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

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Chapter 7
Conclusions

536. In writing this dissertation I have reached a number of conclusions. The conclusions are presented below per chapter of the dissertation.

7.1 The intended construction of the H(V)R

537. If no uniform construction and application of a Rule exists the intended construction and application should be sought. To find the intended construction three rules of construction are used: the textual or objective rule, the subjective rule and the teleological rule. Aids to construction are the following:

- The plain text of the convention should prevail if it is clear.
- The Rules should be read as a whole.
- The French text should prevail if another language is unclear.
- If possible the Travaux Préparatoires can be used to find out what the framers meant by the words they used if the words are not clear.
- The common law background should be taken into account when necessary.
- The text of the convention can be interpreted so as to meet the object of the Rules.
- The compromise character of the Rules should be borne in mind.

7.2 Duties of the carrier

538. An agreement wherein the duties to load and stow are given to the carrier is not contrary to the H(V)R. At common law the duties ‘to exercise care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure’ are overriding obligations.

7.3 Overriding obligation

539. At common law the expression ‘overriding obligation’ means that loss or damage (also) caused by a failure to fulfill the obligation means that the carrier will be responsible.

The meaning under the English law governed by the H(V)R is that in the case of competing causes (i.e. the damage is a result of more than one cause and each of the causes

800. See supra § 2.6.
801. See supra § 2.6.
802. See supra § 3.9.5.
803. See supra § 4.7.
804. See supra § 4.7.
could have caused all of the damage) the culpable cause will be deemed to be the only relevant cause and the carrier will therefore be liable.\footnote{805}

The framers of the Hague Rules intended art. III(1) to be an overriding obligation and art. III(2) to be subject to the provisions of article IV. This means that if the damage is caused by lack of due diligence to make the ship seaworthy the carrier will not be allowed to invoke the exceptions of art. IV(2). He will however be able to escape liability if he can prove that the damage, or a part of the damage, was not caused by the non-fulfilment of art. III(1). In case of damage caused by non-fulfilment of the duty contained in art. III(2) the carrier can either prove that the damage or part of it was not caused by the non-fulfilment, or invoke an exception (a provision of article IV).\footnote{806}

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

540. Art. IV(1) was not intended as an additional exception but as a division of the burden of proof.\footnote{807}

7.5 **The 'nautical fault' exception**

541. There seems 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).\footnote{808}

7.6 **The fire exception**

542. 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.\footnote{809}

543. The 9th Circuit construes the fire exception differently to the other American circuits. However, this does not lead to different results. The results of the 9th Circuit are the same as the other circuits only for different reasons. The 9th Circuit will deny the defence in cases 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.\footnote{810}
7.7 **Perils of the sea**

544. The framers of the Rules intended the ‘perils of the sea’ exception to be construed according to English common law.811

7.8 **The catch all exception**

545. The q-clause is a typical residual clause. It was not intended as a general rule.812

7.9 **Division of the burden of proof**

546. The H(V)R do not provide a general rule for the division of the burden of proof. This indicates that the framers did not intend to create such a rule.813

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.814

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811. See supra § 5.4.3.6.
812. See supra § 5.5.7.
813. See supra § 6.7.
814. See supra § 6.8.