CONTRACTS OF CARRIAGE OF GOODS BY WATER IN THE FEDERAL COURTS – A PRIMER

By David Colford ©

Introduction – Jurisdiction and the applicable law[1]

The Courts' jurisdiction is founded on s.101 and the laws of Canada including those laws enacted over subject matter of "navigation and shipping".[2] The Federal Courts and its predecessor, the Exchequer Court, were given concurrent jurisdiction over agreements relating to the carriage of goods by water, regardless of the nature of the agreement, eg. by charter party, bill of lading, waybill, Master's receipt.[3] The applicable law was Canadian Maritime Law defined as follows[4]:

"Canadian maritime law" *« droit maritime canadien »*	« droit maritime canadien » *"Canadian maritime law"*
"Canadian maritime law" means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;	« droit maritime canadien » Droit — compte tenu des modifications y apportées par la présente loi ou par toute autre loi fédérale — dont l'application relevait de la Cour de l'Échiquier du Canada, en sa qualité de juridiction de l'Amirauté, aux termes de la *Loi sur l'Amirauté*, chapitre A-1 des Statuts revisés du Canada de 1970, ou de toute autre loi, ou qui en aurait relevé si ce tribunal avait eu, en cette qualité, compétence illimitée en matière maritime et d'amirauté.

This body of federal law "encompassed the common law principles of tort, contract and bailment"[5] formerly administered by the Exchequer Court, exercising its admiralty jurisdiction and by the English Admiralty Courts:[6]

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[1] There are two major Canadian texts – W.Tetley, Marine Cargo Claims, 4th Edition, Volumes I & II, Yvon Blais Inc. Cowansville, Quebec, 2008 and Gold, E. et al. Maritime Law, at Chapters 8 "Carriage of Goods by Charterparty" and 9 "Carriage of Goods under Bills of Lading and other Similar Documents", Irwin Press, Toronto, 2003 (2nd edition under preparation). English texts include Carver on Bills of Lading, ed.G.Treitel and F.M.B.Reynolds, 3rd edition, Sweet & Maxwell, 2011 and R. Aikens et al., Bills of Lading, Informa, London, 2006, both of which have to be used with circumspection.
All references herein to the Canadian Maritime Law Association Journal can be found in the "Papers" section of the website of the The Canadian Maritime Law Association at http://www.cmla.org
[2] Canada Constitution Act, 1867, R.S.C.1985, Appendix II, no.5, at section 91(10)
[3] Federal Courts Act, R.S.C.1985, Chap.F-7, as amended, section 22
[4] Ibid.s."Canadian Maritime Law" and section 42 "Canadian maritime law as it was immediately before June 1, 1971 continues subject to such changes therein as may be made by this Act or any other Act of Parliament".
[5] ITO-Int'l Terminal Operators v Miida Electronics [1986] 1 S.C.R.752 at 779g
[6] Ibid, page 776g

"Thus, the body of admiralty law, which was adopted from England as Canadian maritime law, encompassed both specialized rules and principles of admiralty and the rules and principles adopted from the common law and applied in admiralty cases as these rules and principles have been, and continue to be, modified and expanded in Canadian jurisprudence."

In Tropwood v Sivaco et al.[7], Laskin, CJ had to address an apparent conundrum developed by the earlier McNamara and Quebec North Shore cases[8] which required that any right claimed be founded on a text of federal law – in this case the cargo was imported into Canada and the contract of carriage was governed by Belgian law; the issue was on what basis could the Federal Courts exercise jurisdiction:[9].

It is my opinion that this body of law [ed. -"Canadian Maritime Law"] embraces conflict rules and entitles the Federal Court to find that some foreign law should be applied to the claim that has been put forward. Conflicts rules are, to put the matter generally, those of the forum. It seems quite clear to me that s. 22(3) of the Federal Court Act, which I have already referred to, envisages that the Federal Court, in dealing with a foreign ship or with claims arising on the high seas may find it necessary to consider the application of foreign law in respect of the cause of action before it.

Notwithstanding an early caveat[10], case law from the American courts are referred to when Canadian and English sources are deficient on certain subjects so long as they are not inconsistent with underlying principles of Canadian Maritime Law.[11]

Personal Jurisdiction of the Courts over contracts of carriage

The Courts' personal jurisdiction is world-wide subject to considerations of "forum non conveniens". In Santa Maria Shipowning & Trading Co. v Hawker Industries Ltd.[12]in answer to an argument that because the whole of the contractual cause of action arose geographically outside of Canada, the cause of action was therefore not within the court's jurisdiction, Chief Justice Jackett said at p.335:

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[7] [1979] 2 S.C.R.157, fought between the now Mr. Justices Harrington and Nadon!

[8] Quebec North Shore Paper Co. v C.P.Ltd.[1977] 2 S.C.R.1054, and McNamara Const.(Western)Ltd. v The Queen [1977] 2 S.C.R.654; the culmination of the Supreme Court's thinking can be found in Ordon Estate v Grail [1998] 3 S.C.R.437

[9] Ibid, at pages 166-167, for an application, see Ontario Bus Industries v The "Federal Calumet" [1992] 1 F.C.245,upheld (1992),150 N.R.149; an exposition of conflict of law rules as applied in maritime cases can be found in Johanne Gauthier (as she was) "Conflict of Laws: Old Rules and Modern Problems", Meredith Memorial Lectures, 1986, Faculty of Law, McGill University, "Current Problems in Maritime Law – Canada/United States/International, DeBoo, Toronto, 1987

[10] Antares Shipping v "The Capricorn" et al [1980]1 S.C.R.553

[11] Francosteel Corp. v "The Federal Danube" et al.(1990) 37 F.T.R.184, Redpath Industries Ltd. v "The Federal Calumet" (1993)131

[12] [1976] 2 FC 325 at page 335

> "In the absence of any knowledge of authority directly, related to the question, I am not persuaded that admiralty subject matter jurisdiction is subject to implied geographical limitations. In an admiralty case (and, as far as I am aware,, in any other cause in any court), in the absence of express limitation, there is no basis for implying geographical limitations on the Court's jurisdiction other than the necessity of serving the defendant with the Court's geographical jurisdiction unless leave under appropriate authority is obtained to serve ex juris."

The latter decision was cited with approval in United Nations v Atlantic Seaway Corp.[13]. This case involved a cargo claim between two foreign parties pursuant to a contract of carriage entered into outside of Canada and performed outside of Canada. The only connection to Canada was a jurisdiction clause which stipulated that disputes were to be determined in Canada in the Federal Court. Objection was raised as to the court's personal jurisdiction. LeDain, J., as he was then, said at p. 550-551:

> " The terms of the Federal Court Act which confer jurisdiction in personam in respect of cargo claims contain no qualification, express or implied, based on the place where the cause of action arises. In addition to the unqualified terms of paragraphs (e), (h) and (I) of subsection 22(2), which have been quoted above, reference may be made to subsection 22(3)(c) which reads:
>
> > For greater certainty, it is hereby declared that the jurisdiction conferred on the Court by this section is applicable:
> > .....
> >
> > (c) in relation to all claims whether arising on the high seas or within the limits of the territorial, internal or other waters of Canada or elsewhere and whether such waters are naturally navigable or artificially made so, including, without restricting the generality of the foregoing, in the case of salvage, claims in respect of cargo or wreck found on the shore of such waters...[emphasis added]
>
> Subsection 43(1) provides that "Subject to subsection (4) of this section, the jurisdiction conferred on the Court by section 22 may in all cases be exercised in personam." Subsection (4) imposes certain conditions or limitations on the jurisdiction in personam in collision cases as follows:
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> > No action in personam may be commenced in Canada for a collision between ships unless
> > (a) the defendant is a person who has a residence or place of business in Canada;

[13] [1979] 2 F.C.541 (FCA)

(b) the cause of action arose within the territorial, internal or other waters of Canada; or
(c) the parties have agreed that the Court is to have jurisdiction.

It is significant, I think, that no such limitations are placed upon jurisdiction "in personam" in respect of cargo claims. It is a reason for not implying any.

The Participants in any contract of carriage[14]

Shipping involves many participants. – a ship owner, possibly a bare boat owner who has leased the ship from a registered ship owner[15], a time charterer, who has obtained by time charter party, the services of the ship and her Master and crew from the ship owner or disponent owner,[16] and a seller who either voyage charters a vessel[17] or books space on a vessel[18], and a buyer or receiver of cargo[19]. Shipping may be part of a "multi-modal" movement where there are interconnecting contracts of carriage by water and by land.[20]

Specialists in arranging transport on behalf of shippers and receivers are freight forwarders[21]. Not only do freight forwarders limit themselves to making transport contracts, but they also engage in the oversight of the logistics chain, sometimes acting as "Non-vessel Common Carriers" (the "NVOCC") assuming contractual carrier responsibilities and overseeing the land transport by truck and rail, warehousing and even distribution of cargo serving their customers' inventory needs.[22]

The object of all transport is delivery and the reasonable expectation of cargo interests is the enhancement of value of their cargo carried and delivered at destination in the same good order and condition as at the time of shipment.

The "Contract of Carriage of Goods by Water"

A contract of carriage of goods by water is not a contract of services nor of lease, but rather a bailment on terms subject to Canadian Maritime Law which includes not only that general body of admiralty law, referred to above, but also "any other Act of

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[14] Michael Smith et al. "Who's who in Carriage of Goods (2007) 1 C.M.L.A.J.NO.3
[15] The Baumwoll Manufacturer von Carl Scheibler v Furness [1893] A.C. 8 (H.L.)
[16] Sea & Land Securities Ltd. v William Dickinson & Co. (1942) 72 Ll.L.Rep.159 (CA)
[17] Lantic Sugar Limited v Blue Tower Trading (1991) 52 F.T.R.161
[18] Grace Plastics Ltd. v The "Bernd Wesch II" [1971] F.C.273,
[19] Canastrand Industries Ltd. v The "Lara S" [1993] 2 FC 553
[20] Boutique Jacob v Pantainer Ltd. 2006 FC 217, 2006 partially reversed at Boutique Jacob v Canadian Pacific Railway 2008 FCA85
[21] Consolidated Fastfrate Inc. v Western Canada [2009] 1 S.C.R.407 see in general, John Bromley "Liability of Freight Forwarders" (2008) 4 C.M.L.A.J.no.2
[22] H.Paulin & Co. Ltd. v A Plus Freight Forwarder et al. 2009 FC 727

Parliament" such as the Marine Liability Act, 2001[23], Part 5 composed of sections 41 to 46. The contract of carriage must be distinguished from other maritime contracts involving other parties which may be involved concurrently with the contract of carriage by water, eg the bare boat charter party[24], the time charter party[25], the voyage charter party[26], the slot charter party, the tug and tow contract[27]et cetera, all the latter of which are governed by Canadian Maritime Law.

Part 5 of the Marine Liability Act brings into force in Canada the "Hague-Visby Rules" as defined to govern Canada's international trade, and where applicable, its domestic trade. Part 5, in the author's opinion, appears to be Parliament's unfinished business. The other parts of the Marine Liability Act covering the subject matter of "Personal Injuries and Fatalities"(Part 1), "Apportionment of Liability" (Part 2), "Limitation of Liability for Maritime Claims"(Part 3), "Liability for Carriage of Passengers by Water"(Part 4), "Liability and Compensation for Pollution"(Part 6)[28], "Ship-Source Oil Pollution Fund"(Part 7), and "General Provisions" (Part 8) appear to be complete codes governing their respective subject matter and include incorporation of applicable international conventions as schedules.

The Hague-Visby Rules do not apply to contracts of carriage by charter party (except when a bill of lading is issued and then only to regulate the relations between the carrier and the holder), nor to carriage of cargo on deck nor to carriage of live animals.[29]

Moreover, pursuant to the definition of "contract of carriage" in Article I[30], the Rules only apply to those contracts "covered by a bill of lading or similar document of title" when, pursuant to Article X, the bill of lading is issued in a "Hague-Visby Rules" state, carriage is from a port of a "Hague-Visby Rules" state or the bill of lading terms evidences the parties' agreement that the Hague-Visby Rules apply.

The Rules apply to all contracts of carriage evidenced by a bill of lading carried from Canada, but they do not apply to contracts of carriage which are governed by a foreign law which has either not accepted the "Hague-Visby Rules" regime, such as countries which have accepted the "Hamburg Rules"[31] which contain more onerous provisions governing the carrier's responsibilities, or countries which have not accepted the

[23] 2001 S.C.chap.6
[24] The Baumwoll Manufacturer von Carl Scheibler v Furness [1893] A.C. 8 (H.L.) North Ridge Fishing Ltd. v. "Prosperity" (The) 2000 BCCA 283, 74 B.C.L.R. (3d) 383, 186 D.L.R. (4th) 374(BCCA)
[25] Sea & Land Securities Ltd. v William Dickinson & Co. (1942) 72 Ll.L.Rep.159 (CA
[26] Lantic Sugar Limited v Blue Tower Trading (1991) 52 F.T.R.161 (Fed.Ct.TD)
[27] See Atlantic Cement Carriers Ltd. v The "Atlantic Elm" 2002 FCT 761
[28] When Bill C-3 presently before Parliament is passed, this Part will be amended to include "Liability and Compensation –Oil and Hazardous and Noxious Substances" and will incorporate as a new schedule the text of the "Hazardous and Noxious Substances Convention".
[29] Article I (b) and (c)
[30] Article 1(e) to be read with Article X and interpreted in light of s.43(3)
[31] Marine Liability Act, ibid, schedule 4, not in force in Canada

amendments made by the Brussels Protocol of 1968 (particularly the increase in the limits of liability), for example, the United States and many countries in the Far East, such as South Korea. There are countries which have not accepted the basic convention known as the "Hague Rules of 1924", for example, Brazil.

The determination whether the "Hague-Visby Rules" govern is critical, because the consequences may be quite different. Otherwise, common law principles of Canadian Maritime Law which include the principles of freedom of contract and a different time bar may apply.[32]

Moreover, the application of the "Hague-Visby Rules" appears to be limited only to those contracts which are evidenced by a bill of lading, and not waybills (which are not documents of title), nor carrier's receipts or other forms of contract of carriage.[33] It is not always necessary that a bill of lading be actually issued for the Rules to apply. It is sufficient if a bill of lading was contemplated and intended to be issued[34].

The Common Law

At common law, there are two aspects of the contract of carriage by water[35]:

Seaworthiness[36]	Care of Cargo
Absolute undertaking that the ship is seaworthy, that is, tight, strong, staunch and fit in every way for the transport intended – undertaking addresses the condition of the ship, its equipment and fittings and also the training and competence of the Master and crew	Duties to exercise due care to receive, load, stow, carry, care for, discharge carefully and deliver the cargo. Duty addresses human conduct and whether the various functions have been performed with due care

At common law, under bailment theory, the only exceptions to liability were Act of God, Act of King's Enemies and fault of the shipper (for example, insufficient packing, inherent defect, misstatement as to nature of the goods, failure to disclose dangerous character of goods). Upon making proof of the bailment, the reception in good order and condition at load port, the delivery in damaged order and condition at discharge port (or no delivery at all) and the damages suffered, unless the carrier could prove one of the exceptions, judgment would be entered against it, no matter how seaworthy the vessel.

[32] Wells Fargo Equipment Finance Co. v The Barge "MLT-3" 2013 FCA 96, see W. Sharpe "Carriage Outside the Hague-Visby Rules" (2011) C.M.L.A.J.no.12
[33] Cami Automotive v Westward Shipping 2009 FC 664 upheld at 2012FCA16
[34] Pyrene Co. v Scindia Navigation Ltd. [1954] 1 Lloyd's Rep. 321 followed by Anticosti Shipping Co. Ltd. v. St. Amand [1959] S.C.R. 372
[35] Canadian Forest Products Ltd v. Belships [1999] 4 F.C.320, 1999 CarswellNat 1073
[36] The most extensive discussion of the concept of "seaworthiness" and how it is distinguished from "care of the cargo" can be found at The Eurasian Dream [2002] 1 Lloyd's Rep. 719 particularly paragraphs 120-136

Professor William Tetley in his textbook[37] provided the following exposition of "seaworthiness":

3) Definition of seaworthiness

Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage.11 Seaworthiness therefore has two aspects: 1) the ship, crew and equipment must be sound and capable of withstanding the ordinary perils of the voyage;12 and 2) the ship must be fit to carry the contract cargo.[13] The Australian High Court has summarized seaworthiness as follows in Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad (The Bunga Seroja):[14]

"Article III, r. 1 therefore effectively imposes an obligation on the carrier to carry the goods in a ship which is adequate in terms of her structure, manning, equipment and facilities having regard to the voyage and the nature of the cargo."

Seaworthiness means many things -- a tight hull and hatches, a proper system of pumps, valves and boilers, and engines, generators and refrigeration equipment in good order. A seaworthy vessel must be equipped with up-to-date charts, notices to mariners and navigating equipment and the crew must be properly trained and instructed in the ship's operation and idiosyncrasies. Equipment must be properly labeled and diagrams must be available and posted. The ship must be bunkered and supplied for the voyage or diligent preparations must have been made in advance to obtain bunkers and supplies conveniently along the route.

Seaworthiness is concerned with the fitness of the vessel, rather than with the conduct of the shipowner. In The Fjord Wind, Clarke L.J. made the point clearly:[15]

"...seaworthiness is concerned with the state of the vessel rather than with whether the owners acted prudently or with due diligence. The only relevance of the standard of the reasonably prudent owner is to ask

[37] Ibid, at footnote 1, page 877-878, without the author's footnotes.

> whether, if he had known of the defect (my emphasis), he would have taken steps to rectify it."

As of the 19th century the absolute undertaking as to seaworthiness and the manner in which the cargo would be cared for was subject to the principles of freedom of contract. It was considered preposterous that any shipper would agree to less than a seaworthy ship; however contracts contained many and various exceptions of carrier's liabilities and also limitations of carrier's liability with respect to the care of the cargo[38].

The "Hague-Visby" Rules"[39]

In 1924, to address the imbalances in the relationship between carriers and shippers and to support the integrity of bills of lading used, the major trading nations entered into the "International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", otherwise known as the "Hague Rules"[40].

The purpose of the convention is to protect the integrity of bills of lading upon which international trade at the time depend by agreeing on minimum standards of conduct that the carrier would abide by, establishing defences that the carrier could raise against any properly proven claim and providing a standard that carriers must exercise due diligence before and at the beginning of the voyage to make the ship seaworthy. The convention, as enacted in Canada, also provide for a one year time bar of proceedings and a right to limit liability under a contract of carriage to $500 per package or unit. In 1968, a protocol was agreed to wherein the amounts recoverable under the limitation right were increased. In 1979, the concept of "standing drawing rights" was substituted for the gold standard as the medium for determining the value of the limitation.

During the last twenty years, parties particularly in the container line trade, are using waybills to circumvent the necessity of surrendering a document to obtain delivery from the ocean carrier. Currently, waybills issued by the major container lines all contain clauses paramount which stipulate that the contract is governed at the minimum by the Hague Rules Convention of 1924, possibly as a condition of their insurance cover by the major P+I Clubs. However, in certain instances, the right of the carrier to limit its liability is different (and much lower) than the Hague-Visby Rules regime.

The differences between a bill of lading and a waybill (or other forms of transport document)[41]are:

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[38] Steel v. State Line Steamship Co. (1877-78), 3 A.C. 72 (H.L.) (1877) 3 Asp.M.L.C.516

[39]An overview of the Hague-Visby Rules can be found in Peter Cullen "Ocean Carriage/Hague-Visby Rules" (2008) 4 C.M.L.A.J.no.3

[40] Adopted in Canada with the enactment of the Carriage of Goods by Water Act, S.C.1936, c.49

[41] See Peter Pamel et al. "Bills of Lading vs Sea Waybills and The Himalaya Clause" (2011) 7 C.M.L.A.J.no.4

<table>
<tr><th>Bill of Lading[42]

Note: "B.L." refers to Bills of Lading Act, RSC, 1985, Ch.B-5</th><th>Waybill</th></tr>
<tr><td>Receipt by Carrier
- Prima facie evidence of apparent good order and condition –H.V.III(3)
- Conclusive evidence in the hands of endorsee or consignee – B.L.(4)</td><td>Receipt by Carrier
- Prima facie evidence of apparent good order and condition, unless otherwise stated</td></tr>
<tr><td>Evidence of contract of carriage
- Subject to Hague-Visby Rules as governing law which apply to period between the commencement of loading and the completion of discharge
- Consignees and endorsees obtain rights and liabilities by reason of consignment and endorsement – B.L.(2)
- Rights of parties to reduce carrier's responsibilities below standard set forth in Rules are restricted on pain of nullity</td><td>Evidence of contract of carriage
- Subject to Canadian Maritime Law (common law principles of contract, tort, and bailment and principles of freedom of contract, particularly with respect to exclusion and limitation of liability clauses)
- Principles apply from time of reception to time of delivery</td></tr>
<tr><td>Document of title
- Must be surrendered upon delivery
- Negotiable /Transferable, unless otherwise stated – B.L.(2)
- Controls right of transfer and to possession</td><td>Not a document of title
- Right to possession by virtue of being named as receiver/consignee
- Not transferable nor negotiable
- Surrender of document not required, but carrier has duty to ascertain identity of party which shipper has directed carrier to make delivery.</td></tr>
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The Burden of Proof in the Marine Claim for Cargo Loss/Damage

In Kruger Inc. v Baltic Shipping Inc., it was stated:[43]

> (1) At the outset, the cargo owners need only establish their interest in the cargo, that it was not delivered in the same condition as received on board and the value of the cargo was lost or damaged. If the carrier offers no defence, judgment will be for the plaintiff.

[42] Canadian General Electric v Armateurs du St.Laurent Inc. (The « Maurice Desgagnés »)[1977] 1 FC215 contains a discussion of the nature and characteristics of a bill of lading.
[43] (1989)57 D.L.R. (4th) 498 at 502(FCA)

(2) The carrier can shift the burden of proof back to the plaintiffs by establishing that the loss or damage is attributable to one of the excepted perils set out in Article IV of the Hague Rules."

(3) The cargo owners must then establish the carrier's negligence or both that the ship was unseaworthy and that the loss was caused by that unseaworthiness.

(4) If the points on unseaworthiness are established, the carrier can only escape liability by establishing that due diligence was exercised to make the ship seaworthy

1) The Claimant has to prove an interest to sue

The party who has suffered a loss is the only party who has the right to sue. However, the claimant must establish either its contractual right, the breach thereof, and the consequence of the breach being damage, or the tort – the failure of the carrier to exercise its duty of care at a time when the claimant had a proprietary interest in the goods, or at least a virtually certain interest in the future.[44]

In Canada, in The "Lara S"[45], Justice Reed advanced the proposition that since there exists sufficient proximity between a shipper and a receiver of goods because their relationship is governed by a contract of sale of the goods, then even if the receiver does not benefit from the Bills of Lading Act, discussed below, it can nevertheless recover its pure economic losses from the carrier. This decision was rendered before the Supreme Court's decision in Bow Valley Husky (Bermuda)Ltd. v Saint John Shipbuilding[46]; yet Justice Reed's formulation has never been challenged and the likelihood is high that it would be accepted.

2) The Claimant must prove the contract

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[44] This is the key distinction in tort law between Canadian Maritime Law and English law where the claimant must show that it had a proprietary interest at the time the tort was committed – see The Aliakmon [1986] 2 Lloyd's Rep. 1 (House of Lords)

[45] Ibid.footnote 19

[46] [1997] 3 S.C.R.1210 at page 1242 per McLachlin, J. as she was, at paragraph 48: (1) relational economic loss is recoverable only in special circumstances where the appropriate conditions are met; (2) these circumstances can be defined by reference to categories, which will make the law generally predictable; (3) the categories are not closed. La Forest J. identified the categories of recovery of relational economic loss defined to date as: (1) cases where the claimant has a possessory or proprietary interest in the damaged property; (2) general average cases; and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.

Most contracts of carriage involve a contract precedent, whether a booking note reservation of space and commitment as to freight, a voyage charter party, a contract of affreightment and any other service contract whereby in return for the guarantee of space onboard a vessel to load and to discharge at agreed ports and for a freight payment, there is an undertaking to secure the performing carrier's agreement – often evidenced by the bill of lading and its terms that will be issued following reception of the cargo – and the presentation of the vessel at the port of loading.

Although the bill of lading may present the best evidence of the terms of contract, it is not the only evidence, nor is it conclusive evidence, except in the hands of an endorsee or consignee which had obtained property rights as a result of its endorsement or consignment[47], to be discussed below. The subject matter of the contract and its terms may be the subject of oral testimony and evidence of customary usage to be brought by both the cargo damage claimant and the carrier.[48]

For example, with respect to cargo stowed on deck, it is open to cargo damage claimants to prove that they never agreed that their cargo be stowed on deck (which is not subject to the Hague-Visby Rules[49]), and self-serving statements on the back of the bill of lading that the carrier has an option to stow goods on deck or under deck is not sufficient to overcome the shipper's objection that under deck stowage was never the intention of the contract.[50]

3) The claimant must provide evidence of receipt in good order and condition by the carrier.

a) Who is the carrier?

Generally, in containerized shipments, the transport document itself identifies the carrier who is answerable for cargo damage claims. They also contain Circular Indemnity clauses and Covenant not to Sue clauses which have been upheld and which require shipping interests to sue only the named carrier and indemnify the latter in the event of breach.[51]

The controversy over identifying the carrier is where the transport document contains the name of the ship and is signed either by the Master or on behalf of the Master – which begs the question – who is the Master working for and on whose account does

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[47] Leduc v Ward (1888) 20 Q.B.D.475(C.A.)

[48] *The "Ardennes"* (1950), 84 Ll. L.R. 340, *Saint John Shipbuilding & Dry Dock Co. v. Kingsland Maritime Corp.* (1981) 126 D.L.R. (3d) 332(F.C.A.), Captain v Far Eastern Steamship Co. (1978),97 D.L.R.(3d)250 (B.C.S.C.), David Colford "From Booking Note to Volume Contract" (2009)5C.M.L.A.J.no.4, Peter W. Davidson "Steel Cargo Claims" (2002) 1 C.M.L.A.J.no.8, Peter W.Davidson "To Market, To Market" (2011) 7 C.M.L.A.J.no.3

[49] Grace Plastics Ltd. v The "Bernd Wesch II" [1971] F.C.273

[50] St. Siméon Navigation Inc. v A. Couturier & Fils Limitee, [1974] S.C.R. 1176

[51] Ford Aquitaine Industries SAS v. Canmar Pride (Ship), 2004 FC 1437

the Master's signature or that of the Master's agent bind? Even though the actual carrier has not been named, so long as it is identifiable through searches of shipping registries and / or Lloyd's ship intelligence services, court decisions have upheld "demise clauses" and "identity of carrier" clauses defining the shipowner as "carrier".[52] However, where there is a conflict between what the contract of carriage was and the bill of lading terms, the court does proceed with an examination of the evidence to determine the identity of the carrier as a question of fact.[53]

Consignees and endorsees and receivers are in a different position and are bound only by the contract terms contained in the bill of lading[54] by virtue of implied contract[55] and, where applicable, the Bills of lading Act[56] which reads:

Right of consignee or endorsee	Droits acquis au consignataire et à l'endossataire
2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.	2. Tout consignataire de marchandises, nommé dans un connaissement, et tout endossataire d'un connaissement qui devient propriétaire de la marchandise y mentionnée par suite ou en vertu de la consignation ou de l'endossement, entrent en possession et sont saisis des mêmes droits d'action et assujettis aux mêmes obligations à l'égard de cette marchandise que si les conventions contenues dans le connaissement avaient été arrêtées avec ce consignataire ou cet endossataire.

b) Receipt in good order and condition in accordance with its terms

Under the Hague-Visby Rules, at Article III (3), certain minimum standards are established as to what must appear on the bill of lading:

3. After receiving the goods into his	3. Après avoir reçu et pris en charge les

[52] Patterson Steamship v Aluminum Co.of Canada [1951] S.C.R.852, Grace Plastics Ltd. v The "Bernd Wesch II" [1971] F.C.273, Aris Steamship Co. Inc. v Associated Metals & Minerals Corporation [1980] S.C.R.322, Weyerhaeuser Co.et al v Anglo-Canadian Shipping (1984), 16F.T.R.294, Lantic Sugar v Blue Tower Trading (1991)52F.T.R.161 upheld at (1993), 163 N.R.191, Union Carbide v Fednav Ltd (1996) 131 F.T. R.241 Jian Sheng Co. v. Great Tempo S.A. (1998) 225 N.R. 140, [1998] 3 F.C.418 (FCA)
[53] Cormorant-Bulk Carriers Inc. v Canficorp (Overseas Projects) Ltd.(1984), 54 N.R.66 (FCA), Carling O'Keefe v C.N. Marine [1990] 1FC483(FCA), Canastrand industries Ltd. v The "Lara S" [1993]2 FC553 upheld at(1994) 176 N.R.31 (FCA)
[54] Union Carbide v Fednav Ltd (1996) 131 F.T. R.241
[55] Brandt v Liverpool, Brazil and River Plate Steam Navigation [1923] All E.R.Rep.656
[56] R.S.C.,Chap. B-5, s.2

charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:	marchandises, le transporteur ou le capitaine ou agent du transporteur devra, sur demande du chargeur, délivrer au chargeur un connaissement portant, entre autres choses :
o (*a*) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; o (*b*) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper; o (*c*) the apparent order and condition of the goods: Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.	o *a*) les marques principales nécessaires à l'identification des marchandises telles qu'elles sont fournies par écrit par le chargeur avant que le chargement de ces marchandises ne commence, pourvu que ces marques soient imprimées ou apposées clairement de toute autre façon sur les marchandises non emballées ou sur les caisses ou emballages dans lesquels les marchandises sont contenues, de telle sorte qu'elles devraient normalement rester visibles jusqu'à la fin du voyage; o *b*) ou le nombre de colis, ou de pièces, ou la quantité ou le poids, suivant les cas, tels qu'ils sont fournis par écrit par le chargeur; o *c*) l'état et le conditionnement apparents des marchandises. Cependant, aucun transporteur, capitaine ou agent du transporteur ne sera tenu de déclarer ou de mentionner, dans le connaissement, des marques, un nombre, une quantité ou un poids dont il a une raison sérieuse de soupçonner qu'ils ne représentent pas exactement les marchandises actuellement reçues par lui, ou qu'il n'a pas eu des moyens raisonnables de vérifier.
4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(*a*), (*b*) and (*c*).	4. Un tel connaissement vaudra présomption, sauf preuve contraire, de la réception par le transporteur des marchandises telles qu'elles y sont décrites, conformément aux alinéas 3*a*), *b*) et *c*).
However, proof to the contrary shall not be	Toutefois, la preuve contraire n'est pas

admissible when the bill of lading has been transferred to a third party acting in good faith.	admise lorsque le connaissement a été transféré à un tiers porteur de bonne foi.

The time and place and what it is that has been received, eg bundles, units, pallets, cartons, etc. and qualifying clauses are the subjects of interpretation. The meaning of "apparent good order" is relative to what any reasonable carrier may be expected to see. The phrase "said to contain" is used with sealed containers or other forms of packaging or unitization where it is impossible or impracticable for any reasonable carrier to verify, and the burden is on the shipper to prove exactly what the cargo consists.[57]

The Damage

"Damage" includes the physical alteration of the cargo or damages suffered by the receiver for undue delay[58]. What we see as problematical in the carriage of fruits and vegetables is whether overripe produce having a loss of shelf life constitutes "damage", and whether, if so, such was caused by undue delay or, worse, by a faulty refrigerated container.

Furthermore, the claimant must also prove that it has suffered a personal loss, and is not claiming on behalf of someone else.[59] Subrogated insurers in the common law provinces have no independent right of action and must bring suit in the name of their insurers.[60] However, in the province of Quebec, insureds lose the right to bring suit which they have subrogated in favour of underwriters who have to bring suit in their own name. Certainly, underwriters of non-marine insurance placed in Quebec would be the only parties who would have an interest to sue[61], for example, for damage by a ship to a crane or a bridge or dock. However, where the insurance cover is a marine insurance policy, then federal law-and practice – should apply.[62]

[57] Silver v Ocean Steamship [1929] All E.R.Rep.611, Canada and Dominion Sugar Co. v Canadian National(West Indies) Steamships (1946)80 Ll.L.Rep.13(P.C.) Coutinho, Caro & Co.(Canada)Ltd. v The "Ermua" (1982)121 D.L.R.(3d)571 (FCA)
[58] St. Lawrence Construction Ltd. v Federal Commerce and Navigation Co. Ltd.(1985)56 N.R.174(FCA)
[59] Union Carbide v Fednav Ltd.(1996)131 F.T.R.241 where the shipper's claim had been dismissed because it had been paid and made a claim on behalf of consignees who could not for one reason or other claim on their own behalf.
[60] Northern Elevator Co. v Richelieu &Ontario Navigation Co. (1907), 11 Ex.C.R.25 aff'd (1908) 11 Ex.C.R.231
[61] Art.2474 Quebec Civil Code
[62] See G.Strathy et al. The Law and Practice of Marine Insurance in Canada, LexisNexis Canada, 2003, pages 194 to 196, and discussing the problems raised by Switzerland General Insurance Co. v Logistec Navigation Inc. (1986) 7 F.T.R.196.

Issues over the duty to mitigate have been fully ventilated by the Federal Courts which the Supreme Court of Canada has upheld and followed itself.[63]

Measure of damages

Unlike rail or trucking law where the measure of damages is determined by the value of the cargo at the time of shipment (and easily established by the commercial, freight and insurance invoices), in maritime law, the principle is that the claimant must be made whole – and typically what the claimant has lost is the arrived sound market value, that is the value the goods would fetch on resale, at the port of discharge[64]. The claim would be composed of the net value lost (arrived sound market value less the arrived damaged market value) plus any additional out of pocket expenses, including survey fees necessitated by the damaged or lost condition. A lengthy demonstration about how marine cargo damage claims are adjusted by the courts can be found in Union Carbide v Fednav Limited.[65]

The Applicable Law

In Canada there are two regimes that govern contracts of carriage by water – that covered by the Hague-Visby Rules[66] and that covered by Canadian Maritime Law where the convention does not apply and the principles of freedom of contract prevail. Notably, the convention does not apply to transport documents, other than bills of lading, unless the parties to the contract agree. The distinction is critical because, under Article III (8) of the Hague-Visby Rules, the parties are prohibited from agreeing to any reduction of the carrier's liabilities below the standards set forth in the Rules.[67]

Waybills have become more common in the container line trade, but for reasons arising from the carriers' P&I Club Rules requiring carriage contracts to be governed by, at least, the Hague Rules of 1924, various clauses have been developed and have given

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[63] Cisco Redpath Industries v The Cisco [1994] 2 F.C.279 (FCA) cited with approval in Southcott Estates Inc. v. Toronto Catholic District School Board - 2012 SCC 51, [2012] 2 SCR 675, Redpath Industries Redpath Industries v The "Federal Calument" 1993 CarswellNat 428, 63 F.T.R.131

[64] Goldco Imports Ltd. v The Meiochu Maru [1966] Ex.C.R.498 at 503-504 per Jackett, C.J.

[65] Union Carbide v Fednav Ltd. (1996) 131 F.T.R.241, from paragraphs 152 to 195

[66] Marine Liability Act, S.C.2001, c.6, section 43 incorporating by reference Schedule 3, being the "Hague-Visby Rules".

[67] Nabob Foods v. The Cape Corso [1954] Ex. C.R. 335, [1954] 2 Lloyd's Rep. 40, where the trial judge refused to enforce an agreed damages clause in the bill of lading because the figure agreed to was below the arrived sound market value less the arrived damaged market value. In Cami Automotive, Inc. et al v. Westwood Shipping Lines Inc. (The "WSL Anette") 2009 FC 664, the governing document was a waybill, and not subject to the Hague-Visby Rules. The parties had agreed to the application of US COGSA, the version of the Hague Convention 1924 adopted by Congress in 1936 which provided that the carrier could limit liability for US$500 per unit or package.

rise to considerable issues of interpretation not only in conflict of laws, but also in deriving the parties' intention. For example[68]:

> "**2. Paramount Clause**
>
> The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply."

What the carrier has to Prove

Cause of the loss

Before the carrier can claim the benefit of an exception stipulated in its favour in Article IV(2)(a) to (q) or a contractual exception where the Hague-Visby Rules do not apply, under bailment theory, the carrier must prove the cause of the loss. In a marine insurance case, Lord Brandon warned that it is not the nature of the judicial process for the court to "play Sherlock Holmes" and ascertain the most probable explanation, unless positive evidence has been adduced by the party on whom the burden lies.[69]

In Pendle & Rivett, Ltd. v. Ellerman Lines, Ltd.[70] the cargo disappeared inexplicably.

> "That being so, under Art. IV, Rule 2(q) the burden is on the defendants to show that these goods were lost and taken out of the case without any fault or privity on the part of the carrier or neglect by his servants or agents. Have they discharged the burden? If I accept all their evidence, in a sense they have. But in another sense they have not, because that which they seek to prove is wholly irreconcilable with the evidence given for the plaintiffs. There is in truth a mystery about the loss. If I accept the evidence given for the defendants the loss of the goods is quite inexplicable. In those circumstances one side or the other must win. I cannot give victory to both. I think the only logical result is that defeat must be on the side on which rests by this statute the burden of explaining that which would be otherwise inexplicable. Having regard to the wholly inexplicable

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[68] Yemgas FZCO et al. v Superior Pescadores S.A.[2014]EWHC971

[69] (The Popi M) Rhesa Shipping Co. S.A. v. Fenton Insurance Co. Ltd. [1985] 2 Lloyd's Rep. 1(H.L.) See also *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1987) 8 F.T.R. 191 at p. 197, 1987 AMC 1474 at p. 1479 (Fed. C. Can.), upheld (1988) 86 N.R. 39 (FCA.): "Mere speculation will not overcome the prima facie evidence of a clean bill of lading." See also *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 160: "The defendant cannot overcome the burden of proof by merely postulating as to the cause of the damages."

[70] (1927), 29 Ll. L. Rep. 133 at p. 136,

conflict of evidence on both sides I think I must hold that the defendants have not discharged the burden which is upon them by Art. IV, Rule 2(q) of the Act."

Exceptions to liability

Not only must the carrier prove the cause of the loss, it must also prove that that its defence comes within the allowed exceptions, whether under the Rules or, if the Rules do not apply, under the contract taking into account the rules of interpretation of exclusion clauses.[71]

In the event that the carrier can prove that the loss had two (or more) causes, one of which is included within the accepted exceptions and one of which is not, the carrier will be held wholly liable.[72]

Hague-Visby Defences – Article IV (2)

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from	2. Ni le transporteur ni le navire ne seront responsables pour perte ou dommage résultant ou provenant :
(*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;	*a)* des actes, négligence ou défaut du capitaine, marin, pilote ou des préposés du transporteur dans la navigation ou dans l'administration du navire;
(*b*) fire, unless caused by the actual fault or privity of the carrier;	*b*) d'un incendie, à moins qu'il ne soit causé par le fait ou la faute du transporteur;
(*c*) perils, dangers and accidents of the sea or other navigable waters;	*c*) des périls, dangers ou accidents de la mer ou d'autres eaux navigables;
(*d*) act of God;	*d*) d'un « acte de Dieu »;
(*e*) act of war;	*e*) de faits de guerre;
(*f*) act of public enemies;	*f*) du fait d'ennemis publics;
(*g*) arrest or restraint of princes, rulers or people, or seizure under legal process;	*g*) d'un arrêt ou contrainte de prince, autorité ou peuple ou d'une saisie judiciaire;

[71] Mediterranean Shipping Company S.A. v Courtiers Breen Ltee 2011 QCCA2173, see also Belships, above
[72] Gosse Millerd v Canadian Government, [1929] A.C. 223, (1928)32Ll.L.Rep.91 (H.L.)

(*h*) quarantine restrictions;	*h*) d'une restriction de quarantaine;
(*i*) act or omission of the shipper or owner of the goods, his agent or representative;	*i*) d'un acte ou d'une omission du chargeur ou propriétaire des marchandises, de son agent ou représentant;
(*j*) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;	*j*) de grèves ou lock-out ou d'arrêts ou entraves apportés au travail, pour quelque cause que ce soit, partiellement ou complètement;
(*k*) riots and civil commotions;	*k*) d'émeutes ou de troubles civils;
(*l*) saving or attempting to save life or property at sea;	*l*) d'un sauvetage ou tentative de sauvetage de vies ou de biens en mer;
(*m*) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;	*m*) de la freinte en volume ou en poids ou de toute autre perte ou dommage résultant de vice caché, nature spéciale ou vice propre de la marchandise;
(*n*) insufficiency of packing;	*n*) d'une insuffisance d'emballage;
(*o*) insufficiency or inadequacy of marks;	*o*) d'une insuffisance ou imperfection de marques;
(*p*) latent defects not discoverable by due diligence;	*p*) de vices cachés échappant à une diligence raisonnable;
(*q*) any other cause arising without the actual fault and 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.	*q*) de toute autre cause ne provenant pas du fait ou de la faute du transporteur ou du fait ou de la faute des agents ou préposés du transporteur, mais le fardeau de la preuve incombera à la personne réclamant le bénéfice de cette exception et il lui appartiendra de montrer que ni la faute personnelle ni le fait du transporteur n'ont contribué à la perte ou au dommage.

One of the compromises in 1924 was that the carrier could not by contract create other exclusions of liability, and if it did so, such exclusion would be null and void under Article

III (8).[73] This does not prevent the carrier from excluding liability outside of the period to which the Hague-Visby Rules applies as defined in Article I (e)[74]:

(*e*) "carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.	*e*) « transport de marchandises » couvre le temps écoulé depuis le chargement des marchandises à bord du navire jusqu'à leur déchargement du navire.

To take advantage of any of these defences, the carrier must show the cause of the damage, as discussed, and that it occurred during the period to which the Hague-Visby Rules applies.

The author proposes to discuss some of the more contentious defences.

Error in navigation or in management of the ship

It is understood in the case law that if the loss or damage to cargo arises from the carrier's mismanagement of the cargo, rather than mismanagement of the ship, the defence does not apply.[75]

In Kalamazoo Paper Co. v Canadian Pacific Railway Co.[76], the ship struck a rock as a result of negligent navigation, pierced the hull and water damaged the cargo. The ship beached to avoid sinking. Following the beaching, the cargo claimants alleged that owing to the failure of the captain to direct the use of all available pumping facilities to prevent entry of further water into the hold and away from the cargo, further cargo was damaged. While the various members of the court were of different opinions as to whether any more cargo was damaged as a result of the captain's failure, they were unanimous in holding that the neglect of the Master was in the management of the ship because the purpose of the pumping was to save the ship, the cargo and the venture in general. In this respect the court followed the trilogy of British cases, namely, The Glenochil [1896] P.10, The Rodney [1900] P.112 and The Ferro [1893] P. 38, decisions in which cargo was damaged as a result of negligent operations carried on board the ship which affected the safety of the cargo. The distinction drawn in The Ferro, a case

[73] Mimi Lim Procs. 1979 AMC 1640 (4 Cir. 1979) where a seaman suffered a psychotic episode and flooded the holds damaging the cargo. The ship owner led evidence that it had no way of knowing the seaman's psychiatric history and had otherwise exercised due diligence to make the ship seaworthy. Held; act of seaman was an act of barratry which was not included among the defences, and thus the carrier was liable.
[74] See the "after discharge clause" in.); Buenos Aires Maru (ITO v. Mitsui O.S.K. Lines) [1986] 1 S.C.R. 752 or the "total exclusion of responsibility" of the contractual carrier in Boutique Jacob v Pantainer Ltd. 2006 FC 217
[75] Gosse Millard Ltd. v Canadian Government Merchant Marine Ltd. (1928)32 Ll.L.Rep.91(H.L.); Eisenerz G.m.b.H v Federal Commerce & Navigation Co.Ltd. [1974] S.C.R.1225;
[76] [1950] S.C.R. 356

involving negligent stowage, and later on, in Gosse Millard, is that the operation must relate in substantial part to the management of the vessel itself.[77]

"Perils of the Sea"

This is a contentious area. The Supreme Court of Canada on at least two occasions has defined "perils of the sea" as 'perils which could not have been foreseen or guarded against as probable incidents of the intended voyage'[78] The exception was fully explored in detail by the trial judge in Kruger Inc[79]., a case involving a vessel leaving the Port of Montreal in the full knowledge that it would be facing heavy seas and storm conditions when it reached the Great Banks area. Instead it encountered a hurricane and sank. To be fair, there were problems with the ship's stowage and its ventilators.

In Canastrand Industries v The "Lara S"[80], Justice Reed formulated in this way:"Whether or not a storm is a peril depends on the intensity of the storm or weather conditions which could normally be expected in that geographic area, at that time of year...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 year and that could not be reasonably guarded against."

The criticisms that have been made of this formulation is that at certain times of the year, heavy weather and sea conditions are always foreseeable, that weather can suddenly change for the worse, that "freak" wave conditions can develop and that Masters and their crew are trained to navigate the vessel through difficult conditions, otherwise the ship should never leave port!

In the The "Bunga Seroja"[81] the Australian High Court challenged the rigidity of the Canadian approach and American case law.[82] The Court rejected the submission that to qualify as "a peril of the sea" within art. IV, r. 2(c) a carrier had in every case to show that the sea hazard giving rise to the loss or damage was unpredictable and unforeseeable as that requirement did not appear in the language of par. (c) nor was it necessary to, or inherent in, the concept of the immunity stated; in deciding whether a particular sea hazard amounts to a peril of the sea within the immunity, it might be relevant to have regard to a number of factual considerations; these 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

[77] See also The Tasman Pioneer [2010] 2 Lloyd's Rep 13 (NZ Supreme Court) where the court held that the errors must not be so egregious that they amount to barratry by the crew.
[78] See Kruger Inc. v Baltic Shipping Inc. (1989)57 D.L.R.(4th)498 at page 504 summarizing Charles Goodfellow Lumber Sales Ltd. v Verreault [1971] S.C.R.522 and Canadian National Steamships v Bayliss [1937] S.C.R.261
[79] (1993] 2 F.C. 5531987) 11 F.T.R.80
[80] Canastrand Industries Ltd. v The "Lara S" [1993] 2 FC 553
[81] [1999] 1 Lloyd's Rep.512
[82] Ibid, at pages 518-9

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; none of these circumstances were decisive and they were no more than factual indicia.[83]

Despite criticisms of the text book writers[84], it must be remembered, that Tashereau, J. after reviewing the trial judge's findings of fact in Keystone[85] did not require that the carrier show an extraordinary catastrophe, but rather:

> "...to constitute a peril of the sea the accident need not be of extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of the damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence."

"Faults of the shipper"

Many of the carrier's defences arise from acts, faults, omissions, or neglect shippers or the inherent character of the cargo itself.

Faulty stowage by the shipper[86], improper or insufficient packing of the goods[87] Insufficiency or inadequacy of marks, act or omission of the shipper or owner of the goods, his agent or representative to properly prepare and stow cargo, inherent vice of the cargo[88] and wastage of cargo caused by inherent defect of cargo are all covered.

"Acts of Third Parties"

The traditional exceptions of act of God, act of war, arrest or restraint of princes[89], strikes[90], riots and civil commotion are available.

Efforts to save life and property while at sea which give rise to cargo damage are also covered.

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[83] The "Bunga Seroja", ibid. from the headnote at page 513
[84] Carver, above, at page 712 ('it is submitted that on the basis of the interaction of the carrier's positive duties and an exception that does not apply if there is negligence, what emerges from it is correct'); Tetley, above, at page 1045 condemns this approach – 'the eviscerated notion of peril...apart from being out of step with the general understanding of the concept elsewhere, also constitutes a potentially serious distortion of the overall scheme of the Rules, fraught with unforeseen implications."
[85] Ibid at page 505
[86] Sealink v Doman 2003 FC712
[87] Trent Rubber Services (1978)Ltd. v Polartic (1978) 12 F.T.R.140 Guadano v S.S."Cap Vincent" [1973] F.C.726 (furniture improperly stowed by shipper into a container) American Risk Management Inc. v. APL Co. Pte. Ltd 2002 FCT 1023 , (2002), 224 F.T.R. 249 General Motors Corporation v Cast (1983) Limited et al. (1994),74F.T.R.81 (automobile converters packed by shipper into metal bins instead of pallets and stowed in container without bracing and thus incapable of withstanding normal transport by sea and rail.)
[88] Produits Alimentaires Grandma Ltée v Zim Israel Navigation Co.I1987)8F.T.R.191 upheld(1988)86 N.R.39 Wirth Ltd. v. Belcan, N.V. (1996), 112 F.T.R. 81 (F.C.T.D
[89] Nobel's Explosives Co v Jenkins [1896] 2 QB 326
[90] Crelinsten Fruit Co. v. The Mormacsaga [1969] 2 Ex. C.R. 215

The "q" clause – "any other cause arising without the actual fault or privity of the carrier"- anticipates an incident which causes cargo damage in which the carrier, its agents, employees and sub-contractors are blameless of any negligence and the burden is on the carrier to prove that it falls within the exception. In Francosteel Corp. v MV Federal Danube[91] – the ship carrying steel cargo was delayed for several weeks in the St.Lawrence River, waiting for the Valleyfield Bridge to be repaired. Difficulties with ventilation of the holds were encountered because the weather kept changing. The trial judge held that an otherwise competent first officer misjudging the effects of ventilating holds when he should not have or not ventilating when he should have, made non-negligent errors in judgment. The Court held that the carrier could benefit from this exception.

The Seaworthiness Issue – Article IV (1)

1. Neither 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.	1. Ni le transporteur ni le navire ne seront responsables des pertes ou dommages provenant ou résultant de l'état d'innavigabilité, à moins qu'il ne soit imputable à un manque de diligence raisonnable de la part du transporteur à mettre le navire en état de navigabilité ou à assurer au navire un armement, équipement ou approvisionnement convenables, ou à approprier et mettre en bon état les cales, chambres froides et frigorifiques et toutes autres parties du navire où des marchandises sont chargées, de façon qu'elles soient aptes à la réception, au transport et à la préservation des marchandises, le tout conformément aux prescriptions de l'article III, paragraphe 1. Toutes les fois qu'une perte ou un dommage aura résulté de l'innavigabilité, le fardeau de la preuve, en ce qui concerne l'exercice de la prévue au présent article.

The obligation of the carrier to exercise due diligence before and at the beginning of the voyage is an overriding obligation.[92] The fact that the carrier employs otherwise

[91] (1990) 37 F.T.R.184
[92] Maxine Footwear v. Can. Gov't Merchant Marine [1959] 2 Lloyd's Rep. 105, [1959] A.C. 589 (P.C.)

competent employees, agents and/or subcontractors is not a defence if due to their negligence the obligation is not performed.[93] The various carrier defences explored above are not available to the carrier if the carrier fails to show how it exercised due diligence before and at the beginning of the voyage to make sure the vessel was seaworthy.[94] It must be emphasized that, at common law, the carrier's duty to provide a seaworthy vessel at all times was absolute, while under the Hague-Visby Rules, the carrier only has to show that "before and at the beginning of the voyage" it exercised due diligence to make its vessel seaworthy in all respects of the ship, the competence and ability of the Master and crew and the fitness of the ship's equipment for the purpose intended.

Himalaya Clauses, Covenant not to Sue and Circular Indemnity Clauses.

A typical clause, which has been the subject of decisions, is the standard term and condition from the OOCL bill of lading/waybill terms.[95]

> **25) SUB-CONTRACTING AND INDEMNITY**
>
> (a) The Carrier shall be entitled to sub-contract the whole or any part of the duties undertaken by the Carrier in this Bill of Lading in relation to the Goods on any terms whatsoever consistent with any applicable law.
>
> (b) Merchant undertakes that no claim or allegation shall be made against any person performing or undertaking such duties (including all servants, agents and sub-contractors of the Carrier) other than the Carrier, which imposes or attempts to impose upon any such person, or any vessel owned by any such person, any liability whatsoever in connection with the Goods or the carriage of the Goods from port of loading to port of discharge whether or not arising out of negligence on the part of such person and, if any such claim or allegation should nevertheless be made, the Merchant will indemnify the Carrier against all consequences thereof.
>
> (c) Without prejudice to the Merchant's indemnity obligations herein, the Vessel and every subcontractor of the Carrier of any nature whatsoever (including but not limited to the Participating Carrier, the Vessel, the owner, charterer, operator, Master, officer and crew of the Vessel, and employees, agents, representatives, and all stevedores, terminal

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[93] (The Muncaster Castle) Riverstone Meat Co. Pty. v. Lancashire Shipping Co. [1961] 1 Lloyd's Rep. 57, [1961] A.C. 807 (H.L.) (The Amstelslot) Union of India v. N.V. Reederij Amsterdam [1963] 2Lloyd's Rep. 223 (H.L.)

[94] North Star Cement Ltd. v. Labelle 1976 AMC 944 (Fed. Ct. of Canada)(leaky vessel) CNR v. E. & S. Barbour Ltd. [1963] S.C.R. 323(non-ice strengthened vessel forcing ice) Robin Hood Flour Mills v N.M.Patterson ("The Farrandoc) [1967] 1 Ex.C.R.175 aff'd [1968] 1 Ex.C.R.175 (carrier not explaining valve system to new engineer)

[95] To be found at http://www.oocl.com ; [95] Boutique Jacob v Pantainer Ltd. 2006 FC 217, 2006 partially reversed at Boutique Jacob v Canadian Pacific Railway 2008 FCA85; Ford Aquitaine Industries SAS v. Canmar Pride (Ship), 2004 FC 1437

operators, watchmen, carpenters, lasher, ship cleaners, surveyors and other independent contractors) shall have the benefit of every right, defence, limitation and liberty of whatsoever nature herein contained or otherwise available to the Carrier as if such provisions were expressly for its benefit, and in entering into this contract, the Carrier, does so not only on its own behalf but also as agent and trustee for such persons or Vessel. The term "subcontractor" as used herein shall include both direct and indirect subcontractors hired by the Carrier to perform the Carrier's own obligations under the Bill of Lading, or the obligations of any person for whom the Carrier acts as agent. An indirect subcontractor is a person with whom the Carrier is not in contractual privity. For the purpose of this Clause 25, the Vessel and all subcontractors shall be deemed to be parties to the contract evidenced by this Bill of Lading.

(d) The provisions of Clause 25(b) shall extend to claims or allegations of whatsoever nature against other persons chartering space on the carrying Vessel.

(e) The Merchant further undertakes that no claim or allegation in respect of the Goods shall be made against the Carrier by any person other than in accordance with the terms and conditions of this Bill of Lading which imposes or attempts to impose upon the Carrier any liability whatsoever in connection with the Goods whether or not arising out of negligence on the part of the Carrier and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.

Clause (a) is the liberty to sub-contract clause "on any terms" which allows the contractual carrier to select the sub-contractors to perform carriage which it doesn't perform. The Boutique Jacob decision summarizes the case law and demonstrates how Non-Vessel Operating Common Carriers, such as Pantainer, and contractual carriers such as "OOCL" (who incidentally subtracted the ocean voyage stage of this transport to the NYK container line company pursuant to a slot charter party) organize a multi-modal movement from Hong Kong to Montreal.

Clauses (b) and (e) are the "Covenant not to Sue" and "Circular Indemnity" Clauses which obliges shipping interests to sue only the contractual carrier and not to make claims in tort against the carrier's sub-contractors in an attempt to circumvent the carrier's limitation clauses. These types of clauses have been enforced by the courts on the policy ground of avoiding multiplicity of proceedings which would only end up with the carrier making a claim against the claimant for any excess it has to reimburse its sub-contractor over the amount of the contractual limitation amount.[96] In the Ford

[96] The "Elbe Maru" [1978] 1 Lloyd's Rep.206; B.H.P. v Hapag-Lloyd Aktiengesellschaft, [1980] 2 N.S.W.L.R. 572 The Nedlloyd Columbo [1995] 2 HKC 655 Chapman Marine Pty.Ltd. v Wilhelmsen Lines and Conaust, [1999]F.C.A. 141,

Acquitaine decision, the Court suspended proceedings brought "in rem" against the performing carrier, the ship, at the request of the contractual carrier, OOCL.

Clause (c) is the typical "Himalaya Clause" which has a long history of development and judicial recognition. Its purpose is to confer the benefit of all of the carrier's rights of exclusion, limitation, immunities, such as time-bar, and any other defence on any of its employees, agents, and/or sub-contractors. For example, in the ITO decision, the Supreme Court held that the terminal which was responsible for the theft of a consignment of electronic calculators could invoke the carrier's non-responsibility clause for losses occurring after discharge from the vessel.[97] In the Boutique Jacob decision, the railway hired by OOCL to perform the land carriage from Vancouver to Montreal was entitled to benefit from OOCL's $2 per pound limitation of liability for losses arising outside the Hague-Visby Rules period of application ("from loading to discharge").

Time Bar

Under the Hague-Visby Rules, Article III (6), the time bar for cargo damage claimants to sue is one year from delivery or from the time delivery should have been made in the event of loss. However, under Canadian Maritime Law, where the Hague-Visby Rules do not apply, the applicable time bar is the general time bar in maritime matters of three years, stipulated in s.140 of the Marine Liability Act[98].

Carrier's Limitation of liability under the Contract of Carriage

There are two possibilities depending on which regime is applicable:

Under the Hague-Visby Rules

Once the claimant has met its burden of proof of showing damage and the measure of damages, the carrier has the burden of proof of showing that it is entitled to limit its liability in accordance with the Rules.

Hague-Visby Rules as defined in the Marine Liability Act included the amendments in 1968 increasing the amounts of the limitation together with the adjustments with respect to the calculation of limitations in the Brussels Protocol of 1979. The carrier's

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[1999] A.M.C.1221, at 1239 (Fed.Ct. Australia) Timberwest Forest Corp. v. Pacific Link Services Corp. (F.C.), 2008 FC 801, [2009] 2 FCR 496, paragraphs 69 and 70, per Justice Harrington Whitesea Shipping and Trading Corporation & Anor v El Paso Rio Clara Ltd & Ors [2009] EWHC 2552 (Comm)

[97] Midland Silicones Ltd. Scruttons, Ltd. [1961] 2 Lloyd's Rep. 365, [1962] A.C. 446 (H.L.); Buenos Aires Maru (ITO v. Mitsui O.S.K. Lines) [1986] 1 S.C.R. 752 Fraser River Pile & Dredge Ltd., v. Can-Dive Services Ltd., [1999] 3 S.C.R. 108

[98] Fargo Equipment Finance Co. v The Barge "MLT-3" 2013 FCA 96

entitlement to limit does not depend on whether the carrier committed a "fundamental breach" since the scope of Article IV (5) covers "in any event".[99]

Prior to the Brussels Protocol of 1979, limitation under the Hague-Visby Rules was calculated according to francs which involved calculating the value of gold on any specific date. The purpose of Standing Drawing Rights ("S.D.Rs") was to choose the average of major currencies as determinative of a value, rather than rely on the gold standard.

Article IV (5) (a) defines the limitation as follows:

- in an amount not exceeding 666.67 units of account per package, or
- two units of account per kilogramme of gross weight of goods lost or damaged, **whichever is higher**

How do you perform the calculation?

A: Take the date of Arrival or when goods should have arrived at the Port of Discharge (Delivery)

B: Identify "units" by number, packages and weight – note Article IV(5)(c) says[100]:

> (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit.

C: To obtain the figure for "units of account" go to www.imf.org, (International Monetary Fund website), click where it says "Data and Statistics", then "IMF Finances", then "Special Drawing Rights (SDRs), and then, on the left side, click "SDR Valuation" – enter date and then scroll the country concerned, eg United States (only four choices are given)

Example: 2 coils of steel weighing 2,000 kilogrammes each are totally damaged on January 27, 2010; each coil has an arrived sound market value of $ 5,000; the value of the SDR on January 27, 2010 was US$ 1.56113 or Cdn $1.670 as per the Bank of Canada website, therefore:

First limitation: 666.67 x 1.670 x 2 coils = Cdn $ 1,113.34

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[99] St. Lawrence Construction Ltd. v. Federal Commerce & Navigation Co.[1985]1 FC 767, 56 N.R.174(FCA)
[100] To see how this applies to containerized cargo, see El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA [2004] FCAFC 202, [2004} 2 Lloyd's Rep.537 (Federal Court of Australia)

Second limitation: 2 x 1.670 x 2,000kg x 2 coils = Cdn $ 13,360

SOLUTION: carrier cannot be liable for more than the value of the cargo lost; therefore, it is liable for $ 10,000 and cannot benefit from the limitation rights.

HOWEVER, assume that the arrived sound market value of each coil was $10,000, and then the carrier is liable only for $ 13,360, instead of $ 20,000.

Canadian Maritime Law

The principle of freedom of contract means that the parties may agree to any limitation of liability, for example, in Cami Automotive[101], the parties had agreed to US$500 per unit.

Moreover, when foreign law is applicable, the exchange rate may give rise to some surprising amounts, for example, in The "Ebn Al Waleed"[102], the exchange rate of Turkish dinars resulted in the carrier being able to limit its responsibility to $2.30 per unit!

Multi-modal carriage of goods where one stage is by sea

Muti-modal contracts of carriage may contain more than one carrier's right of limitation, depending on whether the carrier can prove where the loss or damage occurred. As limitation clauses are interpreted against the interests of the carrier who stipulated them, if there is more than one limitation clause, the highest of the limitations is usually the one that is applicable. Moreover, as a result of the Himalaya Clause, the land carrier may take advantage of a limitation clause stipulated in the carrier's favour.[103]

Shipper's Responsibilities

1. To pay the freight

Many cases involve the question whether the shipper might have to pay twice because it entrusted its payment to its own agent who didn't pay the carrier. [104] Furthermore, the contract may provide (or not) for other financial liabilities.[105] In the container line trade, there may also be container demurrage and detention which gives rise to whether a

[101] 2009 FC 664
[102] [2000]1 Lloyd's Rep.270 (Fed.Ct.) upheld at 2001FCA111.
[103] Boutique Jacob v Pantainer Ltd. 2006 FC 217, 2006 CarswellNat 439 (Fed Ct.TD) reversed in part Boutique Jacob v Canadian Pacific Railway 2008 FCA85, 2008 CarswellNat 590 (CA)
[104] CP Ships v Les Industries Lyon Corduroys Ltee [1983] 1 FC 736; Mediterranean Shipping Co. S.A. v. BPB Westroc Inc., 2003 FC 942H. Paulin & Co. Ltd. v. A Plus Freight Forwarder Co. Ltd., 2009 FC 727
[105] Canadian Pacific Forest Products Ltd. v. Termar Navigation Co., [1998] 2 FC 328

carrier has a duty to mitigate these charges and what parties are responsible to pay for them...even possibly a freight forwarder who acts and contracts as an agent?[106]

2. To contribute to General Average

Contracts of carriage by water give rise to possibly two further obligations which shippers by land or by air will never experience. If as a result of a casualty, the cargo and ship are put into danger, and are saved, the salvor in addition to claiming its quantum meruit for its work may also claim a reward based on its success and the difficulty encountered in achieving that success. Since the Master of the ship is held to be an agent by necessity for both the ship and the cargo, actions by the Master in allowing the salvage effort to proceed bind both the ship owner and the cargo interests.

Since it is not fair for the ship owner to bear the whole costs of the salvage and any other disbursement that the ship owner incurs to save the voyage, the carrier can make a claim in "general average" calling on cargo interests to contribute to their fair share in proportion to the value of the cargo and of the ship that has been saved.

General Average has been defined[107]

General average loss	Avaries communes
65. (1) A general average loss is a loss caused by or directly consequential on a general average act, and includes a general average sacrifice and a general average expenditure.	**65.** (1) L'avarie commune est la perte causée par un acte d'avarie commune ou en résultant directement; y sont inclus les sacrifices et les dépenses d'avarie commune.
General average act, sacrifice and expenditure	Actes, sacrifices et dépenses d'avarie commune
(2) A general average act is any extraordinary sacrifice or expenditure, known as a general average sacrifice and a general average expenditure, respectively, that is voluntarily and reasonably incurred in time of peril for the purpose of preserving the property from peril in a common adventure.	(2) L'acte d'avarie commune consiste en sacrifices ou dépenses extraordinaires — appelés sacrifices d'avarie commune et dépenses d'avarie commune respectivement — raisonnablement et volontairement consentis en situation de danger dans le but de préserver les biens d'un péril lors d'une opération commune.

[106] DHL Global Forwarding (Canada) Inc. v CGM-CMA S.A. 2013 FC534; Encan Liquidation General Canada Inc. v Transintra Canada 2000 CarswellNat 2989; CTO International Ltd. v Intercon Freight (1992) 56 F.T.R.94
[107] Marine Insurance Act, S.C.1993, c22, s.65(1), (2) and (3), as fully explored in Ultramar Canada Inc. v Mutual Marine Office Inc. (The "Pointe Levy")(1994),82 F.T.R.1 where at page 8, Justice Rouleau stated: "The obligation to contribute in general average does not depend upon any contract between the parties."

General average contribution	Contribution d'avarie commune
(3) Subject to the conditions imposed by maritime law, a person who incurs a general average loss is entitled to receive from the other interested persons a rateable contribution, known as a general average contribution, in respect of the loss.	(3) Sous réserve des conditions imposées par le droit maritime, l'avarie commune donne le droit à la personne qui la subit de recevoir des autres intéressés, à l'égard de la perte, une contribution proportionnelle appelée contribution d'avarie commune.

The obligation to contribute exists except where the cause of the act is the fault of the carrier and there is no contractual exemption of liability binding on the cargo[108]

3. Warrant the fitness of the cargo and its equipment or packaging to be carried

Both at common law and under the Hague-Visby Rules, there has always been provision that the shipper, who is the best person to know the nature and carrying characteristics of its cargo, bears the responsibility to warrant and inform the carrier concerning its nature, characteristics and its fitness. In addition, the cargo must be properly prepared and sufficiently packaged for the transport intended and that any equipment used to contain the cargo must also have the same like fitness. There is an emerging warranty by the shipper not only of fitness of cargo for the transport intended, but also that its equipment used for the transport of its cargo is also fit for the voyage intended.[109]

Under the Hague-Visby Rules which reflects the position at common law:

a. The shipper must provide in writing the leading marks necessary for the identification of the cargo and the number of packages or pieces or the quantity or weight, as the case might be.[110]

b. The shipper guarantees the accuracy about the characteristics of the cargo[111]

c. The shipper must respond to damage claims whether by the carrier or other cargo for any fault or act of the shipper, inherent defect of the cargo not

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[108] Federal Commerce and Navigation Company Limited et al. v Eisenerz-GmbH [1974]S.C.R.1225 Ellerman Lines Ltd. v Gibbs Nathaniel (Canada) Ltd. (1983)4 D.L.R.(4th)645 aff'd (1986)26 D.L.R.(4th)161 (F.C.A.)

[109] Heath Steel Mines Ltd. v The "Erwin Schroder"[1970] Ex.Cr.426; AK Steel Corporation v AcelorMittal Mines Canada Inc. 2014 FC 118 Oceanex Inc. v Praxair Canada Inc. 2014 FC6

[110] Hague-Visby Rules, Article III (3)

[111] Hague-Visby Rules, Article III(5)

discoverable by due diligence, its insufficiency of packing, the insufficiency or inadequacy of the its marks and never knowingly misstate the nature or value of the cargo.[112] Moreover, the shipper must not misrepresent any characteristic about the cargo, even about its ultimate destination after the port of discharge which might be a source of delay to the carrier.[113]

The Hague-Visby Rules at Article IV (3) establish the standard:

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.	3. Le chargeur ne sera pas responsable des pertes ou dommages subis par le transporteur ou le navire et qui proviendraient ou résulteraient de toute cause quelconque sans qu'il y ait acte, faute ou négligence du chargeur, de ses agents ou préposés.

Moreover at common law, and as reflected in the Hague-Visby Rules, there is a strict liability regime created when cargo is or becomes dangerous to other cargo and the ship and the shipper has not disclosed the nature, or scope, or severity of its dangerous character to the carrier.[114]

In contrast to Article IV (3), Article IV (6) is drafted as follows:

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or	6. Les marchandises de nature inflammable, explosive ou dangereuse, à l'embarquement desquelles le transporteur, le capitaine ou l'agent du transporteur n'auraient pas consenti, en connaissant la nature ou leur caractère, pourront à tout moment, avant déchargement, être débarquées à tout endroit ou détruites ou rendues inoffensives par le transporteur, sans indemnité, et le chargeur de ces marchandises sera responsable de tout dommage et dépenses provenant ou résultant directement ou indirectement de leur embarquement. Si quelqu'une de ces marchandises

[112] Hague-Visby Rules, Article IV (2) which not only provide defences to the carrier when cargo is lost or damaged, but may also in appropriate circumstances envisaged by Article IV((3) be causes of action.
[113] Cormorant Bulk-Carriers Inc. v Canficorp (Overseas Projects) Ltd. (1984), 54 N.R.66
[114] The history has been canvassed in Les Industries Perlite Inc. v The Ship "Marina Di Alimuri [1996]2 F.C.426

destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.	embarquées à la connaissance et avec le consentement du transporteur devenait un danger pour le navire ou la cargaison, elle pourrait de même façon être débarquée ou détruite ou rendue inoffensive par le transporteur, sans responsabilité de la part du transporteur, si ce n'est du chef d'avaries communes, s'il y a lieu.

There had been a controversy, particularly in the United States, as to whether the shipper's liability was to be governed by the due diligence regime, or whether its liability was strict, particularly under the Hague-Visby Rules. This was settled by the 2nd Circuit through the pen of Justice Sotomayer, as she then was, where the Court held[115] that it was following the lead of the House of Lords in The Giannis NK,[116] a case involving the presence of khopra beetles in a food cargo which the carrier had to dump in the sea following the refusal of the port authorities to allow the ship to discharge the cargo. The following was decided:

1) "dangerous" to be given a broad meaning; goods need not be dangerous if they are dangerous to other goods, although not necessarily to the vessel – "dangerous" need not be physically dangerous in the sense it causes an alteration to the goods; it is sufficient that there were to cause losses to other cargo;

2) there is no qualifying language in either Art. IV(3) or Art.IV(6) which subjects one provision to another or that cause one to override the other – similar to Art. III (2) – accordingly, Art. IV (6) is a separate provision addressing a specific subject matter and providing a carrier with different remedies with respect to dangerous cargo depending on whether the carrier was informed by the shipper and had consented to its dangerous characteristics;

3) there is no evidence of any intention of Parliament that the shipper was to be divested of liabilities under the contract of carriage simply by the negotiation or consignment of the bill of lading

4) the leading case, Brass v Maitland had a majority opinion which said that the liability of a shipper for dangerous goods at common

[115] Senator Linie GmbH v. Sunway Line, Inc. 291 F.3d 145, 2002 AMC 1217 (2 Cir. 2002),
[116] Effort Shipping Ltd. v Linden Management S.A.(The "Giannis NK")[1998] A.C.605, [1998] 1 Lloyd's Rep.337

> law does not depend, when it arises, on his knowledge or means of knowledge that the goods were dangerous. Hence, Art. IV (6) simply replicated the common law's position on the responsibilities of the shipper.

The decision expressly left open the question whether goods are dangerous if they are liable to cause delay to the vessel and cargo through operation of local law (eg – prohibited or restricted cargo – asbestos? Unwashed cargo carrying plant vegetation which might inhabit unwanted insects? Cargo subject to forfeiture, like elephant ivory tusks, illegal animal skins). It was said:

> "It is not necessary to consider a further argument that goods may be of a dangerous nature even though they do not present any physical danger to ship or cargo, but are 'legally' dangerous in the sense that they are liable to cause delay to ship and cargo through the operation of some local law."

There is uniformity now in the law as this decision has been followed both in Canada and in the United States.[117]

Multi-Modalism

As a result of containerization, all container lines offer their services not only on a "port-to-port" basis, but on a "door-to-door" basis where the ocean carrier organizes the land transport to and from the ports to the final destination which require land transport to be arranged for by the water carrier.[118] Moreover, often land liability regimes may be incorporated into the marine contracts of carriage which have an impact on the liability of the ocean carriers, and also on the liability of the land carrier.[119]

Rail law

The scope of federal rail law only goes as far as the Canada Transportation Act[120]; provides, which governs Canadian railway companies and contracts of carriage by rail entered into in Canada relating to extra-provincial rail transport. Needless to say, the

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[117] *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.,* 291 F.3d 145 (2nd Cir. 2002) per Sotomayer, J. as she then was. The same decision has been followed in Canada, in Elders Grain Co.Ltd. v The "Ralph Misener" (2003) 237 F.T.R.37 2003 FC 837 upheld at 2005 FCA 139.
[118] Boutique Jacob v Pantainer Ltd. 2006 FC 217 reversed in part Boutique Jacob v Canadian Pacific Railway 2008 FCA85
[119] Boutique Jacob, supra; Quebec Liquor Corporation v DART EUROPE [1979] AMC 2382 (F.C.T.D.)Dopplemayr Lifts Ltd. v Hapag-Lloyd Aktiengesellschaft [1982] 2 F.C. 772 (F.C.T.D.) See in general R.Fernandes "Road and Rail Carriage in the 21st Century-Legal Issues (2008) 1.C.M.L.A.J.no.1
[120] S.C.1996, c.10 see Rui Fernandes "Road and Rail Carriage in the 21st Century" [2008] 1 C.M.L.A.J.no.1

Federal Court has no jurisdiction over local rail carriage governed by provincial law and carriage which originates from the United States does give rise to controversy.[121]

Trucking law

Following the Federal Court of Appeal's decisions[122] that the Federal Court had no jurisdiction over trucking contracts, a regulation was promulgated[123] pursuant to the Motor Vehicle Transport Act[124] provided a text of federal law upon which the Court can exercise jurisdiction, as follows:

CONDITIONS OF CARRIAGE AND LIMITATIONS OF LIABILITY	CONDITIONS DE TRANSPORT ET LIMITATION DE RESPONSABILITÉ
1. (1) Subject to subsection (2), the conditions of carriage and limitations of liability that apply to transport by an extra-provincial truck undertaking are those set out in the laws of the province in which the transport originates, as amended from time to time, that are applicable to transport by a motor carrier undertaking within that province.	**1.** (1) Sous réserve du paragraphe (2), les conditions de transport et la limitation de responsabilité relatives au transport effectué par une entreprise de camionnage extra-provinciale sont celles qui sont prévues par les règles de droit de la province d'où s'effectue le transport, avec leurs modifications successives, qui sont applicables au transport effectué par une entreprise de transport routier dans cette province.
(2) For greater certainty, in the absence of a provincial enactment dealing specifically with conditions of carriage and limitations of liability, the conditions of carriage and limitations of liability that apply to transport by an extra-provincial truck undertaking are those agreed to by the undertaking.	(2) Il est entendu que, à défaut d'un texte provincial prévoyant expressément les conditions de transport et la limitation de responsabilité, les conditions de transport et la limitation de responsabilité relatives au transport effectué par une entreprise de camionnage extra-provinciale sont celles auxquelles l'entreprise consent.

Evidently, this regulation does not cover local truck deliveries within a province nor any trucking contract for transport which originates outside of a province of Canada. Accordingly, the Federal Court has jurisdiction only over extra-provincial trucking contracts provided that the transport originates with a province of Canada.

[121] Marley Co. v Cast North America (1983) Inc. (1995), 94 F.T.R.45; Watt & Scott Inc. v Chantry Shipping S.A.et.al.[1988] 1 FC537 re the scope of s.23 of the Federal Courts Act.
[122] Matsuura Machiner Corp. v Hapag Lloyd A.G. (1997), 211 N.R.156 and Garfield Container Transportation v Uniroyal Goodrich Can.Inc.(1998),229N.R.201
[123] Conditions of Carriage Regulations, SOR/2005-404
[124] R.S., c.29 (3rd Supp.); S.C.2001, c.13, ss 1 and 6

Jurisdiction and Arbitration Clauses in Contracts of Carriage

In general, agreements to litigate or arbitrate disputes under a foreign law and in a foreign forum[125] are fully enforceable, unless they are subject to s.46 of the Marine Liability Act or other forms of legislative intervention[126].

Z.I.Pompey v ECU-Line, N.V. [2003] 1 S.C.R.450 at paragraph 19:

> Pursuant to s. 50(1) of the *Federal Court Act*, the court has the discretion to stay proceedings in any cause or matter on the ground that the claim is proceeding in another court or jurisdiction, or where, for any other reason, it is in the interest of justice that the proceedings be stayed. For some time, the exercise of this judicial discretion has been governed by the "strong cause" test when a party brings a motion for a stay of proceedings to enforce a forum selection clause in a bill of lading. Brandon J. set out the test as follows in *The "Eleftheria"*, [1969] 1 Lloyd's Rep.237 at p. 242:
>
> > (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be

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[125] Ocean Star Container Line v Iberfreight S.A. 1989 CarswellNat 708, 104 N.R.164, Anraj Fish Products Industries Ltd. v Hyundai Merchant Marine Co. 2000 CarswellNat1290, 262 N.R.270

[126] Seidel v TELUS Communications Inc. [2011] 1 S.C.R.531 at paragraph 2

> prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In 2001, Federal Parliament addressed complaints of Canadian shippers and receivers that often their claims for compensation were met with demands by the carriers to litigate outside of Canada in accordance with forum selection clauses as a way to bargain down the settlement amount or to discourage any settlement possibilities. Marine Liability Act, 2001 S.C.c.6, s.46 (1) reads as follows:

INSTITUTION OF PROCEEDINGS IN CANADA	PROCÉDURE INTENTÉE AU CANADA
Claims not subject to Hamburg Rules	Créances non assujetties aux règles de Hambourg
46. (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where:	46. (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :
(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or	b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;
(c) the contract was made in Canada.	c) le contrat a été conclu au Canada.

The impact of s. 46 was discussed in Z.I. Pompey Industrie supra per Bastarach, J.:

> 37 Section 46(1) of the Marine Liability Act, which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the Federal Court Act to stay proceedings because of a forum selection clause where the requirements of s. 46(1)(a), (b), or (c) are met. This includes where the actual port of loading or discharge is in Canada...........
>
> 38 Indeed, s. 46(1) would appear to establish that, in select circumstances, Parliament has deemed it appropriate to limit the scope of forum selection clauses by facilitating the litigation in Canada of claims related to the carriage of goods by water having a minimum level of connection to this country. ....

It is the author's opinion that s.46 only applies to contracts of carriage evidenced by a bill of lading, and not otherwise; it has been decided that it does not apply to contracts of carriage by charterparty[127]. Whether it applies to contracts of carriage evidenced by waybill and/or which are governed only by Canadian Maritime Law (but not by Part 5 of the Marine Liability Act) remain to be decided.

Needless to say, the Courts have control over their processes and any proceeding before the Courts is subject to "forum non conveniens" considerations.[128] That is not to say that there will not be conflicts between Canadian courts and courts in other forums which do not recognize the Canadian legislative intervention.[129]

The Future – Reform

The Marine Liability Act, under Part 5, and the predecessor statute it consolidated[130], provides that upon report of the Minister of Transport to Parliament every five years as to whether the Hamburg Rules[131] should replace the Hague-Visby Rules, then should the Minister consider and report that it is in the Canadian interest, the Hamburg Rules will be brought immediately into force in Canada, and the Hague-Visby Rules shall be deemed to have been repealed, without the intervention of Parliament. While the Hamburg Rules Convention is in force internationally, they have never come into force in Canada, and are unlikely to because of other events.

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[127] Canada Moon Shipping Co.Ltd. et al. v Companhia Siderurgica Paulista-COSIPA 2012 FCA 284

[128] Spar Aerospace Ltd. v American Mobile Satellite Corporation [2002] 4 S.C.R.205, Mazda Canada Inc. v Cougar Ace (The) 2 F.C.R.382 Hitachi Maxco Ltd. et al. v Dolphin Logistics Company Ltd. et al. 2010 FC 853, Ford Aquitaine Industries v The "Canmar Pride" 2005 FC 4, Magic Sportswear Corp. v Mathilde Maersk (The) 2006 FCA 284, [2007]2 F.C.R.733

[129] O.T.Africa Line Ltd. v Magic Sportswear Corp. et al. [2005] EWCA Civ 71 (Eng.CA)

[130] Carriage of Goods by Water Act, S.C.1993, c.21

[131] The United Nations Convention on the Carriage of Goods by Sea, 1978, concluded at Hamburg, set forth as Schedule 4 to the Marine Liability Act.

Since 1993, the international community has been engaged in a lengthy negotiations which resulted in the signing at Rotterdam on September 23, 2009, the "United Nations Convention on Contracts for the International Carriage of Goods Wholly or in Part, by Sea", commonly known as the "Rotterdam Rules". Thus far, 25 nations including the United States have signed. Only two nations, Spain and Togo, have ratified the agreement. The convention needs twenty nations to deposit instruments of ratification before it comes into force. Many African nations will ratify the convention once the convention is ratified by the United States, however that remains elusive.

The convention contains some 96 articles which cover the entire period of responsibility from the time the goods are received until the time they are delivered, unless the parties agree otherwise, and provide an entire code of rights and responsibilities of carriers, both the performing and contractual carriers, shippers and receivers and the third parties performing services. One distinguishing aspect is the freedom of the parties to contract out of the carrier's responsibilities with respect to care of the cargo. However, the carrier is obligated to exercise due diligence to maintain the seaworthiness of the vessel at all times. It contains a complete code governing the rights and obligations of parties to contracts evidenced by negotiable or non-negotiable transport documents.

Canada remains reluctant to commit itself to signing the Convention until it sees what its major trading partners will do. Canada still has a Bills of Lading Act which was passed in 1871 modeled on the British statute passed in 1855, which has been updated in 1992 to address certain problems caused by the British aversion to allowing recovery of pure economic losses.[132] Shippers loath the idea of allowing freedom of contract to carriers to reduce the standards of performance relating to care of the cargo, while carriers are only too happy with the complete freedom of contract regime so long as only waybills are used. It is very difficult to predict the future and we must all wait to see what the Minister of Transport has to say in his report expected before Parliament recesses in December 2014.

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[132] Carriage of Goods by Sea Act, 1992, U.K.1992, c.50