THE CARRIER'S LIABILITY UNDER THE SCANDINAVIAN BILLS OF LADING ACTS IN CASE OF CONCURRENT CAUSES

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On August 25, 1924, an International Convention for the Unification of certain Rules of Law relating to Bills of Lading was concluded at Brussels. The contents of the convention are commonly known as the Hague Rules, after the venue of the conference of the International Law Association that preceded the conclusion of the convention.[1] The aim of the convention was to eliminate the drawbacks caused by the widespread use of exoneration clauses in bills of lading. In order to strengthen the significance of the bill of lading in the exchange of negotiable documents and to remove the drawbacks caused by the use of exoneration clauses, the Hague Rules placed upon the carrier a minimum responsibility. According to the convention, the carrier is free from liability for damage arising from certain causes, listed in art. 4, sec. 2, of the convention, but as a counterbalance he cannot exempt himself from liability through exoneration clauses which go beyond the exemptions listed in the convention.

According to the second paragraph of the Protocol of Signature of the Hague Rules, the rules may be given effect in a country either by giving them the force of law as they are or by including them in the national legislation in a form appropriate to that legislation. Most of the states which have adopted the Hague Rules have employed the first alternative and incorporated the convention in their legal systems by placing it on the statute book in its original form or by laying it down in a national enactment, making in the provisions of the convention such minor changes in wording or terminology as were required by their legal systems.[2] Some states, however—among them, Germany—have moulded the provisions so as to correspond to their national legislative technique and inserted the provisions in their national commercial and transport laws.[3]

[1] International Law Association, 30th Conference at The Hague, August 30–September 3, 1921.

[2] Demetrios Markianos, *Die Übernahme der Haager Regeln in die nationalen Gesetze über die Verfrachterhaftung*, Hamburg 1960, p. 43.

[3] Markianos, *op. cit.*, pp. 44 f.

The question of the manner of incorporating the Hague Rules in the Scandinavian legal systems was the subject of lively discussion when the Scandinavian Maritime Codes were being reformed in the 1930s. The inclusion of the Hague Rules in the chapter on affreightment of the Scandinavian Maritime Codes was one of the alternatives studied by the drafters of the bills.[4] It was, however, held expedient not to incorporate the Hague Rules in the Scandinavian legislative systems by inserting them in the affreightment chapter of the Maritime Code of each country. The reasons for this were that the systematics of the Hague Rules were alien to the Scandinavian legislative techniques and that their contents were in many respects unclear and therefore difficult to define as regards scope and substance. In the Scandinavian countries the Rules were eventually incorporated by the enactment of statutes containing straight translations of the text of the 1924 Convention. By so doing it was endeavoured to guarantee the uniformity of the provisions in all the Scandinavian countries and to avoid the danger that the meaning of the Hague Rules would undergo a change as to their substance when being redrafted in order to fit into the national patterns of legislation.[5]

It should be mentioned that the Hague Rules enactments cover only certain transports. Thus, transports within a country and transports between two or more Scandinavian countries are governed by the Maritime Code of the country or countries concerned.

A PROBLEM CONCERNING THE LIABILITY FOR DAMAGES

Since the inclusion of the Hague Rules in the national systems of law was effected in a similar manner in all the Scandinavian countries and since even the wording of the provisions is uniform, one would expect that the court practice based on the rules would also be uniform in all the Scandinavian countries. Despite sim-

[4] Committee Report on a Reform of the Maritime Code (Finnish Committee Report No. 8/1939), p. 104; Sejersted, Fredrik, *Om Haagreglene*, 2nd ed. Oslo 1949, pp. 25 f.

[5] In connection with a planned partial reform of the Scandinavian Maritime Codes the question of inserting the Bills of Lading Convention in the Scandinavian Maritime Codes has again been discussed, but the issue still awaits a final settlement.

ilarities, however, some inconsistencies can be detected when comparing decisions rendered in the various Scandinavian jurisdictions. This kind of situation can be illuminated by the problems arising when cargo is damaged during a voyage partly through the carrier's negligence and partly through an event not imputable to the carrier. In considering these problems we may start from the Swedish Supreme Court decision 1950 N.D. 527 (the *Thorden linoleum case*).

The M/S *Selma Thorden* was carrying rolls of linoleum from New York to Gothenburg, where they were unloaded for the consignee's account onto the quayside, as the consignee was not present to receive the goods when they were being unloaded from the vessel. In spite of instructions marked on the rolls that the rolls were to be kept in a vertical position, they were piled horizontally, with the result that they were damaged. When the transport insurer who had indemnified the consignee sued the carrier for compensation, the carrier stated by way of excuse that the damage had partly been caused by inadequate packing, and contested his liability on this and certain other grounds. However, as damage to goods in connection with unloading could be imputed to the carrier as negligence, the Swedish Supreme Court, by virtue of sec. 4, subsec. 2, of the Bills of Lading Act, held the carrier responsible for the whole loss irrespective of whether or not inadequate packing of the goods had also contributed to the damage.

Thus, in this decision the carrier was ordered to indemnify the whole damage, although the damage was only partly due to the carrier's negligent act. The liability for damage under the Bills of Lading Act was not apportioned, as would otherwise have been expected in cases where some external factor, appearing without the carrier's fault, has contributed to the damage.[6]

The Swedish approach has seemingly not been adopted in Norway, as is indicated by the Norwegian Supreme Court decision 1955 N.D. 1. In the case at bar, part of a consignment of textile goods carried was stolen during a voyage from the United States to Norway. In the opinion of the district court of Oslo, the carrier was guilty of negligence, because the cargo had not been looked after with sufficient care during the voyage. In addition the court found the packing of the goods inadequate. For this reason the

[6] Folke Schmidt, Gösta Wilkens, Kurt Grönfors, Kaj Pineus, *Huvudlinjer i svensk frakträtt*, 2nd ed. Stockholm 1965, p. 68. Cf. Erling Selvig, *Det såkalte husbondansvar*, Oslo 1968, p. 199.

compensation was adjusted in such a way that the carrier had to indemnify only half of the damage. The Norwegian Supreme Court, however, considered that the packing had been normal and consistent with the custom of the trade, and since the carrier had undertaken to carry the goods without drawing attention to the insufficiency of the packing, he was ordered to indemnify the whole of the damage on the ground of negligence in the handling of the goods.

In this case the transport from the United States to Norway was based on a liner bill of lading. The district court adjusted the compensation claim, on the ground that the damage was caused not only by the carrier's negligence, but also in part by inadequate packing of the goods. Thus the district court construed the Norwegian Bills of Lading Act—the wording of which, on this point, is identical to that of the Swedish Act—as permitting the adjustment of the compensation if an external factor besides the carrier's negligence contributed to the damage. The Norwegian Supreme Court, in its turn, did not directly have to take a stand on the adjustment question, since in its opinion the packing was adequate. In Norwegian legal writing, however, this decision has been referred to as an authority for the doctrine that adjustment is allowed in situations of this kind.[7] It has been argued that if adjustment was not permissible under the Bills of Lading Act, the Supreme Court would have referred to this ground when awarding compensation, and not to new findings of the facts.[8] Since the Supreme Court did not decide the liability question on the argument mentioned, but entered upon an inquiry into the adequacy of the packing, this is understood to prove that an adjustment of the indemnity would have been possible had the packing been insufficient.

In Finland and Denmark, the question of the adjustment of indemnity claims under the Hague Rules has not been brought to the courts in the same manner as in the Swedish and Norwegian cases described above. But in claims governed by the Maritime Code compensation has been adjusted when some external factor beyond the carrier's control contributed to the damage.[9]

In the light of the decisions described above, Scandinavian court

[7] Nils Dybwad, *N.D.* 1955, p. IV; Per Gram, *A.f.S.* 2.711–712. See also Schmidt *et al., op. cit.*, p. 68.

[8] Nils Dybwad, *N.D.* 1955, p. V.

[9] See concerning Denmark 1942 N.D. 344 (the District Court of Østre), 1943 N.D. 266 (the District Court of Agder). See also Norwegian decisions 1945 N.D. 391 (the City Court of Oslo) and 1952 N.D. 24 (the City Court of Oslo).

practice cannot be considered clearly settled as far as adjustment of compensation is concerned. One has to be careful in drawing conclusions from the decision of the Norwegian Supreme Court case, since the doctrine of apportionment was not expressly referred to in the *ratio decidendi*. Furthermore, one cannot assume that the adjustment problem should necessarily be solved identically in cases governed by the national Maritime Code and in cases governed by the Bills of Lading Act. It is to be regretted that, in spite of its significance, our problem has attracted but little attention in Scandinavian legal writing.

OBSERVATIONS CONCERNING THE SCANDINAVIAN LAW OF TORTS

The Scandinavian countries constitute an area within which similar principles prevail in many domains of law. The body of private law is in essential respects the same in all the Scandinavian countries. In part this is due to the fact that the statute books as a whole are—as is also the greater part of the body of maritime law—a product of Scandinavian cooperation. In details, however, differences between the countries exist, as for instance within the law of torts. Thus, the master's responsibility for damage caused by his servant to a third party is judged on different principles in Finland and Sweden, on the one hand, and Denmark and Norway, on the other. Therefore, in discussing the liability for damages resulting from concurrent causes, we have to raise the question whether differences between the Scandinavian countries within the field of the law of torts may explain the different approaches to the problem of the adjustment of compensation of claims under the Hague Rules.

In Finland the rule on the adjustment of indemnity in tort is laid down in chap. 9, sec. 1, subsec. 2, of the Penal Code: "If the injured person has contributed to the damage by his own fault, or if some other circumstance not pertaining to the crime has contributed to the damage, the indemnity shall be adjusted accordingly."

This provision means that the same principle of adjustment is to apply both to contributory negligence on the part of the

plaintiff and to damage which can be attributed to various concurrent causes. According to its wording, the provision only concerns tort liability based on crime. However, the principle of adjustment of the indemnity is not limited to suits based on crimes. It applies to civil wrongs in general as well as to the field of "contractual damages". Thus the provision expresses a general principle governing the whole field of the law of torts. The fact that the provision concerned was laid down in the Penal Code is due to historical reasons. Indeed, chap. 9 of the Penal Code contains a number of provisions, besides the clause quoted, that are pertinent to the law of torts.

If the damage is the combined effect of the defendant's negligent act and of some cause beyond his control, or the combined effect of the negligent act of the defendant and of an act of the injured person himself, the defendant will, under Finnish law, have to compensate only that part of the damage which has resulted from his negligent act. If the distribution of the damage on the various causes cannot be ascertained, it is within the discretion of the court to assess what portion of the damage shall be attributed to the negligent act of the defendant and what portion to other factors.[1]

In Sweden the corresponding provision is comprised in chap. 6, sec. 1, of the Penal Code of 1890; the chapter in question remained on the statute book when the old penal code was replaced by a new Criminal Code on January 1, 1965. According to the second paragraph of this section, damages shall be adjusted according to what is deemed reasonable when the person who suffered damage contributed to the damage by his own negligence.

This provision differs from the corresponding Finnish provision in the respect that it only deals with the effect of contributory negligence. On the question whether the indemnity is also to be adjusted when the damage can be attributed to a cause not pertaining to the delict, the Swedish Penal Code gives no information. In spite of this divergence in the wording of the two provisions, Swedish courts apply the same principle as the Finnish courts. If the damage has resulted partly from a negligent act of the defendant and partly from a contingency, the defendant will have to indemnify only that part of the damage which can be

[1] T. M. Kivimäki & Matti Ylöstalo, *Suomen siviilioikeuden oppikirja. Yleinen osa*, 2nd ed. Porvoo 1964, p. 437; Y. J. Hakulinen, *Velvoiteoikeus. I. Yleiset opit*, 2nd ed. Helsinki 1965, p. 355; Hans Saxén, *Adekvans och skada*, Turku 1962, p. 106.

attributed to his negligent act.[2] Even in cases where it has been impossible to distinguish the part of the damage which should be attributed to each cause, the defendant has been ordered to indemnify only a reasonable part of the total loss.

Norwegian law follows in this issue the Swedish pattern. According to sec. 25 of the Act on Entry into Force of the Penal Code of Norway, the liability for damage may be reasonably adjusted if the injured person contributed to the damage through his own negligence. However, if the injured person acted intentionally, he will not be compensated. There is no rule on the statute book on cases where the damage is caused partly through the fault of the defendant and partly by a contingent independent factor. Opinions among legal writers vary to some extent. If the damage resulted from the combined effect of a negligent act of the defendant and of an external independent factor, it has been considered that the defendant is responsible only for that part of the damage which was caused by his negligent act.[3] Some scholars claim, however, that the courts have adopted the principle of the main cause, a doctrine similar to the principle of *causa proxima.* The defendant has to pay damages for the full loss, if his act in comparison with the other factors contributing to the damage may be regarded as the main cause of the damage.[4]

In Denmark there is on the statute book no provision corresponding to the Finnish, Norwegian and Swedish provisions referred to above. The opinions of scholars differ as regards the details. If the damage is the combined effect of an act of the defendant, entailing liability, and of a concurrent cause, it is held that the injured person in general has to suffer the harmful consequences of the concurrent cause.[5] If, however, the damage resulted from various causes in such a way that the consequences resulting from each cause can be distinguished, the defendant has to pay compensation for the part of the damage caused by his own act.[6]

With regard to the adjustment provisions of the law of tort of the Scandinavian countries, some differences have been noted.

[2] Kurt Grönfors, *Skadelidandes medverkan,* Stockholm 1954, p. 30; Hjalmar Karlgren, *Skadeståndsrätt,* 3rd ed. Stockholm 1965, p. 39. See also Saxén, *op. cit.,* p. 107.

[3] J. Øvergaard, *Norsk erstatningsrett,* 2nd ed. Oslo 1951, pp. 22 ff.

[4] Kristen Andersen, *Erstatningsrett,* Oslo 1959, p. 24.

[5] Stig Jørgensen, *Juristen* 1961, p. 198, and *Erstatningsret,* Copenhagen 1966, pp. 179 ff. See also A. Vinding Kruse, *Erstatningsretten. I Del,* Copenhagen 1964, pp. 210 ff.

[6] Jørgensen, *Erstatningsret,* p. 179, note 10.

Thus only the Finnish statute contains an express provision about adjustment of indemnity when an external cause contributed to the damage. Generally speaking, however, the adjustment principles of the Scandinavian countries may be regarded as relatively uniform. In particular it should be noted when comparing Swedish and Norwegian law that it is not justifiable to conclude—as might have been inferred from the *Thorden linoleum case*—that the principle of the main cause has been adopted by the Swedish law of torts.

ON THE PRINCIPLES CONCERNING THE ADJUSTMENT OF INDEMNITY IN ANGLO-AMERICAN MARITIME LAW

In Anglo-American law the rules on the carrier's liability for damage resulting partly from the carrier's negligence and partly from causes beyond his control seem to differ from the principles adopted in the Scandinavian countries, although Anglo-American law and the law in the Scandinavian countries are not wholly comparable on this point because of the differences in the law of contract and tort between the legal systems. The rule of adjustment of damages in cases where the damage was the combined effect of various causes is not applied to the carrier's liability in Anglo-American law. The point of departure is to be found in the doctrine of the *causa proxima.* According to this principle, developed in the law of insurance and subsequently extended, *inter alia,* to the law of the carrier's liability, the decisive matter is to find the immediate or the main cause of the damage.[7] In determining the liability, attention is paid to this immediate, principal cause, while other more remote factors contributory to the damage are considered irrelevant.

However, the *causa proxima* rule has not been applied indiscriminately in cases concerning the carrier's liability. If the damage to the goods is to be attributed partly to the carrier's

[7] Carver, "Carriage by Sea" (*British Shipping Laws* II), London 1963, p. 142; Scrutton, *Charterparties and Bills of Lading,* 17th ed. London 1964, p. 209. See also Hans Götz, *Das Seefrachtrecht der Haager Regeln,* Bielefeld 1960, pp. 129 ff.; Fritz Lindenmaier, "Adequate Ursache und nächste Ursache", *Zeitschrift für das Gesamte Handelsrecht und Konkursrecht* 1950, pp. 243 ff.

negligence and partly to causes beyond his control, the carrier has as a rule been ordered to indemnify the whole damage.[8] Thus the carrier's negligence is considered as a ground entailing the duty to compensate the whole loss, although his negligence was only a contributory cause and to a large extent was attributable to causes beyond his control. The idea of apportioning damages on the basis of the effect of each of the various causes is not taken into consideration.

When comparing the Scandinavian legal systems and Anglo-American law with regard to the indemnification of injury resulting from the combined effect of various causes, we find that different rules are applied.[9] In the Scandinavian countries the adjustment of liability is considered as the main rule, and the Scandinavians are inclined to exonerate the defendant even in cases where concurrent causes exist. In Anglo-American law the tendency is the opposite. The carrier has to indemnify the whole damage wherever the damage was at least partly caused by his negligent act.

Looking at the Swedish Supreme Court decision 1950 N.D. 527 in the light of these statements, it seems that the Swedish Supreme Court has followed the Anglo-American rule. Consequently, the problem of adjustment is not linked only with the law of torts. Rather it is a matter of the interpretation of a national statute based on an international convention.

THE WORDING OF SCANDINAVIAN BILLS OF LADING ACTS

As stated above, the Scandinavian countries incorporated the Hague Rules in their legal systems by way of special statutes which contain straight translations of the Bills of Lading Convention. At same points, however, it has been endeavoured to make the wording derived from the Bills of Lading Convention clearer and more precise. This happened, among other things, with regard to sec. 2 of art. 4. According to art. 4, sec. 2 (*q*) of the Hague Rules,

[8] Carver, *op. cit.*, pp. 143 ff.; Scrutton, *op. cit.*, p. 209.

[9] See also Gunnar Bomgren, "Några reflexioner kring konossementskonventionens kausalbegrepp", *Teori och praxis. Skrifter tillägnade Hjalmar Karlgren*, Stockholm 1964, p. 46.

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from ... (*q*) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributes to the loss or damage.

The Scandinavian countries have departed from the text of this clause in so far as the provision on the burden of proof has been transferred to a separate subsection of sec. 2. As a result of this, subsec. (*q*) has acquired a shade of meaning slightly different from the original text of the convention.[1] According to subsec. (*q*) as it is worded in the Scandinavian Bills of Lading Acts, the carrier shall be responsible "for loss or damage resulting from any cause other than those mentioned in sec. 2, subsecs. (*a*)–(*p*) of art. 4 and arising without the fault or negligence of the carrier or anyone for whom he is responsible". In a new section it is added: "The carrier shall not have the favour of exoneration on the grounds mentioned under subsecs. (*c*)–(*p*), when it is to be assumed that he or anyone for whom he is responsible contributed to the loss or to the damage by his fault or neglect." The decisive question concerning the adjustment of liability is how we ought to construe the words: "the carrier shall not have the favour of exoneration", if "he or anyone for whom he is responsible contributed to the damage by his fault or neglect".

The problem cannot be solved by way of a linguistic interpretation of this expression. The text may be understood as meaning that the carrier shall not be exonerated from liability if one of the causes contributory to the damage was his negligence or the negligence of his servant or his agent. In other words, if the negligence of the carrier or someone acting on his responsibility has contributed to the damage, liability is not adjusted, and the carrier has to indemnify the whole damage. Such an interpretation would follow the principle adopted in Anglo-American law.

One may, however, also attach a more limited meaning to the words "the carrier shall not have the favour of exoneration". It is true that the carrier will not be exonerated from liability if he or someone acting on his responsibility has contributed to the

[1] Bomgren, *op. cit.*, pp. 45 ff.

damage through a negligent act. But the question to what extent the carrier will have to compensate the loss or the damage is left open. According to this interpretation the Scandinavian Bills of Lading Acts are not incompatible with the general principles of adjustment of liability for damage in the Scandinavian law of torts.

THE IMPACT OF ANGLO-AMERICAN LAW WHEN INTERPRETING NATIONAL BILLS OF LADING ACTS

Since the wording of the Scandinavian Bills of Lading Acts leaves open the question of the adjustment of liability in case of a concurrent cause, we must look for guidance in the legislative history in order to answer our question. Should the liability principles of Anglo-American law apply to the interpretation of the national bills of lading acts, as the decision of the Swedish Supreme Court in the *Thorden linoleum case,* 1950 N.D. 527, would seem to indicate?

In drafting the Hague Rules the Harter Act, 1893, of the United States was used as a model. At the international conferences during which the Hague Rules were drafted, the Anglo-American representation was strong, and the convention is in its main parts a piece of Anglo-American legal thinking. It contains concepts and expressions peculiar to the Anglo-American legal systems. The material is arranged and the rules are formulated in a way which is alien to the Continental civil-law tradition. If an interpreter of the statute had to base his interpetation of the Bills of Lading Convention on the law of some nation, he would indisputably have to choose the law of England or of the United States. However, the question whether the Anglo-American legal systems can be chosen as the basis for the interpretation of the Bills of Lading Convention cannot be considered as a separate issue. The problem has a wider scope and concerns the general method of interpretation of a national enactment based upon an international convention. Must we, where such a statute is concerned, fall back upon the legal system of the state whose rules were the model for the clauses of the international convention in question?

International conventions are usually the outcome of various

kinds of compromises and conciliations. It is seldom that the national rules of an individual state are accepted as the model for an international convention. Therefore the country of origin can hardly ever be established beyond dispute. In most cases one is not able to point to the legal system whose rules should be used as a basis for the interpretation of the international convention. The Hague Rules, however, are exceptional in this respect. It is indisputable that the American Harter Act served as the prototype.

One might argue that the interpretation prevailing in the legal system of the country of origin cannot be accepted as the basis of the interpretation of the international convention even when the origin is clear. The terms of the international convention were detached from their "national groundwork" when they were embodied in an international convention.[2]

On the other hand, we ought to strive for a uniform interpretation of statutes based on international conventions. The very object of an international convention and of the national statute based upon it is to eliminate harmful diversities between various legal systems. This aim would not be reached if different principles of interpretation were applied in various states. Not until a national statute based on an international convention is made applicable to an individual case can it be assessed to what extent the object of the international convention—i.e. the establishment of a uniform practice in the questions regulated by the convention—has been achieved.

The establishment of a uniform international interpretation does not, however, require that the international interpretation shall be based on the legal system of any given state. This way of settling interpretation problems "on a national basis" may, on the contrary, lead to diversities in interpretation. The other states are rarely willing to follow the court practice, or interpretations otherwise indicated, of another state. Especially in cases where the provisions of the international convention are the outcome of compromises, diverse interpretations in different states are an unavoidable result of settling interpretation problems on the basis mentioned. In interpreting national statutes based on international conventions, one must therefore strive to achieve uniform results of interpretation by reference to the purpose of the convention,

[2] Esko Hoppu, *Rahdinottajan tavaravastuusta,* Vammala 1966, pp. 110 ff.; Matti Ylöstalo, *Tutkimuksia vekselioikeuden alalta,* Vammala 1956, p. 34; Wilhelm Bayer, "Auslegung und Ergänzung international vereinheitlichter Normen durch staatliche Gerichte", *RabelsZ* 1955, pp. 603 ff.

the wording of the provision concerned, and the history of the convention.[3] In this connection, attention must naturally be paid to views and interpretations offered in the other contracting states.[4] Only by attentively following the court practice in all states which have acceded to the convention and by analysing the interpretations adopted in those states can a uniform international interpretation be achieved as to national statutes based on the convention.

For these reasons the statements that the Hague Rules are drafted in accordance with Anglo-American legislative techniques, that the Harter Act was used as a model and that Anglo-American concepts underlie many of the provisions of the convention are not decisive arguments. In the opinion of the present writer the provisions of the convention ought, in spite of their Anglo-American origin, to be interpreted on the basis of general international standards of interpretation of conventions.

It is true that the provisions of the Bills of Lading Convention have their origin in Anglo-American law. This does not mean that the legal systems of Britain and the United States should be accorded decisive importance. On the other hand, they cannot be disregarded. It is necessary to resort to these systems for the simple reason that the Bills of Lading Convention uses concepts and expressions which cannot be understood without some knowledge of Anglo-American law. The concept "document of title" in art. 1 (*b*) of the Bills of Lading Convention, which has no true counterpart in the Continental and Scandinavian legal systems, provides an example. The explanation of the concept "management of ship" in art. 4, sec. 2 (*a*) likewise requires some familiarity with Anglo-American law.

Although the meaning of some of the articles of the Hague Rules cannot be understood without reference to Anglo-American law, this is not a sufficient reason for making the adjustment principles of Anglo-American law applicable to the interpretation of a national bill of lading act. It was necessary to resort to Anglo-

[3] Hoppu, *op. cit.*, p. 108; Heikki Jokela, *Kansainvälisessä lakiyhteistyössä syntyneiden säännösten (yhtenäislakien) tulkinnan ongelmia*, Helsinki 1965, pp. 17 f.; Bayer, *op. cit.*, pp. 630 ff. See also Kurt Grönfors, "Talerätt och skadeståndsrätt enligt luftbefordringskonventionen", *Teori och praxis. Skrifter tillägnade Hjalmar Karlgren*, Stockholm 1964, pp. 87 ff.; Nils Grenander, "A unification problem", *Liber amicorum of congratulations to Algot Bagge*, Stockholm 1956, pp. 80 ff.

[4] Bayer, *op. cit.*, pp. 625 f.; Grenander, *op. cit.*, p. 81; Kurt Grönfors, "Om konventionstolkning", *Sv.J.T.* 1957, pp. 18 f.; Hoppu, *op. cit.*, p. 109; Jokela, *op. cit.*, pp. 17 f.; Ylöstalo, *op. cit.*, p. 34.

American law only because of the technique used in the drafting of the Hague Rules. In the opinion of the present author international conventions ought to avoid concepts which are the exclusive property of certain legal systems. It would be preferable to abandon the standard concepts of the legal terminology and to make use of new expressions that are capable of being remodelled to correspond to the national legislation within each legal system.[5] If this procedure had been followed in the drafting of the Hague Rules, there would be no need for references to Anglo-American law in order to explain concepts appearing in the convention. The lack of precision in the text of the Hague Rules is explained by the fact that they were originally intended to serve as a model bill of lading and that the drafters of the convention considered themselves unable to "improve" the language of this model.

Anglo-American law is pertinent to the interpretation of the Hague Rules from another point of view also. In interpreting a national statute based on the Hague Rules—just as in the process of interpreting any statute that embodies a convention—one has to keep an eye on the court practice arising in the other contracting states as well as on interpretations appearing in other ways. Special importance will be attached to those states in which a great number of court decisions are produced. As concerns the Hague Rules, as well as other maritime rules based on international conventions, the English legal system will necessarily occupy a central position. This is due to the fact that parties often, by invoking a particular clause in the contract, submit disputes concerning charterparties and bills of lading to English courts according to English law. Britain and the United States also play a vital part where the interpretation of maritime law is concerned, by virtue of the fact that these states are great maritime powers.[6] The weight which should be attached to Anglo-American law has been expressly stated by Scandinavian courts. In holding, in the case 1955 N.D. 438, the "invoice clause" to be invalid by virtue of sec. 3, subsec. 8, of the Swedish Bills of Lading Act in so far as the clause relieved the carrier from liability, the Swedish Supreme Court stated that this interpretation of the Act was supported by information as to the

[5] Grenander, *op. cit.*, pp. 78 ff.; Hans Ficker, "Zur internationalen Gesetzgebung", *Vom deutschen zum europäischen Recht. Festschrift für Hans Dölle.* vol. II, Tübingen 1963, pp. 35 ff.; Jokela, *op. cit.*, pp. 4 ff.

[6] Hoppu, *op. cit.*, pp. 109 f.

negotiations which preceded the convention and the practice of the courts in countries which were parties to the convention.

It is true that we ought to strive for a uniform interpretation of statutes embodying international conventions. However, on some occasions national points of view may weigh heavier than the aim of international unity.[7] As concerns the Hague Rules we have to face the problem whether regard to Anglo-American law will require an exception from the ordinary national principle of adjustment of indemnity in case of concurrent causes.

THE RELATION OF THE HAGUE RULES TO THE NATIONAL LAW OF TORTS

The primary object of the Hague Rules was—as stated above—to strengthen the value and significance of the bill of lading as a negotiable instrument. This aim was to be reached by the incorporation in the legal systems of the various states of uniform provisions on the issuing of the bills of lading as well as on the information to be embodied therein. Further, the drafters wanted to eliminate the drawbacks of excessive use of various kinds of exoneration clauses. The carrier should have a certain minimum responsibility irrespective of possible differences between various national systems.

The question of the carrier's minimum responsibility was settled in the Hague Rules in the following way. The carrier enjoys certain exoneration benefits by virtue of the provisions of the convention. The carrier is not responsible, among other things, for damage arising or resulting from a neglect or default of the master, mariner, pilot or the servants of the carrier "in the navigation or in the management of the ship", nor for "fire, unless caused by the actual fault of privity of the carrier". The carrier is likewise not liable for any loss or damage to or in connection with goods to an amount exceeding £100 sterling in gold for each package or unit, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. On the other hand, the carrier may not, through an exoneration clause in a contract, relieve himself from liability

[7] See also Grönfors, "Om konventionstolkning", *Sv.J.T.* 1957, pp. 18 ff.

or limit it to any extent wider than that permitted by the provisions of the convention.

The question of liability, however, is not of such a nature that it could be exhaustively regulated apart from other questions pertaining primarily to the law of contract and the law of torts. In considering the carrier's minimum responsibility as well as the validity of the exoneration clauses, many of the general issues of the law are of vital importance. For instance, the carrier's liability cannot be decided without taking a stand on the questions of causation and damage caused without intention or fault. In determining the significance of the exoneration clauses one has to resort to the principles concerning the interpretation and validity of contracts in general. It does not seem possible to settle such questions through international conventions—particularly not through a convention concerning a single field of law, such as that of maritime law—since that would imply the extension of the scope of the convention beyond its proper domain to the law of contract and the law of torts. The regulation of the carrier's liability through the Hague Rules is restricted to certain specific questions. It was not intended to be exhaustive, and questions properly pertaining to other fields of law were to be settled in accordance with the national laws.[8] This was stated, too, by the Swedish Supreme Court in the case 1955 N.D. 438, referred to above. There it was found that the convention did not contain any provision concerning the question how the amount of damages should be meted out. In such a case, according to this decision, the indemnity is to be determined on the basis of the national legislation applicable to the case.

ADJUSTMENT OF LIABILITY UNDER THE BILLS OF LADING ACTS

In considering the wording of the Scandinavian Bills of Lading Acts we have noted that the provision in sec. 4, subsec. 2, is ambiguous. The following alternatives are covered by the text: (i) negligence on the part of the carrier or a servant may constitute

[8] Carver, *op. cit.*, p. 198; Hoppu, *op. cit.*, pp. 93 f.; Johs. Jantzen, *Godsbefordring til sjøs*, 2nd ed. Oslo 1952, p. 510. See also Lennart Hagberg, "The validity of invoice value clauses under the Hague Rules", *A.f.S.* 3.503; Sejersted, *op. cit.*, p. 46.

full liability; (ii) the indemnity may be adjusted if in addition to the negligence of the carrier or the servant some external factor has contributed to the damage. The meaning of the provision was not discussed in the legislative material.

In tackling the problem from the point of view of the Finnish legal system, one has to note that there is an express legislative provision about adjusting the liability in cases where some external factor has contributed to the damage side by side with the culpable person's negligence. Not to adjust the carrier's liability in a case like this would be a divergence from a principle adopted by the legislator and consistently applied within the Finnish law of torts. There must be strong reasons for justifying such a divergence. The need to achieve an internationally uniform interpretation of provisions based on the Bills of Lading Convention is a cogent argument. However, it could hardly be regarded as a sufficient ground for the making of an exception from the general principle of the Finnish law of torts, since adjustment issues are primarily to be regarded as a question pertaining to the general law of torts. Furthermore, there is—since the problem failed to be expressly settled in the Hague Rules—no guarantee that an internationally uniform practice would ensue in regard to the question. On the contrary, the unsettled state of Scandinavian court practice gives reason to presume that no uniform interpretation will be reached. In addition, we should note that the application of national legislation may raise greater and more significant obstacles to the objectives of the Bills of Lading Convention than the inconveniences arising from the lack of uniformity with respect to the adjustment of liability. As an example, we may mention the carrier's responsibility for statements with regard to the goods in the bill of lading, a responsibility which the estoppel rules in the Anglo-American law of evidence make rather rigorous. Since there is no counterpart in Scandinavian law to the estoppel rules, counterevidence concerning statements made in the bill of lading will be permitted.[9]

As regards the other Scandinavian countries, there is the difference that they lack express provisions about the adjustment of liability in cases where the damage is partly due to the negligence of the defendant and partly to causes beyond his control. However, all the Scandinavian countries have followed fairly uniform principles in this respect—the liability has been adjusted if some

[9] Schmidt *et al.*, *op. cit.*, pp. 143 f.

external circumstance has contributed to the damage. Therefore the views presented above with regard to the Finnish legal system should also apply to the law of adjustment of the other Scandinavian countries.[1]

ON THE ADJUSTMENT OF LIABILITY WITH REGARD TO CLAIMS UNDER THE SCANDINAVIAN MARITIME CODES

According to sec. 118 of the uniform Scandinavian Maritime Codes, the carrier is responsible for the loss of or damage to goods in his care, unless it can be assumed that the loss or damage has arisen from a cause which cannot be attributed to the fault or neglect of the carrier or anyone acting on his responsibility. The carrier may, however, relieve himself from the responsibility or limit his responsibility by exoneration clauses inserted in the charterparty or the bill of lading. Only in domestic and in Scandinavian traffic is the use of exoneration clauses restricted upon the same principles as in the Hague Rules.

From the point of view of legal technique, the Scandinavian Maritime Codes follow principles quite different from those of the Hague Rules. In accordance with the Continental style of drafting, the carrier's liability is governed by a provision of a general character laying down responsibility for negligence as a principle. The codes have no counterpart to the list of exempted causes embodied in art. 4, sec. 2 (*a*)–(*p*) of the Hague Rules.

The codes do not settle the question whether damages should be adjusted in cases where the damage occurred as a combined result of the carrier's negligence and of causes beyond his control. The question is easier to answer, however, than the problem of adjustment with regard to claims under the Bills of Lading Acts, because the provisions on affreightment in the Scandinavian Maritime Codes are not based on any international convention. It is true that they are products of Scandinavian cooperation for the purpose of achieving uniformity between the Scandinavian countries. There is, however, nothing to prevent one of the Scandi-

[1] But see Schmidt *et al.*, *op. cit.*, p. 68, Sejersted, *op. cit.*, p. 70, and Selvig, *op. cit.*, p. 199.

navian countries from departing from the uniformity, if it should so wish. The affreightment chapter of the code forms part of the legal system of each country. This implies that questions not settled through special provisions in the Maritime Codes must be solved according to the internal rules of the country concerned by applying general principles of the law of contract and the law of torts. For reasons given above, this should imply, in cases governed by the Finnish Maritime Code, that indemnity shall be adjusted if an external circumstance beyond the carrier's control has contributed to the damage side by side with negligence on the part of the carrier or his servant.