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

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Chapter 6
Division of the burden of proof under the H(V)R

6.1 Introduction

499. The H(V)R do not provide a general rule for the division of the burden of proof.\(^\text{728}\) That is not surprising because as the official name\(^\text{729}\) shows, the Hague Rules were not intended to govern all aspects of law relating to carriage of goods by sea under a bill of lading.\(^\text{730}\) The Rules do however contain some specific provisions. Art. IV(1) provides a rule for the division of the burden of proof in case of loss or damage caused by unseaworthiness. In that case art. IV(1) specifically provides that the carrier has to prove that he complied with art. III(1). This rule relieves the cargo interest of the hard task of having to prove that the carrier did not exercise due diligence to provide a seaworthy ship. He can suffice with the proof of loss or damage caused by unseaworthiness and thus place the burden of proving due diligence on the carrier. The other specific allocation of the burden of proof is provided by the ‘catch all’ exception art. IV (2) q. That exception provides that the carrier wishing to avail himself of that exception has the burden of proving that he exercised due diligence to provide a seaworthy ship and that there was no negligence regarding treatment of the cargo.

500. This chapter will start with the allocation of the burden of proof in general and thereafter will deal with the division of the burden of proof for the specific exceptions of art. IV(1) and (2). The various views on the division of the burden of proof in case of a cargo claim will be discussed below.

6.2 In general

The Popi M

501. Before discussing the division of the burden of proof in general under the Rules, I should like to point out that national law of civil procedure can be of influence. The main question is: when is a matter proven? Should there be absolute certainty or is a reasonable amount of probability sufficient? The answer to this question and other questions of proof and evidence should be found in the applicable national law as the

\(^{727}\) See for an earlier version of this chapter Hendrikse & Margetson 2006.
\(^{728}\) The UNCITRAL draft convention does provide a division of the burden of proof in article 18. See document A/CN.9/WG.III/WP.101 on <www.uncitral.org> under Working Group III.
matter is not dealt with by the Hague Rules. E.g. in The Kapitan Sakharov, a case concerning loss of life and cargo damage due to the explosion of a container of dangerous cargo, reference was made to the decision of the House of Lords in The Popi M. The Kapitan Sakharov case was governed by the Hague Rules. The Popi M concerned a ship which sank due to unclear circumstances. The owners claimed that the loss was a peril of the sea and claimed under the hull insurance policy. The defendants denied that the loss was caused by a peril of the sea. They attributed the loss due to unseaworthiness of the vessel.

502. In first instance Bingham J. said:

'(1) on the evidence the submission by the defendants that the loss was caused by wear and tear would be rejected;
(2) although the submission by the plaintiffs that the cause of water entering the vessel was contact by the vessel with a moving submerged object, i.e., a submarine, was inherently improbable, on the balance of probabilities that explanation would be accepted and since such a collision with a submarine fell within the policy cover against perils of the sea, the plaintiffs succeeded against each defendant for his proportionate share of the insured value of the vessel.'

503. The case before the House of Lords mainly dealt with the question of what is meant by proof of a case on a balance of probabilities. Although the Popi M is a case concerning hull insurance and not a cargo claim under the HVR it is still interesting as an illustration of the views regarding the question of when something is proven or not.

504. Lord Brandon of Oakbrook said in his well-known speech:

'My Lords, the late Sir Arthur Conan Doyle in his book “The Sign of Four”, describes his hero, Mr. Sherlock Holmes, as saying to the latter’s friend, Dr. Watson: “how often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?” It is, no doubt, on the basis of this well-known but unjudicial dictum that Mr. Justice Bingham decided to accept the shipowners’ submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.

In my view there are three reasons why it is inappropriate to apply the dictum of Mr. Sherlock Holmes, to which I have just referred, to the process of fact-finding which a Judge of first instance has to perform at the conclusion of a case of the kind here concerned.

731. See for example Cooke et al 2007, p. 978 where the authors refer to the example of the maxim res ipsa loquitur as applied in common law. Another example is the rule under Dutch law that under specific conditions the division of the burden of proof is reversed (the reversal rule or in Dutch ‘omkeringsregel’).
733. The Popi M, [1985] 2 Lloyd’s Rep. 1. This is a case concerning the proof of a ‘peril of the sea’ in the marine insurance sense.
The first reason is one which I have already sought to emphasize as being of great importance, namely, that the Judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No Judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

The second reason is that the dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water that a diver’s examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.

The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a Judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a Judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense. This is especially so when it is open to the Judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.

In my opinion Mr. Justice Bingham adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgement, the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship’s hull, and that, in these circumstances, the shipowners had failed to discharge the burden of proof which was on them.736

505. In *Pepi M* Lord Brandon of Oakbrook concluded:

‘In my opinion the only inference which could justifiably be drawn from the primary facts found by Mr. Justice Bingham was that the true reason of the ship’s loss was in doubt, and it follows that I consider that neither Mr. Justice Bingham nor the Court of Appeal were justified in drawing the inference that there had been a loss by perils of the sea, whether in the form of collision with a submerged submarine or any other form.’

506. The question of when a statement is proven shall depend on national law and doctrine.

The burden of proof under the H(V)R in general

507. In general the view on the division of the burden of proof is:

1. the cargo interest proves a prima facie case by proving damage and e.g. showing a clean bill of lading;
2. the carrier proves that the damage was caused by one of the excepted perils provided by art. IV(2). The choice of exception will determine what the carrier must prove.\footnote{See infra.} There are different points of view regarding what the carrier should prove at this point to escape liability.\footnote{Ex art. 4(l).}
3. The carrier could also rely on the exemption for unseaworthiness provided by art. IV(1). In that case he will have to prove that he used due diligence to provide a seaworthy ship.\footnote{Ex art. 4(l).}
   Instead of proving the above it is said that the carrier can rebut the prima facie case against him by proving that he complied with his duties as contained in art. III(1) and III(2). Schoenbaum cites American cases in which it was decided that the carrier can escape by proving the damage was caused by an excepted peril or that he used due diligence to prevent the damage.\footnote{See Schoenbaum 2004, volume 1, p. 677. In my view the second option is the proof of the q- or ‘catch all’ exception. It is not clear why the possibility of proving the absence of fault is mentioned separately as if it were an additional way to escape liability besides the q-exception.}
4. if the loss or damage was caused by concurrent causes one of which being non-fulfilment of the duties contained in art. III(1) and (2) the carrier has the burden of proving for which part he is not liable. If he fails in that proof he will be liable for the entire loss or damage.\footnote{Ex art. IV(1).}

6.3 Common law

6.3.1 In general

508. There are two competing principles regarding the division of the burden of proof in claims on the contract of carriage under a bill of lading. At common law the divi-
The division of the burden of proof is based on The Glendarroch case. In that case Lord Esher held that the carrier only needs to assert and prove that the damage was caused by an excepted peril. The cargo interest has the burden of proving the carrier’s negligence. The second view is based on the assumption that a contract for the carriage of goods is a contract of bailment, in which case the division of the burden of proof resulting from that bailment will be observed. This implies that the carrier must prove the absence of negligence as well as the fact that the damage is a result of an excepted peril. There is no binding House of Lords decision as to which of the two views should apply under the Hague (Visby) Rules. Below the different views will be discussed in detail followed by my own point of view.

6.3.2 The Glendarroch

The Glendarroch case has been an important judgement in respect of the division of the burden of proof in cases concerning claims based on a contract of carriage of goods under a bill of lading. In The Glendarroch case the bill of lading contained the usual common law exceptions including the perils of the sea exception, but it did not contain the exemption from negligence. The cargo interests held the carrier liable for non-delivery. The carrier invoked the perils of the sea exception. The judge in first instance, Sir F.H. Jeune, ruled that the carrier had the burden of providing evidence that the damage was caused by an excepted peril and that it was caused by something other than its own negligence. On appeal, however, the court of appeal decided that if the incident causing the damage was one of the excepted perils, the cargo interest should prove the carrier’s negligence by showing that the carrier was not entitled to invoke the exception in question. Referring to Roman law, Lord Justice Lopes repeated the general rule that the burden of proof lies on the person who affirms a particular thing:

’If, however, the excepted cause by itself is sufficient to account for the loss, it appears to me that the burden of shewing that there is something else which deprives the party of the power of relying on the excepted cause lies on the person who sets up that contention.’

6.3.3 The Canadian Highlander

The Canadian Highlander was carrying a cargo of sheets of tin under a bill of lading. Upon arrival it turned out that the sheets had rust damage caused by exposure to rainwater while the ship was in dry dock for repairs. The rainwater could enter the ship’s

746. The Glendarroch Rule will be discussed in more detail below.
750. Quoted in the appeal case of 1894, [1894] P. 226. The court of first instance considered: ‘...in order to excuse themselves from the damage to the goods it lay on the defendants [the carrier] to shew, not only a peril of the sea, but a peril of the sea not occasioned by their negligence’.
751. Digest, xxii. 3, 2. ‘ei incumbit probation qui dicit, non qui negat.’
hold due to carelessness in moving and replacing the tarpaulins which were supposed to cover a hatch when work was being carried out in the hold. The case was governed by the Hague Rules. Judge Wright considered that the division of the burden of proof contained in the q-exception was implicitly applicable to all exceptions. 754 He thereupon held that the carrier is considered to be the bailee and that in case of cargo damage the carrier must therefore prove that he had exercised ‘reasonable care’ for the goods. He also said that:

‘I do not think the terms of art. III put the preliminary onus on the goods-owner to give affirmative evidence that the carrier was negligent.’

511. Judge Wright based this conclusion on English authority pertaining to contracts of bailment:

‘The carrier is a bailee and it is for him to show that he took reasonable care of the goods while in his custody (which includes the custody of his servants on his behalf) and bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailee that the defendant (the bailee) is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for the defendant to explain or offer valid excuse for not having done so. It is for him to prove that reasonable care has been exercised.’ 755

512. Thus, in judge Wright’s view the cargo interest only needs to prove loss or damage, whereupon the carrier has the burden of proving that the damage was caused by an excepted peril and that the damage was not a result of any negligence on his part.

513. A number of comments are in order: Firstly, regarding the conclusion that the division of the burden of proof under the q-exception is also applicable to all the other exceptions. I disagree. Like Von Ziegler I am of the opinion that the reason that the burden of proof is given specifically for the q-exception is because the division here differs from the traditional (i.e. as in The Glendarroch 756) division of the burden of proof for the exceptions 4(2) (a-p). 757

The second comment is the use of the words reasonable care for the cargo. In the Rules the obligation to care for the cargo is phrased as an absolute obligation to handle the cargo ‘properly and carefully’. Such an absolute obligation exceeds reasonable care which sounds more like an obligation to merely use due diligence. Finally Wright does not seem to recognise the necessity of uniform interpretation of an international convention. By declaring English law pertaining to the contract of bailment applicable to a convention that should be interpreted uniformly he did not assist the object of the convention: uniformity. Therefore I disagree with Wright’s interpretation and agree

754. Art. IV(2)(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 this 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.

755. 28 L.L.L.Rep 88, 103.

756. See supra.

with the obiter dictum grounds in the judgement of the House of Lords in *The Albacora*, which will be discussed below.\(^{758}\)

### 6.3.4 **The Maltasian. Obiter dictum grounds\(^{759}\)**

**Court of Session (Inner House)**\(^{760}\)

514. With respect to the division of the burden of proof Lord Clyde found that both the above discussed views can be found in court decisions. He thereupon said:

‘..., although in the latest edition of Scrutton on Charterparties [17th ed. (1964)], at p. 424 the view is expressed that the carrier will escape liability if the exception applies unless the goods owner in turn proves negligence.’

515. Lord Clyde’s consideration shows that he is familiar with decisions that support both views, and he refers to Scrutton on Charterparties which advocates *The Glendarroch* rule. However Lord Clyde does not take up a position.

**House of Lords**\(^{761}\)

516. The cargo interests cited *The Canadian Highlander*\(^{762}\) as authority to assert that the carrier had not complied with the additional burden of proof that there had been no negligence on the part of the carrier. Lord Pearce (House of Lords) said:

‘I have doubt whether Mr. Justice Wright was correct in saying (...) that such an additional onus lies on the defenders.’\(^{763}\)

517. In the House of Lords, Lord Pearce is clear: in his obiter dictum opinion he shows to be an advocate of *The Glendarroch* rule.

### 6.3.5 **The views of some authors**

518. The authors of Carver believe that – in spite of the diverse case law – the prevailing doctrine seems to be that *The Glendarroch* rule still applies.\(^{764}\) The authors observe that the majority of authority, including obiter dicta in the House of Lords favour the aforementioned view of Scrutton. However the authors of Carver conclude that there is a strong case for applying the bailment rule, rather than the rule stemming from *The Glendarroch* because the latter rule creates considerable difficulties for cargo claimants in respect of matters peculiarly within the knowledge of the carrier.\(^{765}\)

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758. Carver 2005, p. 621 also notes that the prevailing opinion seems to have hardened into an assumption that the Glendarroch principles also apply under the Hague Rules.


762. See supra.


Scrutton expresses the view that, except in cases where negligence or privity is expressly dealt with, as in the nautical fault and the fire exceptions, the carrier is protected against loss or damage if he can prove that the cases falls within the specific exception unless the goods-owner in his turn proves negligence. Scrutton refers to a series of judgements which support his view, such as The Glendarroch, and thereupon lists a series of judgements which adhere to the other view i.e. that the carrier has the additional burden of proving that damage or loss was not due to his negligence. Scrutton notes that it can be doubted if the point has yet been fully argued in a case where it was material to the decision. Scrutton correctly observes that the division of the burden of proof pertaining to the q-exception is provided by the q-exception itself. Other authors, too, believe that the cargo interest must prove unseaworthiness in accordance with The Glendarroch. On the other hand, Cooke et al. take the view that in cases in which seaworthiness is not at issue Judge Wright’s opinion in The Gosse Millard is to be preferred to The Glendarroch Rule. They note that Judge Wright’s view ‘is more consistent with art. IV (2) sub q, which deals specifically with the carrier’s fault or neglect and the burden of proof.’ Clarke points out that ‘[a] significant feature of English common law is that, to establish a defence, generally the carrier does not have to prove that he was not negligent’ and that in England, that perspective has been carried over to the Rules. Clarke notes that, although that is not the view in some civil law countries, it is the most widespread view.

519. According to the Canadian author Tetley:

‘Most more recent English decisions and authors however, uphold the view that, in general, the carrier may rebut the claimant’s prima facie case simply by proving that the loss was caused by an excepted peril. At that point, the onus switches to the cargo claimant to prove that the true cause of the loss was the carrier’s negligence. That is also my position.’

6.3.6 Common Law: conclusion

520. Opinions are divided among legal authors. In case law support is to be found for both views. I believe that in principle The Glendarroch Rule is the right one concerning this matter. This rule finds support in the aforementioned obiter dictum ground taken by the influential House of Lords in the Maltasian case. It was the rule under common law and there is no reason to change that rule for the Hague Rules. However a hard and fast rule for every case can not be given as will be discussed below.

769. Cooke et al. 2007, p. 980.
770. Id.
774. See also Carver 2005, p. 620.
6.4 Dutch Law

6.4.1 Authors

521. According to the leading Dutch authors the carrier only needs to prove a fact or circumstance as described in the invoked exception as cause of the damage. The carrier does not have an additional burden of proving that he complied with the obligations contained in article III (1) and (2).775

6.4.2 Dutch decisions

522. In the Nordpol case, the court held:

‘The provisions under c to p do not release the carrier from liability for loss or damage caused by himself or his agents. They only pass the burden of proof concerning the carrier’s fault to the cargo interest...’776

523. In the Pericles II case the court of appeal took the following position with respect to the burden of proof:

‘In the main, the carrier is released by the causes mentioned [perils of the sea]; but the cargo interest may prove a special failure on the part of the carrier, which makes him liable because the loss or damage would not have occurred if the carrier had not failed imputably.

This is not so for events covered by the q-exception. In that case the burden of proving the absence of negligence is expressly placed on the carrier.’777

524. In the Hua Fang case the Rotterdam District Court ruled that the cargo interests had to prove the carrier’s failure to exercise due diligence to make the ship seaworthy.778 According to the court this would be the system of the H(V)R. I do not agree. The system of the Hague Rules is 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 (art. IV(1) H(V)R).779

525. In the Corrientes II case the cargo was damaged by fire. The court decided that in principle the cargo interest has the burden of proving that i) the cause of the fire was the carrier’s failure to exercise due diligence to provide a seaworthy ship or ii) the cause of the fire was the actual fault or privity of the carrier.780

526. In the Amilla case, however, the court ruled contrary to the view of the authors cited above. In that case the carrier invoked the nautical fault exception. From the facts

776. Nordpol, Rotterdam District Court 2 June 1959, S&S 1959, 43.
779. See supra § 5.3.9.
of the case the court decided that the ship was unseaworthy and that the carrier had not exercised due diligence to make the ship seaworthy. The court decided the carrier could only rely on the nautical fault exception after he disproved the court’s assumption of unseaworthiness and lack of due diligence. According to the court a carrier can only rely on the nautical fault exception after he has successfully disproved the assumption of unseaworthiness, ‘… because the carriers’ duty contained in art IV [sic] par. 1 Hague Rules is weightier than his right to rely on an exception to escape liability.’

527. The first thing to wonder about in this decision is if the court meant the carriers’ duty contained in art. IV(1) as it said or if the court was actually referring to the duty contained in art. III(1). The provision contained in art. IV(1) is not a really a duty but an allocation of the burden of proof in case of damage caused by unseaworthiness. Assuming the court actually meant the duty contained in art. III(1) (due diligence to provide a seaworthy ship) the court reached a correct decision on the wrong grounds. The reason given by the court was that the obligation is more important than the exception. Actually the court should have relied on the division given in art. IV(1). If the damage or loss was caused by unseaworthiness the carrier only has the burden of proving his due diligence and not (as the court required) proof of seaworthiness.

All in all this judgement is not a clear application of the system of the Hague Rules.

6.4.3 Dutch law: conclusion

528. The view expressed by Dutch authors and in Dutch cases is fairly clear. If the carrier can prove that the loss or damage was caused by an excepted peril he will not be responsible for the damage unless the cargo interests can disprove the excepted peril or prove that the loss or damage was due to a failure of the carrier to fulfil his duties regarding the cargo. If the cargo interests can prove loss or damage by unseaworthiness, art IV(1) provides that the carrier will be responsible unless he can prove due diligence was exercised to make the ship seaworthy.

6.5 Some other continental authors

529. The Belgian author Stevens is also of the opinion that the carrier only needs to invoke an exemption clause without having the additional burden of proving that he complied with the duties contained in art. III(1) and (2). Subsequently, the burden of proof shifts back to the cargo interest, who for his part may try to prove a failure on the part of the carrier.782 The Swiss author Von Ziegler holds the same view.783

6.6 The author’s opinion: the division of the burden of proof depends on the invoked exception

530. Which party should prove what and when should he prove it? It cannot be said which of the points of view described above is the correct point of view in general. The answer to the question shall depend on the facts of the case and the exception the carrier is relying on to escape liability. E.g., depending on the damage, proof of a peril of

the sea may involve the proof of due diligence or proof that the cargo was properly stowed because a peril of the sea is unavoidable damage caused by an event at sea.\textsuperscript{784} I do not agree with Royer who wrote that the q-exception contains the general rule as to the liability of the carrier.\textsuperscript{785} The exception contains the division of the burden of proof for the q-exception. It is not a general rule. A simple reading of the wording of the exception makes this clear:

‘... but the burden of proof shall be on the person claiming the benefit of this exception,...’ (emphasis added, NJM)

531. A contrario reasoning would suggest that the division of the burden of proof of negligence for the other exceptions is on the cargo interest.\textsuperscript{786} Another indication is art. IV (1). If the loss or damage was caused by unseaworthiness the carrier has the burden of proving that he exercised due diligence to provide a seaworthy ship. The fact that the division of the burden of proof is expressly given for this exception implies that whenever loss or damage was caused by one of the other excepted perils contained in art. IV (2) the carrier only has the burden of proving that the excepted peril caused the damage. According to the American author Schoenbaum: ‘If the cargo interest places in issue the seaworthiness of the vessel or proper stowage, the carrier has the burden of proof of due diligence in these regards.\textsuperscript{787} The burden then returns to the cargo interest/shipper to show that the carrier’s negligence was at least a concurrent cause of the loss.’\textsuperscript{788} (emphasis added, NJM) It is unclear what is meant by ‘places in issue’. US COGSA requires that, for the carrier to be liable, there is proof that the unseaworthiness caused the loss. In other words there is causal connection between the unseaworthiness and the loss or damage.\textsuperscript{789} The second phrase, however, is clear. It follows that the cargo interest must prove negligence (in conformity with The Glendarroch rule). Schoenbaum is however unclear. In the chapter on the burdens of proof he says the carrier can rebut the cargo interest’s prima facie case by showing the damage was caused by one of the excepted causes or that it acted with due diligence to prevent the damage.\textsuperscript{790} In the extensive footnote to this remark he goes on to say that ‘under COGSA as well as the Harter Act, the duty of due diligence to care for the cargo [sic] and to make the vessel seaworthy are said to be conditions precedent to the enjoyment of any of the excepted causes.’\textsuperscript{791} Schoenbaum cites two cases to support this view.\textsuperscript{792} Both cases were governed by the Harter Act. Under the Harter act the duty of due diligence is indeed a condition precedent to the enjoyment of the exceptions, even if there is no causal relation-

\textsuperscript{784} See supra § 5.4.
\textsuperscript{785} Royer 1959, chapter V. See supra § 5.5.7 for a discussion of Royer’s system.
\textsuperscript{786} See Von Ziegler 2001, p. 384.
\textsuperscript{787} Schoenbaum 2004, p. 678. The use of the expression ‘due diligence’ in connection with proper stowage is of course not correct. As mentioned above according to art. III(2) the cargo has to be stowed properly and carefully.
\textsuperscript{788} Schoenbaum 2004, p. 679.
\textsuperscript{789} Schoenbaum 2004, p. 682. Under the Harter Act the provision of a seaworthy vessel is a condition precedent for exemption (The Isis, 290 U.S. 333).
\textsuperscript{790} Schoenbaum 2004, p. 677.
\textsuperscript{791} Schoenbaum 2004, p. 678, footnote 16.
\textsuperscript{792} 685 F. Supp, 897 and 719 F.Supp. 479.
ship between the unseaworthiness and the damage. In *The Isis* the US Supreme Court held:

> The maritime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel, though the unseaworthy feature is unrelated to the loss. The law reads into a voyage policy of insurance a warranty that the vessel shall be seaworthy for the purpose of the voyage. There are many cases to the effect that, irrespective of any relation of cause and effect, the breach of the warranty will vitiate the policy. What is implied is a condition, and not merely a covenant, just as here there is not a covenant, but a condition of exemption.

532. Schoenbaum is correct in his view that proof of due diligence to provide a seaworthy ship is a condition precedent to the enjoyment of the exceptions under the Harter Act. However, in the cases cited by Schoenbaum no mention is made of such a condition precedent under COGSA. It is unclear how Schoenbaum arrived at the opinion given in the aforementioned footnote.

533. In my view the burden of proof should be divided as follows:

1. The cargo interest makes a *prima facie* case by proving contract of carriage, showing a clean bill of lading and bringing evidence of the loss or damage.
2. The carrier proves the damage was caused by an excepted peril. What that proof should entail depends on the exception he is relying upon and the facts of the case.
   a. E.g. damage caused by a nautical fault or by fire. The carrier can suffice with proof of the nautical fault or the fire and the causal connection between the exception and the damage. The cargo interest will then have the burden of (i) rebutting the existence of the peril or (ii) rebutting the causal connection between the peril and the damage or (iii) proving that the damage was (also) caused by the carriers’ failure to fulfil his duties. In case of the fire exception the cargo interest could attempt to prove the carriers’ actual fault or privity caused the fire.
   b. E.g. cargo is lost or damaged due to overwhelming human forces. The carrier could invoke one of the following exceptions: act of war, act of public enemies, restraint of princes, quarantine, strikes and riots and civil commotions. To benefit from one of these exceptions the carrier should prove that the excepted peril caused the loss or damage. Proof of the excepted peril also involves proof that the carrier could not avert the peril i.e. that he was not responsible for the cause of the quarantine or that he did not endeavour to avert a strike. The cargo interest will then have to prove that the carrier did not take the correct measures in the face of the peril. He can also try offering proof or rebut as discussed above under point a sub (i), (ii) and (iii).

794. 290 U.S. 333, 352 (*The Isis*).
795. These duties are contained in art. III(1) and art. III(2). To use due diligence before and at the beginning of the voyage to make the ship seaworthy and to treat the cargo properly and carefully.
797. Id.
6.7 The intended division of the burden of proof

534. As was said above, the Rules do not contain a general rule for the division of the burden of proof. This indicates that the framers did not intend to create such a rule.

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c. E.g. if cargo is damaged by overwhelming natural forces the carrier could rely on the exemptions for damage caused by perils of the sea or by an act of God. Damage caused by a peril of the sea is described as 'any damage to the goods carried caused by seawater, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure'.798 (emphasis added, NJM) This means that if e.g. seawater entered the hold via the hatches during rough weather, proof of damage due to a peril of the sea will include proof of due diligence to provide a seaworthy ship. If the carrier can not prove that he exercised due diligence to provide a seaworthy ship with respect to the hatches he will not be able to prove that the damage could not be guarded against. In the same sense: If rough weather caused damage to the cargo because the cargo was able to shift proof of damage due to a peril of the sea will include proof of compliance with the duty to load, stow and handle the cargo properly and carefully.

Once the carrier has established the proof of the cause of damage by one of these perils the cargo interest will have the burden of (i) disproving the existence of the peril or (ii) rebutting the causal connection between the peril and the damage or (iii) proving that the damage was (also) caused by the carrier’s failure to fulfil his duties.

d. If the carrier wants to rely on the q-exception (any other cause arising without the actual fault or privity of the carrier etc) he will have to prove that the damage was not caused by his negligence. The cargo interest can counter with proof or rebuttal discussed under a.

e. The carrier can also invoke art. IV(I): damage caused by unseaworthiness which was not due to lack of due diligence to provide a seaworthy ship. He will have the burden of proving damage caused by unseaworthiness and the burden of proving the use of due diligence to provide a seaworthy ship.

3. If the carrier succeeds in the proof of damage caused by an excepted peril the cargo interest could also attempt to prove that the damage was caused (completely or partially) by unseaworthiness. The burden of proof will then shift back to the carrier to prove he used due diligence to provide a seaworthy ship.799 The cargo can also try to prove damage due to non-compliance with art. III (2).

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798. Carver 2005, p. 609. The requirement that the peril could not be foreseen does exist under U.S. law (see e.g. Schoenbaum 2004, p. 697 and the authority cited there). It is however debatable how much importance should be given to the requirement that the peril could not be foreseen under English and Australian law. See Great China Metal Industries v. Malaysian International Shipping Corp. (The Bunga Seroja), [1999] 1 Lloyd’s Rep. 512. See also § 5.4.

799. Art. 4(I)H(V)R.
6.8 Conclusion

535. The wording or nature/interpretation of the invoked exception will determine the content of the required proof and the division of the burden of proof. No general rule applies.