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The 1910 Collision Convention: Can an old sea dog learn new tricks?

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The 1910 Collision Convention

1. The 1910 *Convention*[1] effected a few, now almost universally accepted, rules to regulate liability of a sea going vessel for collisions between it and another sea going or inland navigation vessel. Lord Phillips of Worth Matravers CJ[2], a highly regarded Admiralty jurist, gave this common sense explanation of the term "sea-going vessel", albeit, in seeking to give it a meaning in a statute creating a criminal offence[3]: *"A sea-going vessel is a vessel which sets out to sea on a voyage"*. In allowing the defendant's appeal, his Lordship reasoned that *"by no stretch of the imagination could [a jet ski] be so described"*[4].

2. One immensely important rule has endured without controversy. Article 8 requires the master of each vessel in collision to render assistance to the other so far as possible without endangering his or her ship, crew and passengers. Despite the current, perhaps uncooperative, international situation, I doubt that there is much appetite to interfere with this recognition of common humanity.

3. Before the 1910 *Convention,* the general rule of maritime law was that if two vessels collided and each was at fault, regardless of the degree of blameworthiness of either, each shipowner was liable to the other for a moiety or half of the damage to the other's vessel. That resulted in the difference in the value of the damage to each vessel (which could be very unequal) being halved and, then, the owner in whose favour that calculation resulted was able to recover that sum as a judgment against the other owner or prove for it, along with other claimants in any limitation fund established by the other owner. Also, in English

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[1] *The Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels*, done at Brussels on 23 September 1910.

[2] giving the judgment of the Court of Appeal that included Rafferty and Mackay JJ in *R v Goodwin* [2005] EWCA Crim 3184; [2006] 1 Lloyd's Rep 432 at 439 [38].

[3] the *Merchant Shipping Act 1995* (UK).

[4] *R v Goodwin* [2005] EWCA Crim 3184; [2006] 1 Lloyd's Rep 432 at 439 [39].

law jurisdictions, cargo owners on each vessel had to bear half their loss on the same basis[5] and could only claim against the other vessel or her owner for half of their loss.

4. The 1910 *Convention* abolished the unjust moiety rule. Instead, courts could now find the proportionate fault of each vessel and fix the damages accordingly. However, the 1910 *Convention* also provided in Article 4 that owners of cargo as well as passengers and crew whose luggage or effects on a carrying vessel was damaged in a collision now could claim from the other vessel the proportion of their property loss for which the stranger vessel was at fault although they still had to bear themselves the balance of the loss in proportion to the fault of the carrying vessel.

5. Because there is no strict liability for loss under the 1910 *Convention*, a person alleging that a ship was wholly or partly at fault has the onus of proving the liability of that vessel, at least in common law jurisdictions[6]. In *The Miraflores and the Abadesa*[7], the House of Lords held that in apportioning "fault", as used in giving effect to Article 4 of the 1910 *Convention*, the Court must investigate and weigh each vessel's blameworthiness for the collision, together with its role in the causation of the loss or damage.

6. Even though it was a State Party to the 1910 *Convention*, the United States of America has never ratified it. For the first 60 years after it came into force, the United States courts adhered to the unfair moiety rule regardless of each vessel's degree of fault. Eventually, in 1975, the Supreme Court of the United States recognised the lack of *"any intrinsic merit"* in the unjust and inequitable allocation of damages that the old moiety rule usually produced and adopted as the maritime law of the United States the same rule that is reflected in Article 4[8].

7. For over a century in most countries, the rules in the 1910 *Convention* have continued to govern the allocation of liability for vessels involved in a collision. However, conditions in ordinary life and the maritime industry in 2025 are very different to those that existed

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[5] *The Stoomvaart Maatschappy Nederland v The Peninsular and Oriental Steam Navigation Company (The Khedive)* (1882) 7 App Cas 795 at 800-801 per Lord Selborne LC, 807-808 per Lord Blackburn with both of whom Lord Watson agreed at 823.

[6] *Owners of SS Heranger v Owners of SS Diamond* [1939] AC 94 at 104 per Lord Wright, with whom Lord Atkin, Lord Thankerton, Lord Russell of Killowen and Lord Porter agreed.

[7] [1967] 1 AC 826 at 845 per Lord Pearce with whom Lord Reid and Lord Hodson agreed, see too per Lord Morris of Borth-y-Gest at 841-842.

[8] *United States v Reliable Transfer Co Inc* 421 US 397 (1975) at 403-404, 410-411 per Stewart J for the Court; see too Thomas J Schoenbaum, *Admiralty and Maritime Law* (4th ed, 2004, Thomson West) at § 12-8.

in 1910. Is it time to contemplate whether improvements ought be considered – or as I put in the title, new tricks can be taught – or should we default to the situation that Longfellow described in his 1863 poem '*The Theologian's Tale: Elizabeth*'[9]:

> Ships that pass in the night, and speak each other in passing,
> Only a signal shown and a distant voice in the darkness;
> So on the ocean of life we pass and speak one another,
> Only a look and a voice, then darkness again and a silence.

8. I want to explore in this paper whether it is time to revise the 1910 *Convention* by amending existing rules or adding new rules and if doing so would better protect the interests of one or more classes of persons whose property has been damaged by a collision that it regulates. I will discuss four, possibly related areas, namely, whether there is a role for:
    - channelling liability for collision damage to just the shipowners and or any bareboat or demise charterers or salvors (**the channelling issue**);
    - requiring shipowners to have mandatory insurance for collision damage (**the insurance issue**);
    - creating a right in a person who suffers loss or damage from a collision to sue the insurer directly (**the direct action issue**); and or
    - making vessels at fault jointly and severally liable for the full amount of any loss or damage to property suffered by third parties, such as owners of cargo, passengers and crew on the carrying ship or owners of infrastructure like wharves, port facilities or bridges (**the third party rights issue**).

The channelling issue

9. When a ship collides with and occasions damage to another ship or other property, such as a wharf[10], the injured person *eo instantii* acquires a maritime lien, or "privilège" in civil law, over the ship at fault. A maritime lien is a claim or privilège on the *res*, usually, a ship, that travels with it from its inception regardless of any subsequent change in possession or ownership. It remains inchoate until it is carried into effect by a legal process[11], such as the service of a writ *in rem* and consequent arrest, in a common law jurisdiction, or an attachment, in a civil law jurisdiction.

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[9] Henry Wadsworth Longfellow, *Tales of a Wayside Inn*, 1863, Part Third.
[10] *United Africa Co Ltd v Owners of MV Tolten (The Tolten)* [1946] P 135.
[11] *Harmer v Bell (The Bold Buccleugh)* (1852) 7 Moo PC 267 at 284-285; 13 ER 884 at 890-891 per Jervis CJ giving the opinion of the Privy Council which also comprised Pollock CB, the Right Hon T Pemberton Leigh and the Right Hon Sir Edward Ryan.

10. Importantly, the 1910 *Convention* personifies vessels as bearing liability for the damage done by a collision. That reflects the nature of the maritime lien that will have attached to the vessel or vessels at fault at the moment of the collision and will continue to adhere to her or them, regardless of any change of ownership or possession that may occur subsequently, until the lien is either discharged or lost. Thus, it does not matter if an owner or bareboat charterer of a ship at fault in a collision continues to have an *in personam* liability for the damage after a sale or change of possession of the ship, she can still be arrested or attached by any person whose person or property was injured as a result of the collision.

11. In addition, Article 13 extends the operation of the 1910 *Convention* to situations in which there is no direct physical contact between two vessels[12]. In *The Norwhale*[13] Brandon J held that Article 13 extended the meaning of "fault" in the 1910 *Convention* to incorporate both fault in the navigation, as well as fault in the management or operation, of a vessel. His Lordship held that because the 1910 *Convention* used the expression "the fault" without any qualification about the type of fault concerned, it should not be understood as limited only to faults in navigation[14].

12. Cases have held that Article 13 enables a person to recover damages in situations that include:
    - damage to a moored ship that, itself, was defectively moored, caused by wash generated by the excessive speed of the vessel at fault[15];
    - damage caused by a collision between a ship and an innocent barge towed by another ship[16];
    - damage caused by the discharge of water and other liquid from one ship (the aircraft carrier HMS *Eagle*) onto the deck of a barge causing the barge to list and then sink[17].

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[12] Article 13 provides: *"This Convention extends to the making good of damages which a vessel has caused to another vessel, or to goods or persons on board either vessel, either by the execution or non-execution of a manoeuvre or by the non-observance of the regulations, even if no collision had actually taken place."*
[13] *The Norwhale; Franetovich & Co (Owners) v Ministry of Defence* [1975] QB 589 at 597 and 599; [1975] 1 Lloyd's Rep 610.
[14] albeit his Lordship invoked the wording of the *Maritime Conventions Act 1911* (UK) which expressly supported that construction.
[15] *The Batavier III* (1925) 23 Ll L Rep 21; *The* Norwhale [1975] QB 589 at 594 per Brandon J.
[16] *The Cairnbahn* [1914] P 25 at 33 per Lord Sumner, and 37-38 per Warrington J; see too at 30 per Lord Parker of Waddington.
[17] *The Norwhale* [1975] QB 589 at 591 per Brandon J.

13. The inchoate nature of the collision maritime lien and the consequences it imposes on everyone who later owns or comes to be in possession of a ship at fault in the collision, suggests that it may be worthwhile considering a new rule to channel the liability that attaches to the ship as a maritime lien or privilège into an identified person or class, such as the owner or salvor at the time of the collision. However, if the liability were channelled into one person, the interests of the holders of the maritime lien or privilège for collision damage would have to be protected. This could be done by requiring ships to be insured to meet those claims up to the maximum amount of special drawing rights (SDRs) for which the ship could limit her liability in the version of *The Convention on Limitation of Liability for Maritime Claims* 1976 (**LLMC**)[18] in force in the jurisdiction most favourable to an injured party who could arrest or attach her there. At present, the maximum limitation sum is set using the values in SDRs agreed in 2012 (**the 2012 limits**).

14. As this scenario suggests, one possibility is that each of the four potential reforms with which this paper deals could be seen as interrelated and simultaneously integrated with the commercial and practical realities of modern maritime trade. After all, almost every P&I Club and hull and machinery insurance cover must be written with the potential risk that the Club or insurer will need to establish a limitation fund or put up security for a vessel in a jurisdiction that applies the 2012 limits for the LLMC which is, of course, the most favourable to claimants.

15. The purpose of the ancient civil law principle that a ship owner could limit his liability to the value of his ship is reflected in the LLMC. That purpose is to give effect to a public policy of protecting shipowners from financial ruin and maritime trade generally, by giving them the ability to limit their maximum liability for the prescribed classes of damage caused by a vessel to its value[19]. However, as the Full Court of the Federal Court of Australia recently observed, *"the limitation regime is not necessarily 'fair'"*[20], citing what Lord Denning MR had said in *The Bramley Moore*[21]:

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[18] done at London on 19 November 1976, as amended by the *Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims* 1976 done at London on 2 May 1996, as amended by resolution LEG 5 (99) adopted by the Legal Committee of the International Maritime Organisation at London on 19 April 2012 (see e.g., *Limitations of Liability for Maritime Claims Act 1989* (Cth)).

[19] See *Strong Wise Ltd v Esso Australia Resources Pty Ltd* [2010] FCA 240; [2010] 2 Lloyd's Rep 555; 185 FCR 149 at 157-166 [22]-[52], where I traced the historical uses of the shipowner's right to limit and the history of limitation conventions.

[20] *Tasmanian Ports Corporation Pty Ltd v CSL Australia Pty Ltd (The Goliath)* [2025] FCAFC 53 at [5] per Burley, Sarah C Derrington and O'Sullivan JJ citing *The Bramley Moore* [1964] P 200 at 220; [1963] 2 Lloyd's Rep 429 at 437.

[21] [1964] P 200 at 220; [1963] 2 Lloyd's Rep 429 at 437, with Donovan and Danckwerts LJJ agreeing.

> The principle underlying limitation of liability is that the wrongdoer should be liable according to the value of his ship and no more … I agree that there is not much room for justice in this rule; but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.

16. Article 1 of the LLMC defines the class of persons who have the right to limitation of liability for any of the six classes of maritime claims specified in Article 2. Those persons are, *first*, the ship owner, defined as *"the owner, charterer, manager and operator of a seagoing ship"* together with the ship herself, *secondly*, a salvor, *thirdly*, any person for whose act, neglect or default the shipowner or salvor is responsible and *fourthly*, the insurer of liability for claims subject to limitation in accordance with the LLMC. As a matter of commercial reality, either the ship and salvor will have P&I Club and hull and machinery insurance cover or the ship will be sold by the court in a jurisdiction where she is arrested or attached and the proceeds placed in a limitation fund. Accordingly, if any claimant seeks to recover a substantive amount of loss or damage, the insurance or fund will meet that claim either in full or in accordance with whatever priority rules apply to claims in that jurisdiction when the court ranks them. This form of channelling is both practical and commercially realistic.

17. Relevantly, for the purposes of the 1910 *Convention* the only persons who are likely to be worth suing, if a ship has caused damage as a result of a collision with another ship or something else, are her owner, a charterer with possessory rights over her, i.e., a bareboat charterer, perhaps her managers and or operators, together with any salvor, and insurer, being effectively the same cohort as the LLMC recognises. Likewise, the nature of limitable claims under Article 2 of the LLMC comprises most, if not all, of the kinds of claim that any collision between two or more vessels is likely to generate to which the 1910 *Convention* will apply.

The insurance issue

18. Most commercial vessels engaged in international cargo or passenger carriage are likely to have P&I Club and hull and machinery insurance cover that extends up to the 2012 limits, being the maximum amounts limitable under the LLMC. Thus, the market for these covers would be readily able to adapt to a new requirement to issue a certificate to be carried as one of a ship's documents, stating that she was insured up to the 2012 limits. Of course, one may expect that after a collision, a ship that is still navigable may proceed to a jurisdiction with as low a LLMC limitation cap as her owner can safely find and establish a limitation fund there to meet any claims. This is a legitimate resource available to a P&I

Club, hull and machinery insurer and a shipowner (and any salvor), as defined in the LLMC, to minimise their exposure to claims arising out of a collision in accordance with the law of nations.

19. The industry should have no substantive problem in complying with an article in a revision of the 1910 *Convention* that made it mandatory for a vessel to have insurance for the amount of the current maximum possible sum under the LLMC, be it the 2012 limits or any later amended limits. And because this cover is intended to respond to any collision claims that are limitable under the LLMC, there will be no increased exposure to P&I Clubs, hull and machinery insurers or shipowners from a requirement that each vessel carry a certificate evidencing the very cover that she can be expected already to have in place.

20. Thus, if the LLMC limits applicable in the State Party where a limitation fund is first established are to be applied in respect of a collision casualty covered by a revised 1910 *Convention*, then it is hard to see any adverse consequence for a shipowner or its P&I Club or hull and machinery insurer, since each is already on risk for that liability.

21. Damage from collisions ordinarily will be within the cover that a vessel will have under P&I Club and hull and machinery insurance up to the extent of the vessel's right to limitation of her liability under the LLMC. However, that cover also must continue to be available for the other circumstances in which claims to which it responds could arise.

22. Unless the 1910 *Convention* is amended to introduce liabilities that are not subject to limitation under the LLMC already, there is little point in seeking to require a shipowner merely to procure a certificate evidencing cover already available for damage caused by a collision between two or more vessels at fault.

23. But if third parties are given new rights under a revision of the 1910 *Convention*, then there may be good reason to make it mandatory for the P&I Club or hull and machinery insurer to issue separate cover that will respond exclusively to any newly added risks. Of course, such a requirement can be expected to increase the costs for both shipowners and their P&I Clubs and hull and machinery insurers.

The direct action issue

24. Since States Party agreed in 1969 to Article VII paragraph 8 of the CLC 1969[22], several international maritime conventions have included provisions entitling persons who suffer loss or damage from marine casualties to sue a vessel's insurer directly for certain classes of damage for which the relevant convention requires insurance cover[23].

25. If a P&I Club or hull and machinery insurer is sued directly, it should be able to establish a limitation fund in the jurisdiction in which it is sued under a direct action right. The entitlement to proceed directly against a vessel's insurer saves a claimant having to track and arrest or attach an insured vessel when they wish to enforce a claim under the relevant convention as if it were the shipowner.

The third party rights issue

26. The above discussion provokes an obvious question: why does one need to channel liability and have mandatory insurance for damage resulting from collisions involving two or more ships at fault when the LLMC, likely P&I Club and hull and machinery insurance cover and the existing legal rules already deal with these scenarios effectively?

27. The 1910 *Convention* regulates some rights and liabilities arising out of the collision of two or more vessels only in respect of damage to one or more of those ships, and injury or damage to passengers, crew, their luggage, effects and cargo carried on any of those ships.

28. As I noted at the outset, Article 4 of the 1910 *Convention* also incorporates a rule that the cargo and property of persons, including the crew, carried on a ship in fault in a collision bear the same proportion of loss for their property damage as the degree of fault of that carrying ship. Thus, cargo owners, passengers and crew can only claim from the other ship at fault the proportion of their property damage losses that matches the proportionate fault of that other ship. That is, as Brandon J encapsulated the English position, *"where two or more ships are in fault, each should only be severally liable for her proportion of the damage or loss caused to cargo carried in any one of them"*[24]. In contrast, the long established United States position is that, when both vessels are at fault in a collision, an innocent owner of cargo

[22] *International Convention on Civil Liability for Oil Pollution Damage*, done at Brussels on 29 November 1969.
[23] Similar direct recourse against an insurer is available, for example, under the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*, done at London on 23 March 2001 in Article 7 paragraph 10.
[24] *The 'Giacinto Motta'* [1977] 2 Lloyd's Rep 221 at 226.

or effects on one vessel has the right to recover its loss in full from the other ship at fault and, in turn, the non-carrying vessel can recover back from the carrying ship the proportion of what it paid to the cargo or effects owner for which the carrying ship was at fault[25].

29. Additionally, in this context, most collisions resulting in damage to cargo are likely to have been caused by a circumstance falling within Article 4(2)(a) of the *Hague* and *Hague-Visby Rules*[26]. That article excludes a carrier, including a shipowner, from liability for an *"act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the [carrying] ship"*.

30. It follows that in most cases of collision between two or more ships at fault to which the 1910 *Convention* applies, it is likely that cargo owners will have no claim against the carrying ship, and will only have a claim against the other ship in fault for the proportion of their loss for which that ship was responsible. This is because, in the ordinary course, Article 4(2)(a) of the *Hague* or *Hague-Visby Rules* will exclude the carrying ship from liability to owners of cargo on board for its share of responsibility for that loss.

31. Nonetheless, it is also well established that, as a result of the decisions of the Supreme Court of the United States in *The Sucarseco*[27] and the majority of the House of Lords in *The Greystoke Castle*[28], cargo owners can recover in full from the other ship in fault their contributions to general average in respect of the carrying ship, regardless of the proportion of her fault. The cargo owner's claim to recover in full its payment of a general average contribution does not arise from the physical damage to its cargo that the collision caused and, so, is not governed by the 1910 *Convention*. Rather it is an independent economic loss, as Hughes CJ explained in *The Sucarseco*[29]:

> The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its

[25] See *Aktieselskabet Cuzco v The Sucarseco* 294 US 394 (1935) at 400-401 and the cases there cited by Hughes CJ giving the opinion of the Court; *The 'Giacinto Motta'* [1977] 2 Lloyd's Rep 221 at 226 per Brandon J; see too Schoenbaum, op cit at § 12-8.

[26] The *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, done at Brussels on 25 August 1924 (**the *Hague Rules***) and those rules as amended by the *Protocol amending the Hague Rules*, done at Brussels on 23 February 1968 (**the *Hague-Visby Rules***) and its analogue in the United States' *Carriages of Goods by Sea Act 1935*.

[27] *Aktieselskabet Cuzco v The Sucarseco* 294 US 394 (1935).

[28] *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265.

[29] *Aktieselskabet Cuzco v The Sucarseco* 294 US 394 (1935) at 404, in a passage that both Lord Roche and Lord Porter quoted with approval in *Morrison Steamship Co Ltd v Greystoke Castle (Cargo Owners)* [1947] AC 265 at 284, 286-287, 295.

> representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision.

32. This raises the next question, namely what new rights or adjustment of rules regulating existing rights of third parties is it necessary or desirable to create to remedy unfairness, injustice or deficiencies in matters as they stand now under the 1910 *Convention*? Different policy issues arise here depending on the nature of the claim by the person suffering loss and damage.

33. The States Party to the 1910 *Convention* accepted in Article 4 that liability for personal injury and death should be joint and several regardless of the degree of fault of the vessels. There is no apparent need to change that rule. But why should the owner of cargo on a carrying vessel, who had no role in the causation of a collision, lose the right to recover from a wrongdoer the full loss it suffered? Even if Article 4(2)(a) of the *Hague* or *Hague-Visby Rules* applies to exclude the liability of the carrying ship at fault, there is no present commercial or policy reason to relieve the stranger ship from being liable in full to an innocent cargo owner whose property on the carrying vessel was damaged by the collision.

34. The compromises necessary for the States Party to arrive at the exclusion in Article 4(2)(a) of the *Hague* and *Hague-Visby Rules* of a carrier's liability to cargo owners on its vessel for errors in navigation, management and operation had nothing to do with third party wrongdoers, such as another vessel's master's or crew's navigational error or other fault causative of a collision. That article requires a cargo owner to agree to relieve the carrying vessel from that class of liability as part of a congeries of rights and other liabilities that the *Hague* and *Hague-Visby Rules* created to balance the commercial interests of carriers by sea and shippers of cargo on their vessels. However, nothing in the *Hague* and *Hague-Visby Rules* conveys sympathy for, or a desire to, exonerate a ship from liability that through its fault also causes damage to cargo being carried on another ship.

35. At present, the non-carrying ship at fault gets a windfall under Article 4 of the 1910 *Convention* because its liability for damaging an innocent owner's cargo or personal effects on another ship is reduced by the proportion that the other ship is at fault. This unjust and capricious outcome has no modern justification. The time is long past when ships were owned by their masters, who often also owned the cargo they carried and so could be expected to share all of the loss occasioned by a collision under the old default moiety rule for vessel and cargo damage where both vessels were at fault. The United States

sensibly never adopted that unprincipled rule and correctly so. Moreover, if one or both ships limits her liability under LLMC, a cargo or personal property owner should be able to prove for its full loss[30] in each limitation action.

36. Reform of this anomaly, no doubt, will distress shipowners, P&I Clubs and hull and machinery insurers. But, it is probable that the increase in premiums for this class of cover is not likely to be great and, to some extent can be expected to be offset by a corresponding reduction in premiums payable by cargo interests, leaving a negligible net effect on the cost of sea carriage of cargoes.

37. On the other hand, it is difficult to see what advantage can be gained by amending the 1910 *Convention* to deal directly with claims by third parties, such as the owners of infrastructure or innocent ships. To provide for such claims separately would require both a shipowner to hold separate P&I Club or insurance cover to respond solely to such a casualty and the creation of a new bespoke right to limitation of liability or to establish a fund to meet such claims together with an exclusion of those claims from being subject to limitation under the LLMC. Such a move would negate the policy of the LLMC to contain the maximum liability of a shipowner for all loss or damage arising from an incident on a distinct occasion to the value of his ship.

Conclusion

38. The problem in examining whether reform of an international maritime convention should occur is that, often, the different interest groups have very diverse perspectives and, as Longfellow's poem foreshadowed, are like '*Ships that pass in the night, and speak each other in passing*'.

39. Nonetheless, the obvious injustice of depriving the owners of cargo and personal effects on a carrying ship at fault from being able to obtain full recovery from one of the persons whose fault caused the loss or damage, being the stranger (non carrying) vessel and her owner that Article 4 of the 1910 *Convention* still stipulates calls for reform.

[30] Subject to the exclusion in Article 4(2)(a) of *Hague* and *Hague-Visby Rules* for the carrying vessel.