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

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Chapter 5
Art. IV(1) and some of the exceptions of art. IV(2) HR

5.1 Art. IV(1): loss or damage due to unseaworthiness

5.1.1 Introduction

220. Art. IV(1) provides that

‘[n]either the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.’

221. Under English law the purpose of art. IV(1) is to divide the burden of proof in case of damage caused by unseaworthiness. The meaning of or reason for art. IV(1) is, however, unclear. Is it meant as merely a division of the burden of proof in cases concerning loss or damage caused by unseaworthiness or is it also meant as an exemption from liability for loss or damage caused by unseaworthiness? This is the primary question which will be discussed below (§ 5.1.2).

222. If the provision is treated as an exemption from liability then only unseaworthiness not due to a lack of due diligence to provide a seaworthy ship will exempt the carrier from liability. The carrier will therefore have to prove that before and at the beginning of the voyage due diligence was exercised to make the ship seaworthy. This becomes clear from the reference to article III(1) in article IV(1). Article III(1) provides that the carrier shall be bound ‘before and at the beginning of the voyage’ to exercise due diligence to make the ship seaworthy. This makes it clear that the period to exercise due diligence is restricted to the period before and at the beginning of the voyage.331 The unanimous decision of the CMI sous committee of 21 October 1922 also made this clear. The committee decided that the obligation to use due diligence to make the ship seaworthy is restricted to the period before and at the beginning of the voyage.332

331. See also Carver 2005, p. 603 where it is noted that this seems to be assumed by the Court of Appeal in Leesh River Tea Co. Ltd v. British India S.N. Co. Ltd [1966] 1 Lloyd’s Rep. 450, 457 and Scrutton 1996, p. 441.
5.1 ART. IV(1): LOSS OR DAMAGE DUE TO UNSEAWORTHINESS

5.1.2 Is art. IV(1) an exception from liability or merely a division of the burden of proof?

5.1.2.1 English law

223. Under English law art. IV(1) only protects against latent defects of the ship. At common law the only event which falls under unseaworthiness is unseaworthiness existing before or at the time of sailing. The warranty of seaworthiness is not a continuing warranty, in the sense of a warranty that the vessel shall continue fit during the voyage. If a ship becomes unseaworthy after leaving port art. IV(1) will not be a defence against a claim for cargo damage under English law and the H(V)R. As McNair J. said:

‘If you get seawater coming into a ship which was initially seaworthy, it does not come in as a result of unseaworthiness, but as a result of perils of the sea.’

224. In *The Leesh River* case due diligence was exercised before the ship departed Calcutta. When the ship was discharging and loading cargo at Port Sudan stevedores stole a storm valve cover plate. After departure from Port Sudan cargo was damaged because seawater could enter through the storm valve. As to the application of art. IV(1) McNair J. said:

The defendants, upon whom the burden lies of bringing themselves within the exceptions contained in Art. IV, first relied upon Art IV, r. 1, set out above, dealing with unseaworthiness. Though it was agreed that the vessel became unseaworthy at Port Sudan when the cover plate was removed and that the ship’s officers were not negligent in failing to ascertain that the cover plate had been removed, I have formed the clear opinion, and so hold, that Art. IV, r. 1, only applies to the obligation to exercise due diligence to secure initial seaworthiness “before and at the beginning of the voyage.” See the words “in accordance with the provisions of paragraph 1 of Article III” which occur at the end of the first sentence of Art. IV, r. 1. Except that by the rules the absolute obligation to secure seaworthiness at this stage is altered to an obligation to exercise due diligence to secure seaworthiness, the rules do not, so far as is material for present purposes, alter the position as it existed before the Act at common law. In my judgement, this point fails.

225. On appeal this construction of art. IV(1) was followed.

333. See per Lord Wright in Smith, Hogg & Co., Ltd v. Black Sea & Baltic General Insurance Co., Ltd., 67 L.L.L.Rep. 253, 257: ‘Hence the qualified exception of unseaworthiness does not protect the ship-owner. In effect, such an exception can only excuse against latent defects.’


335. [1966] 1 Lloyd’s Rep. 450, 454 (Leesh River Tea Company Ltd., and others v. British India Steam Navigation Company Ltd., The ‘Chyebassa’).


226. This judgement illustrates that under English law the exception provided by art. IV(1) only applies to circumstances that could not be discovered by exercising due diligence before and at the beginning of the voyage. The exception does not apply to unseaworthiness arising after the voyage commenced. It has been said that the reasons for this construction are unclear. Especially the reference to the ‘position as it existed before the Act at common law’ is hard to place. Did McNair mean by the ‘position as it existed at common law’ the ‘absolute obligation to secure seaworthiness at this stage’? If that was meant then McNair seems to be saying that the absolute obligation (under the Rules mitigated to ‘due diligence’) still exists under the Rules. This would mean that, in McNair’s view, the carrier would be bound to exercise due diligence before every stage of the journey. This, however, would be contrary to the earlier decision of Mr. Justice Hewson in The Makedonia where it was established that the doctrine of stages no longer exists under the Rules. Probably the reason for this construction is that actual unseaworthiness occurring after the beginning of the voyage is not qualified as unseaworthiness under English law because the carrier only needs to exercise due diligence for seaworthiness before and at the beginning of the voyage.

227. Under English law art. IV(1) does play a role in the division of the burden of proof. Carver, Scrutton and Cooke refer to the division of the burden of proof in Minister of Food v. Reardon Smith Line and consider that division to be applicable to art. IV(1) even though that case concerned the nautical fault exception (art. IV(2)a). The division of the burden of proof was as follows:
1. The cargo interest proves prima facie damage.
2. The carrier proves that the damage was caused by an excepted peril.
3. The cargo interest proves that the damage was caused by unseaworthiness.
4. The carrier now has to prove that he exercised due diligence to make the ship seaworthy.

228. Regarding the second sentence of art. IV(1) McNair J. said:

‘Furthermore, it seems to me that if one treats the matter purely as a matter of contract, the second sentence in Art. IV, Rule 1, strongly supports the submission made on behalf of the ship that no onus as to seaworthiness is cast on the ship-owner, except after proof has been given by the other party that the damage has resulted from unseaworthiness.’

229. It has also been said that under English law art. IV(1) is there to emphasise the overriding obligation of art. III(1).

338. See also Clarke 1976, p. 151 and 155.
339. See infra § 3.2.
345. See chapter 4.
5.1 ART. IV(1): LOSS OR DAMAGE DUE TO UNSEAWORTHINESS

5.1.2.2 Dutch law

230. According to Royer and Cleveringa art. IV(1) is an exception that the carrier can invoke to escape liability.\(^\text{346}\) On the other hand Boonk does not consider art. IV(1) as a separate exception but as a result of the duties contained in art. III(1). Unseaworthiness can occur even if due diligence was exercised in accordance with art. III(1). Art. IV(1) makes clear that the carrier will not be responsible for such unseaworthiness. Boonk does however remark that if the unseaworthiness occurred during the voyage then art. IV(1) will be a ‘real exemption’.\(^\text{347}\) Boonk restricts the application of art. IV(1) as an exemption to unseaworthiness that occurred during the voyage.

In a number of recent decisions it has also been recognised that art. IV(1) can be relied upon as an exemption from liability.\(^\text{348}\) It is clear that under Dutch law art. IV(1) is considered to be an exemption from liability. The carrier can use unseaworthiness as a defence as long as he can prove that he used due diligence to make the ship seaworthy.

Von Ziegler concludes that this is the continental European application of art. IV(1).\(^\text{349}\)

231. In the *Singapore Jaya* the District Court of Rotterdam ruled that the ship was seaworthy at the beginning of the voyage. Referring to Rule IV(1) the court ruled that the carrier had to prove that due diligence had been exercised to make the ship seaworthy.\(^\text{350}\) In the *Barentzgracht* the court of appeal ordered cargo interests to prove that the ship was seaworthy and the carrier was given the burden of proving due diligence.\(^\text{351}\) The Hague Court of Appeal ruled that the carrier had to prove that damage was caused by unseaworthiness and that the carrier had exercised due diligence to make the ship seaworthy.\(^\text{352}\)

In the *Hea* the ships engine failed, forcing the ship to deviate. Expenses were incurred for repairs. The cargo interests refused to pay the carrier’s general average claim on the grounds that the ship was seaworthy due to lack of due diligence. This was refuted by the carrier who could state facts showing that due diligence was exercised. The Amsterdam District Court then ordered the cargo interest to disprove the carrier’s proof of due diligence.\(^\text{353}\)

5.1.2.3 U.S. law

232. The division of the burden of proof must have been unclear at the time of the framing of the Hague Rules because, under the ancestor of the Hague Rules, the Harter Act\(^\text{354}\), the carrier had to prove due diligence before he could invoke an exception, even if there was no causal connection between the unseaworthiness and the exception.\(^\text{355}\)

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\(^{349}\) Von Ziegler 2000, p. 217.


\(^{351}\) Amsterdam Court of Appeal 18 February 1999, S&S 1999, 106 (Barentzgracht).


\(^{353}\) Amsterdam District Court 8 January 2003, S&S 2003, 76 (Hea).

\(^{354}\) 46 U.S.C. App. § 190 etc.

\(^{355}\) The Iss, 290 U.S. 333.
The U.S. Supreme Court called the provision of a seaworthy ship 'a condition of exemption' under the Harter Act. Art. IV(1) was introduced to make it clear that under the Hague Rules it is no longer required to prove due diligence before an exception can be relied upon. In *Damodar Bulk Carriers* the 9th Circuit explained that the history of the provision made it clear that art. IV(1) was meant as a division of the burden of proof:

> ‘[w]hen Congress considered the legislation that became COGSA from 1923 to its eventual enactment in 1936, it exhaustively questioned persons who had served as members of the American delegation to the European conventions that led to the promulgation of the Hague Rules at the Brussels Convention of 1924. To a man, these experts testified year after year that the provision that became 46 U.S.C.App. § 1304 was intended to change the existing law under the Harter Act, 46 U.S.C.App. § 190-95 (Supp. V 1987), to make it more favorable to shipowners. Indeed, the change contemplated and eventually enacted was the only benefit carriers received under COGSA that was a change from existing law.

In the first hearing on COGSA, Mr. Norman Beecher, the special admiralty counsel of the United States Shipping Board and a United States representative to the Brussels Conventions of 1922 and 1923, testified to this effect:

> ‘This section [§ 1304] constitutes a modification of the Harter Act, in that it does not make it a condition precedent to the carrier receiving the benefit of these exceptions that he shall have exercised due diligence to make the ship in all respects seaworthy—properly manned, equipped, and so forth.’

### 5.1.2.4 The intended construction of rule IV(1)

233. The textual construction of art. IV(1) does indicate that it is an exoneration from liability. This however does not make sense. Reading art. IV(1) with art. III(1) shows that the carrier is only bound to exercise due diligence before and at the beginning of the voyage. He would not be responsible for unseaworthiness which did not result from lack of due diligence even without art. IV(1). As the objective construction leads to an unlikely result I shall apply the rule of subjective construction. What did the framers mean when they conceived art. IV(1)? Using legislative history of the U.S. COGSA as an aid to subjective construction it becomes clear that the intention of the framers was to change the law as it existed under the Harter Act. Since *The Isis* decision which was rendered under that Act the carrier had to prove that he had exercised due diligence before he could invoke an exception. No causal connection between lack of due diligence and damage was required. To change this law art. IV(1) was added as a division of the burden of proof and not as an exception. Art. IV(1) makes it clear that the carrier does not have to prove due diligence before he is allowed to invoke an exception. He will only have to prove due diligence if the loss or damage is caused by unseaworthiness. Indeed, a separate exception for unseaworthiness not caused by a lack of due diligence is unnecessary because of the existence of the q-clause.357

357. See infra § 5.5.
5.2 The 'nautical fault' exception

5.2.1 Introduction

234. The 'nautical fault' exception is the first of 17 exceptions provided by art. IV(2). The exception provides:

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

a. Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

235. This is the carrier's major exception and also one of the most controversial exceptions of the Hague (Visby) Rules. The following questions will be discussed in this paragraph:

1. What is 'navigation of the ship'?
2. What is 'management of the ship'?

236. These questions have been discussed in a number of cases. Because of the history of the exception early English and U.S. judgements from before the Harter Act are also relevant for the construction of the exception. Before the Harter Act came into force the exemption clause excusing the carrier for loss or damage caused by errors in the navigation of the ship was used on bills of lading. That clause was adapted by the Liverpool Steamship Owner's Association in 1885 to also exclude liability for damage caused by acts or faults in the management of the ship. Eight years later this exception was included in the Harter Act.

5.2.2 What is meant by 'navigation of the ship'?

237. At the end of the nineteenth century and the beginning of the twentieth there was some discussion about the meaning of this expression. In some pre-Hague Rules cases the meaning was sometimes extended under differently worded exceptions, and in other contexts, particularly insurance, to matters connected with loading and unloading. For that reason Carver considers such cases of little value where the Rules apply. An exception is the Canada Shipping in which Bowen L.J. held:

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358. See Hendrikse & Margetson 2005a for an earlier version of this chapter.
359. As Boonk correctly remarks the expression 'nautical fault' which is used in practice is strictly speaking not correct. All damage due to management of the ship is covered by the exception. A fault is not required (Boonk 1993, p. 172). I shall however use the expression in this chapter because it is convenient.
361. See e.g. Hare 1999, p. 630 and Aiken et al 2006, p. 270.
362. See infra.
363. See Royer 1959, p. 460.
238. Navigation involves decisions taken at sea, but can also involve decisions taken in port.367 The aspects of navigation meant in the nautical fault exception concern acts of navigation taken on board the vessel relying on the exception.368 The word ‘navigation’ refers to the maritime aspects of navigation and not commercial, economic or legal aspects of the management of the ship.369 So, if for example, the captain misinterprets the contract of carriage and sails to the wrong port the exception will not apply because the error is not an act of navigation in the sense of the exception.

239. It is not always easy to distinguish between ‘navigation’ in the sense of the exception and ‘navigation’ which is related to economic aspects of the management of the ship. It used to be thought that the period in which the exception applies was restricted by time.370 The period wherein the exception applied was from the moment of departure until the moment of arrival, unless the ship was to depart to a following port after arrival. In other words: the period was the moment of departure from the first port until the moment of arrival at the last port. This would however mean that an error in navigation (e.g. the calculation of an incorrect course) made before departure from the first port, would not be considered an error in the navigation of the ship in the sense of the nautical fault exception. In The Hill Harmony the House of Lords however decided that such a restriction of the period of application was not correct, or at least too broadly or confusingly stated, because the moment at which an error in navigation is made is not relevant for the sort of error and for the consequences of the error.

240. Lord Bingham of Cornhill said:

‘In Lord (Owners of the Steamship) v. Newsum Sons and Co. Ltd., (1920) 2 L.J.L.Rep. 276; [1920] 1 K.B. 846 the dispute was between owner and charterer. The master had decided to remain in port for some time, despite advice to continue the voyage by a prescribed route. Mr. Justice Bailhache held that the master’s deliberate choice, while in harbour, of one or two routes to be pursued could not be an error in the management or navigation of the ship within the meaning of an exception in the charter-party. While the Judge, in my opinion, erred in his formulation of principle, I would not question his conclusion. The decision is inconsistent with the view that the choice of route from one port to another is a navigational matter within the sole discretion of the master.’371

241. And Lord Hobhouse of Westborough:

368. If a fault in the navigation of a ship causes cargo damage on board another ship that other ship can rely on the peril of the sea exception [art. IV(2)c H(V)R]. See e.g. The Xantho, (1887) 12 A.C. 503. See also Cooke e.a. 2007, p. 1022.
'In Lord v. Newsum, the vessel was under a six month time charter made in 1916. She was ordered on a laden voyage to Archangel but had to abandon the voyage because the master chose to proceed by a route close to the coast of Norway and was held up by the presence of German submarines. If he had proceeded by a route further from the coast, as prescribed by the British Admiralty and by the Norwegian war risk insurers, she would have been able to complete the voyage. The owners were held liable under the “utmost despatch” clause. The “navigation and management” clause was held to provide no defence. Mr. Justice Bailhache said at p. 279; p. 849:

“The decision was no doubt correct but the reasoning is certainly confusing. The character of the decision cannot be determined by where the decision is made. A master, while his vessel is still at the berth, may, on the one hand, decide whether he needs the assistance of a tug to execute a manoeuvre while leaving or whether the vessel’s draft will permit safe departure on a certain state of the tide and, on the other hand, what ocean route is consistent with his owners’ obligation to execute the coming voyage with the utmost despatch. The former come within the exception; the latter does not. Where the decision is made does not alter either conclusion.”

242. In the Dutch Poeldijk case the captain was criticised because he should have slowed down and changed course sooner and the change of course should have been more pronounced. The court of appeal decided that these errors of navigation were not errors in the sense of the exception because if the error had not been made only part of the cargo damage would have been prevented. In this judgement the word ‘navigation’ in the exception has the same meaning as it does in ordinary speech. Navigation means conducting the ship from one position to another along to the safest, fastest and most economical route according to the techniques of theoretical and practical seamanship. During such navigation cargo damage may occur due to the ships motion. Safe navigation does not mean a guarantee against cargo damage. Such damage can be prevented by taking account of the obligation contained in art. III(2). If the cargo was treated in accordance with art. III(2) and damage still occurred due to the ships motion then the carrier can invoke the perils of the sea exception provided by art. IV(2)c.

243. In 1959 Royer wrote that ‘navigation’ entails acts at sea and ‘management’ entails acts at sea and in port. According to Royer this distinction should be taken into account when construing the words ‘management’ and ‘navigation’. As was seen above the Hill Harmony decision has rendered this point of view out of date. Royer is of the opinion that it is difficult to define the words ‘navigation’ and ‘management’ and that it is better to give examples of acts of navigation to get an idea of the

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375. See § 5.4. Tetley seems to be of the same opinion. He writes: ‘On occasion a master will force his ship through a storm, instead of heading at slow speed into the wind, with the result that the cargo is damaged. This is really an error in the management of the cargo because the master has disregarded possible damage to cargo in favour of arriving in port a day or two early (Tetley 1988, p. 402).
meaning. By doing so the word ‘management’ will need no definition because that word will entail all nautical acts which cannot be qualified as ‘navigation’.

Royer gives the following examples of errors in the navigation of the ship:
- neglecting to run into a port to repair damage to the engines;
- the commencement of a voyage regardless of forecasted storms;
- neglecting to employ a pilot where a pilot is obligatory to employ one or where one is required;
- neglecting to keep the charts up to date;
- the incorrect choice of an anchorage;
- grounding and collision which is not due to unseaworthiness;
- errors made in the art of steering and or manoeuvring the ship.

244. Blussé van Oud Alblas defines the word as ‘acts concerning seamanship in the strict sense of the word.’ He gives similar examples to those mentioned by Royer.

245. Royer’s conclusion is that an error in ‘navigation’ can roughly be said to mean a shortcoming on the bridge of the ship in the navigation of the ship and that an error in the management of the ship is an error made in another part of the ship. Cleveringa defines a navigation error as a shortcoming in the art of pilotage and mentions the following examples:
- decisions and acts of pilotage;
- neglecting to take a radio bearing;
- neglecting to consult the available charts.

246. Stevens correctly concludes that there is little doubt about the meaning of the word. The meaning of the word ‘navigation’ in the exception is comparable to the meaning of the word in everyday speech. ‘Navigation’ means the art to sail a ship safely from a known position to the required position along a predetermined route.

5.2.3 What is meant by ‘management of the ship’?

247. The construction of the word ‘management’ has led to many disputes and the use of such a vague expression in the Hague (Visby) Rules has generated a lot of criticism. Pre Hague Rules judgements are also relevant for the interpretation of the expres-
5.2 THE ‘NAUTICAL FAULT’ EXCEPTION

In The Glenochil, a decision rendered under the Harter Act, the Divisional Court held that damage caused by negligent ballasting was an error in the management of the ship and that the operation of the exception as to ‘management’ was not limited to the period during which the vessel was at sea, but extended to the period during which the cargo was being discharged. Tetley defines an error in the management of the ship in conjunction with an error in the navigation of the ship as ‘an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well-being and towards the common venture generally.’

It is important to distinguish management of the ship from care of the cargo. An error made in the care of the cargo will cause the carrier to be liable for the damage caused by that error because it is a breach of the duty contained in art. III(2) which is not covered by the nautical fault exception.

In his dissenting judgement in the Canadian Highlander case which was approved in the House of Lords Lord Justice Greer correctly summarised the meaning of the expression as follows:

‘…, if the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.’

In the House of Lords Viscount Sumner said:

‘If the navigation is of the entire ship, so must the management be. Of course, in both cases alike some one and perhaps very subordinate part of the ship or its equipment may be the object which is immediately dealt with negligently, but neglect in regard to that object must still be neglect in the management of the ship, if it is to avail the ship-owner as a defence. (…) There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics, might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpau—

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384. Carver 2005, p. 609. See also Cooke e.a. 2007, p. 1023 where it is remarked that judgements from the period before the Hague Rules regarding the word ‘mangement’ still apply. On the other hand judgements concerning the word ‘navigation’ do not still apply, because that word is used in different contexts. The authors of Cooke e.a. refer to the Canadian Highlander case (see above) to add weight to this point of view.


387. Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd. (The Canadian Highlander), 32 LL.L.L.R 91. In the House of Lords report the name is spelt ‘Millerd’ whereas in the lower courts it is spelt ‘Millard’.

lin, which was neglected, was a precaution solely in the interest of the cargo. While the ship’s work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or of scraping the ‘tween decks’.\textsuperscript{389} (emphasis added, NJM)

251. Tetley remarks that ‘[i]f both ship and cargo have been affected by the same error then the carrier is usually exculpated, because the whole venture is implicated, but each case must be decided on its own facts.’\textsuperscript{390} He writes that the House of Lords upheld Greer L.J. in the Canadian Highlander case, declaring the error was in management of the cargo because the act, although made by persons directing their attention to the ship, was one which affected cargo alone.\textsuperscript{391} This point of view can indeed be derived from the above quoted passage of Sumner’s speech. Another test can also be derived from that passage. The so called ‘primary purpose test’ which is discussed below. The purpose of the tarpaulin was solely (and so primarily) for the protection of the cargo. Neglecting to use the tarpaulin caused the damage to the cargo. The neglect was therefore an error in the management of the cargo, and not of the ship. Therefore the carrier cannot rely on the nautical fault exception.

252. Carver cites a number of cases from which the following examples of ‘management’ are derived. In The Hector negligent failure to use locking bars on board to secure tarpaulins in rough conditions.\textsuperscript{392} In that case the failure to use locking bars before the beginning of the voyage was not considered to be a breach of the duty to use due diligence to make the ship seaworthy. McNair said:

\begin{quote}
I am satisfied that this forecast in these waters indicated a prospect of improving weather conditions, and that prudent seamanship did not require on that forecast that locking bars should be fitted in position on leaving Melbourne, even though this involved a winter voyage across the Australian Bight, in which, according to the master of the Hector, conditions may be expected to change very quickly. Though the Australian Bight has a bad reputation, the voyage to Fremantle traverses a part of the Australian Bight which was just within the permanent summer zone under the Load Line Rules.
I therefore hold that there was no lack of due diligence in this respect.\textsuperscript{393}
\end{quote}

253. Other examples are the negligent taking in of fresh water\textsuperscript{394} and negligent control of a refrigeration apparatus which cooled not only the cargo but also other chambers in the ship.\textsuperscript{395}

Theft of ship’s parts or of goods by employees of stevedores unloading the ship is not covered by the exception.\textsuperscript{396} Regarding this point Mr. Justice McNair said:

\begin{quote}
\begin{enumerate}
\item Gose Millard Ltd. v. Canadian Government Merchant Marine Ltd. (The Canadian Highlander), 32 I.L.L.I.R 91.
\item Tetley 1988, p. 398.
\item Tetley 1988, p. 399.
\item Ibid.
\item Minnesota Mining and Manufacturing (Australia) Pty Ltd. v. Ship Novoaltaisk (1972) 2 N.S.W.L.R. 476.
\item Rowson v. Atlantic Transport Co. Ltd., [1903] K.B. 666 (A case governed by the Harter Act.).
\end{enumerate}
\end{quote}
5.2 THE ‘NAUTICAL FAULT’ EXCEPTION

‘Admittedly, the felonious act of the stevedores in removing the cover plate was not an act done in the navigation of the ship, and I am equally certain that it was not an act done in the management of the ship. The authorities on the meaning of this phrase are set out in Scrutton on Charterparties, 17th ed. (1964), at p. 243, and none of them covers this particular form of activity by the crew. See in particular Hourani v. T. & J. Harrison, (1927) 28 L.L.Rep. 120; (1927) 32 Com. Cas. 305 (C.A.), to which I shall have to refer later. In my judgement, this point fails.’

254. Other examples are the entry of rain through hatches negligently left uncovered to facilitate repairs while the ship was in port and mismanagement of refrigeration machinery by the chief engineer. Tetley remarks that carriers most often invoke the nautical fault exception as a defence against claims for damage to cargo due to improper ballasting. He correctly points out that the error must not have taken place before the beginning of the voyage because the error would be a breach of the duty contained in art. III(1) and that cargo damage due to water entering through defective valves will only be covered by the nautical fault exception if the carrier can prove that he exercised due diligence before the beginning of the voyage to check the valves.

255. According to Carver because the words of art. IV(2)a do not refer to negligence, but to ‘act, neglect or default’ it seems that the exception would even cover a wilful or reckless act. However, no authority regarding this point is cited. In the Dutch case Quo Vadis the court of Appeal in The Hague held that: ‘... Kroesen [the Captain and owner of the Quo Vadis, NJM] can also invoke his contractual defence (error in the management of the ship) to parry the claim based on tort even if he is reproached for making a severe error, as long as there was no default verging onto wilful misconduct.’ (emphasis added, NJM)

256. As was made clear by Lord Justice Greer in The Canadian Highlander the principal inquiry, therefore, is whether the act or default which caused loss or damage was done (or left undone) as part of the care of the cargo or as part of the running of the ship, not specifically related to the cargo. This question is not always easy to answer. In Rowson v. Atlantic Transport Co. (Court of Appeal) for example it was held that an error in the use of refrigeration machinery was an error in the management of the ship because the refrigeration machinery was used to cool the ship’s stores as well as the cargo. This decision does seem strange. I would sooner agree with Wright J. in Foreman and Ellams v. Federal Steam Navigation Co. (KBD). Wright J. said:

398. Canadian Highlander (see supra).
402. The Dutch expression is: ‘aan opzet grenzende schuld’.
404. See above.
405. See also Cooke e.a. 2007, p. 1024.
‘A negligence or exception clause in a statute, as in a contract, ought, I think, to be strictly construed. The words of Art. IV., r. 2 (a), appear to be connected with matters directly affecting the ship as a ship, and not with matters affecting exclusively, or even primarily, the cargo, even though such latter matters involve the user of parts of the ship. The word “navigation” is clearly only applicable to the ship as such, and I think the more general word “management” should be read as ejusdem generis, and the word “ship” should receive the same connotation with each of the substantives on which it is dependent, the word “management” covering many acts directly affecting the ship which could not well be covered by “navigation”. The words of the exception are not “in the navigation or in the management of the ship or in the management of any part of the ship necessary for the proper and due care of the cargo”, nor are the words, to put it differently, “in the management of the cargo by the use of the ship’s parts or appliances”.

257. Wright J. points out that Rowson’s case was not followed in the USA:

’The limitation in question has not been approved in the United States: see The Samland, where it was held that failure properly to control the refrigerating appliances was not a fault in the management of the vessel. The judge said of Rowson’s case: This case, however, was not followed by Judge Dietrich in The Jean Bart, and the Circuit Court of Appeals in this [New York] Circuit in Andean Trading Co. v. Pacific Steam Navigation Co., has expressly approved and followed Judge Dietrich’s decision. It is clearly established that s. 3 of the Harter Act is limited in its application to faults “primarily connected with the management of the vessel, and not with the cargo.” I may add that even if the provision of refrigerated food for the crew is equated with the provision of fuel for the propulsion of the ship, so that the refrigeration of the ship’s chamber forms part of the management of the ship, and the same refrigerating machinery is used for the crew’s food and for the cargo, these facts ought not to affect the conclusion that, quoad the refrigeration of the cargo holds, it is the management of the cargo and not of the ship which is involved. But the point does not arise in this case.’ (citations omitted, NJM)

258. Some machinery on board is exclusively intended for the management of the cargo. For example refrigeration equipment used to cool the cargo holds. Some parts of the engine room are exclusively related to the management of the ship, such as the main engines used for the propulsion of the ship. Other parts of the ship may relate to either, according to the situation, so that hatch covers are part of the vessel’s outer skin in bad weather but for the protection of cargo in port or in calm weather. In the Canadian Highlander cargo was damaged because rain could enter through the hatches which were open to facilitate repairs in port. The carrier invoked the nautical fault exception to escape liability. The House of Lords held that there is a difference between lack of care for the cargo and lack of care for the ship which causes cargo damage. Only the last instance is covered by the exception. Although the hatches were

407. Ibid.
408. Ibid.
open to facilitate the repair of the ship, tarpaulins were rigged to protect the cargo. The purpose of the tarpaulins was protection of the cargo. Neglect to use the tarpaulins constituted lack of care for the cargo so that the carrier could not rely on the exception.410

Conclusion

259. Management of the ship should be distinguished from management of the cargo. The carrier is responsible for damage caused by mismanagement of the cargo. The carrier can rely on exception IV(2)a to escape liability for damage caused by an act or omission concerning the management of the ship but not for mismanagement of the cargo. It can sometimes be hard to qualify an act (or omission) as management of the ship or as care of the cargo. This problem is discussed below.

5.2.3.1 The primary purpose test

260. Because an act or omission can influence the ship and the cargo the question will arise how to qualify that act or omission. The US Supreme Court considered this question in The Germanic, a case governed by the Harter Act.411 That case has been the leading case in the US for almost a century.412 The Germanic arrived in port 36 hours behind schedule and coated with ice (approximately 213 tons). This weight was increased by a heavy fall of snow after her arrival. In order to sail at her regular time on the following Wednesday, cargo was discharged from all of the five hatches at once. At the same time coal was being bunkered from coal barges on both sides. Due to the high centre of gravity and the manner of loading and bunkering of coal the ship eventually listed beyond control and sunk.

The defence of the carrier was that the ship had sunk due to an error in the management of the ship (loading fuel in the form of coal).413 On the other side the cargo interests stated that the damage was a result of mismanagement of the cargo. The U.S. Supreme Court held:

‘The question is whether the damage to the cargo was “damage or loss resulting from faults or errors in navigation or in the management of said vessel”, as was set up in the answers, in which case the owner was exempted from liability by § 3 of the Harter act, or whether it was “loss or damage arising from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery” of merchandise under § 1 of the same, in which case he could not stipulate to be exempt. The second section also recognizes and affirms the “obligations” to carefully handle and store her cargo, and to care for and properly deliver the same.

(…)

410. Gosse Millard v. Canadian Government Merchant Marine, 32 LII.L.Rep. 91. This case is also discussed infra in § 5.2.3.2.
413. The decision is from 1905 when ships still burned coal as fuel. Therefore the loading of coal is an act in the management of the ship. The coal is not cargo but fuel.
If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if (...) the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects falls within both sections; and if that be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss. (emphasis added, NJM)

261. This test is known as the ‘primary purpose test’. Although the Germanic case was governed by the Harter Act the test is also used under the H(V)R.

262. In the Iron Gippsland case damage (vapour contamination) occurred to a cargo of ‘Singapore Gas Oil’ (also known as ‘ADO’). ADO is an inflammable product. To prevent ignition of explosive gases which develop in the tanks containing ADO the tanks are first filled with inert gas.

In the Iron Gippsland case the ADO was contaminated via the inert gas system and its flashpoint reduced to an unacceptable level. The question to be answered was whether the contamination of the ADO was failure to care for the cargo in accordance with art. III(2) or if it was an act covered by the nautical fault exception. The Australia Supreme Court of New South Wales (Carruthers, J.) said that:

‘It is true that inert gas systems were installed on tankers fundamentally for the protection of the vessel. However, the purpose of the inert gas system is primarily to manage the cargo, not only for the protection of the cargo but for the ultimate protection of the vessel from adverse consequences associated with that cargo and, in my view, damage occasioned to cargo by mismanagement of the inert gas system cannot be categorized as neglect or fault in the management of the ship.’ (emphasis added, NJM)

263. I agree. This exception should be strictly construed otherwise it could also cover incidents regarding the care of the cargo. If, in those instances, the exception were to be applied in favour of the carrier the duty contained in art. III(2) could be undermined.

5.2.3.2 The author’s opinion

264. As was noted above old decisions rendered before the enactment of the Hague Rules are still relevant for the construction of the expression ‘management of the ship’. The first English judgement in which the expression was interpreted was the Ferro case. In that decision it was held that stowing of the cargo was not an act covered by the expression ‘management of the ship’. Gorell Barnes, J. said:
'It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo.'

265. In the Glenochil case a clear distinction was made between acts concerning the management of the ship and acts not concerning management. Regarding that distinction it was held:

‘... but the distinction, (....), is one between want of care of cargo and want of care of vessel indirectly affecting the cargo.’

In the same judgement Gorell Barnes J. said:

‘... and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words “management of the said vessel”.’

266. As was said above the U.S. Supreme court developed the ‘primary purpose test’ under the Harter Act in The Germanic and this is still the test used under the H(V)R and the COGSA statutes which are based on the Hague Rules.

267. In Rowson v. Atlantic Transport Company Kennedy J. quoted the following consideration from the Rodney case:

‘... the words “faults or errors in the management of the vessel” include improper handling of the ship as a ship, which affects the safety of the cargo, ...' (emphasis added, NJM)

268. The emphasised passage shows that the act should be an act committed for the sake of the ship, so that an act committed for the sake of the cargo is not an act in the management of the ship.

269. Often the problem in cases concerning the nautical fault exception is the qualification of an act. The question will then be whether the act is an act primarily for the sake of the ship or an act primarily for the sake of the cargo. See e.g. the differences in qualifying the act which caused the damage in the Canadian Highlander case. In the court of appeal Lord Scrutton found that leaving the hatches open (allowing rain to enter which damaged the cargo) was an act for the sake of the ship. The hatches were indeed open because it was necessary for the repair of the ship. On the other hand Greer J. (one of the other three judges of the court of appeal) said with regard to leaving the hatches open:

420. See supra.
‘... the evidence in this case failed to establish any want of care of the vessel, but only want of care of the cargo, consisting of a failure to use the hatch covers and tarpaulins sufficiently to afford adequate protection of the cargo.’

270. If the act which caused cargo damage can be qualified as an act equally well for the sake of the ship as for the sake of the cargo then the exception should be interpreted strictly. It is a strong defence and if the scope of its application were not restricted the exception could undermine the obligation contained in art. III(2). A good example is the *Iron Gippsland* case. The inert gas is used to contain the cargo so it could be seen as an application primarily for the sake of the cargo. On the other hand the application of inert gas could also be qualified as an act in the management of the ship because if the cargo explodes the ship will be damaged. In such a case strict interpretation of the expression will lead to the result that the act is to qualified as an act primarily for the sake of the cargo.

5.2.3.3 An alternative for the primary purpose test?

271. Stevens discusses an alternative for the primary purpose test. That alternative test is two staged. Firstly the question should be answered whether the act would also have been committed if there were no cargo on board. If the answer is ‘no’ then it is an act concerning the management of the cargo. If the answer is ‘yes’ then the second question is: where will the greatest damage occur? If the cargo will suffer the greatest damage the act is qualified as management of the cargo. In the *Iron Gippsland* case a strict interpretation of the expression led to the decision that the application of inert gas was primarily for the purpose of controlling the cargo. Using the alternative test the answer to the first question would probably have been ‘no, the inert gas would not have been applied if no potentially explosive cargo was carried’. That answer leads to the conclusion that, as inert gas is only applied when cargo is carried, the use of inert gas is therefore an act primarily for the care of the cargo and not an act in the management of the ship. In this instance the alternative method leads to the same solution as the primary purpose test. If the act would also have been committed with cargo on board it does not necessarily mean that the act is an act in the management of the ship. As was said above, the decisive factor is where the greatest risk of damage is created. If the act (or omission) primarily or exclusively causes damage to the cargo then the act or omission is management of the cargo and not management of the ship. An example is the pumping out of the bilges. If the bilges are not properly pumped out an amount of the remaining bilge water will primarily cause damage to the cargo if it enters the hold. On the other hand some bilge water in the hold will not affect the safety of the ship and will also not cause damage to the ship. This leads to the result that the carrier will be liable for the cargo damage caused by the bilge water.

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424. Ibid.
425. See infra § 3.8.
426. See supra.
428. See supra.
429. This answer does however depend on the facts. Empty tanks may contain volatile vapours depending on the previous cargo. In that case inert gas would be used to contain those vapours.
5.3 THE FIRE EXCEPTION

However, if the act or omission primarily endangers or damages the ship then the exception will apply because the act or omission is to considered ‘management of the ship’.

272. The alternative method discussed by Stevens can lead to different solutions than the primary purpose test. Stevens discusses a decision of the Antwerp court of Appeal of 5 October 1982. In that case bunkers were overheated causing damage to the cargo. Overheated bunkers will create hardly any risk for the ship, but can damage the cargo due to overheating of the holds. Under the primary purpose test overheating the bunkers would clearly have been an act of management of the ship and thus an exclusion from liability for the owners. Under the alternative test the answer to the first question (would the bunkers have been heated without cargo on board?) is ‘possibly’. The second stage is: where did most damage occur?

273. The answer is ‘damage occurred to the cargo’. Therefore, according to the alternative test, the carrier is liable for mismanaging the cargo. Another example is a decision of the Brussels court of appeal of 22 February 1973. Bunker hoses were connected to the wrong pipe causing fuel oil to access the cargo. No danger or damage existed for the ship but the cargo was damaged, leading to liability of the carrier.

274. In my opinion the last two examples lead to incorrect decisions. The heating of fuel oil and the bunkering of fuel oil are beyond doubt acts of management of the ship. There is no reason to apply rules of construction or interpretation to a case which is clear. Objective reading of the expression ‘management of the ship’ and the purpose of the exception – no liability for damage caused by acts regarding the management of the ship – can only lead to the conclusion that bunkering and heating fuel oil are acts of management of the ship. Fuel oil is required for the propulsion of the ship. Only the hypothetical case of damage caused by loading fuel which is exclusively intended to run machinery required to condition the cargo could be an error in the treatment of the cargo.

The last two examples show that the alternative test should be applied with care.

5.2.4 The intended construction of art. IV(2)a

275. There seem to be consensus on the construction and application of art. IV(2)a, i.e. there is no obvious lack of uniformity. Therefore there is no need to establish the intended construction and application of art. IV(2)a.

5.3 The fire exception

5.3.1 Introduction

276. Art. IV(2)b H(V)R provides:
Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

b. Fire, unless caused by the actual fault or privity of the carrier (emphasis added, NJM).

277. The following questions will be discussed below.

(i) Why is there a proviso added to the exception?
(ii) What is meant by ‘fire’?
(iii) What is meant by ‘actual fault or privity’?
(iv) Which persons can be seen as ‘the carrier’?
(v) How is the burden of proof divided?

278. Before studying these questions, or rather, the possible answers to those questions, some additional information on the Fire Statutes of England and America is required.

5.3.2 The Fire Statutes and the fire exception

5.3.2.1 Introduction

279. When comparing the application of the fire exception of the H(V)R under different legal systems it is important to bear in mind that under American and English law other statutes exonerating the carrier from damage caused by fire apply: the so called ‘Fire Statutes’. The name ‘Fire Statute’ is confusing because the name does not make clear that no more is meant than an article of statutory law. The English Fire Statute is contained in section 186(1) of the Merchant Shipping Act 1995. The American Fire Statute is contained in 46 U.S.C. App. § 182. The Fire Statutes provide the carrier with a fire defence independent of the H(V)R. It is possible that a Fire Statute applies besides the fire exception of the H(V)R.

280. The present English Fire Statute provides:

‘Subject to subsection (3) below, the owner of a United Kingdom ship shall not be liable for any loss or damage in the following cases, namely

(a) where any property on board the ship is lost or damaged by reason of fire on board the ship.’

281. The American statute is contained in section 182 of the Limitation of Ship-owners’ Liability Act of 1851 and it provides:

‘No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by

432. S. 186(1) sub-a of the Merchant Shipping Act 1995. Section 502 of the Merchant Shipping Act 1894 contained an earlier version of the Fire Statute. That section provided: ‘The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, (a) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship, ...’
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means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. 433

282. For the sake of simplicity I shall refer to the fire exception of the HVR as ‘the fire exception’. The expression ‘fire defences’ means the Fire Statute (English or American) and the fire exception jointly.

283. In cases concerning loss or damage of goods by fire the question is which fire defence applies (Fire Statute of fire exception). Another question is if the carrier can rely on the fire defences if the loss or damage was caused by lack of due diligence to make the ship seaworthy. One view is that the carrier can rely on the Fire Statute even if the loss or damage was caused by lack of due diligence. Another view is that the duty to exercise due diligence is an overriding obligation and failure to fulfil that duty will lead to liability of the carrier if that failure caused the loss or damage by fire.

284. Before going in to these points I shall discuss the historical background of the Fire Statutes.

5.3.2.2 The historical background of the Fire Statutes

285. The exoneration for damage by fire provided by the English Fire Statute is based on the principle in the maritime law states that a carrier is not responsible for loss or damage caused by fire unless caused by his actual fault or privity. 434 The reasons are that fire can easily start on board a ship and that the potential danger posed to cargo, vessel and crew that may result from fire is serious. Moreover because of the nature of fire and the destruction that results, the causes of a fire are often difficult to determine. 435 Because of the risk of fire and the destructive consequences of fire the English legislator found it necessary to protect the carrier against liability for damage caused by fire at sea. After the English Fire Statute was established the Americans found themselves bound to follow the English example in the interest of American carriers.

286. In Consumers Import Co. v. Zosenjo (1943) the U.S. Supreme Court explained the historical background of the Fire Statute. Justice Jackson said:

‘At common law, the shipowner was liable as an insurer for fire damage to cargo (...) We may be sure that this legal policy of annexing an insurer’s liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier’s duty (...). To enable our merchant marine to compete, Congress enacted this statute [the Fire Statute, NJM]. It was a sharp departure from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic ef-

433. 46 U.S.C.App. § 182.
435. UNCITRAL WP.21, p. 27 and Aikens et al, p. 271-272. See also Nissan Fire & Marine Insurance v. M/V Hyundai Explorer (Hyundai Explorer), 95 F.3d 641, 646.
ficts than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well-known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subrogees to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.436

287. The Supreme Court quoted Senator Hamlin where he was discussing the bill which led to the Fire Statute:

‘This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine.’437 (…)

288. In Consumers Import Co. v. Zosenjo the U.S. Supreme Court continued to discuss the legislative history.

289. On February 26, 1851, speaking to the bill, Senator Hamlin said:

‘These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary first, from the fact that the English common law system really never had an application to this country, and second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more.’438

290. The above makes it clear that the statutory defences against fire were given to carriers for commercial reasons. The reasons mentioned above are that fire can easily start on board a ship and the potential danger posed to cargo, vessel and crew is great. Because of the nature of fire and the destruction that results, the causes of a fire are of

437. Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851.
ten difficult to determine. 439 For these reasons English and American legislators provided carriers with a statutory protection against responsibility for damage caused by fire. This allowed the carriers to lower their freight rates.

5.3.2.3 *The English Fire Statute* 440

291. The English Fire Statute only applies to ships of the United Kingdom. 441 Because of art. VIII of the Hague Rules the English Fire Statute also applies when the fire exception applies. 442 This means that the carrier can invoke the Fire Statute instead of the fire exception of the HVR. The reason for the carrier to do so is that the Fire Statute offers the carrier more protection than the fire exception of the HVR. Contrary to the fire exception the English Fire Statute also applies in case of a proven failure to fulfil the duty of art. III(1) HVR (the duty to exercise due diligence to furnish a seaworthy ship) unless the shipowner could be proved to have been personally wilful or reckless. 443 This was also the construction of section 502 of the Merchant Shipping Act 1894 (the older version of the English Fire Statute). E.g. in *Virginia Carolina Chemical Company v. Norfolk and North American Steam Shipping Company* the Court of Appeal held that a shipowner is not deprived of the protection of s. 502 merely by reason of the fact that the fire is caused by the unseaworthiness of the ship. Buckley L.J. said:

> The first question is as regards the true construction of s. 502 of the Merchant Shipping Act, 1894. Apart from statute a shipowner was at common law under two liabilities, the one that of an insurer arising from the fact that he was a carrier, and therefore bound to produce the goods which had been entrusted to him for carriage, and the other under an implied warranty of seaworthiness. The statute in the case of fire, if I rightly understand it, relieves him from both the first and the second of those liabilities, if the fire happens without his actual fault or privity. It relieves him not only from the liability as an insurer but also from the liability under an implied warranty of seaworthiness. To express the same thing in other words, the section is not to be read as if it said “the owner of a seaworthy British sea-going ship”; it is, “*the owner of any British sea-going ship,* be it seaworthy or unseaworthy, *shall not be liable* for damage by fire unless it happens with his actual fault or privity. That is the construction which I place upon the statute. If there is no special contract, the defendants can rely on the statute construed as I have construed it.” 444 (emphasis added, NJM)

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440. See § 5.3.2.1 for the text of the English Fire Statute.
441. Section 13(3) Merchant Shipping Act defines ‘A United Kingdom Ship’ as ‘A ship is a “United Kingdom ship” for the purposes of this Act (except section 85 and 144(3)) if the ship is registered in the United Kingdom under Part II (and in Part V “United Kingdom fishing vessel” has a corresponding meaning)’.
442. That article reads: The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.
292. Depending on the circumstances either the English Fire Statute or the fire exception will apply. The existence of the two regimes (Fire Statute and fire exception) relating to the same issue (damage caused to cargo by fire) does not lead to problems in English courts. The same cannot, however, be said for American courts.

5.3.2.4 *The American Fire Statute*[^445]

293. The words ‘No owner of any vessel, ...’ indicate that the American Fire Statute can also apply to foreign vessels. There is no explicit restriction that the rule can only apply to American ships. See e.g. *The Pocone* case concerning a Brazilian carrier.[^446]

294. Although the proviso ‘unless such fire, ...’ is worded differently than the fire exception, American courts have held that the words ‘actual fault or privity’ of the fire exception, and the words ‘design or neglect’ have the same meaning.[^447]

295. The USA have been party to the Hague Rules since 1936.[^448] The American codification of the Hague Rules is the US ‘Carriage of Goods by Sea Act’ (US COGSA). The fire exception of the Hague Rules is codified by art. 4(2)b COGSA. Art. 8 of the US COGSA should cause the American Fire Statute to prevail above the fire exception.[^449] However, the existence of two statutory provisions dealing with the same issue (fire causing damage to cargo) has led to two different lines of reasoning in the American courts.

5.3.3 **American decisions**

296. If the American Fire Statute applies on its own there is no statutory legal obligation for the carrier to exercise due diligence to provide a seaworthy ship. There is however an implied warranty to provide a seaworthy ship. In *Earle & Stoddart, Inc et al. v. Ellerman’s Wilson Line, Ltd.* the U.S. Supreme Court held:

‘...in every contract of affreightment there is, unless otherwise expressly stipulated, an implied warranty of seaworthiness at the commencement of the voyage. The warranty is absolute that the ship is in fact seaworthy at that time, and the liability does not depend upon the knowledge or ignorance, the care or negligence, of the shipowner or charterer.’[^450] (emphasis added, NJM)

297. This means that a contract for the carriage of goods by sea contains the implied warranty that the ship be seaworthy when she commences the voyage. The 9th Circuit follows a different line of reasoning than the other circuits regarding the relationship

[^445]: See § 5.3.2.1 for the text of the American Fire Statute.
[^447]: See e.g. Damodar Bulk Carriers, Ltd. v. People’s Insurance Company of China, 903 F.2d 675, 681.
[^448]: 46 U.S.C. app. sections 1300 etc (COGSA). The USA did not ratify the Visby protocol.
[^449]: 46 USC app. section 1308 is referred to (also referred to as section 8 US COGSA). That section provides: The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [46 App. U.S.C. 801 et seq.], or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States [46 App. 181-188] or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.
that exist between the American Fire Statute, the implied warranty that the ship be seaworthy and the COGSA obligation to exercise due diligence to furnish a seaworthy ship.

5.3.3.1 Application of the Fire Statute on its own: breach of non-delegable duty by others than owner is not to be considered ‘design or neglect of the owner’

Earle & Stoddart v. Ellerman’s Wilson Line

298. In Earle & Stoddart v. Ellerman’s Wilson Line the U.S. Supreme Court held that the owner’s failure to diligently determine whether the vessel was seaworthy was not ‘neglect of such owner’ within the Fire Statute so that the owner could rely on the Fire Statute. The U.S. Supreme Court said that the purpose of the Fire Statute would be thwarted if the Fire Statute would be construed in such a way that the carrier would have to bear a risk which the legislator aimed to take away from him. The breach of a non-delegable duty by others than those who could be considered to be the carrier personally is not to be considered ‘design or neglect of the owner’. The US Supreme Court followed earlier English decisions.

A/s J. Mowinckels Rederi v. Accinanto (The Ocean Liberty)

299. The Earle & Stoddart v. Ellerman’s Wilson Line reasoning was applied under COGSA in A/s J. Mowinckels Rederi v. Accinanto (The Ocean Liberty). The Court of Appeal (4th Circuit) held:

‘[w]e do not think that the carrier can be held liable on the theory that stowage of cargo was a non-delegable duty negligence in performance of which should be imputed to the carrier in determining whether it had exercised due care to make the vessel seaworthy. Directly in point is the case of Earle & Stoddart v. Ellerman’s Wilson Line, supra, 287 U.S. 420, 53 S.Ct. 200, in which a vessel was held to be exempted from liability by reason of the fire statute, although she was rendered unseaworthy before leaving port as the result of the negligent stowage of coal in her bunkers by her chief engineer. The exemption of the fire statute is admittedly the same as that provided by the Carriage of Goods by Sea Act. The Supreme Court, speaking through Justice Brandeis, thus dealt with the questions which seem to be crucial here: “The contention is that the statute does not confer immunity where the fire resulted from unseaworthiness existing at the commencement of the voyage and discoverable by the exercise of ordinary care; (...) The first statute, in terms, relieves the owners from liability ‘unless such fire is caused by the design or neglect of such owner.’ The statute makes no other exception from the complete immunity granted. The cargo owners do not make the broad contention that the statute affords no protection to the vessel owner if the fire was caused by unseaworthiness existing at the commencement of the voyage. Their conten-

451. See supra. The purpose was to allow American carriers to compete on an equal footing with English carriers.


tion is that it does not relieve the owner if the unseaworthiness was discoverable by due diligence. The argument is that the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable, and if the unseaworthiness could have been discovered by due diligence there was necessarily neglect of the vessel owner. (...) The courts have been careful not to thwart the purpose of the fire statute by interpreting as ‘neglect’ of the owners the breach of what in other connections is held to be a non-delegable duty.”454 (emphasis added, NJM)

300. The above shows that where the Fire Statute applies on its own (so not besides COGSA) there is no problem. Even if the fire was caused by lack of due diligence to make the ship seaworthy the carrier can still rely on the Fire statute, unless the lack of due diligence qualifies as design or neglect of the owner.

5.3.3.2 When both the Fire Statute and COGSA apply: the 9th Circuit contrary to the other circuits?

301. When the Fire Statute and COGSA both apply in the same case the court of appeal of the 9th Circuit tends to hold that the carrier cannot assert the fire defences if lack of due diligence to make the ship seaworthy caused the fire.455 The courts of appeal of 2nd, 5th and 11th Circuits apply the law differently i.e. if the Fire Statue and the fire exception are both applicable then the Fire Statute will prevail ex section 8 COGSA which provides:

‘The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [46 App. U.S.C. 801 et seq.], or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States [46 App. 181-188] or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.’

302. Therefore if the fire exception of COGSA applies as well as the Fire Statute, the fire exception should be ignored and the Fire Statute should be applied. That means that the carrier can only be responsible for damage by fire if the fire was caused by the owners design or neglect.456

303. Below relevant American decisions are discussed to illustrate the different lines of reasoning discussed above.

Asbestos Corp v. Compagnie de Navigation Fraissinet et Cyprien Fabre (2nd Cir. 1972)457

304. This is the first judgement of the 2nd Circuit in a case concerning damage by fire in a case in which both the Fire Statute and the fire exception of COGSA applied. In that case fire in the engine room could not be extinguished because all fire fighting

455. See e.g. Sunkist Growers Inv v. Adelaide Shipping Lines Ltd., 603 F.2d 1327.
equipment was in the engine room and thus could not be reached. It was held that the ship was unseaworthy due to the absence of fire fighting equipment. The question to be answered was if the unseaworthiness should preclude application of the fire exception / Fire Statute. The court of appeal (2nd Circuit) affirmed the decision of the district court (SDNY) in which Judge Levet said that an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage – either by starting a fire or by preventing the fire to be extinguished – will exclude the shipowners form the exemption of the Fire Statute and COGSA. Judge Levet of the district court had said:

“The owners of the Marquette through their “design or neglect” and “privity or knowledge” were negligent in placing all fire fighting equipment inside the engine room and failing to provide an emergency pump or fire system located or controlled from outside the engine room. This negligence on the part of the shipowners displays a total disregard for minimal protection of cargo and rendered the Marquette unseaworthy. Under the circumstances this court concludes that the defendant-shipowners are not exempt from liability under COGSA § 1304(2) (b) or the Fire Statute.”

458

Liberty Shipping (9th Cir. 1975)

305. In this case the Fire Statute and COGSA applied. In a short judgement the 9th Cir. agreed with the consideration in the Asbestos Corp case where the 2nd Circuit (1973) held that an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage will exclude the shipowners form the exemption of the Fire Statute and COGSA. The 9th Circuit also held that:

The statutory exemptions, it is contended, do not permit the imposition of liability by non-delegable duty. Appellant relies on Earle & Stoddart, Inc. v. Ellerman’s Wilson Line, Ltd., 287 U.S. 420, 53 S.Ct. 200, 77 L.Ed. 403 (1932), where it was held that owner liability for loss attributable to unseaworthiness cannot be imposed on the theory of a non delegable duty created by implied warranty; and that the statutory requirement that there be design or neglect on the part of the owner precludes such a result.

However, the district court’s holding here was entirely consistent with Earle & Stoddart. COGSA provides, 46 U.S.C. s 1303(1):

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(a) Make the ship seaworthy, ...

In the case before us liability was not based on the traditional elements by which an owner is held liable for unseaworthiness of his vessel – those related to warranty and non delegable duty. Here there was owner neglect and actual fault constituting failure to exercise the due diligence required by COGSA through permitting the vessel to put to sea without having properly trained the master and crew in the use of fire-fighting equipment and without having


remedied deficiencies in the vent closing devices. Where the unseaworthy conditions that were the cause of the fire damage existed by reason of owner neglect or actual fault, the exemptions created by the Fire Statute and COGSA do not apply.\textsuperscript{460}

306. This case makes clear that COGSA is applied by the 9th Circuit regardless of art. 8 COGSA through which the Fire Statute should prevail. In the next case, Sunkist, the line of reasoning of the 9th Circuit was clarified.\textsuperscript{461}

Sunkist (9th Cir. 1979)\textsuperscript{461}

307. In this case the Fire Statute and COGSA applied. Fire broke out in the engine room and spread via the bilge. A break in the fuel line and oil splashing onto the hot exhaust turbo chargers of the numbers 1 and 2 generators was the cause of the fire. Due to errors of the crew the fire could spread resulting in failure of refrigeration machinery causing loss of the cargo of fruit. The vessel owner and charterer were in violation of COGSA both in their failure to provide a proper compression or flange joint in the fuel line to a generator and in failing to properly man and equip the crew properly trained in engine room fire-fighting. The 9th Circuit held that if a ship is unseaworthy due to lack of due diligence the carrier could not rely on the fire exception or Fire Statute. The 9th Circuit did make clear that ‘neglect of the owner’ under the Fire Statute refers to ‘the neglect of managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees.’ In other words the neglect of the employees is not imputed to the carrier.

308. The court of appeal (9th Circuit) cited the Canadian case Maxine Footwear (The Maurienne)\textsuperscript{462} and concluded that if there was a breach of the duty contained in art. 3(1) COGSA which caused the loss, the carrier is responsible for the damage. Regarding art. 8 COGSA the court held:

‘we do not believe the provisions of Section 8 of the original COGSA, 46 U.S.C. s 1308, invalidates or in any manner affects COGSA’s requirements that the carrier shall be bound to exercise due diligence to make the ship seaworthy. Section 1308 provides that the provisions of the legislation shall not affect the rights and obligations of the carrier under the Fire Statute and other legislation. As we have already said, the Fire Statute must be read in the light of COGSA, the more recent legislation.’\textsuperscript{463}

\textsuperscript{460} Liberty Shipping, 509 F.2d 1249.
\textsuperscript{461} Sunkist Growers Inv v. Adelaide Shipping Lines Ltd., 603 F.2d 1327.
\textsuperscript{463} Sunkist Growers Inv v. Adelaide Shipping Lines Ltd., 603 F.2d 1327.
309. This is an unrealistic construction of section 8 COGSA because that construction reaches a solution which is contrary to the intention of section 8. That intention is that older legislation should prevail.464

310. The court of appeal of the 9th Circuit emphasised the importance of uniformity. The court held:

‘If not in conflict with our decisions, and they are not, we should follow the decisions of the Canadian authorities that have already interpreted The Hague Rules. See Foscolo, Mango & Co., Ltd. v. Stag Line (1932) A.C. 328; (1931) 41 Lloyd’s List L.R. 165 (1931). It is there said “As these rules must come under the consideration of foreign courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the Rules should be construed on broad principles of general acceptance.”’465

311. The attempted uniformity is however not achieved. The 9th Circuit applies the Maxine Footwear (The Maurienne) decision of the Privy Council differently than the Privy Council does. In The Maurienne it was made clear that the duty to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage is an overriding obligation and that failure to fulfil that obligation by employees of the carrier will be imputed to the carrier and cause the fire exception to fail. In the decisions of the 9th Circuit however, only lack of due diligence by the carrier personally will cause the fire exception to fail. Lack of due diligence by employees or agents is not imputed to the carrier. Furthermore the Privy Council based its decision that art. III(1) was an overriding obligation on the words ‘Subject to the provisions of article 4’ in art. III(2). These words were however omitted from the U.S. COGSA. This indicates that the American legislator did not intend to differentiate between the strictness of the duty contained in art. III(1) and art. III(2) as the 9th Circuit does.

Another obstacle to uniformity is the existence of the Fire Statutes. Because England and America have the Fire Statutes it is impossible to reach uniformity with nations who do not have such legislation as the Fire Statutes, without ignoring art. 8 COGSA (or art. VIII of the Hague Rules). The Maurienne is based on the Canadian Water Carriage of Goods Act, 1936. There is no fire statute in Canadian law. If there had been a Canadian fire statute the Maurienne would have had a different outcome because the carrier would have been able to rely on the fire statute.

312. In the Sunkist case the court of appeal of the 9th Circuit made clear that the failure of the carrier personally466 to use due diligence to make the ship seaworthy will deny the carrier of the fire exception if the failure to exercise due diligence led to an

464. Art. 8 COGSA provides: ‘The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916 [46 App. U.S.C. 801 et seq.]; or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States [46 App. 181-188] or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.’


466. In this case the 9th Circuit recognises that for the application of the fire exception a failure of the carrier’s employees to exercise due diligence will not be imputed to the carrier (at p. 1336).
inexcusable condition of unseaworthiness. An inexcusable condition of unseaworthiness is a condition of unseaworthiness that existed because of the carrier’s lack of due diligence. At first glance the court of appeal seems to be adding a reason to the statutory proviso of the defence: an inexcusable condition of unseaworthiness. Lack of due diligence by the carrier personally to make the ship seaworthy will, however, only be an addition to the proviso if that lack of due diligence cannot be considered equal to ‘actual fault or privity’ of the carrier. It seems to me, however, that the two reasons to deny the fire defence, are the same. Lack of due diligence by the carrier personally to make the ship seaworthy is equal to actual fault or privity (or design or neglect) of the carrier. Indeed the Sunkist court held:

> ‘Here, the design or neglect was that of managing officers or supervisory employees, not that of the master or crew or subordinate employees. The “design or neglect” being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to the commencement of the voyage.’

313. The 9th Circuit denied the carrier the benefit of the Fire Statute because the carrier personally failed to exercise due diligence to make the ship seaworthy. This failure is equal to ‘design or neglect’ of the Fire Statute and therefore the carrier cannot rely on the defence. The result is correct but the reasoning could have been clearer.

**Ta Chi Navigation (2nd Cir. 1982)**

314. This was the second opportunity the 2nd Circuit had to decide a case concerning cargo damaged by fire. The fire was caused by an explosion which was caused by a gas leak.

Van Graafeiland, Circuit Judge said:

> ‘The shipper can prove that the carrier caused the damage either by proving that a negligent act of the carrier caused the fire or that such an act prevented the fire’s extinguishment. Asbestos Corp. Ltd., supra, 480 F.2d at 672. This delineation of the carrier’s liability did not change with the 1936 enactment of the Carriage of Goods by Sea Act (COGSA) (...). Congress specifically provided that COGSA shall not affect the rights and obligations of the carrier under the Fire Statute. 46 U.S.C. s 1308. Congress also included in COGSA a provision that the carrier shall not be responsible for fire damage resulting from fire “unless caused by the actual fault or privity of the carrier”. 46 U.S.C. s 1304(2)(b) (...). We disagree (...) with the 9th Circuit’s interpretation of the interrelation between the Fire Statute and COGSA, an interpretation that is concurred in by no other Circuit. (...) In American Tobacco Co. v. The Katingo Hadjipatera (...) Judge Frank, writing for himself, Judge Swan, and Judge Learned Hand, said that, once a shipowner

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467. Ibid. at p. 1325.
468. Hyundai Explorer, 93 F.3d 641, 647.
469. That proviso provides that the defence will fail if the fire was caused by the actual fault or privity of the carrier.
470. Ibid.
established loss by fire, "(n)o liability could be imposed unless the owners of (cargo) car-
ried the burden of proving that the fire was caused by the shipowner's design or negligence
or the carriers' actual fault or privity." (...) When Congress wanted to put the burden
of proving freedom from fault on a shipowner claiming the benefit of an ex-
emption, it specifically said so. See 46 U.S.C. s 1304(2)(q). The Sunkist court
would read the language of subsection (q) into subsection (b), "although Congress did not put it there". (...) This Court has not put it there either. We adhere
to our prior holdings that, if the carrier shows that the damage was caused by fire, the
shipper must prove that the carrier's negligence caused the fire or prevented its extinguis-
hment. If on remand the shipper fails to meet this burden, the action must be dismissed.
Only if the shipper sustained the burden would the carrier have the obligation to establish
what portion of the damage was not attributable to its fault." 472 (emphasis added,
NJM)

315. The above decision was followed by the 5th Circuit in Westinghouse Electric473 and
the 11th Circuit in Banana Services v M/V Tasman Star.474

**Damodar Bulk Carriers, Ltd. v. People’s Insurance Company of China (9th Cir. 1990)**

316. The 9th Circuit clarified its previous decisions in the Damodar Tanabe case. In that
case the COGSA fire exception applied and the US Fire Statute applied by its incorpo-
ration in the bill of lading. The 9th Circuit repeated that under the Sunkist rules the car-
rier has an

'overriding obligation to make the ship seaworthy [sic, NJM]475 and if that obli-
gation is not fulfilled and the non-fulfillment causes the damage, the fire im-
munity of Section 4, Paragraph 2(b), cannot be relied upon.'476

317. The 9th Circuit explained that none of its earlier cases presented facts that pose
the problem of the burden of proving the cause of the fire. That problem did not arise
in the earlier cases because in those cases unseaworthiness was the cause of the dam-
age.477

318. Sneed (Circuit Judge) said:

'Section 1304(2)(b) excuses the carrier or the ship from responsibility “for loss
or damage arising or resulting from (…) [f]ire, unless caused by the actual fault
or privity of the carrier.” The provision itself does not state on which party the
burden of proof lies when the cause of the fire is unknown. None of our earlier
cases present facts that pose this specific problem. In earlier cases unseawor-thi-
ness was the cause of the damage. See, e.g., Sunkist Growers, Inc. v. Adelaide Shipping
Lines, 603 F.2d 1327, 1341 (9th Cir.1979), cert. denied, 444 U.S. 1012, 100 S.Ct. 659,

474. Banana Services v. M/V Tasman Star 68 F.3d 418 (11th Cir. 1995).
475. The obligation is to exercise due diligence to make the ship seaworthy.
476. Damodar Bulk Carriers, Ltd v. People’s Insurance Company of China, (Damodar Tanabe), 903 F.2d 675.
477. Ibid. at page 686.
62 L.Ed.2d 640 (1980) (holding that carrier could not invoke the fire exemption if it failed to carry the burden of showing due diligence to make the ship seaworthy and the unseaworthiness caused the cargo damage); In re Liberty Shipping Corp., 509 F.2d 1249, 1252 (9th Cir.1975) (holding that carrier could not invoke COGSA and Fire Statute exemptions where the “unseaworthy conditions that were the cause of the fire damage existed by reason of owner neglect or actual fault”). Here unseaworthiness has not been established as the cause of the damage.

When that is the case, the shifting burdens of proof take a slightly different focus. First, the carrier has the burden to show that the loss was caused by one of the section 1304(2) exemptions, in this case, fire. 46 U.S.C. § 1304(2)(b). That burden has been successfully borne in this case. At this point the burden returns to the shipper to prove that the fire was “caused by the actual fault or privity of the carrier.” See In re Ta Chi Navigation (Pan.) Corp., S.A., 677 F.2d 225, 228 (2d Cir.1982) (“If the carrier shows that the damage was caused by fire, the shipper must prove that the carrier’s negligence caused the fire or prevented its extinguishment.”) (quoting Asbestos Corp. v. Compagnie De Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 673 (2d Cir.1973)).

319. To summarise: Here the cause of the damage was not unseaworthiness. This means that once the carrier has proved damage by fire the cargo interests have to prove that fire was caused by the actual fault or privity to beat the fire exception defence.

320. The 9th Circuit then went on to explain that:

‘Sunkist, 603 F.2d at 1327, does not alter this analysis. In Sunkist, the court did not reach the question before us. The Sunkist court merely reasoned that because the ship’s unseaworthiness caused the loss, the carrier could not invoke the fire exception. Id. at 1336. A different issue arises in this case. Here the cargo interests have failed to carry their burden of proof to show that unseaworthiness had caused the loss and now insist that they need not show that the carriers’ negligence caused the fire. This would weight the scales too heavily in favor of the cargo interests.’

321. It can be concluded that if the damage was not caused by unseaworthiness the law of the 9th Circuit is the same as that of the 2nd, 5th and 11th. However if the Fire Statute and COGSA apply and if unseaworthiness caused the fire and the cause of the unseaworthiness was due to the failure to exercise due diligence to make the ship seaworthy, the 9th Circuit applies the law as if the Fire Statute does not exist. The 9th Circuit considers the duty to exercise due diligence to make the ship seaworthy an overriding

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478. Footnote quoted: ‘The existence of the Fire Statute, 46 U.S.C.App. § 182, as a contractual term in the bill of lading does not change this analysis. Under that statute, the carrier must prove that the loss was caused by fire, and then the shipper must prove that the fire was “caused by the design or neglect of such owner.” (…) We agree with the Second Circuit that “design or neglect” is functionally equivalent to “actual fault or privity.” Asbestos Corp. v. Compagnie De Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669, 672 (2d Cir.1973).’

479. Damodar Tanabe, 903 F.2d 675, 686.

480. Ibid. at p. 686-687.
obligation. Under the law of the 9th Circuit this means that if lack of due diligence by the carrier personally to make the ship seaworthy caused the fire, the carrier cannot rely on the Fire Statute. In the Hyundai Explorer case the 9th Circuit repeated its rule that, when applying the fire exception, the negligence of employees of the carrier is not to be imputed to the carrier.

Hyundai Explorer (9th Cir., 1996)

322. In this case fire was caused by a faulty repair job in the engine room. The fault was not discoverable by due diligence and it was not possible to determine who was responsible for the repair job. Both the Fire Statute and the fire exception applied. The cargo interests argued that the duty to exercise due diligence to make the ship seaworthy was a non-delegable duty, meaning that the fault of an employee was to be regarded as a fault of the carrier. The 9th Circuit did not agree and held:

“This claim is without merit and manifests Cargo Interests’ failure to recognize the different standards of due diligence that apply in the fire defences and other COGSA exemptions. While the carrier’s duty of due diligence is non-delegable for exoneration under the non-fire COGSA exemptions, a different standard of due diligence, one derived from the Fire Statute, governs fire cases and eliminates vicarious liability imputed to the carrier. Under the fire defenses, a carrier is liable only for “his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents as distinguished from that of the master or subordinates.” Consumers Import Co. v. Kabushiki Kaisha, 320 U.S. 249, 252, 64 S.Ct. 15, 16, 88 L.Ed. 30 (1943); see also Earle & Stoddart v. Ellerman’s Wilson Line, 287 U.S. 420, 427, 53 S.Ct. 200, 201, 77 L.Ed. 403 (1932) (“The courts have been careful not to thwart the purpose of the fire statute by interpreting as ‘neglect’ of the owners the breach of what in other connections is held to be a non-delegable duty.”); Westinghouse Elec. Corp. v. M/V “Leslie Lyes”, 734 F.2d 199, 209 (5th Cir.), cert. denied, 469 U.S. 1077, 105 S.Ct. 1077, 105 S.Ct. 577, 83 L.Ed.2d 516 (1984); Hasbro Indus. v. M/S St. Constantine, 705 F.2d 339, 342 (9th Cir.1983) (holding that the negligence of the “shipowner’s supervisory or managing employees” was sufficient to find personal negligence); In re Ta Chi Navigation Corp., S.A., 677 F.2d 225, 228 (2d Cir.1982) (“Neglect ... means negligence, not the breach of a non-delegable duty.”); Sunkist, 603 F.2d at 1336 (stating that “‘neglect of the owner’ under the Fire Statute refers to ‘the neglect of the managing officers and agents as distinguished from that of the master or other members of the crew’”) (quoting Albina Engine & Machine Works v. Hershey Chocolate Corp., 295 F.2d 619, 621 (9th Cir.1961)); In re Liberty Shipping Corp., 509 F.2d 1249, 1252 (9th Cir.1975); Asbestos Corp. Ltd. v. Compagnie De Navigation Fraissinet et Cyprien Fabre et al., 480 F.2d 669, 673 n. 7 (2d Cir.1973).

Although a carrier generally is not liable for the negligence or lack of due diligence of its crew or other lower level employees, it still may be liable for the actions of an employee responsible for starting the fire or preventing its spread if the carrier was personally negligent, for example, by not adequately training
the employee or by failing to provide sufficient fire fighting equipment. See, e.g., Hasbro, 705 F.2d at 342; Asbestos Corp., 480 F.2d at 672. 483

323. The 9th Circuit thus repeated the point of view taken in its previous decisions that the negligence of the carrier’s employees is not imputed to the carrier. Regarding the requirement to exercise due diligence to make the ship seaworthy the court of appeal of the 9th Circuit said:

‘Exoneration under the fire defenses is not voided by an unseaworthy condition, but rather by an “inexcusable” unseaworthy condition, i.e., one that existed because of the carrier’s lack of due diligence. See Hasbro, 705 F.2d at 341; Sunlight, 603 F.2d at 1335 (quoting Asbestos Corp., 480 F.2d at 672). To carry its burden of proving due diligence, HMM had to prove that it had done all that was “proper and reasonable” to make the Vessel seaworthy. See Martin v. The Southwark, 191 U.S. 1, 15-16, 24 S.Ct. 1, 5-6, 48 L.Ed. 65 (1903). 484

Conclusion: 9th Circuit contra 2nd, 5th and 11th Circuits?

324. It has now become clear that the disagreement between the 9th Circuit and the 2nd, 5th and 11th Circuits is more academic than real. The latter three circuits will allow the fire defences (Fire Statute and probably fire exception) unless the fire was caused by the carrier’s actual fault or privity. An inexcusable condition of seaworthiness due to lack of fire fighting equipment or lack of crew training will constitute such actual fault or privity.

The 9th Circuit seems to reach same result but on different grounds. The 9th Circuit introduces an overriding obligation 485 (based on Maxine Footwear) to exercise due diligence to make the ship seaworthy. Failure to fulfil this obligation by the carrier personally will deprive him of the fire exception and the fire statute. An inexcusable condition of seaworthiness caused by the carrier’s failure to properly equip the ship with fire fighting equipment and man it with a properly trained crew will prove failure to fulfil the overriding obligation and therefore will deprive the carrier of the benefit of the Fire Statute or the fire exception.

All of the circuits recognise that negligence of the carrier’s employees or agents is not imputed to the carrier. The results of the 9th Circuit are however the same as the other circuits only for different reasons. The 9th Circuit will deny the defence because of a breach of an overriding obligation by the carrier personally. In the other circuits the exception will also be denied, but in those circuits the reason would be that the fire was caused by the carrier’s design or neglect. The difference in construction does not lead to a difference in application of the fire defences.

483. Hyundai Explorer, 93 F.3d 641.
484. Ibid.
485. See § 5.3.2. for a comment on the introduction of an overriding obligation under U.S. COGSA.
5.3 THE FIRE EXCEPTION

5.3.3 What if COGSA applies alone and not besides the Fire Statute?

It can be derived from Westinghouse Electric\textsuperscript{486} and Banana Services v. M/V Tasman Star\textsuperscript{487} that if the fire exception would apply on its own (i.e. not additional to the Fire Statute) the decisions of the 2nd, 5th and 11th Circuits would not be different. Schoenbaum also remarks that fire cases are treated \textit{sui generis} under COGSA.\textsuperscript{488} This means that the construction of the 2nd, 5th and 11th Circuits of the fire exception on its own would be the same as the construction of the fire exception if it applied with the Fire Statute. This construction makes sense because it is in line with the reasoning that the intention of the framers of the Hague Rules was to incorporate the Fire Statute into the Rules. This view is supported by the fact that the addition of the proviso to the fire exception was added after the proposal of the USA.\textsuperscript{489} It would seem that the intention was to make the fire exception similar to the US Fire Statute. It has indeed been said that the fire exception under the Hague Rules could yield a different interpretation from US COGSA, because the Hague Rules do not have the antecedent of the Fire Statute.\textsuperscript{490}

5.3.3.4 Conclusion

In the U.S. only fault or neglect of the carrier personally will cause the fire defences to fail. Failure by the carrier personally to exercise due diligence to make the ship seaworthy qualifies as fault or neglect and will cause the fire defences to fail. However, failure of the carrier’s employees or agents to exercise due diligence to make the ship seaworthy will not be imputed to the carrier and will not cause the fire defence to fail. Under English law this is different. Failure of the carrier’s employees or agents to exercise due diligence to make the ship seaworthy is imputed to the carrier and is considered a breach of the overriding obligation to exercise due diligence to make the ship seaworthy.

\textsuperscript{486} Westinghouse Electric Corp v. M/V Leslie Lykes, 734 F.2d 199 (5th Cir. 1984).

\textsuperscript{487} Banana Services v. M/V Tasman Star, 68 F.3d 418 (11th Cir. 1995).

\textsuperscript{488} Schoenbaum 2003, p. 620.

\textsuperscript{489} See infra § 5.3.4.

\textsuperscript{490} Damodar Bulk Carriers Ltd., 903 F.2d 675, 681 (2nd Circuit). Speaking through Circuit Judge Sneed the 9th Circuit Court of Appeal said:

"COGSA and the Hague Rules are virtually identical in their language. The only possible discrepancy is an interpretive one involving the fire exception in COGSA [...] and the International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), art. IV(2)(b) [...] Prior to COGSA’s passage, bills of lading under American law were subject to the Fire Statute [...] enacted in 1851. The Fire Statute attempted to free the vessel owner from liability for fires on board unless the fire started because of his “design or neglect”. This language differed slightly from COGSA's “actual fault or privity” in the fire exemption [...] Nevertheless, Mr. Cletus Keating, who represented the American Steamship Owners’ Association at the 1935 hearings on COGSA, testified that commercial interests viewed these clauses as having the same legal effect: I personally do not believe there is any difference between actual fault, privity, design, or neglect. This language here on line 8, page 7, follows the language of the British statute, and, of course, that is the language of the original convention, and I do not believe we ought to put in different words, because that would interfere with the effectiveness of the language; and as it is, I do not think it interferes with the uniformity of the substance.

Carriage of Goods by Sea: Hearing on S. 1152 Before the Senate Comm. on Commerce, 74th Cong., 1st Sess. 60 (1935)." Gilmore and Black observe that the courts have interpreted COGSA “to save the Fire Statute from repeal”.

Gilmore & Black, supra, at 161.

Because the Hague Rules do not have this antecedent, the fire exception under the international version could yield a different interpretation from COGSA. (emphasis added, NJM)
seaworthy so that the fire exception of the Hague Rules will fail. However, this is not so for the English Fire Statute. The English Fire Statute can relieve the carrier from responsibility even if the duty to exercise due diligence was not fulfilled.

5.3.4 The proviso ‘unless caused by the actual fault or privity of the carrier’ in the fire exception

327. Under the Hague (Visby) Rules the carrier is not responsible unless the fire was caused by his actual fault or privity. During the Diplomatic Conference of October 1923 Sir Leslie Scott recognised that there was something illogical in including the reservation ‘the actual fault or privity of the carrier’ in the fire exception, when there was the same provision in the q-exception (‘catch all’). But he feared omitting the proviso, which recalled the previous rounds of the compromise finally reached by the interested parties.491

It seems to be a proviso added to be sure that it is clear that the carrier means the carrier personally and e.g. not the fault or privity of the agents of the carrier. The q-exception will apply only if there was no negligence by the carrier or his agents and servants. Therefore the wording of the fire exception is similar to the wording of the Fire Statutes. Furthermore, the fact that they were added on the proposal of the United States492 increases the likelihood of the intention of similarity with the Fire Statutes. Therefore I do not agree with the remark of Sir Leslie Scott that the proviso is illogical.

328. It has been said that this phrase did not merely denote the fault of someone for whom the carrier was responsible, but required personal fault of the carrier, or, where as is usual the carrier is a corporation, its alter ego ‘directing mind and will’.493

329. The question of how to determine whose act or knowledge or state of mind was to be attributed to the company was discussed by the Privy Council in Meridian Global Funds Management Asia Ltd. v. Securities Commission.494 The Privy Council held that a company’s rights and obligations were determined by rules whereby the acts of natural persons were attributed to the company normally to be determined by reference to the primary rules of attribution generally contained in the company’s constitution and implied by company law and or general rules of agency; but that, in an exceptional case, where application of those principles would defeat the intended application of a particular provision to companies, it was necessary to devise a special rule of attribution to determine whose act or knowledge or state of mind was for the purpose of that provision to be attributed to the company; that, although the description of such a person as the ‘directing mind and will’ of a company did not have to be apposite in every case, knowledge of an act of a company’s duly authorised servant or agent, or the state of mind with which it was done, would be attributed to the company only where a true construction of the relevant substantive provision so required.495

491. Travaux Préalatoires, p. 401.
492. Travaux Préalatoires, p. 402.
495. Ibid.
5.3 THE FIRE EXCEPTION

330. The Privy Council held that, having regard to the policy of the applicable rules (the Securities Amendment Act 1988), the appropriate rule of attribution in this case led to the decision that the knowledge of a person was attributable to the company irrespective of whether that person could be described in a general sense as the directing mind and will of the company.

331. Lord Hoffmann, speaking for the Privy Council, said:

‘Once it is appreciated that the question [of whose act (or knowledge or state of mind) was for this purpose attributable to the company, NJM] is one of construction rather than metaphysics, the answer in this case seems to their Lordships to be (...) straightforward (...) The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under section 20(3). The fact that Koo did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships’ view affect the attribution of knowledge and the consequent duty to notify.

It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the “directing mind and will” of the company. But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in In re Supply of Ready Mixed Concrete (No. 2) [1995] 1 A.C. 456 and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515. On the other hand, the fact that a company’s employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaugh-
ter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.\textsuperscript{496}

332. In Lennard’s Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd. (The Edward Dawson) the question was whether the company could invoke the protection of s. 502 of the Merchant Shipping Act 1894 to relieve it from the liability which the respondents sought to impose on it. That section provided:

‘The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, (a) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship, ...’ (emphasis added, NJM)

333. In the House of Lords Viscount Haldane L.C. said:

‘It has not been contended at the Bar, and it could not have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.’\textsuperscript{497} (emphasis added, NJM)

334. This makes it clear that the proviso contained in the fire exception is of true value because it limits the group if people who’s ‘fault or privity’ should be taken into account to the people who can be considered to be the company itself. This group of people is smaller than the group whose actions are taken into account when construing the other exceptions. If, for example, the ship’s officers who are responsible for the stowing of the cargo, are negligent in supervising and directing that work, and cargo damage occurs during rough weather which would not have occurred if the cargo had been stowed properly, then the carrier will not be able to rely on the ‘perils of the sea’ exception. The negligence of the ship’s officers is negligence of the carrier.\textsuperscript{498} Another example is the duty of the carrier to exercise due diligence to make the ship seaworthy. The English cases The Manchester Castle\textsuperscript{499} and The Happy Ranger\textsuperscript{500} show that a carrier will

\textsuperscript{496} Meridian Global Funds Management Asia Ltd. v. Securities Commission, [1995] 2 A.C. 500, 511-512.


\textsuperscript{498} See § 5.4 about the perils of the sea exception. The carrier has the duty to load and stow the cargo properly and carefully. If his employees or agents fail to do so that failure is imputed to the carrier.

\textsuperscript{499} [1961] 1 Lloyd’s Rep. 57.

\textsuperscript{500} [2006] 1 Lloyd’s Rep. 649.
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 or contractors of 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.

The result of the proviso of the fire exception is that the carrier will only be responsible for damage caused by fire if it can be proved that the cause of the damage was a result of the actual fault or privity of the carrier. To render the carrier responsible, it is not sufficient that the fault or privity is the fault or privity of somebody who is merely a servant or agent for whom the company is liable.

Under common law none of the common law exceptions, other than that of jettison, apply where the carrier is negligent. The common law exceptions were construed as subject to an implicit proviso ‘unless the carrier has been negligent.’ The proviso in the fire exception seems to have been added just to make it extra clear that the carrier will only be responsible for fire caused by his actual fault or privity, but not for the actual fault or privity of his agents. It leads to the result that the carrier will not easily be found responsible for damage caused by fire. This ties in with the intention of the English and American legislators to protect the interests of their carriers for commercial reasons. Because the carriers no longer had to take the risk of liability for damage to cargo in account the freight rates could be lower thus allowing for a competitive position into the shipping industry for English (and later) American ships. It seems to have been the intention of the legislator to make the fire defence an almost unbeatable defence. For that reason the proviso ‘unless caused by the actual fault or privity of the carrier’ was added.

5.3.5 What is meant by ‘fire’ in the fire exception?

Dutch law: Fire

335. According to Royer the linguistic meaning of the word should prevail. That means that ‘fire’ means flames, glowing and singing. Heat that does not have the aforementioned characteristics, like the self heating of hay or heat caused by steam, is not ‘fire’ in the sense of the exception. Cargo damage caused by chemicals or by explosion not causing flames is not damage covered by the fire exception. Royer is of the opinion that linguistic interpretation of the exception leads to the conclusion that damage caused indirectly by fire, such as damage by smoke, heating or water used to extinguish the fire, is damage which will be covered by the exception.
On the other hand other Dutch authors are of the opinion that scorching and smouldering is not damage in the sense of the fire exception and that visible flames are required to bring the damage under the fire exception.510

336. In the Hua Fang case cargo was partly on fire and partly heated to such an extent that fire could start at any moment. The District Court of Rotterdam held that:

‘... if, as in this case, the self-heating of the cargo eventually develops such an intense heat to cause the cargo to burst into flames, the damage caused by self-heating which existed before the actual fire, is also covered by the fire exception.’511

337. This decision also illustrates that the District Court of Rotterdam requires actual flames for the damage to be covered by the fire exception. The same view was held by the courts in several older decisions.512 The above shows that the opinion under Dutch law is that actual flames are required and that mere heating is not sufficient to allow the carrier to successfully invoke the exception.

English law: Fire

338. The modern well-known English reference books do not define the word ‘fire’. Tetley does however discuss the definition.513 Cooke e.a. presume that explosion caused by fire will be covered by the exception but explosions caused by something else than fire will not.514 Damage caused by acts necessary to put out the fire will be covered by the exception.515

339. In Tempus Shipping Co. v. Louis Dreyfus Co., Wright J. said:

‘It is clear that fire due to spontaneous combustion constitutes a case of fire within the bill of lading exception of fire or an insurance against fire (if questions of inherent vice are excluded) or of fire within s. 502 of the Merchant Shipping Act: Greenshields, Cowie & Co. v. Stephens & Sons, Ltd.516 In Knight of St. Michael517 a loss of freight through heating of cargo was held to be a loss, not indeed by fire, but within the general words of the policy as ejusdem generis. Mere heating, which has not arrived at the stage of incandescence or ignition, is not within the specific words "fire".

Thus in The Diamond518 damage due to smoke and water used to quench fire was held to be within the section as damage caused by reason of fire. I do not think the damage need

515. The Diamond (1906) P. 282. See also Cooke e.a. 2007, p. 1026.
be consummated on board the ship, since the words “on board” are to be construed with the word “fire” and not with “loss and damage.” In the earlier statutes the words were “fire happening on board,” and I do not think that the omission of the word “happening” was intended to change the effect of the section. In the present case I think the damage and loss of the maize in the lighter was the direct and necessary consequence of the coal on board being on fire, and I, therefore, think that so far the statute applies.519 (emphasis added, NJM)

340. It can be deduced from the quoted passage that heating which has reached the state of incandescence is within the meaning of the word ‘fire’.

341. It can indeed be argued that incandescence without flames should also be covered by the fire exception. The reason is that the carrier who discovers that cargo is glowing, should stop all ventilation and cool the boundaries of the glowing cargo. If he then succeeds in restoring the cargo to an acceptable temperature he will not be able to invoke the fire exception. However, if the carrier opened all the hatches, thus allowing air to enter and flames to erupt, he would not be liable because the damage was caused by fire. It would be unfair if the carrier who acts correctly in the case of a fire threat cannot invoke the fire defences to cover the loss of the smouldering cargo because he acted in the correct manner i.e. cooled the boundaries and starved the glowing cargo of oxygen thus preventing flames.

American law: ‘Fire’

342. Under American law there seems to be no discussion about the meaning of the word ‘fire’ in the exception. See e.g. the Buckeye State case.520 It was held in that case that more than mere heating is required for the fire exception to apply.

5.3.6 What is meant by ‘actual fault or privity’?

Dutch law: ‘Actual fault or privity’

343. The Dutch codification of the expression ‘actual fault or privity’ in art. 469 of the Dutch Commercial Code was first ‘intent or fault of the carrier’521 and later in art. 383 of Book 8 of the Civil Code ‘the fault of the carrier personally’.522 Fault is used in the sense of culpa.523 The newer version in the Civil Code clarifies that the fault must be a personal fault of the carrier. In the older, Commercial Code version ‘intent’ or ‘fault’ of the carrier was the phrase. As both expressions are based on the Hague Rules these subtle differences are academic.

In 1961 Cleveringa wrote that the origins of the expression lead to the conclusion that the American interpretation should be followed.524 Cleveringa does not, however at-

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522. In Dutch: ‘Veroorzaakt door de persoonlijke schuld van de vervoerder’.
523. A term of civil law, meaning fault, neglect, or negligence.
tempt to define the expression. Neither does Boonk, another well-known Dutch author of more recent date.\textsuperscript{525} Royer on the other hand discusses the question extensively.\textsuperscript{526} According to Royer the word ‘actual’ in the expression ‘actual fault or privity’ has no significance.\textsuperscript{527} Royer is of the opinion that ‘actual fault or privity’ is identical to the expression ‘fault or neglect’ used in the q-exception and that expressions should be construed in the same way that they are in the Dutch Civil Code. This solution makes sense because there is no international concept of ‘fault’ or misconduct.\textsuperscript{528} I have not been able to find any clear examples of ‘actual fault or privity’ in decisions of the lower Dutch courts. Also the Supreme Court of the Netherlands has not rendered a decision giving an example or definition of ‘actual fault or privity’.

\textit{English and American law: ‘Actual fault or privity’}

344. English and American authors do not attempt to define the expression. Examples can however be derived from English and especially from American decisions. The American courts give the same meaning to the expression ‘design or neglect’ from the American Fire Statute as to the words ‘actual fault or privity’ which is used in the fire exception. The American courts construe the expressions as being negligence that either started the fire or prevented the fire to be extinguished.\textsuperscript{529} ‘Neglect’ in the Fire Statute means the same as ‘fault’ in the fire exception.\textsuperscript{530} ‘Design’ is construed as ‘a causative act or omission, done or suffered wilfully or knowingly by the ship owner’.\textsuperscript{531} It has been said that ‘privity’ therefore means the same.\textsuperscript{532}

345. In \textit{Asbestos Corp v. Compagnie de Navigation Fraissinet et Cyprien Fabre} the 2nd Circuit held that:

‘an inexcusable condition of unseaworthiness of a vessel, which in fact causes the damage – either by starting a fire or by preventing its extinguishment– will exclude the ship-owners from the exemption of the Fire Statute and COGSA.’\textsuperscript{533}

346. The 2nd Circuit agreed with the opinion given by Judge Levet in the District Court (SDNY).\textsuperscript{534} Levet J. recognised that unseaworthiness does not prevent the application of the Fire Statute and that once the defendant has sustained the burden of proving that it comes within the exemption of COGSA § 1304(2) (b) or the Fire Statute the burden

\textsuperscript{525} Boonk 1993, p. 176-181.
\textsuperscript{526} Royer 1959, p. 546-559.
\textsuperscript{527} Royer 1959, p. 551.
\textsuperscript{528} For this reason art. 29(1) of the Convention on the contract for the International Carriage of Good by Road (CMR) provides: The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seised of the case, is considered as equivalent to wilful misconduct.
\textsuperscript{529} Ta Chi Navigation, 677 F.2d 228.
\textsuperscript{530} The Strathdon, 89 F. 374, 378 (E.D.N.Y. 1898).
\textsuperscript{531} O’Conner & O’Reilly 2002, p. 116.
\textsuperscript{532} Asbestos Corp v. Compagnie de Navigation Fraissinet et Cyprien Fabre, 480 F.2d 669.
\textsuperscript{533} 345 F.4th 814.
then shifts to the shipper to prove that the fire was caused by the ‘design or neglect’ or ‘actual fault or privity’ of the carrier. Levet J. said:

347. ‘It is indeed unfortunate that all equipment aboard the *Marquette* available for fighting engine room fires was located in or controlled from the engine room. It was this “putting all the eggs in one basket” which led to the deplorable situation to which the chief engineer testified: “the ship was condemned as we had no further possibility of fighting the fire.”

(...). It is incumbent upon every ship-owner to provide a seaworthy vessel, equipped with adequate means of fighting fire on board. The standard is whether it is reasonable for a ship-owner to provide certain apparatus to meet the contingency of fire (...). What is reasonable is what is required in light of all the circumstances. This court has no interest in imposing an unreasonable or higher standard than required upon the ship-owner. Minimal foresight, however, dictates that the engine room is highly volatile compartment of a ship and the possibility of fire breaking out is ever present. A ship-owner must anticipate and provide for the contingency that a fire may break out in the engine room disabling all fire fighting equipment located in the engine room. The owners of the Marquette through their “design or neglect” and “privity or knowledge” were negligent in placing all fire fighting equipment inside the engine room and failing to provide an emergency pump or fire system located or controlled from outside the engine room. This negligence on the part of the ship-owners displays a total disregard for minimal protection of cargo and rendered the Marquette unseaworthy. Under the circumstances this court concludes that the defendant-ship-owners are not exempt from liability under COGSA § 1304(2) (b) or the Fire Statute.’

348. In *Sunkist Growers, Inc. v. Adelaide Shipping Lines* it was held that: ‘The “design or neglect” being the failure to provide a proper compression or flange joint and to properly man and equip a trained crew prior to the commencement of the voyage.’

**Conclusion**

349. The conclusion from these cases is that failure to fulfil the non-delegable duty to use due diligence to furnish a seaworthy ship does not render the carrier responsible. However if the ship is unseaworthy due to lack of due diligence and that unseaworthiness was due to ‘design or neglect’ and ‘privity or knowledge’ of the carrier, the carrier is therefore not exempt from liability under the fire exception or the Fire Statute.

**5.3.7 Which persons are meant by ‘the carrier’?**

350. This paragraph does not concern the problems of the identity of the carrier. It assumes that it is known which entity is the carrier. The question is: whose actions can be attributed to the carrier?

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Dutch law: ‘the carrier’

351. The acts of the owner of a sole proprietorship, the active partners of general partnership, the bookkeeper of a shipping company and the directors of a private company with limited liability can be attributed to the carrier. Within a legal person the acts of other persons than the directors can be attributed to ‘the carrier’. Decisions on this point from other fields of law are also relevant to determine which people can be identified with the carrier.\textsuperscript{537} In the \textit{Portalon} case the court of appeal held the acts of those who are in actual control of the corporation are to be attributed to the carrier. The acts of the captain of a ship cannot be attributed to the carrier.\textsuperscript{538} Under Dutch law acts of the governing bodies of a legal person are attributed to the legal person. Also acts of those whose conduct is, according to societal opinion, to be attributed to the legal person are considered acts of the legal person.\textsuperscript{539} Considering their societal position, the conduct of the captain and chief engineer is not considered as conduct of the legal person.\textsuperscript{540}

English law: ‘the carrier’

352. The phrase ‘actual fault or privity’ also appeared in the English Fire Statute of the Merchant Shipping Act 1894.\textsuperscript{541} Under that statute it was clear that this phrase did not merely denote the fault of someone for whom the carrier was responsible, but required personal fault in the carrier, or where as is usual the carrier is a corporation, its \textit{alter ego} or ‘directing mind and will’.\textsuperscript{542} More recent authority in a different context has made it clear that this may however require a further discrimination as to ‘whose act (or knowledge or state of mind) was for this purpose intended to count as the act etc. of the company?’\textsuperscript{543} In the \textit{Meridian Global Funds Management Asia Ltd. v. Securities Commission} case Lord Hoffman in delivering the judgement of the Privy Council said:

‘One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a

\textsuperscript{537} Boonk 1993, p. 180.
\textsuperscript{539} Supreme Court of The Netherlands, 6 April 1979, NJ 1980, 34.
\textsuperscript{541} See supra.
matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.\(^{544}\)

353. In de Apostolis the court held that the fault or privity of the ‘general manager’ of the vessel’s managers counted as actual fault or privity of the owners.\(^{545}\)

*American law: ‘the carrier’*

354. Under American law the answer to the question which people are to be identified with the carrier is complicated because the Fire Statute and fire exception often both apply in the same case. The question of who is ‘owner’ under the American Fire Statute and ‘carrier’ under COGSA is not considered separately in American decisions. This creates the impression that ‘owner’ and ‘carrier’ are the same entities which, strictly speaking, is incorrect. The proviso of the American Fire Statute reads: ‘..., unless such fire is caused by the design or neglect of such owner’ (emphasis added, NJM). ‘Owner’ is the (legal) person who owns the ship. The Limitation Act (of which the Fire Statute is part of) also provides that:

> [t]he charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of title 48 of the Revised Statutes relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.\(^{546}\)

355. The proviso of COGSA reads ‘unless caused by the actual fault or privity of the carrier.’ COGSA defines ‘carrier’ in art 1 sub a COGSA as: ‘the owner or the charterer who enters into a contract of carriage with a shipper.’ (emphasis added, NJM).

356. In Westinghouse Electric, referring to the Ta Chi Navigation case, the court held:

> ‘It has long been held that the COGSA fire exemption and the Fire Statute exemption are the same (...) except that COGSA extends to the “carrier”, not just the “owner” as in the Fire Statute.’\(^{547}\)

357. I shall not go into the different scopes of application of the fire exception and Fire Statute and restrict myself to some considerations from American cases.

358. In Asbestos Corp v. Compagnie de Navigation Fraissinet et Cyprien Fabre the district court held that:

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547. Ta Chi Navigation, 677 F.2d 225.
Negligence on the part of the master, any crew member or agent is not imputed to the owner. However, courts have found that fault of managing agents to whom the corporation delegates the task of inspection, decisions on precautions, and the like is the fault of the owner, ...".548

359. In the Tecomar S.A the words ‘managing officer’ were said to mean ‘anyone whom the corporation has delegated general management of general superintendence of the whole or a particular part of the business.’549

360. In Westinghouse Electric, reference was made to a decision of the US Supreme Court in Consumers Import concerning the application of the fire defences. The US Supreme Court held that:

‘..., the negligence was, (...), by shore-based persons who were delegated the task of designating and planning the stowage. Because the delegees were not managerial agents with a broad range or responsibility in the corporation and because they were “qualified by experience to perform the work,” such negligence was not the “design or neglect” of the owner.”550

361. In Union Oil Co. v. Point Diver the 5th Cir. held that:

‘[a] finding of neglect of owner means personal negligence, or in the case of a corporate owner, negligence of managing officers and agents as distinguished from that of the Master or his subordinates.’551

362. In Sunkist the 9th Circuit held:

‘In Albina Engine & Machine Workers v. Hershey Chocolate Corp., 295 F.2d 619 (CA9 1961), we held that:

“neglect of the owner” under the Fire Statute refers to “the neglect of managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees.”552

363. It can be concluded that under the Fire Statute and under the COGSA fire exception the personal negligence of the owner or carrier will beat a fire defence. In a corporation the negligence should be negligence of corporate managers and agents, who are acting within the scope of their authority for that negligence to be imputed to the owner/carrier. Negligence of the captain and crew can not to be imputed to the owner or the carrier.

550. Westinghouse Electric, 734 F.2d 199.
551. Union Oil Co. v. Point Diver, 756 F.2d 1223 (5Cir. 1985).
552. Sunkist, F.2d 1327, 1336.
5.3.8 The relationship between the duties of the carrier and the fire exception

American law

364. Under the law of the 2nd, 5th and 11th Circuits the mere breach of a duty causing damage by fire is not sufficient to overcome the fire exception. A breach of a duty entailing actual fault or privity of the carrier personally is required. In the 9th Cir. however, if the claimant proves that unseaworthiness caused the fire, the carrier can only rely on a fire defence if he proves his personal due diligence to make the ship seaworthy. The duty to exercise due diligence to make the ship seaworthy is an overriding obligation under the law of the 9th Circuit.553 Below the situation under Dutch and English law is discussed.

Dutch law

365. Cleveringa is of the opinion that the duties contained in art. III(1) and (2) H(V)R are not affected by the proviso of the fire exception and that the proviso does not have much significance.554 Royer follows the American point of view that the carrier is only responsible for damage caused by his personal fault and that the fire exception prevails above the duty contained in art. III(1) H(V)R if the actual fault or privity of the carrier was not the cause of the fire.555 According to Boonk justice is done to the words ‘Subject to the provisions of Article IV, …’ in art. III(2) and the proviso in the fire exception if the duty contained in art. III(1) is considered a more fundamental duty than the duty contained in art. III(2). This means that fire due to a lack of due diligence to provide a seaworthy ship which is not equal to actual fault or privity of the carrier will render the carrier responsible. However fire caused by a breach of art. III(2) which is not equal to actual fault or privity of the carrier, will not cause the fire exception defence to fail.556

366. In the Portalon the court of appeal held that the carrier could not avail himself of the fire exception if lack of due diligence to make the ship seaworthy caused the fire. The court of appeal also held that the cargo interest could not beat the fire exception by proving the carrier was in breach of one of his duties contained in art. III(1) or (2). The court of appeal held that:

‘the [Travaux Préparatoires] of the Hague Rules do not show with certainty that (…) contrary to what is the case with the other exceptions, it was the intention to allow the exoneration for damage by fire (…) even if the carrier did not fulfil his primary duty to exercise due diligence to make the ship seaworthy and to properly and carefully care for the cargo.’557

367. The court of appeal clarified its opinion when discussing the third complaint of the cargo interests which was aimed against the decision of the district court that neg-

ligent treatment of the cargo does not beat the fire exception. The court of appeal allowed this point of appeal and thus held that the duty to properly and carefully care for the cargo is an overriding duty.

368. In the *Hua Fang* however, the District Court of Rotterdam held:

'A carrier can not avail himself of the fire exception if the fire was caused by his actual fault or privity as stated in art. 4(2)b H(V)R or by unseaworthiness which was a result of lack of due diligence which the carrier must exercise ex art. 3(1) H(V)R before and at the beginning of the voyage. Because of the system of the H(V)R the cargo interests must state, and if necessary prove that the fire is a result of these factors which will overcome the fire exception. A possible breach of the duty contained art. 3(2) H(V)R to exercise due diligence [sic] for the care of the cargo, however, is not significant if that breach caused the fire, because a breach of that duty does not set aside the application of the fire exception, unless the fire was caused by actual fault or privity of the carrier.'

369. In the *Boschkerk* the district court and the appeal court held that the fire exception will exonerate the carrier if the damage was caused by servants of the carrier but not if the fire was caused by a lack of due diligence to make the ship seaworthy.

370. The above shows that the opinion of Dutch authors and courts are divided regarding the question if the duty to care for the cargo properly and carefully is an overriding obligation. In other words the question: Will the fire exception apply if the fire was caused by (or could not be controlled due to) negligence in the care of the cargo where the negligence was not due to the actual fault or privity of the carrier? However, there is no doubt that the duty to exercise due diligence to make the ship seaworthy is an overriding obligation under Dutch law.

371. I doubt if the *Portalon* decision of The Hague Court of Appeal on 30 December 1966 would still be followed by Dutch courts because the decision that a breach of the duty contained in art. III(2) will cause the fire exception to fail is so evidentially contrary to the construction of the Rules by English and American courts.

*English law*

372. In *Maxine Footwear Co. Ltd. v Canadian Government Merchant Marine Ltd.* (The Maurienne)* a ship caught fire while still in port and after loading had begun. The fire had been caused by work negligently performed with an acetylene torch. Although the case was a decision of the Privy Council (Canada) under the Canadian Water Carriage of Goods Act, 1936 it seems to be the leading case in English law. If the fire creates unseaworthiness during the period over which the ship must be seaworthy under the

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5.3 The Fire Exception

Rules, [the fire exception] does not apply, for the loss is caused by unseaworthiness
which is not an excepted peril.\footnote{Carver 2005, p. 608 referring to Maxine Footwear (see supra). See also Scrutton 1996, p. 444.}

373. In Apostolis the court of appeal held:

‘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.’\footnote{A. Meredith Jones v. Vangemar Shipping Co. (The Apostolis), [1997] 2 Lloyd’s Rep. 241.}

374. This decision makes clear that causal connection between the lack of due dili-
genence and the damage by fire is required to overcome the fire exception. This also is
clear from Maxine Footwear where Lord Somervell of Harrow said:

‘Art. III, Rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfil-
ment causes the damage, the immunities of Art. IV cannot be relied on. This is the
natural construction apart from the opening words of Art. IV, Rule 2. The fact
that that Rule is made subject to the provision of Art. IV and Rule 1 is not so
conditioned makes the point clear beyond argument.’\footnote{Maxine Footwear Co. Ltd v. Canadian Government Merchant Marine Ltd (The Maurienne), [1959] 2 Lloyd’s Rep. 105, 113.}

375. Art. III(2) H(V)R and of the English COGSA start with the words ‘Subject to the prov-
sions of article IV,...’. As was said above these words have been referred to as being an
indication that art. III(1) is an overriding obligation.\footnote{Ibid.} In the Apostolis the meaning of
the opening words of art. III(2) in relation to the proviso of the fire exception was dis-
cussed. Tuckey J. of the Queen’s Bench Division said:

‘Article III, r. 2, which would otherwise impose liability on owners on the basis
of my findings of fact, is expressed to be subject to the provisions of art. IV. Article IV,
r. 2 says no liability for fire “unless” caused by actual fault or privity. (…) The
fault and privity provision is an exception to an express exemption and there-
fore, following general principles of construction, it is for the party alleging
that the exception applies to establish it.’ (emphasis added, NJM)

376. On appeal the court of appeal held:

‘... the allegation of privity against the owners must fail, and the defence un-
der art. IV, r. 2 succeeds. In this context it is therefore of less importance whether
the owners would otherwise been liable under art. III, r. 2.’\footnote{The Apostolis, [1997] 2 Lloyd’s Rep. 241, 248 (Court of Appeal).} (emphasis added, NJM)

377. The above shows that if the fire is due to lack of due diligence to make the ship
seaworthy the carrier will be responsible. If, however, the fire is due to failure to fulfil
the duty of art. III(2) the carrier can rely on the fire exception unless the fire was caused by his actual fault or privity.

Conclusion

378. Under English and Canadian law and the law of the 9th Circuit the duty to exercise due diligence to make the ship seaworthy is an overriding obligation and the duty ex art. III(2) H(V)R regarding the care for the cargo is not. This follows from the words ‘subject to the provisions of art. IV’ in art. III(2). It has also been said that it follows from art. IV(1) which provides that if the damage was caused by unseaworthiness the carrier has to prove that he used due diligence. The fact that the carrier gets the burden to prove his due diligence would show that art. III(1) is an overriding obligation.567 The last argument is less convincing than the argument that the meaning of art. IV(1) is to show that the law of the Harter Act is changed in the sense that the proof of due diligence is not a precondition to the application of one of the exception.568

379. So under English and Canadian law III(1) H(V)R is an overriding obligation and III(2) is not. Why is this so? At common law, as would be expected, the duty make the ship seaworthy is an absolute duty. That duty and the duty to care for the cargo properly and carefully are both overriding obligations.569

380. Under the Hague Rules the duty to make the ship seaworthy was reduced to a duty to exercise due diligence to make the ship seaworthy. The question of why the Hague Rules changed the common law rule that both duties of the carrier (regarding seaworthiness of the ship and care for the cargo) are both overriding obligations to the rule that only the duty to exercise due diligence to make the ship seaworthy is an overriding obligation is discussed in § 4.7. The new rule is to the advantage of carriers. This is contrary to the compromise character of the Rules. The actual result of the overriding obligation rule and in my opinion the reason that it exists, is for the sake of the fire exception. The fire exception could only exist in the same form as the fire statute if the overriding obligation rule was introduced.

5.3.9 The burden of proof

Dutch law: the burden of proof

381. The cargo interests first have to prove damage to the cargo which occurred after loading. The carrier will then prove that the damage was caused by fire and invoke the fire exception. If the cause of the fire remains unknown the carrier can rely on the fire exception.570 The cargo interests can either prove that the fire was due to unseaworthiness or due to the actual fault or privity of the carrier.571 In the former instance the

568. See the Damodar Tanabe, 903 F.22 675, 684-685. See also § 5.1.
569. Paterson SS Ltd v. Canadian Co-operative Wheat Producers Ltd., 49 LI.L.R. 42. See supra § 4.2. See also Carver 2005, p. 499.
carrier will have to prove that he used due diligence to make the ship seaworthy (art. IV(1) H(V)R). In the latter instance the carrier will be responsible. This is the system according to the H(V)R. However in the *Hua Fang* the District Court of Rotterdam held that:

'A carrier can not rely on the fire exception if the fire was caused by the carrier’s actual fault or privity as stated in art. IV(2)b, or by unseaworthiness due to lack of due diligence before and at the beginning of the voyage ex art. III(1). It follows from the system of the H(V)R that the cargo interests have to (…) prove that the fire was caused by these causes which will successfully deprive the carrier of the fire defence.'

382. In my opinion the court misstated the system of the H(V)R. Art. IV(1) clearly provides that if the loss or damage was caused by unseaworthiness the carrier has to prove that he exercised due diligence to make the ship seaworthy. The cargo interests only have to prove that the loss or damage caused by unseaworthiness. They do not have to prove the carrier’s failure to exercise due diligence.

383. According to Schadee failure to fulfil the duty contained in art. III(2) H(V)R will also overcome the fire exception. The cargo interest have the burden of proving the failure to fulfil the duty contained in art. III(2). As is seen above this was also the view held by the court of appeal in the *Portalon* case. The opinion of Schadee was written over fifty years ago and I do not think it will be followed by courts in the Netherlands today because it is evidentially contrary to the construction of the fire exception by English and American courts.

**English law: the burden of proof**

384. The cargo interests first have to prove damage to the cargo which occurred after loading. If the cargo interests can prove that the ship was unseaworthy at the beginning of the voyage and that unseaworthiness caused the fire then the carrier will have the burden of proving that due diligence was exercised to make the ship seaworthy (art. IV(1) H(V)R). If the ship became unseaworthy because of the fire and the carrier can not prove due diligence before and at the beginning of the voyage then he can not rely on the exception. The cargo interests have the burden of proving actual fault or privity.

**American law: the burden of proof**

385. As was discussed above the 9th Cir. has held that the carrier can not assert the fire exception unless he proves that he exercised due diligence to make the ship seawor-
ART. IV(1) AND SOME OF THE EXCEPTIONS OF ART. IV(2) 5.3

The 2nd, 5th and 11th Circuits do not require this proof of the carrier. The shipper can prove that the carrier caused the damage either by proving that a negligent act of the carrier caused the fire or that such an act prevented the fire’s extinguishment. In the 2nd, 5th and 11th Circuits fire caused by merely a lack of due diligence will not be sufficient to rebut the fire exception.

5.3.10 The intended construction of the fire exception

386. What is meant by the words ‘the carrier’s actual fault’? Objective construction does not help. The French text uses the expressions ‘le fait ou la faute du transporteur’. To discover what the framer meant I shall resort to subjective construction, i.e. what did the framers mean? The Travaux Préparatoires do not give a definite explanation. Bearing the common law roots in mind it is permissible to study common law. Mr. Justice Jocobucci of the Canada Supreme Court explained the meaning as follows:

‘The leading Anglo-Canadian case setting out the meaning of the words “actual fault or privity” and its application to a corporate shipowner is Lennard’s Carrying Co. v. Asiatic Petroleum Co., [1915] A.C. 705 (H.L.), affirming [1914] 1 K.B. 419 (C.A.). The words “actual fault or privity” were found to denote something personal and blameworthy to a shipowner as opposed to a constructive fault arising under the doctrine of respondeat superior. In the oft quoted words of Viscount Haldane L.C. at p. 713-714:

It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself. It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy; and I take the view that when anybody sets up that section to excuse himself from the normal consequences of the maxim respondeat superior the burden lies upon him to do so.’

387. The intention of the framers was that the carrier can not rely on the fire exception if the fire was caused by the fault or privity of someone whose action is the very action of the company itself as opposed to fault or privity of somebody who is merely a servant or agent for whom the company is liable.

Reading the Rules as a whole it can be deduced that the carrier can not invoke the exceptions of art. IV if the cause of the fire is non-fulfilment of art. III(1). The carrier can invoke the fire exception if the cause was non-fulfilment of art. III(2) (because that art. applies subject to the provisions of art IV) unless the cause can be qualified as actual fault or privity. Still reading the Rules as a whole it can also be deduced that art. VIII of the Rules will leave carriers the benefit of the Fire Statutes. If the Fire Statutes were the same as the fire exception there would be no reason to specifically refer to the applica-

578. See supra (The Sunkist case).
579. Asbestos Corp. Ltd., supra, 480 F.2d at 672.
580. See supra.
bility of the Fire Statutes. This indicates that the Fire Statutes were thought to be a stronger defence than the fire exception.

388. The object of the fire exception in combination with art. VIII is that carriers will not be responsible for damage by fire unless:

(i) it was caused by the actual fault or privity of the carrier (as opposed to constructive fault or privity) or
(ii) by non-fulfilment of art. III(1) unless a Fire Statute applies.

5.3.11 Conclusion

389. The English and American Fire Statutes are very important defences for the sea carrier under English and American law. The defence will only fail if the fire was caused by the actual fault or privity of the owner. Even if the fire was caused by unseaworthiness at the beginning of the voyage the fire defence can be relied upon. The defence will only fail if it can be proven that the unseaworthiness was caused by the actual fault or privity of the carrier.582 The fire exception is also a very strong defence (although less so than the Fire Statutes). The fire exception will fail if the fire was caused by lack of due diligence to make the ship seaworthy. Under English law this is the result of the concept of the overriding obligation to exercise due diligence to make the ship seaworthy. The reason for such a wide ranging exemption for damage caused by fire is rarely stated in English decisions. In American decisions it however becomes clear that the reason for such a strong defence is to make sure that the carrier will, in principle, not be responsible for damage caused by fire. This allowed the carrier to reduce the freight rates. The conclusion is that the fire defences were intended to be practically unbeatable.

It can be wondered whether such reasoning is still valid in the modern era. Other carriers (i.e. road, rail and air carriers) do not have a similar defence against liability for damage by fire. Is the risk of fire at sea greater than in other forms of transport and if so, is it still justified to have legislation which protects the sea carrier to such a great extent as the maritime fire defences? It is beyond the scope of this book to discuss these questions. Risk analysis would have to show if the risk of fire at sea is greater and the consequences more severe than in other modes of carriage and economic research would have to show what the economical consequences would be of removing the defence. However, although there is considerable opposition to the retention of the fire exception (as well as the nautical fault exception)583 the fire exception has been retained in the UNCITRAL Draft Instrument on Carriage of Goods by Sea but in a different form.

390. In the draft instrument the fire exception is worded under art. 18:

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance

582. See infra.
583. UNCITRAL WG III document WP.101.
that caused or contributed to it took place during the period of the carrier’s responsibility as defined in chapter 4.

2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 19.

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

(f) fire on the ship

Art. 19 provides that the carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

(a) any performing party;
(b) the master or crew of the ship;
(c) employees or agents of the carrier or a performing party; or
(d) any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

391. It is clear that this fire exception is not nearly as far reaching as the fire exception of the Hague Rules. The carrier bears the burden of proving either the exception or the absence of fault. If he chooses to prove fire he will have to prove fire on the ship. Furthermore the reference to article 19 in article 18(2) makes it clear that if the fire is caused by the fault of one of the carrier’s employees the carrier will also be liable. This certainly will make it easier for cargo interests to defeat the fire exception in the new instrument than under the Hague (Visby) Rules.

5.4 Perils of the sea

5.4.1 Introduction

392. The ‘perils of the sea exception’ has been an important and strong defence of carriers from earliest times. The exception is contained in art. IV(2)c H(V)R and reads:

‘neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(c) Perils, dangers and accidents of the sea or other navigable waters.’

393. The expression ‘Perils of the Sea’ is construed differently in different legal systems. The applicable law will be of influence on the carrier’s chance to successfully invoke the exception or not. The Bunga Seroja case of the High Court of Australia is a well

researched case regarding the perils of the sea.\textsuperscript{585} After extensive historical and comparative law study the judges in that case reached a decision which has been criticised by Tetley.\textsuperscript{586} Regardless of Tetley’s criticism the case is, in my opinion, one of the best researched judgements written on the application of the perils of the sea exception and for that reason the case is referred to relatively often in this paragraph. In the \textit{Bunga Seroja} case a comparison is made between the application of the exception in the UK, the USA, Canada and Australia. The case shows that there are two schools of thought. Under American and Canadian law the event which caused the damage has to be unforeseeable for the exception to succeed. This requirement does not however exist under English and Canadian law. Below the application of the exception under English, American, Canadian and Australian law is researched. Then the application of the exception under Dutch law is researched. First however, the exception will be discussed in general whereby the historical background of the exception also plays a role. I will conclude that the application of the exception in the Netherlands is similar to the application of the exception under Australian law. I will also conclude that the nature of the exception leads to the conclusion that the carrier can not rely on it if the loss or damage was caused by lack of due diligence to provide a seaworthy ship or to care for the cargo properly and carefully. The carrier can only rely on the exception if he fulfilled the duties contained in art. III(1) and (2). The carrier has to prove that the cause of the loss or damage was unavoidable to be able to rely on the exception.

\subsection*{5.4.2 Elements that may constitute a peril of the sea}

394. In \textit{Bunga Seroja} Judge Kirby derived a number of factual considerations from existing cases which can help to decide whether a particular event at sea amounts to a peril of the sea. Regarding these Kirby said:

\begin{quote}
These [factual considerations] might include the construction of the vessel, the size and capacity of the vessel, whether the vessel was suitably constructed, normally equipped and properly maintained, whether the event giving rise to the damage or loss was a freak occurrence, the intensity and predictability of any weather or other hazard encountered and whether it could have been guarded against by the ordinary exertions of a carrier’s skill and prudence. Yet none of these circumstances is decisive. They are no more than factual indicia.\textsuperscript{587}
\end{quote}

395. Another element often considered relevant in court rulings on the question whether a perils of the sea defence should be accepted is the question whether the incident could have been foreseen, which is often regarded as a controversial issue. It largely depends on the applicable law whether a perils of the sea defence will be accepted if the event could have been foreseen. Foreseeability therefore often plays a decisive part. In this section I will take a closer look at the element of foreseeability.

\textsuperscript{586} Tetley 4th ed., chapter 18, p. 7.
\textsuperscript{587} Bunga Seroja, [1999] 1 Lloyd’s Rep. 512 sub 147.
5.4.3 The construction of the exception under various legal systems

5.4.3.1 English law

396. In *Thames and Mersey Marine Ins. Co. v. Hamilton*, Lord Macnaghten pointed out that a rigid definition of the expression ‘perils of the sea’ should be avoided. He said:

‘I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad commonsense view.’

397. In the 1988 edition of *Marine Cargo Claims* Tetley also notes that in England courts have been careful not to formulate rigid definitions of the exception. Despite the fact that a precise definition cannot be formulated, under English law certain elements are often important in deciding the question whether an incident may be considered to be a Peril of the Sea. The two most controversial elements are foreseeability and the question whether an incident must be of an extraordinary nature to qualify as a peril. These two elements will be discussed below.

The requirement that the event was unforeseeable

398. According to Tetley English courts continue to reject the ‘perils of the sea defence’ in cases where the bad weather was foreseeable, and require that it be, if not exceptional, at least unanticipated. Tetley cites four English cases to prove his point. After reading the decisions cited by Tetley it becomes clear that the ‘foreseeable’ aspect is merely a point of view and is not an element which will decide the case.

399. In *The Coral* the exception was not allowed because the cause of the damage was negligent stowing of the cargo.

400. In *The Tilia Gorthon* Mr. Justice Sheen did indeed say:

‘It seems highly probable that none of the deck cargo would have been lost but for the violence of the storm. But the evidence as to the weather has not satisfied me that the conditions encountered were such as could not and should not have been contemplated by the ship-owners. Fortunately for mariners, winds of 48-55 knots (Beaufort force 10) are encountered infrequently. But they are by no means so exceptional in the North Atlantic in the autumn and winter that the possibility of encountering them can be ignored. A ship embarking...”
on a voyage across the Atlantic Ocean at that time of year ought to be in a condition to weather such a storm.\textsuperscript{592}

401. Sheen went on to consider that:

'It is not possible for me to say precisely what force ultimately broke the tensioner. But, even if the tensioner had less than its designed strength, the evidence supports the view that any defect was latent. It could not have been discovered by any reasonable inspection of the tensioner. Mr. Holm looked at each tensioner before it was secured to the eye plate. It would be unreasonable to expect any ship-owner or his crew to do more than that. In those circumstances, the loss did not result from any failure to exercise due diligence to make the ship seaworthy. There must be judgement for the defendants.'\textsuperscript{593}

402. This decision shows that foreseeability is a \textit{point of view} and not the decisive factor. A requirement of unforeseeability can also not be derived from the \textit{The Torenia}\textsuperscript{594} and \textit{The Friso}\textsuperscript{595}

In \textit{The Torenia} the loss was caused by unseaworthiness which was discoverable by the use of due diligence and in \textit{The Friso} Mr. Justice Sheen held that the ship was not seaworthy on sailing.

403. In \textit{The Xantho}, Lord Herschell gave the following point of view regarding the exception:

'I think it clear that the term “perils of the sea” does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril “of” the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{592} The Tila Gorthon. [1985] 1 Lloyd’s Rep. 552, 555.
\item \textsuperscript{593} The Tila Gorthon. [1985] 1 Lloyd’s Rep. 552, 556.
\item \textsuperscript{595} The Friso [1980] 1 Lloyd’s Rep. 469.
\end{itemize}
\end{footnotesize}
by a peril of the sea. I refer to the case of Cullen v. Butler, where a ship having
been sunk by another ship firing upon her in mistake for an enemy, the Court
inclined to the opinion that this was not a loss by perils of the sea. I think, how-
ever, this expression of opinion stands alone, and has not been sanctioned by
subsequent cases.

404. The Dutch author Royer is of the opinion that it is doubtful whether it can be con-
ccluded from The Xantho that unforeseeability is required because an extremely narrow
concept of unforeseeability is observed in this particular case, from which it follows
that unforeseeability is only required for those incidents which necessarily have to oc-
cur during the voyage, such as ‘wear and tear’. Royer says that the concept of unforesee-
ability is therefore only applicable to damage-causing incidents which will always hap-
pen, like the normal wear and tear.

405. Royer quotes a passage from the case Nichols v. Marland (1876) in where it was
said that:

“It could not reasonably have been anticipated, though if it had been anticipat-
ed the effect might have been prevented.”

which, according to Royer, once more shows that unforeseeability is not a separate re-
quirement in addition to inevitability.

406. Another case in which the court held that unforeseeability is not a requirement is
Hamilton, Fraser and Co. v. Pandorf and Co. In this case rats had made a hole in a pipe
through which seawater could enter the cargo and cause damage. Lord Fitzgerald said:

“The accident was fortuitous, unforeseen, and actually unknown until the ship
reached her destination and commenced unloading. I do not however, mean to sug-
gest that to constitute a peril of the sea the accident or calamity should have been of an un-
foreseen character.” (emphasis added, NJM)

The emphasised passage makes it clear that the event need not to have been unforesee-
able to constitute a peril of the sea.

407. Regarding the expressions ‘events which could not be foreseen and guarded
against’ and ‘events which could not be foreseen or guarded against’, Carver writes:

‘Even abnormal weather conditions can be foreseen: the test really seems to be
how practicable it would have been to guard against them. A sure way to guard
against maritime adventure is not to go to sea at all, but it is rare that a carrier
will be regarded as wrong in setting out [see the Bunga Seroja case which is dis-

596. The Xantho, (1887) L.R. 12 App. Cas. 503, 509.
597. Royer 1959, p. 581-582.
598. The case is not available on Westlaw but the following citation was found for it: (1876) L.R. 2 Ex.D. 1.
599. Royer 1959, p. 581 footnote 41.
600. (1887) 12 A.C. 518; the quotation is from Hodges 1999, p. 368.
cussed in this paragraph, NJM]. It seems therefore that the emphasis should really be on the phrase “guarded against” rather than on foreseen.602

408. The Bunga Seroja case contains a good study of the question whether unforeseeability is required for a successful peril of the sea defence under English law. In that case a distinction was made between Anglo-Australian law on the one hand and American-Canadian law on the other. It was made clear that Canadian and American law do require that the event was unforeseeable. This requirement does not exist in Australian and English law. In the Bunga Seroja case McHugh J. said:

‘Under the Anglo-Australian approach, the critical question is not whether the peril can be foreseen or guarded against but whether the harm causing event was of the sea and fortuitous, accidental or unexpected. If it was, a further question arises as to whether that event was the effective cause of the loss. This approach restricts the immunity of the carrier for the loss or damage by reference to the carrier’s negligence rather than by reference to the foreseeability or severity of the peril.’603 (emphasis added, NJM)

409. An example may help to answer that question. If a ship sets out to sea and the forecast weather is bad then it is foreseeable that rough weather may be encountered. However, if that rough weather also causes damage to the cargo, even though all the necessary care was taken and due diligence was used, then that cargo damage may be unexpected. If a carrier were to send a ship on a voyage knowing that cargo damage was imminent then he will not be able to rely on the perils of the sea exception.

410. It can be concluded that under English law there is no requirement that the event that caused the damage was unforeseeable. The occurrence of the damage should, however, be unexpected. Undeniably there are English decisions in which the word ‘unforeseeable’ is used. Unforeseeability is, however, merely one of the aspects which can play a role.

Extraordinary nature of the damage causing event

411. Under English law there is no requirement that the event that caused the damage is extreme or extraordinary.604 E.g. rough seas are common incidents of a voyage but, under English law, often constitute a peril of the sea. Damage caused by a ship striking rocks is not an extraordinary or extreme event but will constitute a peril of the sea if the damage was not avoidable by due diligence and reasonable skill and care.605

605. See The Xantho (1887) 12 A.C. 503, 509 per Lord Herschell and Hamilton v. Pandorf (1887) 12 A.C. 518, 527 per Lord Bramwell. See in the same sense Scrutton 1996, Art. 110 and Tetley 4th ed. ch. 18, p. 5.
Tetley also remarks that ‘English admiralty law defines peril in terms of the foreseeability and possibility of averting the danger, rather than in terms of its irresistibility or extraordinary character.’

5.4.3.2 American law

412. It will be hard for a perils of the sea defence to succeed under American law. American courts require that an event was unforeseeable and of extraordinary nature to constitute a peril of the sea. In the words of Carver “[t]he law in the United States has often been stated in a way requiring more extreme situations than those which would give rise to the defence in England.”

American law was strongly influenced by a definition of ‘perils of the sea’ by Judge Hough in the Rosalia. Hough defined such a peril as:

‘something so catastrophic as to triumph over those safeguards by which skilful and vigilant seamen usually bring ship and cargo to port in safety.’

413. This definition was later elaborated by Judge Hand in the Naples Maru case. Hand said:

‘The phrase “Perils of the Sea”, has at times been treated as though its meaning were esoteric; Judge Hough’s vivid language in the “Rosalia” has perhaps given currency to the notion. That meant nothing more, however, than that the weather encountered must be too much for a well found vessel to withstand.’

414. Both of these definitions emphasise the requirement that the event is extraordinary or extreme (‘catastrophic, too much (…) to withstand’). Besides those requirements American courts also require that the event was unforeseeable.

The requirement that the event was unforeseeable

415. Tetley has derived the following definition from a number of American decisions:

‘A peril of the sea may be defined as some catastrophic force or event that would not be expected in the area of the voyage, at that time of the year and that could not be reasonably guarded against.’

416. American courts do indeed require that the event that caused the damage was unforeseeable for it to constitute a peril of the sea. One of the first decisions of the U.S. Su-
The consideration that "[t]he weather was to be expected" indicates that an aspect of unforeseeability does play a role. In the later case Johnson v. S.S. Schickshinny, unforeseeability was also required. The District Court held:

"The damage was done and found on March 30th, before the hurricane force of the wind arrived. Unquestionably, rough weather and heavy seas were encountered, but where a vessel is subjected to no greater risk or damage than reasonably might have been anticipated on the voyage, peril of the sea furnishes no immunity. (...) If the severe weather should be regarded as so unusual, unexpected, and “catastrophic as to triumph over those safeguards by which skilful and vigilant seamen usually bring ship and cargo to port in safety” (...) or if we substitute the words “of such a character” for “catastrophic” (...) the ship is still liable if its negligence contributed to the loss."612

418. According to Royer American law does not require unforeseeability if the event is such that the damage could not be guarded against.613 In Royer’s opinion this follows from the definition in the Giulia case where the requirement was that the event be of ‘of extraordinary nature’. Although this implies unforeseeability (if an event is of ‘extraordinary nature it is usually unforeseeable) the definition in Giulia contains the word ‘or’:

"Perils of the seas are understood to mean those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."614 (emphasis added, NJM)

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419. According to Royer this definition shows that an event causing damage which could not be guarded against, does not also have to be unforeseeable.\textsuperscript{615} In my opinion however, it is not possible to reach such a conclusion based on a selection from the numerous definitions. I agree with Judge Chase where he said in \textit{The Makalla}:

\begin{quote}
A multiplication of definitions will result only in a multiplication of words without serving any useful purpose. The difficult task is not to define in general terms a peril of the sea, but to determine whether some established facts and circumstances, like those proved in this case, fall within a sound definition. There opinions may be at variance and give to close cases little value as precedents. Yet this situation obtains largely throughout the whole administration of justice because it is impossible to do away entirely with the human element in applying the law to the facts.\textsuperscript{616}
\end{quote}

420. The cases discussed above make it clear that, regardless of certain definitions which seem to indicate otherwise, under American law unforeseeability is required for a peril of the sea defence to succeed. As most things are foreseeable a peril of the sea defence will not easily succeed under American law. There is a great amount of American authority to prove this.\textsuperscript{617} It is also the opinion of most authors. As far as I know, Royer is the only author who concludes that, under American law, unforeseeability is not required for an event to constitute a peril of the sea. Sturley and Tetley emphasise that American courts will not decide that a foreseeable event can constitute a peril of the sea. American courts tend to decide that a seaworthy ship should be able to cope with conditions which could reasonably be expected. On the other hand English and commonwealth courts will decide that foreseeable risks can fall within the exception.\textsuperscript{618} In the \textit{Bunga Seroja} case\textsuperscript{619} The High Court of Australia also distinguishes between American/Canadian law and Anglo/Australian law.\textsuperscript{620}

\textit{Extraordinary nature of the event}

421. In \textit{Bunga Seroja} the judges Gaudron, Gummow en Hayne established that the Anglo-Australian construction of the perils of the sea exception differs from the American-Canadian construction. Under American and Canadian law ‘losses to goods on board which are peculiar to the sea and ‘are of an extraordinary nature or arise from irresistible force or overwhelming power,…’ will constitute a peril of the sea. On the other hand under English and Australian law it is not required that the event that causes the damage is extraordinary in nature.\textsuperscript{621} The peril par excellence under U.S. case-law is, however, invariably one linked with ‘rough weather’. ’Mere bad weather at sea is, of course, not enough to create a presumption of peril. The prevailing weather condi-

\textsuperscript{615} Royer 1959, p. 584.
\textsuperscript{616} The Makalla, 40 F.2d 418.
\textsuperscript{617} See the Bunga Seroja case for a discussion of that authority.
\textsuperscript{620} See infra (Australian law).
\textsuperscript{621} See infra.
tions must at least be of such force to overcome the strength of a well-found ship and the usual precautions of good seamanship.\textsuperscript{622}

422. In \textit{The Rosalia}, Judge Hough said that a peril of the sea ‘means something so cata-
strophic as to triumph over those safeguards by which skilful and vigilant seaman usu-
ally bring ship and cargo to port safely.’\textsuperscript{623} In the \textit{Giulia} the definition was ‘... those per-
ils which are peculiar to the sea, and which are of an \textit{extraordinary nature} or which arise from \textit{irresistible force or overwhelming power}, and which cannot be guarded against by the ordinary exertions of human skill and prudence.’\textsuperscript{624} (emphasis added, NJM)

423. Although, as was mentioned above, one should be careful of drawing general con-
clusions from specific cases, it can safely be said that under American law, when the
event that causes damage is rough weather, mere rough weather is not sufficient. The
weather must be extraordinarily rough. Also the event must be unforeseeable for the
perils of the sea defence to succeed under American law.\textsuperscript{625} The result is that under
American law the perils of the sea defence will rarely succeed.
In the \textit{Bunga Seroja} case the judges concluded that the American construction of the
perils of the sea exception is also followed in Canada. Below I shall make clear why I do
not entirely agree with that finding in \textit{Bunga Seroja}.

424. The American construction deprives the carrier of an important exception. It is
unfair towards the carrier because the carrier may be responsible for damage which he
could not prevent by using due diligence and proper care and for which event the
Rules provide a defence. That defence is however, rendered practically useless under
American law.

5.4.3.3 \textit{Canadian law}

425. Although this book mainly concerns a comparison of English, American and
Dutch law I shall also discuss Canadian and Australia law in this paragraph. The main
reason is that a lot of the research for this paragraph is based on the \textit{Bunga Seroja}
judgement\textsuperscript{626} in which the High Court of Australia also compared Canadian law to En-
glish and American law. Under Canadian law, as under American law, the damage
causing event has to be unforeseeable to constitute a peril of the sea. However, under
Canadian law it is not required that the event is extraordinary in nature.

\begin{quote}
The requirement that the event was unforeseeable
\end{quote}

426. Tetley writes: ‘[t]he unforeseeability and the inevitability of the bad weather have
frequently been reiterated as the major elements of the peril exception in Canadian

95, affirmed 387 F.2d 645 (5 Cir. 1968).
\textsuperscript{623} The Rosalia, 264 F. 285.
\textsuperscript{624} Tetley 2005, p. 2 referring to: ‘The Giulia 218 F, 744 at p. 746 (2 cir. 1914)’ and six other decisions where the
same was said.
\textsuperscript{625} See also Schoenbaum 2003, p. 624. See also the Bunga Seroja case.
maritime law. And cites *Canadian National Steamships Ltd. v. Bayliss* as authority. A passage from that judgement from which a definition of the perils of the sea exception can be derived has been repeated a number of times by the Canada Supreme Court.

427. In *Falconbridge Nickel Mines etc* the Canada Supreme Court held:

“The meaning of the phrase “perils of the sea” in this context has been discussed in a number of cases and from time to time has given rise to what appears to be some conflict of judicial opinion which was in my view attributable to the slightly different approach taken in marine insurance cases to that taken where the sole question at issue relates to the interpretation of the bill of lading, but the cases of Parrish and Heinbecker Ltd. et Al v. Burke Towing and Sabotage Co. Ltd., [1943] S.C.R. 179, Goodfellow Lumber Sales v. Verreault, [1971] S.C.R. 522; [1971] 1 Lloyd’s Rep. 185, and N. M. Paterson & Sons Ltd. v. Mannix, [1966] S.C.R. 180; [1966] 1 Lloyd’s Rep. 139, appear to me to make it plain that this Court has approved and adopted for at least for bill of lading cases the test laid down by Sir Lyman Duff in *Canadian National Steamships v. Bayliss*, [1937] S.C.R. 261, where he said of the defence of “perils of the sea”:

*The issue raised by this defence was of course an issue of fact and it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. [The italics are my own.]*

428. The emphasised passage does not show that the rough weather was not to be foreseen. It shows that the damage to the cargo arising from the rough weather was not to be foreseen. However in *Kruger Inc. v. Baltic Shipping Co.* the Federal Court of Appeal held:

‘With respect to the exception for perils of the sea, counsel for Baltic argued that the test was not whether the weather was foreseeable but rather whether the consequences of the weather, viz. the loss of the ventilators, could have been reasonably foreseen and guarded against. We do not think this statement of the test is correct. It is not the loss of ventilators that is a peril of the sea although the loss of ventilators was found to be the instrumentalities or means which gave rise to the loss of ship and cargo.

The phrase “perils, danger, and accidents of the sea” in Article IV, paragraph 2(c) of the Hague Rules has been interpreted to mean perils which could not have been foreseen or guarded against as probable incidents of the intended voyage. The trial judge was correct, based on the authorities, when he concluded on the basis of the evidence that the weather encountered by the ship:

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627. Tetley, 4th ed. ch. 18, p. 3.
5.4 PERILS OF THE SEA

... while unquestionably severe, which is well recognized by the Plaintiffs, was in fact foreseen and could even have been guarded against. At the very least, it is abundantly clear that the weather could and should have been foreseen and that it could have been guarded against.632

429. Also in the Bunga Seroja case the judges of the High Court of Australia reached the conclusion that both American and Canadian law require the damage causing event (that is the weather, and not the damage caused) to be unforeseeable.633

430. It can be concluded that for a successful perils of the sea defence under Canadian law the carrier must prove that the damage causing event was unforeseeable and that the damage could not be guarded against. In this sense the Canadian construction is similar to the American construction which also requires the damage causing event to be unforeseeable.

Extraordinary nature of the event

431. Referring to the Bunga Seroja,634 Keystone Transports v. Dominion Steel and Coal Corp635 and Goodfellow Lumber Sales Ltd. v. Verrault636 Carver remarks that the English, Canadian and Australian view enables the defence to be triggered off somewhat more easily than in the United States, thus pushing back the burden of raising negligence in respect of seaworthiness or care of cargo on to the claimant with consequent problems of proof.637

In Keystone Transports Ltd. v. Dominion Steel & Coal Corp. Ltd., goods were damaged by seawater. The wind during the voyage was described as ‘fresh’ and ‘strong’ which can not be called extreme. The Supreme Court of Canada held: ‘... it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of wind and waves, when such damage cannot be attributed to someone’s negligence.’638 (emphasis added, NJM)

432. In Kruger Inc. v. Baltic Shipping Co. Pinard J. of the Federal Court of Canada held: ‘Therefore, it is not so much the severity of the storm that must be considered here as the fact that it could have been foreseen or guarded against as a probable incident of the intended voyage in the North Atlantic, at that time of the year.’639

433. A good example of an event causing damage that can not be called ‘extraordinary’ is the event which caused damage in Consolidated Mining & Smelting Co. v. Straits Towing Ltd.640 In that case two barges containing cargo was left at a mooring. There was a 10 to 15 knot wind which is called a gentle to moderate breeze on the Beaufort scale. At the

633. See infra.
time of mooring the water was at the highest level of the year. It was accepted that the barges were holed by underwater obstructions in the form of pilings causing the barges to take water and sink which caused the loss of or damage to the cargo. Mr. Justice Cattanach of the Canada British Columbia Admiralty District said:

'It follows from the foregoing authorities that in order to be a peril of the sea within the exemption from liability under art. IV of the Rules there must be something which could not be foreseen as one of the necessary incidents of the adventure. Therefore the question that follows is whether the defendant should have foreseen that the barges would swing at their moorings at the booming ground in Port McNeill, sheer off a piling, become impaled upon that piling and sink. In my opinion there was nothing which should have alerted the defendant to the possibility of the pilings to which the barges were moored would give way.  

The perils of the sea defence was allowed. Also in this judgement no reference was made to the requirement of an event which should be extraordinary.

5.4.3.4 Australian law

434. Although this book mainly concerns a comparison of English, American and Dutch law I shall also discuss Australian law at this point. The main reason is that a lot of the research for this paragraph is based on the Bunga Seroja judgement of the High Court of Australia. The Bunga Seroja judgement is the leading case concerning the construction of the perils of the sea exception. The judgement is based on historical analysis of the Rules and on a comparative law study of the application of the Rules. In the Bunga Seroja decision the Australia High Court allowed a perils of the sea defence for damage caused by very rough weather in the Great Australian Bight (which is renowned for severe weather). The weather forecast had warned for gales, rough to very rough seas and a moderate to heavy swell. The weather was actually much rougher. Winds of force 10 to 11 Beaufort and wave heights of 10-11.5 m were encountered. In the Bunga Seroja decision the court relied on its previous decision in Gamlen. Also in that decision the High Court concluded that there is a difference between the Canadian/American and Anglo/Australian construction of the perils of the sea defence.

435. In Gamlen, Mason and Wilson, JJ. said that:

'[t]here is a difference between the Anglo-Australian conception of "perils of the sea" and the United States-Canadian conception. According to the latter, "perils of the sea" include losses to goods on board which are peculiar to the sea and "are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence". The Giulia (…) adopting Story on Bail-

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ments, s. 512(a). In the United Kingdom and Australia it is not necessary that the losses or the cause of the losses should be “extraordinary” (Carver Carriage by Sea, vol. 1, 12th ed. (1971), s. 161; Skandia Insurance Co. Ltd. v. Skoljarev). Consequently sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.\(^\text{645}\)

436. In *Bunga Seroja* all six of the judges\(^\text{646}\) decided that the *Gamlen* decision is correct.\(^\text{647}\) The conclusion is that under Australian law unforeseeability of the damage causing event is not required for that event to constitute a peril of the sea. It is also not required that the event that caused the damage must be of an extraordinary nature to constitute a peril of the sea.

*The requirement that the event was unforeseeable*

437. In *Bunga Seroja* Gaudron, Gummow and Hayne said:

> ‘In *Gamlen* Mason and Wilson JJ said that “sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.” The fact that the sea and weather conditions that were encountered could reasonably be foreseen, or were actually forecast, may be important in deciding issues like an issue of alleged want of seaworthiness of the vessel, an alleged default of the master in navigation or management, or an alleged want of proper stowage. Similarly, the fact that the conditions encountered could have been guarded against may be very important, if not decisive, in considering those issues. (Their decision may then make it unnecessary to consider the perils of the sea exception). But if it is necessary to consider the perils of the sea exception, the fact that the conditions that were encountered could reasonably be expected or were forecast should not be taken to conclude that question. To that extent we agree with what was said by Mason and Wilson JJ in *Gamlen*. Such an approach, even if it is different from the American and Canadian approach, better reflects the history of the rules, their international origins and is the better construction of the rules as a whole.’\(^\text{648}\) (emphasis added, NJM)

438. The other judges in *Bunga Seroja* expressed the same view.\(^\text{649}\)

439. Regarding the foreseeability Callinan said that:

> ‘although there is authority for, and much to commend, the proposition that the expression “perils of the sea” should be confirmed to unforeseen or exceptional events, or overwhelming force of the sea: in short, events that could not be reasonably guarded against. The fact that advances in shipbuilding technology, communications, and navigational aids provide the means of significantly reducing exposure to the perils of the sea however defined, make such a propo-


\(^{646}\) Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan.

\(^{647}\) See *Bunga Seroja* points 51, 72, 96, 102, 217, 224 and 226.


sition in modern times more attractive still. Similarly, more reliable methods of assessing the force of the elements are now becoming available (...) However the thrust of the relevant rules taken as a whole is, in my opinion clear. They are designed principally to exonerate shippers and more particularly, carriers who have not been guilty of want of due diligence or fault. Accordingly, in cases in which the carrier has acted as expressly required by the rules, and is not guilty of negligence, and, events at sea can be shown to be the cause of the loss and damage, the carrier should be entitled to immunity.  

440. The above makes clear that under Australian law all aspects of the case play a role and the aspect that an event was foreseeable is only one aspect that plays a role but is certainly not decisive. Conditions for a successful perils of the sea defence is that the carrier used due diligence to provide a seaworthy ship and treated the cargo properly and carefully.

Extraordinary nature of the event

441. In Bunga Seroja Gaudron, Gummow and Hayne said:

“there is a difference between the Anglo-Australian conception of “perils of the sea” and the United States-Canadian conception. According to the latter, “perils of the sea” include losses to goods on board which are peculiar to the sea and “are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence”: The Giulia adopting Story on Bailments, s 512(a). In the United Kingdom and Australia it is not necessary that the losses or the cause of the losses should be “extraordinary” (Carver, Carriage by Sea, vol 1, 12th ed (1971), s 161; Skandia Insurance Co. Ltd. v. Skoljarev). Consequently sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.”  

442. I disagree with the quoted consideration. Above I discussed that in my opinion under Canadian law it is not required that the event is of an extraordinary nature for it to constitute a peril of the sea.

443. Kirby remarks that the intensity (and predictability) of the weather are circumstances which play a role in deciding weather a perils of the sea defence should succeed but that none of the circumstances is decisive. This shows that an ordinary event (e.g. rough weather) can also constitute a peril of the sea.

444. The conclusion from Bunga Seroja is that an ordinary event can also constitute a peril of the sea.

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652. Bunga Seroja, sub 147.
Bunga Seroja: comments

445. The *Bunga Seroja* decision makes it clear that unforeseeability and ‘extraordinary nature’ are aspects which are to be taken into consideration. They are however not decisive. All aspects of the case should be considered when judging if the peril of the sea defence can succeed or should fail. The carrier must however have fulfilled the duties imposed on him by art. III(1) and III(2). The exception will fail if the carrier’s negligence in fulfilling these duties was the cause of the damage.

446. The decision has been criticised by Tetley who is of the opinion that the distinction made in the decision between the Canadian/American construction on the one hand and the Anglo/Australian construction on the other, contrary to what the Australia High Court says, does not exist. Tetley is of the opinion that English and Canadian authorities require unforeseeability as one the necessary elements of the defence (the other element is inevitability, but that is disputed by nobody). As I have discussed in this paragraph unforeseeability is not required under English and Canadian law and Tetley’s arguments are unconvincing. Tetley writes: ‘[t]he conclusion of the High Court in *The Bunga Seroja* is therefore that the carrier need only prove due diligence and proper care of the cargo in order to exculpate himself from liability for a claim resulting from damage done during a storm at sea, *however severe and however expected or expectable the storm may have been*.’ (emphasis added, NJM)

447. I disagree with Tetley’s conclusion on *Bunga Seroja*. In *Bunga Seroja* the planned voyage was in the Great Australian Bight which is renowned for severe weather. The weather forecast warned for gales, rough to very rough seas and a moderate to heavy swell. The decision to leave was based on the received weather reports. The weather encountered was however, worse than the weather predicted. Regarding weather Kirby J. said:

> ‘None of the Judges below treated the intensity of the weather conditions, or the fact that gales had been forecast, as irrelevant. Neither did they treat them as determinative in the way that GCM urged. Instead, they adopted the correct course of examining all of the facts and circumstances. They concentrated attention upon whether the hazards encountered were such as could, and should, have been prevented by the carrier properly and carefully conducting itself with this particular vessel in this place and these circumstances. They asked whether the loss or damage shown arose, or resulted from, the sea hazard or from a want of proper and careful conduct on the part of the carrier. Not only was the approach taken by their Honours clearly open to them. In my view, it was correct. The conclusion reached was inevitable.’

448. I agree with Kirby’s remarks on the decision to sail. Kirby said:

> ‘The extremes of weather encountered by *Bunga Seroja* went beyond the gale conditions forecast. They were so extreme that structural damage was done to
the ship. This is a factual consideration often regarded as relevant in these cases. The various alternatives propounded to avoid the loss of or damage to cargo were convincingly rejected. The only one which remained for this Court (not having been seriously propounded below) was that the ship should not have ventured forth from Burnie. Assuming, contrary to my inclination, that such an argument was available at such a late stage of the litigation, it could not succeed. If every ship of the size, structure and functions of *Bunga Seroja* were obliged to remain in, or return to, harbour upon receipt of weather forecasts predicting gales in the Great Australian Bight or like stretches of ocean, serious inefficiencies would be introduced into the sea carriage of goods. The consequent costs of ships standing by would be wholly disproportionate to the marginal utility of such precautions.  

Obviously, in the unlikely event that a captain decides to sail into a typhoon with the knowledge that the ship will sink and/or the cargo will be lost or damaged, there will not be a peril of the sea because the ship should have avoided the typhoon, either by staying in port or by deviating from its course. In other words, the damage was avoidable. This is one example whereby the ship should not sail if she is in port.

5.4.3.5 Dutch law

449. There are decisions in The Netherlands that show that ordinary rough weather can also constitute a peril of the sea. There is no consensus in the Dutch courts about the question if the damage causing event has to have been unforeseeable for it to constitute a peril of the sea.

*The requirement that the event was unforeseeable*

450. Schadee defines a peril of the sea as ‘an event of the sea’ causing unavoidable damage. Schadee concludes from a decision of the Supreme Court of The Netherlands and the absence of information proving otherwise in the legislative history of the enactment of the Hague Rules in The Netherlands that under Dutch law the event causing the damage does not have to be unforeseeable to constitute a peril of the sea. In Schadee’s opinion an ordinary storm can constitute a peril of the sea. As is clear from Schadee’s definition the damage must be unavoidable. Schadee writes that ‘[t]his means that a competent carrier would not reasonably have been able to prevent the damage caused by the event’.

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657. See e.g. Amsterdam Court of Appeal, 13 December 1990, S&S 1991, 87 (Bickersgracht). In that case the wind force during the entire voyage was 5-7. Because of spray blowing over the cargo could not be ventilated causing damage to the cargo.  
658. The Dutch word ‘zee-evenement’ is used which literally means ‘sea-event’.  
663. Boonk 1993, p. 183. See also Amsterdam Court of Appeal 6 mei 1966, S&S 1967/17 (Helena). In that case the peril of the sea defense was allowed even though the stowage could have been better. The Court of Appeal found it sufficient that reasonable care had been taken.
5.4 PERILS OF THE SEA

451. Royer writes that the degree of foreseeability is an important factor determining how unavoidable the damage will be. If an event is foreseeable then it will be easier to avoid damage caused by that event. This does not however mean that a carrier does not have to guard against the possible consequences of an unforeseen event. 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. 664 Also the cargo must be stowed in such a way that it can survive a voyage undamaged even if, e.g., rougher weather was encountered than was foreseen.

An unforeseeable event causing damage to the cargo will therefore not constitute a peril of the sea if the carrier could have avoided the damage by using due diligence to make the ship seaworthy and by handling and stowing the cargo properly and carefully.

Royer notes that in common law an event causing unavoidable damage does not necessarily have to have been unforeseeable for it to constitute a peril of the sea. The framers of the Hague Rules (who were for a significant part English) did not intend to introduce the additional requirement of unforeseeability for an event to constitute a peril of the sea. 665 Cleveringa and Boonk are also of the opinion that unforeseeability of the event is not required for a successful perils of the sea defence. 666 There is no consensus in the lower Dutch courts on the question of the requirement of unforeseeability. 667

Quo Vadis

452. In the 1993 Quo Vadis 668 case the Supreme Court of The Netherlands rendered a judgement that corresponds with the point of view taken by the Dutch authors Boonk, Schadee, Royer and Cleveringa. The Quo Vadis was sailing from Northern Spain to Antwerp (Belgium) in the last days of December. The wind was SW 8-9 gusting to 10 Beaufort. 669 Seawater entering the engine room through open ventilation ports caused engine failure. The tug Abeille Flandre came to Quo Vadis’ assistance and towed her to Brest. The owner of the Quo Vadis (Kroezen, who was also the captain of Quo Vadis) declared general average.

One of the defences of the owner against the claim for salvage payment was the perils of the sea exception. The owner stated that the seawater entered through open ventilation ports when the ship was entering the shallow waters of the continental shelf and suddenly encountered very rough ground seas.

453. The court of appeal held that Kroezen should have been prepared for the sudden rough shallow water waves in that area and in that season. According to the court of

667. Unforeseeability was not required in the following decisions: District Court Rotterdam 2 September 1994, S&S 1994/113 (Act 7) and District Court Rotterdam 17 April 1956, NJ 1956/634 (Black Condor). In the following decisions the district courts did require that the event was unforeseeable: District Court Dordrecht 1 February 1995, S&S 1996/89 (LEON), District Court Amsterdam 24 April 1974, S&S 1976/37 (Baarn), District Court Rotterdam 26 October 1971 en S&S 1972/5 (Leuve Lloyd).
669. A South Westerly wind in that area is one of the worst directions because the wind is blowing straight out of the Atlantic with no land mass in its way.
appeal Kroezen could have taken measures to avoid the damage in time. For this reason his perils of the sea defence failed. Kroezen appealed against the decision of the court of appeal.

At the Supreme Court Kroezen stated that unforeseeability is not required for a perils of the sea defence. According to Kroezen the real question was, if, when entering shallower water, the captain should always close ventilation ports because of the possibility of sudden ground seas causing water to be shipped on deck.

The Supreme Court did not agree and held that the decision of the court of appeal was correct. The Supreme Court held:

`... considering the time of the beginning of the voyage was 24 December and the voyage was from Northern Spain to Antwerp, the events stated by Kroezen can not be deemed to have been unexpected, meaning that measures could not have been taken in time, so that the sudden confrontation with rough beam seas can also not be considered to have been unexpected. The court of appeal obviously held that Kroezen could not rely on the perils of the sea defence because it can not be said that Kroezen should not have been prepared for such ground seas, so that he should be deemed to have been in a position to be capable of preventing the seawater from entering the engine room via the ventilation port.' (emphasis added, NJM)

454. So, in *Quo Vadis* engine failure caused by foreseeable rough seas and by open ventilation allowing seawater to enter the ship can not be a peril of the sea because the damage was avoidable. By taking the mere precaution of closing the ventilation ports the damage could have been avoided. The cause of the damage is lack of due diligence to make the ship seaworthy and not a peril of the sea. In the words of Royer ‘the expression “perils of the sea” is limited to the point where the negligence of the carrier or his servants begins’.

455. The *Quo Vadis* judgement demonstrates the importance of causality. If the cause of the damage was failure to fulfil the obligations regarding cargo and due diligence the carrier can not rely on the perils of the sea defence.

**Extraordinary nature of the event**

456. Cleveringa is of the opinion that a peril of the sea is a ‘freak event which is violent and overwhelming’⁶⁷¹ Thus Cleveringa follows the American view that a peril of the sea must be an extraordinary event. Schadee on the other hand does not think that the event should be of an extraordinary nature. He writes that unforeseeability is not required and that an ‘ordinary storm’ can also constitute a peril of the sea.⁶⁷₂ The reference to an ‘ordinary storm’ is an indication that Schadee is of the opinion that an extraordinary nature of the event is not required. Boonk attempts to deduce from decisions of the Dutch courts which wind force is required for a peril of the sea, and concludes that a minimum of force 9 or 10 is required. Boonk correctly writes that in the discussed cases the courts spent too little attention to the specific facts of the cases.

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⁶⁷² Schadee 1955, p. 690.
correctly states that in certain situations less rough weather than a force 10-11 storm can constitute a peril of the sea, such as combinations of wind, sea, currents, sudden ground seas and duration of the rough weather. The criterion is, according to Boonk, if the carrier could, under the given circumstances, have prevented or guarded against the damage caused by the rough weather. Boonk is therefore also of the opinion that an event does not need to be extraordinary to constitute a peril of the sea. Hijmans van den Bergh points out the Hague Rules are based on English law and that under that law it is not required that the event needs to consist of ‘causes which are uncommon’.

457. It can be concluded from the above that the prevailing opinion under Dutch law is that an ordinary event can also constitute a peril of the sea. There is however no consensus in the decisions of the Dutch courts.

5.4.3.6 The intended construction of the perils of the sea exception

458. An objective construction of the expression will not lead to an intended construction. The subjective construction has to be used. What did the framers mean when they included the exception? From the Travaux Préparatoires it can be derived that the English attached great importance to the list of exceptions. The exception was included in the list without explanation or comment. Sir Leslie Scott compared the list of exceptions to Moses and the table of stone on which the ten Commandments were written. Sir Norman Hill, who was appointed by the shipowners to act for them, took a leading part in the original drafting of the Rules in 1921. It was obvious that if Britain would not become party to the Rules, then there would be great uncertainty that they would be adopted by any other foreign power. When some of the continental states opposed to the list of exceptions in art. IV(2) it was explained by Sir Norman Hill that the Rules could only be accepted by the British shipowners on unless ‘we had in detail such exemptions as are agreed to be fair and proper’. And Lord Phillimore explained that ‘[w]e have always been accustomed to have our bill of lading enumerate the excepted perils. It is perhaps not so scientific as the French form; on the other hand, it is safer because it leaves less to what is called the appreciation of the judge’.

459. Sir Norman Hill, representative of British shipowners, took a prominent position in drafting the Rules and talked of ‘such exemptions as are agreed to be fair and prop-

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676. In the decision of the District Court Haarlem of 14 November 1972, S&S 1974/88 (Sealord Challenger) and Amsterdam Court of Appeal of 15 April 1955, NJ 1955/492 (PERICLES II) an event of extraordinary nature was not required. An event of extraordinary nature was however required in the following cases: District Court Arnhem 22 August 1992, S&S 1994/30 (Herm Kiepe), District Court Amsterdam 7 December 1988, S&S 1990/113 (Bickersgracht) and District Court Rotterdam 13 November 1987, S&S 1988/96 (Duke of Holland).
677. Travaux Préparatoires, p. 50.
680. Report from the Joint Committee 1923, p. 17.
682. Travaux Préparatoires, p. 373.
er. The Dutch author Blussé described the way the English drafters enforced there will with regard to art. IV (2) as ‘something that looks like abuse of power’.683

460. I conclude that, although the English and American construction of the ‘perils of the sea’ exception was not uniform at the time when the Rules were drafted, a subjective construction of the Rules, using the Travaux Préparatoires and legislative history as aids, leads to the conclusion that the framers of the Rules intended the ‘perils of the sea’ exception to be construed according to English common law.

5.5 The catch all exception

5.5.1 Introduction

461. The q-exception provides:

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

(…)

q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of the exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.’

(emphasis added, NJM)

462. This residual exception is known as the ‘catch all’ exception or ‘q-clause’. It is invoked where other exceptions do not apply. E.g. in Goodwin, Ferreira & Co. Ltd., and others v. Lamport & Holt, Ltd. the damage was caused to cotton which had been loaded into a lighter. The cause of the damage was a machine dropping out of its box when it was being loaded into the same lighter. The box that the machine was packed in was probably not strong enough. The n-exception (insufficiency of packing) did not apply because that exception has reference to the packing of the particular goods in respect of which or to which loss or damage arises.684

463. Below the following issues will be discussed:

(1) Which events are covered by the words ‘any other cause’?
(2) How do the words ‘actual fault or privity’ relate to the words ‘fault or neglect’?
(3) Which persons are meant with ‘agents or servants of the carrier’?
(4) How is the burden of proof divided?
(5) What is the meaning of the word ‘or’ in the exception?

5.5.2 Which events are covered by the words ‘any other cause’?

464. It has been said that although the phrase ‘other cause’ is not accompanied by a word such as ‘whatsoever’, and hence appears to refer back to the enumerated perils, there is nothing in them from which the *eiusdem generis* 685 can be derived, with the result that the phrase must have wide application. 686 In *The Chyebassa* Lord Sellers said:

“Any other cause” would clearly include theft or malicious damage to the ship, ...

465. In that case plaintiffs’ goods were shipped from Calcutta to Rotterdam on defendants’ motor vessel the *Chyebassa* under bills of lading incorporating the Hague Rules. Goods were delivered damaged by sea-water owing to shipowners’ stevedores stealing a storm valve cover plate during unloading and loading of other cargo at Port Sudan.

466. Lord Justice Sellers said:

‘It is beyond question, I think, that the appellants could not have escaped liability if the stevedores’ men in the performance of the work in hand had damaged or stolen the cargo they had to handle. But the men involved did not damage the cargo which they were handling and did not steal any of it. They took the opportunity to remove a very small part of the ship itself in order to steal it and in so doing so damaged the ship that sea water could enter.

The removal was not ship’s work. It was not in the ship’s interest and did not purport to be. It was in no way incidental to or a hazard of the process of discharge and loading. If a complete stranger had entered the hold unobserved and removed the plate, par. (q) would I think apply if the shipowner could prove that it was a stranger who removed the cover and reasonable care had been taken to prevent strangers getting on board the ship and due diligence generally had been exercised. In the present case the act of the thief ought I think to be regarded as the act of a stranger. The thief in interfering with the ship and making her, as a consequence, unseaworthy, was performing no duty for the shipowners at all, neither negligently nor deliberately nor dishonestly. He was not in fact their servant and no question therefore strictly arises of his acting outside the scope of his employment. The appellants were only liable for his acts when he, as a servant of the stevedores, was acting on behalf of the appellants in the fulfilment of the work for which the stevedores had been engaged. Without that the appellants were in no relationship at all with the thief.

685. ‘This term is chiefly used in cases where general words have a meaning attributed to them less comprehensive than they would otherwise bear, by reason of particular words preceding them: e.g., the Sunday Observance Act, 1677 (29 Car. 2, c.7), enacts that no tradesman, artificer, workman, labourer, or other person whatsoever, shall follow his ordinary calling on Sunday; here (…) the word “person” is confined to those of callings of the same kind as those specified by the preceding words, so as not to include a farmer.’ [Wharton’s Law Lexicon, Fourteenth Edition, Third Impression, London: Steven’s and Sons, Sweet and Maxwell: 1949.]


Hourani v. T. & J. Harrison; Brown & Co. v. Same, (1927) 28 L.I.L.Rep. 120; (1927) 32 Com. Cas. 305, established that although stevedores appointed, as here, are independent contractors, the men employed by them to discharge the cargo must be regarded as servants of the shipowner for that purpose within the meaning of par. (q).688 (emphasis added, NJM)

467. And Lord Justice Danckwerts added:

“The theft could not have been prevented by any reasonable diligence of the shipowners through the officers and crew of the ship.

Accordingly, in my view, the shipowners are not liable for the damage to the tea which resulted from sea water entering the hold through the absence of the plate.”689

468. And Lord Justice Salmon:

“The stevedoring company was engaged by the defendants to handle the cargo and their servants became the defendants’ agents for that purpose. Accordingly, if they handled the cargo negligently and thereby damaged it or some other cargo, either directly or indirectly, the defendants would be responsible for their negligence. If, for example, the stevedores had so negligently handled the cargo at Port Sudan that they knocked off the cover plate, there could have been no answer to this claim. Moreover, if the stevedores handled the cargo dishonestly, for example if they stole it, the defendants would be liable to its owners for the stevedores’ dishonest acts. It seems to me however that the theft in this case had nothing to do with the handling of the cargo. The stevedore’s employment merely afforded him the opportunity of stealing the plate. No doubt the defendants owed the plaintiffs a duty to take care that no one stole any part of the ship if the theft of such part might render the ship unseaworthy and damage the cargo. There was however no breach of that duty. The fact that the thief was a stevedore was quite fortuitous as the theft had nothing to do with the work upon which he was engaged. The fact that his employment on board presented him with the opportunity to steal does not, in my judgement, suffice to make the defendants liable: see Morris v. C. W. Martin & Sons, Ltd., [1965] 2 Lloyd’s Rep. 63 (…), where all the relevant authorities on this branch of the law are elaborately discussed.”690

469. To summarise: If a stevedore steals a part of the ship, thus causing damage to the cargo, the carrier can rely on the q-clause because the stevedore was acting outside the scope of his duties. If, however, the stevedore were to have stolen the cargo that he was employed to load and stow, the carrier could not rely on the q-clause.

689. Ibid.
690. Ibid. 
5.5.3 How do the words ‘actual fault or privity’ relate to the words ‘fault or neglect’?

470. The expressions ‘actual fault or privity’ and ‘fault or neglect’ have the same meaning. It has been said that the words ‘actual fault or privity’ come from the Fire Statute (s. 502 of the Merchant Shipping Act 1894). A distinction between the expressions ‘fault or neglect’ and ‘actual fault or privity’ was probably made because under English law the latter expression can only mean the carrier or shipowner himself. For this reason it is necessary to have regard to the directing mind of the carrier. The expression ‘actual fault or privity’ could therefore not be used to indicate a fault of servants or agents of the carrier. In the official French text no such distinction was made. The French text of the Hague Rules only uses the expression ‘du fait ou de la faute’.

5.5.4 Which persons are meant with ‘agents or servants of the carrier’?

471. In Heyn v. Ocean Steamship Co. Justice Mackinnon said:

'It is therefore one of the duties of the carrier to discharge the goods (...) and if he employs an independent stevedore contractor to carry out that part of his duty, namely the duty of discharging the cargo, I think the workmen of that independent stevedore contractor are within the meaning of this provision the agents or servants of the carrier.' (emphasis added, NJM)

472. See, however, the Chyebassa case which is also discussed below. In that case one of the stevedore’s men stole a part of the ship and this was the cause of cargo damage. The court ruled that under those circumstances the carrier could rely on the q-clause. ‘Servants’ must mean, according to Carver, ‘employees’ acting in the course of their employment.

Agents

473. What the word ‘agent’ means is less clear but it seems to refer to a person performing work for which the carrier is responsible such as loading or unloading by a stevedore and his employees.

474. In Hourani v. T. & J. Harrison cargo, or portions of the cargo, had been stolen by the men employed by the stevedores in the discharge of the goods, and the shipowners contended that under the terms of the bill of lading they were exempt from liability. Regarding the question of which persons could be considered ‘agents’ of the carrier Lord Justice Bankes said:

691. Carver 2005, p. 617 and Cooke et.al 2007, p. 1046. See also supra § 5.3.
692. See also § 5.3 and Carver 2005, p. 617.
693. ‘…, du fait ou de la faute du transporteur ou du fait ou de la faute des agents, …’
696. Hourani v. T. & J. Harrison (1927) 28 L.L.L.Rep. 120.
‘..., [in] the case of Machu v. London & South Western Railway, (1848), 2 Exch. 415, a very similar case, (...) the Court held that for the purpose of construing an Act of Parliament in somewhat similar terms to this statute, the servants of the independent contractor would be the agents of the railway company for the purposes of the construction of the statute; and so here it seems to me impossible to put any reasonable construction upon this statute except by regarding the servants of the persons who are employed by the shipowner in order to fulfil his statutory obligation to discharge the vessel, as being his agents for that purpose.’

475. In the same case Lord Justice Atkin said:

‘The other question is the question as to whether or not the servants of the master stevedore at Vera Cruz can be said to be, within the meaning of the clause, the agents or servants of the ship. Mr. Clement Davies did not dispute that the master stevedore himself was to be considered an agent of the ship, and I think he was quite right in so holding. There was a statutory obligation on the ship to discharge, and they performed that duty by entering into a contract with the master stevedore, who for that purpose was their agent in performing their statutory duty; and, to my mind, that in itself would be sufficient to support the matter, because it is plain that the master stevedore, according to our law, would be responsible for the tortuous acts of his servants done in the scope of their employment; but quite apart from that I think that the servants of the stevedore for this purpose are also the agents of the ship, and I think it is made plain by the reasoning of the Court in the case that my Lord has referred to, of Machu v. London & South Western Railway, sup., where the Court had to deal with words which were narrower in their meaning; where they had to deal with the word “servants”, and where the Court held that the servants of the sub-contractor of the carrier were, within the meaning of the Carriers Act, servants of the carrier; and I think that that is sound and applies to this case.’

476. In this case a storm valve cover plate was stolen from the ship by a stevedore who was employed to load cargo. The court of appeal held that, under these circumstances, the stevedore was not to be considered a servant or agent of the shipowner and allowed the carrier’s appeal.

5.5.5 How is the burden of proof divided?

477. The q-clause provides the following division of the burden of proof:

‘..., but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the

697. Ibid.
698. Ibid.
fault or neglect of the agents or servants of the carrier contributed to the loss or damage.  

478. The division of the burden of proof as provided by the q-clause is an exception to the usual division. To rely on the q-clause the carrier has to prove the cause of the damage and that this cause or these causes were not a result of his actual fault or privity nor of the fault or neglect of his agents or servants. This proof will usually be difficult and that is the reason a carrier will primarily try to rely on another exception if possible.  

479. Under American law and English law and also in the views of Tetley and Von Ziegler the carrier will not be able to rely on the q-clause if the cause of the loss or damage is not known. The carrier must not only prove his fault did not cause the damage but also what other cause was responsible. Carver however says:  

'It is not in principle necessary that the carrier prove how the event occurred: it may sometimes be possible simply to prove that all care was taken. This will however be rare.'  

480. Carver cites *Pendle & Rivet v. Ellerman Lines Ltd.* and *The City of Baroda*. In the latter case Mr. Justice Roche did indeed say that it may be possible that the carrier need not prove how the event occurred:  

'In many cases it would be sufficient I think to prove general care that was exercised with regard to the management of a ship and cargo, but in this case it has become, on my view of the facts, material for the defendants also to say that, besides general care in arranging for watching, the watching was vigilantly and properly carried out. The same view of the method in which a bailee, and a shipowner is after all a bailee of goods, may discharge the onus of proof is illustrated and explained both in the judgement of Walton, J., and of the Court of Appeal, in the case of Bullen v. Swan Electric Engraving Co., 22 T.L.R. 275, 23 T.L.R. 258. Sir Gorell Barnes, giving the judgement of the Court of Appeal, said this (at p. 259):  

"They were left, therefore, to the consideration of well-known principles of law. One of these was that a gratuitous bailee must show that the loss occurred through no want of reasonable care on his part – that was to say, as much care as a prudent man would use in keeping his own property. The plaintiffs’ contention (now this is the passage bearing on this case) was that the defendants must show that the loss happened in some way which they could account for, and that in relation to that particular matter and at that particular moment of time proper care was taken. No authority had been cited for such a proposition as that. It was enhancing the burden of proof upon a defendant to an absurd  

extent if he had to prove not only that he had taken every reasonable care but also that he knew how the loss happened.” That good general principle, which I should adhere to and apply wherever possible, does not, I think, for the reasons I have given, extend far enough to protect the defendants in this case. They have proved to my satisfaction that there was a theft; in proving it they have proved that the watchmen were concerned, and it has not been proved, but on the contrary I think, that those watchmen watched vigilantly. In those circumstances I give judgement for the plaintiffs with costs. 705

481. Although the possibility exists that the carrier will not be liable for loss or damage by unknown causes I do not know of any decisions where the carrier could rely on the q-clause for damage or loss by unknown causes. In order to be able to rely on the q-clause it seems to me that the carrier should also prove the cause of the loss. How else will he be able to prove that the cause of the damage is not attributable to his fault? This is also the point of view taken by the UNCTRAL Working Group III. 706 Art. 18(1) of the UNCTRAL draft convention reads:

“The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier’s responsibility.” (emphasis added, NJM)

The emphasised section shows that the carrier will be responsible for unexplained losses which occurred during the period of the carrier’s responsibility.

482. The burden of proof for the q-clause is not a shifting burden of proof as it is for the other exceptions. 707 In Quaker Oats Co. v. M/V Torvanger, regarding the burden of proof in the q-clause, the 5th Circuit (citing Gilmore and Black) held that:

“The carrier’s burden of establishing “his own freedom from contributing fault ... is no mere burden of going forward with evidence, but a real burden of persuasion, with the attendant risk of nonpersuasion.” Gilmore and Black, The Law of Admiralty § 3-37 at p. 168; § 3-43 (2nd ed. 1975). Consequently, the burden of proof does not return to the plaintiff, but rather judgement must hinge upon the adequacy of the carrier’s proof that he was free from any fault whatsoever contributing to the damage of the goods entrusted to his carriage, ...”. 708 (emphasis added, NJM)

483. In the same case it was held, that to rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than its own negligence. The 5th Circuit also held that

706. See document A/CN.9/544, paragraph 97: The Working Group’s consensus is that the carrier should be held responsible for unexplained losses.
707. See Boonk 1993, p. 221.
708. Quaker Oats Co. v. M/V Torvanger, 734 F.2d 238.
once the shipper establishes a prima facie case, under the policy of the law the carrier must explain what took place or suffer the consequences.\textsuperscript{709}

5.5.6 **What is the meaning of the word ‘or’ in the exception?**

484. The second ‘or’ in the text: ‘..., any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier’, should be read as ‘and’.\textsuperscript{710} This means that the carrier does not only have to prove the absence of his own fault or privity but also the absence of the fault or neglect of his servants or agents.

485. In *Hourani Harrison* Lord Justice Atkins said:

‘Again, I disagree with the learned Judge in his view that the word “or” can never have a conjunctive sense; I think it quite commonly and grammatically can have a conjunctive sense. It is generally disjunctive, but it may be plain from the collocation of the words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity, it is quite within the ordinary principles of construction adopted by the Courts to give the word a conjunctive use. Here it is quite plain that the word leads to an absurdity, because the contention put forward by the shipowners in this matter amounts to this, as my Lord said, that if a shipowner himself breaks open a case and steals the contents of it, he is exempted from liability under this section if none of his servants stole the part of the case or broke it open. That seems to me to be a plain absurdity. In addition to that, there is a repugnancy because it is plainly repugnant to the second part of the section. Therefore, I say no more about that.’\textsuperscript{711}

5.5.7 **Dutch law**

*Royer’s system*

486. Royer is the author of the most important Dutch book on the liability of the carrier under the Hague Rules. In Royer’s theory the q-clause contains the general rule as to the carrier’s liability and the general rule for the division of the burden of proof.\textsuperscript{712} He distinguishes that ‘general rule’ provided by IV(2)q from the specific Rule IV(1) and the specific exceptions a, b and c-p. The division of the exceptions into four groups makes sense. The list of exceptions does contain the different types as specified in the four groups. IV(1), a, b and q are types of their own. The exceptions c-p can indeed be grouped together as specific exceptions based on the absence of the carrier’s fault.\textsuperscript{713}
The q-exception is a general exception based on the absence of the carrier’s fault and furthermore it contains its own burden of proof.

487. In Royer’s view the ‘general rule’ consists of three principles. These are (i) The basis of liability is that the carrier is only liable for damage caused outside his fault and outside the fault of his employees and agents; (ii) if the damage was caused by more than one cause and one of those causes was a fault of the carrier or his employees or agents then the fault should be deemed to be the relevant cause of the damage; (iii) the carrier has to prove that neither his fault nor the fault of his employees or agents caused the damage.714

488. Royer compares the four specific ‘groups’ to the general rule contained in the q-exception to find out if the three principles of the general rule apply to those four specific groups. He summarises the conclusion in the table shown below. A plus means that the principle applies, a minus that it does not apply and +/- that the principle partially applies.715

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489. If I have understood Royer’s system correctly it would mean that according to the table above the first principle also applies to the fire exception. I find this hard to understand because the fire exception can also be invoked if the fire was caused by the fault of the carrier’s employees.716 Another point which is not very clear is Royer’s conclusion that the carrier is not required to prove the absence of a fault in the c-p group. This conclusion is debatable for the perils of the sea exception (art. IV(2)c). To rely on that exception the carrier does have to prove that the damage was unavoidable and this may require proving that due diligence was exercised and that the cargo was stowed properly and carefully.717 On the other hand it could be said that the proof of the cause will include the proof of absence of fault so that the Royer’s point of view that the carrier does not have to prove the absence of his fault is correct.

490. I think Royer has overanalysed the q-exception and tried to create a system around it which was not intended by the framers. Also I doubt whether the framers of the Rules meant the q-clause to be the general rule. It seems more likely that the q-clause is a typical residual clause. Indeed at the Diplomatic Conference of October 1923718 Mr. Sohr pointed out that:

‘...the scope of item (q) was not to promulgate a general principle of which the preceding items were an illustration. The text, first of all, sanctioned those ex-

714. Royer 1959, chapter V.
716. See § 5.3.
717. See § 5.4.
718. Meeting of the Sous-Commission Second Plenary Session on 6 October 1923.
ceptions commonly accepted in bills of lading and which, from now on, would offer a means of release for shipowners. Furthermore, it appeared to be a broad provision, but it was not the principle underlying the whole article.\textsuperscript{719}

491. Published cases concerning a successful invocation of the q-exception are rare. In the \textit{Gooiland} case bales of tobacco were damaged due to sweat. During the voyage the hatches could not be opened to ventilate due to heavy weather. The mechanic ventilation system was not sufficient to prevent the sweat. The carrier successfully invoked the q\textsubscript{e}xception.\textsuperscript{720}

492. In the \textit{Boknis} steel rolls were negligently stowed in a container by the shipper. During heavy weather the container of steel rolls started shifting and caused damage to other cargo. The Rotterdam District Court held that a carrier can not rely on the q\textsubscript{e} clause for damage caused to other cargo by negligent stowing of a container by the shipper of that container. The carrier is responsible because the damage caused by the shifting container containing the negligently stowed rolls of steel was also caused by negligent stowing of that container.\textsuperscript{721}

493. In the \textit{Bernd Gunda} bags of sugar dried and caked due to a change of humidity. The drying and caking decreased the volumes of the bags giving the bags space to shift against the ships side and tear open. The drying and caking of the sugar is not something that the carrier can control. The carrier quoted the following passage from Lloyd’s Survey Handbook:

\begin{quote}
‘Sugar. Special care should be exercised in ascribing the cause of damage to this commodity, particularly in the case of alleged water or moisture damage. If not dry to the point at which it is in equilibrium with the relative humidity of the atmosphere, sugar may continue to lose moisture in storage, stowage etc., dry and tend to cake. Similarly, if the sugar is too dry it will absorb moisture from the atmosphere until it attains equilibrium and if atmospheric conditions change and it dries again it will tend to cake. If the sugar is excessively dried it may suffer in lustre and from dust formation. Sugar dried to equilibrium by the manufacturer will, if exposed to atmosphere of high humidity, i.e. in damp localities or during the voyage, inevitably re-absorb moisture to the higher level of the surrounding atmosphere. The absorption or loss of moisture after leaving the manufacturers’ premises will not be apparent until there is a further change in the relative humidity of the atmosphere. For instance, sugar which has been packed in a relative humidity of, say 65%, may well await shipment in a relative humidity of 85% and will come to equilibrium with the atmosphere and, to all intents and purposes, sugar will appear to be unaffected. After loading into the vessel, however, the relative humidity to the atmosphere may fall to 65% and under these circumstances the sugar will lose moisture. During this process it will dry and cake.’
\end{quote}

\textsuperscript{719} Travaux Préparatoires, p. 427.
\textsuperscript{720} Amsterdam District Court 16 June 1971, S&S 1972, 6 (Gooiland).
\textsuperscript{721} Rotterdam District Court 1 July 1983, S&S 1983, 117 (Boknis).
494. The holds of the ship had been inspected before loading and were found to be dry. The court held that the carrier could not be held responsible for the loss of the sugar.\footnote{Rotterdam District Court 15 October 1982, S&S 1983, 104 (Bernd Gunda). See for a similar case Rotterdam District Court 7 January 1980, S&S 1980, 74 (Almut Bornhofen).}

495. In the Rio Parana a cargo of maize was damaged by self heating. The maize would have been delivered in good condition if the voyage could have been completed in the ordinary time. Due to circumstances outside the fault of the carrier the voyage took 11 weeks instead of 6 weeks. The court held that the carrier could rely on the q-clause to escape liability.\footnote{Rotterdam District Court 4 May 1981, S&S 1981, 111 (Rio Parana).}

496. In 1959 (before the Chyebassa decision was rendered\footnote{See supra § 5.5.4.}) Royer concluded that the carrier is responsible for damage or loss caused by the people in his service, regardless if they are working within the scope of their duties. The carrier is also responsible for all other persons if he uses their services for the fulfilment of the contract of carriage.\footnote{Royer 1959, p. 318.} It is unlikely that this view will be followed after the Chyebassa decision.

5.5.8 The intended construction

497. From the above it follows that the q-clause is a residual exception and was not meant as a general rule.

5.5.9 Conclusion

498. Published decisions in which the carrier successfully relied on the q-clause are rare. It is rare for the q-clause to be invoked successfully where none of the other exceptions apply.\footnote{See also Aiken et al 2006, p. 285.} To escape liability the carrier must prove the cause of the damage and the absence of his fault.