NOTES

NAVIGATING THE UNCHARTED WATERS OF LIABILITY APPORTIONMENT: THE ROTTERDAM RULES AND AMERICAN CARGO DAMAGE CLAIMS

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I. INTRODUCTION 464
II. A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA 466
A. Basics of Admiralty Law and Public Policy 466
B. The Development of the Rotterdam Rules 467
C. An Overview of the Rotterdam Rules 469
D. The Carriage of Goods by Sea and the United States: A Present Complicated by the Past 471
III. LIABILITY APPORTIONMENT SCHEMES UNDER THE ROTTERDAM RULES AND THE *VALLESCURA* RULE 473
A. Carrier Liability and Burden-Shifting Under COGSA and the Rotterdam Rules 473
1. COGSA Burden-Shifting 475
2. Rotterdam Rules Burden-Shifting 475
B. Article 17.6 Liability Apportionment 476
C. The *Vallescura* Rule and its Development 478
1. Origins and Development of the *Vallescura* Rule 478
2. Issues with the *Vallescura* Rule 481
D. Reconciling Article 17.6 and the *Vallescura* Rule 482
IV. MECHANISMS FOR APPORTIONING LIABILITY 483
A. The Basic Concepts of Liability Apportionment 483
B. Restatement (Third) of Torts: Apportionment of Liability Two-Step Model 485
C. American Maritime Liability Apportionment: Comparative Fault and *Reliable Transfer* 487
D. Application to Rotterdam Rules' Liability Apportionment 490
V. PUBLIC POLICY AND CONCLUSION 492
A. Promoting Uniformity 492
B. Effect on Shippers and Carriers 493
C. Does the Change Really Matter? 493
D. Conclusion 494

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I. INTRODUCTION

> *But ships are but boards, sailors but men. There be land rats and water rats, water thieves and land thieves - I mean pirates - and then there is the peril of waters, winds, and rocks.*
>
> *- Shylock, The Merchant of Venice*[1]

The ocean is a dangerous place to conduct business. Shakespeare's infamous moneylender Shylock used that very reasoning to charge the merchant Antonio exorbitant rates on a loan backed by cargo ships.[2] While a "pound of flesh" may no longer be required collateral for ship financing,[3] the risk inherent in the carriage of goods by sea is still very real.[4] Cargo transported by sea faces myriad risks, from severe weather and shipwrecks, to water damage and port delays, not to mention human negligence and error.[5] When a confluence of factors leads to cargo damage, the harm can be great and the liability can be complicated. Despite the risks, the shipping industry forms an integral part of modern international trade, where about eighty percent of all traded goods are transported by sea, and is expected to continue growing in the future as international trade expands worldwide.[6]

Over the past decade, the United Nations ("UN") has undertaken the task of regulating international maritime law on the carriage of goods by sea through a series of conventions, culminating in the latest convention, the Rotterdam Rules.[7] Article 17 of this

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1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 1, sc. 3, lines 18-21, *in* 1 THE NORTON SHAKESPEARE: EARLY PLAYS AND POEMS 1128 (Stephen Greenblatt et al. eds., W.W. Norton & Co. 2d ed. 2008).

2. *Id.*

3. *Id.* at act 1, sc. 3, lines 139-47. Luckily for our hero Antonio, after much trial and tribulation, all of his ships arrive safely to port in the end before he starts a new life with his wife Portia. *Id.* at act 5, sc. 1, lines 286-88.

4. *See* Rep. on Formal Safety Assessment of the Mar. Safety Comm. of the Int'l Mar. Org., 83d Sess., July 3, 2007, at 5-7, U.N. Doc. MSC 83/21/2 (2007) [hereinafter Formal Safety Assessment], *available at* http://www.martrans.org/documents/2011/fsa/MSC_83-21-2.pdf (discussing reported accidents on cargo ships between 1993 and 2004).

5. *Id.*

6. *See* U.N. DEP'T OF ECON. AND SOC. AFFAIRS ET AL., WORLD ECONOMIC SITUATION AND PROSPECTS 2013, at 39-40, U.N. Sales No. 13.II.C.2 (2013) [hereinafter WORLD ECONOMIC SITUATION AND PROSPECTS 2013], *available at* http://www.un.org/en/development/desa/policy/wesp/wesp_current/wesp2013.pdf. According to the UN, the shipping industry "has expanded at an average annual rate of 3 per cent [sic] over the last 30 years." *Id.* at 40.

7. WARREN J. MARWEDEL ET AL., AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES 1 (2010), *available at* http://apps.americanbar.org/intlaw/leadership/UN%20Rotterdam%20Rules.pdf. *See*

Convention, which provides the basis of a carrier's liability "for loss, damage[,] or delay" of cargo,[8] was considered by the subcommittee of the United Nations Commission on International Trade Law ("UNCITRAL") that drafted the new convention to be "one of the most important articles in the draft convention with significant practical implications."[9] For the United States, Article 17 does indeed have important implications because its final provision, Article 17.6, applies a liability apportionment scheme that is diametrically opposed to the existing American scheme, known as the *Vallescura* Rule.[10]

Application of the new system would change the way that courts handle concurrent causation and indivisible harm, which could potentially alter case outcomes. Since there is no mathematically certain solution or definitive law for liability apportionment, American courts will need a legal framework for apportioning liability from cargo damage cases consistently and fairly.[11]

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008) [hereinafter ROTTERDAM RULES], *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/122&Lang=E.

8. ROTTERDAM RULES, *supra* note 7, arts. 17.1-17.6; *see also* Anthony Diamond, *The Rotterdam Rules*, 4 LLOYD'S MAR. & COM. L.Q. 445, 472 (2009) ("[Article 17] provides . . . for an enquiry into the carrier's liability to be conducted in a number of stages, stating, in relation to each stage, which party has the burden of proof, what needs to be proved and the consequence of so doing."); Jeffrey P. Briscoe, Comment, *The Rotterdam Rules: A Port in the Storm of Liability Limitations and the Fair Opportunity Split*, 9 LOY. MAR. L.J. 75, 76 (2011). Throughout this article, the terms "damage" and "harm" are used inclusively to represent loss, damage, and delay.

9. Rep. of Working Grp. III (Transp. Law) of the U.N. Comm'n on Int'l Trade Law, 21st Sess., Jan. 14-25, 2008, para. 56, U.N. Doc. A/CN.9/645 (Jan. 30, 2008), *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/645 - Report of Working Group III (Transport Law) on the work of its twenty-first session" hyperlink). UNCITRAL believed "that over the years of extensive negotiations the [U.N.] Working Group had eventually achieved a workable balance between the interests of shippers and carriers and that the draft article [17] represented the best compromise that could be arrived at." Rep. of the U.N. Comm'n on Int'l Trade Law, 41st Sess., June 16-July 3, 2008, para. 76, U.N. Doc. A/63/17; GAOR, 63rd Sess., Supp. No. 17 (2008) [hereinafter UNCITRAL 41st Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/sessions/41st.html (follow "A/63/17 - Report of the United Nations Commission on International Trade Law" hyperlink).

10. *Compare* ROTTERDAM RULES, *supra* note 7, art. 17.6 ("When the carrier is relieved of part of its liability . . . the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable . . . ."), *with* Schnell v. The Vallescura, 293 U.S. 296, 306 (1934) (holding that a carrier is liable for the entire loss unless it can show what portion of the loss was attributable to some "sea peril"). *See also* Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 TEX. INT'L L.J. 427, 447-48 (2009).

11. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 reporters' note cmt. c (Proposed Initial Draft (Revised) 1999).

In this Note, I will first explore the differences between the liability apportionment schemes imposed by the Rotterdam Rules and the *Vallescura* Rule, and how those schemes fit into the larger frameworks of carrier liability under the two systems. I will then analyze how the Rotterdam Rules' liability apportionment system could best be integrated into existing American admiralty law and liability apportionment jurisprudence to create a workable apportionment scheme that accounts for the specific requirements of cargo damage claims. Finally, I will address whether the United States should adopt the Rotterdam Rules' liability apportionment system, consider public policy implications, and analyze the potential impact of the change in systems on carriers and shippers.[12]

II. A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA

A. Basics of Admiralty Law and Public Policy

Admiralty is one of the oldest fields of law, dating back to antiquity, and is a complete legal system within itself, encompassing a wide range of subjects from contract law to insurance and personal injury.[13] From its inception, maritime law has been an international field; important parts of maritime commerce, including the carriage of goods, transpire in international contexts and thus require international legal schemes to function smoothly.[14] Modern maritime law is formed from many inter-connected sources, including "the ever-evolving general maritime law, on one hand, and national maritime statutes and international maritime conventions, on the other."[15] In the United States, admiralty law falls under federal jurisdiction and has a substantial body of federal common law.[16]

Uniformity and harmony are guiding principles of admiralty law

12. The Rotterdam Rules defines a "carrier" as "a person that enters into a contract of carriage with a shipper," and a "shipper" as "a person that enters into a contract of carriage with a carrier." ROTTERDAM RULES, *supra* note 7, arts. 1.5, 1.8. While the question of who actually owns or controls a ship can be very difficult to answer at times, for the purposes of this Note, I am using the most basic definition of a carrier and will not delve into the specific facts of ship management in any particular case.

13. William Tetley, *Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317, 320 (1999). The oldest recorded international maritime law was the Rhodian sea code, which came into force around 800 B.C. and governed maritime commerce in the ancient western world. *Id.*

14. *Id.* at 321; Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625, 646-47 (1998).

15. Tetley, *supra* note 13 at 321-22. General maritime law includes, *inter alia*, maritime shipping industry standards and maritime arbitration awards. *Id.* at 321.

16. U.S. CONST. art. III, § 2; *see* Goldstein, *supra* note 14, at 644-45 (discussing the role of federal common law in admiralty).

policy both domestically and internationally.[17] There is "a global public interest in the unification of transportation rules" because having uniform laws amongst countries makes risks foreseeable, lowers insurance rates and prices for internationally traded goods, and overall, makes trading less expensive.[18] Under a unified international maritime law, there would be more legal certainty, efficiency, and predictability, which would be beneficial to all parties involved in international maritime trade.[19] While maritime law is based on ancient principles and can be slow to change, maritime law should also be harmonized with the requirements of modern maritime commerce.[20]

B. The Development of the Rotterdam Rules

Currently, three older UN conventions governing the carriage of goods by sea are in use by various countries: the 1924 Hague Rules, the 1968 Hague-Visby, and the 1978 Hamburg Rules.[21] Not surprisingly, international maritime law currently lacks a uniform set of rules on cargo carriage. The last UN convention, the Hamburg Rules, attempted to create a uniform rule, but was unable to do so because the convention was not widely adopted by major shipping powers.[22] The Rotterdam Rules are not intended to be the fourth convention on the carriage of goods by sea; they are intended to be a comprehensive, uniform set of rules that will "enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States."[23]

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17. *See* Dennis Minichello, *The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay*, 36 TRANSP. L.J. 229, 230 (2009); Lewis v. Timco, Inc., 716 F.2d 1425, 1428 (5th Cir. 1983) (noting that maritime law's "cardinal mark is uniformity"); ROTTERDAM RULES, *supra* note 7, pmbl. (stating that the UNCITRAL was mandated to "further the progressive harmonization and unification international trade Law").

18. *See* Hakan Karan, *Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules?*, 42 J. MAR. L. & COM. 441, 448 (2011).

19. *See* Theodora Nikaki & Baris Soyer, *A New International Regime for Carriage of Goods By Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves?*, 30 BERKELEY J. INT'L L. 303, 307 (2012); MARWEDEL ET AL., *supra* note 7, at 2.

20. *See* Minichello, *supra* note 17, at 230 ("The admiralty and maritime law in the United States has long been characterized by its dogged pursuit of uniformity; its interconnection with the maritime laws of many of the major trading countries in the world; and its adherence to tradition and hoary historical precedents (some would stay stubbornly so)—changing only in the most cautiously incremental fashion over an extended period of time."); ROTTERDAM RULES, *supra* note 7, pmbl.

21. MARWEDEL ET AL., *supra* note 7, at 1.

22. Nikaki & Soyer, *supra* note 19, at 304.

23. ROTTERDAM RULES, *supra* note 7, pmbl.

UNCITRAL began the new wave of work on the carriage of goods by sea in 1996.[24] In 2001, UNCITRAL established Working Group III to draft a new instrument on the carriage of goods by sea.[25] Other groups assisted Working Group III with the drafting process, including the Comité Maritime International ("CMI"), which created the preliminary draft convention,[26] and the United States, which played an active role through the participation of the Maritime Law Association and the Department of State.[27] After much consideration, UNCITRAL adopted the draft convention and recommended it to the UN General Assembly on July 3, 2008, which officially adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules") on December 11, 2008.[28] The official signing ceremony was held in Rotterdam, the Netherlands, on September 23, 2009.[29]

So far, the United States is one of twenty-five countries that have already signed the Rotterdam Rules.[30] Currently, only the

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24. Rep. of the U.N. Comm'n on Int'l Trade Law, 29th Sess., May 28-June 14, 1996, para. 210, U.N. Doc. A/51/17, GAOR, 51st Sess., Supp. No. 17 (1996), *available at* http://www.uncitral.org/uncitral/en/commission/sessions/29th.html (follow "A/51/17 - Report of UNCITRAL on the work of its twenty-ninth session" hyperlink) (proposing to review the current international laws for the carriage of goods by sea "with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved").

25. Rep. of the U.N. Comm'n on Int'l Trade Law, 34th Sess., June 25-July 13, 2001, para. 345, U.N. Doc. A/56/17, GAOR, 56th Sess., Supp. No. 17 (2001), *available at* http://www.uncitral.org/uncitral/en/commission/sessions/34th.html (follow "A/56/17 - Report of the United Nations Commission on International Trade Law on the work of its 34th session" hyperlink). Interestingly, it was initially suggested that the new maritime convention should not address carrier liability, which had already been addressed by other conventions and which, it was believed, some states might not accept. *Id.* para. 342.

26. Sabena Hashmi, *The Rotterdam Rules: A Blessing?*, 10 LOY. MAR. L.J. 227, 227 (2012). The CMI is a non-profit international organization founded in 1897 that is dedicated to promoting the unification of international maritime law and commerce. Nigel H. Frawley, *A Brief History of the CMI and Its Relationship with IMO, the IOPC Funds and Other UN Organisations*, COMITÉ MARITIME INTERNATIONAL (Jan. 7, 2011), http://www.comitemaritime.org/Relationship-with-UN-organisations/0,27114,111432,00.html. It has frequently worked with UN organizations on maritime issues. *Id.*

27. Minichello, *supra* note 17, at 232.

28. UNCITRAL 41st Sess., *supra* note 9, para. 298; ROTTERDAM RULES, *supra* note 7.

29. New UN Convention Rotterdam Rules Open for Signatures, ROTTERDAM RULES, http://www.rotterdamrules2009.com/cms/ (last visited May 7, 2014). Hence the name, the "Rotterdam Rules." *Id.*

30. *Status of United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, UNITED NATIONS TREATY COLLECTION, (May 7, 2014), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-

Republic of the Congo, Spain and Togo have ratified the Convention,[31] which requires ratification by twenty countries before becoming effective.[32] There has been significant support for international ratification of the Rotterdam Rule that includes not only signatory states[33] and industry groups,[34] but also the European Parliament, which recommended that all of its member states ratify the Convention.[35] The movement towards ratification in the United States will be discussed in a later part.[36]

C. An Overview of the Rotterdam Rules

The Rotterdam Rules have been the subject of much academic discussion that has provided excellent analysis of the major provisions of the rules.[37] As such, I accept the general understanding of the Rotterdam Rules as a premise of my analysis of the carrier's liability provisions of Article 17.[38] I will provide a brief overview of

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8&chapter=11&lang=en [hereinafter *Status of Rotterdam Rules*].

31. *Id.*

32. ROTTERDAM RULES, *supra* note 7, art. 94.

33. *See* Status of Rotterdam Rules, *supra* note 30. Guinea-Bissau is the most recent signatory, having signed the Convention only on September 24, 2013. *Id.*

34. *See, e.g.*, Joint Letter from Bruce J. Carlton, President & CEO, Nat'l Indus. Transp. League, et al., to Susan N. Biniaz, Deputy Legal Adviser for Int'l Affairs, U.S. Dep't of State (Feb. 7, 2013) [hereinafter Biniaz Letter], *available at* http://www.nitl.org/JointLtr-to-Ms_Biniaz_2-7-13.pdf (outlining industry and trade groups' support for U.S. ratification); Press Release, European Cmty. Shipowners' Ass'n, Int'l Chamber of Shipping, BIMCO, & World Shipping Council, Shipowner Associations Welcome EP Support for Rotterdam Rules (May 17, 2010) [hereinafter Shipowner Associations Press Release], *available at* https://www.bimco.org/en/About/Press/Press_Releases/2010/2010_05_17_Rotterdam_Rules.aspx?RenderSearch=true (outlining industry and trade groups' support for European Union ratification).

35. Resolution of 5 May 2010 on Strategic Goals and Recommendations for the EU's Maritime Transport Policy Until 2018, EUR. PARL. DOC. (P7_TA (2010) 128) para. 11 (May 5, 2010), *available at* http://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2010/05-05/0128/P7_TA(2010)0128_EN.pdf; *see also* Nikaki & Soyer, *supra* note 19, at 306 (noting that the European Parliament "will likely determine the future of the Rotterdam Rules"). The European Parliament's recommendation has been well-received by industry groups such as the European Community Shipowners' Association, the World Shipping Council, the International Chamber of Shipping, and BIMCO. Shipowner Associations Press Release, *supra* note 34.

36. *See infra* Part II.D.

37. For good general discussions of the Rotterdam Rules' main provisions, see D. Rhidian Thomas, *An Analysis of the Liability Regime of Carriers and Maritime Performing Parties*, *in* A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA - THE ROTTERDAM RULES 52 (D. Rhidian Thomas ed., 2009); *see also* Sturley, *supra* note 10, at 428; Alexander von Ziegler, *The Liability of the Contracting Carrier*, 44 TEX. INT'L L.J. 329, 335-36 (2009).

38. To read Article 17 in its entirety, please refer to the Appendix, *infra*, pages 74-77. My interpretations are based on plain language, legislative history, and scholarly

the Rotterdam Rules' major developments to provide context and background, as the liability provisions do not stand alone, but rather are part of a larger legislative scheme where every article is interconnected.

The Rotterdam Rules were designed to be "evolutionary, not revolutionary,"[39] and to "integrate[] itself into the broader backdrop of international unimodal transport conventions."[40] The Rules include provisions on admiralty topics that have never before been addressed by an international convention, such as arbitration, the rights of controlling parties, the delivery requirements, and electronic documents.[41] Other provisions of the Convention are reinterpretations of ancient principles of admiralty that have been updated to reflect modern technology and commercial practices, including the obligation of seaworthiness[42] and liability limitations.[43]

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commentary. It is important to keep in mind that Article 17 is meant to be used in conjunction with Chapters 4 and 6. Chapter 4 provides in relevant part for the door-to-door period of a carrier's responsibility and the carrier's obligation of due diligence in providing a seaworthy ship and proper crew, equipment, supplies, and cargo storage areas. ROTTERDAM RULES, *supra* note 7, ch. 4, arts. 12, 14. Chapter 6 provides in relevant part for breaches of contract due to national laws, and states that other international conventions supersede the Rotterdam Rules for loss, damage, or delay occurring solely during a land leg of the cargo's journey. ROTTERDAM RULES, *supra* note 7, ch. 6, arts. 24, 26; *see also* Rep. of the Working Grp. on Transp. Law of the U.N. Comm'n on Int'l Trade Law, 9th Sess., Apr. 15-26, 2002, para. 39, U.N. Doc. A/CN.9/510 (May 7, 2002) [hereinafter Working Grp. III 9th Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/510 - Report of the Working Group on Transport Law on the work of its ninth session" hyperlink).

39. Sturley, *supra* note 10, at 429.

40. Thomas, *supra* note 37, at 53.

41. *See* Hashmi, *supra* note 26, at 265. Under Article 3, electronic records that are equivalent to paper records may be used provided the carrier and shipper both consent. ROTTERDAM RULES, *supra* note 6, art. 8; Minichello, *supra* note 17, at 241.

42. The carrier's duty "to use due diligence to provide a seaworthy vessel . . . . is almost pleonastic in maritime law," but was codified in Article 14 with a new catch: the duty of seaworthiness extends throughout the duration of the voyage. Ziegler, *supra* note 37, at 337-38. The Hague Rules only imposed the duty until the start of the voyage, which no longer comports with the general standard of care for cargo and is unnecessary due to "the developments in telecommunications . . . . [that have made] it absolutely possible for the shore operation of a carrier to communicate with the vessel and supervise its status throughout the voyage." *Id.* at 337.

43. Chapter 12 sets forth the new limits of liability. Parties are still able to contract for higher liability limits, but the new liability limits are significantly higher than before. The standard liability limitation is now 875 Special Drawing Rights ("SDRs") "per package or other shipping unit, or 3 [SDRs] per kilogram of the gross weight of the goods . . . whichever amount is the higher." ROTTERDAM RULES, *supra* note 7, art. 59. An SDR is an International Monetary Fund "international reserve asset" that "can be exchanged for freely usable currencies." *Factsheet: Special Drawing Rights (SDRs)*, INT'L MONETARY FUND 2, http://www.imf.org/external/np/exr/facts/pdf/sdr.pdf (last visited May 8, 2014). As of May 8, 2014, one SDR was worth $1.55696 U.S. dollars. *SDR Valuation*, INT'L

Changes in technology also led to perhaps the most important feature of the Rotterdam Rules for the shipping industry: coverage of multi-modal transport and inland legs through "a door-to-door approach."[44] Though multi-modal transport may be the most prominent part of the Convention, the Rotterdam Rules—most importantly for this paper—also address liability for the loss, damage, or delay of goods in Article 17.[45]

While the Rotterdam Rules have received much international support, not all reception to the Rotterdam Rules has been positive. Some analysts argue that the already complicated Rotterdam Rules might become even more complicated as they are adopted by different states, which could defeat the goal of uniformity.[46] Article 17, the provision on carrier's liability, has been criticized as "a complex, ambiguous and, probably, an incomplete provision" that provides little guidance on how to apportion loss for concurrent causes.[47] This valuable criticism raises significant issues and will be addressed in Part V.

D. The Carriage of Goods by Sea and the United States: A Present Complicated by the Past

The United States has a particularly strong need for an updated maritime code that can address developments in the modern maritime cargo industry, such as containerization and multi-modal transportation.[48] The Harter Act of 1893, the foundation of American maritime cargo regulation, is still in effect today.[49] The United States

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MONETARY FUND, http://www.imf.org/external/np/fin/data/rms_sdrv.aspx (last visited May. 8, 2014).

44. Sturley, *supra* note 10, at 434. A multi-modal approach is necessary because "one legal regime must govern the entire performance of the contract" to truly achieve uniformity and certainty given the realities of modern international commerce. *Id.* Article 12 provides that the carrier is responsible for the goods from when "the carrier or a performing party receives the goods for carriage and ends when the goods are delivered." ROTTERDAM RULES, *supra* note 7, art. 12.1.

45. *See* ROTTERDAM RULES, *supra* note 7, art. 17; *infra* Part III. Additional relevant liability provisions include vicarious liability for carriers and allowing joint and several liability between carriers and maritime performing parties. ROTTERDAM RULES, *supra* note 7, arts. 18, 20; *see* Minichello, *supra* note 17, at 244.

46. *See, e.g.*, Hashmi, *supra* note 26, at 265-67 (recommending that the Rotterdam Rules be redrafted); Regina Asariotis, *Loss Due to a Combination of Causes: Burden of Proof and Commercial Risk Allocation*, *in* A NEW CONVENTION OR THE CARRIAGE OF GOODS BY SEA - THE ROTTERDAM RULES 139, 148 (D. Rhidian Thomas ed., 2009) (noting that different courts are likely to adopt different approaches to liability apportionment).

47. Thomas, *supra* note 37, at 61; *see also* Diamond, *supra* note 8, at 477.

48. *See* Sturley, *supra* note 10, at 430. For a good explanation of modern containerized cargo transport, see Formal Safety Assessment, *supra* note 4, at 3-5.

49. Harter Act, ch. 105, 27 Stat. 445-46 (1893) (codified as amended at 46 U.S.C. §§ 30701-30707 (2012)). The Harter Act has been very

never adopted the Hague-Visby Rules or the Hamburg Rules and still relies instead on the 1936 Carriage of Goods by Sea Act ("COGSA"), which was based on the original 1924 Hague Rules.[50] COGSA governs "all contracts for carriage of goods by sea to or from ports of the United States in foreign trade" and provides for cargo damage claims between carriers and shippers.[51] Many conflicts and inconsistencies currently arise in American maritime law under COGSA due to "the difficulties in trying to interpret and apply a law crafted during the first decades of the twentieth century with conditions that existed at the end of the twentieth century."[52] Hopefully, adopting the Rotterdam Rules would resolve many of the current issues in American admiralty law.

For the United States to ratify the Rotterdam Rules, the President of the United States of America must ratify the treaty after receiving the advice and consent of the Senate.[53] After ratification, the United States would need to incorporate the Convention into domestic law, but in doing so could amend the Rotterdam Rules when codifying them to better address American issues and jurisprudence.[54] The ratification process is well underway, though still has much further to go. The State Department has reviewed the draft ratification package and has sent it to the Federal Maritime Commission, Maritime Administration, and the Department of Justice for review, which are important steps towards ratification.[55]

influential in admiralty law because "it was the first regulation by government of the apportionment of risks between cargo owning interests and ship owning interests. As such it was the spark that led to the 1924 Hague Rules Treaty, on which COGSA is based." Joseph C. Sweeney, *The Prism of COGSA*, 30 J. MAR. L. & COM. 543, 553 (1999) (citation omitted). Importantly, the Harter Act limited exculpatory clauses imposed upon shippers by carriers. *Id.* at 554 ("'[T]he evil to be remedied being one produced by the oppressive clauses forced upon the shippers of goods by the vessel owners.'") (quoting The Delaware, 161 U.S. 459, 474 (1896)).

50. Minichello, *supra* note 17, at 231; Carriage of Goods by Sea Act (COGSA) of 1936, ch. 229, 49 Stat. 1207 (codified as amended at 46 U.S.C. §§ 30701-30707 (2012)); *see* Sturley, *supra* note 10, at 430 ("COGSA as applied by the U.S. courts not only differs from the more modern international regimes, but is also out of step even with the international understanding of the Hague Rules."). *See generally* Sweeney, *supra* note 49, at 559-72 (discussing how COGSA was created).

51. COGSA § 13; *see also* James L. Chapman, IV & Shawn A. Voyles, *Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments*, 16 U.S.F. MAR. L.J. 1, 13-14 (2004) (quoting 46 U.S.C. § 1301(b) (2000)).

52. Minichello, *supra* note 17, at 231. For example, the notorious COGSA $500 package liability limit, which was worth about $8,000 when it was enacted in 1936, went "from protecting shippers' ability to be made whole in the event of lost cargo to one of the most substantial barriers to the shippers' equitable recovery." Briscoe, *supra* note 8, at 79; *see* COGSA § 4.5.

53. U.S. CONST. art. II, § 2, cl. 2.

54. *See* Diamond, *supra* note 8, at 449; Briscoe, *supra* note 8, at 76.

55. *See* Biniaz Letter, *supra* note 34 (urging the Department of State to review

The National Industrial Transportation League, World Shipping Council, Maritime Law Association of the United States, multiple sections of the American Bar Association, and industry leaders such as UPS and FedEx support ratification.[56] "Given the history of the development of this new Convention; the active participation by the United States; and the wide variety of special interests and organizations involved, commentators are cautiously optimistic that the Convention will enter into force . . . ."[57]

Adopting a convention like the Rotterdam Rules "requires an unequivocal decision that, on balance, the national interests are better served by the new Convention, rather than by any of the established international cargo-liability regimes," which understandably involves significant time and consideration.[58] Since it took the United States almost twelve years to ratify the Hague Rules before enacting COGSA, it should not be taken as an ill omen that it has yet to ratify the Rotterdam Rules only four years since the signing of the Convention.[59] However, if the United States delays ratification too long, it could undermine international confidence in the Convention.[60] Ratification in the near future would be optimal in my opinion, but even if ratification is slow or never occurs, at least the Convention has sparked interest and dialogue on the issues facing modern maritime commerce. As such, I believe that my analysis here is relevant to American maritime law regardless of whether Article 17 of the Rotterdam Rules ever enters into effect.

III. LIABILITY APPORTIONMENT SCHEMES UNDER THE ROTTERDAM RULES AND THE *VALLESCURA* RULE

A. Carrier Liability and Burden-Shifting Under COGSA and the Rotterdam Rules

Liability under both COGSA and Article 17 is based on fault, not strict liability.[61] Under the Rotterdam Rules, a carrier may be liable

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ratification quickly); *see also Rotterdam Rules Clear Significant Hurdle on Way to Ratification by the United States*, SAFETY4SEA (June 25, 2013), http://www.safety4sea.com/page/16566/9/rotterdam-rules-clear-significant-hurdle-on-way-to-ratification-by-the-united-st; *see also Commercial Law*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/commercial/ (last visited May 8, 2014) (including the Rotterdam Rules on list of private international law conventions "to [w]hich the U.S. is a Party").

56. Biniaz Letter, *supra* note 34; MARWEDEL ET AL., *supra* note 7.

57. Minichello, *supra* note 17, at 233.

58. Asariotis, *supra* note 46, at 138-39.

59. *See* Sturley, *supra* note 10, at 455.

60. Biniaz Letter, *supra* note 34 (stating that many international businesses have said "their governments will not ratify unless and until the United States does so").

61. *See* UNCITRAL 41st Sess., *supra* note 9, para. 70; Rep. of Working Grp. III (Transp. Law) of the U.N. Comm'n on Int'l Trade Law, 12th Sess., Oct. 6-17, 2003,

for cargo damage "if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility," but may be relieved from liability "if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person" for whom the carrier is responsible pursuant to Article 18.[62] Under COGSA, a carrier may be liable for breaching its duty to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried," but may be relieved of that liability under the COGSA q-clause exception if it could prove that the damage was caused "without the actual fault and privity of the carrier" or its agents.[63]

Both COGSA and Article 17 also contain lists of excepted circumstances that can exonerate a carrier from liability.[64] The Rotterdam Rules maintained all of the traditional excepted circumstances from COGSA except for the q-clause and the error in navigation exception.[65] While the removal of the q-clause appears to have been accommodated by Article 17.2,[66] the error in navigation exception was not so preserved after considerable debate on the issue.[67]

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para. 94, U.N. Doc. A/CN.9/544 (Dec. 16, 2003) [hereinafter Working Grp. III 12th Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/544 - Report of Working Group III (Transport Law) on the work of its twelfth session" hyperlink) (noting that a carrier is "liable only to the extent it had contributed to the loss or damage"); COGSA § 4(1) (stating that a carrier cannot be liable for damage "resulting from unseaworthiness unless caused by want of due diligence"); *see also* COGSA § 3(1)-(2) (stating a carrier's responsibilities for its ship and cargo).

62. ROTTERDAM RULES, *supra* note 7, arts. 17.1, 17.2, 18.

63. *See* COGSA §§ 3(2), 4(2)(q).

64. *See* COGSA § 4(2)(a)-(q); ROTTERDAM RULES, *supra* note 7, art. 17.3(a)-(o).

65. Zeigler, *supra* note 37, at 342-43. The only other major difference between the sets of excepted circumstances is the fire exception, which under the Rotterdam Rules would only require proof of fire rather than proof of fault or privity. COGSA § 4(2)(b); ROTTERDAM RULES, *supra* note 7, art. 17.3(f). The change to the fire exception was made "to accommodate the door-to-door nature of the [Rotterdam Rules] by limiting [the fire exception's] operation to that of a maritime defence." Working Grp. III 12th Sess., *supra* note 61, para. 87.

66. ROTTERDAM RULES, *supra* note 7, art. 17.2; *see also supra* text accompanying note 60.

67. *See* Zeigler, *supra* note 37, at 342-43; *see also* COGSA § 4(2)(a)(providing that a carrier was not liable for loss or damage due to any "act, neglect, or default . . . of the carrier in the navigation or in the management of the ship"). During drafting proceedings, "[i]t was widely felt that the removal of [the error in navigation] exception from the international regime governing carriage of goods by sea [was] . . . an important step towards modernizing and harmonizing international transport law" and was necessary for establishing an effective door-to-door regime. Rep. of Working Grp. III (Transp. Law) of the U.N. Comm'n on Int'l Trade Law, 10th Sess., Sept. 16-20,

1. COGSA Burden-Shifting

The COGSA burden-shifting scheme has been characterized as both a "ping-pong game"[68] and as shifting "the burden of proof more frequently than the winds on a stormy sea."[69] The COGSA burden-shifting scheme provides four general stages: 1) the shipper's establishment of "a prima facie case of loss or damage," 2) the carrier's rebuttal proving either the exercise of due diligence or the occurrence of an excepted circumstance, 3) the shipper's proof that the carrier was responsible for at least a portion of the loss or damage, and 4) the carrier's establishment of the apportionment of liability.[70] This last step, known as the Vallescura Rule, is the key difference between the COGSA and Rotterdam Rules burden-shifting schemes.[71]

2. Rotterdam Rules Burden-Shifting

The Rotterdam Rules' burden-shifting scheme is quite similar to the COGSA scheme, but details the shifting burden of proof more explicitly, which allows parties to know more clearly the burden of proof required at any given stage in any given case,[72] and makes the burden of proof required for unseaworthiness much clearer and easy

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2002, para. 35, U.N. Doc. A/CN.9/525 (Oct. 7, 2002) [hereinafter Working Grp. III 10th Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/525 - Report of Working Group III (Transport Law) on the work of its tenth session" hyperlink). The feared impacts on carriers of removing the exception were supposed to be counterbalanced by the new burden-shifting and liability apportionment schemes. *See id.* para. 36; Working Grp. III 12th Sess., *supra* note 61, paras. 89, 127. Opponents to removal also argued that, despite technological changes, it was not appropriate to compare marine transport with other modes of transportation and that removal would cause economic harm, such as increasing insurance premiums and consumer prices. *See* UNCITRAL 41st Sess., *supra* note 9, para. 68; Working Grp. III 9th Sess., *supra* note 38, para. 44. In the end, arguments for retaining the error in navigation exception "were outweighed by the counterarguments that a modern liability regime for international transportation cannot exonerate the carrier for negligence in areas of performance which are typical to its own key service, namely transportation and navigation." Zeigler, *supra* note 37, at 342.

68. Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1373 (5th Cir. 1979).

69. United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 335 (5th Cir. 2001) (citations omitted) (internal quotations omitted).

70. *See, e.g.*, *id.* at 336; Am. S/A Frutas E Alimentos v. M/V Cap San Rafael, 426 F. Supp. 2d 312, 317 (E.D. Pa. 2006); Chapman, IV & Voyles, *supra* note 51, at 31-33.

71. Sturley, *supra* note 10, at 448.

72. Minichello, *supra* note 17, at 243; SI YOUZHOU & HENRY HAI LI, THE NEW STRUCTURE OF THE BASIS OF LIABILITY FOR THE CARRIER 6 (2009), *available at* http://www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009 (follow "paper Yuzhuo Si + mr. Henry Hai Li" hyperlink).

to apply.[73] The first step of the Rotterdam Rules' burden-shifting scheme is the shipper's prima facie proof of loss, damage, or delay occurring during the carrier's period of responsibility.[74] The second step is the carrier's rebuttal against the presumption of fault by proving that "that the cause or one of the causes of the loss, damage, or delay was not attributable to his fault or the fault of any person for whom he was responsible," or the that one of the excepted circumstances under Article 17.3 contributed, in whole or in part, to the harm.[75] The third step is the shipper's proof that either 1) the fault of the carrier "caused or contributed to the event or circumstance on which the carrier relies,"[76] or 2) proof of "the probable cause of the loss, damage or delay."[77] The fourth step allows the carrier to rebut evidence presented by the shipper in the third step.[78] The final step under the Rotterdam Rules, Article 17.6, provides for liability apportionment.[79]

B. Article 17.6 Liability Apportionment

While the first five provisions of Article 17 mostly mirror the burden-shifting scheme set forth under COGSA, the final provision, 17.6, is radically different.[80] Article 17.6 states:"When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable

73. Nikaki & Soyer, *supra* note 19, at 318. For claims of unseaworthiness pursuant to Article 17.5(a), the shipper must only show "that the damage was 'probably' caused by or contributed to by unseaworthiness" before the burden shifted back to the carrier. UNCITRAL 41st Sess., *supra* note 9, para. 73.

74. YOUZHOU & LI, *supra* note 72, at 6; *see* ROTTERDAM RULES, *supra* note 7, art. 17.1. This step has a very light burden of proof that may be established, for example, through a clean bill of lading and notice of loss, damage, or delay. *See* Zeigler, *supra* note 37, at 339.

75. YOUZHOU & LI, *supra* note 72, at 2-3; *see* ROTTERDAM RULES, *supra* note 6, arts. 17.2, 17.3; Diamond, *supra* note 8, at 473 (explaining that the carrier must only prove that the excepted circumstance was a substantial cause of the damage). Please refer to the Appendix, infra, to read the entire list of excepted circumstances under Article 17.3.

76. ROTTERDAM RULES, *supra* note 7, art. 17.4(a).

77. Rep. of Working Grp. III (Transp. Law) of the U.N. Comm'n on Int'l Trade Law, 19th Sess., Apr. 16-27, 2007, para. 73, U.N. Doc. A/CN.9/621 (May 17, 2007) [hereinafter Working Grp. III 19th Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/621 - Report of Working Group III (Transport Law) on the work of its nineteenth session" hyperlink); see ROTTERDAM RULES, *supra* note 7, art. 17.5(a).

78. ROTTERDAM RULES, *supra* note 7, arts. 17.4(b), 17.5(b); Working Grp. III 19th Sess., *supra* note 77, para. 73.

79. ROTTERDAM RULES, *supra* note 7, art. 17.6.

80. *See* Sturley, *supra* note 10, at 448.

pursuant to this article."[81]Article 17.6, in essence, allows for proportional liability apportionment when there are multiple concurrent causes.[82] By allowing court-determined liability apportionment, Article 17.6 directly contradicts the American rule.[83] While drafting the Convention, Working Group III was concerned about the extremely heavy burden placed on the carrier to apportion liability when loss, damage, or delay was caused by concurrent causes,[84] especially in light of the removal of the error in navigation exception.[85] Article 17.6 was debated extensively during the drafting process, and in its final form "reflected a compromise that many delegations regarded as an essential piece of the overall balance" of the liability provisions in the Convention.[86] Working Group III intended for Article 17.6 to "decrease the carrier's burden of proof of causation" in response to the carrier's difficulty of "identify[ing] the cause of the damage and . . . establish[ing] the causation between the damage and the exonerative events," and to thereby prevent a carrier from being "liable for the entire loss where its fault had only contributed to a minor proportion of the damage."[87]

Article 17.6 appears to provide a more equitable solution to the issue of liability apportionment for damage due to multiple concurrent causes, but it is an imperfect and incomplete system.[88] For example, Article 17 does not state the burden of proof a carrier must meet for liability apportionment of concurrent causes of harm; it is therefore left open for interpretation.[89] This makes it unclear exactly how much a carrier will need to prove and what sort of evidence a court is supposed to consider when apportioning liability.[90]

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81. ROTTERDAM RULES, *supra* note 7, art. 17.6.

82. Asariotis, *supra* note 46, at 115; Sturley, *supra* note 10, at 447. For example, under Article 17.6, a carrier found at fault for unseaworthiness would only be liable for the harm actually caused by the unseaworthiness. Rep. of Working Grp. III (Transp. Law) of the U.N. Comm'n on Int'l Trade Law, 14th Sess., Nov. 29-Dec. 10, 2004, para. 72, U.N. Doc. A/CN.9/572 (Dec. 21, 2004) [hereinafter Working Grp. III 14th Sess.], *available at* http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html (follow "A/CN.9/572 - Report of Working Group III (Transport Law) on the work of its fourteenth session" hyperlink).

83. *See infra* Part III.C (discussing the *Vallescura* Rule).

84. Working Grp. III 10th Sess., *supra* note 67, para. 54.

85. Working Grp. III 12th Sess., *supra* note 61, para. 140; *see also supra* notes 62-64 and accompanying text.

86. UNCITRAL 41st Sess., *supra* note 9, para. 73.

87. Working Grp. III 12th Sess., *supra* note 61, para. 139-40.

88. *See, e.g.*, Thomas, *supra* note 37, at 61.

89. *See id.* at 64.

90. One commentator claimed that "the carrier has to attribute each aspect of the damage to either excepted causes or the causes for which it remains responsible. The result is a ratio, which if applied to the damage, will result in a reduction pro rata of

Working Group III explicitly stated that "[t]he intention of [Article 17.6] was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss, damage or delay . . . ."[91] The legislative history strongly indicates that the individual determinations of apportionment are to be left to courts, but the text of Article 17 gives no guidance about "how, or on what principles, liability for a loss due to concurrent causes is to be apportioned."[92] Issues of causality and specific mechanisms for liability apportionment were intentionally left to national law.[93] Thus, "courts in different jurisdictions are likely to adopt different approaches," which means that predictability and legal certainty may only arrive after significant litigation rather than from the outset.[94] Such a development could harm the uniformity and predictability sought through the Rotterdam Rules, but yet seems inevitable given the Rules' silence on important issues for practical application.

C. The Vallescura *Rule and its Development*

1. Origins and Development of the *Vallescura* Rule

Much like the United States relies on the old 1924 Hague Rules as the basis for its current maritime cargo regime, the United States relies on a 1934 Supreme Court case called *Schnell v. The Vallescura* for case law regarding liability apportionment for cargo claims.[95] In *The Vallescura*, a cargo of onions aboard the steamship *The Vallescur*a decayed during a voyage from Spain to New York City, apparently due to a combination of carrier negligence and bad weather.[96] Neither the lower court nor the carrier was able to

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its liability." Ziegler, *supra* note 37, at 347 (footnotes omitted). This idea is slightly different than the court-apportionment advocated by Working Group III. Working Grp. III 14th Sess., *supra* note 82, para. 77.

91. Working Grp. III 14th Sess., *supra* note 82, paras. 74, 77 (explaining that the differences in language between the draft article and the final article were "not meant to be a deviation from the Working Group's decision to leave the determination of apportionment to the court"); *see also* YUZHOU & LI, *supra* note 72, at 13 (apportionment will be at the discretion of "the presiding judge or arbitrator").

92. Diamond, *supra* note 8, at 477; *see also* Hashmi, *supra* note 26, at 248 (noting there are no guidelines for liability apportionment).

93. Working Grp. III 19th Sess., *supra* note 77, para. 66.

94. Asariotis, *supra* note 46, at 148.

95. Schnell v. The Vallescura, 293 U.S. 296, 303-07 (1934). *The Vallescura* was decided under the Harter Act and is still good law today despite being decided before COGSA's implementation. *Id.* at 303; see *supra* notes 49-50 and accompanying text.

96. *The Vallescura*, 293 U.S. at 301. Interestingly, many cases of concurrent causation for cargo damage involve produce items. Fresh produce like fruits and vegetables have an inherent defect because they naturally decay over time. *Id.* at 305. A carrier is not liable for cargo damage caused by "inherent defect, quality, or vice" of the cargo under both the Rotterdam Rules and COGSA because such damage is considered an excepted circumstance. ROTTERDAM RULES, *supra* note 7, art. 17.3(j); 46 U.S.C. § 30706(b)(5) (2012). However, a carrier can be liable for negligently expediting

ascertain which portions of damage to the onions were caused by negligence or weather.[97] The Supreme Court held that "the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and [the carrier] fails to show what damage is attributable to sea peril."[98] This standard is known as the *Vallescura* Rule.

In practice, the *Vallescura* Rule means that carriers must prove what amount of damage was due to an excepted circumstance, and what amount of damage was due to a cause for which the carrier was liable, such as negligence, even when the harm was indivisible.[99] The *Vallescura* Court considered proving an excepted circumstance or a shipper's negligence and proving the amount of damage caused by that occurrence to be inextricably linked, making the former legally useless without the latter.[100] The *Vallescura* Court reasoned that a carrier should be liable for damage it bore no fault in causing "because the law, in pursuance of a wise policy, casts on [the carrier] the burden of showing facts relieving him from liability."[101] The *Vallescura* Court believed

> [t]he reason for the [carrier's burden of proof] rule is apparent. He is a bailee intrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper.[102]

It makes logical sense that there is an information imbalance between the carrier and shipper. The carrier is likely to have more information about potential exceptions and negligence than the shipper, as the carrier ostensibly has control of the cargo at the time

the decaying process or facilitating the effects of an excepted circumstance. *See, e.g.*, Am. S/A Frutas E Alimentos v. M/V Cap San Rafael, 426 F. Supp. 2d 312, 314 (E.D. Pa. 2006) (cargo of mangoes allegedly damaged due to inherent defect, delay in voyage, and carrier's negligent stowage).

97. *The Vallescura*, 293 U.S. at 307.

98. *Id.* at 306.

99. *See id.*

100. In an illuminating closing analogy, the Court reasoned if a carrier "remains liable for the whole amount of the damage because it is unable to show that sea peril was a cause of the loss, it must equally remain so [liable] if it cannot show what part of the loss is due to [an excepted circumstance]." *Id.* at 307.

101. *Id.*

102. *Id.* at 304. The application of the bailor-bailee paradigm to cargo carriage was further explored in *Commercial Molasses Corp. v. New York Tank Barge Corp.*, where the Supreme Court noted that a carrier has the burden of proving "that the loss was due to an excepted cause and that he has exercised due care to avoid it, not in consequence of his being an ordinary 'bailee' but because he is a special type of bailee who has assumed the obligation of an insurer." 314 U.S. 104, 109 (1941) (citing *The Vallescura*, 293 U.S. at 304).

of damage.[103] If a carrier cannot produce evidence supporting apportionment, a shipper would unlikely be able or willing to do so.

Courts applying the *Vallescura* Rule have explicitly rejected the liability apportionment scheme applied to maritime collisions under *Reliable Transfer*[104] because the *Vallescura* Rule "requires an ascertainable apportionment of damages, as opposed to apportionment of fault," which is the standard used in *Reliable Transfer*.[105] In 1977, the Second Circuit explained that the case *Vana Trading Co., Inc. v. S.S. "Mette Skou"* "represent[ed] an invitation to apply to cargo suits the doctrine of proportionate fault recently made applicable to collision and stranding cases by *United States v. Reliable Transfer Co.* . . ., an invitation which we decline."[106]

The situation in *Vana Trading Co.* is a classic example of concurrent causation in maritime cargo damage. There, the trial court apportioned damages based on the parties' agreement of proportional fault after it determined that damage to a shipment of yams was caused by the shipper's packaging methods, the carrier's stowage conditions, and the stevedore's[107] inadequately vented warehouse.[108] The Second Circuit overturned the trial court's decision and held that because the carrier could not prove the exact proportion of fault attributable to each party, the carrier was liable for the full damages despite the fact that concurrent causation had been established.[109]

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103. *See, e.g.*, Asariotis, *supra* note 46, at 140 ("[E]vidence about the causes of a loss will often be difficult to obtain, particularly for the consignee or shipper of cargo, who may not have access to any of the relevant facts.").

104. Vana Trading Co. v. S.S. "Mette Skou", 556 F.2d 100, 102 (2d Cir. 1977); *see infra* Part IV.C for a discussion of United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

105. M. Golodetz Export Corp. v. S/S Lake Anja, 751 F.2d 1103, 1111 (2d Cir. 1985) (noting that the *Vallescura* Rule "may occasionally lay at the feet of an innocent carrier a loss he could not prevent and for which he bears no blame"); *see also Reliable Transfer Co.*, 421 U.S. at 411.

106. *Vana Trading Co.*, 556 F.2d at 102.

107. A stevedore is a "workman employed either as overseer or labourer in loading and unloading the cargoes of merchant vessels." OED: OXFORD ENGLISH DICTIONARY ONLINE,
http://www.oed.com/search?searchType=dictionary&q=stevedore&_searchBtn=Search (last visited May 8, 2014).

108. *Vana Trading Co.*, 556 F.2d at 102-04. The *Vana Trading Co.* parties actually agreed to divide damages equally and have the stevedore indemnify the carrier, based on the rules set forth in *Reliable Transfer*, because the parties agreed that an exact apportionment of damages was impossible. *Id.* at 106; *see supra* notes 104-05 and accompanying text.

109. *Vana Trading Co.*, 556 F.2d at 105-06 ("All the previous burdens being satisfied, the final burden rested with [the carrier] to show what ascertainable amount of the damage was attributable to the packaging, from which it was excepted, and what was due to the improper stowage and negligent stevedoring . . . . Failing this burden, [the carrier] was chargeable with the entire loss.").

2. Issues with the *Vallescura* Rule

When applied in recent cases, the *Vallescura* Rule sometimes seems fair and reasonable, but sometimes seems incredibly harsh. In some cases, the carrier is unable to prove legally any concurrent causation.[110] In other cases, the carrier lacks enough proof of the portion of damage caused by an excepted circumstance, despite the fact that concurrent causation is apparent.[111] An illustrative case is *Thyssen, Inc. v. S/S Eurounity*, where a cargo of hot rolled steel rusted during a voyage due to contact with seawater, allegedly caused by extremely bad weather.[112] The trial court found that while the severe storm "may have exacerbated conditions and resulted in a greater quantity of sea water entering the holds than would otherwise have occurred," the carrier was liable for all of the damage because it did not show that the storm was the sole cause of water entry, which could have also entered through unseaworthy hatches.[113]

While the carrier's burden under the *Vallescura* Rule is very high, meeting it is not impossible, albeit very rare. In the 1988 Eastern District of Louisiana case *Trade Arbed, Inc. v. M/V Swallow*, the trial court found that the carrier satisfied its "burden of segregating the portion of the loss caused by [its] negligence or breach of duty and the portion caused by something for which the carrier is not responsible."[114] In that case, the carrier overcame the *Vallescura* Rule because it was able to demonstrate through scientific testing of oxidation of the rusted hot rolled steel cargo which portions were damaged by salt water exposure and which portions were

110. For example, in the recent case *Orient Overseas Container Line, Ltd. v. Crystal Cove Seafood Corp.*, a refrigeration unit broke while a cargo of frozen fish was being shipped, and while the carrier was not liable for the refrigeration malfunction, the carrier negligently failed to remedy the situation in a timely manner. No. 10 Civ. 3166, 2012 WL 463927, at *1, *6-7 (S.D.N.Y. Feb. 14, 2012). The Southern District of New York held that the carrier was fully liable for damages because it could not prove that a cause for which it was not responsible damaged the cargo in any way. *Id.* at *11.

111. *See, e.g.*, Mitsui Sumitomo Ins. Co. v. Total Terminals Int'l, LLC, No. CV03-7077, 2004 U.S. Dist. LEXIS 27127, at *46-47 (C.D. Cal. Nov. 8, 2004) (carrier unable to prove amount of damages caused by any contributing excepted circumstance); Sumitomo Marine & Fire Ins. Co. v. The Barge ACBL 1346, No. 00-0491, 2001 U.S. Dist. LEXIS 3070, at *8, *10 (E.D. La. Mar. 13, 2001) (carrier "offered no credible evidence to carry its burden of segregating the damages"). But see contra Skandia Ins. Co. v. Star Shipping AS, 173 F. Supp. 2d 1228, 1252 (S.D. Ala. 2001) ("Plaintiffs are not entitled to recovery because the damage was caused by Hurricane Georges, an 'Act of God,' and not due to any negligence on the part of the Defendants.").

112. No. 89 Civ. 8477, 1993 WL 158511, at *2-*3 (S.D.N.Y. May 13, 1993), aff'd, 21 F.3d 533 (2d Cir. 1994).

113. *Id.* at *3; *see also id.* at *6 (considering the hatches unseaworthy because they were neither water-tight nor in proper condition).

114. 688 F. Supp. 1095, 1106-07 (E.D. La. 1988).

damaged by fresh water exposure, for which the carrier was not liable.[115] Not surprisingly, apportioning liability is much easier when each concurrent cause effects a different, distinguishable type of damage.[116]

The outcome of cases like *Vana Trading Co.* and *Thyssen, Inc.* seem to be unfairly harsh towards the carrier, as a carrier can seldom realistically determine exactly who and what was responsible for indivisible harms.[117] This harshness has not gone unnoticed by courts, including the Second Circuit, which has admitted that "an occasional harsh result may arise."[118] Other courts and commentators have also realized that the *Vallescura* Rule "has proven to be a near-impossible burden for carriers to meet, with the result that carriers generally bear the entire loss whenever the court determines that concurrent causes contributed to it."[119] Amidst this criticism, it is important to remember that the *Vallescura* Rule only comes into effect after the shipper has established that the carrier's negligence contributed at least in part to the cargo damage; as harsh as the rule may appear, it does not penalize completely innocent carriers.[120]

D. Reconciling Article 17.6 and the Vallescura *Rule*

In contrast with the *Vallescura* Rule, the application of Article 17.6 appears to be more lenient towards carriers; indeed, decreasing the carrier's burden was a major consideration in its development.[121] Implementing Article 17.6 would result to fewer all-or-nothing situations given its flexibility and greatly reduced burden of proof.[122]

115. *Id.* at 1100.

116. For example, the type of damage caused by theft (e.g., missing cargo) is different from the type of damage caused by improper ventilation (e.g., spoilage). *See* United States v. American Gulf VII, No. 94-3962, 1996 U.S. Dist. LEXIS 1405, at *11-13 (E.D. La. Feb. 6, 1996) (denying summary judgment). While the case was not decided on the merits, it was the type of situation that lent itself more easily to liability apportionment by carriers.

117. The shipment of yams that arrived "in a damaged and cooked condition" in that case is a prime example of indivisible harm. Vana Trading Co. v. S.S. "Mette Skou", 556 F.2d 100, 103 (2d Cir. 1977); *see also Thyssen, Inc.*, 1993 WL 158511, at *2.

118. *Vana Trading Co.*, 556 F.2d at 106.

119. Sturley, *supra* note 10, at 447; *see also* Daido Line v. Thomas P. Gonzalez Corp., 299 F.2d 669, 671 (9th Cir. 1962) (noting that the burden to apportion damage by cause is "a burden which may be difficult if not impossible to meet").

120. *See, e.g.*, United States v. Ocean Bulk Ships, Inc., 248 F.3d 331, 336 (5th Cir. 2001). RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY has noted that the justification in general tort law for defendants proving the amount of damages caused by each party "was that a culpable defendant should bear the risk that evidence is unavailable to permit division." § 26 cmt. h (2000).

121. *See* Working Grp. III 12th Sess., *supra* note 61, paras. 139-40; *see also supra* notes 82-86 and accompanying text.

122. *See* Ziegler, *supra* note 37, at 347.

It should also promote better settlements, as parties would predict likely outcomes more easily and carriers would be a stronger position in settling concurrent causation cases.[123] The carrier would still need to prove that it should be relieved of some portion of liability, but that is not nearly as difficult as proving what exactly constitutes that portion.[124] Given that cargo damages cases are governed by fault-based liability, not strict liability, it seems significantly fairer to hold a carrier liable only for the harm it actually caused.[125] Indeed, if it is nearly impossible to apportion liability due to the burdens imposed by law, then the point of having liability apportionment is rendered moot.

While the apportionment scheme under Article 17.6 appears to be fairer to carriers, the reasoning and lessons of the *Vallescura* Rule should not be overlooked. Despite its harshness, sound public policy supports the *Vallescura* Rule, including the carrier's position of responsibility, culpability, and knowledge imbalance.[126] Evidentiary problems, such as the shippers' limited knowledge of events at sea, will not disappear by implementing court apportionment of liability, but merely will be passed on to another person.[127] The fact that Article 17.6 is "very much open to interpretation" for situations where there is "a genuine combination of contributory causes for a loss, but no evidence as to the relevant proportion of loss due to the different causes,"[128] is particularly troubling because this vagueness is the very problem that has plagued the *Vallescura* Rule for decades and seems so patently unfair to carriers.[129] Considering this ambiguity, how should American courts actually apportion liability?

IV. Mechanisms for Apportioning Liability

A. The Basic Concepts of Liability Apportionment

Liability apportionment may seem like a panacea for all of the ills that have befallen carriers in concurrent causation cases, but such is not so. Courts cannot apportion liability mechanically, although we would like them to, because "[i]t is not possible to

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123. *See id.*

124. *See id.* at 341 n.88.

125. *See* UNCITRAL 41st Sess., *supra* note 9, para. 70 (stating that the Rotterdam Rules do not impose strict liability).

126. *See, e.g.*, M. Golodetz Export Corp. v. S/S Lake Anja, 751 F.2d 1103, 1111 (2d Cir. 1985) ("[A]n attempt to connect liability to blame may, at first glance, appear to achieve substantial justice, [but] this approach is supported neither by the cases nor the policy considerations that buttress the seemingly harsh rule of *The Vallescura*."); *see also supra* notes 95-102 and accompanying text (discussing the *Vallescura* Court's reasoning).

127. *See* UNCITRAL 41st Sess., *supra* note 9, paras. 71-72.

128. Asariotis, *supra* note 46, at 152.

129. *See supra* notes 110-20 and accompanying text.

articulate an algorithm by which a factfinder can determine percentages of responsibility."[130] Thus, liability apportionment schemes are necessary. Liability apportionment is supported by public policy considerations such as the principles that parties should not be held liable for harm they did not cause and that liability for injuries caused by multiple parties should be apportioned based on comparative responsibility.[131] These underlying policy considerations, however, "must be tempered with two additional considerations:" 1) the ability to be "understood and applied by courts and juries in a reasonably efficient manner," and 2) the ability to accommodate the uncertainty faced when available evidence is scant or inconclusive.[132]

"[T]wo basic forms of liability apportionment" are 1) causal and 2) "fault or responsibility."[133] Causal apportionment divides damages based on causation, and should be used when there is a reasonable evidentiary basis for determining the division of harm caused by multiple parties.[134] Fault apportionment, on the other hand, divides damages based on the responsibility or culpability of the parties, and should be used for indivisible harm that "cannot be reasonably allocated by causal measures."[135] Causal apportionment may seem preferable to fault causation,[136] as causation is an objective determination and fault is a subjective determination, but causal apportionment is practically impossible without sufficient evidence.[137]

This developing field is still unsettled, as currently, "[d]ividing

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130. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8 reporters' note cmt. c (2000).

131. *See id.* § 26 cmt. a.

132. *Id.* These requirements make logical sense and are especially relevant here, as inconsistent application would harm the stated goals of uniformity and certainty, and evidence of the causation of cargo damage can be difficult to find. *See* ROTTERDAM RULES, *supra* note 7, pmbl.; Asariotis, *supra* note 46, at 140.

133. DAN B. DOBBS ET AL., THE LAW OF TORTS § 487 (2d ed. 2011); *accord* Michael D. Green & William C. Powers, Jr., *Conceptual Clarity and Necessary Muddles*, 90 TEX. L. REV. 41, 42 (2011).

134. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(b) ("Damages can be divided by causation when the evidence provides a reasonable basis for the factfinder to determine: (1) that any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery and (2) the amount of damages separately caused by that conduct. Otherwise, the damages are indivisible and thus the injury is indivisible"); *see also* DOBBS ET AL., *supra* note 133, at 68.

135. DOBBS ET AL., *supra* note 133, at 68-69.

136. *See id.* at 68 ("If no evidence shows a basis for causal apportionment, the court may allocate liability in proportion to fault or responsibility instead.").

137. *See* Nicholas J. Healy, *The Basis of Apportionment of Damages in Both-to-Blame Collision Cases*, 47 LOY. L. REV. 993, 1004-05 (2001) (noting that *Reliable Transfer* relies on fault determinations).

damages by causation and apportioning liability by responsibility in the same case has not been widely addressed by statute or case law."[138] Yet, while "[a]pportionment in the face of evidential uncertainty is conceptually messy and does not nourish our appetite for logical ordering. . . . [t]he alternative is worse, so the law should make this accommodation, appreciating the trade-offs involved."[139] This accommodation is essential when applying the Rotterdam Rules' liability provisions, as the alternative here, the *Vallescura* Rule, has already proved to be outdated and unfair to carriers.[140] Further, if American courts implement the Rotterdam Rules' liability apportionment provisions, three major considerations specific to the Rotterdam Rules must be accounted for: (1) any scheme must account for the burden-shifting that had already occurred earlier in the case,[141] (2) any scheme must account for harm attributable to excepted circumstances,[142] and (3) any scheme must contemplate apportioning indivisible harms resulting from concurrent causation.[143] I will now discuss the two existing legal frameworks for liability apportionment that I think should inform how Article 17.6 of the Rotterdam Rules is applied in practice.

B. *Restatement (Third) of Torts: Apportionment of Liability Two-Step Model*

The Restatement (Third) of Torts ("Restatement") addresses modes of liability apportionment[144] and advocates for apportionment between responsible parties, including plaintiffs, for both divisible and indivisible harms.[145] For divisible harms where "damages for an

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138. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26 cmt. a (2000). For this reason, Restatement Section 26 "is designed to leave room for future development." *Id.*

139. Green & Powers, Jr., *supra* note 133, at 54. Professors Green and Powers were both Reporters for the Restatement. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. Reporter's Preface. (2000).

140. *See supra* note 119 and accompanying text.

141. *See* ROTTERDAM RULES, *supra* note 7, arts. 17.1-17.5; *see also supra* notes 72-79 and accompanying text (explaining burden-shifting scheme under Rotterdam Rules).

142. *See* ROTTERDAM RULES, *supra* note 7, art. 17.3.

143. *See id.* art. 17.6; *see also supra* notes 116-20 and accompanying text (explaining how the Vallescura Rule failed to truly accommodate concurrent causation).

144. While the Restatement is not binding law, it is a good source to use here because it sets forth the current academic understanding of the law in this particular field and includes insightful commentary about the field's development. *See* BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

145. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 (2000) ("Plaintiff's negligence . . . that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff."). This comports with the liability scheme under the Rotterdam Rules, as shippers (the plaintiffs) will not be able to recover from carriers (the defendants) for harm for which the carrier is not liable, which includes harm

injury can be divided by causation," Restatement Section 26 calls for a two-step process: (1) the factfinder "divides [damages] into their indivisible component parts," and then (2) the factfinder "separately apportions liability for each indivisible component part."[146] The rationale behind this two-step approach is that it is necessary to determine the causation of damages to know whether fault must be used to divide responsibility among the parties who caused a particular unit of indivisible harm; if all of the harm is distinctly divisible by causation, the second step is unnecessary.[147] Likewise, the first step is unnecessary when damage is truly indivisible.[148]

When multiple concurrent causes are determined to be responsible for the same harm, " there is no basis for further apportionment on a causal basis. A cause is a necessary condition, not a matter of degree, and it does not afford a basis for comparison among causes of the same harm."[149] Thus, responsibility or fault must form the basis for apportioning liability for an indivisible harm.[150] By using a two-step process, a factfinder can cover all bases of potential liability apportionment and account for mixed divisible and indivisible harm.[151] Because "[u]ltimately . . ., no party can be held liable without a finding of legal culpability and legal cause," the Restatement has commented that special steps may be taken to determine factual cause[152] and that factfinders should be able to consider all relevant evidence on responsibility.[153]

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caused by the shipper. *See* ROTTERDAM RULES, *supra* note 7, arts. 17.2, 17.3(h), 17.6.

146. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(a) (2000); accord Green & Powers, Jr., *supra* note 133, at 41-42. The Restatement's explanation of when damages can be divided by causation only partially applies to the situation under the Rotterdam Rules, as carriers are explicitly relieved of liability for damage for which they are not responsible. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(b)(1) (stating that damages can be divided by causation when "any legally culpable conduct of a party or other relevant person to whom the factfinder assigns a percentage of responsibility was a legal cause of less than the entire damages for which the plaintiff seeks recovery").

147. *See* Green & Powers, Jr., *supra* note 133, at 42; David R. Owen & J. Marks Moore, III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 941, 956 (1983) ("Theoretically, causation is an absolute, not apportionable by degrees unless there are distinct harms.") (citation omitted).

148. *See* Green & Powers, Jr., *supra* note 133, at 42.

149. *Id.*

150. As the venerable Professor Prosser succinctly stated, "once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution." William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 481 (1953).

151. *See* Green & Powers, Jr., *supra* note 133, at 42 ("In a perfect world, apportionment would always proceed in this [two-step] manner.").

152. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. §26 cmt. m (2000).

153. *Id.* § 8 reporters' note cmt. c (including evidence that is not part of the underlying claim or defense).

Once a party's legal responsibility for harm has been established, Restatement Section 8 provides two factors to be considered for assigning percentages of responsibility:

> (a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
>
> (b) the strength of the causal connection between the person's risk-creating conduct and the harm.[154]

These factors are not a *deus ex machina* to save us from the morass of divvying up indivisible harms, but they do provide a solid framework for looking at complex situations. The first factor, the nature of risk-creating conduct, speaks to culpability beyond legal causation and includes a deeper consideration of the circumstances surrounding the harm, such as "how unreasonable the conduct was under the circumstances, the extent to which the conduct failed to meet the applicable legal standard, the circumstances surrounding the conduct, each person's abilities and disabilities, and each person's awareness, intent, or indifference with respect to the risks."[155] The second factor, strength of causal connection, may at first glance seem to be applying circular logic, but it actually goes into more depth than the initial causal determination and considers slightly different factors, such as "how attenuated the causal connection is, the timing of each person's conduct in causing the harm, and a comparison of the risks created by the conduct and the actual harm suffered by the plaintiff."[156] By using these factors, fault can be assessed fairly and systematically before apportioning indivisible harm and concurrent causation.

C. American Maritime Liability Apportionment: Comparative Fault and Reliable Transfer

Comparative fault as a method of sharing risk is firmly entrenched in American admiralty jurisprudence,[157] which adopted comparative negligence principles before the concept became widely used in tort law.[158] Maritime personal injury cases brought under the

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154. *Id.* § 8.

155. *See id.* § 8 cmt. c.

156. *Id.*

157. *See* Lewis v. Timco, Inc., 716 F.2d 1425, 1428 (5th Cir. 1983) ("[C]omparative fault has long been the accepted risk-allocating principle under the maritime law. . . .").

158. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 reporters' note cmt. a; *see* Owen & Moore, III, *supra* note 147, at 941 ("In admiralty, the movement toward comparative negligence started at an early date in the form of equal division of damages in collision cases.").

Jones Act,[159] the Death on the High Seas Act ("DOHSA"),[160] and common-law negligence all apply comparative negligence doctrines.[161] "The cumulative effect of these judicial and statutory decisions has been to make admiralty a 'pure' comparative negligence jurisdiction" for almost all maritime torts,[162] with the special exception of Jones Act claims.[163] This overarching concept of comparative negligence also applies to cases analogous to cargo damage claims: collisions.

In the landmark 1975 case *United States v. Reliable Transfer Co.*, the United States Supreme Court abrogated the *Schooner Catharine* rule, which divided damages evenly between parties in collision cases where both parties were at fault, and in its place instituted liability apportionment based on comparative fault.[164] The *Reliable Transfer* Court held that when multiple "parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated

159. The Jones Act incorporates the Federal Employer's Liability Act ("FELA") of 1908, which provided for pure comparative negligence, and holds an employer liable for personal injury. Jones Act, Pub. L. No. 66-261, 41 Stat. 988, ch. 250, § 33 (1920) (codified as amended at 46 U.S.C. § 30103 (2006)); Federal Employer's Liability Act of 1908 (FELA), ch. 149, § 1, 35. Stat. 65 (codified as amended at 45 U.S.C. §§ 51-60 (2006)).

160. DOHSA explicitly includes comparative negligence. Death on the High Seas Act of 1920, 46 U.S.C. § 30304 (2006) ("The court shall consider the degree of negligence of the decedent and reduce the recovery accordingly."). Common law comparative negligence cases include *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

161. *See* Owen & Moore, III, *supra* note 147, at 941-44, 954. The Supreme Court has interestingly never mandated the application of comparative negligence, though it has "recited its existence." *Id.* at 943-44; *see also* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 7 cmt. a.

162. Owen & Moore, III, *supra* note 147, at 942; *see also* City of Chicago v. M/V Morgan, 375 F.3d 563, 571 (7th Cir. 2004) (applying "pure comparative fault" in collision case); Boudreaux v. United States, 280 F.3d 461, 466 (5th Cir. 2002) (citing Miles v. Melrose, 882 F.2d 976, 984 (5th Cir. 1989)) ("In general maritime law, comparative negligence bars an injured party from recovering for damages sustained as a result of his own fault.").

163. Under the Jones Act, a seaman may recover for personal injury caused "in whole or in part" by his employer's negligence. Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997); *see also* Jones Act, 46 U.S.C. § 30104; FELA, 45 U.S.C. § 51. A seaman "is obligated under the Jones Act to act with ordinary prudence under the circumstances," though some courts used to impose only a "slight duty of care." Gautreaux, 107 F.3d at 338-39.

164. The Schooner Catharine v. Dickinson, 58 U.S. 170, 177-78 (1854), *abrogated by Reliable Transfer Co.*, 421 U.S. at 411 (considering "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation"); *Reliable Transfer Co.*, 421 U.S. at 411 (quoting *Schooner Catharine*, 58 U.S. at 178) (arguing that application of the equal division of damages rule often was counterproductive to "what the Court sought to achieve in *The Schooner Catharine*—the 'just and equitable' allocation of damages.").

among the parties proportionately to the comparative degree of their fault."[165] The Court believed that equal division of damages in maritime collision cases was "unnecessarily crude and inequitable" where fault had been apportioned, though it retained equally divided damages where the damages were either actually equal or impossible to apportion based on fault.[166] Further, the *Reliable Transfer* Court reasoned that allowing proportional damages was more in line with American admiralty jurisprudence on maritime personal injury, where "a rule of comparative negligence has long been applied with no untoward difficulties."[167]

In *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, the Ninth Circuit clarified the comparative fault concept in *Reliable Transfer*, explaining, "whether we use the term comparative fault, contributory negligence, comparative causation, or even comparative blameworthiness, we are merely beating around the semantical bush seeking to achieve an equitable method of allocating the responsibility for an injury or loss."[168] While the *Reliable Transfer* liability apportionment scheme is fault-based, courts must consider both causation and culpability before dividing damages.[169] Once causation has been determined, most American courts "favor consideration of culpability alone" when deciding *Reliable Transfer* cases.[170] As one commentator explained, "[o]nly causative fault results in liability, but once it is shown that a collision was caused by faults of two or more vessels, the damages must be apportioned in accordance with the degree of fault of each vessel." [171]

To determine comparative fault, a court must "undertake an individualized evaluation of each collision and to consider and compare the 'fault' of each party, where 'fault' is defined as

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165. *Reliable Transfer Co.*, 421 U.S. at 411.

166. *Id.* at 407-08, 411.

167. *Id.* at 407 (citing Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953); Jones Act, 46 U.S.C. § 30102 (2006); DOHSA, 46 U.S.C. § 30304 (2006)).

168. Pan-Alaska Fisheries, Inc. v. Marine Constr. &
Design Co., 565 F.2d 1129, 1139 (9th Cir. 1977) (emphasis added) (applying *Reliable Transfer* liability apportionment to maritime strict liability claims where the plaintiff's conduct contributed to the harm).

169. Owen & Moore, III, *supra* note 147, at 956-57 (discussing how cases have handled the issue); *see also, e.g.*, S. Pac. Transp. Co. v. Tug Capt. Vick, 443 F. Supp. 722, 737 (E.D. La. 1977) (finding that all parties to a collision were at fault and causally contributed to the accident).

170. Healy, *supra* note 137, at 1001, 1004 (further explaining that damages are "divided in proportion to the fault of the parties, and not upon any basis of respective contribution to or causation of the injury"); *see, e.g.*, Crowley Marine Servs. Inc. v. Maritrans Inc., 530 F.3d 1169, 1175 (9th Cir. 2008) (stating that the purpose of the *Reliable Transfer* comparative fault rule is "to allocate fault according to the blameworthiness of each party").

171. Healy, *supra* note 137, at 1005 (citing *Reliable Transfer Co.*, 421 U.S. at 411).

'blameworthy conduct which contributes to the proximate cause of the loss or injury.'"[172] Since culpability considerations are case-based and there are no strict apportionment guidelines to apply, the *Reliable Transfer* standard is adaptable and flexible enough to address the myriad collision cases falling under its purview.[173] This standard can be adapted to address concurrent causation in cargo damage claims, with a few adjustments. Admiralty courts have adapted in the past to new conditions and conceptions of justice; there is no reason why they cannot do so today when applying the Rotterdam Rules' liability apportionment scheme to cargo damage cases.[174]

D. Application to Rotterdam Rules' Liability Apportionment

While the Rotterdam Rules state that a carrier is only liable for damage "attributable" to something for which the carrier is liable, the previous discussions show that such an attribution must include something more than causation when attempting to apportion damages from multiple concurrent causes.[175] A purely causation-based system has already failed, and the Rotterdam Rules drafters wanted to create a new system that would actually apportion liability, not just pay homage to the idea.[176] Thus, under the Rotterdam Rules, responsibility or fault must be used to apportion indivisible harms arising from concurrent causes.

Fault-based apportionment of indivisible harms is the standard for other claims in American admiralty law,[177] making it possible for a fault-based standard under the Rotterdam Rules to fit in neatly. The *Reliable Transfer* standard has a substantial body of American admiralty case law that can provide a frame of reference when first applying fault apportionment to cargo damage claims. As such, the Second Circuit's holding in Vana *Trading Co. v. S.S. Mette Skou*[178] should be abrogated, and *Reliable Transfer*'s fault-based system of liability apportionment should be applied to cargo damage claims.

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172. *Crowley Marine Servs. Inc.*, 530 F.3d at 1174
(citing *Pan-Alaska Fisheries,* 565 F.2d at 1139).

173. *See id.*

174. *See* Owen & Moore, III, *supra* note 147, at 959-60 ("The evolution of the doctrine of comparative negligence is a fine example of the remarkable ability of the admiralty courts . . . to adjust to new conditions and to develop new doctrines necessary to insure justice.").

175. ROTTERDAM RULES, *supra* note 7, art. 17.6; *see supra* Part IV.B, notes 144-46 and accompanying text.

176. *See supra* notes 110-12 and accompanying text (discussing the harshness of the *Vallescura* Rule in application); *supra* notes 84-87 and accompanying text (explaining that Working Group III intended for courts to apportion liability).

177. *See* Owen & Moore, III, *supra* note 147, at 942; *see also supra* notes 152-56 and accompanying text.

178. *Vana Trading Co. v. S.S. Mette Skou*, 556 F.2d 100, 102 (2d Cir. 1977).

The collision apportionment system in combination with the Restatement provides an excellent starting framework for apportioning liability.

I advocate that the best way to implement the Rotterdam Rules' liability apportionment system would be to adopt a two-step approach incorporating the Restatement's division by causation and *Reliable Transfer*'s fault-based system. The first step of my approach, dividing damages by causation, would account for all of the previous burden shifting and sets the groundwork for causative fault.[179] By the time the final step of the burden-shifting process is reached, both the carrier and shipper have proved that the carrier has caused at least some of the harm, and have possibly proved that the shipper or an excepted circumstance has caused another part of the damage.[180] Thus, even with evidentiary difficulties, there should be a solid foundation about causation in the record. This foundation can be applied to the first step of the Restatement apportionment scheme and then further broken down into its indivisible pieces.

The second step of my approach, comparative fault, would account for concurrent causation that creates indivisible harms.[181] Further, since a fault determination relies on more than causation, the evidentiary issues faced under the *Vallescura* Rule should be less problematic when applying a fault standard.[182] Instead of just considering evidence on causation, a court could instead consider the Restatement's fault factors or the *Reliable Transfer* standard, which both rely on other evidence. Thus, a carrier bears little risk of being held liable for damage for which they should rightly not be liable under the Rotterdam Rules, because causation would have already been determined to the best of a court's ability prior to determining fault and a fault-based approach is the only workable system for apportioning indivisible damage from concurrent causes.[183]

A potential issue with responsibility determination unique to cargo damage claims is that an excepted circumstance, like weather and the perils of the sea, cannot always be deemed to have a

179. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(a) (2000); ROTTERDAM RULES, *supra* note 7, arts. 17.1-17.5; Healy, *supra* note 137, at 1005 (stating that causative fault is required for liability).

180. *See* ROTTERDAM RULES, *supra* note 7, art. 17.6 (a carrier must be "relieved of part of its liability" for liability apportionment to apply); *see also supra* notes 71-78 and accompanying text (explaining Rotterdam Rules' burden-shifting).

181. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 26(a) (2000); Green & Powers, Jr., *supra* note 133, at 41.

182. *See* DOBBS ET AL., *supra* note 133, at 68 (explaining that a court may allocate liability based on responsibility when "no evidence shows a basis for causal apportionment").

183. *See* Prosser, *supra* note 150, at 481. If an indivisible harm could be divided by causation, then it would by definition not be an indivisible harm. *See id.*

subjective "fault."[184] Here the concept of finding an "equitable method" of apportioning responsibility under the *Reliable Transfer* standard is particularly applicable.[185] The Restatement factor for assigning percentages of responsibility based on "the strength of the causal connection" could also help with these situations if "conduct" is loosely interpreted to include unconscious actions.[186] Thus, when faced with an indivisible harm caused in part by an excepted circumstance, courts could decide fault through an equitable consideration of the surrounding circumstances, including the carrier's culpability and the strength of the causal connection of the excepted circumstance.

While other possible methods of allocating damages may exist, the liability apportionment framework proposed here is not only in line with current American jurisprudence and admiralty law, but also meets the requirements specific to the Rotterdam Rules. The two-step approach accounts for the prior burden shifting and can accommodate the Convention's excepted circumstances. Most importantly, this approach can handle indivisible harms using the *Reliable Transfer* fault-based system. This proposed apportionment scheme does not resolve the inherent difficulty of parsing responsibility for concurrent damages, but at least provides a framework from which to begin the process and tools with which to analyze the facts of a case.

V. PUBLIC POLICY AND CONCLUSION

A. Promoting Uniformity

Adopting the Article 17.6 liability apportionment scheme would promote uniformity both domestically and internationally, thus upholding one of the guiding principles of admiralty law and meeting the UN's stated goals for the Convention.[187] It would harmonize American cargo damage claims with other maritime tort and collision claims, thereby giving American admiralty law a uniform approach to liability apportionment. It would also promote uniformity between countries by applying a single international standard rather than the current patchwork of older conventions and national laws.[188] Such a showing of support for the Rotterdam Rules might even help

184. *See* ROTTERDAM RULES, *supra* note 7, arts. 17.3(a)-(o).

185. *See* Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1139 (9th Cir. 1977).

186. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 8(b) (2000). For example, the impact of a hurricane could be considered the storm's conduct for fault purposes. *Id.*

187. *See supra* Part II.A; Minichello, *supra* note 17, at 230; ROTTERDAM RULES, *supra* note 7, pmbl.

188. *See* MARWEDEL ET AL., *supra* note 7, at 1 (stating that three older UN conventions on the carriage of goods by sea are still in force).

persuade other countries to ratify as well, which would boost uniformity even further.[189] Despite the possibility that different countries may adopt different methods of apportionment,[190] under the Rotterdam Rules at least all ratifying countries would be applying the same liability apportionment paradigm, which would provide uniformity at a broader level, if not in the practical application of the rules. Even such a general level of uniformity in principle would arguably be better than the application of disparate legal rules, like the *Vallescura* Rule, to a standard legal framework.

B. Effect on Shippers and Carriers

Not only will carriers have a decreased burden of proof, but they will also be in a stronger position of power when bargaining or settling. Under the *Vallescura* Rule, a carrier was seldom able to prove the damage attributable to each cause.[191] Shippers undoubtedly knew this, and could have used that information to their advantage when negotiating settlements. Under the Rotterdam Rules, carriers could better predict the likely effects of excepted circumstances on their liability because they would not need to worry about proving the amount of damages caused by that circumstance.[192] Article 17.6 positively affects the overall balance of the burden-shifting scheme and is a much fairer approach for addressing concurrent causation for indivisible harm.[193] The Rotterdam Rules cannot change the information imbalance between carriers and shippers, but at least the Rotterdam Rules would provide a better way to handle the evidence possessed by either side. Overall, the Rotterdam Rules are more equitable for carriers than the current American regime.

C. Does the Change Really Matter?

Given the lengthy and myriad list of excepted circumstances under COGSA and the plethora of ways ocean cargo can be damaged, one might expect that concurrent causation of cargo damage involving the *Vallescura* Rule would appear in a multitude of cases. In reality, surprisingly few cases have reached the point of the COGSA burden-shifting scheme where the *Vallescura* Rule would

189. *See* Biniaz Letter, *supra* note 34, at 1; Shipowner Associations Press Release, *supra* note 34, at 1 (arguing that ratification by "major trading nations, such as EU Member States, will almost certainly give this process critical momentum").

190. *See* Asariotis, *supra* note 46, at 148.

191. *See supra* notes 110-13 and accompanying text. *But see* Trade Arbed, Inc. v. M/V Swallow, 688 F. Supp. 1095, 1106-07 (E.D. La. 1988) (holding that carrier met burden of allocating damages).

192. *See* ROTTERDAM RULES, *supra* note 7, art. 17.6.

193. *See* UNCITRAL 41st Sess., *supra* note 9, para. 76.

come into play.[194] This paucity of cases is likely due to judgments based on earlier steps in the COGSA burden-shifting process and pre-trial settlements, as well as the relatively narrow scope of the issue. While the *Vallescura* Rule may have a somewhat small case record, it has influenced an entire field of admiralty law for almost eighty years and its abrogation by the Rotterdam Rules should not be lightly brushed aside.[195] This issue is but a microcosm of the larger field of liability apportionment for indivisible harms, but one that provides its own unique perspective and challenges. As such, the application of the Rotterdam Rules' liability apportionment scheme is in fact an issue worthy of consideration and analysis.

D. Conclusion

Though the *Vallescura* Rule may have a solid public policy foundation and Article 17.6 has its flaws, changing perspectives on liability apportionment, the needs of the international shipping industry, and the goal of uniformity all support the liability apportionment scheme presented under Article 17.6. The United States should thus, at the very least, adopt this particular portion of the Rotterdam Rules.

While the legal field of liability apportionment may be uncharted waters for American marine cargo damage claims, courts have a workable road map to guide them. By synthesizing current American jurisprudence on liability apportionment with modern comparative negligence doctrines in other maritime claims, an apportionment scheme may be constructed that both reflects the current state of the law and the specific needs of the Rotterdam Rules. While future litigation, statutory changes, and advances in evidence collection may change the way liability is apportioned in the future, for now, the proposed two-step model provides a solid foundation for claims of loss, damage, or delay arising from the carriage of goods by sea.

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194. According to Westlaw KeyCite, only 255 cases have cited *The Vallescura*. Citing References for The Vallescura, WESTLAWNEXT (Mar. 14, 2013), http://1.next.westlaw.com (search "The Vallescura," then click "Citing References").

195. Schnell v. The Vallescura, 293 U.S. 296, 302-05 (1934).

APPENDIX

Article 17: Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of

the carrier's responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(a) Act of God;

(b) Perils, dangers, and accidents of the sea or other navigable waters;

(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire on the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the

documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

(a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or

(b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier

cannot prove that this event or circumstance is not attributable to its fault or to

the fault of any person referred to in article 18.

5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all

or part of the loss, damage, or delay if:

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the

holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.[196]

196. ROTTERDAM RULES, *supra* note 7, art. 17.