Bull, Housser & Tupper LLP

DECK CARGO EXCLUSION CLAUSES: CANADA AND THE US

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Prepared by:
M. Clete Purcell
Bull, Housser & Tupper LLP
Vancouver, British Columbia

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Introduction

The international rules of carriage recognize the inherent risk associated with deck carriage and, for the most part, allow parties to allocate such risk as between themselves. The risk associated with the carriage of deck cargo is most often managed through the use of exemption clauses in the contract. However, as this paper will consider, the extent to which such clauses may be utilized may vary from nation to nation. In Canada, for example, carriers may rely on an exclusion clause for deck cargo provided certain conditions are met under the Hague/Visby Rules. In comparison, the United States continues to rely on protectionist legislation, which may prevent carriers from relying on similar non-responsibility clauses in particular situations.

This paper is not intended to represent an exhaustive analysis of U.S. law in this area. Instead, it seeks to examine a peculiar point of American law, which may continue to have an impact on foreign shipments inbound to the United States.

Exemption Clauses Generally

Exemption clauses may limit liability or exclude liability altogether. While there is nothing inherently evil about exemption clauses, most find something distasteful about a party assuming a large obligation and then attempting to reduce that obligation through the use of an exemption clause.[1] In the end, the exemption clause simply modifies contractual obligations and affects the nature and scope of a party's performance.[2] When used in a commercial context, where the contracting parties are bargaining from positions of equal strength, the exemption clause may fairly allocate risk to the commercial consumer who, in exchange, may take advantage of lower service costs.

To be sure, problems occur with exemption clauses when they are carefully drafted to favour one party and then are placed into a contract without fair disclosure – such as in standard form consumer contracts. The basis for the problem stems from an inequality of bargaining power between the parties. In such cases, the consumer does not have the commercial knowledge or financial means to ensure that the risk is fairly allocated between the parties.[3]

This problem is alleviated in the modern bill of lading where exclusions for deck cargo are required to be placed prominently on the face of the bill of lading. In theory, the exclusion for deck cargo found on a bill of lading, "provide(s) certainty of meaning" and "enable(s) both parties to make rational insurance arrangements".[4] There may be commercial justification for permitting the use of exclusion clauses and, in modern contracts for the carriage of goods by

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[1] Stephen M. Waddams, *The Law of Contracts*, 5th ed. (Canada Law Book, 2005) at 332 [Waddams].

[2] G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Scarbourough: Carswell, 1994) at 571.

[3] Waddams, note 1 at 334.

[4] *Ibid.*

sea, the deck cargo exclusion may operate fairly and effectively to allocate risk as between the parties.

Allocation of Risk Before the Hague Rules

In most countries, the Hague or Hague/Visby Rules[5] allocate the risk of loss for damage to cargo carried on ocean liners in international commerce under bills of lading.[6]

Prior to the adoption of the Hague/Visby Rules, the system of risk allocation between carrier and cargo owner was based upon principles of general maritime law.[7] In the early nineteenth century, under these principles, the Court would simply impose basic obligations on the carrier to protect the goods. As a result, the carrier was subject to a broad liability for cargo, unless the damage resulted from a recognized "excepted cause" such as an act of God or an inherent vice in the goods.[8]

Gradually, international trade increased and the shipowner, particularly the British shipowner[9], began to benefit from an increase in commercial strength.[10] Bills of lading[11], used primarily as a receipt for goods, began to contain exculpatory clauses which reduced the carriers' liability for cargo damage or loss.[12] The British courts began to adopt a "*laissez-faire* notion of contract" and permitted carriers to exempt themselves from the basic obligations that were once imposed upon them. This notion of "freedom of contract" though, was applied inconsistently. In England and Canada, for instance, the carrier had the freedom to assume virtually no liability, even for negligence.[13] The United States, by contrast, put more restrictions on carriers' ability to rely on exemption clauses. As Michael Sturley noted, in his treatise "The History of COGSA and the Hague Rules":

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[5] *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, August 25, 1924 [the "Hague Rules 1924"], as amended by the Protocols of February 23, 1968 and December 21, 1979 [the "Visby Protocols"] [the "Hague/Visby Rules"]. It is beyond the scope of this paper to discuss the extent to which the Visby Protocol of 1968 changed the Hague Rules.

[6] Michael F. Sturley, "The History of COGSA and the Hague Rules" (1991) 22 Journal of Maritime Law and Commerce 1 [Sturley].

[7] *Ibid.* at 4.

[8] David Yates et. al., eds., *Contracts for the Carriage of Goods by Land, Sea and Air*, looseleaf (Hong Kong: Lloyds of London Press, 2000) at 1-292 [Yates].

[9] Erastus C. Benedict, *Benedict on Admiralty: Carriage of Goods by Sea*, 7th ed. (New York: Matthew Bender, 1995) at 2-3 [Benedict].

[10] Yates, note 8 at 1-293.

[11] Before bills of lading were introduced, merchants travelled with their goods and so did not need to receive documentation from the carrier. When merchants began to trust carriers to deliver their goods overseas it became necessary for them to have some sort of receipt from the carrier, which acknowledged that the identified goods had been received. See Yates, note 8.

[12] Benedict, note 9 at 2-2.

[13] *Glengoil S.S. Co. v. Pilkington*, (1898) 28 S.C.R. 146 (S.C.C.).

> "This conflict among major maritime nations, which became more serious in the early twentieth century, meant that the general maritime law no longer provided a uniform risk allocation. The desire to restore international uniformity to the field ultimately produced the Hague Rules (and thus COGSA)."

Early attempts to unify the law were largely unsuccessful[14] Meanwhile, the major maritime nations, such as Canada and the U.S. set about enacting domestic legislation to ensure that limits were placed on the ability of carriers to exclude liability.[15] To this day, particularly in the U.S., these national statutes continue to have an impact on the parties ability to allocate risk as between themselves.

The United States Harter Act

With a view to protecting American public policy and, in particular, American shippers, the United States government reacted strongly to what they thought was an overreaching on the part of British shipping interests.[16] The United States Supreme Court acted first in a number of cargo damage cases, which sought to ease cargo interests' burden in claiming against carriers.[17] The United States Congress followed with the enactment of the Harter Act of 1893[18], which, to this day, has never been repealed or amended.

The Harter Act is considered to be the principle precursor of the Hague and Hague/Visby Rules and one of the first consumer protections acts.[19] Its focus as means of protection for U.S. cargo interests was made obvious in Congressman Michael Harter's pronouncement at Congress:

> "(The Bill) is a measure which deprives nobody of any right, but which will by its operation deprive some foreign steamship companies of certain privileges which for many years they have exercised to the great disadvantage of American commerce."[20]

The original bill went through various amendments, which resulted in a final document that was protective of U.S. cargo interests but also thought to be amenable to "the legitimate and honest steamboat interests."[21]

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[14] For example, the International Law Association, founded in 1873, attempted to achieve international uniformity for the law governing bills of lading. In 1897, the International Maritime Committee was formed and, in 1905, adopted conventions relating to collisions and salvage, but not to bills of lading.

[15] Sturley, note 6 at 10.

[16] Joseph C. Sweeney, "Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary" (1993) 24 Journal of Maritime Law and Commerce 1 [Sweeney].

[17] *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397 (1889); *New Jersey Steam Nav. Co, v. Merchants' Bank (The Lexington)*, 47 U.S. 344 (1848).

[18] 46 U.S.C. §§ 190-196.

[19] William Tetley Q.C., *Marine Cargo Claims*, 4th ed., online: McGill Faculty of Law <http://www.mcgill.ca/maritimelaw/mcc4th> [Tetley Text].

[20] Benedict, note 9 at 2-4, citing 24 Cong. Rec. 172 (1892).

[21] Sturley, note 6 at 14, citing comments made by Representative O'Neil (24 Cong. Rec. at 1292).

The Harter Act effectively "broke with existing legal theory by forbidding carrier exculpatory clauses, thereby intervening in the contractual relations between cargo-owning interests and ship owning interests."[22] The Harter Act reflected the position of U.S. courts at the time: "a bill of lading clause limiting the carriers liability was valid unless it was unreasonable, and that a clause which attempted to exempt the carrier from liability for his own or his servants' negligence was unreasonable."[23]

Section One of the Harter Act prohibits carriers from relying on clauses that purport to exempt liability for consequences of "negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery" of cargo or which diminish or avoid the obligation to be diligent to make the vessel fit for the voyage.[24]

Section Two of the Harter Act forbids exculpatory clauses which lessen the carrier's obligation to exercise due diligence to make the vessel seaworthy.

The Harter Act's general prohibition against exemption clauses includes those clauses that purport to exclude liability for deck cargo. In other words, the Harter Act applies to deck cargo.

The Hague Rules

After the enactment of the Harter Act, the International Law Association ("ILA")[25] and its unofficial descendant, the Comite Maritime International ("CMI") continued to strive for international uniformity in the interpretation of bill of lading clauses.[26] Eventually, these efforts resulted in the Hague Rules.[27]

Generally, the Hague Rules followed many of the principles developed in the Harter Act. Under the Hague Rules, the carrier is obliged to take care of the cargo and is not allowed to exclude liability, such as for negligent stowage.[28] In exchange, the carrier is provided, *inter alia*, with a number of valid exceptions to liability. Unlike in the Harter Act, though, the Hague Rules recognize the special risks posed by deck cargoes. Presumably, to the international delegates who attended the original drafting sessions at the Hague in 1921, it did not seem fair to "impose the higher liability of the Hague Rules on a carrier when the parties explicitly arranged for deck

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[22] Sweeney, note 16 at 1.

[23] William Tetley, Q.C., "Limitation, Non-Responsibility and Disclaimer Clauses" (1986) 11 Mar. Law 204, citing Carver, infra [Tetley Article].

[24] Thomas Carver, *Carriage by Sea*, 13th ed. (London: Stevens & Sons, 1982) at 335.

[25] The International Law Association's Maritime Law Committee grew out of the British Maritime Law Committee. Having found themselves subject to Harter style legislation at home in England, the "prospect of international agreement was much more appealing to British interests – including the powerful shipowning interests." See Sturley, note 6 at 19.

[26] Sweeney, note 16 at 30.

[27] The Hague Rules 1924, note 5.

[28] The Hague/Visby Rules, note 5, article 3(8).

carriage."[29] Accordingly, the Hague Rules do not apply to "cargo which by the contract of carriage is stated as being carried on deck and is so carried." [30]

(a) Application in Canada – Marine Liability Act

Although Canada was never a party to the Brussels Convention, it nevertheless adopted the Hague Rules into national law by the Water Carriage of Goods Act of 1936[31]. In 1993, Canada repealed the 1936 Act and enacted the Carriage of Goods by Water Act, which gave effect to the Visby Protocol to the Hague Rules (the "Hague/Visby Rules"). At present, Part 5 of the Marine Liability Act[32], which replaced the 1993 Act, continues to give effect to the Hague/Visby Rules, including the exclusion as to deck cargo.

(b) Application in Canada – Carriage of Goods by Sea Act

The U.S. incorporated the Hague Rules into domestic law by enacting the Carriage of Goods by Sea Act ("COGSA") in 1936.[33] By its terms COGSA does not apply to shipments agreed to be carried on deck: "The term 'goods' [excludes] ...cargo which by the contract of carriage is stated as being carried on deck and is so carried."[34] One of the differences between COGSA and the Harter Act, then, is that COGSA expressly recognizes the special risk posed by deck cargoes, whereas the Harter Act contains no such express reference.

Deck Carriage in Canada: Exclusions for Negligence?

In Canada, the carrier may take advantage of a deck cargo exclusion clause found in a bill of lading. This is because deck cargo is not subject to the Hague or Hague/Visby Rules provided the following conditions are met: 1) the bill of lading on its face states that the goods are carried on deck and 2) the cargo is in fact carried on deck.[35]

Most of the Canadian cases considering deck cargo exclusion clauses focus on the necessity of clear and unambiguous language. The courts recognize that, in the face of a clean bill of lading, the cargo owner is entitled to assume that the cargo is being carried "safely" under deck. The cargo owner can consent to on deck stowage only if he is properly informed.

The rationale for the need of clarity in terms seeking to limit or exclude liability was explained by the British Columbia Supreme Court in *Meeker Log & Timber Ltd v. Sea Imp III (The)*, [1994] B.C.J. No. 3006. *The Sea Imp* involved the loss of a barge fully laden with a cargo of cedar shake blocks, which was being towed through the northern waters on the

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[29] Benedict, note 9 at 12-17.
[30] The Hague/Visby Rules, note 5, article 1(c).
[31] S.C. 1936, c. 49.
[32] *Marine Liability Act*, 2001, c. 6.
[33] 46 U.S.C. §§ 1300 – 1315.
[34] *Ibid.* § 1301(c).
[35] Tetley Text, note 19.

east side of Vancouver Island. The master of the tug accepted responsibility for the accident and so the only issue that remained was whether or not the exclusion clauses in the towage agreement operated to protect the tug owner from liability. Lowry J., at paragraph 9, outlined the rationale for the need for clarity in terms seeking to limit or exclude liability:

> "...there is, of course, nothing uncommon about tug owners contracting on terms whereby the risks of a towage are born by the owners of the tow, nor is it anything but usual for the carriers of cargo to carry on terms which place at least some of the risk of damage on the owners of the cargo. The allocation of risk is simply one of the commercial considerations that determines the price to be paid for the services rendered. It is essential that it be clear. It governs the extent to which each party must be concerned with the need to insure against its exposure to loss."

Although the *Sea Imp* was a towing case, Lowry J.'s comments were cited with approval in subsequent cases involving deck cargo.[36] The approving courts also recognized that Lowry J's explanation "lies in its implication that the clarity of meaning is prospective...the clause must be sufficiently clear to alert the parties, in advance of the performance of the contract, to the risks they bear and the responsibilities they face."[37]

The importance of clear and unambiguous deck cargo exclusion clauses was recognized by the Supreme Court of Canada in *St. Simeon Navigation Inc.* v. *A. Couturier & Fils Limitee* (1973), 44 D.L.R. (3d) 478 (S.C.C.) In that case, the Court considered a deck cargo exclusion clause that sought to exclude the carrier from liability for a shipment of timber that went overboard in rough weather. The Court held that such a clause (known as a "liberty clause"), which deemed goods to be stated as being stowed on deck when they are so stowed, without a specific statement to that effect, was in violation of the Hague Rules. The Court noted that a definite statement was necessary to properly inform the shipper and "to prevent shipowners from reducing their liability below the standard contemplated" in the Rules.

The Court relied on the English decision of *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southamption) LD.*, [1953] 2 Q.B. 295. In that case, which considered the applicability of the Hague Rules as incorporated by the Carriage of Goods by Sea Act, 1924, Pilcher J. found that a "liberty clause" was not effective to exclude deck cargo as "goods" defined in Article 1(c) of the Hague Rules. Pilcher J. said the following about the policy considerations underlying the rule:

> "In excluding from the definition of "goods", the carriage of which was subject to the Act, cargo carried on deck and stated so to be carried, the intention of the Act was, in my view, to leave the shipowner free to carry deck cargo on his own conditions, and unaffected by the obligations imposed on him by the Act in any case in which he would, apart from the Act, have been entitled to carry such cargo on deck, provided that the cargo in question was in fact carried on deck and that the bill of lading covering it contained on its face a statement

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[36] *Timberwest Forest Ltd. v,. Gearbulk Pool Ltd.*, [2001] B.C.J. No. 1253 (B.C.S.C.)

[37] Ibid, Cullen J. at para. 71.

> that the particular cargo was being so carried. Such a statement on the face of the bill of lading would serve as notification and a warning to consignees and endorsees of the bill of lading...that the goods which they were to take were being shipped as deck cargo. They would thus have full knowledge of the facts..."

St. Simeon Navigation was followed by the British Columbia Supreme Court in *Timberwest Forest Ltd. v. Gearbulk Pool Ltd*, [2001] B.C.J. No. 1253, affirmed [2003] B.C.J. No. 104 (B.C.C.A.). In *Timberwest*, the Plaintiff arranged to have the Defendant transport packages of lumber. The lumber was mishandled and became contaminated. Three bills of lading were issued in respect of the cargo. Each bill of lading stated that cargo carried on deck was at the cargo owner's sole risk. The bills stated that 86% of the cargo was on deck and the balance was contained inside the ship. The evidence indicated that it was unclear as to the exact quantity of the cargo that was on deck. Liability turned on the interpretation of the applicable bills of lading. The Court reiterated the principal that in Canada "the parties have freedom to contract out of any liability for damage to, or arising from carriage of, cargo stowed on deck while being carried at sea." However, it qualified the principle by noting that "the freedom to contract out of liability requires clear and unambiguous terms to satisfy the courts of the intentions of the parties." With that, the Court found the exclusion clauses to be unenforceable on the basis that carrier's description of the goods created uncertainty "such that the degree of potential risk to the owner and the legal implications to all the parties (was) not readily ascertainable."[38]

The Court of Appeal agreed with the motions judge and found the failure of the carrier to sufficiently describe the deck cargo, beyond the 86% - 14% description, resulted in uncertainty that was analogous to the absence of information in the bills of lading in the "liberty clause" cases (*St. Simeon Navigation, Svenska*). The Appeal was dismissed and, at paragraph 46, Levine J.A. noted that:

> "...the conclusions reached by the trial judge reflect a construction of the definition of "goods" that accords with practical affairs and business efficacy, in that certainty is necessary for the parties to commercial transactions to assess their respective risks and determine the appropriate price for their goods and services."

While carriers in Canada may take advantage of the deck cargo exclusion clause, they are still obliged to properly load, stow, care for and discharge the cargo and, generally, are subject to the obligations of a carrier at sea by common law unless those obligations are also modified by the contracts in issue.[39] In light of these general obligations, the courts will review the relevant exclusion clause, to ensure that it is intended to exclude liability for negligence. Again, these cases turn on the requirement for clarity and the court's pursuit to determine the intention of the parties.

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[38] Cullen J. at paragraph 95

[39] Edgar Gold et. al., *Maritime Law* (Toronto: Irwin Law Inc., 2003) at 360. *Power Construction v. C.N.R* (1983), 41 Nfld. & P.E.I.R. 99 (Nfld. C.A.)

In *Canadian Pacific Forest Products Limited et at. v. The "Beltimber" et al.*, (1999), 175 D.L.R. (4th) 449 (F.C.A), leave to appeal refused [1999] S.C.C.A 421 (the "Beltimber"), the Federal Court of Appeal considered a claim for damages for loss of part of a cargo of lumber, which was carried on deck from Canada to Belgium. The Plaintiff alleged that the Defendant carrier was negligent by virtue of faulty securing, maintenance and care of the cargo, and by its failure to heed weather forecasts. The Defendant claimed that it was exempt from liability by virtue of a deck cargo exclusion clause found in the bills of lading.

Each of the bills of lading were stamped on its face with the words "on deck at shipper's risk" and included a "liberty clause", at Clause 8, which specifically allowed the carrier to stow goods on deck. Clause 8 provided, in part:

> "Goods stowed on deck shall be at all times and in every respect at the risk of the shipper/consignees. The carrier shall in no circumstances whatsoever be under any liability for loss of or damage to deck cargo, howsoever the same may be caused...".

At trial, the Court found that the bills of lading were not subject to the Hague Rules because the face of the bills of lading explicitly stated that the cargo was being "carried on deck" and the cargo was, in fact, so carried. However, the Court also concluded that Clause 8 did not exclude liability for negligence at common law as it did not include an express reference to negligence. The Court further noted that express references to negligence in other clauses of the bill of lading implied that negligence was not intended to be excluded by Clause 8:

> "...the fact that in this instance clauses 9 and 11 of the Bills of Lading refer to "negligence", for the specific purposes contemplated in these clauses while Clause 8 does not, suggests that there was a distinction between the two in the minds of the parties." [40]

The Federal Court of Appeal found, too, that the deck cargo exclusion clause did not exclude negligence. The Appeal Court agreed that the test to be applied was set out in *Canadian Steamship Lines Ltd. v. The King,* [1952], 13 A.C. 192 (P.C.), which test seeks to assist the courts in construing the language of an exclusion clause. The test was subsequently adopted by the Supreme Court of Canada *in ITO-International Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752 ("ITO-International Terminal Operators") as follows:

1. If the clause contains language which expressly exempts the person in whose favour it is made (the "proferens") from the consequence of negligence of his own servants, effect must be given to that provision.

2. If there is no express reference to negligence, the Court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens.

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[40] This concept is reiterated in cases that are concerned with the strict construction of exclusion clauses generally.

3. If the words used are wide enough for the above purpose, the Court must then consider whether the head of damage may be based on some other ground other than that of negligence. The other ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but, subject to this qualification, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on part of his servants.

The Appeal Court noted that the third component of the test, which refers to multiple heads of damage, might be of particular application in contracts for carriage of goods by sea where the nature and extent of a carrier's liability is to be determined by common law principles. That is, the liability of a carrier of goods by sea is not confined to acts of negligence. For example, a carrier may also attract liability for failing to deliver the goods safely and for breach of the implied warranty of seaworthiness. The Appeal Court found that because Clause 8 did not include an express reference to negligence, it was not meant to exclude liability for negligence but for the other heads of liability imposed on the carrier at common law.

The implication of the line of cases beginning with *Canadian Steamship Lines* and ending with the *Beltimber* is that Canadian courts will give effect to exemption clauses that exclude negligence provided such clauses make express reference to this particular head of damage.

The U.S. Rub – No Exclusion for Negligence

In the U.S., the Harter Act prohibits parties from contracting out of negligence, including cases involving deck cargo. The prohibition might be traced back to the public policy considerations that underlined the Harter Act and which continue to focus on the protection of the rights of the shipper.

Although COGSA has displaced the Harter Act in many ways, the Harter Act still applies of its own force to the pre-loading period and the post-discharge period in foreign and domestic trade.[41] More importantly, for our purposes, the Harter Act is thought to apply to "all *cases* not governed by COGSA".[42] In other words, despite the existence of COGSA, the Harter Act continues to apply *ex propore vigore* (of its own force) to the carriage of cargo on deck during the "tackle to tackle" period.

The U.S. case often cited for the above proposition is *Blanchard Lumber Co. v. S.S. Anthony II*, 259 F.Supp 857 (S.D.N.Y 1966) [*Blanchard Lumber*]. In *Blanchard Lumber*, a shipment of lumber was carried on deck from British Columbia to Rhode Island. The Court found that the cargo had been negligently stowed. The carrier had lashed fork-lift trucks on top of the piles of

[41] COGSA, note 5, § 1311.

[42] Benedict, note 9 at 2-10.

lumber. When the ship encountered bad weather on the voyage, the fork-lift trucks shifted, which caused the chains to part and the cargo to jettison overboard.

As the shipment originated from Canada, the Court first considered whether or not to apply Canadian law (which was the proper law of the contract)[43]. In finding that U.S. law applied to the contract, the Court said:

> "In this case, where there is at least doubt as to the applicability of Canadian Water Carriage of Goods Act, and where the Canadian interpretation of that statute leads to a result strictly contrary to the one reached by American courts interpreting similar language in the comparable American statute...it is my opinion that American law, and specifically the Harter Act in this case, must be applied in order that the strong American policy of protection to shippers, evidence by both the Harter Act and the Carriage of Goods by Sea Act, may be maintained."

The Court then went on to consider the problem of the Harter Act's applicability to the "tackle to tackle" period, which is normally reserved for the application of U.S. COGSA. The Court found that although COGSA did not expressly preserve the Harter Act as to deck cargo from tackle to tackle, in "the absence of affirmative legislative expression to the contrary...(there is) no reason for holding that the Harter Act is superseded in all cases by (COGSA) as to deck cargo in the "tackle to tackle" period."[44] As such, the deck cargo exclusion clause did not operate to protect the carrier in the face of negligence. Instead, the exclusion clause was found to mean that "the shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage."[45]

Some parties may attempt to incorporate COGSA by reference into contracts in order to govern situations outside its scope. Presumably, for carriers anyway, the hope is to take advantage of the fact that COGSA is expressly made inapplicable to on deck cargo. In such cases, however, the clause will be "treated as a term of the contract, to be interpreted in conjunction with all other terms"[46] As such, even where COGSA is extended by the bill of lading so as to apply to deck cargo, any provision of COGSA incompatible with the Harter Act is invalid.[47]

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[43] See Tetley Text, note 19. Professor Tetley makes this conclusion in *Marine Cargo Claims* at c. 1 at 25. Also see *Blanchard Lumber*, above at note 6 in the decision, where Levey J. explained that U.S. law should be applied because the Paramount Clause, which purported to apply the Canadian Water Carriage of Goods Act, "merely (said) that the Canadian Act is applicable and does not limit the application of the deck cargo exclusion clause". It appears that in his view the Paramount Clause was not clear enough to apply the Canadian law.

[44] Although *Blanchard Lumber* has not been cited by any U.S. court for this particular principle, many leading maritime academics have cited the case as an example of the Harter Act's application to "all cases not covered by COGSA". Also see Benedict, note 9; Sweeney, note 16; Tetley Text, note 19.

[45] *Blanchard Lumber*, above, citing *Pioneer Import Corp. v. The Lafcomo*, 138 F.2d 907 (2nd Cir. 1943).

[46] Benedict, note 9 at 5-7.

[47] Tetley Text, note 19 at c. 1 at 39; and *Pt. Indon. Epson Indus. v. Orient Overseas Container Line, Inc.* 208 F. Supp. 2d 1334 (S.D.Fla. 2002). However, it should be noted that, but for *Blanchard Lumber*, most of the cases that make this finding refer to the application of cargo outside the "tackle to tackle" period.

This concept was illustrated in *Saudi Pearl Insurance Co. Ltd.* v. *M.V. ADITYA KHANTI and Global Container Lines Ltd.* et al. 1997 U.S. Dist. LEXIS 7663 [*Saudi Pearl*], which case involved the loss at sea of a part of a cargo of creosoted wood telephone poles, which had been stowed on deck for the voyage from Alabama to Saudi Arabia. The Court found that while the parties could agree to contractually extend COGSA to on deck shipments (which would make COGSA compatible with the Harter Act), such coverage could only be established with express language. Having concluded that no such express language existed in the contract in question, the Court simply applied the Harter Act on the basis that "deck cargo is governed by the pre-COGSA law, which in America included the Harter Act."[48] The Court then explained how the statute might be applied:

> "The claimant must first establish a prima facie case by demonstrating that that the cargo was delivered to the carrier in good order and condition and was damaged or missing upon outturn...A carrier may rebut the shipper's prima facie case by producing substantial evidence either that it exercised due diligence with regard to the cargo or that the loss was within an "exception" established by law"

The Court found, first, that the carrier had exercised due diligence with regard to the cargo. The Court also found that the on deck exclusion clause operated to shift the risk to the shipper in circumstances where the loss did not result from negligence but, instead, from "the customary and predictable risks of deck carriage."[49] In the end, the carrier was able to take advantage of the deck cargo exclusion clause because it had exercised due diligence with regard to the cargo as is required under the Harter Act.

As outlined in *Saudi Pearl*, to have COGSA apply with the force of law, something beyond an incorporation by reference is likely necessary. For instance, the bill of lading must expressly state that COGSA will apply to deck cargo "notwithstanding section 1(c)".[50] Of course, the carrier gets nowhere with such a bill of lading, as the incorporation COGSA in this way simply exposes the carrier to all of the provisions of that statute.

Since the Harter Act has the force of statute, where it differs from the common law principles, its application has an overriding effect. In general, though, it seems that the common law in the U.S. is generally protective of cargo interests. While a cargo owner agreeing to on deck stowage assumes the risk of damage which is a natural concomitant of deck stowage, the carrier will remain obligated to properly load, stow and care for the cargo.[51] A carrier is not permitted to utilize clauses relieving itself from a duty to properly stow the cargo or to exercise due diligence to make the vessel seaworthy. However, there have been cases to

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[48] Keenan J. referred to Arnold W. Knauth, *The American Law of Ocean Bills of Lading*, 4th ed. (Baltimore: American Maritime Cases, 1953) at 236.

[49] *Saudi Pearl, citing Hartford Fire Ins. Co. v. Calmar Steamship Corp.*, 404 F.Supp 442 (W. D. Wash. 1975).

[50] *Diethelem & Co.* v. *S.S. Flying Trader*, 141 F. Supp. 271 (S.D.N.Y, 1956).

[51] *The Ponce,* 67 F. Supp. 725 (D. NJ. 1946).

the contrary[52] and so the implications of the application of the Harter Act continue to have an impact.

The Dilemma for Shipments Inbound to the U.S.

For practical purposes, the problem for the carrier stems from the way that either of the Marine Liability Act (Hague/Visby Rules), COGSA (Hague Rules) and the Harter act is applied.[53]

Section 43(1) of Canada's Marine Liability Act applies the Hague/Visby Rules (which have the force of law in Canada) to, *inter alia*, shipments under bills of lading outbound from Canada.[54] By contrast, in the U.S., COGSA and the Harter Act apply outwards from U.S. ports as well as inwards. This "chauvinistic" application of COGSA and the Harter Act goes against the general principle of private international law that the foreign law of a contract will be applied by local courts.[55] As Professor Tetley notes, in his treatise entitled Marine Cargo Claims:

> "...it also disregards the potentially closer and more real connection to such contracts of the country of shipment, which is also often the place where the bills of lading are issued (and/or the place of business of the shipper)."

This conflicts of law issue is problematic because of the different approaches that each regime has in dealing with deck cargo exclusion clauses. In the circumstances, it is unlikely that the U.S. will enforce a foreign deck cargo exclusion clause, which excludes damage due to negligence, even if such a clause was allowed to operate in the country of shipment. As the U.S. cases illustrate, such a clause would come in direct conflict with the Harter Act, which expressly prohibits carriers from relying on exclusion clauses that exempt liability for consequences of "negligence".

So, just as it did when it was first introduced by the U.S. Congress over 110 years ago, the Harter Act continues to have the capability of interfering in the contractual relations between cargo interests and carrier interests. The lesson for carriers? Skip the U.S. and ship to Canada.

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[52] *Chester* v. *Maritima del Litoral,* S.A. 1985 A.M.C. 2831 (7th Cir. 1984). Also see Benedict, note 9 at c.14. U.S. courts may have also been more permissible when considering the doctrine of deviation, which doctrine continues to apply to the carriage of deck cargo, but such cases are beyond the scope of this paper.

[53] This paper assumes that the contract of carriage is subject compulsorily to either the Hague/Visby Rules (Marine Liability Act) or COGSA/ the Harter Act. It is beyond the scope of this paper to consider the conflict of laws when these regimes do not apply compulsorily.

[54] Tetley Text, note 19 at c.1 at 34.

[55] William Tetley Q.C., *Marine Cargo Claims*, 3rd ed. (Montreal: International Shipping Publications – Blais, 1988) at 20. Provided that the foreign law is substantive, does not violate public order/policy and the resort to foreign law is not intended as an evasion of local law.