L. Rep. 190. For a rare decision involving a three-ship collision where no negligence was found on the part of any of the ships, resulting in each of them bearing its own loss, see *The British Diligence and The Comanchee*, (1945) 78 Ll. L. Rep. 266.

(28) For U.K. decisions determining that the vessels involved were equally to blame for the collision, see *The Verena*, [1961] 2 Lloyd's Rep. 127 (C.A.); *The Alonso de Ojeda and The Sestriere*, [1976] 1 Lloyd's Rep. 125 at p. 132; *The Golden Mistral*, [1986] 1 Lloyd's Rep. 407 at pp. 409 and 413.

(29) [2003] 2 Lloyd's Rep. 188.

equally to blame for the collision and apportioned liability between them at 50/50.

In United States, until 1975, American law followed the rule requiring equal division of liability among colliding vessels guilty of contributory fault in a collision, regardless of their degrees of fault. In1975 in the case of *United States v Reliable Transfer Co. Inc.*,[30] this practice was overturned. The U.S. Supreme Court reversed the divided damage rule and imposed the proportionate fault rule with respect to vessel collision damage (other than damage to cargo, persons and other innocent third parties). In that case a vessel, sailing at night, stranded on a sand bar outside New York harbor. Her owner brought an action against the United States in federal district court[31] accusing the Coast Guard of failing to maintain proper light at the southernmost point of the breakwater and seeking to recover for damages to his vessel caused by the stranding. The district court found that the vessel's grounding was caused 25% by the failure of the Coast Guard to maintain the breakwater light and 75% by the fault of the Whalen. The court held, however, that the settled admiralty rule of divided damages required each party to bear one-half of the damages to the vessel. The Court of Appeals[32] for the Second Circuit affirmed this judgment. The owner of Whalen appealed to the Supreme Court. Mr. Justice Stewart delivering the opinion of the Court said:

> "More than a century ago…… this Court established in our admiralty law the rule of divided damages. That rule, most commonly applied in cases of collision between two vessels, requires the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their fault may have been….It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice…..

He concluded:

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

Consequently, in U.S. courts today, while the United States has never

(30) 421 U.S. 397, 1975 AMC 541.
(31) 1973 AMC 930 (E.D.N.Y. 1973)
(32) 497 F.2D 1036, 1974 AMC 756 (1974).

accepted Collision Convention 1910, vessel collisions are adjudged under the proportionate fault rule, at least in respect to responsibility between the vessels.(33) Equal division of damages applies only where the parties are equally at fault or when their comparative degrees of fault cannot be measured fairly.

3.3. Damage caused by *force majeure*

The liability for collisions is fault-based. Article 319 of the *Maritime Code* (Art. 2 of the Collision Convention 1910) states that if the collision is caused by "*force majeure*" (irresistible force), or if its causes are unknown, each party bears its own losses. A "*force majeure*" is one which cannot be controlled by the parties, for example, a sudden unpredicted storm of such intensity as to cause a properly anchored vessel to drag its anchor and collide with another vessel.(34)

An unknown causes is something has no relevance to the fault of either party, even though it is not ascertained itself. Article 319 of the *Maritime Code* expressly exempts parties from being liable to each other, but says nothing about their liabilities to a third party. Since articles 320 and 321 of the *Maritime Code* are fault-based, it can be concluded that the colliding parties are not liable to the loss of a third party if they are proven to be free of fault in the collision.

4. EVALUATION OF FAULT

4.1. General

We have seen that arts. 320 and 321 of the *Maritime Code* (Arts. 3 and 4 of the Collision Convention 1910) only impose liability when there has been fault.(35) It is therefore important to investigate whether there has been negligent

(33) See, for example, *Self v. Great Lakes Dredge* & *Dock Co.,* 832 F.2d 1540 at p. 1545,1988 AMC 2278 at p. 2285 (11 Cir. 1987); *Joia v. Jo-Ja Serv. Corp.,* 1988 AMC 2259 at p. 2270 (1 Cir. 1987); *Pennzoil Producing Co. v. Offshore Express Inc.,* 1994 AMC 1034 at p. 1038 (5 Cir. 1991); *Exxon CO. v. Sofec Inc.,* 1995 AMC 1521 at pp. 1525-1526 (9 Cir. 1995), affd 517 D.S. 830,1996 AMC 1817 (1996).

(34) S*ee James River Transport Inc v. Nasenbulk* [1974] AMC 575 where during a 56-knot typhoon in Sasebo, Japan, two vessels lying at anchor in anchorage positions designated by the harbour authority collided after dragging their anchors. *Held:* that neither vessel was at fault, and each should bear its own damages.

(35) "Fault" implies blameworthy conduct that causes or contributes to a collision. *The British Aviator,* [1965] 1 Lloyd's Rep. 271, 277. Fault also involves negligence, "a failure to exercise that degree of the skill and care which are ordinarily to be found in a competent seaman." *The Llanover,* [1945] 78 Ll.L.Rep. 461; *The Boleslaw Chrobry,* [1974] 2 Lloyd's Rep. 308, 316.See generally Nicholas J. Healy and Joseph C. Sweeney, Establishing Fault in Collision Cases, 23 J.Mar.L. & Corn. 337 (1992).

conduct by one or both vessels and, if fault on both sides is found, to apportion the degree of blame between the vessels. The provisions of the Maritime Code provide very little guidance concerning the evaluation of fault. However, as a collision is often caused by a vessel violating navigation regulations and rules, therefore, the evaluation of fault should be approached in the light of the Regulations for Preventing of Collisions at Sea (the Collision Regulations) (also known as the "COLREGS 1972"), adopted by the International Maritime Organization (IMO) in 1972, and as amended in 1981, 1987,1989 and 1993.(36) The Collision Regulations are designed not only to prevent collision but also to prevent the risk of collision. They have been introduced into the national law of every shipping nation in the world and are applicable "to all vessels upon the high seas and in all waters connected therewith." In UAE, all vessels (37) navigate in UAE water must comply with the Collision Regulations .In any case where a master does not comply with the Collision Regulations, the master is liable to pay fine AED 1000. (38)

4.2. The Collision Regulations

The Collision Regulations are divided into five parts. General rules (1-3); navigational rules (4-19); construction rules (20-31); signal rules (32-37); and the exception rule (38).

A discussion of all the Collision Regulations is beyond the scope of this work. Instead we examine a few central rules and the importance placed on them by case law in determining fault.

Rule 5 requires every vessel at all times to maintain "a proper lookout", which is generally interpreted as requiring a separate person stationed somewhere other than on the bridge where practicable, and in addition to the officer of the watch. Maintaining "a proper lookout" duty is a prerequisite for

(36) The International Regulations for Preventing Collisions at Sea, 1972, universally referred to as the "Collision Regulations 1972" or the "COLREGS 1972" were adopted by the Convention on the International Regulations for Preventing Collisions at Sea, at London, October 20, 1972 and came into force on July 15, 1977. See 1143 V.N.T.S. 346. The COLREGS 1972 were amended on November 19, 1981 (in force June 1, 1983), on November 19, 1987 (in force November 19, 1989), on October 19,1989 (in force April 19, 1991) and on November 4,1993 (in force November 4, 1995). The COLREGS apply in approx. 140 States.]

(37) For these purposes, 'vessel' includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water (Collision Regulations 1972 r 3 (a)); and 'seaplane' includes any aircraft designed to manoeuvre on the water [r 3 (e)). The Collision Regulations 1972, whilst not applying to a jet-ski, contain a standard of care to which the driver of a jet-ski should conform: see *Steedman v. Scofield* [1992] 2 Lloyd's Rep 163.

(38) See Rules and Regulations for Seaports 1985, Part 4; see also *Mercantile International, LLC v. United States of America,* 2007 AMC 814, where the court found that the only rules of sea road applied in UAE territorial water are the Collision Regulations .

safe navigation at sea, and the case law makes it clear that considerable weight is placed on ensuring that this duty is satisfied,(39) see as an example *The General VII* (40) where a collision occurred between the vessel Rora Head and motor tug General VII in the River Thames in 1985. The duties of vessels navigating there were prescribed in the Port of London River Byelaws 1978 which incorporated the International Collision Regulations, Rule 5 being relevant. One minute before the collision General VII was on the starboard bow of the Rora Head. The white stern light of General VII would have been visible to those on the bridge of Rora Head and if that light had been observed and carefully watched it would have become apparent that its bearing was closing. The stern light of General VII was visible to, and should have been observed by Rora Head at least two minutes before the collision. Likewise, the masthead lights and green side light for Rora Head should have been seen by General VII throughout the same period. The stern and starboard bow of Rora Head struck the ports side of General VII with such force as to cause General VII to roll over to starboard and capsize with loss of life.

It was held that both vessels were to blame for the collision because they failed to keep a good lookout

Rule 6 requires every vessel at all times to proceed at a safe speed so that 'she can take proper and effective action to avoid collision and be stopped within the distance appropriate to the prevailing circumstances and conditions'. The Rule lists many factors that shall be taken into account in determining what is a speed safe in the circumstances. These factors include the state of visibility, traffic density in the area, the maneuverability of the vessel herself and her stopping and turning ability, special lighting conditions at night, the state of wind sea and current, and the available depth of water. In subpara (b), the Rule comments specifically upon difficulties that may be encountered when using radar to determine the range of vessels or other objects in the vicinity. In the case of *The Roseline*,(41)the Roseline collided with the Eleni V six miles off the coast of

(39) American Courts have found that violation of the lookout rule set forth in Rule 5 is serious and results in the offending vessel being held wholly or partially at fault. See *In re Complaint of Pac. Bulk Carriers, Inc.*, 1980 AMC 2530, 2534-35,(2 Cir. 1980) (holding that vessel which failed, *inter alia*, to post a proper lookout was 100% at fault for collision); see also *Nicholes v. M/V Maya*, 1997 AMC 872, 885, (D.S.C. 1996) (noting that "the performance of lookout duty is an inexorable requirement of prudent navigation" (quoting *Anthony v. Int'l Paper*, 1961 AMC 1890, 1899, (4 Cir. 1961)).

(40) [1990] 2 Lloyd's Rep. 1. See also *The Sabine* [1974] 1 Lloyd's Rep. 465, where two vessels collided and the Court held that that both vessels were equally to blame, the proximate cause of the collision on both sides being failure to maintain a proper look-out.

(41) [1981] 2 Lloyd's Rep. 410.

Norfolk. The Eleni V was split in two and spilled much of her cargo of oil into the sea. Fog was thick at the time. Both vessels carried radar in working order. Each vessel knew of the other's presence at a distance of six miles. Three minutes before impact the Eleni V turned to port.

It was held that both vessels were at fault in not proceeding at safe speeds under the circumstances.

Further, in the *San Nicolas and Fraternity L,*(42) the plaintiffs' vessel, San Nicolas, came into collision with the defendants' vessel, Fraternity L at about 18.8 km in the access channel to the port of Buenos Aires. The main issue between the parties was who was to blame for the collision.

It was held that the collision was caused entirely by Fraternity L, in that she allowed herself to approach too close to the bank at an excessive speed, as a result of which she failed to correct her course in time. Fraternity L alone was to blame for the collision.

Rule7 deals with the risk of collision and requires every vessel in any condition of visibility to use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists.(43) In cases of doubt, such risk is deemed to exist. The Rule also requires that 'assumptions shall not be made on the basis of scanty information, especially scanty radar information'(44). This is particularly pertinent to so-called 'radar assisted collisions'. In the *MancuniumlDeepdale*(45) the scene of the collision was the South-Eastern channel in the River Mersey. The Mancunium was out-bound. The Deepdale was in-bound. Both vessels were in waters covered by the Collision Regulations, 1972 (the version prior to the 1983 version). The stem of the Mancunium collided with the port side of the Deepdale about one-third of the way along her length.

The court found that the Mancunium was substantially to blame because of the failure of those responsible for her navigation to hold her in control in a flood tide. The Mancunium had created a risk of collision by the unreasonable actions of those in charge of her. The Deepdale, however, was initially an innocent party. She was maintaining her course at a reasonable speed on the correct side of the channel, but when she saw a risk of collision she put her engines hard astern which rather than reduce the risk of collision in fact increased it. Her fault

(42) [1994] 2 Lloyd's Rep. 582.
(43) ` Collision Regulations 1972, r 7 (a).
(44) Ibid. r 7 (c).
(45) [1987] 2 Lloyd's Rep. 627.

was, however, less of a contributory factor than the Mancunium so that blame was apportioned two-thirds to the Mancunium and one-third to the Deepdale.

Rule 8 covers actions to be taken in circumstances where there is a risk of collision, It requires that 'any action taken to avoid collision shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship'.(46) Alterations of course shall be big enough to be obvious to the other vessel visually or by radar, and if necessary, the vessel shall slacken her speed or take off her way by stopping or engaging astern.(47) In *Maritime & Mercantile International, LLC v. United States of America,*(48) the crewboat Inchcape 14 and the tanker Yukon collided under a fog in the channel leading to the Port of Jebel Ali, located in Dubai, United Arab Emirates. The collision left the Inchcape 14 seriously damaged and in need of a tow into port. Plaintiffs (the owners of Inchcape 14 and the insurance company) claimed total damages resulting from the collision in the amount of $ 1,737,137.46.

The navigation of the vessels in the channel was governed by the International Regulations for Preventing Collisions at Sea, 1972 .

The Court found, on the facts and evidence, that Inchcape 14 was by far more culpable. In particular, the Court found that the Inchcape 14 violated Rules 2, 5, 6, 7, 8, 19 and 35. The Inchcape 14 was traveling at an unsafe speed and did not take the simple steps of posting a lookout on the bow and sounding a fog horn; Inchcape 14's failure to take these basic, prophylactic measures was inexplicable given the foggy conditions in the channel. Inchcape 14 (and this was the most serious fault of the day in the Court's view) violated Rule 8 by failing to undertake reasonable measures to avoid even the risk of collision when she made radar contact with the Yukon. At that moment, the Inchcape 14 had available to her several options to ascertain the risks of collision and avoid them. Yet, she ostensibly maintained her course, even though she alone had the option of leaving the channel, and she made no follow-up efforts to monitor the Yukon's course, speed, or location on her radar. It was the collection of these negligent acts that ultimately left the Inchcape 14 in the precarious position of steering into

(46) See *The Sanshin Victory* [1980] 2 Lloyd's Rep. 359 where the court found that both the vessels which collided were proceeding at unsafe speeds in restricted visibility, allowing a close-quarters situation to develop. What constitutes a close-quarters situation depends on the size characteristics and speed of the vessels concerned: see *The Verwa* [1961] 2 Lloyd's Rep 127 at 133, CA per Willmer LJ.

(47) Collision Regulations 1972, r 8 (e).

(48) 2007 AMC 814.

the Yukon (and, in fact, being off the Yukon's starboard bow) and making the unexpected port turn.

Rule 9 covers “narrow passages”. A vessel proceeding along the course of a narrow channel(49) or fairway (50) shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable starboard side as is safe and practicable.(51) In *The Nordic Ferry*,(52) collision occurred between the plaintiffs' vessel San Salvador and the defendants' vessel Nordic Ferry in 1987 in an area over which Harwich Harbour Board had jurisdiction. The main issues for decision by the Court were, inter alia, the geographical position of the collision.

It was held that on the evidence the position of collision was about one cable from the Fort Buoy in the dredged channel on the eastern side of mid-channel which was the correct side for Nordic Ferry and the wrong side for San Salvador. Nordic Ferry was not keeping as near to the outer limit of the channel as was safe and practicable as required by Rule 9 of the Collision Regulations. Whilst San Salvador was not being navigated at a safe speed in the prevailing weather conditions, a further and more serious fault was not keeping to her own side of the channel. This was the primary cause of the collision.

In *The Faethon*(53), a collision arose between the vessel Miaoulis and Faethon in 1983 close to the entrance to the port of Piraeus. Vessels entering or leaving the port had to comply with the Piraeus port regulations and the international Collision Regulations, Rule 9 being relevant.

It was held that the main cause of the collision was the failure of Faethon to keep as near to the outer limit of the fairway which lay on to her respective starboard sides as was safe and practicable in accordance with Rule 9 of the Collision Regulations. Her action limited the amount of water available for any incoming vessel and it made a collision with Miaoulis virtually inevitable.

(49) Prima facie ‘narrow channel’ means a channel bounded on either side by land, so that a vessel cannot navigate in any great width between the two banks. A narrow channel must have two boundaries which are close to one another; a stretch of water which on one side is open to an indefinite extent cannot be a narrow channel, see *The Treherbert* [1934] P 31.

(50) ‘Fairway’ means a dear passageway by water. Wherever there is an open navigable passage used by vessels proceeding up and down a river or channel, that may be said to be a fairway: The *Blue Bell* [1895] P 242 at 264, 7 Asp MLC 601 at 602, DC. See also The *Clutha Boat* 147 [1909] P 36, 11 Asp MLC 199; The *Lake Farragut* [1921] P 305. Cf *The Turquoise* [1908] P 148,11 Asp MLC 28 (where a vessel lying moored outside another vessel at a wharf was held not to be in or near a fairway).

(51) Collision Regulations 1972, r 9 (a).

(52) [1991] 2 Lloyd’s Rep. 591.

(53) [1987]1 Lloyd's Rep. 538.

Rule 10 covers traffic separation zones adopted by the International Maritime Organisation (IMO). Of note is the obligation that a vessel shall join a zone, which is generally located in a congested area, at as small an angle to the traffic flow as possible, and when crossing a lane in a zone, she shall do so as nearly as practicable at right angles.(54) Vessels less than 20m in length and sailing vessels must not impede steamships in the traffic separation zones.(55)

Rule 13 covers "overtaking vessels". An overtaking vessel must keep out of the way of all vessels she is passing. A vessel is deemed to be overtaking when coming up(56) from a direction more than 22.5 degrees abaft the beam. Of great significance is Rule 13(d) which confirms the adage 'once an overtaking vessel, always an overtaking vessel', in this way:

> 'Any subsequent alterations of the bearing between two vessels shall not make the overtaking vessel a crossing vessel within the meaning of these Rules or relieve her of her duty of keeping clear of the overtaking vessel until she is finally passed and clear'.

This rule applies to vessels in sight of one another. In the case of *The Iran Torab*,(57)a collision occurred between the vessels Tan and Iran Torab in the Khor Musa Bar Channel whilst proceeding in convoy due to the Gulf War in 1984. The Iran Torab took steps to overtake vessels in the line on their starboard side but a collision occurred with the vessel Tan.

It was held that the main cause of the collision was that the Iran Torab failed to keep out of the way of Tan and this was because Iran Torab steered a converging course and failed to keep a lookout by watching a vessel which was being passed very close on her port side. The Master of the Iran Torab took a decision to overtake Tan and his manoeuvres had to be judged on the basis that they were highly blameworthy and potently causative of the collision.

Rule 14 deals with the 'head-on' situation (when two vessels in sight of one

(54) Collision Regulations r 10 (c). In *The Nordic Clansman*,[1984] 1 Lloyd's Rep. 31, a vessel in entering the Arabian Gulf through the Straits of Hormuz, used the southerly lane instead of the northerly lane for inbound traffic as required by the Traffic Separation Zone for that area. Her Master was charged with breaching rule 10(d) of the Collision Regulations in that he had wilfully used the wrong traffic lane .

(55) Ibid. r 10 (j).

(56) A vessel is deemed to be 'coming up' with another when there is some proximity in space between them even though there is no risk of collision at that time: *The Nowy Sacz* [1977] 2 Lloyd's Rep. 91 t 96, CA.

(57) [1988] 2 Lloyd's Rep. 38.

another[58]are meeting on reciprocal or nearly reciprocal courses so as to involve risk of collision) as before, i.e. each vessel to alter course to starboard thus to pass on each other's port side.[59] Paragraph (c) is intended to avoid any possible conflict in manoeuvre by the respective vessels by providing that if there is any doubt as to whether a 'head-on' situation exists[60] each vessel shall assume that it does and act accordingly. In *The Argo Hope/The Bebington*,[61]a collision occurred in the Manchester Vessel Canal, the port bow of the Bebington striking the port bow of the Argo Hope at roughly a 30-degree angle. It was dark but the weather was fine and visibility good. There were local by-laws for navigating the Canal including a maximum permitted speed, but the rules for vessels approaching each other from opposite directions were essentially the same as the international rules (i.e., rule 14).

It was held that the Argo Hope caused the collision by altering to port but the Bebington's failure to judge correctly the speed and approach course of the Argo Hope and her failure to allow the Argo Hope as much room as possible by keeping well over to her starboard side contributed to the eventual impact. The Argo Hope bore the substantial blame (85 per cent) by wrongly altering to port and the Bebington (I5 per cent) by not accordingly navigating with sufficient caution as expressly required by the Canal by-law.

Rule 15 relates to a crossing situation (i.e. two vessels approaching each other from different angles so as to involve risk of collision) and again, the original rule applies: the one having the other on its starboard side to keep out of the way and, when applicable, to avoid crossing ahead of the other.[62] This rule applies to vessels in sight of one another.[63] In *"The Topaz" and "Irapua"*[64] two vessels (Topaz and Irapua) were collided at night off the east coast of Brazil. The weather was good; it was dark but visibility was good. The owner of

(58) For these purposes, vessels are deemed to be in sight of one another only when one can observed visually from the other.
(59) Collision Regulations 1972, r 14(a).
(60) Such a situation is deemed to exist when a vessel sees the other ahead or nearly ahead and by night she could see the masthead lights of the other in a line or nearly in a line and/or both sidelights and by day she observes the corresponding aspect of the other vessel.
(61) [1982] 2 Lloyd's Rep. 559.
(62) *Normandie (Owners of Norwegian SS) v. Pekin (Owners of British SS), The Pekin* [1897] AC 532 at 536, 537; vessels continue to be crossing vessels until the crossing is completed: see *Orduna (Owners) v. Shipping Controller* [1921] I AC 250, HL (where it was held that vessels were still crossing vessels, although the green light of one, after being originally observed on the port bow of the other, had passed to ahead or slightly to starboard of the bow of the first vessel); *Shipping Controller v. Athena* (1923) 14 Ll. L Rep. 515 at 517, HL per Lord Sumner (commenting on *Orduna (Owners) v. Shipping Controller* supra).
(63) For the meaning 'in sight of one another' see note 80.
(64) [2003] 2 Lloyd's Rep 19.

Topaz brought an action against the owner of the Irapua. The owner of Irapua accept that those on board the Irapua were in breach of Rules 7, 8, 15 and 16. They acknowledge that this was a serious fault, which contributed significantly to the collision. The court found that the case was a crossing case; that Topaz was the stand-on vessel and Irapua the give-way vessel and that Rules15-17 of the Collision Regulations 1972 were accordingly applicable. The court also found that Topaz was also to blame for the collision

The court having regard to both blameworthiness and causation apportioned liability between the two vessels at 80 per cent to Irapua and 20 per cent to the Topaz.

Rule 16 requires a vessel that is required to keep out of the way of another vessel to take early and substantial action in order to do so when possible. Such action can be taken by alterations in either course or speed or both. In *The Estrella*,(65) the two vessels were in a crossing situation and the court decided that the primary blame lay with the Setubal being the 'stand-on' vessel in failing to keep her course and instead making successive slight alterations to port when the two vessels were still a considerable distance apart. The fault of the Estrella, which had less of the blame attributed to her, lay in her failure to take more positive action as the 'give-way' vessel in ample time. This case illustrates the significance of the requirement of Rule 16 to take 'early and substantial action to keep well clear'.

Rule 17 requires the vessel with the right of way to maintain its course and speed. It does, however, have a right to make precautionary manoeuvres to avoid collision, if the vessel obliged to yield does not appear to be doing so. This right to take precautionary action becomes a duty, if the vessels are so close that a collision cannot be avoided solely by precautionary action by the second vessel. This duty to act applies irrespective of whether the vessel itself is responsible for the initial danger, and breach of the duty may result in liability, see *The Angelic Spirit and Y Mariner*,(66) where the vessel Angelic Spirit and the vessel Y Mariner came into collision off the west coast of California. The vessels' courses were initially crossing at an angle of about 16 deg. The collision occurred between the starboard bow of Y Mariner and the port side of Angelic Spirit in way of No 6 hold at an angle of about 40 deg. leading forward on Angelic Spirit.

It was held that both vessels were to blame for the collision. Y Mariner was

(65) [1977] 1 Lloyd's Rep. 525.
(66) [1994] 2 Lloyd's Rep. 595.

the giveway vessel but failed to take early and substantial action to keep clear of Angelic Spirit; instead, she made a small alteration in course to port which was difficult to detect and thereafter failed to take bold action to keep out of the way of Angelic Spirit; finally, she failed to put her engines full astern at the last and she should bear the greater share of the blame. Angelic Spirit was also partly to blame, in that she failed to keep a proper lookout and did not judge the situation correctly; when a stand-on vessel took action as permitted by Rule 17(a) (ii) it had to be bold action which did not make matters worse; the action taken by Angelic Spirit was insignificant action which did not improve matters and she failed to put her engines full astern at the last. Y Mariner was found to be 70 per cent to blame and Angelic Spirit was 30 per cent to blame for the collision.

4.3. Abolition of Presumptions of Fault

There are a number of presumptions in collision law that are directed to the issue of fault. When a moving vessel collided with an anchored vessel there has tended to arise a presumption of fault against a moving vessel. To counteract such a presumption the owner of the moving vessel would probably have had to bring conclusive evidence of one or more of the following lapses on the part of the stationary vessel: (a) that the anchored vessel was improperly positioned, (b) that the anchored vessel was unlit or improperly lit at night; (c) that the anchored vessel had failed to maintain a watch where the circumstances required it; or (d) that the anchored vessel had failed to take adequate steps to avoid the collision.

Presumption of fault also used to arise when a vessel's master had breached any one of the Collision Regulations. That such infringement *per se* should establish prima facie fault in law could lead to injustice and this injustice was remedied by article 6 of the Collision Convention which abolished all "... legal presumptions of fault in regard to liability for collision". Therefore, the plaintiff is required to prove the causal connection between the fault of the colliding vessel(s) - the violation of one or more of the Collision Regulations - and the collision; otherwise no damages may be recovered. Art. 323 of the *Maritime Code* adopted same rule.(67)

4.4. Vicarious Liability of Shipowner

In most instances, collisions result from the negligence of the crew. The shipowner is liable, accordance to the general principles of employment law, for the negligence of his master and crew, provided that their negligence act was

(67) Art. 323 of *the Maritime Code* provides that:

"لا تسري القرائن القانونية على الأخطاء فيما يتعلق بالمسئولية الناشئة عن التصادم".

"(Rough translation) *Legal presumptions of fault shall not apply to liability arising out of collision*".

committed in the course of their employment.(68) This liability is called "vicarious" because it results *ipso facto* from his character as employer. In order to establish liability, the plaintiff need not allege or prove that the shipowner himself was negligent, but simply that a contract of employment existed between the wrongdoer and the shipowner.

Two questions are involved in this topic of Vicarious Liability: Who for this purpose is to be regarded as a servant? What is the ambit of his employment? The master of the vessel is the owner's employee, and so are all the members of the crew. Beyond this, the answer is less certain, for not everyone who is employed is a servant. The owner of a big vessel which cannot leave the dock under her own power must have her towed into open waters and this work is usually done by independent contractors. The shipowner will make an agreement with a tug owner. Naturally, the master and crew of the tug are the employees of the tug owner and not the employees of the owner of the towed vessel. The former, and not the latter, is liable for their torts, at least in the ordinary case. The tug owner is known as an independent contractor, a person who carries out a given piece of work at his own discretion independently of his employer.

Prima facie, therefore, in the process of towing the tug is responsible for any collision which might happen during the conduct of the work. This is the law when, as is the case with the towage of dumb barges; the whole of the motive power is in the tug and the duty of those on board the two towards the tug appears to be substantially confined to following her manoeuvers,(69) and the two is entitled to act on the belief that the tug will be reasonably well navigated.(70) It will be noted, however, that in the operation of towing a vessel the officers and crew and even the engines of said vessel are not altogether passive. Rather the work is a cooperative endeavor in the manoeuvers to be performed by both the tug and the towed vessel. In the ordinary way, therefore, where the master and

(68) Owners were not liable for acts held to have been committed outside the course of their employee's employment in The *Druid* (1842) I Wm Rob 391 (where a tug master, authorised to demand dues for towing, maliciously detained and damaged a ship whose master refused to pay dues). A question may arise whether the general or temporary employer of an employee is liable for the employee's act: see e.g. *The Louise* (1901) 18 TLR 19, DC (where a gang moving a ship in a dock were held to be the employees of the dock company). The liability of the owner as a rule rests on his responsibility for the acts of his employees and agents, and does not depend on the ownership of the vessel.

(69) *The Jane Bacon* (1878) 27 WR 35, CA. When a tug sounds the regulation whistles, the tow need not sound her whistle *(The Marmion* (1913) 29 TLR 646); but see now the Collision Regulations 1972 as to when the tug or tow takes control, and as to the liabilities of the tug and tow towards one another and third persons.

(70) *Comet Lightship (Owners) v. The WH No 1 (Owners) and The Knight Errant* [19I I] AC 30, II Asp MLC 497, HL.

crew of the tug navigate in a negligent manner, both the owners of the tug and the tow are liable.(71)

This is quite unsatisfactory from the point of view of the tug owner, for he is liable for torts committed by the master and crew of his tug though control has passed to the owner of the tow. For this reason, towage contracts usually contain a clause providing that while the towage proceeds, the master and crew of the tug shall cease to be the servants of the tug owner. From then on they become the servants of the owner of the tow. Such towage contracts are regarded by UK law with favour. The law of the UK, in treating tow and tug as one vessel,(72) regards the control and responsibility for the operation as resting with the tow although the motive power is provided by the tug. Thus in *The Niobe*(73) the tug Flying Serpent was towing the vessel Niobe under towage contract terms. Both tug and tow collided with the vessel Valletta. The Niobe was keeping a poor look-out.

(71) Article 315/1 of the *Maritime Code* provides that :
"تسأل كل من السفينة القاطرة والسفينة المقطورة بالتضامن بينها عن الأضرار التي تلحق بالغير بمناسبة القيام بعملية القطر"

"(Rough translation) *The tug and two shall be jointly liable for damage caused to third parties arising out of a towage operation"*. In case of a collision between a tug and her tow causing damage, a liability arises in favour of the one and against the other if the collision is due to the other not fulfilling her duties under the contract of towage. The tug owners are not responsible if the towing becomes impossible through no fault of theirs; nor can they recover compensation from the owners of the tow for damage incurred by the tug owing to dangerous circumstances without misconduct of the tow. The owners of the tow are liable for damage arising to the tug from improper orders of the tow, for example to get connection. Art. 316 *Maritime Code* provides that:
"1- تكون السفينة القاطرة مسئولة عن الأضرار التي تلحقها بالسفينة المقطورة ما لم يثبت أن الضرر نشأ عن قوة قاهرة أوحادث مفاجئ أو عيب ذاتي في السفينة المقطورة أو خطأ من ربانها.
2- أما الضرر الذي يلحق بالسفينة القاطرة فلا تسأل عنه السفينة المقطورة إلا إذا كانت سببا في أحداث هذا الضرر".

"(Rough translation) *1.The towing vessel shall be liable for any damage which it causes to the vessel being towed unless it is established that the damage arose out of force majeure or unforeseeable event or inherent defect in the vessel being towed or through a default on the part of the master thereof.*
2. As for damage caused to the towing vessel the vessel in tow shall not be liable therefore unless it was instrumental in causing such damage." See *Crowley Marine Services Inc. v. Maritrans, Inc*., 2006 AMC 1246, (9th Cir. 2006), where a tanker that was required to have two escort tugs while crossing a passage of Puget Sound arranged with the tugs that it would come from behind and gradually overtake and pass between them, whereupon the tugs would take up their positions on the sides of the tanker to complete the escort maneuver. In attempting to execute this plan, one of the tugs veered off course and the tanker ran into it. The trial judge assessed seventy-five percent of the fault against the tug and twenty-five percent against the tanker.

(72) Under the *Maritime Code*, a tug and tow are generally regarded as separate vessels and there is no rule that the tug is a servant of the tow.

(73) (1888) 13 PD 55. See *The Socrates and The Champion* [1923] P 76 (revsd on the facts [1923] P 162, CA) (where, the rug and tow having been held in fault for jointly participating in a negligent operation, the court refused to apportion liability between them and held them jointly and severally liable for half of the third vessel's damage).

Had she observed Valletta, the collision would not have occurred. The Niobe's owners denied liability for the negligence of Flying Serpent on the grounds that they were not their servants but independent contractors.

It was held that the Niobe was responsible for the Flying Serpent's negligence on the basis that in law the tow had control over the tug.

American law takes a less favourable view towards towage contracts, seeing them as being contrary to public policy. US courts instead have worked out the concept of the "dominant mind", the upshot of which is that only that vessel is liable if its people are actually in control of the operation. If the tug was the “dominant mind” and was negligence then the innocent tow is not liable either *in rem* or *in personam*(74) , and since it is the tug which is doing the pulling, it is the "dominant mind". Where, in the other hand, the tow is the “dominant mind” or its fault or unseaworthiness contributed to the collision, it is liable.(75)In the leading case of *Bisso*,(76) the U.S. Supreme Court invalidated contractual clauses creating fictitious employment, as when the master and crew of the tug become the master and crew of the tow, as well as when the tug is immunized from liability for negligence in performing the towage service.

It is submitted that the more practical view which is in accord with Maritime business is to recognize the validity of fictitious employment in a towage of dumb barges and dead-vessels, but not in a towage of vessels with a crew and engine engage in the cooperative effort of towage regardless of whether the tug or the tow is the dominant motive power.

The situation is less complicated where the vessel in fault has a pilot on board. The pilot is regarded as the shipowner’s agent and the latter is responsible for the former’s negligence, even if the pilotage is compulsory (i.e. a pilot who was required by law to board the vessel and guide her through certain narrow canals or harbours which posed special dangers because of their configuration, depth or obstructions). Article 5 of the Collision Convention 1910,(77) eliminated

(74) *The Eugene F. Moran v. New York Central & Hudson River R. Co*., 212 U.S. 466, 29 S.Ct. 339, 53 L.Ed. 600 (1909); *Curtis Bay Towing Co. v. The Fairwill*, 1953 AMC 195 (E.D.Va.1952).

(75) *Triangle Cement Corp. v. Towboat Cincinnati*, 280 F.Supp. 73 (S.D.N.Y. 1967), affirmed 393 F.2d 936 (2d Cir. 1968).

(76) *Bisso v. Inland Waterways Corp*., 349 U.S. 85 75 S.Ct. 629, 99 L.Ed. 911 (1955).

(77) Art. 5 of the Collision Convention 1910 provides: “liability imposed by the preceding Articles attaches in cases where the collision is caused by the fault of a pilot, even when the pilot is carried by compulsion of law”. Maritime Code, art. 322 states:

"تترتب المسئولية المقررة في هذا الفصل على التصادم الذي يقع بخطأ المرشد ولو كان الإرشاد إجباريا."

‘(Rough translation) *Liability imposed in this section shall apply in respect of collision caused by the fault of a pilot even though the pilotage is compulsory’.*

the old defence of compulsory pilotage, which had formerly been available to the vessel where the collision had resulted from an error or other fault of a 'compulsory pilot'.(78)

In the United Kingdom, the defence of compulsory pilotage was eliminated by the Pilotage Act, 1913, which, at sect. 15(1), made the shipowner "answerable" for the fault of compulsory pilots. In *Workington Harbour Board v. Towerfield (Owners),*(79)this answerability was held even to preclude the shipowner recovering for damages to his own vessel caused by the negligence of the compulsory pilot. The wording of the Pilotage Act 1987,136 at sect. 16, may overcome this particular bar to recovery, but it would appear that the vessel and its owner would still be responsible for damage caused by the compulsory pilot's negligence to other vessels or to shore installations.(80)

In the United States, American law draws an unwarranted distinction between the "voluntary pilot," who is taken on voluntarily, and the "compulsory pilot," who is mandated by a statute or local regulation. The voluntary pilot is considered to be the same as any crew member, and his fault is fully attributable to the vessel owner.(81) A compulsory pilot's fault, however, cannot be imputed to the shipowner personally; the doctrine of *respondeat superior* does not apply. At most, the vessel is liable *in rem* since the compulsory pilot's negligence is attributable to the vessel.(82)

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(78) The nautical reason for this rule is that the pilot is merely an advisor to the master, who remains at all times responsible for the proper navigation of the vessel. The master in his discretion may still countermand the orders of the pilot. But if he accepts absurd advice from the pilot or rejects or ignores sensible advice, the vessel and its owner are liable rather than the pilot. The other reason for this rule is probably one of public policy. The injured vessel has an action against the vessel in fault and is not to be put off with an action against the pilot who will never have the means to make good the loss. Liability for negligence being dependent on control, it is understandable that even the shipowner is not liable, if he has lawfully divested himself of it.

(79) [1951] A.C. 112.

(80) See *Marsden,* 12 Ed., 1998 at paras. 8-05 and 8-06 and para. 12-15. note 40.

(81) *Complaint of American Export Lines Inc.,* 620 F.Supp. 490 (S.D.N.Y. 1985); *United States v. The Westervelt*, 135 F.Supp.596,599 (S.D.N.Y. 1955). But see *United States v. Nielson*, 1955 AMC 935 (1955), where a towing company contracted to furnish two of its tugs to move a steamship. In performing the service, one of the tugboat captains went aboard the steamer and took charge of her as pilot. Allegedly because of his negligence, damage was done to a tug belonging to his actual employer, the tugboat company. The contract contained a "fictitious employment" clause, providing that a tugboat captain going aboard the steamer would become the "servant of the owners of the vessel assisted." The towing company brought suit for the damage on the theory that the captain's negligence must be answered for by his "employer" under this clause. Apparently as a matter of construction of the contract, the Court held this liability could not be brought home to the steamer.

(82) In *The China*, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67 (1868) the Supreme Court held that a vessel operated by a compulsory pilot is liable *in rem* for the negligent acts of the pilot. In *Mount Washington Tanker Co. v. Wahyuen Shipping, Inc.,* 833 F.2d 1541,1542, the court considered a

It may happen that the vessel is chartered by the owner to another person who in turn appoints the master and crew as in the case of a bareboat charter. Under these circumstances, there are some authorities who maintain that the owner can no longer be held responsible for the acts of the master appointed by the charterer, on the ground that the former did not appoint the master. The weight of authority; however, is to the effect that the owner continues to be responsible to third persons for the acts of the master, even if the latter is not appointed by him because he is the only one who appears to have control of the vessel in the certificate of registration, to which third parties look.(83)

The more practical view which is more in accord with modern shipping practices is to exculpate the shipowner in an arms-length bareboat charter arrangement where the charterer not only appoints the master and the entire crew but has full control, management and supervision of the vessel and where such charterer represents himself to be the disponent owner of the vessel, such as issuing Bills of Lading in its name. The case is entirely different in a time or voyage charter where the charterer has only the right to load the vessel and indicate ports or places at which the vessel shall call but has no jurisdiction or control over the acts of the master, and should therefore not be held liable for damages caused by the negligence of the latter in handling the vessel.(84)

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shipowner's motion for summary judgment on the grounds that at the time of the collision the moving vessel was under the control of a compulsory pilot. The court stated that where a moving vessel collides with a fixed object there is a presumption that the moving vessel is at fault and the owner may escape liability "only where the pilot is actually in charge of the vessel and solely at fault."

(83) See *Maritime Code* art. 255 which provides that:

"يضمن المستأجر رجوع الغير على المؤجر بسبب يرجع إلى استغلال السفينة".

"'(Rough translation) *The charterer shall indemnify the disponent owner against action taken against him by third parties attributable to use of the vessel." See The Lemington* (1874) 2 Asp MLC 475 (where a chartered vessel was held liable in an action *in rem* for collision, as the crew were the employees of the charterers, who were pro hac vice owners); The *Tasmania* (1888) 13 PO 110,6 Asp MLC 305 (where a chartered tug was held not liable in an action in rem for a collision with her tow, as the charterers had contracted with the owners of the tow to be see from the liability).

(84) See eg *Scott v. Scott* (18 I 8) 2 Stark 43 8 (it seems that the owner of a barge is not liable for the negligence of the employees of another person to whom he has lent it); *Fenton v. City of Dublin Steam Packet Co* (1838) 8 Ad & El 835 (where the owners kept their own crew on board and were to keep the vessel in good order, and they were held liable for the crew's negligence, although the crew were to be paid by the charterer); *Dalyell v. Tyrer (1858)* EB & E 899 (where a passenger who had contracted for a passage with the lessee of a ferry was held entitled to recover from the owners of a tug, hired by the lessee for one day, for injury arising from negligence of the tug's crew); *Hodgkinson v. Fernie* (1857) 2 CBNS 415 (it seems that the owner of a vessel hired by the government is not responsible for damage resulting from the master's obedience to the order of the officer commanding the expedition). As to when a charterparty amounts to a demise of the ship see *eg Associated Portland Cement Manufacturers (J91O) Ltd v. Ashton* [1915] 2 KB I, 13 Asp MLC 40, CA.

5. THE DIVIDED DAMAGE RULE

5.1. Collision involving Damage to Vessel Only

If both vessels involved in an accident were to blame and both suffered damage, the question arises of how the losses should be allocated. If we assume, for the sake of simplicity, that both vessels were equally to blame, and that vessel A has suffered damage amounting to 40% and vessel B to %80, there are two ways in which we could expect the settlement to be calculated:

a) the losses are added together and then divided by the amount of blame apportioned to each vessel (i.e. 120:2 = 60). Vessel A, which has suffered the lesser amount of loss, has to pay the difference between its actual loss and its contribution (i.e. 20) to B. This way of calculating contributions to be paid under the settlement is called the single liability principle; or

b) each vessel covers the proportion of the opposing party's loss which corresponds to its own degree of fault. A therefore covers one half of B' s damages (i.e. 40) and B covers one half of A's damages (= 20). The two claims are then set off, and the excess is paid by the vessel whose liability is the greatest (i.e. A pays 20 to B). This way of calculating contributions to be paid under the settlement is called the cross liability principle.

Normally the method chosen will not make any difference because the net result for each shipowner is usually the same, whichever method one takes. The position, however, becomes different when a shipowner is capable of invoking an overall limitation of liability. The same situation arises when another person, like mortgagee or insurer, has a secondary interest in the vessel or liability. For example, a P & I Club who has undertaken by the usual club rules the responsibility for one quarter of its member's liability is directly concerned with the amount of liability due from its member.(85) In the context of *Maritime Code,*

(85) P&I Club Rules; (U.K. Club): Collision with other Ship (Sec. 10). The liabilities, set out in paragraphs (A), (B) and (C) below, to pay damages to any other person as a consequence of a collision between an entered ship and any other ship, but only if and to the extent that such liabilities are not recoverable under the Running Down Clause contained in the Hull Policies of the entered ship: (A) One fourth of the liability arising out of the collision but excluding the liabilities listed in paragraphs (B) and (C) of this Section. (B) Liability, arising out of the collision, for or relating to: (i) Costs, damages and expenses of or incidental to the raising, removal, destruction or marking of obstructions, wrecks, cargoes, or any other thing; (ii) Real or personal property or anything except other ships or property on other ships; (hi) Pollution or contamination of any real or personal property except other ships with which the entered ship is in collision and property on those other ships; (iv) The cargo or other property oat he enters ship, or general average contributions, special

however, the problems have been all solved in a practical way. With regard to the overall limitation of shipowner's liability, the *Maritime Code* provides that limitations apply on the basis of single liability(86) Also, Club rules and hull policies usually state that compensation is to be settled on the basis of single liability.(87)

5.2. Collision involving Damage to Cargo

According to art. 321 of the *Maritime Code*(88) an owner of cargo on board a vessel whether it involved in a collision or not is entitled to recover his damages from the vessels in proportion to their relative fault. If one vessel is wholly to blame, there is no difficulty. The vessel at fault is liable for damage caused to the other vessel's cargo.(89)

The situation is more complex when both vessels are to blame. Where there are several tortfeasors, the rule under ordinary tort law is that they are all jointly and severally liable to the cargo owner. In other words, the cargo owner may sue either tortfeasor for the whole amount of his loss. However, the Collision Convention and the *Maritime Code* resolve the question differently. Article 321(90) of the *Maritime Code* (Art. 4 of the Collision Convention 1910) imposes

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charges or salvage paid by the owners of that cargo or property; (v) Loss of life, personal injury or illness. (C) That part of the Owner's liability arising out of the collision, which exceeds the sum recoverable under the Hull Policies of the entered ship solely by reason of the fact that the liability exceeds the valuation of the ship in those policies.

(86) *Maritime Code*, art. 139 provides that:
"إذا نشأ لمالك السفينة عن الحادث ذاته دين قبل أحد الدائنين فلا يسري تحديد المسئولية إلا بالنسبة إلى المبلغ الباقي بعد إجراء المقاصة بين الدينين".
"'(Rough translation) *If as a result of the incident itself the shipowner owes a debt to one of the creditors, liability shall not be limited save in respect of the balance of the sum after set-off of both debts."*

(87) N.Y.P.E. Form: New Both-to-Blame Clause; If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, Mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contract.

(88) See infra, note 17.

(89) See infra, note 27.

(90) *Maritime Code*, art. 321/1provides that:
" إذا كان الخطأ مشتركا قدرت مسئولية كل سفينة بنسبة الخطأ الذي وقع منها.....".
"(Rough Translation) *If a collision resulted from a fault of more than one vessel then the liability shall be assessed in proportion to fault of each one……".*

liability pro rata, i.e. each vessel is only liable for damage in proportion to its own degree of fault. If cargo on vessel B has been damaged for %100, and the vessels are equally to blame, the cargo owner can claim %50 from the owner of vessel A. Whether the cargo owner will also have a claim against the owner of vessel B, and the size of any such claim, will be determined by the contract of carriage contained, for example, in the charterparty or bill of lading and the applicable legal rules.(91)Because, if the fault is considered an error in navigation, such as a breach of the Collision Regulations 1972, the carrier is usually not liable at all. This is because of the errors in navigation exception in the Hague Rules, the Hague-Visby Rules, or other contract of carriage giving effect to such rules.(92) In that case, the cargo interests will be limited to the %50 recoverable from the non-carrier (vessel A). In the rarer situation- as we shall see later- where the fault has arisen from a failure to use due diligence before and after the commencement of the voyage, in terms of the seaworthiness of the vessel's navigational equipment or problems related to the crew, the remaining %50 of cargo damages will be recoverable from the carrier on the basis of a breach of the contract of carriage.

5.3. Cargo Rights against Unseaworthy Carrier

Although most collisions are caused by human error, the carrier, however, insulated from liability to cargo for errors in navigation and management,(93) as long as the shipowner has exercised due diligence in furnishing a seaworthy vessel.(94) Thus, to establish the liability of the shipowner, the cargo owner must

(91) See *The Giacinto Motta* [1977] 2 Lloyd's Rep 221 (where an exception clause was held to extend to an indirect claim by a party who had to pay the party who suffered the actual loss).

(92) Under the Hamburg Rules, exoneration in respect of errors in navigation does not exist.

(93) *Maritime Code*, art. 275/1 (B) provides that :
"1-يكون الناقل مسئولا عن الهلاك أو التلف اللاحق بالبضائع في الفترة ما بين تسلمه البضائع في ميناء الشحن وتسليمها لصاحب الحق فيها في ميناء التفريغ ما لم يثبت إن هذا الهلاك أو التلف ناشئ عن أحد الأسباب الآتية:
ب- الأخطاء التي تقع في الملاحة أو في إدارة السفينة من الربان أو البحارة أو المرشدين أو غيرهم من التابعين البحريين."
"(Rough translation) *1. The carrier shall be responsible for loss or damage sustained by the goods during the period from the time he takes delivery of the goods at the port of loading to the time he delivers the same to the person having the right to them at the port of discharge unless it is proved that the said damage or loss arose out of one of the following causes:*
B. Default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

(94) Art. 272/1(b) of the *Maritime Code* provides that:
"يلتزم الناقل قبل السفر وعند بدئه ببذل العناية اللازمة لجعل السفينة في حالة صالحة للملاحة وتجهيز السفينة وتطقيمها وتموينها على الوجه المرضي، وتهيئة العنابر والغرف الباردة وغيرها من أقسام السفينة لتلقي البضائع ونقلها وحفظها".
"(Rough translation) *The carrier shall be bound before and at the beginning of the voyage*to exercise due diligence to make the ship seaworthy and properly man, equip and supply the ship. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are

prove that the vessel was unseaworthy at the beginning of the voyage and that this unseaworthiness was a proximate cause of the collision and resultant damage.(95) Two common grounds of unseaworthiness in collision cases are manning deficiencies (failure to provide a competent crew) and equipment deficiencies (failure to provide the vessel with required navigational tools or to ensure their proper operation).(96)

When faced with the defense of error of navigation, the cargo owner should first inquire as to the expertise of the crew. It is axiomatic that the vessel "must ... be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skillful master of sound judgment and discretion."(97) The axiom, however, is not easily applied.

5.4. Collision involving Personal Injury or Loss of Life

If there has been personal injury or loss of life and both vessels were to blame, "they shall be jointly and severally liable".(98) An injured passenger on vessel B can thus sue vessel A for full damages, although vessel A is only partially to blame for the collision.

The degree of fault is therefore only relevant where a party claims a contribution. Article 321/3 of the *Maritime Code* (Collision Convention 1910, art. 4/3) establishes that liability to pay a contribution will arise where a party has paid more than its share. This means that there is no basis for a contribution claim unless one of the parties has covered a greater portion of the injured party's claim than that which corresponds to the amount it was to blame. If the vessels are equally at fault, vessel A only has a contribution claim against vessel B if it has covered more than half the total damage. A cannot demand a contribution

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carried, fit and safe for their reception, carriage and preservation.

(95) This, of course, oversimplifies the procedure. Where the Maritime Code applies the shipowner must prove due diligence to make seaworthy as a condition precedent to invoking the exception of navigational error. Under *Maritime Code*, cargo must prove unseaworthiness and causation; the burden then shifts to the vessel owner to prove "due diligence" or to disprove causation.

(96) E.g. in the case of a vessel not safely navigable owing to her improper trim (The *Argo* (1859) Sw 462), or not having a proper mast to carry her light (The *Hirondelle* (1905) 22 TLR 146, CA). Where breakdowns have occurred, it is negligent to omit regular checks on equipment: The *Louis Sheid* [1958] I Lloyd's Rep 606 at 615.

(97) *The Framlington Court*, 69 F.2d 300, 304 (5th Cir. 1934).

(98) Art. 321/3 of the *Maritime Code* provides that:
" وتكون المسئولية بالتضامن إذا أدي الضرر إلى وفاة شخص على السفينة أو إصابته ويكون للسفينة التي تدفع أكثر من حصتها الرجوع على السفن الأخرى".
"(Rough translation) *Liability shall be joint if the (collision) leads to the death or injury of a person on board the vessel and the vessel which has paid more than its share shall have a right of recourse against the other vessels."*

simply because it has covered his proportion of damage, while B, for whatever reason, has paid nothing. In *The Esso Malaysia*,(99) as a result of a collision on the high seas between a Latvian trawler and a Panamanian tanker crew members of the trawler were killed. On behalf of the deceased crew action was taken *in rem* against a sister vessel. It was agreed that the collision and resulting deaths were directly caused by the negligent act of the tanker which was found to be 85 per cent to blame. The trawler was only 15 per cent to blame.

Held: where death or merely injury had resulted from a collision, a claimant was at liberty to pursue his claim against either of the two offending vessels (or any of them if there were more than two) for full damages or, as the relevant legal expression would have it, he might sue 'jointly or severally'. Having once recovered full damages or a suitably negotiated compromise from the one party at fault, however, any concurrent action he might be taking against the other, or others, would be discontinued. The unsuccessful defendant then had a right to seek a contribution by way of indemnity from the other vessel(s) at fault, but only if the other vessel(s) would have been directly liable to the original claimant in the first place.

6. DETERMINATION OF DAMAGES

6.1. Categories of Losses

UAE does not have its own rules for the calculation of losses or damages arising from a collision. According to the international maritime practice, losses sustained by the colliding vessels, losses of or damage to cargo, loss of freight, costs and expenses associated with the collision, and their interest should be taken into account for the determination of compensation.

6.2. Burden of Proof

The burden is always on the plaintiff who claims damages to prove that the damage was caused by the negligence of the defendant. When the plaintiff has made out a prima facie case that the damage claimed is occasioned by the collision, the burden of proof then shifts to the defendant to show that the damage was not so occasioned, for example by showing that it is to be attributable to another or a concurrent cause for which the plaintiff is responsible.

6.3. Assessment of Damage

(99) [1974] 2 Lloyd's Rep.143.

The *Maritime Code* requires the parties causing damages to undertake the liability of compensation.(100) Damages sustained by a vessel may be calculated by referring to a reasonable cost of repair or to the market price of a similar vessel at the time of collision.

Damages sustained by a cargo should be assessed by considering the contract price of the cargo, the reasonable costs for carriage and insurance and a reasonable profit margin expected by the cargo owner. If the contract price is not suitable for this purpose, the market price of like cargo at the time of accident may be referred to. The loss of freight and other expenses can only be assessed in the particular circumstance concerned.

6.3.1. Total Loss and Damage

Compensations for damaged vessels can be categorized as either a total loss or damage.

6.3.1.1. Total loss

If a vessel is totally lost by the collision, her owner is entitled to recover her market value at the time and place of loss. This rule was announced in the early British case of *The Clyde*,(101) where it was said:

> The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be its market value ... In order to ascertain this, there are various species of evidence that may be resorted to; for instance, the value of the vessel when built. But that is only one species of evidence, because the value may furnish a very inferior criterion whereby to ascertain the value at the moment of destruction. The length of time during which the vessel has been used, and the degree of deterioration suffered, will affect the original price at which the vessel was built. But there is another matter infinitely more important than this - known even to the most unlearned - the constant change which takes place in the market. It is the market price which the court looks to, and nothing else, as the value of the property. It is an old saying, "The worth of a thing is the price it will bring."

And was later applied in the English case of *The Argonaftis*,(102) where a

(100) *Maritime Code*, art 320 provides:
"إذا نشأ التصادم عن خطأ إحدى السفن التزمت هذه السفينة بتعويض الضرر الناشئ عن التصادم" .
"(Rough translation) *If the collision is caused by the fault of one of the vessels, liability to make good the damages which has resulted from the collision attaches to that vessel*."

(101) 166 Eng. Rep. 998 (P.C. 1856) at pp. 998-99.

(102) [1989] 2 Lloyd's Rep. 487.

vessel Argonaftis collided with the vessel lfrikia while laid up in harbour, causing damage. The plaintiffs (owners of Ifrikia) obtained judgment on liability and the issue before the court was the amount of damages which the plaintiffs were entitled to recover from the Argonaftis. The Court reached the conclusion that the market value on the day of the collision of the lfrikia was US$900,000. After the collision the vessel was sold for scrap for US$700,000 and the damage done by Argonaftis by the collision reduced her value by US$200,000, which the plaintiffs were entitled to recover. The Court further noted that "in deciding what sum of money the plaintiffs were entitled to recover, the main principle to be applied was that the plaintiffs were entitled to receive as damages such a sum of money as would place them in as good a position as they would have been in if the collision had not occurred".

American Courts also adopted the "market value" rule in landmark case of *Standard Oil Co. v. Southern Pacific Co. (The Proteus-The Cushing).*(103) In that case the Cushing and the Proteus collided at night. The Proteus and her cargo were lost. The district court(104) found that both vessels were at fault and referred the question of damages to a commissioner. The commissioner reported that there should be awarded on account of the loss of the Proteus $ 750,000 with interest. Her owner contended that the commissioner's valuation of the Proteus was too low and appealed.

The Second Circuit first acknowledged that market value was the measure of damage said:

> The principle governing the computation of damages is that the sufferer by the collision which is the result of wrongdoing, whether by negligence or mistake, is entitled to *restitutio in integrum*. It is that, as far as practicable, the owner is to be restored to the same pecuniary position as if no collision had taken place, and where a vessel is totally lost the owner is entitled to recover the actual value, and this is defined in the admiralty courts to be her market value; that is to say, the gross sum for which she might have been sold immediately before the collision."(105)

The court then held that, although the Proteus was eighteen years old and had been built for $ 557,600 and renovated nine years earlier at a cost of $ 90,000, her value at the time of her sinking was $ 1,225,000, relying upon the testimony of an experienced surveyor-appraiser and two presidents of steamship

(103) 1925 AMC 779 (1925).
(104) 292 F. 560, (2d Cir. 1923).
(105) Ibid. at 566.

companies.

6.3.1.2. Valuation in absence of market value

When there is no market value for the vessel in the place and time of collision, the calculation might be based on the original construction cost or purchase value of the lost vessel, deducting from it the depreciation. In *E.I. DuPont de Nemours & Co. v. Robin Hood Shifting & Fleeting Service, Inc.*(106) an EDIC-3, a special purpose barge for carrying sulfuric acid, was sank as a result of the loss of power in one engine of the defendant's tug towing the barge with the anchor chain of a bulk carrier.

The district court appropriately applied the rule of "replacement cost less depreciation" to the valuation problem. The low bid for a replacement barge was $ 900,000. The average life of barges on the Mississippi is twenty years. The useful life of the EDIC-3, however, was thirty years, due to DuPont's superior maintenance program. Because the barge was built in 1960, it had a remaining useful life of six years. Applying 20% useful life remaining to the replication cost of $ 900,000, the court found replacement cost less depreciation to be $ 180,000. It then added $ 100,000 to this value to account for DuPont's superior maintenance program.

On appeal, the computation of the district court of $280,000 was affirmed by the Fifth Circuit.

The other rule adopted for calculation of damages in the absence of a "market value", is the value of the vessel to her owner as a 'going concern' at the time and place of the loss. The rule was applied in the Englsih case of *The Liesbosch, Dredger v. Edison SS*,(107) where the vessel *(Liesbosch)* was lost after having been dragged from where she was moored in Patras harbour into the open sea. This happened by reason of the negligence of the vessel *Edison.* At the time, *Liesbosch* was performing harbour dredging work under a contract which provided for severe penalties for delay. The lost dredger could have been replaced by a newly-purchased one, but her owners were not in a sufficiently good financial position to do so immediately. They were obliged at great expense to hire a replacement. In their claim for damages for the loss of their dredger they included the costs of hiring in addition.

Held: that although the damages in respect of the hiring of the replacement were not recoverable ….. since that was the direct result of the claimant's

(106) 899 F.2d 377 (5th Cir. 1990).
(107) [1933] AC 449, HL.

financial instability and not the defendant shipowner's negligence, nevertheless the claimant was entitled to the value of Liesbosch as a going concern and not merely her value as a somewhat old dredger.

It also applied in the American case of *The President Madison,*(108) where the vessel (President Madison) broke adrift from her mooring and collided with several vessels, including the Harvester, which was destroyed. The Harvester, a wooden stern wheel vessel, had been built for a particular service. She operated over a seventy-five mile stretch of the Skagit River. Sixty-three miles of the trip were on Sound, which required a sturdy vessel, and twelve miles were on the Skagit River, which required a vessel of shallow draft. The Harvester was sturdily built and had a light draft of but two feet. Efforts by her owners to find a suitable replacement were unavailing: the choices were either not strong enough to navigate the Sound or too deep in draft to navigate the Skagit River in all seasons.

The owners of the Harvester built a new boat, which had one hundred tons greater capacity, at a cost of $ 69,000. Their experts testified that a vessel identical to the Harvester would have cost between $ 60,000 and $ 65,000.Witnesses for the President Madison testified that the market value of the Harvester was between $10,000 and $ 13,000 at the time of the collision; that the cost of rebuilding her would be between $ 41,000 and $ 45,000; and, after deducting depreciation, that her value was $ 12,000 to $ 14,000. The trial judge found that the vessel had no market value, because of her peculiar construction, and that the cost of replicating the Harvester would be $ 65,000. He concluded her value "as a going concern" to be $ 35,500.

6.3.1.3. Damage to vessel

Where the vessel is not a total loss, the basic rule is that her owner is entitled to the difference between her value immediately before the collision and her value immediately after it. This difference can usually be calculated with some accuracy by adding (a) the amount reasonably spent for repairs and the expenses incidental to repairs, (b) the “detention damages,” if any, i.e., the expenses incurred and profits lost as a result of the vessel having been taken out of service for repairs, and (c) salvage charges, general average contributions, pollution avoidance costs, and other expenses necessitate by the collision.

(108) *American Mail Line, Ltd. v. Skagit River Navigation & Trading Co. (The President Madison)*, 1937 AMC 1375 (9th Cir. 1937).

a) Temporary repairs

Recovery will be allowed for the cost of temporary repairs incurred in a reasonable belief of their necessity. In *Compania Punta Alta, S.A. v. Dalzell*(109) a vessel (Marjory) was struck and, because she was loaded with cargo, immediate repairs were required to make her seaworthy and able to continue her voyage. An independent surveyor engaged by her owner advised that deferring permanent repairs would not increase their costs. The classification surveyor advised that permanent repairs could be deferred for a year until the next scheduled dry docking. Temporary repairs were made afloat by discharging only a small amount of cargo.

After temporary repairs were made, the vessel sustained propeller damage which necessitated her dry-docking. Permanent collision repairs were made contemporaneously with the dry dock repairs. The court affirmed the award of temporary and permanent repairs on the ground that the libellant had reasonably relied upon the advice of competent expert.

Clearly, whether the decision to make temporary repairs is reasonable is a determination which must be made and weighed in the light of the circumstances prevailing at that time.

b) Permanent repairs

Repairs of a permanent nature are a recoverable item of damages to the extent that they are proven necessary to restore the vessel to a condition as strong, serviceable, and seaworthy as it was before the collision.(110) However, the law does not require that the vessel be restored to its identical precollision condition. The issue was squarely presented to the court in *Zeller Marine Corp. v. Nessa Corp.*(111) In that case, a wooden scow sustained some relatively small cracks in her keelson, the breast bone of such a vessel, as a result of being struck by falling steel girders being unloaded from her hold. Her owner contended that it was entitled to have the vessel restored to its identical precasualty condition. If so, the repair would have entailed the removal of numerous hull planks at considerable expense to replace the slightly damaged keelson. The experts

(109) 1958 AMC 2007.

(110) See *The Kingsways* [1918] 14 Asp MLC 509, CA, where a ship had been temporarily repaired, and it was proved with reasonable certainty that, although permanent repairs had not been affected, they will be effected, her owners are entitled to recover a sum in respect of the prospective permanent repairs and of the prospective loss of time occupied in effecting them.

(111) 1947 AMC 43 (S.D.N.Y. 1946), aff'd, 1948 AMC 418 (2d Cir. 1948).

argued that any repair should be limited to fastening a sister plank alongside the keelson in the way of the damage. The court rejecting the proposition of an identical restoration, said:

> "*Restitutio in integrum* is the leading maxim in such cases, and where repairs are practicable the general rule followed by the admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred ....
>
> It seems unreasonable to read the Supreme Court's definition as if it meant to include everything that was not impossible. Similarly, to read the words, "restore the injured vessel to the condition in which she was" as if it meant restore to the identical condition, rather than restore to as good a condition, seems to me to be unreasonable. A construction of the Supreme Court's rule in the former manner attributes some virtue to a mechanical system of justice over a rational desire to make the libellant whole. The disparity between the extent of the damage and the cost of complete restitution reveals in all its exaggerated form the irrationality of a literal application of the maxim to the instant case.

The Second Circuit affirmed.(112)

c) Dry-docking

The cost of dry-docking a vessel will be allowed as an element of collision damages, provided that the proximate cause of the damage for which the vessel is dry-docked and the reasonable necessity of a dry-docking to make the vessel seaworthy are proven by objective evidence. Thus, in *Skibs A/S Dalfonn v. S/T Alabama*,(113)Texaco's tanker, the Alabama, sustained two holes in her bow which were temporarily repaired. Her owners decided to drydock her at the end of her current voyage and set about cleaning her tanks in preparation for the gas freeing required prior to hot work, an operation which extended her voyage by about ten days. The Commissioner appointed to determine the damages concluded that the dry-docking was not necessary and limited Texaco's damages to $ 22,668.26 of the $ 108,169.77 claimed.(114) The district court reduced the award even further to $ 20,162.33, and the court of appeals affirmed.(115) Texaco sought to convince the courts that the Coast Guard required the dry-docking by

(112) See *Zeller Marine Corp. v. Nessa Corp*., 1948 AMC 418 (2d Cir. 1948).
(113) 1967 AMC 267 (2d Cir. 1967).
(114) Ibid. at 269.
(115) Ibid. at 274.

issuing a temporary Certificate of Inspection for one voyage following the temporary repairs. The courts found that the Coast Guard's record was inconclusive and that Texaco itself had only requested permission to proceed to Galveston. After reviewing the evidence, the court held that "under the circumstances of this case, there was sufficient [evidence] to warrant the commissioner's conclusion that the Coast Guard did not require immediate permanent repairs." Therefore, Texaco's claim for dry-docking expenses and loss of profits during the tank cleaning and dry-docking were disallowed.

d) Concurrent repairs

Dry-docking not only takes the vessel out of service, but it is quite expensive as well. An owner does not dry-dock her vessel lightly, but only does so if the need is obvious, a diver's inspection has disclosed a need, or if dry-docking is periodically required by the rules of its classification society or by governmental regulation.(116)If the collision renders the vessel unseaworthy and requires a dry-docking to restore its seaworthiness, the owner will take advantage of the opportunity to perform necessary maintenance or will advance the work of the next periodic dry-docking. Conversely, collision damages which do not require immediate, but rather eventual, dry-docking are usually deferred until the next scheduled dry-docking and are done concurrently with owner's routine maintenance work and routine classification surveys. As a consequence of these circumstances, disputes often arise between the tortfeasor and the victim as to how the dry-docking expenses and lost time are to be allocated.(117)To further complicate matters, it sometimes happens that, between the collision and the dry-docking, a subsequent misfortune, such as heavy weather damage or another collision, occurs. How, then, is the cost of the dry-docking, and the loss of use attributable to it, allocated among the owner, the first tortfeasor, and the second or subsequent tortfeasors? In *The Ferdinand Retzlaff,* (118)the Cape Nelson was in collision with the Ferdinand Retzlaff in the English Channel in April 1965. Blame was apportioned 60 per cent to Cape Nelson and 40 per cent to Ferdinand Retzlaff. At the time of the collision Cape Nelson was trading under a long-term charter and was currently on a voyage from Monrovia to a West German port. She was thereafter fixed to perform a further round voyage, after which she was scheduled to go for routine survey and owners' repairs. The vessel was in fact sent direct to the designated repair yard where survey work, collision repairs and

(116) See *Stevens v. F/V Bonnie Doon*, 1982 AMC 294, 296-97 (9th Cir. 1981).
(117) See *Bouchard Transp. v. Tug Ocean Prince*, 691 F.2d 609, 611, 1982 AMC 2944, 2946-47 (2d Cir. 1982).
(118) [1972] 2 Lloyd’s Rep. 120.

owners' repairs were carried out at the same time. Her owners claimed damages for detention on the grounds that they had acted reasonably in having the collision damages immediately repaired, that the carrying out of owners' repairs and survey work at the same time as the permanent collision repairs did not lengthen the total time taken in repair or increase the cost of collision repairs. They denied that they should have to give credit to the owners of Ferdinand Retzlaff on the "grounds of a supposed advantage gained. The Ferdinand Retzlaff's owners counter-argued that the decision to effect permanent repairs immediately and at the previously chosen dry dock was unreasonable. Temporary repairs afloat would have been sufficient. At least, they argued, credit should be given for the time saved in bringing forward the special survey and owners' repairs so as to be performed concurrently with the collision repairs.

It was held that the test to be applied to determine whether an innocent shipowner had acted reasonably was that of the prudent uninsured owner under the same circumstances. On these facts the Cape Nelson's owners had acted reasonably in effecting permanent repairs immediately. Furthermore, it was reasonable for such repairs to be done at the dry dock they had already selected. The other shipowner was not entitled to receive credit for the saving of time in bringing forward the survey and owners' repairs for there was no evidence to show that this had adversely affected either the cost of the collision repairs or the time occupied by them. Damages for detention for the full period (13 days) were awarded

e) Loss of use of a vessel

When a profitable commercial vessel is disabled as a result of collision, its owner may recover the value of the use of that vessel during the period of its repair and return to service, provided that they had a commercial use for that vessel and no idle vessel to replace it.

Calculation of loss of use of a commercial vessel may be predicated upon charter hire, net of expenses under voyage or time charter, passenger revenue, or the value of fish not caught.

Detention damages, in the case of a vessel operating under a time charter, are usually measured by the loss of charter hire suffered by the owner under the customary breakdown clause, less any savings effected by reason of the fact that the vessel is not operating, e.g., in crew wages. Where the charter contains a "cesser of hire" or "off-hire" clause, providing that charter hire ceases in the

event of a grounding, collision, breakdown, or other such misfortune.(119) Computation of the owner's loss of use in such cases is simple when the charter is for a long enough period that it includes the period of repair. The days, hours, and minutes of off-hire are multiplied by the rate of hire. The owner saves very few expenses, unless it is economically feasible to repatriate some of the crew during detention. The time charterer has no standing to recover the loss of its damages from the tortfeasor.(120) For example, in the case of a long off-hire period the charterer may save $200,000 in hire, but because the chartering market has risen sharply since the charter was made, he may have to pay $350,000 for the use of a substitute vessel during the repair period. He will not be entitled to recover the $150,000 damages he has suffered ($350,000 paid for a substitute, less $200,000 off-hire). On the other hand, in the case of a "hell or high water" time charter, requiring the charterer to pay hire even during breakdown periods, so that the owner suffers no detention damages, it has been held that the charterer is entitled to recover the charter hire he has been required to pay during the repair period.(121)

In *Domar Ocean Transportation, Ltd. v. M/V Andrew Martin*,(122) the Domar 7001 was a tank barge used in tandem with the tug Cindy Cenac to transport petroleum products. The tug was owned by Cenac Towing, but had been under a long-term, open-ended "evergreen" charter(123) beginning four years before the barge was struck and damaged.(124) The tug sustained no physical contact or damage. As the barge was laid up for collision repairs, the tug had little to do. The integrated unit of the Cindy Cenac and the Domar 7001 was customarily chartered out at $ 373 per hour. The court allowed this rate, less the towage revenue earned by the Cindy Cenac while the barge was detained. On appeal, the court of appeals affirmed the award, holding that Domar had a proprietary interest in the barge and tug as a unit. The court further noted that Domar had spent $ 350,000 to provide the tug with a raised pilothouse to facilitate the navigation of the two vessels as a single unit. The court found that "even if the two vessels were not so uniquely designed to work with each other as to exclude other use, they were indisputably so operated that they functioned as an integrated unit. It held that Domar had the requisite proprietary interest in

(119) See, e.g., New York Produce Exchange Time Charter; Stand time Tanker Time Charter Party.
(120) See *Federal Commerce & Navigation Co. v. M/V Marathonian*, 1975 AMC 2436 (2d Cir. 1975).
(121) See *Venore Transp. Co. v. M/V Struma*, 1978 AMC 2146, 2150 (4th Cir. 1978).
(122) 1987 AMC 1370 (5th Cir. 1985).
(123) An "evergreen" contract is one which continues to renew itself automatically until one of the parties gives timely notice of its decision not to renew.
(124) See *M/V Andrew Martin*, 1987 AMC 2146 at 1372-73.

the combination and that the Domar 7001/Cindy Cenac unit was physically damaged through [the] Andrew Martin's stipulated negligence.

When the vessel is operating under a voyage charter at the time of the collision, the calculation of detention damages is more difficult than it is when she is operating under a time charter. In some cases the courts apply a three-voyage rule, i.e., the detention damages are calculated on the basis of the average of (1) what the daily earnings of the vessel on the collision voyage would have been, but for the collision, (2) the actual daily earnings on the voyage immediately preceding the collision, and (3) the actual daily earnings on the voyage immediately following the collision voyage. In *Marine Transport Lines, Inc. v. M/V Tako Invader*,(125) seagoing petroleum Barge MBC-2 was detained 14.3 days for collision repairs and, as a result, missed one voyage of twelve to fifteen days. The court applied the "three voyage rule" and determined that MBC-2 earned an average revenue of $ 105,000 per voyage. Under the “three voyage rule,”(126) the court determined the charter-hire rate for the voyage immediately preceding the collision, the charter-hire rate during the voyage of the casualty, and the charter-hire rate of the first voyage succeeding the casualty, and averaged all three.(127) The court then subtracted $ 25,255 for the approximate variable costs of the three trips and computed the value of the loss of use to be $ 79,745. The defendant complained that no deduction was made for a "utilization factor" to account for the fact that the vessel was not constantly at work, but the court affirmed, saying: "Because the expected length of the Marine Guardian's impending voyage approximately equalled the number of days she was detained for collision repairs, a probable utilization rate of 100% permitted the district court to arrive at Marine Transport's detention damages with reasonable certainty." (128)

Use of the "three voyage rule" is inappropriate, however, when the charter market rapidly rises or falls. Thus, in *The Gylfe v The Trujillo*,(129) the court held that because the chartering market was declining rapidly, inclusion of the voyage prior to the collision voyage would result in an excessively high estimate of profits lost during the detention period. There was evidence that a charter was being negotiated at the time of the collision,

(125) 37 F.3d 1138, 1995 AMC 622 (5th Cir. 1994).
(126) See *Delta S.S. Lines, Inc. v. Avondale Shipyards*, Inc., 747 F.2d 995, 1000, 1985 AMC 2554, 2560 (5th Cir. 1984); *Kim Crest, S.A. v. M/V Sverdlovsk*, 753 F. Supp. 642, 650, 1991 AMC 1364, 1375 (S.D. Tex. 1990).
(127) See M/V Tako Invader, 37 F.3d at 1140-41, 1995 AMC at 625-26.
(128) Id., 1995 AMC at 626.
(129) 1954 AMC 233 (2d Cir. 1954).

but the negotiations had to be abandoned because of the collision damage. The court accepted the rate offered by the prospective charterer, pointing out that the result was almost the same as it would have been had the collision and post-collision voyages been averaged.

A bareboat or demise charterer is one who charters the whole of the vessel, pays hire continuously, often insures the vessel, and supplies the crew, fuel, and consumable stores. Such a charterer is considered to be the owner *pro hac vice*, i.e., for the particular term of the charter, and may maintain an action for damages to the vessel and for loss of use. This issue was decided by the Fifth Circuit in *Bosnor, S.A. De C.V. v. Tug L.A. Barrios:* (130)

> "The question presented is whether Reyna had a sufficient proprietary interest in the Cheramie Bros. 101 to escape the grasp of Robins and Testbank. Reyna asserts that its status as a bareboat charterer of the barge confers on it the necessary proprietary interest.
>
> We agree. Robins itself suggests that a bareboat charterer has a proprietary interest in the vessel chartered. "The district court allowed recovery on the ground that the respondents had a "property right' in the vessel, although it is not argued that there was a demise ...." A bareboat charterer stands in the shoes of the owner of the vessel for the duration of the charter and is responsible for managing and maintaining the vessel; the shipowner merely retains a right of reversion. Additionally, if the vessel is damaged, the charterer is ordinarily responsible to the shipowner for the damage."(131)

f) The Lisbon Rules

In an effort to unify the widely varying methods of assessing damages in collision cases, the Comittee Maritime International adopted the *CMI Lisbon Rules on Compensation for Damages in Collision Cases (The Lisbon Rules)* in 1987. These rules are neither statutory in form nor intent but are designed as a set of principles recommended for voluntary adoption by shipowners, insurers, and, where appropriate or necessary, by courts. They could also be adopted by states as model laws. The *Lisbon Rules* are a practical set of guidelines designed to deal

(130) 1987 AMC 2956 (5th Cir. 1986).

(131) *Ibid.* at 2964-65 (alterations in original) (quoting *Robins Dry Dock & Repair Co. v Flint*, 275 U.S. 303, 308, 1908 AMC 61, 62 (1927)); see also *Dow Chem. Co. v. M/V Roberta Tabor*, 1987 AMC 2170, 2181-82 (5th Cir. 1987) (holding charter party was not prevented from suing owner of chartered tug for damages); *Sutton River Serv., Inc .v. Inland Tugs Co.*, 1985 AMC 858, 863 (S.D. Ill. 1984) (holding charter party could recover damages for lost profits from owner of negligent vessel).

with problems that may arise out of a collisions, including the following:

i. damages for the total or partial loss of a vessel, and

ii. the method of calculating damages for loss of use of a vessel during the time required for repairs,

Rule I Total Loss

1. In the event of a vessel being a total loss, the Claimant shall be entitled to damages equal to the cost of purchasing a similar vessel in the market at the date of the collision. Where no similar vessel is available, the Claimant shall be entitled to recover as damages the value of the vessel at the date of the collision calculated by reference to the type, age, condition, nature of operation of the vessel and any other relevant factors

2. Damages recoverable in the event of a total loss shall also include:

(a) Reimbursement of salvage, general average and other charges and expenses reasonably incurred as a result of the collision.

(b) Reimbursement of sums for which the Claimant has become legally liable and has paid to third parties in respect of such liability, arising out of the collision by reason of contractual, statutory or other legal obligations.

(c) Reimbursement for the net freight lost and the value of bunkers and vessel's gear lost as a result of the collision and not included in the value of the vessel ascertained in accordance with Rule I 1. above.

(d) Subject to reimbursement for any claim for loss of freight under paragraph (c) above, compensation for the loss of use of the vessel for the period reasonably necessary to find a replacement whether the vessel is actually replaced or not. Such compensation to be calculated in accordance with Rule II, less any interest which the Claimant may be entitled to receive under Rule IV in respect of the said period.

Rule II Damage to Vessel

1. In the event of a vessel being damaged but not being a total loss as defined in these Rules, the Claimant shall be entitled to recover as damages:

(a) The cost of temporary repairs reasonably effected, and the reasonable cost of permanent repairs.

The cost of those repairs shall include but not be limited to the cost of any necessary drydocking, gasfreeing or tank cleaning, port charges,

supervision and classification surveys, together with drydock dues and/or wharfage, for the time occupied in carrying out such repairs.

(b) Reimbursement of salvage, general average and other charges and expenses reasonably incurred as a result of the collision.

(c) Reimbursement of sums, for which the Claimant has become legally liable and has paid to third parties in respect of such liability, arising out of the collision by reason of contractual, statutory or other legal obligations.

(d) Reimbursement for the net freight lost and the cost of replacing bunkers and vessel's gear lost as a result of the collision and not included in the cost of repairs under Rule II 1.(a).

Although the *Lisbon Rules* do not have the force of law, they are designed to be used in negotiations as guidance on what can and cannot be recovered; they therefore contribute to the more efficient and practical handling of maritime claims.

6.3.2. Cargo Damage

Compensation for cargo damages should include: loss of cargo; loss in cargo value due to the damage; reasonable cost for repair, handling and preserving the damaged cargo; reasonable costs for rescuing, salvaging and cleaning the cargo; general average and other reasonable costs. The compensation for a loss of cargo should be based on the actual value of the cargo, which is calculated by deducting the expenses saved after the loss from the total cost spent on the cargo consisting of the cargo value at the time of shipment, the paid freight and the insurance premium. The compensation for damaged cargo should be based on either the cost of repair or, as the case may be, the actual loss, which is the balance after deducting the residue value and saved cost from the original cost of the cargo.

The compensation for losses arising from delay in delivering cargo should be determined by referring to the difference between the expected value of the cargo, which is a combination of the actual cost of the cargo and expected profit on the cargo, and the actual market value of cargo on arrival. (132)

(132) *Dunn v Buckttall Bros, Dunn v. Donald Currie & Co* [1902] 2 KB 614 at 622,623,9 Asp MLC 336 at 339, CA; *Koufos v C Czamikow Ltd, The Heron II*[1969] lAC 350, [1967] 3 All ER 686, [1967] 2 Lloyd's Rep 457, HL (fact that sugar prices fluctuate was known so that loss due to delay was foreseeable).

The expected profit must not exceed 10 per cent of the actual cost of the cargo concerned.

6.3.3. Damage to Other Structures

The principles pertaining to damages sustained by fixed property, such as bridges, wharves, submerged pipelines and cables, overhead cables, shore rigs and platforms, locks, and dams are essentially the same as those governing vessels. In *Pillsbury Co. v. Midland Enterprises*,(133) the defendant's tow broke up, and its drifting barges struck a marine cell and a dolphin, damaging both beyond repair. The court found that the marine cell had a useful life of forty years and had been in use six years when struck. The dolphin(134) had a useful life of thirty years and was two years old when destroyed. The court allowed the cost of replacement of the marine cell and the dolphin, as well as the costs of design and engineering. A reduction was made for 15% (6/40) depreciation of the cell and 6.7% (2/30) for depreciation of the dolphin.

In the case of *re M/V Elaine Jones*, (135) a tow collided with the ninety-seven-year-old Eads Bridge spanning the Mississippi River at St. Louis. The award of damages included the cost of repairs without any reduction for depreciation. At the time of the collision, the bridge was in sound condition and had a remaining useful life of an indefinite number of years. It had been fully depreciated in accordance with governing rates. On appeal, Canal Bargo Co. (the barge owner) argued that the district court erred by not reducing damages for depreciation. The Fifth Circuit affirmed, reasoning:

> A party suffering injury to his property is entitled to no more than restoration to its condition prior to the wrong. As a practical matter, repair may leave property in a better condition. Depreciation, which in terms of a declining dollar figure reflects the annual depletion of an item's continuing usefulness for a given purpose, then becomes a handy tool to reduce the recovery for repair costs to the level necessary to return the injured party to the economic position in which he was found. Since the repairs neither enhanced the value nor extended the life of Eads, reduction of recoverable repair costs by depreciation previously taken would leave Terminal in a significantly worse economic position than before the accident.

(133) 715 F. Supp. 738, 1989 AMC 2113 (E.D. La. 1989).
(134) In admiralty parlance, a "dolphin" is not an amicable sea mammal, but rather a mooring post to which to attach a ship's cables.
(135) 323 F. Supp. 805, 1971 AMC 2577 (N.D. Miss. 1971), aff'd in part, rev'd in part, 480 F.2d 11, 1973 AMC 843 (5th Cir. 1973).

6.3.4. Damages recoverable by Death and Personal Injury

In the UAE the personal injury or death claimant in a collision case will receive full provable damages. Assuming a both -to-blame collision, each vessel is jointly and severally liable to the claimant. The amounts that a vessel owner is obliged to pay death and personal injury claimants are included in his claims against the other vessel. If the amount the claimant recovers is reduced because of the claimant's contributory fault, the shipowner who pays the claim can include only that reduced amount in his claim against the other vessel.

7. CONCLUSION

Loss caused by a collision must be borne by a shipowner who is at fault. A shipowner who was negligent in causing a collision is liable for all damages suffered by the other shipowner and by other persons. When a collision is accidental or is caused by *force majeure*, no compensation is payable by either side, and then the loss must be borne by the person on whom it falls.

The burden of proof is on a person bringing an action for damages. A plaintiff, whether he is a shipowner or a cargo owner, must prove that the defendant's ship was negligent, that the collision was caused by the negligence, and that he has suffered damages as a result of the collision

When judging whether a shipowner was negligent, the degree and standard of care is that of an ordinary shipowner, master and crew. The standard should be determined in light of the circumstances that were known or should have been known to them. In order to hold a shipowner liable, a collision must have been preventable through exercise of ordinary care, caution and maritime skill.

A ship's infringement of Collision Regulations at the time of, or immediately prior to a collision is prima facie evidence of that ships negligence. However, the infringement of a rule in the course of navigation is not a decisive factor, and other elements leading to the collision are also taken into account, in deciding whether a shipowner was negligent. There is no statutory presumption of fault with regard to the infringement of a navigational rule.

The shipowner is liable not only for his own negligence, but also for that of his servants (i.e., employees) provided the negligent act was committed in the course of the employment. This liability is called ‘vicarious’ (i.e., deputed) because it results ipso facto from his character of employer.

In a collision action the damage is likely to fall under one of two heads: the ship may be lost altogether, or she may require repairs. If the ship has become a total loss the defendant must replace her. He need not pay so much as the

plaintiff requires for buying a new vessel, for this would place the latter in a substantial better position than he was before the casualty. Normally, what the defendant has to pay is only market value, evidence must be heard to establish what the value of the ship was to the owner as a going concerns, and the sum thus arrived at constitutes the measure of damages.

المصادمات البحرية في إطار القانون البحري في قانون دولة الإمارات العربية المتحدة دراسة مقارنة •

إعداد

د. عبد الله حسن محمد *

ملخص البحث:

على الرغم من سعة البحار والمحيطات وبالرغم من التقدم التقني الهائل في مجال أدوات وأساليب الملاحة البحرية إلا أن حوادث التصادم بين السفن لا تزال تقع، وذلك لأسباب عديدة من بينها ضخامة السفن الحديثة فضلا عن السرعة العالية التي تسير بها. كما أن الخطأ البشري (فردياً كان أو مشتركاً) يعتبر من أهم الأسباب في وقوع حوادث التصادم.

فعندما يقع حادث تصادم فإن الآثار المادية المترتبة عليه خطيرة وقد تكون مميتة. فقد يؤدي التصادم إلى غرق السفن المتصادمة وموت بحارتها. كما أن حمولة هذه السفن خاصة إذا كانت من مشتقات البترول قد تؤدي إلى تلوث مياه البحار ورمال الشواطئ. كما أن الآثار القانونية المترتبة تكون معقدة ومتشابكة. حيث تتجاوز هذه الآثار أصحاب السفن لتشمل الأشخاص المصابين وأصحاب البضائع المنقولة وشركات التأمين وغيرهم.

ولأهمية التصادم البحري فقد وقعت عدة اتفاقيات دولية كان الغرض منها الحد من التصادم البحري وتنظيم الآثار القانونية المترتبة عليه في حالة وقوعه.

• أجيز للنشر بتاريخ **2008/2/13**.

** أستاذ القانون البحري المساعد – رئيس قسم القانون الخاص– كلية القانون – جامعة الإمارات العربية المتحدة

ففي هذا البحث نلقي الضوء على التصادم البحري في ظل القانون البحري الإماراتي من خلال المسائل التالية:

1) تعريف التصادم البحري وبيان أنواعه.
2) أركان المسئولية.
3) مفهوم الخطأ في التصادم البحري.
4) قاعدة تقاسم المسئولية.
5) تقدير التعويض.