COMPENSATION FOR DAMAGES IN COLLISION CASES*

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INTRODUCTION:

The topic can be best divided into the three incidence of loss in cases of collision:

a) Collision Caused Without the Fault of Either Ship
b) Collision Caused By the Fault of One Ship
c) Collision Caused By the Fault of Both Ships

For each of the above incidence, a discussion of the particular rules concerned, namely: (a) the Hague Rules; (b) the Common Law Rules; (c) the Philippine Rules; and (d) the Lisbon Rules, is hereby presented.

Perhaps, tracing briefly the developments of the Hague Rules and the Lisbon Rules would be appropriate.

In September, 1921, a set of rules formulated by the Comite Maritime International (CMI) was adopted at the Hague by the International Law Association (ILA). The International Maritime Committee (or the Comite Maritime International) is a private organization composed of representatives of business and legal interest from the leading maritime nations, whose primary objective is to standardize world maritime laws. This set of rules formulated at the Hague became known as the "Hague Rules". The ILA recommended use of these rules by shipping interests and further emphasized that countries which had legislated on the "bills of lading" should bring their national legislation into harmony with the Rules. To do away with wide exception clauses in the bills of lading exempting shipowners from almost every conceivable loss or damage occurring in the course

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of a sea voyage, as well as to bring some stability to the system, the ILA worked for the adoption of the Hague Rules by maritime states at an International Convention, which were to govern the rights and liabilities of carriers by sea. The Hague Rules have been amended and the last amendment of which was in the Brussels Protocol, 1968, and which was incorporated in the Carriage of Goods by Sea Act, 1971.

Like the Hague Rules, the Lisbon Rules is another CMI product, formulated in Lisbon in July 1986, thus, the name "Lisbon Rules". The Lisbon Rules may be adopted by parties exercising a legal right to a claim of damages arising out of the collision and the parties defending themselves against such claims. (Rule A). Although these rules are primarily intended for use during arbitration, the CMI strongly recommended its passage either for legislation or for direct enforcement by any maritime country. The adoption of the Lisbon Rules by any party in their respective control is not precluded, as a matter of fact, it is encouraged.

In the Philippines, there is really no specific rule with regard to compensation for damages in collision cases. At present, what we have are our antiquated provisions in our Code of Commerce and, suppletory to that, the applicable provisions in the Civil Code. In this respect, the more pertinent provisions of the Civil Code are: Art. 2199; Art. 2200; Art. 2201; Art. 2203.

I. SCOPE AND MEANING OF COLLISION

"Collision", in the strict sense of the word is the impact of two ships both of which are moving; or the impact of ships and other navigable objects, like a floating buoy. Thus, "if the keel of the vessel had been damaged when it struck something with her bottom during the voyage, the charterers would not be entitled to refuse to pay the freight as the cause of loss of time had not been a collision within an off-hire clause of a bill of lading."[1] (Hough v. Head, (1885) 54 L.J.Q.B. 294)

In its broad sense, on the other hand, "collision" would include allision, which refers to the striking of a moving vessel against one that is stationary, and perhaps other species of encounters between vessles,[2] (Wright v. Brown, 4 lrd. 97, 58 Am. Dec. 622) or of a vessel and other floating, though non-navigable objects.

Thus, "collission" in order to give rise to an action for damages need not be in contemplation of a case where there be actual contact between ships or between a ship and some objects other than a ship.[3] (Roscoe's Admiralty Practice, 5th edition). It is sufficient that there be negligence on the part of those in charge of the erring vessel within the scope of their duty in navigating her; as in negligently allowing their vessel to drag down towards another, thereby compelling that other to slip her anchor and chain in order to avoid collision[4] (The Port Victoria, [1902] p. 25); or going too fast in narrow waters and thereby causing a swell whereby a barge was sunk.[5] (The Batavier, [1854], 9 Moo. P.C. 286).

Under the Lisbon rules, "collision" means any accident occurring between vessels arising from fault such as fault in navigation or the failure to comply with a statutory rule and which causes damage to a claimant even if no collision has taken place.[6] (please see Lisbon Rules, Annex "A")

II. EFFECTS OF COLLISION

What happens in case of "collision? " When a collision occurs, causing damage to cargo, cargo claimants have the option to proceed against the vessel which carried the cargo or against the non-carrying vessel or against both. This question of "whom to sue" in collision damage is the first legal problem of the cargo claimant. The second question relates to recovery of the losses against the offending vessel. In collision cases, unless the cause of loss or damage had been excepted in the contract of carriage, compensation must be paid for the goods lost or damaged. The measure of amount of compensation, however, will depend largely on the law that governs the responsibility and liability of the carrier. (A.R. Palacios, **Actions and Defences Concerning Loss or Damage in the Carriage of Goods By Sea**, 1981, pp. 302 & 358).

Under the British maritime law system, damage done by a ship in collision is one of the recognized maritime liens. The lien is essential, because the effect of collision between ships may be too extensive that, in result, both ships may be reduced to a state of total loss with their respective cargos sustaining irremediable losses or damages, or one of which has been reduced to that condition. This lien acts as a legal claim against a ship or any other maritime property, and can be made effective by seizure of that property[8] (A.R. Palacios, supra. at 303). It is legally referred to as a right in rem, i.e. a right enforceable against the world at large; in this case, the thing itself, no matter in whose possession it may be (Harmer v. Bell, The Bold Buccleugh, /1850], 7 Moo P.C.C. 267], as contradistinguished from a right *in personam*, i.e. against a particular person, like the shipowner.

Generally speaking, in collisions between vessels there exist three divisions or zones in time. The first division covers all the time up to the moment when the risk of collision may be said to have begun. Within this zone no rule is applicable because none is necessary. Each vessel is free to direct its course as it deems best with reference to the movements of the other vessel. The second division covers the time between the moment when the risk of collision begins and the moment when it has become a practical certainty. The third division covers the moment when collision has become a practical certainty up to the moment of actual contact.[10] (G. Urrutia & Co. v. Basco River Plantation Co., 26 Phil. 623)

III. JURISDICTION IN CASES OF COLLISION

Authorities have it that States have plenary jurisdiction over the ships that bear their flags anywhere in the world.[11] (Colombos, **The International Law of the Sea**, 6th edition [1967]).This rule has been brought into conformity with the theory that a ship is a piece of floating territory under the doctrine of extra-territoriality expressed in the words of Oppenheim in regarding a public ship "as a floating portion of the flag state." This theory, however, met disagreement with the English legal minds in **Chung Chi Cheung vs. The King**[12] ([1939] A.C. 160, p.

174) where the above theory was rejected as being impracticable when tested against the actualities of life on board ship and ashore. In this case, Lord Atkin expounded:

> "The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore . . . If a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that, when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local court would have no jurisdiction? What is the captain of the public ship to do? Can he claim to have the local national surrendered to him? He would have no claim to the witnesses, or to compel their testimony in advance, or otherwise. He naturally would hand the case to the local courts. But on this hypotheses the crime has been committed on a portion of foreign territory. The local court then has no jurisdiction, and this fiction dismisses the offender untried and untriable."

Thus, under the English Administration of Justice Act of 1956. Sections 1 (1) & (4), – "an action may always be brought in the state whose flag the defendant vessel flies." In cases of collision damage, the British and American courts will always be disposed to hear collision actions if the defendant ship, irrespective of nationality, is in British or American port at the time when the action is instituted in court. This is even so although the collision occurred on the high seas, or even in foreign territorial waters for, in the opinion of the British and American courts, collisions are matters **communis juris** and can therefore be adjudicated by courts of all maritime states.[13] (A.R. Palacios, *supra.* at 306)

In the United Kingdom, the common law jurisdiction may be exercised, whether the ships are British or foreign, and whether the collision occurs in foreign waters or on the high seas. In the light of this rule, "a foreign ship that has injured a British ship or property of a British subject in any port of the world may be detained if found within the territorial waters of the coast of the United Kingdom, so as to compel her owners to abide by the event of any action in the courts of this country for damage caused by her,"[14] (Merchant Shipping Act 1894, Sec. 683) Based on existing authorities, however, this rule will not apply to a ship that is simply passing the coast of this country on a foreign voyage,[15] (R.V. Keyn, [1877] 2 Ex. D. 63, 218).

IV. INCIDENCE OF LOSS IN CASES OF COLLISION

The principles of the incidence of loss in cases of collision was first laid down by Lord Stowell of the English Admiralty Court during the years 1798 to 1828. In the 1816 case of the **Lord Melville**, he divided collisions into four classes: 1) where the collision is caused without fault in either ship; 2) by the fault of both ships; 3) by the fault of the plaintiff ship; and 4) by the fault of the defendant ship. The third and fourth classes can be simply combined as, 'by the fault of one ship."

A. Collision Caused Without Fault of Either Ship

1. The Hague Rules

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
b) Fire, unless caused by the actual fault or privity of the carrier.
c) Perils, dangers and accidents of the sea or other navigable waters.
d) Act of God.
e) Act of war.
f) Act of public enemies.
g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
h) Quarantine restrictions.
i) Act or omission of the shipper or owner of the goods, his agent or representative.
j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general.
k) Riots and civil commotions.
l) Saving or attempting to save life or property at sea.
m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
n) Insufficiency of packing.
o) Insufficiency or inadequacy of marks.
p) Latent defects not discoverable by due diligence.
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 contributed to the loss or damage.[16] (Art. IV, Sec. 2 Carriage Of Goods By Sea Act (COGSA) of 1924)

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.[17] (Art. IV. Sec. 3, COGSA, 1924).

2. The Common Law Rules

In a case where the carrier's liability in respect of damage or loss of cargo is not governed by the Hague Rules as where the carriage is governed by a charter-party, the measure of carrier's liability will be the ordinary tort rules applied to admiralty cases.

Where, however, those special circumstances were wholly unknown to the carrier that breached the contract, her owners, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and not affected by any special circumstances arising from such breach of contract. Here, as a general rule, the shipowner's liability is basically limited to the normal consequences of collision, such as the reasonable values of the goods lost or damaged.

Thus, if, however, the loss or damage had been the result of some especially sensitive condition of the goods, which had not been brought to the notice of the carrier, the rule excludes a claim for damages for that special loss.[18] (Baldwin v. L.C. & D. Ry 2 Q.B.D. 583) But, in one recent case, **The Pegase**[19] ([1980] Com LR9), it was held that: "there is no rule of policy which, unless special circumstances had been communicated at the time of the contract, a carrier would not be held liable in damages for loss of profits." On the whole, the essence of the principle above seemed to be that, if those special circumstances could be foreseen by a reasonable man, then, the shipowner would still be liable for the consequences of his negligent act in navigation. Lord Denning M.R. summed up this position in one leading case:

> "It is said that since the case of the *Wagon Mound* (No. 1).[1961] A.C. 388 P.C.) the old doctrine of *Re-polemis*, [1921] 3 K.B. 560 has gone and a person is not liable for the consequences of negligence except so far as they are reasonably foreseeable by him. That proposition must be taken subject to this qualification, "that it is not necessary that the precise concantenation of circumstances should should be envisaged. If the consequence was one of which was in the general range which any reasonable person might foresee (and was not of an entirely different kind which no one could anticipate), then it is within the rule that a person who has been guilty of negligence is liable for the consequences.[20] (Steward v. West African Terminals [1964] 2 Lloyd's Rep. 371, 375).

3. The Philippine Rule

The vessels may collide with each other through fortuitous event or force majeure. Under Article 830 of the Code of Commerce, each vessel and each cargo shall bear its own damages. Thus:

> "If a vessel should collide with another, through fortuitous event or force majeure, each vessel and its cargo shall bear its own damages.'

Two vessels may collide with each other without their fault but by reason of the fault of the third vessel. Under Article 831 of the Code of Commerce, the owner of the third vessel causing the collision shall be liable for the losses and damages. Thus:

"If a vessel should be forced by a third vessel to collide with another, the owner of the third vessel shall indemnify the losses and damages caused, the captain thereof being civilly liable to said owner.

A vessel which is properly anchored and moored may collide with those nearby by reason of a storm or other cause of force majeure. Under Article 832 of of the Code of Commerce, the vessel run into shall suffer its own damages and expenses. Thus:

"If by reason of a storm or other cause of force majeure, a vessel which is properly anchored and moored should collide with those nearby, causing them damages, the injury occasioned shall be considered as particular average of the vessel run into.

4. The Lisbon Rules

The Lisbon Rules are silent with regard to collision caused without the fault of either vessel.

B. Collission Caused By the Fault of One Ship

1. The Hague Rules

The carrier or the ship shall be liable for the loss or damage arising or resulting from unseaworthiness caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation. Whenever loss or damage resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exception[21] (Art. IV, Sec. 1 COGSA, 1971).

In the Hague Rules, there are two measures of compensation: the first, when the "nature" and "value" of the goods shipped have been declared by the shipper before shipment and inserted in the bill of lading.[22] (Art. IV, Sec. 5(a), COGSA, 1971). By this classification, in case of loss or damage to cargo occasioned by collision or any other causes for which the carrier's liability had not been excepted, the total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged[23] (Art. IV, Sec. 5(b) COGSA, 1971). The value of goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, be referenced to the normal value of goods of the same kind and quality[24] (Art. IV, Sec. 5(b)2 COGSA, 1971). The second, if the "nature" and "value" of the goods have not been declared before shipment, the carrier or shipowner's liability

for any loss or damage to or in connection with the goods, shall not exceed an amount which is the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is higher[25] (Art. IV, Sec. 5(a) COGSA, 1971). A package is a question of fact to be decided by the Court. Thus, an unboxed automobile was held not a package.[26] (Studebaker v. Charlton SS. Co., 59 Lloyd. L.R. 23).

However, neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in the above paragraph if it is proved that the damage resulted from the act or omission of the carrier done with the intent to cause damage, or recklessly and with knowledge that damage would probably result[27] (Art. IV, Sec. 5(e) COGSA, 1971).

2. The Common Law Rules

Where the carriage is covered by a contract, and the carrier breaches the contract by negligent navigation which eventually led to collision, and in consequence the shipper's goods were damaged or lost, the measure of carrier's liability in damages, is "either such as may fairly reasonably be considered arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it"[28] (Hadley v. Baxendale [1854] , 9 Exch. 341). In application of these principles, they generally refer to the carrier's liability for the value of the thing lost or damaged, which, in effect, deprived the shipper of its use, or value, if it had been sold, including the loss of profit[29] (The Arpad, [1934] p. 189). If, however, the collision resulted in mere delay in delivery of the goods, the measure of damages, which had been adopted in some cases, was the amount of interest at a fair rate, for the time lost upon the value of the goods[30] (British Columbia Saw Mill Co. v. Nettleship, [1868] L.R. 3 C.P. 499). As to what is a fair rate is a question of fact, but is usually based upon the fair existing rate of interest in the place of discharge. In some cases, the measure of damages is the difference between the market value of the goods at the time when they ought to have been delivered and the time when they were in fact delivered[31] (Dunn v. Buckna, 1 Bros. [1902] 2 K.B. 614).

Where the special circumstances under which the carriage was actually made were communicated by the shipper to the carrier, and thus known to both parties, the damages resulting from breach of the carriage, by negligent or faulty navigation ending in collision, are those which the parties would reasonably contemplate would be the amount of injury which would normally follow from a breach of contract under those special circumstances, so known and communicated[32] (The Heron II, Koufos v. C. Czarnikow, Ltd. [1967] 3 All E.R. 686 H.L.). So in case of loss or damage owing to collision, if the shipper had given notice, or the carrier had known upon accepting the shipment, that the goods were for sale at the port of destination, the damages recoverable are the value of the goods lost or damaged, loss of profits, and liabilities incurred upon a sale or contract for the use of the goods which the collision had frustrated. If, however, the collision merely resul-

ted in delay in delivery of the goods, the shipowner's liability is confined to loss: by a fall in the market value of the goods at their destination, loss of profits, and possibly liabilities incurred upon a sale or contract for the use of the goods which the delay had frustrated.[33] (A.R. Palacios, *supra.* at 363,364). However, it should be considered that a fall in the market value of goods is not always a consequence of delay in delivery, most especially if it is caused by a fluctuation which is not of a periodical, regularly recurrent kind, so that it would not be anticipated as a matter of common expectation[34] (Hawes v. S.E. Ry [1884] 52 L.T. 514, 516). Equally true is the rise in market price if likewise caused by price fluctuation.

3. The Philippine Rules

If a vessel should collide with another, through the fault, negligence, or lack of skill of the captain, sailing mate, or any other member of the complement, the owner of the vessel at fault shall indemnify the losses and damages suffered, after an expert appraisal[35] (Art. 826, Code of Commerce).

Under the terms of Article 826, only the "owner" is held liable for the damages arising from a collision caused by the fault of his vessel. This does not mean, however, that the ship agent is exempted from liability. The liablity of a naviero, in the sense of charterer or agent, is clearly deducible from the general doctrine of jurisprudence stated in Article 1902 of the (old) Civil Code (now Art. 2176 of our New Civil Code), and it is also recognized, but more specially as regards contractual obligations, in Article 586 of the Code of Commerce. Moreover, both the owner and the agent (naviero) should be declared to be jointly and severally liable since the obligation for damages caused by collision has its origin in a tortious act and not from contract[36] (Verzosa v. Lim, 45 Phil. 416, cited in A.F. Agbayani, **Commentaries and Jurisprudence on the Commercial Laws of the Philippines**, 1979 edition. Vol. 4, p. 282).

4. The Lisbon Rules

The claimant shall be entitled to recover only such damages as may reasonably be considered to be the direct and immediate consequence of the collision[37] (Rule C. Lisbon Rules).

Damages in accordance with these Rules shall be recoverable only to the extent that they could not have been avoided or minimized by the exercise of reasonable diligence by the claimant[38] (Rule D, Lisbon Rules).

Damages shall place the claimant as nearly as possible in the same financial position as he occupied prior to the incident giving rise to the claim[39] (Rule E, Lisbon Rules).

The burden of proving the damages sustained in accordance with these Rules shall be upon the claimant.[40] (Rule F, Lisbon Rules).

a.) Total Loss

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. Where no similar vessel is available the claimant shall be entitled to recover as damages the market value of the vessel calculated by reference to the type, age, condition, nature of operation of the vessel and all other relevant factors.

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

a) compensation for the loss of use of the vessel for the period reasonable and necessary to find a replacement whether the vessel is actually replaced or not.

b) reimbursement of general average and other expenses reasonably incurred as a result of the collision.

c) reimbursement of any sums paid by way of compensation to third parties in respect of legal liabilities arising out of the collision.

d) reimbursement of sums legally due and/or paid as compensation for death, personal injury and loss of or damage to personal possessions arising out of the collision and by reason of contractual, statutory or other legal obligations.

e) reimbursement for the net freight and the value of bunkers and ship's gear lost as a result of the collision and not included in the value of the vessel.[41] (Rule I, Lisbon Rules)

b.) Damage to Vessel

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.

b) the reasonable cost of permanent repairs which shall include the cost of any necessary drydocking, gas-freeing or tank cleaning, port charges, supervision and classification surveys, together with drydock dues and/or berthage for the time occupied in carrying out such repairs.

c) reimbursement of general average and other expenses reasonably incurred as a result of the collision.

d) reimbursement of any sums paid by way of compensation to third parties in respect of legal liabilities arising out of the collision.

e) reimbursement of sums legally due and/or paid as compensation for death, personal injury and loss or damage to personal possessions arising out of the collision and by reason of contractual, statutory or other legal obligations.

f) reimbursement for the net freight and the cost of replacing bunkers and vessel's gear lost as a result of the collision.

Damages recoverable shall also include:

a) compensation for the net loss of earnings arising from the collision.

b) expenses actually incurred during the period of loss of use, other than those included under Rule II. I.

c) when collision damage repairs are carried out in conjunction with necessary Owners' work or with the essential repair work arising out of another incident, damages shall include compensation for loss of use only to the extent that the period under repair is extended by reason of the collision damage repairs.

d) in the event of successive collisions, a party liable for a subsequent collision shall be bound to pay damages calculated pursuant to the provisions of the Rule only to the extent that the period under repair is extended by reason of the repair of the subsequent collision damage.[42] (Rule II, Lisbon Rules).

c.) **Property on Board**

The Owner of property on board a vessel which is involved in a collision shall be entitled to recover damages when such property has been lost or damaged in consequence of the collision.

In the case of goods such damages shall be calculated as follows:

a) If goods are lost, their Owner shall be entitled to reimbursement of their market value at the port of destination at the time when they should have arrived.

b) When such market value cannot be determined in a precise manner, the value of the goods shall be the shipped value plus freight and insurance if incurred by the claimant, plus a margin for profit, if any, assessed at no more than 10% of the value of the goods calculated as above.

c) If goods are damaged, the claimant shall be entitled to damages equal to the difference between the value of the goods in sound condition at destination and their value in damaged condition[43] (Rule III, Lisbon Rules).

C. Collision Caused By The Fault of Both Ships

1. The Hague Rules

In a collision where both vessels are to be blamed, the cargo carrying vessel may be excepted from liability under the Hague Rules to her own shippers, but her liability remains unaltered in respect of the other colliding vessel and the latter's cargo owners. The Hague Rules however have not provided any measure for equitable division of loss arising from this type of collision.[44] (A.R. Palacios, *supra*, at 365).

2. The Common Law Rules

a) The English Rule

Until the passage of the British Maritime Conventions Act 1911, the old rule of English Admiralty Law required each shipowner whose vessel was in fault in bringing about the collision to bear half the loss. In other words, the damages, including those of cargo owners,[45] (The Milan, [1861] 31 L.J. Adm. 105) were

divided equally between the shipowners, though their negligence was not in equal degree, and in turn, each could claim from the other half of his total loss.[46] (The Woodrop. Sims, [1815] 2 Dos. 83) As regards the cargo owner whose shipment suffered damage or loss in collision, he would be entitled to full compensation on the basis of the principle of *restitutio in integrum*[47] (The *Clarence*, [1850] 3 W. Rob. 283).

Upon its enactment, the Maritime Convention Act 1911 had accomplished two things: first, it abolished the statutory presumption of fault, and secondly, it introduced variable division of loss based on degrees of fault. Briefly, if two or more vessels at fault in collision cause loss or damage to one or more of those vessels, to their cargoes or any property on board, or freight, their liability shall be in proportion to their degree of fault, except when the circumstances of the case do not permit the possibility of establishing different degrees of fault as in that event the liability shall be apportioned equally.[46] (Section 1, Maritime Convention Act 1911). Moreover, this "division of liability" will not operate against a vessel whose fault in collision did not cause or contribute any loss or damage, or affect the liability of any person under a contract of carriage or any other contract: as where the carriage is governed by the Hague Rules; or impose a liability upon any person who is already exempted from liability by contract or by law: as where the carrier enjoys the protection of exception liabilities in the Hague Rules against loss or damage of cargo; or affect the right of any person to limit his liability in the manner provided by law; as where the carrier invokes limitation of its liability either under the Hague Rules or the Merchant Shipping Act of 1894, as amended.

There are two distinct types of collisions where the proportionate division of loss in Act 1911 will not apply. These are: where the doctrine of "alternative danger" applies to a collision, the defendant-vessel bears the full loss. and, where the "plaintiff's negligence is subsequent to that of defendant", the plaintiff cannot recover[49] (Section 1(b), Maritime Conventions Act 1911);

The doctrine of *"Alternative Danger"* is exemplified in this manner. "Ship "A" manoeuvers in a negligent manner and suddenly brings ship "B" into a grave danger. The master of "B" on the spur of the moment and without time for deliberation gives an order which he believes will avert the imminent danger. In fact, the order is wrong, and it becomes the proximate cause of the collision. In these circumstances, it has been held that the negligence of the master of "B" shall not be counted at all; "A" must bear the whole loss (*The Bywell Castle* (1879) 4 P.D. 219). For as held in another case:

> "it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger, because a person chooses one danger which he believes smaller rather than continue to be exposed to one which is apparently imminent"[50] (*The Utopia*, [1893] A.C. 492).

In a nutshell, the elements of 'B's" act, which would make "A" shoulder the entire loss, are: (a) the act was done in the 'agony of the moment of danger of collision'; (b) danger of collision is imminent; and (c) the time is too short for "B" to grasp the real situation, without any material time to deliberate on his act. This doctrine of *"Alternative Danger"* is akin to the principle of *"Error in extremis"*, which is applied in civil law countries to collisions in similar circumstances.

The rule in "Error in Extremis" is that the steamer must not approach so near a sailing vessel, and on such a course as to alarm a man of ordinary skill and prudence. If the man on the sailing vessel makes an improper maneuver, he is not responsible. It is what is called an "error in extremis." The leading case on the subject is *The Lucille* (15 Wallace, 676). In that case a steamer and schooner were approaching on converging courses only half a point apart, so that they would have come within thirty yards of each other, in Chesapeake Bay. The court held that this was too close and condemned the steamer. The rule that vessels may each assume that the other will obey the law is one of the most important in the law of collision[51] (J.N. Nolledo, Commercial Law Reviewer, 7th edition, 1985, p. 108).

In respect of the second kind of collision, where the *"plaintiff's negligence is subsequent to that of defendant"*, the situation depicts a case "where both plaintiff and defendant are negligent, but the defendant's negligence in point of time comes first. In other words, the defendant's negligence was not the last, or proximate cause of the collision. The plaintiff's subsequent or contributory negligence furnished the proximate cause. Here the defendant can no longer be said to have caused the collision. It was the plaintiff's new intervening act which did so and snapped the chain of causation[52] (*Davies v. Mann*, (1842) O.M. & W. 564; *The Sans Parcil*, (1900) D. 267).

b) **The American Rule**

The United States rule on "both-to-blame collision" is entirely different from those being enforced in other shipping nations. There, in a collision where both vessels are to blame, whether of equal or varying degrees of fault, the American courts will allow a cargo owner to recover in full against the non-carrying vessel, [53] (*The Beaconsfield*, [1894], 158 U.S. 303) and in turn, allow also the non-carrying vessel to claim one-half[54] (U.S. v. Farr Sugar Corp. [1951] 2 T.L.R. 1013) of the amount so paid from the carrying vessel. In other words, the "fault" and "damages" are always apportioned equally, no matter what the degree of fault. For example, a cargo claimant whose cargo was carried on vessel "X" may recover all the value of his loss from vessel "Y", and the latter vessel may then add that value to the sum of damages she shares equally with vessel "X". This rule has been heavily criticized as anomalous and a source of friction for maritime experts. Thus:

> "The United States alone, of the great powers possessing large merchant fleets and important marine insurance markets, adheres to the peculiar doctrine that cargo in ships does not accept the same proportion of fault as its carrier ship in a both-to-blame collision. The American doctrine permits cargo to sue the other ship for its full loss and then permits the other ship to add the cargo recovery to its items of losses to be divided with the carrier ship. In this way the carrier ship pays one-half of the losses of its own cargo when there is both to blame decision, although it pays none of the losses of its own cargo if the decision is that all the fault is on one ship alone. This curious anomaly in American jurisprudence, that the carrier pays more if his navigations are half at fault than if they are solely at fault, has long been a source of friction."[55] *(Knauth, Ocean Bills of Lading*, Ed. 1953, p. 211).

The U.S. rule on "divided damages" however is there for a good reason. They serve two purposes: first, it deflects the harsh effects of the Harter Act 1893 and the U.S. Carriage of Goods By Sea Act 1936 on the innocent cargo owner, who is normally barred from recovering his losses from the carrying vessel even when the latter's negligent navigation was the proximate cause of the collision. Secondly, the rule is meant to protect the innocent cargo owner[56] (A.R. Palacios, *supra.* at 371). In any event, to remedy the alleged anomaly mentioned in Knauth's comment, the U.S. shipowners who had experienced the effects of this rule, have actually sought inclusion in their contract of carriage of a "both-to-blame collision clause", which, *inter alia*, provides that "the owners of goods on board the defaulting or negligent ship will indemnify the carrier against all loss or liability to the non-carrying ship or her owners etc," but the Supreme Court of the United States has held that this clause, when included in bills of lading, is invalid by U.S. law for being unreasonable[57] *(United States of America v. Atlantic Mutual Insurance Co.*, [1952] 1 T.L.R. 1237). The crux, however, is that on the whole, the American rule against unreasonable clauses does not apply to charter parties[58] (The G.R. Crowe, [1923] 296 Fed. Rep. 506). Consequently, this clause continues to be valid in charter-parties, and is included in most charter-parties where there is a possibility of an American court having jurisdiction in the event of collision.

3. **The Philippine Rule**

If the collision is imputable to both vessels, each one shall suffer its own damages, and both shall be solidarily responsible for the losses and damages occasioned to their cargoes[59] (Art. 827, Code of Commerce).

Thus, suppose that A owns one vessel, worth ₱200,000, while B owns the other vessel, worth ₱300,000. A will suffer his loss of ₱200,000 while B will suffer his loss of ₱300,000. Suppose further that A carried the cargo of C and D worth ₱100,000, while B carried the cargo of E and F, worth ₱150,000, making a total of ₱250,000. Both A and B will be solidarily liable for the whole amount of ₱250,000 to the extent of the value of their respective vessels and the freightage thereof.

The characteristic language of the law in making the "vessels" solidarily liable for the damages due to the maritime collision emphasizes the direct nature of the responsibilities on account of the collision incurred by the shipowner under maritime law, as distinguished from the civil law and mercantile law in general

x x x to admit the defense of due diligence of a *bonus paterfamilias* (in the selection and vigilance of the officers and crew) as exempting the shipowner from any liability for their faults, which would have rendered nugatory the solidary liability established by Article 827 of the Code of Commerce for the greater protection of injured parties[60] (A.F. Agbayani, *supra.* at pp. 282-283).

It is noteworthy to state that under Article 828 of the Code of Commerce, "the provisions of the Art. 827 discussed above are applicable to the use where it cannot be determined which of the two vessels has caused the collision." Article 828 is also known as the provision on the "doctrine of inscrutable fault." According to Gilmore & Black[61] (G. Gilmore & C.L. Black, Jr., *"The Law of Admiralty."* 2nd edition, The Foundation Press, Inc., New York, 1975) in their treatise "The Law of Admiralty 'inscrutable fault' is said to exist when the court can see that a fault has been committed, but is unable, from the conflict of testimony, or otherwise to locate it[62] (The Worshington & Davis, 19F. 836, 839). The seemingly settled rule is that in such case no one can recover anything[63] (The Worshington, supra). Obviously, if liability must rest on fault, there can be no liability where proof fails as to who is at fault, in such a position, no one has made out a case on which liability can be predicated.

However, under our law, the rule of liability announced in Article 827 is applicable not only to the case where both vessels may be shown to be actually blameworthy but also where it is obvious that only one was at fault but the proof does not show it. Thus, under Articles 827 and 828, in case of a collision between two vessels at sea, both are solidarily liable for the loss of cargo carried by either to the full extent of the value thereof, not only in the case where both vessels may be shown to be actually blameworthy but also in the case where it is obvious that only one was at fault but the proof does not show it; and it makes no difference that the negligence imputable to the two vessels may have differed somewhat in character and degree and that the negligence of the sunken ship was somewhat more marked than that of the other[64] (Gov't of the Phil. v. Phil. Steamship Co., 44 Phil. 359).

The tort rule known as the "doctrine of last clear chance", which states that where the person who has the last fair chance to avoid the impending harm fails to do so that person is chargeable with the consequences of the accident, without reference to the prior negligence of the other party[65] (Picart v. Smith, 37 Phil 814), cannot apply to Article 827, where the collision is imputable to the fault of both vessels. This is because of the express provisions of Article 827, under which, the evidence disclosing that both vessels are blameworthy, the owners of neither can successfully maintain an action against the other for the loss of or injury to his vessel[66] (William v. Yangco, 27 Phil. 68).

The action for the recovery of losses and damages arising from collisions cannot be admitted if a protest or declaration is not presented within twenty-four hours before the competent authority of the port where the collision took place, or that of the first port of arrival of the vessel, if in the Philippine territory, and to the consul of the Republic of the Philippines if it occurred in a foreign country[67] (Art. 835, Code of Commerce).

The reason for Article 835 is the necessity of preventing fictitious collisions and improper indemnities. In a way, it establishes a condition precedent necessary for the maintenance of an action for damages caused by maritime collisions. No action will lie without the protest required by it. This rule applies whether the plaintiff is a private individual or the government itself[68] (U.S. v. Smith Bell & Co., 5 Phil. 86).

4. The Lisbon Rules

When a vessel is wholly or partly liable for a collision, these Rules shall apply to the ascertainment of the damages which she has caused to another vessel or to the goods on board either vessel.[69] (Rule B)

These Rules shall not extend to the determination of liability.

It is hereby submitted that in the rules above quoted, "wholly" would refer to collision caused by the fault of one ship; while "partly" would refer to collision caused by the fault of both parties.

CONCLUSION:

Collision liability is really based on fault; the mere fact of impact has no legal consequence[70] (The Java, 81 U.S. 189 [1872] cited in Gilmore & Black, *supra.).* This theory can probably sum up the topic hereby discussed.

Annex "A"

In the Rules, the following words are used with the meanings set out below:

"Collision" means any accident occurring between vessels arising from fault, such as a fault in navigation or the failure to comply with a statutory rule and which causes damages to a claimant even if no collision has taken place.

"Total loss" means the actual total loss of the vessel or such damage to the vessel that the cost of repairs would exceed the market value when repaired.

"Vessel" means any ship, craft, machine or structure able to be navigated, whatever its purpose.

"Claimant" means any person or corporation suffering physical or financial loss as a result of a collision, in respect of which damages are due and includes any one of the following persons: the owner of the vessel, (the charterer), the rightful owner of the goods, or any third party including crew members, passengers or other persons lawfully on board.

'Damages ' means the financial compensation payable to the claimant.

"Loss of use ' means the period of time during which the claimant is deprived of the use of the vessel.

"Property" means cargo and things on board.

"Freight" means the remuneration payable for the carriage of goods by the vessel or for the use of the vessel.

LISBON RULES

RULE A

These Rules are available for adoption following a collision by parties exercising a legal right to claim damages arising out of the collision and the parties defending themselves against such claims.

RULE B

When a vessel is wholly or partly liable for a collision, these Rules shall apply to the ascertainment of the damages which she has caused to another vessel or to the goods on board either vessel.

These Rules shall not extend to the determination of liability.

RULE C

The claimant shall be entiled to recover only such damages as may reasonably be considered to be the direct and immediate consequence of the collision.

RULE D

Damages in accordance with these Rules shall be recoverable only to the extent that they could not have been avoided or minimized by the exercise of reasonable diligence by the claimant.

RULE E

Damages shall place the cliamant as nearly as possible in the same financial position as he occupied prior to the incident giving rise to the claim.

RULE F

The burden of proving the damages sustained in accordance with these Rules shall be upon the claimant.

RULE I

TOTAL LOSS

I. 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. Where no similar vessel is available the claimant shall be entitled to recover as damages the market value of the vessel calculated by reference to the type, age, condition, nature of operation of the vessel and all other relevant factors.

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

(a) compensation for the loss of use of the vessel for the period reasonable and necessary to find a replacement whether the vessel is actually replaced or not. Such compensation to be calculated in accordance with Rule II. 2, less any interest which the claimant may have earned (or should have earned) from the time he has received compensation for the loss of the vessel until the date on which he has applied those funds to the purchase of a replacement vessel.

(b) reimbursement of general average and other expenses reasonably incurred as a result of the collision.

(c) reimbursement of any sums paid by way of compensation to third parties in respect of legal liabilities arising out of the collision.

(d) reimbursement of sums legally due and/or paid as compensation for death, personal injury and loss of or damage to personal possessions arising out of the collision and by reason of contractual, statutory or other legal obligations.

(e) reimbrusement for the net freight and the value of bunkers and ship'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.

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.

(b) the reasonable cost of permanent repairs which shall include the cost of any necessary drydocking, gas-freeing or tank cleaning, port charges, supervision and classification surveys, together with drydock dues and/or berthage for the time occupied in carrying out such repairs.

However, when the collision damage repairs are carried out in conjunction with necessary owners' work or with essential repair work arising out of another incident, the damages shall include drydock dues, berthage and/or other time-based charges only to the extent that the period to which such charges relate has been extended by reason of the collision repairs.

(c) reimbursement of general average and other expenses reasonably incurred as a result of the collision.

(d) reimbursement of any sums paid by way of compensation to third parties in respect of legal liabilities arising out of the collision.

(e) reimbursement of sums legally due and/or paid as compensation for death, personal injury and loss of or damage to personal possessions arising out of the collision and by reason of contractual, statutory or other legal obligations.

(f) reimbursement for the net freight and the cost of replacing bunkers and vessel's gear lost as a result of the collision.

2. Damages recoverable shall also include:

(a) compensation for the net loss of earnings arising from the collision. This compensation shall be assessed as follows:

- the loss of the gross earnings of the vessel during the period of loss of use, calculated by reference to a determined period before and after the collision or by reference to the earnings of comparable vessels in the case of trades subject to seasonal influences.

- from the gross earnings shall be deducted the operating costs which would normally have been incurred in order to achieve the gross earnings, such as hire payable, crew costs, port disbursements and insurance.

(b) expenses actually incurred during the period of loss of use, other than those included under Rule II. 1.

In the interpretation of this Rule II. 2, the following particular provisions will also apply:

i) when loss of use of the vessel occurs during the performance of a voyage charter-party and such loss of use does not entail cancellation of the charter-party, compensation shall be calculated by applying the average net earnings on the two previous and two subsequent voyages to the period of loss of use.

When no reference to two previous and two subsequent voyages is possible, the net earnings on other relevant voyages or on the voyage during which the collision took place shall form the basis of compensation.

If such loss of use entails the proper cancellation of the charter-party and freight remains unearned compensation shall include the net freight lost.

ii) When loss of use of the vessel occurs while it is being operated commercially on a regular line, compensation shall include the net freight lost during the period of loss of use. In the event of the freight not yet having been earned by the vessel at the time of the collision or when the loss of use of the vessel continues beyond the duration of the voyage during which the collision took place, compensation shall be calculated by applying the average net earnings on the two previous and the two subsequent voyages to the period of loss of use.

When no reference to two previous and two subsequent voyages is

possible the net earnings on other relevant voyages or on the voyage during which the collision took place shall form the basis of compensation.

iii) When loss of use of the vessel occurs while it is performing a consecutive voyage or time-charter, compensation shall include the net loss of hire during the period of loss of use. In the event of the loss of use entailing the proper cancellation of the charter-party, compensation shall include the net hire due during unperformed portion of the charter, subject to the overriding obligation to avoid or minimize the loss in accordance with Rule D.

c) When collision damage repairs are carried out in conjunction with necessary Owners' work or with the essential repair work arising out of another incident, damages shall include compensation for loss of use only to the extent that the period under repair is extended by reason of the collision damage repairs.

(d) In the event of the successive collisions, a party liable for a subsequent collision shall be bound to pay damages calculated pursuant to the provisions of the Rule only to the extent that the period under repair is extended by reason of the repair of the subsequent collision damage.

RULE III

PROPERTY ON BOARD

1. The Owner of property on board a vessel which is involved in a collision shall be entitled to recover damages when such property has been lost or damaged in consequence of the collision.

2. In the case of goods such damages shall be calculated as follows:

(a) If goods are lost, their Owner shall be entitled to reimbursement of their market value at the port of destination at the time when they should have arrived.

(b) When such market value cannot be determined in a precise manner, the value of the goods shall be the shipped value plus freight and insurance if incurred by the claimant, plus a margin for profit, if any, assessed at no more than 10% of the value of the goods calculated as above.

(c) If goods are damaged, the claimant shall be entitled to damages equal to the difference between the value of the goods in sound condition at destination and their value in damaged condition.

Where physical damage to goods arises from the prolongation of the voyage following the collision, the compensation shall be fixed on the same basis. However, where the loss arises from a fall in the market value during such prolongation there shall be no right to damages.

In the case of property not intended for sale, the owner of the property shall be entitled to recover:

– where the property has been lost or is irreparable: the reasonable cost of its replacement;

– where the property is damaged and can be repaired: the reasonable cost of repairs.

RULE IV

Claims if necessary shall be calculated in Special Drawing Rights at the rate of exchange prevailing on the day the loss was sustained or the expense incurred.

The final amount due (having struck a balance between the claims if necessary) shall be calculated in Special Drawing Rights but shall be paid to the claimant in the currency of his choice at the rate of exchange prevailing on the date of payment.

RULE V

INTEREST

(i) Rate:

Interest on damages shall be recoverable in addition to the principal sum. The rate of interest shall be the annual average rate applicable to S.D.R. Linked Deposits.

(ii) Period:

In the event of a total loss of a vessel, interest shall run on the value assessed according to these Rules from the date of the accident to the date of settlement.

For all other claims interest shall run from the date the loss was sustained or the expense was incurred to the date of settlement.