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

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Summary

1 Introduction

The research question is: If uniform construction of a Rule does not exist, how should the Rule be construed?
Per researched topic questions are formulated and these questions are answered under English, American and Dutch law. Incidentally Canadian and Australian law is also researched. The English language legal systems were chosen because of the Anglo/American roots of the Hague Rules and Dutch law was researched because I am qualified under Dutch law.

2 Construction of the Hague (Visby) Rules

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.

3 Duties of the carrier

Before and at the beginning of the voyage the carrier is required to exercise due diligence to make the ship seaworthy. The carrier is also required to treat the cargo properly and carefully. In principle these duties are non-delegable and the carrier will be responsible for errors of his servants and agents in the fulfilment of these duties.
The standards of the law regarding the due diligence to be exercised for seaworthiness are very high, demanding and uncompromising. Only in very exceptional circumstances does the law allow a defect to be overlooked and is liability avoided. The one concession relates to want of due diligence by the builder of a ship or a preceding owner from whom the new owner acquires possession. But even this exception is subject to the neutralising qualification that once the new owner acquires possession he will be liable for failure to detect defects making the ship unseaworthy which he ought to have discovered by the exercise of due diligence.
The duty to exercise due diligence to make the ship seaworthy is a non-delegable duty. There is no consensus regarding the question if the duty to properly and carefully load and stow the cargo can be delegated. Article III(8) provides that the requirement of proper care for the cargo cannot be delegated. However, this is not in keeping with existing practise. In the *Jordan II* case and in the earlier English decisions *Pyrene* and *Renton* existing commercial practise was recognised by the House of Lords and transfer of the responsibility for loading and stowing was deemed permissible. Therefore under English law, third party bill of lading holders may be harmed by the existence of a FIO(S)(T) clause between the shipper and the carrier of which they had no knowledge. In my view the Dutch Supreme Court takes a more reasonable view, which protects third party bill of lading holders who had no knowledge of a contractual delegation of the duty to load and stow properly and carefully. In the US there is a diversity of authority. The existing diversity is another obstacle to uniformity.

### 4 The relationship between the obligations of the carrier and the exceptions

Under English law the duty to exercise due diligence to make the ship seaworthy is an overriding obligation and the duty to handle the cargo in accordance with art. III(2) is not. Under American law this distinction is not made, save for the 9th Circuit in its application of the fire exception. Under Dutch law the duty to exercise due diligence to make the ship seaworthy is overriding but in a different sense than under English law. Under Dutch law the carrier will be responsible for the entire loss in case of damage caused by a coincidence of damage caused by unseaworthiness and by another, non culpable cause. There is no consensus regarding the question if the duty contained in art. III(2) is overriding under Dutch law.

The effect of the ‘overriding obligation’ rule is noticeable in cases concerning the fire exception. E.g. under English law it is possible that the carrier will not be responsible for damage by fire, even though his employees were negligent in the fulfilment of art. III(2) and that negligence caused the fire. However, if the fire was caused by a breach of the overriding obligation contained in art. III(1) the carrier will not be allowed to rely on the fire exception.

### 5 Some of the exceptions provided by art. IV H(V)R

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

Under Dutch law art IV(1) exempts the carrier from responsibility for damage caused by unseaworthiness if he can prove that he exercised due diligence to make the ship seaworthy. Under English law art. IV(1) is not treated as an exemption but as a division of the burden of proof. The Leesh River case clearly 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. Art. IV(1) was actually added as a division of the burden of proof. This was necessary because under the Harter Act the carrier had to prove that he exercised due diligence to make the ship seaworthy before he could rely on a defence. This was even so if there was no causal connection between unseaworthiness and the damage. My conclusion is
that art. IV(1) was not intended as an additional exception but as a division of the burden of proof.

5.2 The 'nautical fault' exception

There is little doubt about the meaning of the word ‘navigation’ in the nautical fault exception. The meaning of the word ‘navigation’ in the exception is the same as 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. The nautical fault exception also contains the expression ‘management of the ship’. ‘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. It can sometimes be hard to qualify an act (or omission) as management of the ship or as care of the cargo.

It is clear that the interpretation of the expression ‘management of the ship’ is not the problem. The problem is qualifying the act that caused damage. Was it an act primarily for the sake of the ship or was it an act primarily for the sake of the cargo? If the act causing cargo damage can be qualified as an act that could be said to have been done 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 it’s application were not restricted the exception would render the obligation contained in art. III(2) of no value.

5.3 The fire exception

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. The fire exception is also a very strong defence (although less so than the Fire Statutes). Under English law the fire exception will fail if the fire was caused by lack of due diligence to make the ship seaworthy. Under American law the defence will only fail if the carrier personally failed to exercise due diligence and that failure caused the fire. Failure of the carrier’s employees or agents to exercise due diligence is not imputed to the carrier.

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 allows the carrier to reduce the freight rates. The conclusion is that the fire defences were intended to be practically unbeatable.

5.4 Perils of the sea

Many authors are of the opinion that, because the exception originates from the common law, the English construction should be followed. Still there are clear differences
in the application of the exception in different countries. Under American and Canadian law the requirement exists that the event causing the damage was unforeseeable. Under English and Australian law this requirement does not exist. It will be very hard under American and Canadian law for a carrier to escape responsibility by relying on the perils of the sea defence. Under American law the carrier will have to prove that he exercised his duties (ex art. III(1) and (2)), that the damage causing event was unforeseeable and that the damage causing event was extraordinary of nature. Under Dutch law it was made clear in the *Quo Vadis* case that unforeseeability of the event is not required for a successful perils of the sea defence. Of course the carrier must prove that the damage was unavoidable. This is so under all of the legal systems discussed above. The Dutch construction concurs with the English and Australian construction of the exception. My conclusion is 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**

This residual exception is known as the ‘catch all’ exception or ‘q-clause’. It is often involved where other exceptions do not apply, and seems mainly to be successful in cases of pilferage. 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 or 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. In case of damage caused by an unknown cause the carrier will not be able to successfully invoke the q-exception.

6 **Division of the burden of proof under the Hague (Visby) Rules**

The wording or nature/interpretation of the invoked exception will determine who has to prove what. No general rule applies.