NEW SECTION 46 OF THE *MARINE LIABILITY ACT*: ITS APPLICATION AND EFFECT ON SECTION 50 OF THE *FEDERAL COURT ACT*

By John G. O'Connor

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On May 10, 2001, Parliament enacted the *Marine Liability Act*[1] as part of the revision of the *Canada Shipping Act*[2], a piece of legislation first enacted shortly after Canada gained full sovereignty from the United Kingdom[3]. The *Marine Liability Act* came into force on August 8, 2001. Portions of the *Canada Shipping Act* concerning such matters as limitation of liability and civil liability for pollution have been transferred to the *Marine Liability Act*. Other parts of the *Canada Shipping Act* have been revised in the new *Canada Shipping Act 2001*[4].

The separation of the legislation into two Acts is aimed at facilitating the adoption of international conventions without involving the revision of the more technical

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1 S.C. 2001, c. 6

2 R.S.C. 1985, c. S-9.

3 S.C. 1934 c. 44. This Act replaced for Canada the *Merchant Shipping Act, 1894*, 57-58 Vict. c. 60 (U.K.) as well as the former *Canada Shipping Act*, R.S.C. 1927, c. 186 which contained Canada's local amendments to the *Merchant Shipping Act, 1894*, as was permitted by sections 735 and 736 thereof, on the condition that 'colonial' or local amendments receive the approval of Her Majesty in Council. Although Canada became a country in 1867 by virtue of the *Constitution Act 1867*, 30-31Vict., c. 3 (U.K.), it only gained full international sovereignty in 1931 with the coming into force of the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.). From that date on U.K. legislation would only apply to Canada when the constitution of 1867, itself a U.K. statute, was being amended. This last legislative link continued until the passing of the *Canada Act 1982*, c. 11 (U.K.).

4 S.C. 2001, c. 29.

shipping aspects contained in the *Canada Shipping Act 2001*. The *Marine Liability Act* also contains Canada's enactment of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as amended by the 1990 Protocol, as well as Canada's carriage of goods legislation, formerly contained in the *Carriage of Goods by Water Act* enacted in 1993.[5]

Prior to 1993, Canada's carriage of goods legislation, originally adopted in 1936[6], gave effect to the Hague Rules of 1924. In 1993, Canada followed the Australian initiative by incorporating both the Hague-Visby Rules and the Hamburg Rules in a revised *Carriage of Goods by Water Act*. That legislation has now become Part 5 of the new *Marine Liability Act*. The Hague-Visby Rules continue to have force of law in Canada and apply to all outbound cargoes from Canada. However, if and when the Minister of Transport considers the Hamburg Rules should replace the Hague-Visby Rules, the latter shall cease to apply. By virtue of section 44 of the *Marine Liability Act*, such a determination must be made on January 1, 2005, and every five years thereafter, until the Hamburg Rules are adopted.

The Hamburg Rules include articles 21 and 22 concerning jurisdiction and arbitration but these articles will only come into force in Canada if and when the Hamburg Rules as a whole are brought into force under section 45 of the *Marine Liability Act*.

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5 S.C. 1993, c. 21.
6 S.C. 1936, c. 49.

The purpose of this paper is to review new section 46 of the *Marine Liability Act* which is now in force and which is very similar to articles 21 and 22. The application of section 46 and the effect of the section on existing section 50 of the *Federal Court Act*[7] will also be discussed.

Articles 21 and 22 of the Hamburg Rules

Article 21 of the Hamburg Rules reads as follows:

"Article 21 – Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

(b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) the port of loading or the port of discharge; or

(d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the

«Article 21 – Compétence

1. Dans tout litige relatif au transport de marchandises en vertu de la présente Convention, le demandeur peut, à son choix, intenter une action devant un tribunal qui est compétent au regard de la loi de l'État dans lequel ce tribunal est situé et dans le ressort duquel se trouve l'un des lieux ou ports ci-après :

(a) l'établissement principal du défendeur ou, à défaut, sa résidence habituelle;

(b) le lieu où le contrat a été conclu, à condition que le défendeur y ait un établissement, une succursale ou une agence par l'intermédiaire duquel le contrat a été conclu;

(c) le port de chargement ou le port de déchargement;

(d) tout autre lieu désigné à cette fin dans le contrat de transport par mer.

2. (a) Nonobstant les dispositions précédentes du présent article, une action peut être intentée devant les tribunaux de tout port ou lieu d'un État contractant où le navire effectuant le transport ou tout autre navire du même propriétaire a été saisi conformément aux règles applicables de la législation de cet État et du droit international. Toutefois, en pareil cas, à la requête du défendeur, le demandeur doit porter

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7 R.S.C. 1985, c. F-7.

action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective."

l'action à son choix devant l'une des juridictions visées au paragraphe 1 du présent article pour qu'elle statue sur la demande, mais le défendeur doit préalablement fournir une garantie suffisante pour assurer le paiement de toutes sommes qui pourraient être adjugées au demandeur;

(b) Le tribunal du port ou lieu de la saisie statuera sur le point de savoir si et dans quelle mesure la garantie est suffisante.

3. Aucune procédure judiciaire relative au transport de marchandises en vertu de la présente Convention ne peut être engagée en un lieu non spécifié au paragraphe 1 ou 2 du présent article. La disposition du présent paragraphe ne fait pas obstacle à la compétence des tribunaux des États contractants en ce qui concerne les mesures provisoires ou conservatoires.

4. (a) Lorsqu'une action a été intentée devant un tribunal compétent en vertu du paragraphe 1 ou 2 du présent article ou lorsqu'un jugement a été rendu par un tel tribunal, il ne peut être engagé de nouvelle action entre les mêmes parties et fondée sur la même cause à moins que le jugement du tribunal devant lequel la première action a été intentée ne soit pas exécutoire dans le pays où la nouvelle procédure est engagée.

(b) Aux fins du présent article, les mesures ayant pour objet d'obtenir l'exécution d'un jugement ne sont pas considérées comme l'engagement d'une nouvelle action.

(c) Aux fins du présent article, le renvoi d'une action devant un autre tribunal dans le même pays, ou devant un tribunal d'un autre pays, conformément à l'alinéa *a*) du paragraphe 2 du présent article, n'est pas considéré comme l'engagement d'une nouvelle action.

5. Nonobstant les dispositions des paragraphes précédents, tout accord d'élection conclu par les parties après qu'un litige est né du contrat de transport par mer est valable. »

The first paragraph of article 21 contains its key provisions. It sets out the jurisdiction within which an action may be instituted. It states that the plaintiff may proceed before a court in the place designated for that purpose in the contract of carriage or in any state where the goods were loaded or discharged, where the defendant has his principal place of business or where the contract of carriage was made, provided in this last case that the defendant has there a place of business or agency through which the contract was made.

The second paragraph of article 21 provides for the additional jurisdiction of any other contracting state where the carrying vessel or any sistership may be arrested. The defendant may, by providing alternate security, force the plaintiff to remove the action to one of the states referred to in the first paragraph.

The third paragraph prohibits proceedings related to the carriage of goods under the Hamburg Rules in any other place although convention states retain provisional jurisdiction.

The fourth paragraph of article 21 prohibits any further proceedings unless the judgment of the court competent under the first or second paragraph is not enforceable in the country in which new proceedings are taken. Judgment enforcement proceedings are not considered to be a new action.

Finally, the fifth paragraph excepts from the preceding paragraphs an agreement entered into after the claim has arisen which designates a forum for the claim.

Article 22 of the Hamburg Rules reads as follows:

"Article 22 – Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent

« Article 22 – Arbitrage

1. Sous réserve des dispositions du présent article, les parties peuvent prévoir, par un accord constaté par écrit, que tout litige relatif au transport de marchandises en vertu de la présente Convention sera soumis à l'arbitrage.

2. Lorsqu'un contrat d'affrètement contient une disposition prévoyant que les litiges découlant de son exécution seront soumis à l'arbitrage et qu'un connaissement émis conformément à ce contrat d'affrètement ne spécifie pas par une clause expresse que cette disposition lie le porteur du connaissement, le transporteur ne peut pas opposer cette disposition à un détenteur de bonne foi du connaissement.

3. La procédure d'arbitrage est engagée, au choix du demandeur :

(a) soit en un lieu sur le territoire d'un État dans lequel est situé :

(i) l'établissement principal du défendeur, ou, à défaut, sa résidence habituelle, ou

(ii) le lieu où le contrat a été conclu, à condition que le défendeur y ait un établissement, une succursale ou une agence par l'intermédiaire duquel le contrat a été conclu, ou

(iii) le port de chargement ou le port de déchargement;

(b) soit en tout autre lieu désigné à cette fin dans la clause ou le pacte compromissoire.

4. L'arbitre ou le tribunal arbitral applique les règles de la présente Convention.

5. Les dispositions des paragraphes 3 et 4 du présent article sont réputées incluses dans toute clause ou pacte compromissoire, et toute disposition de la clause ou du pacte qui y serait

therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen."

contraire est nulle.

6. Aucune disposition du présent article n'affecte la validité d'un accord relatif à l'arbitrage conclu par les parties après qu'un litige est né du contrat de transport par mer. »

The first paragraph of article 22 allows the parties to refer a dispute arising under the Hamburg Rules to arbitration. This paragraph would be effective in a country where there is no national legislation giving effect to arbitration clauses. Such is not the case in the U.K. or the U.S. where arbitration legislation exists.[8] It would also be of little effect in Canada where the UNCITRAL Model Law on arbitration has been adopted by the federal and provincial authorities.[9]

The second paragraph of article 22 entrenches the principle that charter-party arbitration clauses must be expressly incorporated in bills of lading to bind subsequent holders. Again, this principle does not require enactment in Canada[10].

The third paragraph of article 22 contains its key provisions. In a manner similar to the first paragraph of article 21, it states that the claimant shall have the option of instituting arbitration in the place designated in the arbitration clause or in any state where the goods were loaded or discharged, where the defendant has his principal place of business or where the contract of carriage was made, provided in this last

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8 See the *Arbitration Act 1996*, c. 23 (U.K.) and the U.S. federal *Arbitration Act* 9 U.S.C. ss. 1-14.

9 See the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.). Each Canadian province has enacted similar legislation.

10 *Nanisivik Mines v. F.C.R.S. Shipping* [1994] 2 F.C. 662 (C.A.) and *Thyssen Canada v. The Mariana* [2000] 3 F.C. 398 (C.A.).

case that the defendant has there a place of business or agency through which the contract was made.

The final paragraphs give effect to the third paragraph notwithstanding the drafting of the arbitration clause, but except from the application of the third paragraph, any arbitration agreement entered into after the claim has arisen.

Section 46 of the *Marine Liability Act*

Section 46 of the *Marine Liability Act* is new and includes in one section many of the principles contained in articles 21 and 22 of the Hamburg Rules. Section 46 reads as follows:

"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.
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract,	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement

designate by agreement the place where the claimant may institute judicial or arbitral proceedings."

à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale. »

Section 46 of the *Marine Liability Act* is similar to the key paragraphs of articles 21 and 22 of the Hamburg Rules. Section 46 only applies if the Hamburg Rules do not apply to the contract of carriage. This avoids all possible contradictions between the two. Section 46 states that where a contract of carriage refers the parties to adjudication or arbitration in any place other than Canada, the claimant may, at his option, institute judicial or arbitral proceedings in Canada if Canada was the actual or intended port of loading or discharge, if the defendant resides or has a place of business or agency in Canada or if the contract of carriage was made in Canada. Sub-section 46(2) goes on to include the exception that an agreement entered into after the claim arises is not affected by the provision.

It should be noted that although section 46 can never come into conflict with articles 21 and 22, the venue option of the claimant under the *Marine Liability Act* is in some ways wider than that afforded by the Hamburg Rules. Canadian courts and arbitrators will have jurisdiction even if Canada is only an intended port of loading or discharge, where, for example, a cargo is lost en route to Canada. Furthermore, they will have jurisdiction if the defendant resides or has a place of business or agency in Canada or if the contract was made in Canada but without requiring the linking of the two conditions. However, Canada's enactment is also more limited as, not being a

bilateral or multilateral treaty, it cannot give the claimant similar options before the courts or arbitrators of any state other than Canada.

The Application of Section 46

It should first be noted that section 46 applies only to contracts for the carriage of goods by water to which the Hamburg Rules do not apply. Thus, although the Hamburg Rules define 'contract of carriage' and 'bill of lading', we need not consider whether section 46 applies to contracts so defined as the two are mutually exclusive.

However, when the Hamburg Rules do not apply, which is virtually always as so few of Canada's trading partners have adopted the Hamburg Rules, the Hague Rules or Hague-Visby Rules will apply and both contain the following definition of 'contract of carriage':

"'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same:"	«'contrat de transport'» s'applique uniquement au contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par eau, il s'applique également au connaissement ou document similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement; »

Is the contract for the carriage of goods mentioned in section 46 the same as the contract of carriage defined above? It is submitted that section 46 would encompass

the Hague Rule definition but may go slightly beyond that definition. The Hague Rule definition requires a bill of lading or similar document of title. It is commonly agreed that a bill of lading is not the contract of carriage but only evidence of the contract[11] which was concluded before the bill was issued and which is also evidenced by the booking note, written and verbal undertakings of the carrier, etc. Thus, although the Hague Rule definition of contract of carriage requires a bill of lading, section 46 does not. It does not even require the contract to be in writing although it invariably will be and will usually be 'covered' and evidenced by a bill of lading.

Furthermore, the Hague Rules require the bill of lading to be a document of title. Thus, waybills or non-negotiable receipts are not, *prima facie*, covered by the Hague Rules although they can be evidence of a contract of carriage[12]. Even a negotiable bill of lading will only be a receipt if it is issued under a voyage charter-party to a charterer as the charter-party will be the contract of carriage.[13] The Hague Rules only apply in such cases as from the moment such a bill of lading regulates the relations between the carrier and the holder of the bill – presumably immediately after negotiation by the charterer.

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11 See Tetley, *Marine Cargo Claims* (3d ed.) at page 10 *et seq.* and *The Ardennes* [1951] 1 K.B. 55 at 59; [1950] 84 Lloyd's Rep. 340 at 344..

12 Tetley argues that waybills should be governed by the Rules as well. His argument is based on article VI of the Rules which allows the Rules to be avoided on the condition no bill of lading is issued and a non-negotiable receipt is so marked and used. If the Rules only apply to bills of lading, why, argues Tetley, are there additional requirements in article VI? However, to date, the caselaw has not so extended the application of the Rules. See Tetley, *Marine Cargo Claims* (3d ed.) at page 944 *et seq.*

13 See Tetley, *Marine Cargo Claims* (3d ed.) at 219 and the authorities there cited including the Federal Court case *Union Industrielle v. Petrosul* [1984] F.C.J. No. 238 (Q.L.), March 23, 1984.

Although the Hague Rules may only apply to contracts of carriage covered by a document of title, section 46 arguably applies to any contract of carriage, whether or not a bill of lading or other document of title has been issued and whether or not it has been negotiated, as long as the Hamburg Rules do not apply.

Does section 46 apply to charter-parties? It is submitted that a charter-party is not a contract of carriage but a contract of hire for the use of a vessel. Thus, section 46 will not normally affect a jurisdiction or arbitration clause in a charter. However, there are exceptions. Where a bill of lading is in the hands of a charterer, it is the charter-party that contains the contract of carriage. It is submitted that, in such cases, section 46 will apply to and override the forum selection in the charter-party which is the contract of carriage.

Further, where a bill of lading is a document of title, it can still incorporate the terms of a charter-party including but not limited to a forum selection clause, usually providing for arbitration abroad. Section 46 will override that clause as between the carrier and the holder of the bill of lading but may also require Canadian courts or arbitrators to interpret and apply any other clause of the charter-party incorporated in the bill of lading even though it will not prevent the carrier, as owner, from litigating or arbitrating a dispute under the charter-party with the charterer in the specified forum.

In conclusion, section 46 will allow Canadian courts and arbitrators to hear cargo claims on any contract of carriage notwithstanding the form of document containing the forum selection clause. However, the usual case will involve a bill of lading for cargo shipped from or to Canada which may contain its own printed forum selection clause or which may incorporate the forum selection clause of a charter-party concerning the carrying vessel.

The Federal Court of Appeal has already underlined one advantage of section 46. Although *obiter*, as section 46 was not yet enacted, the Court of Appeal expressed the opinion in *Fibreco Pulp v. Star Shipping*[14] that the section would allow the claimant to litigate related claims in one action in Canada. And, undoubtedly, the court most likely to hear any claim under section 46 will be the Federal Court of Canada.

Section 50 of the *Federal Court Act*

Section 50 of the *Federal Court Act* allows the Court, in its discretion, to stay proceedings where *forum non conveniens* dictates that a foreign court would be a preferable forum.[15] The Federal Court can exercise this power even in absence of a jurisdiction or arbitration clause in the bill of lading or charter.[16] However, article 8 of the *Commercial Arbitration Code*[17] obliges[18] Canadian courts to refer the parties to

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14 [2000] F.C.J. No. 889 (Q.L.), May 24, 2000, at para. 9.

15 *Antares Shipping v. The Capricorn* [1977] 2 S.C.R. 422 at 448. See also *The Seapearl* [1983] 2 F.C. 161 (C.A.) and *The Nosira Lin* [1984] 1 F.C. 895 (C.A.).

16 *The Seapearl*, *supra*, note 15.

17 R.S.C. 1985, c. 17 (2nd Supp.).

18 See authorities, *supra*, note 10.

arbitration under arbitration clauses. But the *Code* does not oblige courts to refer the parties to the *place* where arbitration is to be conducted under such clauses and thus Parliament's enactment of article 22 of the Hamburg Rules and section 46 of the *Marine Liability Act* is not in contravention of Canada's convention undertakings. In fact, section 46 maintains the obligation to refer the parties to arbitration but states in what cases the claimant will have the option to come to Canada to arbitrate in addition to the place stated in the arbitration clause.

Considering that arbitration is an agreement, it is likely that, where section 46 applies, the claimant will address himself to the Federal Court either on a motion to appoint an arbitrator under article 11 of the *Commercial Arbitration Code* or by simply filing an action. If the defendant wants to arbitrate in the latter case, the Court will likely refer the parties to the Association of Maritime Arbitrators of Canada or to the Vancouver Maritime Arbitrators Association if the matter arises on the west coast. It is however submitted that section 46, where applicable, effectively removes the power of the Court to send the claim abroad, regardless of whether procedural advantages, such as the right to appeal an arbitral award, are lost and even regardless of whether a jurisdiction or arbitral clause exists or not. Section 46 does not only apply where there is such a clause. Rather, it permits judicial proceedings in Canada without regard to any jurisdiction clause and permits arbitral proceedings to be taken in Canada notwithstanding a reference to foreign arbitrators.

Thus although section 50 of the *Federal Court Act* is intact and applicable to litigation in many fields of jurisdiction of the Federal Court of Canada, it is no longer applicable where section 46 of the *Marine Liability Act* applies, nor would it prevent proceedings in Canada, it is suggested, where the Hamburg Rules apply, due to articles 21 and 22 thereof. Thus, where the conditions of section 46 are met, cargo claims will no longer be referred to foreign courts or arbitrators without the consent of the claimant and the conditions of application of section 46 cover virtually all cargo claims involving Canada. In this sense, the effect of section 46 on section 50 of the *Federal Court Act* is similar to that of the enactment of the *Commercial Arbitration Code* which removed the discretion of the Court as to the effect of arbitration clauses in general.

In a recent decision, the Federal Court faced for the first time the question as to whether section 46 affects section 50 of the *Federal Court Act* and whether the new section has retrospective application. In *The Castor*[19], Justice Gibson found that section 46 "[c]learly ... does limit the discretion of this Court to stay proceedings in the interest of justice where there is a jurisdiction clause ... in a bill of lading".[20] Justice Gibson goes on to decide that section 46 applied to the facts of the case without having a retrospective effect. The motion for a stay in the case was filed before the Act was adopted but only argued after section 46 came into force. In this

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19 2001 FCT 1330; [2001] F.C.J. No. 1821 (Q.L.), December 4, 2001.

20 *ibid*, para. 9.

sense, Justice Gibson found the motion to be continuing facts and subject to section 46. The case is presently on appeal.

Finally, the term 'claimant' in section 46, much as in the Hamburg Rules from which it is derived, will not, it is suggested, allow the defendant carrier to make a pre-emptive motion to a Canadian court or arbitral panel in an attempt to avoid the forum specified in the bill of lading. At any rate, the contract of carriage will be the contract of the carrier and it would be unlikely that, after having stipulated a venue, a carrier would want to avoid the application of its own clause.

Conclusions

The adoption of section 46 of the *Marine Liability Act*, like the adoption of the *Commercial Arbitration Code* before it, is to remove the discretion of the Federal Court under section 50 of the *Federal Court Act*. Section 46, where applicable, and it will be applicable in almost all cargo claims involving Canadians, will allow the claimant to proceed in Canada before the Federal Court or any other competent court, or where an arbitration clause is contained or incorporated into the contract of carriage, before the Association of Maritime Arbitrators of Canada or the Vancouver Maritime Arbitrators Association instead of the arbitration association of the city specified in the contract. It remains to be seen when and how such arbitrations would be monitored by the Federal Court. Although the question of the retrospective application of section 46 is presently before the Federal Court of Appeal, it is

submitted that the importance of the point will at any rate be short-lived. Marine cargo claims in the Federal Court of Canada have been profoundly affected by new section 46 of the *Marine Liability Act.*