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

Margetson, N.J.

Citation for published version (APA):

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Chapter 4
The relationship between the duties of the carrier
and the exceptions

4.1 Introduction

161. In the H(V)R the duties of the carrier are contained in art III(1) and (2). The duty contained in art III(1) (seaworthiness) is an obligation to use due diligence. The duty contained in art III(2) (regarding the care for the cargo) is an absolute obligation. Art. IV H(V)R contains the exceptions from liability. It has been said that the relationship between the duties and the exceptions is unclear.261 In this chapter the following topics regarding these articles will be discussed:

Causes of damage: competing and concurring causes (4.2)
The expression ‘overriding obligation’: common law (4.3.1)
The expression ‘overriding obligation’: H(V)R (4.3.2)
The requirement of causal connection (4.4)
Doctrines regarding the relationship between art. III(1) and III(2) and art. IV (4.5)
Concurrence of culpable and non-culpable causes of damage: common law (4.6.1)
Concurrence of culpable and non-culpable causes of damage: H(V)R (4.6.2)
Why is art. III(2) not also considered an overriding obligation under English law? (4.7)
The intended relationship between art. III and IV (4.8)

4.2 Causes of damage

162. It is possible that damage was caused by an excepted peril (a non-culpable cause) and by the non-fulfilment of one of the duties of the carrier (a culpable cause). Royer separated the two ways that a culpable and a non-culpable cause can cause damage into two groups. The first group is damage attributable to causes which exist together but whereby there is no causal connection between the causes. The second group contains the events whereby the one cause is the cause of the other cause.262 The problem in such cases of cargo damage caused by more than one cause (culpable and non-culpable) is how liability should be apportioned. This problem is discussed in the Report of Working Group III (UNCITRAL) on the work of its 12th session.263 The reason that this problem was tackled by the UNCITRAL working group, is the proposed abolishment of the nautical fault exception in the proposed UNCITRAL convention which is to replace the H(V)R. Often one of the causes of cargo damage can be qualified as ‘management of the ship’ so that the carrier will not be liable for that cause. The non-culpable cause will then remain and the carrier will not be liable. However, the

260. See for an earlier version of this chapter Hendrikse & Margetson 2005a.
262. Royer 1959, p. 231.
elimination of the nautical fault exception ‘may have the unintended effect of depriv-
ing the carrier of every statutory defense in any case in which navigational fault could plausibly be argued’. This could lead to unfair results. E.g. if the carrier is held liable for all the damage when only a small part of the damage is caused by a culpable cause and the larger part of the damage by a non-culpable cause.

A solution of the problem would be that, in cases of more than one cause of damage, a system exists whereby the carrier will only be liable for the damage caused by the culpable cause. The most recent UNCITRAL proposal is that the carrier will be relieved of liability if, alternatively to proving the absence of fault, he proves that one or more of the excepted perils provided by art. 18(3) caused or contributed to the loss, damage or delay.

163. In the Report on the work of the 12th session of Working Group III it was suggested that

‘... the draft instrument should provide guidance to courts and arbitral tribunals to avoid certain causes of the damage being neglected, for example through excessive reliance on the doctrine of overriding obligations. The discussion focused on paragraph 4 of the third proposed redraft of article 14 [concerning the basis of liability. Art. 14 became art. 17 in the version of 26 March 2007 and it became art. 18 in the version of January 2008, NJM]. It was suggested that, in discussing the issue of apportionment of liability, it might be useful to bear in mind a distinction between concurring causes and competing causes for the damage. In the case of concurring causes, each event caused part of the damage but none of these events alone was sufficient to cause the entire damage (for example, where the damage was attributable to both weak packaging by the shipper and improper storage by the carrier). In the case of competing damages, the court might have to identify an event or the fault of one party as having caused the entire damage, irrespective of the fault of the other party (for example, where the goods were damaged as a result of artillery fire hitting the vessel, a decision might need to be made as to whether the artillery fire was to be regarded as the only cause of the damage, irrespective of the fault the master of the vessel might have committed by bringing the ship into a war zone). It was pointed out that, in this second situation, the doctrine of “overriding obligations” would often apply. It was suggested that draft article 14 dealt only with the situation where concurring faults were at stake and not with the second situation described as “competing faults”.

164. I agree that the distinction should be made between damage caused by competing causes (one cause can cause all the damage) and concurring causes (each cause is the cause of part of the damage). The overriding obligation rule as it exists under common law is unreasonable. It means that a carrier may be responsible for damage which was not caused by non-fulfilment of a duty (see below).


266. Document A/CN.9/544, p. 44.
4.3 The expression 'overriding obligation'

4.3.1 Common law

165. This expression was used by the Privy Council in Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers, Ltd. (The Sarnidoc). Lord Wright said:

‘It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King’s enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier’s duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognised that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier (…) [he then quoted Lord Sumner who had said in a different case:]

[T]he exception in the bill of lading (…) only exempts him [the shipowner] from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care (…) [I]t was common ground that the ship had to deliver what she received as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness (…) the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.’

267 (emphasis added, NJM)

166. At common law the carrier is absolutely responsible for delivering the goods that were bailed to him in the same order and condition as they were in when he received them. This was the carrier’s overriding obligation. The quoted passage above makes clear that later that concept developed into the separate overriding duties to exercise due care in the handling of the goods and the duty to furnish a seaworthy ship. The concept of separate overriding obligations regarding the seaworthiness and the care of

4.3 THE EXPRESSION ‘OVERRIDING OBLIGATION’

the cargo were a result of the original overriding obligation. At common law the duties ‘to exercise care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure’ are overriding obligations.268

167. Clarke wrote about the common law phrase ‘overriding obligation’:

‘... these obligations were then said to be overriding, in that the parties were presumed not to have intended to except liability for their breach.’269

168. Lord Wright explained the phrase as follows:

‘If then goods were lost, say, by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.’271

Summary

169. The expression ‘overriding obligation’ has its origin in common law. Under common law the duty deliver the cargo in good order and condition was an absolute duty and an overriding obligation. If the carrier failed to fulfil that duty and damage occurred due to more than one cause, one being an excepted peril and the other a non-excepted peril then the non-excepted peril is seen as the only cause. The carrier will be responsible for the whole of the damage, not merely for such proportion as must have been incurred due to the unseaworthiness.272 No distinction is made between competing causes and concurring causes.273

170. I find this rule unreasonable because it could mean that a carrier will be responsible for all of the damage even though only a small portion of it was caused by a non-excepted peril. This is different under the English law developed under the H(V)R. Under that law the carrier will be allowed to prove for which portion of the damage he is not responsible even if a portion of the damage was caused by the non-fulfilment of art. III(1).274

4.3.2 The H(V)R

171. In the Maxine Footwear case, concerning the application of the Hague Rules, Lord Somervell of Harrow explained the relationship between art. III(1) and IV of the Hague Rules as follows:

270. In carriage of goods by sea, unseaworthiness does not affect the carrier’s liability unless it causes the loss, as was held in the Europe, [1908] P. 84 and in Kish v. Taylor, [1912] A.C. 604.
273. See supra § 4.1.
274. See infra § 4.6.2.
‘Article III, rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. This is the natural construction apart from the opening words of Art. III, rule 2. The fact that the rule is made subject to the provision of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument.\(^{275}\) (emphasis added, NJM)

172. The words ‘and the non-fulfilment causes the damage’ do not leave room for the distinction between ‘all of the damage’ or ‘part of the damage’, or to use the terminology discussed in the introduction; there is no room for distinction between concurring causes or competing causes. The overriding obligation rule from Maxine Footwear assumes that the causes are competing causes, i.e. one of the causes could have caused all of the damage.

173. Regarding the relationship between art. III(2) and art. IV Lord Pearson said in The Maltasian:

‘Art. III, r. 2, is expressly made subject to the provisions of Art. IV. The scheme is, therefore, that there is a \textit{prima facie} obligation under Art. III, r. 2, which may be displaced or modified by some provision of Art. IV. Art. IV contains many and various provisions, which may have different effects on the \textit{prima facie} obligation arising under Art. III, r. 2. The convenient first step is to ascertain what is the \textit{prima facie} obligation under Art. III, r. 2.’\(^{276}\)

174. So, according to the English construction of the Hague Rules, the expression \textit{overriding obligation} means, that when damage is a consequence of competing causes, i.e. non-fulfilment of art. III(1) and an excepted peril, the exceptions of art IV(2) cannot be successfully invoked.

175. Carver remarks that the full consequences of this overriding nature as applied to the Rules are not clear:

‘It cannot mean that if the seaworthiness duty is not first proved to have been complied with, the exceptions of Art. IV cannot be invoked at all whether or not the damage occurred in connection with unseaworthiness. (…) Rather, it must mean that if art III(1) is not fulfilled and the non-fulfilment causes the damage the immunities of art. IV cannot be relied on.’\(^{277}\)

176. Strictly speaking this implies that if art III(2) has been violated and this violation caused the damage, exceptions can still be invoked. This will however depend upon which exception is being invoked. For example, a carrier will not be able to rely on the perils of the sea exception to obtain exoneration from liability if he failed to meet the obligations contained in art III(2).\(^{278}\) This is because one of the main tests to prove a peril of the sea is that the damage caused by that event was unavoidable. If the carrier


\(^{277}\) Carver 2005, p. 571.

\(^{278}\) See § 5.4 for a detailed discussion of the perils of the sea exception. See in general Carver 2005, p. 609.
could have avoided the damage by e.g. stowing the cargo better the damage was avoidable.

177. This means the carrier will not be able to prove the damage was caused by a peril of the sea.

178. The view also exists that art. IV(1) H(V)R is an indication that art. III(1) contains an overriding obligation.\textsuperscript{279} Karan explains this view as follows: ‘[a]rticle 4(1) of the Hague and Hague-Visby Rules exempts the carrier from liability for loss or damage arising only from unseaworthiness unless caused by want of due diligence. By contrast Article 4(2)(q) of the same Conventions removes liability for loss or damage arising from any occurrence resulting without fault. For that reason, the liability regime under Articles 3(1) and 4(1) is more special, and, thereof, prevails over the one under Articles 3(2) and 4(2).’\textsuperscript{280} I do not agree with this view. As is discussed in § 5.1 art. IV(1) was included to change existing American law. The distinction between the overriding obligation of art. III(1) and the non-overriding obligation of art. III(2) is made clear by the words in art. III(2) saying that art. III(2) is subject to the provisions of art. IV. This follows from a simple objective construction of art. III(1) and art. III(2). There is no need for the more complicated aid to construction used by Karan (reading the Rules as a whole).

\textbf{Summary}

179. The expression ‘overriding obligation’ is used in decisions regarding the H(V)R but in a different meaning than under common law. The meaning under the H(V)R is that if the damage is caused by non-fulfilment of art. III(1) the carrier cannot rely on an exception to escape responsibility for damage caused by non-fulfilment art. III(1).

4.4 \textbf{The requirement of causal connection}

4.4.1 \textbf{American law}

180. Under the Harter Act the carrier has no recourse to exceptions in the case of unseaworthiness prior to the voyage, even if there is no causal connection between the unseaworthiness and the damage.\textsuperscript{281} On the other hand it is generally recognised under the H(V)R that causal connection between the non-fulfilment of a duty and the loss or damage is required to disallow the carrier recourse to an exception to escape liability.\textsuperscript{282}

4.4.2 \textbf{English law}

181. Also under English law causal connection between a non-excepted peril and the damage is required to prove liability of the carrier. From the Maxine Footwear case it follows that there must be causal connection between the non-compliance with art. III(1)

\textsuperscript{279} Clarke 1976, p. 159.
\textsuperscript{280} Karan 2004, p. 105.
\textsuperscript{281} The Isis, 290 U.S. 333.
\textsuperscript{282} Schnell & Co. v. S.S. Vallescura, 293 U.S. 296. See infra § 4.6.2.
and the damage. 283 This also follows from the last words of the text of art. IV(1). 284 This means that the carrier cannot rely on the provisions of art. IV to escape liability for the portion of damage caused by non-compliance with art. III(1). However, if another portion of the damage had a cause other than non-compliance with art. III(1) he does have an escape hatch. In that event the carrier will be allowed to avail himself of the provisions of art. IV.

182. In Apostolis (Court of Appeal) it was held that

“To show breach of art. III r. 1 AMJ must show that the carriers failed to make the ship seaworthy and that their loss or damage was caused by the breach, or in other words was caused by unseaworthiness.” 285 (emphasis added, NJM)

183. This consideration also leads to the conclusion that a violation of art III(1) will only lead to liability of the carrier if a causal connection has been proven between the unseaworthiness and the fire. 286

184. However, this is not so under Dutch law.

4.4.3 Dutch law

185. The following consideration from the Dutch Quo Vadis judgement demonstrates that the Supreme Court of the Netherlands (SCN) applies the overriding obligation rule as it exists in common law, to cases governed by the H(V)R.

‘If the damage is due to two causes, as meant above, the unseaworthiness for which due diligence was not exercised, ought to regarded as the only cause, leaving no possibility to reduce liability by invoking an exception out of the second para of art. 469 [old Commercial Code; currently art. 8:383 (2) Dutch Civil Code].’ 287 (emphasis added, NJM)

186. From this consideration it follows that if there is any causal connection between a failure to fulfil an obligation and the damage the non-excepted peril is held to be the only relevant cause and the carrier will be liable for all of the damage, not merely for the portion which was caused by the non-excepted peril. This rule blocks the escape hatch of disproving causal connection between the non-excepted peril and a portion of the damage.

187. Another opinion also exists. The Dutch author Schadee gives an example of damage to the cargo occurring on an under manned ship. There is no causal connection between the damage to the cargo and the failure to fulfil the duty to exercise due dili-

284. See § 5.1.
gence to make the ship seaworthy. Even so, Schadee is of the opinion that the carrier has no recourse to an exception.\textsuperscript{288} As was said above, this is the view under the Harter Act, but is incorrect under the H(V)R.

4.5 \textbf{Doctrines concerning the relationship between art. III and art. IV}

4.5.1 \textbf{England}

\textit{The requirement of due diligence to make the ship seaworthy}

188. As was said above, under English law art III(1) H(V)R contains a so called overriding obligation.\textsuperscript{289} From the aforementioned decision in \textit{Maxine Footwear} (concerning damage caused by fire) it follows that the fire exception will fail if the fire that caused the damage is a consequence of a failure to exercise due diligence to ensure seaworthiness before and at the beginning of the voyage. The consequence hereof is that the carrier will not be able to rely on any of the exceptions of art IV(2) H(V)R to escape from liability for the damage caused by the non-fulfilment of art. III(1).\textsuperscript{290}

\textit{The requirement of care for the cargo}

189. Art III(2) H(V)R begins with the words ‘\textit{Subject to the provisions of Article 4, the carrier shall, …}’ (emphasis added, NJM). It has been argued that the emphasised words imply that the obligations contained in art III(2) cannot be deemed to be overriding obligations because of the reference to the exceptions of art IV(2) H(V)R.\textsuperscript{291} This does not however mean that if loss or damage which was caused by a breach of art. III(2) and an event which may qualify as an exception of art. IV(2) the carrier will not be responsible. As was said above, the proof of an excepted peril will often also entail the proof that the duty contained in art. IV(2) was fulfilled.\textsuperscript{292} The relevance of the words ‘\textit{subject to the provisions of art. IV}’ is that the carrier, in certain instances, will be allowed to rely on a certain exception (e.g. the fire exception) even though the loss or damage was caused by the negligence of his employees or agents in the fulfilment of the duty contained in art. III(2). However, because under English law the duty contained in art. III(1) is an overriding obligation, he will not be allowed to rely on the fire exception if the loss or damage was caused by the failure to fulfil the duty to exercise due diligence to make the ship seaworthy.\textsuperscript{293}

\textsuperscript{288} NJB 1954, p. 730.
\textsuperscript{290} Carver 2005, p. 571 where reference is made to the aforementioned Maxine Footwear case.
\textsuperscript{292} See supra the example of the ‘perils of the sea’ exception.
\textsuperscript{293} See § 5.3 on the fire exception. See also Carver 2005, p. 572-573 and the discussion of English case law. See in the same sense Aikens et al. p. 256-257.
4.5.2 The United States

190. The American COGSA does not contain the proviso ‘subject to the provision of article 4’ of art III(2) of the HI[VR]. However this has not led to an absence of a debate of the ‘overriding obligation’ of due diligence for a seaworthy ship. The 9th Circuit introduced the concept of an overriding obligation for seaworthiness in America in the Sunkist case, regarding the application of the fire defences. This view of the 9th Circuit was based on the Maxine Footwear case. In Maxine Footwear the words ‘subject to the provisions of article 4’ in art. III(2) played an important factor in the Privy Council’s decision that art. III(1) is an overriding obligation. The 9th Circuit seems to have overlooked that those words were omitted from the U.S. Cogsa. The view of the 9th Circuit does, however, seem to be an exception and, as far as I know, the concept of ‘overriding obligation’ is not applied to other exceptions and has also not been recognised by the U.S. Supreme Court. According to Schoenbaum the carrier’s duty to properly care for the cargo and to exercise due diligence before and at the beginning of the voyage to provide a seaworthy ship are indeed both overriding obligations.

4.5.3 The Netherlands

The requirement of due diligence to make the ship seaworthy

191. In the Quo Vadis case, the Supreme Court of The Netherlands (SCN) held that the requirement to exercise due diligence to ensure seaworthiness is an overriding obligation.

192. The carrier had argued that if the damage is a result of concurrent causes (a culpable and a non-culpable cause) fault and liability should be divided. In my view this argument is correct. It is also in line with the Vallescura rule. I do not see why the carrier should not be given the opportunity to prove that he is not liable for a part of the damage.

193. At first view the above quoted consideration of the SCN appears to be in accordance with that from Maxine Footwear quoted above. The decision of the SCN, however, goes a little further. Whereas in Maxine Footwear there is room for a division of damages if some of the damage was caused by a breach of art. III(2) and if the carrier proves that he was not culpable for part of the damage, the Dutch Supreme Court has explicitly ruled this possibility out: if damage in caused by concurrent causes, the culpable cause is considered to be the ‘only cause’.

As was said above this was the application of the ‘overriding obligation’ rule at common law. The decision of the SCN is incorrect as it does not allow room for the carrier.

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296. See § 5.3.
300. The Vallescura rule is discussed below in § 4.6.2.1.
to escape from responsibility for the part of the damage not caused by the breach of a duty.

_The requirement of care for the cargo_

194. Under Dutch law the system of _stare decisis_ does not exist, meaning that, especially in the lower courts, conflicting judgements exist. Just for interest I will mention the _Portalon_ case because I do not agree with the decision. I do however stress that this is only one of many cases and is not a rule of law under Dutch law.

195. In the _Portalon_ case, the Court of Appeal judged that the cargo interest can also deprive the carrier of the fire exception by proving that the carrier did not fulfil the duties contained in art III(1) and (2). The Court of Appeal held that 'the history of the fire exception does not show with certainty that during the framing of the Hague Rules (...) the intention prevailed that, contrary to the other exceptions, the exclusion of liability ought to be allowed under the fire exception, even if the carrier has not fulfilled his primary obligation to exercise due diligence to ensure the seaworthiness of the vessel and insufficient care was taken for proper and careful loading, treatment, stowing etc.' (emphasis added, NJM)

196. The Court of Appeal thus held that in relationship to the fire exception the obligation contained in art III(2) of the Hague Rules is an overriding obligation. Considering the intended construction of the fire exception I suggest that this decision is contrary to the correct application of the fire exception.

4.6 _Concurrence of culpable and non-culpable causes of damage_

4.6.1 _Common law: The Lilburn_

197. In _The Lilburn_ Lord Wright said:

‘There is always a combination of co-operating causes out of which the law, employing its empirical or common-sense view of causation, will select the one or more which it finds material for its special purpose of deciding the particular case. That this is the test of the significance of an event from the standpoint of causation is clearly illustrated by this very doctrine of seaworthiness and its relation to kindred questions of negligence as applied to the two maritime contracts, marine insurance and sea carriage of goods. In the former, seaworthiness is a condition precedent (at least in voyage policies) and if not complied with the insurance never attaches. In carriage of goods by sea, unseaworthiness does not affect the carrier’s liability unless it causes the loss, as was held in the Europa, [1908] P. 84, and in Kish v. Taylor, [1912] A.C. 604. (...) In carriage of goods by sea, the shipowner will in the absence of valid and sufficient exceptions be liable for a loss occasioned by negligence. Apart from express exceptions, the carrier’s contract is to deliver the goods safely. But when the practice

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301. However, the SCN does tend to follow its own decisions.
303. See § 5.3 on the fire exception.
of having express exceptions limiting that obligation became common, it was
laid down that there were fundamental obligations, which were not affected by
the specific exceptions, unless that was made clear by express words. Thus, an
exception of perils of the sea does not qualify the duty to furnish a seaworthy
ship or to carry the goods without negligence (see Paterson Steamships, Ltd. v.
Canadian Co-operative Wheat Producers, Ltd., supra). From the nature of the contract,
the relevant cause of the loss is held to be the unseaworthiness or the negligence as the case
may be, not the peril of the sea, where both the breach of the fundamental obligation and
the objective peril are co-operating causes. The contractual exception of perils of the
seas does not affect the fundamental obligation, unless the contract qualifies
the latter in express terms.\(^{304}\) (emphasis added, NJM)

198. So, to use the terminology introduced in the introduction: when there are
competing causes of damage the relevant cause of the loss is held to be the cul-
pable cause. Does this mean the carrier will not be allowed to invoke an excep-
tion or disprove the cause of the damage?

199. Regarding this question Lord Wright said:

‘The question is (...) would the disaster not have happened if the ship had ful-
filled the obligation of seaworthiness, even though the disaster could not have
happened if there had not also been the specific peril or action?
There is precise authority for this in the judgement of the Court of Appeal de-
ivered by that great authority on mercantile law, Scrutton, L.J., with the con-
in that case was damaged by leakage through a leaky rivet; the damage might
have been checked but for the negligence of the master in not detecting the wa-
ter in the hold and pumping it out. It was held (notwithstanding an exception of neg-
ligence) that the shipowners were responsible for the whole of the damage, not merely for
such proportion as must have been incurred before the inflow of water could have been
checked. No distinction was drawn between damage due to perils of the seas alone and that
due to perils of the seas and to negligence combined. Scrutton, L.J., said, at p. 214:
The water which entered and did the damage entered through unseaworthi-
ness; its effects when in the ship might have been partially remedied by due
diligence, which the shipowner’s servants did not take. But in my view the
cause of the resulting damage is still unseaworthiness ... Here the man who has
by his original breach of contract caused the opportunity for damage has by
the negligence of his servants increased it. He cannot show any exception to protect
him, and cannot show that the dominant cause of the damage was not the unseaworthi-
ness which admitted the water into the ship.’\(^{305}\) (emphasis added, NJM)

200. Lord Wright went on to explain that the language used by Carver did not apply to
the contract of carriage:

'If I may, however, venture to criticise the language of the learned Lord Justice, I should prefer to avoid the word “dominant”, which he takes from the marine insurance cases cited by him, in which it is necessary to find the *causa proxima* or dominant cause. This results by reason of the special character of that contract where the liability to pay depends, broadly speaking, on the casualty being caused directly by the happening which the contract stipulates to be the event on which the indemnity becomes exigible. There may be in marine insurance cases a competition of causes so that it is necessary to determine which event is the dominant cause. Negligence is not material, nor, in time policies, is unseaworthiness material; nor is it material, in one sense, in other classes of marine policies from the point of view of causation, since, if the warranty is not complied with, the risk never attaches.'

201. Lord Wright then explained the law with regard to the carriage of goods by sea:

‘In cases, however, of the sea carriage of goods the liability depends, in the words of the Lord Justice, on a “breach of contract”, that is, to provide a seaworthy ship. *The sole question, apart from express exception, must then be, “Was that breach of contract a “cause of the damage.”* It may be preferred to describe it as an effective or real or actual cause, though the adjectives in my opinion in fact add nothing. *If the question is answered in the affirmative the shipowner is liable though there were other cooperating causes, whether they are such causes as perils of the seas, fire and similar matters, or causes due to human action, such as the acts or omissions of the master, whether negligent or not, or a combination of both kinds of cause.*

202. At common law the carrier will be responsible for all of the loss or damage if a cause of the loss or damage or merely some of the loss or damage was the non-fulfilment of a contractual duty. The carrier will not be allowed to invoke an exception or to disprove causal connection between the non-excepted peril and the damage.

4.6.2 *H(V)R*

203. Under the *H(V)R* the expression ‘overriding obligation’ is used in a different meaning than under common law. The meaning which follows from *Maxine Footwear* is that in the case of competing causes (i.e. the damage is a result of more than one cause and each of the causes could have caused all of the damage) the culpable cause will be deemed to be the only relevant and the carrier will therefore be liable.

204. In Carver 2005 it is said that the problem of damage caused by concurrent causes under the *H(V)R* should be solved as follows:

‘The technique for solving such problems in English law depends on whether one of the causes is unseaworthiness. If it is, the overriding nature of Article

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III.1, together with the fact that the excepted perils mostly do not apply where the carrier is negligent, has been held to create the result that the carrier must pay for the whole loss. If however one of the causes is the carrier’s other main obligation, of properly and carefully caring for cargo under Art. III.2, this duty is expressly made subject to Art. IV, hence in principle the loss generated by each cause should be determined.\textsuperscript{308} (citations omitted, NJM)

205. The author of the quoted passage refers to \textit{The Fiona} [1994] 2 Lloyd’s Rep. 506 and to \textit{The Christel Vinnen} [1924] P. 208, 241 and to \textit{Smith Hogg & Co. Ltd. v. Black Sea & Baltic General Insurance Co. Ltd.} [1940] A.C. 997 as authorities for the statement that when one of the causes for damage is unseaworthiness, the carrier will be responsible for all the damage and will not be allowed to rely on one of the exceptions provided by art. IV. The last two cited cases are cases in which the common law applied and not the H(V)R. In \textit{The Fiona} the question was whether art. IV(6) was the overriding obligation or art. III(1). I do not see how the cited authorities could lead to the statement that when one cause of damage is unseaworthiness the carrier will be liable for all the damages under the H(V)R. Although that is so under common law I do not think it should be so under the H(V)R.

206. If there is a concurrence\textsuperscript{309} of negligence in the care for the cargo or the duty to exercise due diligence to make the ship seaworthy and an exception, then the carrier remains liable for the full extent of the damage unless he can prove which part of the damage was caused by an excepted cause. As was said above, the carrier will not be allowed to invoke an exception to escape from liability for the damage \textit{caused by} the non-fulfilment of art. III(1).

4.6.2.1 American law: Vallescura Rule

207. This follows from the so-called \textit{Vallescura Rule}.\textsuperscript{310} The \textit{Vallescura} judgement is a decision of the U.S. Supreme Court from 1934 under the Harter Act. The rule still applies under U.S. COGSA.\textsuperscript{311} In the \textit{Vallescura} it was held that:

’Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril. (...) upon the evidence, it appears that some of the damage, in an amount not ascertainable, is due to sea peril. That does not remove the burden of showing facts relieving it from liability. If it remains liable for the whole amount of the damage because it is unable to

\textsuperscript{308} Carver 2005, p. 621-622.

\textsuperscript{309} By a concurrence of causes I mean the situation wherein more than one cause of damage exists and each of the causes caused part of the damage but neither of the causes could have caused all of the damage. In the terminology introduced in § 4.1: ‘concurring causes’.

\textsuperscript{310} Schnell & Co. v. S.S. Vallescura, 293 U.S. 296.

\textsuperscript{311} See for example 306 F.2d 426 (2nd Cir.) in which it was said that ‘If libelant done this, we would have a parallel to Schnell v. The Vallescura, with one cause proved to be excepted and the other not, and the teaching of that case, which we assume to be applicable to COGSA in this respect, would then place upon respondents the burden of showing how much of the damages came from the excepted as distinguished from the unexcepted cause.’
show that sea peril was a cause of the loss, it must equally remain so if it cannot show what part of the loss is due to that cause.’ (emphasis added, NJM)

208. See also the *Irish Spruce* case, in which it was said that:

‘The law under the Carriage of Goods by Sea Act is clear that if both an “excepted peril” under s.1304 (2) (...) and unseaworthiness or another element described in (...) s. 1303(1), concur in causing cargo damage, the shipowner is liable for the entire loss unless he can exonerate himself from part of the liability by showing that some portion is attributable solely to the “excepted peril”.'

209. In Tetley’s view the overriding obligation rule applies when damage is caused by a concurrence of a lack of due diligence for seaworthiness and an excepted cause. In such a case the carrier remains liable for the entire damage. However, if the damage is caused by a violation of art. III(2) and an excepted cause, then the *Vallescura* rule does apply because the concurrence is of two causes of equal weight. I do not agree with this point of view. Under US COGSA no distinction is made between the duties concerning care of the cargo and seaworthiness. Also the doctrine of ‘overriding obligations’ is not a part of American law.

4.6.2.2 English law

210. In the *Canadian Highlander* case damage had been caused by negligence in the care for the cargo and by a nautical fault. Viscount Sumner considered that:

‘... unless it be held that negligence merely in discharging cargo is negligence in the management of the ship, [which is clearly not the case; NJM] it is incumbent on the shipowner, on whom the whole burden of proving this defence falls, to show how much damage was done in the subsequent operations, because it is only in respect of them that he can claim protection.’

211. The *Canadian Highlander* case shows that if damage is caused by the non-fulfilment of art. III(2) the carrier will still be allowed to prove that an excepted peril was the cause of a portion of the damage.

212. In *The Torenia* the shell plating of the vessel sprang a leak through some defect in her structure. The carrier pleaded that the loss was caused by one or more latent or other defects in the vessel’s port side shell plating (...) not discoverable by due diligence and expressly relied on art. IV(2)(p) as well as art. IV(2)c. The proof that the defect was a ‘latent defect not discoverable by due diligence’ was however, not given.

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313. Tetley 4th edition, ch. 15, p. 22: ‘The rule with respect to due diligence [overriding obligation rule] is stricter because the conflict is not between two equal provisions [an exculpatory exception and care of cargo], but between an exculpatory exception and an overriding obligation [due diligence].’
314. See supra § 4.3.2.
315. Also known as ‘Gosse Millerd’.
213. Mr. Justice Hobhouse said:

“The question of the construction of art. IV, r. 2, which I have to consider is whether, where the carrier proves that the loss resulted from a peril of the sea and a defect in the ship, but does not go on to prove that the defect was a “latent defect not discoverable by due diligence”, the carrier has proved a defence under r. 2.

This question seems to me to admit of only one answer. Where the facts disclose that the loss was caused by the concurrent causative effects of an excepted and a non-excepted peril, the carrier remains liable. He only escapes liability to the extent that he can prove that the loss or damage was caused by the excepted peril alone (e.g., Gosse Millerd Ltd. v. Canadian Government Merchant Marine Ltd., (1928) 32 L.L.Rep. 91; [1929] A.C. 223 at p. 98 and 241, per Viscount Sumner. Here the carrier has proved, as concurrent causes, perils of the sea (an excepted peril under par. (c)) and a defect (ex-hypothesis not a latent defect) which is not an excepted peril as it does not satisfy the criteria of par. (p). I see nothing in the drafting of r. 2 which would justify one in concluding that the carrier is nevertheless relieved of liability.”

214. The latent defect which is not an excepted peril must be qualified as unseaworthiness as a result of non-fulfilment of art. III(1). The use of the general words “non-excepted peril” are an indication that the Gosse Millerd rule can also apply if a portion of damage was a cause of the non-fulfilment of art. III(1). The fact that the non-excepted peril was in fact non-fulfilment of art. III(1) makes it clear that in The Torenia case the rule accepted that a carrier is allowed to prove which part of the damage was not caused by non-fulfilment of the overriding obligation contained in art. III(1). This rule follows indirectly from the Maxine Footwear case. As was said above, the carrier will not be allowed to escape liability for the non-fulfilment of art. III(1) and the damage indicates that if there is no causal connection the carrier may prove for which portion he is not responsible.

215. English case law shows that the overriding obligation rule and the English version of the Vallescura Rule co-exist. The overriding obligation rule follows from the aforementioned Maxine Footwear. The English version of the Vallescura Rule follows from Gosse Millerd (which judgement was rendered well before Maxine Footwear) and The Torenia (rendered some time after Maxine Footwear). Damage as a consequence of a failure to fulfil the duty contained in either art III(1) (The Torenia) or art III(2) (Gosse Millerd) will be attributed to the carrier. If the carrier can demonstrate which part of the damage was caused by a non-culpable occurrence when a culpable and a non-culpable cause of damage concur, he will not be liable for that part of the damage under English law.

318. See supra § 4.3.2.
321. This is different under Dutch law. For from Quo Vadis (SCN 11 June 1993, NJ 1993, 123) it follows that when there are two possible causes of damage, the culpable cause is considered to be the legally relevant cause. The carrier is not given the opportunity to prove which part of the damage he is not liable. As was discussed above, this was the rule at common law, but is incorrect under the Hague Rules.
4.7 ART. III(2) NOT ALSO CONSIDERED AN OVERRIDING OBLIGATION UNDER ENGLISH LAW?

Why is art. III(2) not also considered an overriding obligation under English law?

216. The question arises why the obligation to use due diligence to make the ship seaworthy is an overriding obligation and the duty to care for the cargo properly and carefully is not. As was seen above in the early days the carrier was strictly liable for the goods as a bailee. Later the view was developed that the carrier had two overriding obligations: care for the cargo and the duty to furnish a seaworthy ship. At common law the duty of the carrier to provide a seaworthy ship is an absolute duty of the carrier. Even if the unseaworthiness was not discoverable by due diligence the carrier would still be liable. Then, under the Hague Rules, the duty regarding seaworthiness was reduced to a duty to exercise due diligence to make the ship seaworthy. The view was developed that the duty to provide a seaworthy ship is overriding and the duty regarding care for the cargo is not. In 1963 an article on seaworthiness was published by Zaphiriou explaining that:

> “During the last seventy years legislatures, courts and international conferences have tried to strike and maintain a balance between the paramount duty to protect the public (crews, passengers and cargo-owners) and rendering justice to the shipowners. The protection of the public demands ideal standards and an absolute guarantee of safety, while justice to shipowners is based on the realisation of a number of technical and commercial realities that call for relativity. A ship is a complex instrument with potentially hidden defects, some of which are undiscoverable by reasonable human care. The maintenance, repair and inspection of the ship are delegated to experts and qualified registered surveyors and are largely carried out while a ship is in port or in dry-dock. Constantly improving scientific methods of detection minimise the existence of latent defects, though the use of such methods may sometimes involve a commercially unreasonable loss of time or expenditure. All the facets of this problem are reflected in a number of recent English decisions which deal with unseaworthiness.”

217. Von Ziegler cites Zaphiriou and writes that in international trade, involving carriage of goods by sea, the ship is the centre point. All interested parties have to be able to rely on the soundness of the ship. This applies for the parties involved in shipping (owners, the bank, the insurers of the ship and the insurers of the cargo) and for the general public and its interest in an intact environment. Theoretically these interests should lead to an absolute seaworthiness and fitness of the ship which demands that all safety measures shall be taken. A modern ship should be absolutely seaworthy and able to endure the strains of the sea, salt water and the cargo it is carrying.

It seems that the view of Zaphiriou and in particular the view of Von Ziegler is that the duty to exercise due diligence to make the ship seaworthy is also in the public interest and therefore a more important duty than the duty regarding the treatment of the cargo. For that reason the duty regarding seaworthiness is an overriding obligation un-

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322. See supra § 3.5.1.
323. See supra § 3.5.2.
der the English law regarding the Hague Rules and the duty regarding treatment of the cargo is not.

I have not encountered this point of view in case law nor in the Travaux Préparatoires. I also doubt if this was actual reason why the concept of an overriding obligation of seaworthiness was created under the Hague Rules in *Maxine Footwear*. If e.g. the aspect of seaworthiness regarding the cargoworthiness of the vessel is considered it is difficult to see how this could effect the environment or safety of the public. E.g. if certain cargo was loaded into dirty tanks causing contamination of the cargo it would be a fault due to the ship being uncargoworthy and so a breach of the overriding obligation ex art. III(1) HVR. How is this different from improper stowing causing cargo damage due to rough weather? The argument heard in practice is that a shipowner is an expert on ships and not an expert on cargo. For that reason the carrier can contract out of loading and stowing the cargo. On the other hand the duty to exercise due diligence to make the ship seaworthy is an overriding obligation and a non-delegable duty. There is indeed something to say for this point of view. On the other hand it can also be said that the essence of the contract of carriage is to transport the cargo and deliver it in the same condition as it was received by the carrier. In my view both duties should be considered overriding. However, it must be concluded that under English law the duty to exercise due diligence to make the ship seaworthy is more important than the duty regarding the cargo (ex art. III(2)) and therefore the duty to exercise due diligence is an overriding obligation. This may be a result of the common law view that the duty to make the ship seaworthy is an absolute duty meaning that the carrier will be liable for damage caused by unseaworthiness even if the unseaworthiness was not discoverable by due diligence.

4.8 **The intended construction of the relationship between the duties and the exceptions**

218. The framers of the Hague Rules intended art. III(1) to be an overriding obligation and art. III(2) to be subject to the provisions of article IV. This follows from the objective rule of construction that the meaning of the text should prevail if it is clear. This means that if the damage is caused by lack of due diligence to make the ship seaworthy the carrier will be liable for that damage which was caused by the lack of due diligence to make the ship seaworthy. However, if the damage is caused by non-fulfilment of the duties contained in art. III(2), the carrier will be allowed to avail himself of the provisions of art. IV. To understand the intended construction of the Rules the Rules should be read as a whole. Art. IV(1) requires causal connection between the failure to fulfil the duty contained in art. III(1) and the damage. This means that if damage was caused by non-fulfilment of art. II(1) the carrier will not be allowed to invoke the provisions of art. IV.

219. He will however be able to escape liability for a portion of the damage if he can prove which portion of the damage was caused by an excepted peril.

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326. The reason of public interest is not given in that judgement.
327. See supra § 3.9.
328. See supra § 3.5.1.
329. See supra § 2.6.
4.8 INTENDED CONSTRUCTION OF RELATIONSHIP BETWEEN DUTIES AND EXCEPTIONS

The text of the Rules says nothing about the requirement of causal connection between non-fulfilment of art. III(2) and the damage. However, common sense dictates that causal connection between non-fulfilment or art. III(2) and damage to the goods is required to render the carrier liable. In case of damage caused by non-fulfilment of the duty contained in art. III(2) the carrier can either prove that the damage or part of it was not caused by the non-fulfilment of the duties contained in art. III(1) en (2), or invoke an exception (a provision of article 4).

330. In § 5.1 it is made clear that art. IV(1) was included in the Rules to remove the effect of The Isis case (rendered under the Harter Act). That decision caused the carrier to be liable if he could not prove that due diligence had been exercised to make the ship seaworthy, even if there was no causal connection between the unseaworthiness and the damage.