The system of liability of articles III and IV of the Hague (Visby) Rules

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Chapter 3
Duties of the carrier

3.1 Introduction

68. The duties of the carrier are contained in art. III (1 and 2) H(V)R:90
1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
   (a) Make the ship seaworthy;
   (b) Properly man, equip and supply the ship;
   (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.91
2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried. (emphasis added, NJM)

69. Art. III par. 1 and 2 raise the following questions which will be discussed below:

   What is meant by voyage? (3.2)
   What is meant by before and at the beginning of the voyage? (3.3)
   Why is the requirement restricted to the period before and at the beginning of the voyage? (3.4)
   What is meant by due diligence? (3.5)
   Is the duty to exercise due diligence to provide a seaworthy ship delegable? (3.6)
   What is the meaning of seaworthy? (3.7)
   What is meant by properly and carefully? (3.8)
   Is the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried delegable? (3.9)

3.2 What is meant by ‘voyage’?

70. A voyage can be subdivided into several stages. During a voyage a ship may call at various intermediate ports for loading and discharging of goods. At common law the carrier is under an absolute obligation to provide a seaworthy ship at the beginning of each stage of the voyage.92 That this is no longer the case is clear from the wording of Art III(1) H(V)R. Under the Rules the voyage is the contractual voyage and not the stages within it.93 In consequence, the carrier need only exercise due diligence to make the

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90. In the Dutch Civil Code the obligations are contained in art 8:381(1 and 2) DCC.
91. The three aspects of seaworthiness are the physical condition of the ship, the quality of the crew and the cargoworthiness of the ship (art. III(1) a, b and c H(V)R).
92. See e.g. Carver 2005, p. 503-504 and Cooke et al. 2007, p. 971.
3.2 WHAT IS MEANT BY ‘VOYAGE’?

vessel seaworthy at the port where the cargo is loaded. Royer, Boonk, Cooke et al. and Cleveringa hold the same view. Royer in particular, but implicitly also the other aforementioned authors, believe that a contract of carriage only refers to two ports: the port of loading and the port of discharge. What lies before and after these ports is irrelevant to the contract of carriage. This view was held by Hewson J. in The Makedonia:

‘I see no obligation to read into the word “voyage” a doctrine of stages, but a necessity to define the word itself. (...) “Voyage” in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading. The rule says “voyage” without any qualification such as “any declared stage thereof”.

71. Carver notes that the wording ‘before and at the beginning of the voyage’ appears to leave no room for the doctrine of stages.

72. The term ‘voyage’ can be construed as covering the entire voyage covered by the bill of lading, irrespective of calls at intermediate posts. The doctrine of stages does not apply under the Rules. The voyage for a cargo is the contractual voyage as stated on the Bill of Lading for that cargo. Schoenbaum, however, cites US cases in which it was held that the doctrine of stages can be revived under certain conditions. Schoenbaum writes:

‘..., the doctrine of “seaworthiness by stages” holds that where the ship is at a port, a substantial and actual intervention by the owner or his agents will revive the duty to exercise due diligence to make the ship seaworthy, so that the ship must be seaworthy at each particular stage of the voyage.

73. To support this statement Schoenbaum cites cases which were not governed by the Hague Rules. One of them is The Glymont. In that case the 2nd Circuit said:

‘Here is a case where master and crew have surrendered their management and have made appeal to the owner to resume control himself. Response to that appeal destroys the continuity of the voyage, as if it were broken into stages. (...) An owner intervening in such circumstances must be diligent in inspection or forfeit his immunity. Negligence at such a time is not the fault of servants employed to take the owner’s place for the period of a voyage. It is the

97. Cooke et al. 2007, p. 971. Cooke et al. observe that the period ‘before and at the beginning of the voyage’ embraces at least the period from the beginning of loading till the moment the ship leaves on her voyage.
fault of the owner personally, exercising his own judgement to determine whether the voyage shall go on.103

74. However, as was said above, none of the cases mentioned by Schoenbaum in this respect were governed by the Hague (Visby) Rules or a Carriage of Goods by Sea Act based on those rules. These cases are therefore irrelevant for cases governed by the H(V)R.

3.3 What is meant by ‘before and at the beginning of the voyage’?

75. One can wonder which time span is entailed by the expression ‘before and at the beginning of the voyage’; how long before the voyage begins, does the obligation apply and when has the voyage begun? These questions are discussed below.

3.3.1 Before the voyage

76. In Maxine Footwear the Privy Council said:

‘In their Lordships’ opinion “before and at the beginning of the voyage” means the period from at least the beginning of the loading until the vessel starts on her voyage. The word “before” cannot in their opinion be read as meaning “at the commencement of the loading”. If this had been intended it would have been said. The question when precisely the period begins does not arise in this case hence the insertion above the words “at least”.’104

77. According to this decision the period before the voyage extends at least to the time of actual commencement of the loading. The question remains when the period begins. Carver notes that the phrase ‘Before (…) the voyage’ is vague and that there will often be cases where the breach of duty treated as eventually giving rise to the loss or damage, occurred very considerably before loading.105

The extent of the period ‘before the voyage’ will depend on the facts of the situation. In my view common sense says that the period will include the time which an ordinary careful and prudent owner would require to achieve the degree of fitness of the vessel required to encounter the voyage and the suitability of the ship for carrying the cargo contemplated, on the voyage contemplated.106

78. E.g. in the Kriti Rex case107 the ship’s engine failed due to contaminated lubricating oil causing failure to deliver cargo. It was apparent from the ship’s rough engine room logs that for some months prior to the casualty those on board had been keeping a detailed record of main engine filter flushings. These reports showed that the filters were flushed between 5 and 10 times a day which is more often than acceptable.108

Flushing was required to clear the filters of debris filtered out of the lubricating oil. As

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103. The Glymont, 66 F.2d 617.
108. According to J.K. Langendoen who sailed as an engineer on Dutch vessels in the 1990’s and who I inter-
viewed on this point, 2 to 4 times a day would be the acceptable limit for an old engine.
3.3 WHAT IS MEANT BY ‘BEFORE AND AT THE BEGINNING OF THE VOYAGE’?

to the question whether the owners exercised due diligence to make the vessel seaworthy Judge Moore-Bick said:

‘The question whether the owners exercised due diligence to make the vessel seaworthy does not loom large in this case because they accepted that having failed to have regular analyses of the lubricating oil carried out it would be difficult for them to argue successfully that they had done all that they could reasonably have done to ensure that the oil was fit for service. In my judgement they were right to make that concession since regular independent analysis of the lubricating oil is a standard precaution against contamination by water and other foreign matter. Regular independent analysis of the lubricating oil is a standard precaution against contamination by water and other foreign matter and would probably have shown that there was excessive particulate matter in the oil. However, I do not think that criticism of the owners can be confined to their failure to have such analyses regularly carried out. The unusually high frequency of filter flushings which had been a continuous feature of this engine’s operation prior to the voyage was sufficient to indicate that there was a large amount of sludge in the sump tank which ought to have been cleaned. I accept that the sump tank was not easy to enter because of its size and construction, but I am not satisfied, as I have said, that it was completely inaccessible, much less that it was impossible to remove sludge from it by one means or another. In these circumstances I am satisfied that the owners did fail to exercise due diligence in the respect I have mentioned and that their failure to do so caused or contributed to the casualty.’

79. This case shows that knowledge concerning the condition of the vessel over a series of voyages can lead to the conclusion that the carrier failed to exercise due diligence to make the ship seaworthy before a specific voyage.

80. Royer correctly points out that the ship should be ready to receive the cargo, i.e. the ship should be cargoworthy, at the moment that loading commences. This follows from art. III(1) H(V)R.110

81. If there is no contract of carriage the owners will be under no obligation to exercise due diligence. That duty only begins when a contract of carriage comes into existence. The contract of carriage will also determine when the voyage is to commence. In conclusion it can be said that the contract of carriage will determine when the voyage will commence and the duty to exercise due diligence begins when the owner entered into the contract of carriage.

109. As opposed to the following consideration by Channell J. in the common law decision McFeddon v. Blue Star Line. [1905] 1 K.B. 697: ‘There is, of course, no warranty at the time the goods are put on board that the ship is then ready to start on her voyage; for while she is still loading there may be many things requiring to be done before she is ready to sail. The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: it takes effect at the time of sailing, and at the time of sailing alone.’

What is meant by ‘before and at the beginning of the voyage’?

3.3.2 The beginning of the voyage

82. The moment of departure is the beginning of the voyage. The voyage commences, when the ship breaks ground for the purpose of departure. Thereafter, under the Hague Rules the obligation to use due diligence for seaworthiness ends. The carrier may avoid liability for damage caused by unseaworthiness occurring after the voyage commenced by relying on art. IV(1) or art. IV(2)p [V]R unless the unseaworthiness was discoverable by the use of due diligence before and at the beginning of the voyage. Carver refers to decisions in which the courts inferred unseaworthiness from a breakdown occurring soon after the ship sailed. The question whether or not the voyage had already started, was the subject under discussion in the American case of Mississippi Shipping Co. v. Zander & Co. (S.S. Del Sud). The court held:

‘In a very real sense the voyage had begun. The ship had no further purpose at the dock. She was made ready for sea. She was being turned around for the purpose of leaving. The lines to the dock were fast not to keep her there, or to continue her stay at the wharf. They were there solely as an essential step in her navigational manoeuvring. They were no less vital than the hawser to the straining tug off the starboard quarter. The ship’s engines were actively manoeuvring to accomplish the swing and officers and men were stationed for simultaneous undocking and departure. The ship was literally and figuratively in the sole command of the master on the bridge (...) What we decide is consistent with the ancient observation of Judge Story that “... the voyage commences, when the ship breaks ground for the purpose of departure, ...” (...) Once it is determined that the hole in the ship’s side occurred after the voyage had begun within the meaning of Cogsa Section 3, the failure of the master to inspect and repair damage at Santos was likewise an error in navigation and management and also excused under Section 4.’

83. Furthermore, the court held that

‘the use of “before and at” does not make the commencement of the voyage – whenever it is – any less a beginning. When the voyage begins, it is the voyage, and not the beginning of it, which continues. The dual reference is to make doubly sure that with respect to cargo then being loaded the vessel must be seaworthy at the time of the receipt of cargo and must continue in that state until the ship sails. That the duty reaches backward from the commencement does not make it reach forward, as the Act prescribes that the latest point of performance is at the beginning. The voyage must have some place (and time) of beginning. After that, it is not the beginning, but the voyage itself which transpires.’

3.4 Why Requirement Restricted to ‘Before and at Beginning of the Voyage’?

84. In the light of these principles a majority of the Court therefore concluded that the voyage had commenced at the time the damage to the ship’s side was sustained.

85. According to this case the test is not ‘can the ship actually manoeuvre freely’ (the physical theory) but that the ship is not being controlled from land but entirely from the ship (the command theory). The deciding factor in this last theory is that the ship is totally ready to leave port and commence the voyage.\(^{115}\)

86. The following consideration of the Amsterdam Court of Appeal is incorrect:

‘The “beginning of the voyage” is the time of loading. When cargo is loaded in three ports, the beginning of the voyage is the moment the ship leaves the first port.’\(^{116}\)

Both sentences are not in accordance with the aforementioned English and American doctrine and case law. The court of appeal’s consideration may be due to its unfamiliarity with the Hague Rules in 1952.\(^{117}\)

3.4 Why is the requirement restricted to the period ‘before and at the beginning of the voyage’?

87. The ratio legis of the limitation of the period in which the carrier is required to exercise due diligence for a seaworthy ship is that the carrier has no more influence on the state of the ship after she sails.\(^{118}\)

At the ILA 1921 Hague Conference\(^ {119}\), Sir Norman Hill gave the following explanation, whereupon the present text of the opening sentence of Article III was adopted:

‘...As I understood it, and I think that is as the cargo interests generally understood it, the obligation in regard to seaworthiness is up to the time of starting on the voyage. To begin with, a ship worthy to take that cargo, and when she leaves on the voyage she must still be seaworthy. If you go further than that, and you say that there is an absolute obligation on the part of the shipowner to keep the ship seaworthy throughout the voyage, then, of course, you render quite valueless most of your exceptions. For instance, if, through the negligent navigation of the pilot, the ship is run on the rocks and holed, she ceases to be seaworthy. There cannot be an overriding obligation on the shipowner to keep the ship seaworthy throughout the voyage: he is excused, and we will agree, as I understand, that he should be excused, because the damage has been done through the negligence in the navigation. When this was drafted, I think all of the interests clearly agreed that the obligation, and the only obligation, they wanted to put on the shipowner was that the ship shall be seaworthy when she starts loading, that she shall be seaworthy when she starts on her voyage. If he has done that, he


\(^{116}\) Amsterdam Court of Appeal 12 November 1952, NJ 1954, 370 (The Deido).

\(^{117}\) The Hague Rules were enacted for the Netherlands on 18 February 1957 (Trb. 1957, no. 24).

\(^{118}\) Von Ziegler 2002, p. 130.

What is meant by ‘due diligence’?

3.5

has done his duty, and then the voyage is made under the conditions set out in 
No. 2, and with the exemptions set out in Article 4.120 (emphasis added, NJM)

88. I do not follow Sir Norman Hill’s reasoning. If the cause of damage is unseaworthi-
ness which was caused by an excepted peril, then the dominant cause of the damage
will be the excepted peril. If an excepted peril can be proven it means the carrier was
not negligent, otherwise the peril could not be proven.121 As the carrier is not liable for
damage caused by unseaworthiness which was not a lack of his due diligence (art. IV(1)
H(V)R) Sir Norman Hill’s remark is not entirely correct.

It should be noted that Sir Norman Hill refers to a ship that is seaworthy before load-
ing. This is not completely correct. The Hague Rules replaced the common-law require-
ment of absolute seaworthiness (seaworthiness as a condition of the ship) with the ob-
liation to exercise due diligence to make the ship seaworthy.122

I agree with Von Ziegler that a temporal limitation of the period in which due dili-
gence for the seaworthiness has to be exercised is no longer justified.123 In these days
of modern aids to communication and safe/reliable ships with systematic mainte-
nance plans it no longer makes sense to limit the period in which due diligence to
make the ship seaworthy ought to be exercised to a period before and at the beginning
of the voyage. In that sense the new UNCITRAL draft instrument is an improvement,
because article 15 of this draft provides that the carrier is obliged to exercise due dili-
gence before, at the beginning of and during the voyage to make and keep the ship sea-
worthy.124 This means that under the future UNCITRAL convention the carrier will no
longer be able to escape liability for cargo damage caused by unseaworthiness which
was not a result of lack of due diligence before and at the beginning of the voyage.

3.5 What is meant by ‘due diligence’?

3.5.1 Common law: absolute warranty of seaworthiness125

89. At common law the duty of the carrier to provide a seaworthy ship is an absolute
duty of the carrier.126 That means that even if the cause of unseaworthiness was not
discoverable by due diligence the carrier will still be liable. The duty is also referred to
as an absolute warranty. At common law the carrier also, however, has complete free-
dom of contract. He can escape liability by negotiating his own terms. Even the im-
plied duty to furnish a seaworthy ship can be reduced or excluded.127 Abuse of the car-
riers’ stronger bargaining position resulted in the curtailment of this freedom by the
Hague Rules. The forerunner of the Hague Rules is the (U.S.) Harter Act.128 The object of
the Hague Rules and the Harter Act was to protect cargo interests from widespread ex-

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120. Travaux Préparatoires, p. 145-146.
121. See chapter 6.
122. See § 3.5.
issue in TVR 2004, p. 44.
125. See also Rhidian Thomas 2006.
127. Cargo ex The Laertes (1877) 12 P.D.; Varnish & Co. Ltd v. Kheti (Owners) 82 Ll.L.Rep. 525. See also Carver
2005, p. 505.
clusion of liability by carriers. Art. III (8) of the Hague Rules ensures that the carrier is bound by the Hague Rules. On the other hand the Hague Rules and the Harter Act reduced the absolute warranty of seaworthiness to a duty to exercise due diligence to provide a seaworthy ship. The intent of the U.S. Congress was to relieve the shipowner from liability without fault.

90. Under a contract of marine insurance this means that seaworthiness is a condition precedent and if not complied with the insurance never attaches. In carriage of goods by sea however, unseaworthiness does not affect the carrier’s liability unless it causes the loss. In McFadden v. Blue Star Line Channell J. said the following regarding the absolute warranty of seaworthiness:

‘Now I think it is clear that, apart from the Harter Act, that warranty is an absolute warranty; that is to say, if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made. And there is also another matter which seems to me to be equally clear -- that the warranty of seaworthiness in the ordinary sense of that term, the warranty, that is, that the ship is fit to encounter the ordinary perils of the voyage, is a warranty only as to the condition of the vessel at a particular time, namely, the time of sailing; it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage.’

91. This consideration makes clear that though the standard of the duty is absolute, there is no requirement that the ship be perfect. The duty is to use a ship that is fit to encounter the ordinary perils of the voyage. The absolute warranty of seaworthiness can result in a type of liability without fault in cases concerning damage caused by concurrent causes of which one is unseaworthiness. In Smith, Hogg & Co. v Black Sea & Baltic General Insurance Company, Ltd. Lord Wright said:

‘... the contract may be expressed to be that the ship owner will be liable for any loss in which those other causes covered by exceptions co-operate, if unseaworthiness is a cause, or if it is preferred, a real, or effective, or actual cause.’

92. The standard set by the law is measured by reference to the standards that an ordinary careful owner would demand in respect of his own ship. If a ship goes to sea with

129. He can, however, take on a more extensive liability than the minimum prescribed by the Hague Rules.
a defect which such an owner would not have tolerated, the ship is unseaworthy.\textsuperscript{135} At
common law the obligation to provide a seaworthy ship is strict. If a ship is unseawor-
thy the owner is liable, with no defences or excuses entertained.\textsuperscript{136}

3.5.2 Hague (Visby) Rules: Due diligence

93. What is meant by the words ‘due diligence’ in art. III(1) H(V)R? To answer that ques-
tion Carver refers to \textit{The Amstelslot}\textsuperscript{137}, where the court held that lack of due diligence is
\textit{negligence}.\textsuperscript{138} Lord Reid said:

‘But where, as here, the defendant meets the \textit{prima facie} case against him by
calling two surveyors of unchallenged reputation who are found by the Judge
to be impressive and who say what they did and why they did it and why they
did not do more, then, unless they can be successfully criticized for their omissions,
a Judge is entitled to say that \textit{due diligence} was exercised (…) It is impor-
tant to get clear the point to which criticism must be directed. There is here no
lack of care and no lack of skilled knowledge. The surveyors were quite familiar
with the three methods of examination which it is said that they should have
adopted; and they could easily have followed them if they had chosen to do so.
What is said against them is that by deciding in effect that these methods were
not appropriate to the sort of examination they were conducting, they made
an error of judgement which a competent surveyor ought not to have made.
Lack of due diligence is \textit{negligence}; and what is in issue in this case is whether
there was an error of judgement that amounted to professional negligence.’

94. In the same case the court held that the mere fact that with hindsight it is possible
to see that extra precautions should have been taken does not mean that due diligence
was not exercised. Lord Reid said:

‘It is not enough to say that if those steps had been taken there would have
been a better chance of discovering the crack. In a great many accidents it is
clear after the event that if the defendant had taken certain extra precautions
the accident would or might have been avoided. The question always is wheth-
er a reasonable man in the shoes of the defendant, with the skill and knowl-
dge which the defendant had or ought to have had, would have taken those
extra precautions.’\textsuperscript{139}

95. Regarding the words ‘due diligence’ in general L.J. Auld said in \textit{The Kapitan Sakharov}:

‘USC was required under art. III, r. 1, of the Hague Rules to exercise due dili-
gence to make the vessel seaworthy. The Judge correctly took as the test wheth-
er it had shown that it, its servants, agents or independent contractors, had ex-
ercised all reasonable skill and care to ensure that the vessel was seaworthy at

\textsuperscript{136} Rhidian Thomas 2006, p. 87.
3.5 WHAT IS MEANT BY ‘DUE DILIGENCE’?

the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage. He also correctly stated the test to be objective, namely to be measured by the standards of a reasonable ship-owner, taking into account international standards and the particular circumstances of the problem in hand.140

96. Carver mentions cases in which examples of due diligence are to be found regarding the care that should be employed in fumigation,141 maintaining steering gear,142 electrical equipment143 and engines,144 selecting crew145 and providing documentation.146, 147 The presence of dangerous cargo does not necessarily mean that due diligence was not exercised.148 In The Kapitan Sakharov containers of dangerous cargo were stowed below deck and exploded. The dangerous cargo had not been declared by the shipper.

Although the stowage of the containers of dangerous cargo below deck contravened SOLAS149, IMDG150 and MOPOG151 the Court of Appeal held that compliance with the aforementioned instruments was not necessarily determinative of the issue of due diligence. Although the court found the ship was unseaworthy because of the dangerous and undeclared cargo below deck the court held that the carrier’s duty of due diligence as to the structure and stowage of its ship did not extend to verification of the declared contents of containers or other packaging in which cargo is shipped unless put on notice to do so. The containers of dangerous cargo were closed with a customs seal and were not capable of internal examination by the carrier. The court held that the carrier had exercised due diligence with respect to the non detection of the dangerous cargo because he could not with the exercise of reasonable skill and care have detected the presence of the dangerous cargo.152

Referring to Canadian, English and American authority, Tetley defines due diligence as a serious, competent and reasonable effort on the part of the carrier to fulfil the obligations referred to under Art III(1) H(V)R.153 It is the effort which a carrier acting with reasonable care would exercise. Tetley has derived the following test from English authority:

146. Ibid.
149. International convention for the Safety of Life at Sea.
151. The Russian Federation’s version of the IMDG code.
WHAT IS MEANT BY ‘DUE DILIGENCE’?

‘all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage.’

97. It has been said that in reality the undertaking to use due diligence to make the ship seaworthy is not really less onerous than the old common law undertaking that the ship is in fact seaworthy. This is because the relief to the carrier will occur only in cases where the unseaworthiness is due to some cause which the due diligence of the carrier personally and all his servants and agents could not discover (latent defects not discoverable by due diligence). The English cases The Muncaster Castle and The Happy Ranger show that a carrier will not be able to escape from liability if the unseaworthiness was due to an error of the carrier’s servants, agents or independent contractors. This will even be the case if the servants, agents and or contractors used by the carrier are well-known, experienced and respected so that one should be allowed to trust that the work delegated to such entities would be sound. In The Happy Ranger the carrier was found liable for a faulty rams horn hook of a crane on a brand new ship which had only recently come into the carrier’s ‘orbit’. The carrier was liable because, although the hook had been certified, it had never been proof loaded. In Muncaster Castle the carrier was found liable for cargo damage caused by the carelessness of a fitter employed by skilled repairers working for the carriers.

98. Rhidian Thomas remarks that ‘the ordinary careful owner test’ used by judges does not correspond with the shipping industry’s idea of the ordinary careful owner. ‘To the mind’s eye or the judiciary the ordinary careful owner is a paragon of watchfulness, attentiveness and responsiveness, who keeps abreast of all technical developments, tolerates little that is less than perfect, takes only the best advice, plans ahead with meticulous care, works in harmony with classification societies, employs skilled and experienced superintendents, crew, agents and independent contractors, and uses equally skilled and competent inspectors to supervise everything done on his behalf. Such an owner is no ordinary or reasonable animal in the commercial sense.’ Rhidian Thomas correctly remarks that the legal concept and reality are far apart. The standards of the law are therefore very high, demanding and uncompromising. Only in very exceptional circumstances will a defect be overlooked by the law and liability avoided. The one concession relates to want of due diligence by the builder of a ship or a preceding owner from whom the new owner acquires possession, and in respect of which the new owner does not assume responsibility. This arises from the language of the Hague Rules which obliges the carrier to use due diligence to make the ship seaworthy. This the carrier can only do if the ship is within his possession and control.


158. In The Muncaster Castle, the term ‘orbit’ is used co-extensively with ownership or service or control.

159. See infra § 3.6.


3.5 WHAT IS MEANT BY ‘DUE DILIGENCE’?

But even this exception is subject to the neutralising qualification that once the new owner acquires possession he will be liable for failure to detect defects making the ship unseaworthy which he ought to have discovered by the exercise of due diligence.162

3.5.3 Dutch cases

99. In The Deidi the Amsterdam Court of Appeal held with respect to the concept of due diligence:
‘Inspections during the voyage and before loading do not have to be exhaustive, but if no attention was paid to a pipe and socket connection, which could easily have been inspected by tapping it with a hammer, the inspection was inadequate.’163

In The Straat Soenda the court of appeal held:
‘Due diligence’ does not include regular and thorough checking of the hundreds of metres of piping.164

In The Imke the Amsterdam District Court held:
‘In general, the carrier is not responsible for faults in the ship, which were made before he took over the ship, unless he could have reasonably discovered these faults by careful and skilful inspection [after he took the vessel over, NJM]. It would be unreasonable to demand that “due diligence” means that the ship should be inspected for construction errors which are not visible from the outside, especially since Lloyd’s has issued a certificate of seaworthiness for the ship’.165

In the NDS Provider the Supreme Court of the Netherlands held that the duty to exercise due diligence to make the ship seaworthy extends to containers provided by the carrier to the shipper.166 The Supreme Court of the Netherlands drew an analogy between the holds of the ship and containers and held that the duty contained in art. III(1) H(V)R applied to the containers.

In my opinion it goes too far to extend the scope of art. III(1) to containers. Containers are not a part of the ship and a carrier will have no control over the container when it is ashore to be transported and stuffed. In that period anything could happen to the container outside the carrier’s knowledge. The duty imposed on the carrier by the Supreme Court of the Netherlands would mean that the carrier would have to inspect every container coming aboard. Seeing the quantity of containers loaded on modern container ships and the speed of loading this is unrealistic.

3.5.4 Conclusion

100. In my opinion the examples and citations discussed above make clear that a single definition of the expression *due diligence* is not easy to formulate. When assessing if the standards of due diligence were met, the courts will have to rely on common sense, ex-

164. Amsterdam Court of Appeal 5 February 1964, S&S 1964, 44 (Straat Soenda).
166. SCN 1 February 2008, C06/082HR. This judgement was rendered after completion of this manuscript but before it was printed, allowing me to briefly discuss it. In a future publication I shall discuss the judgement in depth.
pert information and on domestic and foreign case law. Rhidian Thomas correctly sums it up as follows:

'[t]he duty to make a ship seaworthy is an exceptionally demanding legal obligation. Rarely will the owner of a defective or deficient vessel avoid liability. The adoption of the Hague Rules of a limited and qualified position, requiring the exercise of due diligence to make the ship seaworthy is not as significant as might first appear. It is more apparent than real, for little has changed from the absolute undertaking of seaworthiness under the common law. The only difference is that under the Hague Rules the carrier is protected from liability in respect to latent defects (The Amstelslot [1963] 2 Lloyd’s Rep. 223). Even when the fault is outside the orbit of the carrier’s assumed or vicarious liability, the consequential protection will often be neutralised by the carrier’s direct personal duty to exercise due diligence on the transfer of acquisition of the ship.168

However, the Dutch decision Straat Sunda of the Amsterdam Court of Appeal seems to be less strict than the English courts.'

3.6 Is the duty to exercise due diligence to make the ship seaworthy delegable?

101. Under English170 and US171 law the obligation to exercise due diligence to provide a seaworthy ship is a non-delegable duty. This means that shipowners are responsible for unseaworthiness resulting from lack of diligence by a servant of independent ship repairers, even though they were of high repute and properly appointed by the ship owners.172 The leading case is The Muncaster Castle173, in which the House of Lords found that the words ‘due diligence to make the ship seaworthy’ had been taken from the Harter Act174 and similar British Commonwealth statutes. In the interest of uniformity these words should therefore be given the meaning attributed to them prior to the Hague Rules: A carrier was responsible to the cargo-interests unless due diligence in the work had been shown by every person to whom any part of the necessary work had been entrusted, no matter whether he was the carrier’s servant, agent, or independent contractor. Therefore in The Muncaster Castle the carrier was held liable for the negligent repair work carried out by an independent contractor.

102. In the same case Lord Keith of Avonholm said:

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167. See also Bayer 1959, p. 561.
169. See supra.
173. Ibid.
174. 46 USC App. § 190-196.
The Hague Rules abolished the absolute warranty of seaworthiness. They substituted a lower measure of obligation. The old law no doubt worked hardly on shipowners and charterers, in the absence of exception or exclusion. The change in the law, not confined entirely to England, operated to afford relief to shipowners, as well as some protection to shippers. It would, however, be a most sweeping change if it had the result of providing carriers with a simple escape from their new obligation to exercise due diligence to make a ship seaworthy. If this were the plain effect of the statute, cadit quaestio. But in dubio the Courts should, in a change of the suggested dimensions, lean the other way. The language of the Hague Rules does not, I think, lead to the result contended for by the respondents. The carrier will have some relief which, weighed in the scales, is not inconsiderable when contrasted with his previous common-law position. He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence.\footnote{The Muncaster Castle, [1961] 1 Lloyd's Rep 57.}

103. In The Muncaster Castle reference was made to Smith Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Company Ltd.,\footnote{Smith Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Company Ltd., 64 LL.L.Rep 87.} in which the court held:

‘In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner by the substitution. For (…) the relief to the shipowner will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover in the case of latent defects not discoverable by due diligence.’\footnote{The Muncaster Castle, [1961] 1 Lloyd's Rep 57.} (emphasis added, NJM)

104. Lord Radcliffe said:

‘It seems to me to be plain on the face of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left the port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect…’\footnote{The Muncaster Castle, [1961] 1 Lloyd's Rep 57.} (emphasis added, NJM)

105. The Muncaster Castle case was brought to the attention of the CMI Sub-Committee on Bills of Lading and discussed during the CMI 1963 Stockholm Conference. The Sub-Committee expressed the opinion that ‘the interpretation of the Hague Rules by the courts in the United Kingdom and the United States places a very much heavier bur-
DUTY TO EXERCISE DUE DILIGENCE TO MAKE THE SHIP SEAWORTHY DELEGABLE? 3.6

den on the carrier than is the case in other countries. According to the Sub-Committee the difference in construction is a result of the difference in wording used in the English and French version of the Hague Rules. In the English version the words ‘due diligence’ are used whereas the French version uses the expression ‘exercer une diligence raisonnable’ which should have been translated as ‘reasonable diligence’. The Sub-Committee reached the conclusion that efforts made to create a uniform rule of construction on this point would come up against a fundamental difference of opinion between notions on the construction of the French version and the attitude of Anglo-Saxon law. Because a solution acceptable to all parties would not be possible the Sub-Committee recommended a status quo, but also recommended an investigation of the actual position in the various countries on this particular point.

106. Some of the reactions to the decision of the Sub-Committee are the following; Britain proposed an amendment of art. III(1) which would lead to protection of the owner who used independent contractors of repute as regards competence. Denmark and Sweden welcomed efforts to try to find a solution to the difficulties caused by the Muncaster Castle decision. Also Loeff, the delegate for the Netherlands, was willing to support the amendment proposed by Britain. The U.S.A. however sought international uniformity on this point, preferably on the basis of amendment of the Hague Rules to assure that the jurisprudence of all countries would be brought into accord with the jurisprudence of the U.S. and England.

107. After voting, the Sub-Committee adopted the amendment proposed by Britain at the Stockholm Conference. As is well-known, the proposed amendment was eventually rejected so that the Muncaster Castle problem still exists.

108. Monsieur Prodromidés of France however was of the opinion that the Muncaster Castle decision had not created a problem. A report on the subject by Monsieur le Doyen van Ryn indeed concluded that the Muncaster Castle decision is in line with the law of Sweden, The Netherlands, Italy, France, U.S.A., Denmark, Canada and Belgium. Monsieur Prodromidés asks the question why the members of the CMI Stockholm Conference of 1963 want to try to amend or modify the Convention ‘in order to avert the disparities in the various countries, when the quasi unanimity which we desire already exists in most countries.’

109. Today The Muncaster Castle view still appears to be generally acceptable in most jurisdictions. A practical reason in support of the Muncaster Castle solution was given by Lord Radcliffe in The Muncaster Castle:

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179. This should not really be a problem as French is the authentic language of the convention.
180. Ibid.
182. Travaux Préparatoires, p. 150.
184. See Travaux Préparatoires on p. 150-153. This report was written at the request of the Sub-Committee to investigate the the actual position in the various countries in respect of ‘due diligence’.
185. Ibid., p. 174.
3.7 WHAT IS THE MEANING OF SEAWORTHINESS?

'I should regard it as unsatisfactory, where a cargo owner has found his goods damaged through a defect in the seaworthiness of the vessel that his rights of recovering from the carrier should depend upon particular circumstances in the carrier's situation and arrangements with which the cargo owner has nothing to do; as, for instance, that liability should depend on the measure of control that the carrier had exercised over persons engaged on surveying or repairing the ship, or on such questions as whether the carrier had or could have done whatever was needed by the hands of his own servants or had been sensible or prudent in getting done by other hands. Carriers would find themselves liable or not liable according to circumstances quite extraneous to the sea carriage itself.'

110. Under Dutch law it is unclear for which group of persons the carrier is liable. I disagree with the view taken by some Dutch authors that the problems should be solved by means of the Dutch law of obligations, for such a solution is contrary to the need for uniform construction of the convention. I agree with Lord Radcliffe's view quoted above. The carrier is directly liable for cargo damage caused by unseaworthiness as a result of his agents failure to exercise due diligence. If agents of the carrier were responsible for the unseaworthiness then that is no defence against the cargo claim. The carrier, not the cargo interests, is the one who should retrieve the damages from the agent responsible for the unseaworthiness.

111. The framers of the new UNCITRAL instrument have decided not to tackle the problem (if any) in the new instrument. The consensus seems to be that it is not possible to create uniformity on all fronts within the Rules.

3.7 What is the meaning of seaworthiness?

112. The requirements stated in art. III(1)(a), (b) and (c) are features of the warranty of seaworthiness as developed at common law. Existing authority on the common law duty can usually be employed, bearing in mind that common law cases are likely to be based on the absolute or strict obligation of seaworthiness, whereas under Rules the obligation is one of due diligence.

113. The general term 'seaworthiness' entails the fitness of the ship to encounter the voyage and the suitability of the ship for carrying the cargo contemplated, on the voyage contemplated. There is no requirement that the ship be perfect. The duty is to furnish a ship that is fit to encounter the ordinary perils of the voyage. In Mcfadden v. Blue Star Line Channell J., citing Carver, said:

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189. Ibid. at p. 125.
190. The author discussed this matter with prof. Van der Ziel who is involved in the framing of the UNCITRAL instrument.
‘A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the ship-owner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.’

114. Under art. III(1) a ship can be unseaworthy if it is unfit for the particular voyage anticipated. This can occur when it is improperly crewed, equipped and supplied and where the ship is safe as a navigating entity, but uncargoworthy because it is unfit for the particular cargo to be carried. Von Ziegler derives the following definition from American cases:

‘Seaworthiness is a *relative* term which looks to such matters as the type of vessel, character of the voyage, reasonably expectable weather, and navigational conditions. [...] The vessel must be *reasonably fit to carry the cargo she has undertaken to transport*.’

115. Von Ziegler also quotes the following English test:

‘The test in a case of this kind, of course, is not absolute; you do not test it by absolute perfection or by any absolute guarantee of successful carriage. It has to be looked at realistically, and the most common test is: Would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?’

116. Tetley derives the following definition from numerous decisions:

‘Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage. Seaworthiness therefore has two aspects: 1) the ship, crew and equipment must be sound and capable of withstanding the ordinary perils of the voyage and 2) the ship must be fit to carry the contract cargo.’

117. In the Australian case *Bunga Seroja* a number of points of view derived from mainly English and US authority were expressed on the issue of seaworthiness:

‘1. [S]eaworthiness is to be assessed according to the voyage under consideration; there is no single standard of fitness which a vessel must meet. Thus, sea-

worthiness is judged having regard to the conditions the vessel will encounter. The vessel may be seaworthy for a coastal voyage in a season of light weather but not for a voyage in the North Atlantic in mid-winter.\footnote{197}

2. Thus, definitions of seaworthiness found in the cases (albeit cases arising in different contexts) all emphasize that the state of fitness required “must depend on the whole nature of the adventure”. The vessel must be “fit to encounter the ordinary perils of the voyage”; it must be “in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured.”\footnote{198}

3. Further, if the question of seaworthiness is to be judged at the time that the vessel sails, it will be important to consider how it is loaded and stowed. If the vessel is over laden it may be unseaworthy. If it is loaded or stowed badly so, for example, as to make it unduly stiff or tender it may be unseaworthy.\footnote{199}

4. The standard of fitness [is not] unchanging. The standard can and does rise with improved knowledge of shipbuilding and navigation.\footnote{200}

5. Fitness for the voyage may also encompass other considerations as, for example, the fitness of the vessel to carry the particular kind of goods or the fitness of crew, equipment and the like. The question of seaworthiness, then, may require consideration of many and varied matters.\footnote{201}

118. Judges Gaudron, Gummow and Hayne went on to consider:

“What is important for present purposes is not the detailed content of the obligation to make the ship seaworthy, it is that making the ship seaworthy (or, as the Hague Rules provide, exercising due diligence to do so) requires consideration of the kinds of conditions that the vessel may encounter. If the vessel is fit to meet those conditions, both in the sense that it will arrive safely at its destination and in the sense that it will carry its cargo safely to that destination, it is seaworthy.”\footnote{202}

119. Gaudron, Gummow and Hayne summarised:

“Thus, the performance of the carrier’s responsibilities under art. III, rr. 1 and 2 will vary according to the voyage and the conditions that may be expected.”\footnote{203}

“In art. III, r. 1, the term “seaworthiness” should be given its common law meaning. Nothing in the rules generally or in the Travaux Préparatoires suggests otherwise. It was a term well-known at common law and, for the reasons I have given, it is probable that that was the meaning that the drafters of the rules intended it to have. What constitutes “seaworthiness” depends on the voyage to be undertaken. The ship must be seaworthy to undertake the voyage

\footnote{197. Ibid. at point 27 per Gaudron, Gummow and Hayne J].
198. Ibid. at point 28.
199. Ibid. at point 29.
200. Ibid. at point 30.
201. Ibid. at point 31.
202. Ibid. at point 33.
203. Ibid. at point 35.
planned and to face any expected weather or storms. If, as was the case here, the ship is expected to sail through an area of sea which is renowned for its severe weather, appropriate precautions must be taken to ensure that the ship is fit to undertake that voyage both in respect of the ship itself and the stowage of the cargo. The carrier must exercise due diligence at the start of the voyage to make the ship seaworthy in the light of the anticipated weather conditions.\(^{204}\)

120. According to Tetley, a vessel is seaworthy if it is fit to load, discharge and carry the cargo during the intended voyage.\(^{205}\) Schoenbaum derives the following rule from American case law:

> ‘whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport’, and adds to this that such a general rule should be tested on a case by case basis.\(^{206}\)

121. The open standards and tests of reasonableness make the question whether a ship is sufficiently seaworthy extremely casuistic. However, the Hague Rules furnish a useful test for seaworthiness which makes allowances for various climates and geographical data, and also the technical possibilities. No legal uncertainty has developed despite the flexible standards because carriers and cargo interests are familiar with the particulars of the intended voyage.

3.8 **What is meant by ‘properly and carefully’?**

122. Art III(2) H(V)R provides that the carrier shall *properly and carefully* load, handle, stow, carry, keep, care for, and discharge the goods carried. At the ILA 1921 Hague Conference Sir Norman Hill made the following remark with respect to due care for the cargo:

> ‘And, Sir, you notice that in No. 2 we were very careful in drafting this. No. 1 is “to exercise due diligence”- that is taken from all the existing laws on this subject of all nations. Then in 2 it is positive. It is not a question of the carrier exercising due diligence under 2 it is “The carrier shall be bound to provide for the proper and careful handling, loading, stowage, carriage, custody, care, and unloading of the goods carried”. That is an absolute obligation on the carrier during the voyage, and it is only qualified by the exceptions in Article 4.’\(^{207}\) (emphasis added, NJM)

123. Sir Norman Hill’s remarks show that from the wording of paragraph art. III(2) with respect to the care for the cargo it follows that the carrier, as a matter of course, guarantees the proper and careful handling of the goods.\(^{208}\)

124. I agree with the opinion expressed in the Bunga Seroja where Gaudron, Gummow and Hayne said:

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204. Ibid. per Judge McHugh at point 86.
207. CMI Travaux Préparatoires, p. 185.
‘Whether the goods are properly and carefully stowed must also depend upon the kinds of conditions which it is anticipated that the vessel will meet. The proper stowage of cargo on a lighter ferrying cargo ashore in a sheltered port will, no doubt, be different from the proper stowage of cargo on a vessel traversing the Great Australian Bight in winter. Thus, the performance of the carrier’s responsibilities under art. III rr. 1 and 2 will vary according to the voyage and the conditions that may be expected.’

125. In *The Bunga Seroja* Judge McHugh expressed the following view:

‘Notwithstanding the opening words of art. III, r. 2, the terms of art. IV, r. 2 do not in my opinion affect the content of the obligations imposed by art. III, r. 2. The carrier remains under an obligation to “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.” But the carrier is not liable if the “loss or damage” to the goods arises or results from one of the matters identified in pars. (a)-(q) of art. IV, r. 2. Where the owner alleges a breach of art. III, r. 2 and the carrier relies on one of the identified matters in pars. (a)-(q) as a defence, the liability of the carrier will turn on whether the loss or damage arose or resulted from the breach or from the identified matters. In that respect, art. III, r. 2 and art. IV, r. 2 effectively track the common law doctrine applicable to bills of lading. The common law position was stated by Mr. Justice Willes in *Grill v. General Iron Screw Collier Co.*:

“In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant.”’

126. As Boonk remarks, the carrier may not be an expert in the care of certain goods. This implies that the shipper is obliged to inform the carrier of the manner in which he should handle the goods.

127. Regarding the construction of the words ‘properly and carefully’ Lord Pearson said:

‘[t]he word “properly” adds something to “carefully”. If “carefully” has a narrow meaning of merely taking care. The element of skill or sound system is required in addition to taking care.’

128. Although the second sentence is not very clear I think Lord Pearson meant that ‘properly’ goes further than ‘carefully’. ‘Properly’ is ‘carefully’ plus an element of skill or sound system.

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209. See also the *Bunga Seroja*, [1999] 1 Lloyd’s Rep. 512 at points 34 and 35.
211. Boonk 1993, p. 130.
129. Regarding the words ‘properly and carefully’ Lord Reid said:

‘... I think that “properly” in this context has a meaning slightly different from “carefully”. I agree with Viscount Kilmuir, L.C., that here “properly” means in accordance with a sound system213 (...) and that may mean rather more than carrying the goods carefully. But the question remains by what criteria it is to be judged whether the system was sound.”214

130. Lord Reid goes on to formulate a test to judge if operations have been conducted according to a sound system:

‘In my opinion, the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods.’215 (emphasis added, NJM)

131. The emphasised phrase immediately raises the question of the extent of the carrier’s obligation to inspect. Should he, in case of doubt, ask the Shipper? In some Dutch decisions the norm is the ‘reasonably acting carrier’.216 I.e. what would a competent carrier have done under those circumstances? Cleveringa uses the following test for the required level of care:

‘The level of care, which a dedicated carrier, who has the knowledge which might be expected of such a carrier, applies under such circumstances.’217

132. I believe this to be a correct construction. It would be unfair if e.g. a carrier, who is specialised in transport of fruit in refrigerated ships from South America to Rotterdam, may defend himself against a cargo claim on the grounds that he was not familiar with the handling of fruit. That would be contrary to the test that was formulated in the Maltasian which says that ‘the obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods.’218

133. It is however true that, in the Maltasian, Lord Pearce said that ‘a sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system in relation to the general practice of carriage of goods by sea.’219 However, I think that this statement should be applied in the correct context. The rule can not be applied to specialist forms of transport such as e.g. refrigerated transport or heavy lift shipping.

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215. Ibid.
219. Ibid.
3.9 Is the Duty Contained in art. III(2) Delegable?

3.9.1 English law: general remarks

134. Carriers should learn from previous cases and new knowledge. The Flowergate\(^{220}\) is a case concerning moisture damage to cocoa. When the cargo was loaded it was apparently in good condition. However, upon arrival the moisture level of the cocoa proved to be too high. The case runs to 47 pages in Lloyd’s List Law Reports. Most of the decision is about factual issues concerning the transport of cocoa. The conclusion of the case is that the moisture level of the cocoa was too high at the time of loading. Roskill J. said that the case had yielded a great deal of knowledge of the carriage of cocoa, which had been obscure before. This knowledge, learned during the proceedings, led to the decision that carriers were not responsible for the damage. Reid said:

‘If in the future and in the light of what is now known, shipowners continue to accept cocoa for shipment merely on the strength of its apparent condition, and heedless of the implications of what its true condition may in fact be by reason of its moisture content, they may find it said against them hereafter that they have engaged themselves to carry that cocoa safely to destination, whatever that moisture content may ultimately prove to be.’\(^{221}\) (emphasis added, NJM)

135. According to Carver carefully refers to the absence of negligence. Carver is less clear on the construction of the word properly, which, according to Carver, might tend to mean something nearer to strict liability which can only be averted by successfully invoking an exception. However, in G.H. Renton & Co. Ltd. v. Palmyra Trading Corp, preference was given to another construction, that is, the meaning of ‘in accordance with a sound system.’\(^{222}\)

136. Albacora S.R.L. v. Westcott & Laurance Line Ltd. (The Maltasian) is the leading case on the construction of the expression properly and carefully. Lord Reid’s construction and test quoted above explain the construction of the word properly. I believe Cleveringa’s test makes sense: ‘the level of care, which a dedicated carrier, who has the knowledge which might be expected of such a carrier, applies under such circumstances.’\(^{223}\)

3.9 Is the duty contained in art. III(2) delegable?

3.9.1 English law: general remarks

137. Under English law the duty contained in art. III(2) is not delegable for so far as it applies. In that view art. III(2) does not impose duties in respect of loading, handling, stowing and discharge except in so far as the carrier by the contract of carriage undertakes these.\(^{224}\) Art. III(2) is only directed to the manner in which the obligations under
taken are to be carried out. If undertaken the duties are non-delegable. In *International Packers London Ltd. v. Ocean Steam Ship Co., Ltd.* McNair J. held:

‘I can see no difference in principle between the ship owner’s obligation under art. III, r. 1, and that under art. III, r. 2. As a matter of law, therefore, I would hold that the defendants would be liable if the surveyor gave negligently wrong advice. A fortiori the ship-owner would be liable if the advice was the result of incorrect or inadequate information given to the surveyor by the ship’s officers, or if the action taken (which for this point of law must be assumed to be negligent) was the joint act of the ship’s officers and the surveyor.’

138. Under English law the carrier may include a FIOS(T)226 clause in the agreement. The leading cases are *Pyrene, Renton and Jordan II.*227 Citing French decisions Von Ziegler argues that if it can be proven that the FIO or FIOS clause merely refers to the costs and not to the actual handling of the cargo, the carrier will remain liable for exercising due care with respect to the cargo.228 Von Ziegler believes that when a FIO or FIOS clause has been agreed on by which the shipper is fully responsible for loading and stowing, inadequate performance of those duties will be regarded as a fault on the part of the shipper so that the carrier will be able to rely on art. III(2) (i) H(V)R to escape liability.229

*The Jordan II* 230

139. In the *Jordan II* the House of Lords was invited by the cargo interests to revise its position regarding the question whether a FIOS clause is allowable under the Hague (Visby) Rules. Lord Steyn came to the conclusion that a purposive construction of the Rules which permits transfer of the responsibility to load and stow the cargo to the cargo interests is to be preferred above a literal construction of the Rules which would lead to an unreasonable result; i.e. a result which would not comply with the existing practice that FIOS(T) clauses are deemed to be acceptable by the involved parties.231

140. Carver remarks that in cases such as the *Jordan II* there may be an overriding responsibility on the carrier, exercised by the master, to supervise the loading and stowage. Furthermore in some cases it may be possible to establish that loss is due to faulty supervision or failure to intervene where this was necessary.232

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226. The contract of carriage contains a clause providing that the shipper takes care of the loading, unloading and stowing of the cargo. In case of a FIOST clause the shipper also takes care of the trimming of the ship.
231. In chapter 2 the considerations in the *Jordan II* case regarding the construction of the Rules are discussed.
3.9 IS THE DUTY CONTAINED IN ART. III(2) DELEGABLE?

The views of the textbook writers, decisions in foreign jurisdictions and third party bill of lading holders

141. According to Lord Steyn:

‘Since the decision of the House in Renton\(^{233}\) in 1956 no English textbook writers have challenged its correctness.’

142. I cannot agree. Gaskell points out that that the Pyrene\(^{234}\) case has been criticised because in that case the court held that the carrier was not liable for damage caused by the shipper’s poor way of stowing the cargo. Gaskell takes the view that a clause stipulating that the shipper is liable for the loading and stowing of the cargo is in conflict with the provisions contained in art. III(8) H(V)R.\(^{235}\)

Carver, however, argues that a FIO clause is not in conflict with the H(V)R. His opinion is based on the Pyrene decision in which Devlin J. said:

‘The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage. But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within that carrier’s obligations is left to the parties themselves to decide.’\(^{236}\)

Decisions in foreign jurisdictions

143. Lord Steyn also discussed foreign decisions. He said:

‘Counsel placed great reliance on decisions of the 2nd Circuit Court of Appeal in Associated Metals and Minerals Corp. v. M/V The Arktis Sky 978 F.2d 47 (2nd Cir 1992) and the 5th Circuit Court of Appeal in Tubex Inc v. M/V Risan, 45 f 3rd 951 (5th Cir 1995) in which it was held that loading, stowing and discharging under section 3(2) of the United States Carriage of Goods By Sea Act are “non delegable” duties of the carrier. In neither of these decisions is there any reference to the earlier English decisions in Pyrene and in Renton. Counsel for the cargo owners pointed out that The Arktis Sky has been followed at first instance in South Africa: The Sea Joy (1998) (1) SA 487 at 504. And with reference to Tetley, Marine Cargo Claims, 4th ed in preparation, chapter 25, at p. 21, he said that in France a shipowner may not contract out of responsibility for improper stowage by an F.I.O.S.T. clause.

On the other hand the Renton decision has been followed in Australia: Shipping Corporation of India v. Gamlen Chemical Co. A/Asia Pty Ltd. (1980) 147 CLR 142 and Hunter Grain Pty Ltd. v. Hyundai Merchant Marine Co. Ltd. (1993) 117 ALR 507; compare, however, doubts expressed in Nikolay Malakhov Shipping Co. Ltd. v. SEAS Sup-


\(^{235}\) Gaskell 2000, p. 261.

144. With respect to foreign decisions Lord Steyn concludes that internationally there is no dominant view. The weight of opinion in foreign jurisdictions is fairly evenly divided. Lord Steyn recognises that third party bill of lading holders will in practice often not have seen the charter-party or had advance notice of relevant charter-party clauses. He says that although this is a point of some substance it is, however, an inevitable risk of international trade and cannot affect the correct construction of art. III(2).

145. After the above analysis Lord Steyn concludes that everything ultimately turns on what is the best contextual construction of art. III(2). He then goes on to consider whether a departure from the Renton decision is justified. He points out that an opportunity arose in 1968 to improve the operation of the Hague Rules. But an international conference took the view that only limited changes were necessary. Lord Steyn went on to say that if in the United Kingdom there had been dissatisfaction with the effect of the Renton decision, one would have expected British cargo interests to have raised it when Parliament considered the Bill which was to become the Carriage of Goods by Sea Act 1971. If invited to do so, Parliament could have considered whether Renton should be reversed. The matter was not raised at all. Instead, art. III(2) was re-enacted in unaltered form. Furthermore Lord Steyn repeated his view that no academic writers have argued that the Renton decision should be reversed. For these reasons Lord Steyn reached the view that the case against departing from Renton is overwhelming. Also ever since the Renton decision all sorts of transactions have been entered into on the basis that Renton accurately reflected the law. Risks would often have been assessed in reliance on the decision of the House in Renton as to how they should be borne. He says that but for the reliance on Renton it is likely that different freight rates and insurance premiums would sometimes have been charged.

On top of all the reasons discussed above Lord Steyn cites from an UNCTAD publication in which the Renton decision is discussed. Also in that publication it is recognised that according to English law the words of art. III(2) do not define the scope of the contract service but the terms upon which the agreed service is to be performed. The final reason is that the United Nations Commission on International Trade Law (UNCITRAL) is currently undertaking a revision of the rules governing the carriage of goods by sea. This exercise involves a large scale examination of the operation of the Hague (Visby) Rules. Steyn says that it apparently extends to art. III(2). It will take into account representations from all interested groups, including shipowners, charterers, cargo owners and insurers. According to Lord Steyn this factor by itself makes it singularly inappropriate to re-examine the Renton decision now [i.e. In the Jordan II case, NJM].
3.9.2 **U.S. Law**

146. The American author Schoenbaum writes that ‘like the duty of seaworthiness, the duty of care of the cargo is non-delegable’. A study of the American cases and the opinions of other authors prove this to be correct. According to Gaskell, it is doubtful whether an FIOS provision could effectively transfer the responsibility for loading and stowing to the cargo owner under U.S. law. Schoenbaum cites cases in which it was ruled that this did not mean the shipper and the carrier could not enter into a valid agreement placing the duty of loading the cargo on the shipper. Tetley is of the opinion that the duty is non-delegable ex 46 U.S.C. § 1303(8). The 2nd and 5th Circuits are also of that opinion. The 9th Circuit however, held that FIO shipments are a common and commercially acceptable practice. In conclusion it can be said that amongst the circuit courts the 2nd and 5th Circuits take the view that the duty is non-delegable. On the other hand the 9th Circuit is of the opinion that a FIO clause is acceptable.

3.9.3 **Dutch law**

147. In its judgement of 19 January 1968 (The Favoriet) the Dutch Supreme court decided that the carrier can leave the stowing of the cargo up to the shipper but that the carrier can not use that fact as a defence against a third party holder of the bill of lading if that third party did not have knowledge of the agreement regarding the stowing. The Dutch authors Boonk and Van Overklift are of the opinion that the same must apply for loading and discharging and I see no reason to disagree. If loading and stowing are delegable why should loading and discharging not be? The circumstances will be the same as those for loading and stowing. In the Risa Paula case the Hague Court of Appeal held that parties could agree that the loading of the cargo would be left up to the shipper.

148. Van der Wiel discusses two cases concerning damages due to improper stowing under a charter party containing a FIOS clause. Neither of the two cases were governed by the H(V)R. In the Atlantic Duke case steel pipes were carried on deck under a Gencon

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242. M/V Arkits Sky, 978 F.2d 47 (see infra) and M/V Farland, 462 F.2d 319 (see supra).
243. Schoenbaum 2004, p. 687 The decisions cited are equivocal. In Sigs. Cabon Corp. v. Lykes Bros. S.S. Co., Inc., 655 F. Supp. 1435, 1438 upholding a FIOS clause in the bill of lading and Sumimoto Corp. of America v. M/V Sie Kim, 632 F. Supp. 824, 837 upholding a ‘free in/out’ provision of a bill of lading. On the other hand there appears to be a split of authority on this issue in the Circuits. On the one hand the 2nd and 5th Circuits will not allow the view that the duty is delegable. The 9th Circuit however, held that FIO shipments are a common and commercially acceptable practice (Atlas Assur. Co. v. Harper Robinson Shipping Co., 508 F.2d 1381, 1389).
245. Associated Metals and minerals v. The Arkitis Sky, 978 F.2d 47 (2nd Cir.) and Tubacex Inc. v M/V Risan, 45 F.3d 951, 956 9th Cir.).
IS THE DUTY CONTAINED IN ART. III(2) DELEGABLE?

3.9

charter party with a FIOS clause. The cargo on two of the hatches was not secured and lashed properly and shifted in rough weather. The vessel had to put into a port to have the cargo re-lashed. The owners demanded payment of the additional costs of the voyage charterer. The court of appeal held that, although the time charterer was responsible for the stowing and lashing of the cargo, the vessels crew had the duty to check if the work had been done properly and that the vessel was seaworthy. This led the court of appeal to hold that the fault of the time charterer was 2/3 and the fault of the owners 1/3. Therefore 2/3 of the owners’ claim was awarded. This division was based on construction of the charter party.

A similar case discussed by Van der Wiel in which the court (The Hague Court of Appeal) held that damages were to be divided between charterer and owner is the Boekanier.

149. Van der Wiel draws the conclusion from these cases and other Dutch cases that under Dutch law and the H(V)R it is permissible to delegate loading, lashing, stowing and discharging to the cargo interests but that the carrier is responsible to check the work. In case of cargo damage the damages may be divided between the cargo interests and the carrier. Van der Wiel concludes that he finds ‘…, the Dutch system wherein the damages are divided the best’. However, after reading the Atlantic Duke and the Boekanier it becomes clear that the court’s decision to divide the damages was based on construction of the charter parties and not on construction of the H(V)R which did not apply in those cases. Therefore I think that Van der Wiel probably meant that he is an advocate of the system wherein damages may be divided between the parties. Division of damages in cases of cargo damage under the H(V)R and a FIOS(T) clause is not a general rule that can be derived from the Dutch cases.

150. I agree with the Favoriet decision as it recognises existing commercial practice but also protects third party bill of lading holders who do not know of the existence of a delegation of certain duties to the shipper.

3.9.4 UNCITRAL

151. In Jordan II Lord Steyn refers to the proposed UNCITRAL treaty. Art. 14 (regarding ‘specific obligations’ of the carrier’) of the proposed instrument reads:

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 27, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the parties may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the docu-

253. Van der Wiel 2001, p. 82.
254. Van der Wiel 2001, p. 82.
mentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Art. 18 (regarding the basis of liability) contains the following exoneration in paragraph 3 and sub i:

3. The carrier is also relieved of all or part of its liability (...) if, alternatively to proving the absence of fault (...) it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

(...) 

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 14, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

152. Paragraph 2 of art. 14 makes clear that the framers of the proposed UNCITRAL instrument follow the House of Lords decision in the Renton case.

153. The exception provided by art. 18(3)i makes it extra clear that the carrier will not be liable for damage caused by loading, handling, stowing or discharging of the goods if the parties had agreed that the loading, handling, stowing or discharging of the goods was to be performed by the shipper. The carrier can avoid liability by either proving the absence of fault or by invoking the i-exception.

154. Art. 18(3)i also provides an exception to that exception. If the loading, handling, stowing or discharging of the goods is performed by the carrier on behalf of the shipper and damage occurs then the carrier will not be able to rely on art. 18(3)i.

155. Art. 18(3)i does not exonerate the carrier for any loss or damage in the period that the cargo is being loaded, handled, stowed or discharged. It only exonerates for the actual activity of loading, stowing, handling or discharging. So if e.g. cargo is stolen during loading (as was agreed between the parties) then the carrier will still be liable for the loss of the stolen cargo.

156. At present there is no international uniformity regarding the allowability of a FIOS(T) clause under the Rules.256 Uniformity of construction of the Rules is desired. If the proposed UNCITRAL instrument is adopted with the provision mentioned above in the proposed art. 14 par. 2 the desired uniformity will have been reached for this point.

3.9.5 The intended construction of art. III(2)

157. The above shows that there is no agreement on the issue whether the requirement of proper care for the cargo can be delegated. Article III(8) provides that the require-  

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256. See Lord Steyn’s speech in Jordan II under point 22.
ment of due care for the cargo cannot be delegated with the result that the carrier is exempted from liability thereof. However, this is not in keeping with existing practise. In *Jordan II* and the earlier English decisions *Pyrene* and *Renton* existing commercial practice was recognised and transfer of the responsibility for loading and stowing was deemed permissible. Under English law however, third party bill of lading holders may be harmed by the existence of a FIO clause between the shipper and the carrier of which they had no knowledge. In my view the Dutch Supreme Court takes a more reasonable view which protects third party bill of lading holders who had no knowledge of a contractual delegation of the duty to load and stow properly and carefully. In the U.S. there is a diversity of authority.

158. Now that the lack of uniformity has been established the question which has to be answered is: what is the intended construction and application of Rule III(2)? A textual, i.e. objective construction of art. III(2) is clear. The carrier has to properly and carefully load and stow. Art. III(8) is also clear: ‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.’

159. The text seems to be clear. The carrier is responsible for loading, stowing etc and any clause relieving the carrier from those responsibilities is null and void. Although the text is clear the result could be absurd. Was this really what was intended? If a shipper expressly agrees to be responsible for stowing it would be absurd if he could hold the carrier responsible for damage due to bad stowing for which the shipper was responsible himself.

Regarding the duty contained in art. III(2) the following speech of Mr. Louis Franck is included in the Travaux Préparatoires. He said:

‘Article 3(2) contained an essential clause highlighting that the carrier, except as provided for in article 4, was responsible for seeing that everything required for loading, handling, stowage, carriage, custody, and unloading was provided for the goods to be carried. And the inclusion of every clause permitting the shipowner, without incurring responsibility, to fail in this essential duty of overseeing the preservation of the goods from the point of view of successful stowage, loading, and unloading was null and void. *That was the main element of the convention because it was in this way that, in the past, the use of immunity clauses had given cause for the greatest criticism.* The result had been the creation of different sorts of bills of lading that still bore the form, but whose content was completely destroyed by the force of the immunity clauses.’

160. Bearing in mind that the framers of the Rules were practical people it seems unlikely that they would intend to create a duty which does not comply with commercial

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257. See supra § 2.3.1: If the meaning of the words is clear but lead to an absurd result then the objective construction has failed. Broad principles of general acceptation can be used to test if a result is absurd.

258. Travaux Préparatoires, p. 186.
practise. The emphasised sentence makes clear that the immunity clauses had given cause for criticism. If a carrier were to include a clause exempting him from responsibility for damage due to non fulfilment of art. III(2) such a clause would be null and void. On the other hand a contract between a carrier and a shipper containing a clause saying the shipper should load and stow is not an immunity clause. It is common commercial practise. The House of Lords recognised this and therefore let a teleological construction which expressed the object of the Rules prevail over an objective construction which would lead to absurd results. The object of the Rules was to create a compromise between shippers and carriers. This means the carrier could no longer use immunity clauses. The object was not to change commercial practise whereby shippers and carriers are acting on an equal footing.

259. It would be contrary to general principles of law if a shipper who agrees to load and stow would be able to successfully hold the carrier responsible for damage caused by the shipper’s failure to fulfil his part of the contract correctly (see Van Delden 1986, p. 1041).