

# CHAPTER 1

## APPLICATION OF THE RULES GENERALLY

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## CHAPTER 1

### APPLICATION OF THE RULES GENERALLY

#### I. Introduction

The Hague Rules<sup>1</sup> were adopted in 1924, the Hague/Visby Rules in 1968<sup>2</sup> and 1979<sup>3</sup> and the Hamburg Rules<sup>4</sup> in 1978. Each international convention in turn attempted to broaden its application in order to avoid lacunae, to encompass all contracts of carriage as well as bills of lading, and to permit incorporation by reference. This chapter deals with the application of the three sets of rules.

While the Hamburg Rules are in force in about twenty-six countries, the Hague Rules or the Hague/Visby Rules are presently in force in most of the world's shipping nations. Some nations such as France have two international regimes. They apply the Hague Rules to shipments from a Hague Rules nation and the Hague/Visby Rules to all outbound shipments. Belgium applies the Hague/Visby Rules inbound and outbound<sup>5</sup> and

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<sup>1</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, August 25, 1924 and in force as of June 2, 1931, better known as the "Hague Rules". Although the Convention was adopted in Brussels in 1924, it was based on an earlier draft adopted by the International Law Association at The Hague in 1921 (the "Hague Rules of 1921"), as amended at a diplomatic conference held in Brussels in 1922 (a text known as the "Hague Rules of 1922"), and at meetings of a *sous-commission* of that conference in Brussels in 1923. For this reason, while the final 1924 Convention is generally referred to in French as the "*Convention de Bruxelles*", it is generally called the "Hague Rules" or the "Hague Rules 1924" in English. On the history of the adoption of the Hague Rules 1924, see Michael F. Sturley, "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1-57.

<sup>2</sup> The term "Hague/Visby Rules 1968" refers to the Hague Rules 1924, as amended by the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", adopted at Brussels, February 23, 1968", which Protocol entered into force June 23, 1977, and is often referred to as the "Visby Rules". The Visby Rules were the result of the Comité Maritime International (C.M.I.) Conference of 1963 in Stockholm, Sweden, which formally adopted the Rules in the ancient town of Visby, on the Swedish island of Gotland, following the Conference. Nearly five years passed, however, before the Visby Rules were formally adopted as a Protocol to the Hague Rules 1924 by a diplomatic conference, held in Brussels. The Visby Rules do not stand alone but are amendments to the Hague Rules and the resulting rules are known as the "Hague/Visby Rules".

<sup>3</sup> The Hague Rules 1924, as amended by the Visby Protocol of 1968, were further amended by the "Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of lading (August 25, 1924, as Amended by the Protocol of February 23, 1968), adopted at Brussels, December 21, 1979, which Protocol came into force on February 14, 1984. The 1979 Protocol changed the basic unit of account of the Hague/Visby Rules 1968 from *poincaré* gold francs to Special Drawing Rights ("S.D.R.'s") of the International Monetary Fund (I.M.F.). For this reason, the 1979 Protocol is sometimes called the "Visby S.D.R. Protocol". The term "Hague/Visby Rules" as used in this book refers to the Hague Rules 1924, as amended by the Visby Protocols of 1968 and 1979, unless otherwise indicated.

<sup>4</sup> United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg on March 31, 1978, and in force November 1, 1992.

<sup>5</sup> *Convention du 25 août 1924 pour l'unification de certaines règles en matière de connaissance*, amended by the *Protocole du 23 février 1968*, *Conventions Internationales, Les Codes Beiges*, t. 1, 450. See also the German Commercial Code (*Handelsgesetzbuch*), Book 5 (Maritime Commerce) (*Seehandel*), as amended by the Act of July 25, 1986 (BGBl. 1986 I 1120), art. 662, and the Introductory Law to the Commercial Code (*Einführungsgesetz zum Handelsgesetzbuch*) of May 10, 1897 (RGBl. S. 437 as amended), art. 6, by

the United States applies COGSA (the Hague Rules)<sup>6</sup> in the same way. Some nations<sup>7</sup> have a national local law for internal shipments which is similar but not identical to the Hague Rules or the Hague/Visby Rules.<sup>8</sup> Finally, some nations such as the United States have a local law for inland traffic and after discharge and before loading, which is unique to them.<sup>9</sup>

The problem is further complicated by the method of adoption of the Rules. Some nations such as Canada<sup>10</sup> and Australia<sup>11</sup> have enacted a local statute to which is attached the Hague/Visby Rules as a schedule, but Canada and Australia have neither acceded to nor ratified the original 1924 Convention adopting the Hague Rules and therefore cannot be considered as “contracting states”. Some countries such as France ratify conventions and such ratification makes the convention law.<sup>12</sup> Finally, some countries, particularly in South America, have never ratified or acceded to the 1924 Convention or the 1968 or 1979 Protocols<sup>13</sup> or the Hamburg Rules, nor have they adopted equivalent national

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which Germany applies the Hague/Visby Rules in international shipments both inbound and outbound, but, in shipments to Hague Rules countries, does not apply the Hague/Visby provisions on indemnity actions or the 2 S.D.R. kilo limitation. For an English translation of the German Commercial Code, see *The German Commercial Code*, Simon L. Goren, trans., 2 Ed., Fred B. Rothman & Co., Littleton, Col., 1998.

<sup>6</sup> The American *Carriage of Goods by Sea Act*, Act of April 16, 1936, 49 Stat. 1207, 46 U.S. Code Appx. 1300-1315, is commonly referred to by the acronym “COGSA”, which term is also used in this book.

<sup>7</sup> See Law No. 66-420 of June 18, 1966 of France, modified by Law No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986.

<sup>8</sup> See, for example, the German Commercial Code (*Handelsgesetzbuch*), Book 4 (Commercial Contracts) (*Handelsgeschäfte*), as amended by the Act of June 25, 1998 to Reform the Law on Freight, Forwarding and Warehousing (Transport Law Reform Act) (*Gesetz vom 25 juni 1998 zur Neuregelung des Fracht-, Speditions- und Lagerrechts (Transportrechtsreformgesetz)*, BGBl. I. S. 1588, in force July 1, 1999, as amended. For an English translation, see <http://www.transportrecht.org/>

<sup>9</sup> *Harter Act*, 46 U.S. Code Appx. 190-196 (U.S.).

<sup>10</sup> *Marine Liability Act*, S.C. 2001, c. 6, Part 5 and Schedule 3, in force August 8, 2001, replacing the *Carriage of Goods by Water Act*, S.C. 1993, c. 21, which in turn replaced the *Carriage of Goods by Water Act*, R.S.C. 1985, c. C-27.

<sup>11</sup> *Carriage of Goods by Sea Act 1991* (Cth.), No. 161 of 1991, Schedule 1, in force October 31, 1991, repealing the former *Sea-Carriage of Goods Act 1924*, which had given effect to the Hague Rules 1924 in Australia with effect from January 1, 1925. The 1991 statute was in turn amended by the *Carriage of Goods by Sea Amendment Act 1997* (Cth.), No. 123 of 1997, in force September 15, 1997, and by the *Carriage of Goods by Sea Regulations 1998* (Cth.), Statutory Rules 1998, No. 174, in force July 1, 1998.

<sup>12</sup> Art. 55 of the Constitution of France of October 3, 1958 (*Journal Officiel*, October 5, 1958) is to the effect that treaties duly ratified or approved by France have precedence, from the time of their publication, over municipal laws, provided that they have been implemented by the other contracting party or parties. See *Tribunal de Commerce du Havre*, July 31, 1970, DMF 1971, 163 at p. 166; upheld by the *Cour d'Appel de Rouen*, October 2, 1970, DMF 1971, 162 at p. 167 *et seq.* See generally Tetley, *Int'l Conflict*, 1994 at p. 104, note 5.

<sup>13</sup> A state may express its consent to be bound by a treaty by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agree&: art. 11 of the Vienna Convention on the Law of Treaties 1969, adopted May 22, 1969, U.N. Doc. A/Conf. 39/27, and which entered into force on January 27, 1980. Both the 1924 Brussels Convention (adopting the Hague Rules) and the 1968 Brussels Protocol (adopting the Visby Rules) specifically refer to conditions for ratification at their respective arts. 11 and to conditions for accession at their respective arts. 12. With respect to the Visby S.D.R. Protocol 1979, see arts. 6 (re ratification) and 7 (re accession). Ratification is the expression of consent by a state which actually participated in the international negotiations and the conference to draw up the text of the treaty; see art. 14 of the Vienna Convention. It usually involves a two-tier procedure: the state proceeds to have the treaty approved by its own constitutionally appropriate organ

legislation. Nevertheless, it is generally the practice in those countries to incorporate COGSA or the Hague Rules or the Hague/Visby Rules by reference into the bill of lading.<sup>14</sup>

The purpose of this chapter is to consider the application of the various Conventions under as many practical circumstances as possible.

## **II. The Hague Rules**

### **1) The general principle of application**

The general principle regarding the application of the Hague Rules is that they apply by their own force (*ex proprio vigore*) to contracts of carriage covered by a bill of lading or any similar document of title. Art. 2 and the definition of “contract of carriage” in art. 1(b) makes this clear:

“Art. 2 - Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.

”Art. 1(b) -'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 sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty 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.”

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and then formally exchanges or deposits its instruments of ratification. In the case of the 1924 Brussels Convention and its 1968 and 1979 Protocols, the instruments of ratification must be deposited with the Belgian Government. Accession is the expression of consent by a state which did not participate at the international conference or sign the agreed text; see art. 15 of the Vienna Convention. A state may accede to a treaty before or after it actually comes into force. In the case of the 1924 Brussels Convention and its 1968 and 1979 Protocols, the state desiring to accede must deposit the instruments of accession with the Belgian Government.

See generally Francesco Berlingieri, “Uniformity in Maritime Law and Implementation of International Conventions” (1987) 18 JMLC 317; Tetley, “Canadian Interpretation and Construction of Maritime Conventions” (1991) 22 R.G.D. 109-128 at pp. 118-120.

<sup>14</sup> Some national laws impose the domestic carriage of goods by sea regime on international carriage in certain cases. See, for example, France’s Law no. 66-420 of June 18, 1966, art. 16 of which makes that Law applicable to contracts of carriage to or from a French port where no international convention to which France is a party applies. That particular French provision may be a “dead letter”, however, now that France is party to the Rome Convention 1980 on the Law Applicable to Contractual Obligations, adopted at Rome, June 19, 1980 and in force April 1, 1991 (EEC 80/934, O.J.E.C. October 9, 1980, No. L 266/1 to L 266/7). The Rome Convention, by its art. 3(1), would require French courts, in all international carriage cases, to apply the Hague or Hague/Visby Rules (and probably the Hamburg Rules) if the bill of lading expressly invoked them (or some national law giving effect to them).

## 2) Paramount clauses and the Hague Rules

Art. 10 of the Hague Rules states: “The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.”

Most national laws invoking the Hague Rules stipulate that the bill of lading shall contain a paramount clause. Sect. 13, para. sixth, of COGSA<sup>15</sup> states:

“Every bill of lading, or similar document of title issued in Canada that contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the Rules as applied by this Act.”

Even if the bill of lading does not contain a paramount clause, the Rules still apply. This seems manifestly clear from the Hague Rules themselves and was so declared in *Shackman v. Cunard White Star Ltd.*<sup>16</sup>

If the bill of lading does not contain a paramount clause and does not invoke the Hague Rules but invokes some other law, the Hague Rules still apply. The contrary decision of the Privy Council in *Vita Food Products Inc. v. Unus Shipping Co. Ltd. (The Hurry On)*<sup>17</sup> is in error.<sup>18</sup> Fortunately, *Vita Food* is limited in its application and itself contains the source of its being distinguished - the Court stating that whether or not the Hague Rules will be given effect depends on where the case is tried. For example, if the *Vita Food* case had been tried in Newfoundland, where the bill of lading was issued, then the Hague Rules would have applied. As Lord Wright himself stated: “A Court in Newfoundland would be bound to apply the law enacted by its own Legislature ...”<sup>19</sup> This has permitted the *Vita Food* decision to be distinguished, and authors have evolved principles of their own as to when the Hague Rules apply.<sup>20</sup> The principles are roughly to the effect that the Hague Rules will apply in almost every case, the main exception being where a bill of lading was issued in a contracting state, which bill of lading invoked English law and did not contain a paramount clause, and the case was tried in England.

Fortunately, the decision of the Privy Council in *Vita Food* has not been followed.<sup>21</sup>

<sup>15</sup> 46 U.S. Code Appx. 1312.

<sup>16</sup> 31 F. Supp. 948 at p. 950, 1940 AMC 971 at p. 973 (S.D. N.Y. 1940).

<sup>17</sup> [1939] A.C. 277, (1939) 63 Ll. L. Rep. 21, 1939 AMC 257 (P.C.).

<sup>18</sup> See Tetley, *Marine Cargo Claims*, 1 Ed., 1965, at p. 273-277. See also Tetley, “*Vita Food Products Revisited (Which Parts of the Decision Are Good Law Today?)*” (1992) 37 McGill L.J. 292.

<sup>19</sup> *Supra*, [1939] A.C. at p. 292, 63 Ll. L. Rep. at p. 28, 1939 AMC at p. 265.

<sup>20</sup> *Carver's Carriage by Sea*, 13 Ed. 1982, at para. 575; Scrutton, 20 Ed., 1996 at pp. 409-411.

<sup>21</sup> *Dominion Glass Co. v. The Anglo-Indian* [1944] S.C.R. 409 at p. 417, 1944 AMC 1407 at p. 1415; *Ocean S.S. Co., Ltd. v. Queensland State Wheat Bd.* [1941] 1 K.B. 402, (1940) 68 Ll. L. Rep. 136. In *The Morviken* [1983] 1 Lloyd's Rep. 1 at p. 9 (H.L.), Lord Diplock expressed his malaise with “the wide ranging dicta” in *Vita Food* by stating that it was “no longer necessary to embark upon what I have always found to be an unrewarding task of ascertaining precisely what those dicta mean.” See the direct American approach to the question in *Shackman v. Cunard White Star* 31 F. Supp. 948, 1940 AMC 971 (S.D. N.Y. 1940). See also Tetley, “*Vita Food Products Revisited (Which Parts of the Decision Are Good Law Today?)*” (1992) 37 McGill L.J. 292 at pp. 299-302 and 304-305, showing how *Vita Food* decision has

A paramount clause is no longer required under the Visby Rules because they specifically apply by force of law as if they were directly enacted as part of statutory law.<sup>22</sup>

### III. The Visby Rules

#### 1) A brief history of the Visby Rules

The Visby Rules (the Brussels Protocol of 1968 amending the Brussels Convention of 1924) were the outcome of the successful deliberations of the Comité Maritime International Conference in Stockholm in 1963, where changes to the Brussels Convention of 1924 were adopted. The Comité met in the historic City of Visby after the Conference and thereby gave the Visby Rules their name.

Included in the Visby Rules was the (“Muncaster Castle Amendment”), a proposed amendment to art. 3(1) of the Hague Rules which would have allowed carriers to be relieved of their obligation to exercise due diligence to make the vessel seaworthy provided they diligently chose a reputable independent contractor to do the work.<sup>23</sup> The Muncaster Castle Amendment (a quite retrograde provision)<sup>24</sup> was discarded at the Diplomatic Conference subsequently held and, eventually on February 23, 1968, a Protocol was signed at Brussels amending the Hague Rules.<sup>25</sup>

By March 23, 1977, ten nations (sufficient in number and tonnage, as stipulated in art. 13 of the Brussels Protocol of 1968, to bring the Protocol into effect) had ratified or acceded to the Rules and therefore three months later, on June 23, 1977, the Visby Rules came into force for the United Kingdom, France, Denmark, Norway, Sweden, Switzerland (all of whom had ratified), and Ecuador, Lebanon, Singapore and Syria (all of whom had acceded).

Since that date the vast majority of the world's shipping nations have adopted the Visby Rules.<sup>26</sup>

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been criticized by many eminent scholars and ignored, distinguished, circumvented and opposed, by judges. But see also *Chelleram & Co. Ltd. v. China Ocean Shipping Co.* [1989] 1 Lloyd's Rep. 413 at p. 424 (N.S.W. Supr. Ct., Adm. Div.), invoking *Vita Food Products* to uphold a contractual choice of Chinese law (then the Hague Rules) in a bill of lading covering a shipment from Hong Kong (a Hague/Visby jurisdiction) to Australia.

<sup>22</sup> New art. 10 of the Hague/Visby Rules. See also the U.K. *Carriage of Goods by Sea Act, 1971*, U.K. 1971, c. 19, which no longer requires a paramount clause and did not repeat sect. 3 of the U.K. *Carriage of Goods by Sea Act, 1924*, 14 & 15 Geo. 5, c. 22. The U.K. Act of 1971 specifically stipulates at sects. 1(2), (3), (6) and (7) that the Rules have the force of law. See *The Morviken*, [1983] 1 Lloyd's Rep. 1 at p. 8 (H.L.); *The Benarty* [1983] 2 Lloyd's Rep. 50 at p. 56, rev'd on other grounds, [1984] 2 Lloyd's Rep. 244 (C.A.); *The Antares* [1987] 1 Lloyd's Rep. 424 at pp. 428-429; *The Captain Gregos* [1990] 1 Lloyd's Rep. 310 at p. 312 (C.A.); Scrutton, 20 Ed., 1996 at pp. 413-414; Wilson, 4 Ed., 2001 at pp. 186-188.

<sup>23</sup> The amendment took its name from the decision of the House of Lords in *Riverstone Meat. Co. Pty. Ltd. v. Lancashire Shipping Co. (The Muncaster Castle)* [1961] A. C. 807, [1961] 1 Lloyd's Rep. 57 (H.L.).

<sup>24</sup> See *The Muncaster Castle Amendment-A Commentary*, Tetley, *Marine Cargo Claims*, 1 Ed. 1965, at p. 371.

<sup>25</sup> See the text in Appendix “A”.

<sup>26</sup> See the list of nations which have ratified or acceded to the protocol in Appendix “A”.

## 2) Hague/Visby Rules - a single document

The Visby Rules (the Brussels Protocol of February 23, 1968) should not be considered as a separate convention. The Visby Rules are amendments to the Brussels Convention 1924 and art. 6 of the Protocol stipulates:

“As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.

A Party to this Protocol shall have no duty to apply the provisions of this Protocol to bills of lading issued in a State which is a Party to the Convention but which is not a Party to this Protocol.”

Thus the result of ratification of or accession to the Visby Protocol by a nation is that the nation consents to be bound by the Hague/Visby Rules.<sup>27</sup>

## 3) Visby Rules - force of law

The Visby Rules attempt to overcome the problem created by the *Vita Food Products v. Unus Shipping Co.*<sup>28</sup> decision, where the Hague Rules were not deemed by an English Court to have the force of law and were held to have effect more by agreement than law in the absence of a paramount clause.

Sect. 1 of the former U.K. statute giving effect to the Hague Rules (the *Carriage of Goods by Sea Act*, 1924) and sect. 2 of the former Canadian statute giving effect to the Hague Rules (*Carriage of Goods by Water Act*, 1936) read only: “shall have effect in relation to and in connection with ... ” certain carriage.

The Visby Rules, on the other hand, would seem to give much more authority to the application of the Rules by their wording. Thus, art. 10 of Hague/Visby stipulates that: “Each Contracting State shall apply the provisions ... ”, while national legislation giving effect to the Visby amendments, such as the U.K.'s *Carriage of Goods by Sea Act, 1971*<sup>29</sup>, in four different subparagraphs, specifically gives the Hague/Visby Rules “the

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<sup>27</sup> It should be noted that ratification of the 1968 Protocol by a state which did not ratify the 1924 Convention constitutes accession to the latter (art. 11(2) of the 1968 Protocol). Ratification of the 1979 Protocol by a state not a party to the 1924 Convention constitutes ratification of that Convention, as amended by the 1968 Protocol (arts. I and VI(2) of the 1979 Protocol). Accession to the 1968 Protocol by a state which did not ratify the 1924 Convention constitutes accession to the 1924 Convention as well (art. 12(2) of the 1968 Protocol). Accession to the 1979 Protocol constitutes accession to the 1924 Convention, as amended by the 1968 Protocol (arts. I and VII(2) of the 1979 Protocol). See also Ian Brownlie, *Principles of Public International Law*, 3 Ed. 1979 at pp. 603-605; Hugh M. Kindred et al, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 6 Ed., Toronto, 2000 at pp. 102-103.

<sup>28</sup> [1939] A.C. 277, (1939) 63 Ll. L. Rep. 21, 1939 AMC 257. See also Tetley, *Marine Cargo Claims*, 1 Ed. 1965, at pp. 273-277, where the *Vita Food* decision is criticized; Tetley, *supra*, note 17, (1992) 37 McGill L.J. 292; Tetley, *Int'l Conflict*, 1994 at pp. 313-320.

<sup>29</sup> 1971 U.K. c. 19.



force of law” - sects. 1(2), (3), (6) and (7).<sup>30</sup> In short, if the contract of carriage falls within one of the cases set out in art. 10 of the Hague/ Visby Rules, then the Rules must apply whatever be the proper law of the contract.<sup>31</sup> Other national statutes are to the same effect.<sup>32</sup>

#### 4) Paramount clause - Visby Rules

It is interesting to note that a paramount clause is no longer necessary under the Visby Rules because the Rules apply by force of law. Thus sect. 3 of the U.K.'s *Carriage of Goods by Sea Act*<sup>33</sup> of 1924 calling for a paramount clause in each bill of lading is no longer to be found in the U.K. Act of 1971.

#### 5) Extent of application - Visby Rules

The Hague/Visby Rules apply to carriage of goods between ports in two different States if:

- a) a bill of lading is issued in a contracting state - art. 10(a); or
- b) the carriage is from a port in a contracting state - art. 10(b); or
- c) the Rules are incorporated by reference into the contract of carriage - art. 10(c).
- d) National laws may extend the application of the Hague/Visby Rules in virtue of art. 10 last para. to bills of lading not mentioned in art. 10(a), (b) or (c). Thus the U.K.'s *Carriage of Goods by Sea Act 1971* at sect. 1(6)(b) applies the Hague/Visby Rules to non-negotiable receipts when they specifically invoke the Hague/Visby Rules.<sup>34</sup>
- e) The Hague/Visby Rules can also be applied to domestic carriage as is the case in the Scandinavian nations<sup>35</sup> and in Canada.<sup>36</sup>

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<sup>30</sup> *The Morviken*, [1982] 1 Lloyd's Rep. 325 at 328, where Lord Denning M.R. explained the meaning of “the force of law”:

“In my opinion it means that, in all Courts of the United Kingdom, the provisions of the rules are to be given the coercive force of law. So much so that, in every case properly brought before the Courts of the United Kingdom, the rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules.”

This decision was upheld by the House of Lords in *The Morviken* [1983] 1 Lloyd's Rep. 1, also styled as *The Hollandia* in [1983] 1 A.C. 565 (H.L.).

<sup>31</sup> *Id.*, at p. 329.

<sup>32</sup> See, for example, Canada's *Marine Liability Act*, S.C. 2001, c. 6, sect. 43(1).

<sup>33</sup> (1924) 14 & 15 Geo. 5, c. 22. On the elimination of the “clause paramount” requirement in the 1971 U.K. statute, see Scrutton, 20 Ed., 1996 at p. 414; Wilson, 4 Ed., 2001 at pp. 186-187.

<sup>34</sup> See chap. 45, “Waybills”.

<sup>35</sup> Denmark, Finland, Norway and Sweden adopted a new Nordic Maritime Code, which came into force on October 1, 1994. The Code incorporates some elements of the Hamburg Rules, but makes the Hague/Visby Rules 1968/1979 applicable to domestic carriage within and between each of those countries. See, for example, the Swedish Maritime Code, chap. 13, sects. 1 and 2.

<sup>36</sup> See the *Marine Liability Act*, S.C. 2001, c. 6, sect. 43(2).

## IV. The Hague and Hague/Visby Rules

### 1) Contracts of common and private carriage

The Hague<sup>37</sup> and Hague/Visby Rules apply not only to public or common carriage but also may apply to private carriage, by an incorporating clause.<sup>38</sup> The common law distinction between private and common carriers is not known or referred to in the Hague and Hague/Visby Rules or in the Hamburg Rules.<sup>39</sup> The distinction is not made in the civil law and is not dealt with in this text.

Private carriage is usually by charterparty<sup>40</sup> and takes place when a special contract is entered into for the transportation of particular goods. Common or public carriage is a contract of carriage arranged after public offers and advertisements and is usually by a liner bill of lading i.e., a bill of lading issued by a steamship company whose ships ply an advertised route on a regular “liner” basis.<sup>41</sup> Common carriage, incidentally, can include the transport of the goods of only a single shipper. The Rules apply to common carriage and may apply to private carriage - the criterion is that there be a contract of carriage (normally covered by a bill of lading<sup>42</sup>) rather than a contract of hire (normally a charterparty<sup>43</sup>). Because most private carriage is by charterparty, however, the Rules do not usually affect it.<sup>44</sup>

<sup>37</sup> *Instituto Cubano v. TIV Golden West* 246 F.2d 802, 1957 AMC 1481 (2 Cir. 1957).

<sup>38</sup> See Yung F. Chiang, “The Applicability of COGSA and the Harter Act to Water Bills of Lading”, (1972) 14 B. C. Ind. & Comp. L. Rev. 267. For an interesting discussion as to the differences between the common and private carrier, see Yung F. Chiang, “The Characterization of a Vessel as a Common or Private Carrier”, (1973) 48 Tulane L. Rev. 299; see also Carver, *Carriage by Sea*, 13 Ed., paras. 2-7. See also *Shell Oil Co. v. M/T Gilda* 790 F.2d 1209 at p. 1212 (5 Cir. 1986).

<sup>39</sup> Pre-Harter Act (1893) common law distinguished between the responsibilities of the common and private carrier. The Harter Act (1893) the Hague Rules 1924, the Visby Rules 1968 and the Hamburg Rules 1978 make no mention of private and common carriage - the distinction is between contracts of carriage of goods and contracts of hire of the ship. The Pomerene Act (U.S. Bills of Lading Act 1916, as recodified in 1994), however, specifically refers to “common carriers”, as opposed to private carriers. See, for example, 49 U.S.C. 80102, on the application of the statute.

<sup>40</sup> *Associated Metals & Minerals Corp. v. S.S. Jasmine* 983 F.2d 410 at p. 412, 1993 AMC 957 at p. 960 (2 Cir. 1992): “Charter Parties are said to be roughly synonymous with private carriage.”

<sup>41</sup> See, for example, *I.N.A. v. Blue Star (North America), Ltd.* 1997 AMC 2434 at p. 2440 (S.D. N.Y. 1997): “The *Columbia Star* was being operated in the liner trade and was engaged in the common carriage of cargo.”

<sup>42</sup> *Hugh Mack & Co., Ltd. v. Burns & Laird Lines, Ltd.* (1944) 77 Ll. L. Rep. 377 at p. 383; *Nichimen Co. v. MIV Farland and A/S Virgo* 462 F.2d 319, 1972 AMC 1573 (2 Cir. 1972). See also *General Glass v. Livorno* 1977 AMC 2050 (S.D. N.Y. 1977), where carriage under bills of lading was deemed common carriage despite the shipper's undertaking to pay stowage and discharging costs on FIOS (free in and out) terms.

<sup>43</sup> A demise charter is the hire of the whole ship. The shipowner names the master and crew but they are paid for and are under the authority of the charterer. A bareboat charter is a demise charter where the master and crew are also named by the charterer. A time charter is the hire of the ship for a period of time with the master and crew named, employed and under the instructions of the shipowner. A voyage charter is the hire of the use of the services of a ship or part of a ship.

<sup>44</sup> *Underwriters at Lloyd's v. SeaRiver Maritime, Inc.* 2001 AMC 221 at p. 230 (S.D. Tex. 2000): “In private contracts of carriage, the parties can include whatever terms they deem appropriate to allocate their

## 2) Sea transportation of goods

Rather than a division between common and private carriage, sea transportation is better divided between contracts of carriage and contracts of hire as follows:

- a) Contracts of carriage of goods by sea
  - (i) under bills of lading and similar documents of title;
  - (ii) under waybills (non-negotiable receipts).
  
- b) Contracts of hire of the ship
  - (i) under demise and bareboat charterparties;
  - (ii) under time charterparties;
  - (iii) under voyage charterparties (voyage charterparties are really contracts to hire the services of the ship).

## 3) Bill of lading - the best evidence of the contract

A bill of lading is not necessarily the contract of carriage, but is usually the best of evidence of the contract.<sup>45</sup> The contract is the advertisements, the booking note, the freight tariff, (and on occasion, certain practices of the carrier known and accepted by the shipper) all taken together.<sup>46</sup> The Hague and Hague/Visby Rules apply when the shipment is “covered by a bill of lading or any similar document of title” (art. 1(b)). The word “covered” indicates that a bill of lading need not be issued when the carriage commences; in fact the bill of lading is usually issued afterwards. See “shipped” bill of lading at art. 3(7).

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risk of loss and liability. See *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104, 110, 1941 AMC 1697, 1702 (1941); see also *In Re Complaint and Petition of Int'l Marine Develop. Corp.*, 1973 AMC 1071, 1073, 451 F.2d 763, 765 (5 Cir. 1971) (parties to a private carriage contract ‘may contract pretty much as they please ... and risks of damage may be adjusted in any manner specified by the charter’).” See also *Kerr-McGee Corp. v. Law* 479 F.2d 61 at p. 64, 1973 AMC 1667 at p. 1670 (4 Cir. 1973); *Sun Co. v. S.S. Overseas Arctic* 27 F.3d 1104 at p. 1108, 1995 AMC 57 at p. 62 (5 Cir. 1994). It has also been held in the United States that the *Harter Act*, 46 U.S.C. Appx. 190-196, does not apply to private carriage under a charterparty, unless it is expressly incorporated by reference. See *Brown & Root, Inc. v. American Home Assurance Co.* 353 F.2d 113 at p. 118, 1965 AMC 2689 at p. 2695, 353 F.2d 113, 118 (5 Cir. 1965), cert. denied, 384 U.S. 943, 1966 AMC 2791 (1966); *J. Aron & Co. v. Cargill Marine Terminal, Inc.* 998 F. Supp. 700 at p. 703, 1998 AMC 2286 at p. 2290 (E.D. La. 1998).

<sup>45</sup> *The Ardennes* [1951] 1 K.B. 55 at p. 59, (1950) 84 Ll. L. Rep. 340 at p. 344. See also *Saint John Shipbuilding and Dry Dock Co. Ltd. v. Kingsland Maritime Corp.* (1981) 126 D.L.R.(3d) 332 at pp. 339-340, 1984 AMC 568 at p. 576 (Fed. C.A.), leave to appeal to Supreme Court of Canada denied, November 3, 1981; *Kruger Inc. v. Naviera Lavinel C.A.* (1987) 15 F.T.R. 123 at pp. 125 (Fed. C. Can.); *Cho Yang Shipping Co. Ltd. v. Coral (UK) Ltd.* [1997] 2 Lloyd’s Rep. 641 at p. 643 (C.A.); *King Ocean Central America, S.A. v. Precision Cutting Services, Inc.* 717 So.2d 507 at p. 510, 1998 AMC 2372 at p. 2374 (Fla. 1998); *Texserv Inc. v. Incon Container USA Ltd.* (2000) 48 O.R.(3d) 427 at pp. 433 and 435 (Ont. Super. Ct.); Scrutton, 20 Ed., 1996 at p. 67; Wilson, 4 Ed., 2001 at pp. 134-137.

<sup>46</sup> See chap. 9, “Proving the Contract or the Tort”.

#### 4) Contracts to which the Rules apply

The Hague and Hague/Visby Rules apply to all contracts of carriage of goods by sea, oral or written, except where by art. 6, a non-negotiable receipt is issued in an extraordinary shipment in a non-commercial trade, or except where a non-negotiable receipt is issued in the “national coasting trade”, as permissible under a national statute in accordance with para. 2 of the Protocol of Signature of the 1924 Brussels Convention.

The Rules are ambiguous and state, at arts. 1(b) and 2, that they apply to bills of lading or similar documents of title. But art. 3(8) declares the Rules to be of public order, while art. 6 stipulates that the Rules may only be avoided by the issue of non-negotiable receipts under certain specific conditions. From art. 1(b), art. 2, art. 3(8) and art. 6, taken together, one must conclude that the most rational interpretation (and the best solution to the ambiguity) is that the Hague or Hague/Visby Rules apply to all contracts of carriage of goods by sea, except for carriage under non-negotiable receipts which comply with art. 6<sup>47</sup> and the national coasting trade when permitted by statute.<sup>48</sup>

There are of course certain minor exceptions, such as (i) goods carried on deck and so described on the bill of lading, and (ii) live animals.

The above argument, taking into consideration arts. 1(b), 2, 3(8) and 6 of the Hague and Hague/Visby Rules, has never been ruled on by a court or really discussed by authors, who rely on art. 1(b) alone to contend that the Rules govern only “bills of lading and similar documents of title” (i.e. negotiable documents of carriage<sup>49</sup>), unless a

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<sup>47</sup> See chap. 45, “Waybills”.

<sup>48</sup> For an example of this type of coasting trade provision, see Canada’s *Marine Liability Act*, S.C. 2001, c. 6, sect. 43(2), which makes the Hague/Visby Rules applicable to the coasting trade in Canada, “unless there is no bill of lading and the contract stipulates that those Rules do not apply”. The latter phrase further reinforces the argument drawn from arts. 2 and 6 of the Hague and Hague/Visby Rules, that the Rules ordinarily apply to carriage under non-negotiable documents such as sea waybills, because it permits parties in the Canadian coasting trade to contract out of the Rules under a carriage document other than a bill of lading, *only* if the contract of carriage expressly sets aside the Rules. If the Rules did not ordinarily apply to such non-negotiable contractual documents, the latter proviso would seem unnecessary. It is also noteworthy that, as para. 2 of the Protocol of Signature of the Hague Rules 1924 authorizes, sect. 43(2) of the *Marine Liability Act* permits such express contracting out of the Rules in the Canadian coasting trade under documents other than bills of lading, even in the case of “ordinary” commercial shipments, and not only in the case of “extraordinary commercial shipments”, as under art 6 of the Rules themselves. See also sect. 7(4) of the former *Carriage of Goods by Sea Act*, S.C. 1993, c. 21, which was similar to sect. 43(2) of the *Marine Liability Act*.

<sup>49</sup> See Scrutton, 20 Ed., 1996 at pp. 411 and 423; Gaskell et al., 2000 at sect. 22B.2; Wilson, 4 Ed., 2001 at p. 189. These authors invoke decisions such as *The European Enterprise* [1989] 2 Lloyd’s Rep. 185 at p. 188, which held that the Hague/Visby Rules did not apply, unless the contract of carriage was one under which the shipper was entitled to demand a bill of lading at or after shipment, and therefore did not govern a non-negotiable consignment note. That holding was really an *obiter dictum*, however, as the decision related primarily to the interpretation of sect. 1(6)(b) of the U.K.’s *Carriage of Goods by Sea Act 1971*, U.K. 1971, c. 19, a particular provision permitting the extension of the Rules to non-negotiable receipts by express stipulation. Note also *The Happy Ranger* [2002] 2 Lloyd’s Rep. 357 at p. 363 (C.A.), where Tuckey, L.J., albeit in an *obiter dictum*, questioned the traditional view of English textbook writers that “straight” (i.e. non-negotiable) bills of lading are not bills of lading or similar documents of title subject to the Rules. See also the dissenting judgment of Rix, J., *ibid.* at p. 367, who nevertheless agrees with Tuckey,

particular statute permits their extension to waybills and similar non-negotiable receipts.<sup>50</sup> In the U.K., where there is such a particular statute,<sup>51</sup> the courts have taken this restrictive view, without entering into the meaning of art. 1(b), 2, 3(8) and 6 taken together.

Accepted rules of construction of statutes and interpretation militate in favour of the recognition that the Rules govern waybills, except in the particular case contemplated by art. 6 and in cabotage if permitted under national law. Such recognition would resolve ambiguities and give effect to what appears to have been the intention of the drafters of the Brussels Convention in 1924.

## 5) Waybills

The Hague or Hague/Visby Rules thus apply to non-negotiable receipts (waybills), unless the shipment is an extraordinary shipment in a non-commercial trade or is a shipment in the national coasting trade under special national law.<sup>52</sup>

## 6) Summary of application of the Rules to contracts of carriage

a) The Hague or Hague/Visby Rules apply to all contracts of carriage of goods by sea being:

- (i) bills of lading and similar documents of title;
- (ii) non-negotiable receipts (waybills) in the ordinary course of trade;
- (iii) oral contracts relating to the above.

b) The Hague or Hague/Visby Rules do not apply to:

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L.J. that "... it would be unwise to assume that all of the statements in the text books regarding 'straight' bills are correct."

<sup>50</sup> See *The Chitral* [2000] 1 Lloyd's Rep. 529 at pp. 532-533, where a "straight consigned bill of lading" (i.e. a nominative bill of lading, requiring the delivery of the goods to a named consignee, rather than to order or to bearer) was assimilated to a sea waybill, as defined in the U.K.'s *Carriage of Goods by Sea Act 1992*, U.K. 1992, c. 50.

<sup>51</sup> See the U.K.'s *Carriage of Goods by Sea Act 1971*, U.K. 1971, c. 19, as amended, at sect. 1(6)(b), which provides that the Rules shall have the force of law in relation to any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading. In *The European Enterprise* [1989] 2 Lloyd's Rep. 185 at p. 190, for example, Steyn, J. held that, where incorporated by reference under sect. 1(6)(b) of the U.K.'s *Carriage of Goods by Sea Act 1971*, the Hague/Visby Rules would apply in their entirety to non-negotiable receipts, only if they were incorporated by reference into such receipts *in their entirety*. Partial incorporation was therefore valid, even if its result was to reduce the carrier's liability limitation below the level authorized by the Rules. He further held (at p. 189) that for the incorporation of the Rules to be valid under sect. 1(6)(b), the receipt had to be marked non-negotiable and had to contain an express term stating explicitly that the Rules applied to it "as if the receipt were a bill of lading". On the latter point, Steyn, J. disagreed with the earlier decision of Lloyd, J. in *The Verschroon* [1982] 1 Lloyd's Rep. 301 at pp. 304-305. Steyn, J.'s position is questioned by Wilson, 4 Ed., 2001 at p. 189.

<sup>52</sup> See Chap. 45, "Waybills".

- (i) contracts of carriage of live animals - art. 1(c);
- (ii) contracts of carriage of deck cargo which is carried on deck and “is stated as being carried on deck” - art. 1(c);
- (iii) transportation by charterparty (which is a contract of hire rather than of carriage), unless a bill of lading is issued and “regulates the relations between a carrier and holder of the same.” - art. 1(b)
- iv) non-negotiable receipts (waybills) not in the ordinary course of trade;
- (v) non-negotiable receipts (waybills) in the coasting trade under specific national legislation.

## 7) No bill of lading issued

The Hague and Hague/Visby Rules apply to a contract of carriage covered by a bill of lading or similar document of title, whether or not a bill of lading was in fact issued. This is particularly so because the bill of lading is not necessarily the contract of carriage but usually the best evidence of it. The contract includes the booking note, the tariff, the carrier's advertisements, and practices known and accepted by the shipper, etc., all taken together.

To Devlin J. in *Pyrene Co. v. Scindia Steam Navigation Co.*,<sup>53</sup> the criterion was whether a bill of lading was *intended* and not whether it was *issued*:

“In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation 'covered' by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply.”<sup>54</sup>

The Supreme Court of Canada followed *Pyrene Co. in Anticosti Shipping Co. v. St-Amand*<sup>55</sup> and applied the \$500 per package limitation because, although no bill of lading had been issued, one was intended.

<sup>53</sup> *Pyrene Co., Ltd. v. Scindia Steam Navigation Co., Ltd.* [1954] 2 QB. 402 at pp. 419-420, [1954] 1 Lloyd's Rep. 321 at p. 329.

<sup>54</sup> This *Pyrene* principle is reflected in sect. 1(4) of the U.K.'s *Carriage of Goods by Sea Act 1971*, U.K., 1971, c. 19, which provides in pertinent part that: “... nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, *unless the contract expressly or by implication provides for the issue of a bill of lading or any similar document of title.*” (Emphasis added). The contemplation, rather than the actual issue, of the bill was reaffirmed as being the key factor in determining whether or not the Rule apply was reaffirmed in *The Happy Ranger* [2002] 2 Lloyd's Rep. 357 at p. 362 (C.A.).

<sup>55</sup> [1959] S.C.R. 372 at p. 375, 1959 AMC 1526 at p. 1528. See also *Grace Plastics Ltd. v. The Bernd Wesch II* [1971] F.C. 273 at p. 278; *A.A. Kitson Trucking Ltd. v. Rivtow Straits Ltd.* (1975) 55 D.L.R. (3d) 462 at p. 471; *Captain v. Far Eastern Steamship Co.* (1979) 97 D.L.R. (3d) 250 at p. 259, [1979] 1 Lloyd's 595 at p. 601, [1978] ETL 651 at p. 663, 1978 AMC 2210 at p. 2220. See also *Saint John Shipbuilding and Dry Dock Co. Ltd. v. Kingsland Maritime Corp.* (1981) 126 D.L.R.(3d) 332 at p. 339, 1984 AMC 568 at p. 576 (Fed. C.A.), leave to appeal to Supreme Court of Canada denied, November 3, 1981 (where a bill of lading was issued, but *after* a purchase order which was found to be the true contract of carriage).

On the other hand, where no bill of lading is issued but a charterparty is *contemplated*, then the Hague Rules do not apply, as was held in *Canada Steamship Lines Ltd. v. Desgagné*.<sup>56</sup>

In *The Beltana*,<sup>57</sup> bills of lading were not issued but shipping receipts were issued, subject to “the conditions of the usual form of Bill of Lading currently issued by (Defendants)”. Relying on *Pyrene Co. v. Scindia Steam Navigation Co.*, the Supreme Court of Western Australia held that the Australian *Sea-Carriage of Goods Act, 1924*, applied.

In *St. Lawrence Construction Ltd. v. Federal Commerce and Navigation Co. Ltd.*, although no bill of lading was issued, the parties contracted by letter for the carriage of construction equipment and supplies, to which letter was annexed a standard form bill of lading, subjecting the contract to the Canadian *Water Carriage of Goods Act 1936* (the Hague Rules). The Canadian Federal Court of Appeal, applying *Pyrene*, decided that a bill of lading had been contemplated and in consequence gave the carrier the benefit of the Hague Rules package limitation.<sup>58</sup>

In *Parsons Corp. v. The Happy Ranger*,<sup>59</sup> the contract of carriage consisted of a signed printed front page, entitled “Contract of Carriage”, a 6-page printed rider containing 18 clauses and an attached specimen form of the carrier’s bill of lading. The printed front page provided for the issue, as part of the contract, of a bill of lading in the form of the appended specimen bill, also stipulating that the contract would take precedence over the bill in the event of any conflict between their terms. No bill of lading was actually issued, however. Reversing the trial judge, the English Court of Appeal found that, because a bill of lading was “to be issued”, as in *Pyrene*, the contract was “covered” by a bill of lading and was therefore a “contract of carriage” within the meaning of art. 1(b) of the Hague/Visby Rules.<sup>60</sup> The fact that the bill of lading which might have been issued might not have contained all, or exactly the same, terms as the contract previously agreed to and the specimen bill was not relevant to the *Pyrene* principle; rather, the only relevant question was whether a bill of lading was to be issued.

<sup>56</sup> [1967] 2 Ex. C.R. 234 at p. 243. See also *Harland & Wolff Ltd. v. Burns & Laird Lines* (1931) 40 Ll. L. Rep. 286 at p. 287; *Canadian and Dominion Sugar Co. v. Canadian National (West Indies) Steamships Ltd.* [1947] A.C. 46 at p. 57.

<sup>57</sup> [1967] 1 Lloyd’s Rep. 531 at p. 533. See also *Cour d’Appel d’Aix-en-Provence*, October 31, 1980, DMF 1982, 23 where the Hague/Visby Rules applied although only shipping notes were issued rather than bills of lading. See also *Hermann C. Starck Inc. v. Finn Lines* 1978 AMC 1330 (S.D. N.Y. 1978) where COGSA applied, although only dock receipts were issued which referred to the regular bill of lading of the Line. See also *Miller Export Corp. v. Hellenic Lines* 534 F. Supp. 707, 1982 AMC 1890 (S.D. N.Y. 1982).

<sup>58</sup> [1985] 1 F.C. 767 at p. 777 (Fed. C.A.). See also *Trenton Works Lavalin Inc. v. Panalpina Inc.* (1993) 126 N.S.R.(2d) 287 (N.S. S.C.), varied on other grounds (1995) 139 N.S.R.(2d) 46 (N.S. C.A.).

<sup>59</sup> [2002] E.W.J. No. 2245 (C.A., May 17, 2002).

<sup>60</sup> Because the contract was held to be “covered” by a bill of lading, and thus to be a “contract of carriage” within the meaning of art. 1(b), and because the shipment concerned was from a Hague/Visby state (Italy), the contract was held subject to the Hague/Visby Rules, under a clause paramount in the specimen bill which gave effect to those Rules in trades to which they applied “compulsorily”.

There is also considerable American authority on the application of COGSA where a bill of lading is contemplated even if never issued.<sup>61</sup>

There may be rare cases where the parties do not give much thought to the type of contract of sea transportation which they are entering into, but do not intend in any event that a bill of lading be issued. If they intend a contract of carriage (as opposed to a contract of hire of the ship) and if a non-negotiable receipt is not issued, then the Rules will apply by the conjuncture of arts. 1(b), 2, 3(8) and 6.

## 8) Cargo never received

The Hague and Hague/Visby Rules do not apply if the carrier never receives the goods even if a bill of lading is issued. This is because the contract of carriage has not yet commenced.<sup>62</sup>

## 9) Charterparties

The Hague and Hague/Visby Rules do not apply to charterparties, but can be made to do so by express contract.<sup>63</sup> The express statement, however, must be proper and logical. In *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.*,<sup>64</sup> the Court of Appeal held that the Hague Rules were not applicable where a paramount clause included in a charterparty read: “This Bill of Lading ...”. The decision of the Court of Appeal was reversed by the House of Lords,<sup>65</sup> but the latter did emphasize, however, that a carelessly worded paramount clause can be a dangerous way of incorporating the Hague Rules into a charterparty.<sup>66</sup>

<sup>61</sup> See the large number of decisions cited in *Cera-Tech, S.A. v. S/S Allison Lykes* 1992 AMC 2089 at p. 2100 (E.D. La. 1991), including, *inter alia*, *Luckenbach S.S. Co. v. American Mills Co.* 24 F.2d 704 at p. 705, 1928 AMC 558 at p. 559 (5 Cir. 1928) and *Berkshire Knitting Mills v. Moore McCormack Lines, Inc.* 265 F.Supp. 846 at p. 848, 1966 AMC 2651 at p. 2653 (S.D. N.Y. 1965); *Baker Oil Tools, Inc. v. Delta Steamship Lines, Inc.* 387 F. Supp. 617, 1975 AMC 238 (S.D. Tex. 1974), *aff'd*, 562 F.2d 938, 1978 AMC 370 (5 Cir. 1977); *Ironfarmers Parts & Equipment v. Compagnie Generale Maritime* 1999 AMC 2915 at p. 2917 (S.D. Ga. 1994).

<sup>62</sup> *Strohmeyer & Arpe Co. v. American Line S.S. Corp.*, 97 F.2d 360 at p. 361, 1938 AMC 875 at p. 877 (2 Cir. 1938). See in respect to the Hague/Visby Rules, a reference to Roskill J. in chambers, *Scrutton* 20 Ed., 1996 at p. 118 at note 71, to the effect that the one-year time bar of art. 3(6) and the package/kilo limitations of liability of the carrier would not apply to claims for wrongful statements (i.e. tortious misrepresentations) in the shipping documents, not founded on any allegation of fault in the carriage itself.

<sup>63</sup> Art. 5, para. 2 of the Hague and Hague/Visby Rules. See also *Church Bay (I.B. Effenson Co. v. Three Bays Corp.)* 238 F.2d 611, 1957 AMC 16 (5 Cir. 1956). See also *Australian Oil Refining v. Miller (R. W.) & Co.* [1968] 1 Lloyd's Rep. 448.

<sup>64</sup> [1957] 2 Q.B. 233, [1957] 1 Lloyd's Rep. 271 (C.A.).

<sup>65</sup> [1959] A.C. 133, [1958] 1 Lloyd's Rep. 73 (H.L.). See also *The Satya Kailash* [1982] 2 Lloyd's Rep. 465, where a U.S. clause paramount incorporated COGSA into a charterparty. Error in navigation (art. 4(2)(a)) was deemed compatible with the charterparty but “due diligence” (art. 3(1)) was not.

<sup>66</sup> See chap. 2, “Application of the Rules to Charterparties.” See also *Overseas Tankship (U.K) Ltd. v. B.P. Tanker Co. Ltd.* [1966] 2 Lloyd's Rep. 386. See also *The Fjord Wind* [1999] 1 Lloyd's Rep. 307 at p. 314, upheld [2000] 2 Lloyd's Rep. 191 at p. 197 (C.A.), where the phrasing of two clauses in a voyage charter was interpreted, as a matter of “commercial sense”, to have incorporated into the charter the Hague Rules scheme of obligations and exemptions in relations to the carriage of cargo, without, however, expressly



Of course, the Hague and Hague/Visby Rules apply to bills of lading issued to third parties pursuant to a charterparty by art. 1(b).

The Hamburg Rules specifically exclude charterparties from their application at art. 2(3).

## 10) Waybills

As outlined above, and despite the opposite view of some authors, sea waybills are subject to the Rules in most cases. Nevertheless, parties to waybills frequently incorporate by reference in such documents the CMI Uniform Rules for Sea Waybills, adopted by the CMI in 1990.<sup>67</sup> Under rule 4(i) of those Uniform Rules, the carriage of goods is subject to “any International Convention or National Law which is, or if the contract of carriage had been covered by a bill of lading or similar document of title would have been, compulsorily applicable thereto.” This provision can have the effect of subjecting carriage under waybills to the Hague, Hague/Visby or (presumably) the Hamburg Rules, or some national enactment of them.<sup>68</sup>

## 11) Tackle to tackle

The Hague and Hague/Visby Rules apply, according to art. 2, art. 1(b) and art. 1(e) taken together, “from the time when the goods are loaded on to the time when they are discharged from the ship.” This classic rule is better known as “tackle to tackle”.

“Tackle to tackle” has traditionally meant from the moment when ship's tackle is hooked on at the loading port until the moment when the ship's tackle is unhooked at discharge. If shore tackle is being used, that moment has traditionally been when goods cross the ship's rail. In *Pyrene Co. v. Scindia Steam Navigation Co.*,<sup>69</sup> cargo was attached to ship's tackle and was being loaded on board when the cargo fell outside the ship. It was held that the Rules applied although the goods had not crossed the ship's rail. The decision was correct because ship's tackle had been hooked on.

## 12) The Rules may apply by agreement

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incorporating the Rules by way of a paramount clause. The disponent owners (time charterers) were therefore held bound towards the voyage charterers by the obligation of due diligence to make the ship seaworthy before and at the beginning of the voyage.

<sup>67</sup> See text at (1991) 22 JMLC 617-619. These Uniform Rules are in fact incorporated into many modern sea waybills, including Genwaybill, Linewaybill, Combiconwaybill, Multiwaybill and the P. & O. Nedlloyd Non-Negotiable Waybill. See Gaskell et al., 2000 at para. 22.24.

<sup>68</sup> See Gaskell et al., 2000 at paras. 22.25-22.26.

<sup>69</sup> [1954] 2 Q.B. 402, [1954] 1 Lloyd's Rep. 321. It is interesting that despite the famous *dictum* of Devlin J., *infra*, that the Rules apply to the whole contract of carriage rather than a period of time, the *ratio decidendi* of the decision based on the facts is that the Hague Rules commence when tackle is hooked on. The facts do not concern a pre-tackle loss. The decision is sometimes interpreted to mean that the Hague Rules may apply by their own force before tackle at loading or after tackle at discharge. This is erroneous; Devlin J. only said that the Rules may be extended to before tackle by agreement. See *infra*.

Although “tackle to tackle” is the classic term describing the limits of application of the Rules, the Hague and Hague/Visby Rules apply to the whole contract of carriage,<sup>70</sup> including the entire loading and discharging, *if the parties so agree*.

Art. 7 of both Rules provides:<sup>71</sup>

“Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.”

In other words the period of application may be extended beyond tackle to tackle by the terms of the bill of lading contract. As Devlin J. put it:<sup>72</sup>

“But I see no reason why the rules should not leave the parties free to determine *by their own contract* the part which each has to play. On this view the whole contract of carriage is subject to the rules, *but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.*” [Emphasis added].

### 13) What is the agreement?

If the Rules may be extended to cover the whole loading and discharging operation by agreement, it is proper to examine the intention of the parties in the light of the custom and practice of the port, as well as the nature of the cargo itself (e.g. containers, grain, liquids, bunkers) to determine at what point the operation of loading begins and at what point the operation of discharge ends. In fact Devlin J. specifically referred to “custom and practice of the port and the nature of the cargo”.<sup>73</sup> The point therefore where loading begins will depend on whose tackle is being used, or who supplied the tubes, pipes or other equipment and what type of equipment is being used.

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<sup>70</sup> *Ibid.*, [1954] 2 Q.B. at pp. 416-417, [1954] 1 Lloyd's Rep. at pp. 327-328: “It is not intended to specify a precise moment of time. Of course, if the operation of the rules began and ended with, a period of time a precise specification would be necessary. But they do not. It is legitimate in England to look at section 1 of the Act, which applies the rules not to a period of time but 'in relation to and in connexion with the carriage of goods by sea'. The rules themselves show the same thing. The obligations in article 3, rule 1, for example, to use due diligence to make the ship seaworthy and man and equip her properly are independent of time. The operation of the rules is determined by the limits of the contract of carriage by sea and not by any limits of time ... The reference to 'when the goods are loaded on' in article 1(e) is not, I think, intended to do more than identify the first operation in the series which constitutes the carriage of goods by sea; as 'when they are discharged' denotes the last. The use of the rather loose word 'cover', I think, supports this view ... In short, nothing is to be gained by looking to the terms of article I(e) for an interpretation of article 2.

<sup>71</sup> See also U.S. COGSA, 46 U.S.C. Appx. 1307, which is to the same effect.

<sup>72</sup> *Ibid.*, [1954] 2 Q.B. at p. 418, [1954] 1 Lloyd's Rep. at pp. 328-329.

<sup>73</sup> *Ibid.*

#### 14) Examples of application before loading and after discharge

The Hague and Hague/Visby Rules apply beyond ship's tackle when there is an agreement to that effect.<sup>74</sup>

In *Uncle Ben's Int'l Div. Of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*,<sup>75</sup> the contractual extension of COGSA beyond tackle made the one-year COGSA time-bar applicable to the claim for pre-loading damage to the cargo.

In *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*,<sup>76</sup> for example, the bill of lading stated that the ship's liability ended with its discharge from the ship's gear, but this was held to be subject to the understanding that the cargo was to be lightered ashore by the ship's barge. The Canadian version of the Hague Rules, therefore, applied to the lighterage.<sup>77</sup>

Whether the Rules will apply beyond tackle depends on the actual terms of the contract.<sup>78</sup> In *Hartford Ins. Co. v. M/V OOCL Bravery*,<sup>79</sup> for example, bicycles shipped from the U.S. to the Netherlands under a through bill of lading were stolen during post-discharge road carriage in Belgium. The bill extended COGSA's application to the pre-tackle and post-tackle periods, "except as otherwise provided herein". Another clause in the same bill stipulated that each stage of the transport would be "... governed according to any law and tariffs applicable to such stage". The Second Circuit interpreted these clauses to mean that: "... COGSA applies by contract to the overland portion of the carriage only to the extent that no other law is directed specifically at this portion of the carriage". In this case, because the CMR Convention<sup>80</sup> on road carriage, ratified by Belgium, had the force of law there, that Convention (rather than COGSA) was the law applicable to the relevant stage of transport when the theft happened.<sup>81</sup>

<sup>74</sup> *Leather's Best v. S.S. Mormaclynx* 451 F.2d 800 at p. 807, 1971 AMC 2383 at p. 2390 (2 Cir. 1971); *B. Elliott (Canada) Ltd. v. John T. Clark & Son* 704 F.2d 1305 at p. 1307, 1983 AMC 1742 at p. 1744 (4 Cir. 1983); *Mori Seki USA, Inc. v. M.V. Alligator Triumph* 990 F.2d 444 at p. 447, 1993 AMC 1521 at p. 1523 (9 Cir. 1993); *Hartford Fire Ins. Co. v. The OOCL Bravery* 230 F.3d 549 at p. 557, 2001 AMC 25 at p. 33 (2 Cir. 2000); *Fireman's Fund Ins. Co. v. Tropical Shipping & Construction Co. Ltd.* 254 F.3d 987 at p. 995, 2001 AMC 2474 at p. 2482 (11 Cir. 2001).

<sup>75</sup> 855 F.2d 215, 1989 AMC 748 (5 Cir. 1988).

<sup>76</sup> [1969] 2 Ex. C.R. 261, [1969] 2 Lloyd's Rep. 277; upheld in the Supreme Court of Canada, [1974] S.C.R. 933, (1973) 37 D.L.R. (3d) 545, [1973] 2 Lloyd's Rep. 469, [1974] ETL 45. See also *Hoegh v. Green Truck Sales Inc.* 298 F.2d 240, 1962 AMC 431 (9 Cir. 1962).

<sup>77</sup> See also *Goodwin Ferreira v. Lamport & Holt* (1929) 34 Ll. L. Rep. 192.

<sup>78</sup> In *Federal Ins. Co. v. American Export Lines* 113 F. Supp. 540, 1953 AMC 1330 (S.D.N.Y. 1953), a clause extended the application of COGSA to before loading and after discharge and through the entire time the goods were in the carrier's custody. Another clause in the bill, however, specifically stipulated that COGSA did not apply during lighterage. Damage occurred during lighterage and the Court, applying the maxim that the particular excludes the general, held that COGSA's one year delay for suit did not govern.

<sup>79</sup> 230 F.3d 139 549, 2001 AMC 25 (2 Cir. 2000).

<sup>80</sup> The International Convention on the Contract for the International Carriage of Goods by Road, adopted May 19, 1956, 399 U.N.T.S. 189, commonly known as the "CMR Convention".

<sup>81</sup> 230 F.3d 549 at pp. 558-559, 2001 AMC 25 at pp. 35-36 (2 Cir. 2000).

The American *Harter Act*<sup>82</sup> and the French Law of June 18, 1966<sup>83</sup> are national residuary laws which apply to the periods (including after discharge and before loading) when the international conventions do not have effect by their own force.<sup>84</sup> This gives clarity to the law of the total contract of carriage. Such clarity is not found in Canada and other countries which have no such special act applying before loading or after discharge.

If there is no local statute governing after discharge or its provisions are not proven, then the after-discharge clauses of the bill of lading apply insofar as they are permissible under the applicable general law.<sup>85</sup>

### 15) During transshipment - through bill of lading

It was held in *Captain v. Far Eastern Steamship Co.*<sup>86</sup> that, although the Hague Rules were incorporated by reference into a contract of carriage from Madras via Singapore to Vancouver, the Rules did not apply whilst the goods were ashore during transshipment in Singapore.

*Captain v. Far Eastern Steamship Co.* was, however, distinguished by Bingham J. in *Mayhew Foods v. O.C.L.*<sup>87</sup> who pointed out that the shipper in *Captain* had been told that there would be a transshipment and separate bills of lading had been issued for the two legs of the journey. In *Mayhew Foods*, however, frozen chicken was shipped from a U.K. port, then discharged and stored for almost a week at Le Havre before being loaded on board another ship for carriage to Saudi Arabia. Bingham J., referring to Devlin J.'s judgment in *Pyrene*, emphasized that the rights and liabilities under the Rules attached to the contract of carriage. While sect. 1(3) of the 1971 *Carriage of Goods by Sea Act* made the Rules inapplicable to inland transport prior to shipment on board a vessel, the Rules did apply from the time of shipment at a U.K. port until discharge at the port of destination, even if, before arrival at destination, the goods were discharged and stored on

<sup>82</sup> 46 U.S. Code Appx. 190-196. *Home Ins. Co. v. Puerto Rico Maritime Shipping Auth.* 524 F. Supp. 541, 1982 AMC 1897 (D.P.R. 1981).

<sup>83</sup> Law No. 66-420 of June 18, 1966. See art. 16 of the Law, which sets out its field of application. See also *Cour de Cassation*, November 24, 1975, DMF 1976, 403.

<sup>84</sup> *Uncle Ben's Int'l Div. Of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft* 855 F.2d 215 at p. 217, 1989 AMC 748 at pp. 750-751 (5 Cir. 1988); *Sabah Shipyards v. M/V Harbel Tapper* 178 F.3d 400 at p. 407, 2000 AMC 163 at pp. 170-171 (5 Cir. 1999), cert. denied, 528 U.S. 1048 (1999).

<sup>85</sup> *Cour d'Appel de Rouen*, April 20, 1978, DMF 1979, 538. See also *Cour d'Appel d'Aix*, December 7, 1979, DMF 1980, 726.

<sup>86</sup> (1979) 97 D.L.R. (3d) 250 at p. 262, [1979] 1 Lloyd's Rep. 595 at p. 602, 1978 AMC 2210 at p. 2223, [1978] ETL 651 at p. 667.

<sup>87</sup> [1984] 1 Lloyd's Rep. 317 at p. 320. In *Ryoden Machinery v. Anders Maersk* 1986 AMC 1269 (Sup. Ct. of Hong Kong 1986), a bill of lading was issued in respect to carriage between Baltimore and Shanghai. Pursuant to the carrier's rights under the bill, the cargo was transhipped in Hong Kong and then lost during the voyage from Hong Kong to Shanghai. The cargo owners, seeking to benefit from a higher limit of liability, argued that Hong Kong was the port of shipment and that therefore the Hague/Visby Rules applied by art. 10(b). The Court, however, held that on the basis of the contract of carriage evidenced by the bill of lading the port of shipment was Baltimore; no reference was ever made to Hong Kong in the bill. Following Bingham J. in *Mayhew Foods*, the Court looked to the contract of carriage itself and where the bill of lading was issued, rather than the place where the cargo was loaded on the actual carrying vessel, in order to determine the applicable law. Thus COGSA was applied.

land for transshipment, since such operations were “in relation to and in connection with the carriage of goods by sea” in a ship.

In *Ryoden Machinery Co. Ltd. v. Owners of the Ship Anders Maersk*,<sup>88</sup> boilers were shipped from Baltimore to Shanghai under a bill of lading invoking U.S. COGSA and authorizing transshipment, which occurred in Hong Kong. The Hong Kong Supreme Court, citing *Mayhew Foods*, found that because “transshipment” was not synonymous with “shipment”, the transshipment did not subject the Hong Kong/Shanghai leg of the voyage to Hong Kong’s Hague/Visby Rules, applicable to outbound shipments from Hong Kong. Hence the lower COGSA package limitation under the bill of lading continued to govern in respect of the loss of one boiler during that final leg of the voyage.

## 16) Contracts other than contracts of carriage

Many contracts appear at first glance to be contracts of carriage when in reality they are something else, such as contracts of towage or contracts of construction or even charterparties. All the details and circumstances of the contract must be studied before any conclusion can be reached.<sup>89</sup>

### a) Contract of towage

At times it is difficult to distinguish between a contract of carriage and a contract of towage.<sup>90</sup> The exact nature of the contract in each case will depend on all the facts, on the intention of the parties, and usually on whether or not a bill of lading has been issued.<sup>91</sup> It is interesting that the U.S. Supreme Court's decision in *Bisso*<sup>92</sup> disallowed the

<sup>88</sup> 1986 AMC 1269 (Hong Kong S.C. 1986).

<sup>89</sup> *C.G.E. v. Les Armateurs du St-Laurent Inc.* [1977] 2 F.C. 503, where the Federal Court of Appeal held that it was impossible to discover upon a motion whether the document in question was a bill of lading or a non-negotiable receipt and in any case its relationship to the contract of carriage. Only at trial would all the facts be available, reversing [1977] 1 F.C. 215.

<sup>90</sup> In *Miss. Valley Barge Line v. T.L. James & Co.* 244 F.2d 263, 1957 AMC 1647 (5 Cir. 1957), a common carrier by water, holding an I.C.C. certificate, contracted to transport a barge supplied with cargo; the contract was held not to be a contract of “affreightment” but a contract of towage. Thus, the *Harter Act* (this was a case of inland transport) did not apply. See *Sacramento Navigation Co. v. Salz* 273 U.S. 326, 1927 AMC 397 (1927); *Cornell Steamboat Co. v. U.S.* 321 U.S. 634, 1944 AMC 344. See also *In re: O'Donnell* 26 F.2d 334, 1928 AMC 988 (2 Cir. 1928). See generally Tetley, “Tug and Tow (A Comparative Study – Common Law/Civil Law-U.S., U.K., Canada and France) 1991 *Il Diritto Marittimo* 893-923.

<sup>91</sup> *Tribunal de Commerce du Havre*, November 12, 1957, DMF 1958, 166, where it was held that, although the parties wanted a contract of towage, the internal French Law of April 2, 1936 (as it then was) embodying the Hague Rules applied on every occasion a bill of lading was issued. See also *Consolidated Mining and Smelting Co. v. Straits Towing Ltd.* [1972] F. C. 804: the Hague Rules were applied to carriage by a barge where a bill of lading had been issued. In *Cie Wilfrid Allen Ltife v. Rail and Water Terminal (Quebec) Inc.* [1980] C.S. 994 at p. 1002, it was held that, in the absence of a bill of lading, the Hague Rules were not applicable to the contract of towage. See also *Hercules, Inc. v. Stevens Shipping Co.* 698 F.2d 726 at pp. 736-739, 1983 AMC 1786 at pp. 1801-1806 (5 Cir. *en banc* 1983); *D. & H. Lim. Procs.* 1994 AMC 2285 at p. 2292 (E.D. Va. 1993): “If the parties' basic intent was to contract for the transportation of the cargo, the contract is one of affreightment or transportation. Alternatively, if the parties' intent was to hire a boat to pull the barge, the contract is one of towage.”

incorporation of COGSA provisions into a towage contract limiting the tower's common law liability.<sup>93</sup>

***b) Carriage ancillary to another contract***

At times the carrier and the shipper have an additional relationship besides that of carrier and shipper. Again the exact relationship in respect to the actual carriage of goods must be looked at.<sup>94</sup>

***c) Bills of lading in a set***

On occasion, goods are to be carried in a series of shipments on different voyages by one or more ships. The individual shipments are subject to the Hague or Hague/Visby Rules if bills of lading are issued or intended, or if a charterparty is not the contract.<sup>95</sup> If a charterparty is the contract, the Hague or Hague/Visby Rules do not apply.

***d) Volume or tonnage contracts – « contrat de tonnage »***

An interesting debate has arisen in France over the juridical nature, of what are called volume or tonnage contracts or “*contrats de tonnage*”.<sup>96</sup>

In such a contract, an undertaking is made to transport<sup>97</sup> a certain amount of goods, usually measured in tons, during a period of time, which perhaps may span more than a year, by ships and other means usually to be designated later. The contract often begins inland and is multimodal in nature. Very often a freight forwarder is involved. The tonnage contract is therefore an “umbrella agreement”<sup>98</sup> which in fact constitutes a promise to conclude a number of contracts, either of carriage or charterparty, for the transportation of the goods to be shipped.

Is a tonnage contract subject to the law affecting charterparties or to the law governing bills of lading, i.e. the Hague or Hague/Visby Rules?

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<sup>92</sup> *Bisso v. Inland Waterways Corp.* 349 U.S. 85, 1955 AMC 899 (1955). See also *Hercules v. Stevens Shipping*, *supra*, 698 F. 2d at p. 730, 1983 AMC at p. 1791, where John R. Brown Ct. J., speaking for the majority of the Fifth Circuit Court of Appeals *en banc*, stated: “The Bisso doctrine, reduced to its simplest form, is a judicial rule, based on public policy, which generally invalidates contracts releasing towers from all liability for their negligence.”

<sup>93</sup> *Hercules v. Stevens Shipping*, *ibid.* 698 F.2d at pp. 738-739, 1983 AMC at pp. 1805-1806.

<sup>94</sup> *Sommer Corp. v. Panama Canal Co.* 329 F. Supp. 1187, 1972 AMC 453 (D. C.Z. 1971). The shipper had undertaken to do construction work for the carriers.

<sup>95</sup> Art. 2(4) of the Hamburg Rules is to this effect.

<sup>96</sup> Pierre Bouloy, *Le Contrat de Tonnage (Nouvelles et Informations)*, DMF 1980, 312; R. Rodière, *Le Contrat au Tonnage*, DMF 1980, 323. See also *Cour d'Appel de Rouen*, June 30, 1977, DMF 1978, 535.

<sup>97</sup> “Transport” is used here to cover both carriage of goods (under bills of lading) and affreightment (under charterparties).

<sup>98</sup> See Rêmond-Gouilloud, 2 Ed., 1993, at para. 463, who uses the term “*accord-gigogne*”. Rodière, 12 Ed., 1997 at para. 286-1, speaks of a “*contrat-cadre*” preparatory to other contracts, either of carriage or charterparty.

The answer depends, of course, on the particular terms of each such contract. It is therefore difficult, if not dangerous, to try to arrive at general rules particularly because the possible variations in the terms of such contracts can produce so many different kinds of agreement.<sup>99</sup>

Perhaps the most that can be said is that the tonnage contract will be subject to the normal common law or civil law of the place of contract (unless, of course, the parties have validly agreed upon some other law). If the tonnage contract has the characteristics of carriage of goods, it could be subject to the Hague Rules or Hague/Visby Rules, whereas a contract having the characteristics of an affreightment it will be subject to the law of charterparties.<sup>100</sup>

The individual shipments on particular ships, however, will be treated as either carriage of goods (under bills of lading) or affreightment (under charterparties) depending on the particular agreement entered into for that particular shipment.<sup>101</sup>

Very often in tonnage contracts the shipper and the consignee indicated on the bill of lading are the same person and rarely is the bill intended to be negotiated to a third party.<sup>102</sup> The bill in such cases may very well constitute merely a receipt. Thus the issue of a bill of lading in a tonnage contract is by no means conclusive as to whether the contract is one of carriage or of affreightment.<sup>103</sup> Nor are judges bound by the terms used by the parties to characterize their contract. The problem is not dissimilar to the law affecting booking notes.<sup>104</sup> Booking notes form part of the contract of carriage along with the bill of lading, the carrier's tariff, the oral arrangements, etc.<sup>105</sup> Once, however, a bill of lading is transferred to a third party who relies on it, then the bill of lading may well be the sole contract.<sup>106</sup>

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<sup>99</sup> Rodière, *supra*, DMF 1980, 323 attempts to define three broad classifications of volume contracts.

<sup>100</sup> In *Cour d'Appel d'Aix*, April 19, 1984, DMF 1985, 216, with note by R. Achard, the Court noted that, while the shipowner was committed to providing a certain number of vessels, the shipper determined the ports of final destination, arranged for stowage, discharge and stevedoring, fixed the number of lay days and calculated the demurrage. Taking all these factors together, the Court held that the contract in question was not one of carriage but of affreightment. See *Cour de Cassation*, January 29, 1985, DMF 1985, 400; *Chambre arbitrale maritime de Paris*, December 10, 1984, sentence 552, DMF 1985, 310; *Cour d'Appel de Montpellier*, September 17, 1981, DMF 1983, 186. See also Bonassies, *Le Droit positif français en 1985*, para. 32, DMF 1986, at pp. 72-73. See also *Cour d'Appel de Versailles*, December 10, 1986, DMF 1988, 748, where the tonnage contract was found to have most of the characteristics of a voyage charterparty, the shipowner's obligation being to provide a vessel of a certain capacity. See Bonassies, *Le droit positif français en 1988*, DMF 1989, no. 57, p. 147.

<sup>101</sup> See Rodière & du Pontavice, 12 Ed., 1997 at para. 286-1.

<sup>102</sup> Pierre Bouloy, *supra*, DMF 1980 at pp. 315-318.

<sup>103</sup> See also Rodière, *Traité, Affrètements & Transports*, tome 2, para. 447.

<sup>104</sup> See R. Rodière and A. Chao, *La Booking Note*, DMF 1971, 579; Hervé Tainturier, *Note de Synthèse: La Booking Note*, DMF 1986, 143. See also *Cour d'Appel de Rouen*, March 14, 1985, DMF 1986, 153. See also *Hellenic Lines v. U.S.A.* 512 F.2d 1196 at pp. 1207 *et seq.*, 1975 AMC 697 at pp. 711 *et seq.* (2 Cir. 1975) and case comment by Pierre Bonassies, *États-Unis d'Amérique: jurisprudence 1974-1978*, DMF 1979, 610-612.

<sup>105</sup> *The Ardennes* [1951] 1 K. B. 55, (1950) 84 Ll. L. Rep. 340; see also *The Uhenbels* [1986] 2 Lloyd's Rep. 294 at p. 299.

<sup>106</sup> The presence of a superseding clause will also complicate the result.

Increasingly, however, the tonnage contract is being viewed in France as a contract of voyage charterparty, the principal object of which is to make available to a shipper one or more identified (or identifiable) ships, in order to transport a fixed or determinable quantity of goods on a determined route. This analysis is supported by the fact that in most cases the parties to such a contract are companies of relatively equal bargaining power, who do not usually require the protection of compulsory legislation intended to protect smaller shippers shipping goods under a contract of carriage.<sup>107</sup>

## V. Application of National Statutes

### 1) Introduction

It is a general principle of private international law that the foreign law of a contract, where it is expressly or implicitly chosen by the contracting parties or is the law with which the contract has the “closest and most real connection” or “most significant relationship”,<sup>108</sup> will be applied by local courts:

- (1) if the foreign law is substantive rather than procedural;<sup>109</sup>
- (2) if the foreign law does not violate public order (in civil law jurisdictions) or public policy<sup>110</sup> (in common law jurisdictions) or any mandatory rules of the forum;<sup>111</sup>
- (3) if the resort to foreign law is not intended as an evasion of local law or jurisdiction.<sup>112</sup>

Many Hague Rules nations nevertheless are reluctant to apply any law of carriage of goods by sea but their own, unless the foreign package limitation is higher.

The Visby Rules changed the application of the Hague Rules in three ways. First, the package limitation under Visby is higher than U.S. \$500.00 and Visby provides a per kilo as well, which latter limitation can be very high. Secondly, the Visby Rules apply by force of law and often inwards and outwards. Thirdly, the package and kilo limitations under Visby are uniform, being in poincaré gold francs (or in SDR's. in the case of those nations which have adopted the 1979 Protocol to the Hague/ Visby Rules). In contrast to

<sup>107</sup> See *Cour d'Appel de Versailles*, December 10, 1986, DMF 1988, 748; Rémond-Gouilloud, 2 Ed., 1993, paras. 463-464. See also Vialard, 1997, at para. 389, who refers to the tonnage contract as one which “évolue aux frontières du contrat d'affrètement au voyage” (“evolving on the frontiers of the voyage charterparty”).

<sup>108</sup> See Tetley, *Int'l Conflict*, 1994 at pp. 10-11 and 230-233; Dicey & Morris, *The Conflict of Laws*, (L. Collins, gen. ed.), 13 Ed., Sweet & Maxwell, London, 2000, Rules 173(1) and (2) and 174(1) to (4); Restatement (Second) of the Conflict of Laws, American Law Institute, May 23, 1969, sects. 187 and 188; Rome Convention 1980, arts. 3(1) and 4(1); Québec Civil Code 1994, arts. 3111 and 3112.

<sup>109</sup> On the awkward and outmoded distinction between “substance” and “procedure” in traditional conflict of law theory, see Tetley, *Int'l Conflict*, 1994, Chap. III at pp. 45-68.

<sup>110</sup> On the public order/public policy exception in the private international law of civilian and common law jurisdictions and in the Rome Convention 1980, see Tetley, *Int'l Conflict*, 1994, Chap. V at pp. 95-123.

<sup>111</sup> On mandatory rules generally, see Tetley, *Int'l Conflict*, 1994, Chap. V at pp. 124-133, including a discussion of “obligatory forum court statutes”, a particular type of mandatory rules of the forum.

<sup>112</sup> On evasion of the law/ *fraude à la loi* generally, see Tetley, *Int'l Conflict*, 1994, Chap. VI at pp. 135-172.



the Hague Rules limitation which varies from nation to nation, the Visby Rules have done away with much of the conflict of laws arising from the Hague Rules.

## 2) The United States

The United States, which has a high Hague Rules package limitation, has been especially reluctant to apply foreign law. At times, American public policy would seem to require the protection of the rights of the shipper as opposed to those of the carrier (which latter is often a foreign steamship company). In *Blanchard Lumber Co. v. S.S. Anthony II*,<sup>113</sup> Levet, D.J. stated:

“... 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, evidenced by both the Harter Act and the Carriage of Goods by Sea Act, may be maintained.”

Levet, D.J. believed that applying Canadian law (which was the proper law of the contract) would make the demise clause valid and would relieve the charterer from liability for negligence, contrary to American law. American law was therefore applied and, as the case was concerned with authorized deck carriage, the *Harter Act* controlled.

COGSA<sup>114</sup> and the *Harter Act*<sup>115</sup> apply *outwards* from U.S. ports<sup>116</sup> as well as *inwards*,<sup>117</sup> unlike the 1924 Brussels Convention on Bills of Lading (the Hague Rules), which apply outwards only, and unlike the corresponding legislation of most countries of the world.<sup>118</sup> The inwards application of COGSA to bill of lading contracts made outside the United States for carriage to the United States is unfortunate and chauvinistic. 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). The consequences are even more incongruous now that most shipping nations have adopted the Visby Rules. Shipments to the U.S. from a Hague/Visby nation may be subject to two compulsory regimes: the Hague/Visby Rules and COGSA. One District Court has characterized this situation as a “legal Gordian

<sup>113</sup> 259 F. Supp. 857 at p. 865, 1967 AMC 103 at p. 115, [1966] 2 Lloyd's Rep. 437 at p. 444 (S.D.N.Y. 1966).

<sup>114</sup> See the preamble to COGSA, which states that the statute governs the “carriage of goods by sea *to or from* ports of the United States...” (emphasis added). See also sect. 13, being 46 U.S. Code Appx. 1312.

<sup>115</sup> At sects. 2, 3 & 4, being 46 U.S. Code Appx. 190, 191, 192 & 193. See *Knott v. Botany Mills* 179 U.S. 69 at pp. 74-77 (1900). See also *Blanchard Lumber Co. v. S. S. Anthony II* 259 F. Supp. 857 at p. 865, 1967 AMC 103 at p. 115, [1966] 2 Lloyd's Rep. 437 at p. 444 (S.D. N.Y. 1966).

<sup>116</sup> In *Shackman v. Cunard White Star* 31 F. Supp. 948, 1940 AMC 971 (S.D. N.Y. 1940), a United States District Court held that COGSA is a part of the terms of every outward bill of lading, even if not incorporated by reference.

<sup>117</sup> In *Kurt Orban Co. v. S.S. Clymenia* 318 F. Supp. 1387, 1971 AMC 778 (S.D. N.Y. 1970), COGSA was held to govern a shipment inbound from Australia to the United States, although the bill of lading was issued in Australia and referred to the Australian *Sea-Carriage of Goods Act, 1924*. The District Court's application of COGSA thereby overrode the Australian Act and specifically its sect. 9, which made Australian law compulsory.

<sup>118</sup> Belgium, which has adopted the Visby Rules, is an exception.

knot”, and has seemingly approved of this chauvinistic legislation, stating: “Congress, however, *per proprium vigorem maiorem*, has cut it effortlessly and with aplomb – United States courts must apply COGSA, when its terms so require, regardless where bills of lading were issued or when carriage began.”<sup>119</sup>

This conflict of laws dilemma “bites” with telling effect in respect of the differing limitations of liability of the carrier under the two regimes. In *Sunds Defibrator v. Atlantic Star*,<sup>120</sup> for example, the U.S. court docilely applied COGSA and the \$500 package limitation, although the shipment was from Sweden where the package and kilo limit of Visby are higher. The U.S. Court refused to recognize the substantive law (the Hague/Visby Rules) of the place of the bill of lading contract and the place of shipment (Sweden). The Court also refused to recognize the “force of law” nature of the Visby Rules.

Nevertheless, American courts, to their credit, have begun to give effect to the higher Visby package and kilo limitations in respect of cargo inbound to the U.S. from Hague/Visby Rules nations. American judges have begun to realize that although U.S. COGSA is compulsorily applicable to inbound shipments to America, the statute itself (like the Hague Rules on which it is modelled), permits the parties to the contract of carriage to agree on higher limitations than COGSA provides for and generally to increase the carrier’s responsibilities and liabilities above COGSA levels.<sup>121</sup> This understanding has permitted the higher Visby limitations to be applied to contracts for carriage of goods by sea to the U.S. in two main categories of case: a) where the bill of lading has made the Hague/Visby Rules applicable;<sup>122</sup> and/or b) where the bill of lading

<sup>119</sup> *Acciai Speciali Terni USA, Inc. v. M/V Berane* 182 F. Supp.2d 503 at p. 506, 2002 AMC 519 at p. 522 (D. Md. 2002), citing *Farrell Lines Inc. v. Columbus Cello-Poly Corp.* 32 F. Supp.2d 118 at p. 128, 1998 AMC 334 at p. 345 (S.D. N.Y. 1997), *aff’d sub nom. Farrell Lines Inc. v. Ceres Terminals, Inc.* 161 F.3d 115, 1999 AMC 305 (2 Cir. 1998); and *Rockwell Int’l Corp. v. S/S Koeln Express* 1987 AMC 2537 at p. 2539 (D. Md. 1987).

<sup>120</sup> 1986 AMC 368 (S.D. N.Y. 1983). See also *I.N.A. v. The Sealand Developer* 1990 AMC 2967 (S.D. N.Y. 1989);

<sup>121</sup> See U.S. COGSA, 46 U.S.C. Appx. 1304(5), second para., and 1305, reflecting respectively arts. 4(5), third para., and art. 5 of the Hague Rules 1924. In at least one decision, the higher Visby limits were declared applicable, not on the basis of these COGSA provisions, but simply because they were mandatory under the law of the port of shipment and therefore pre-empted COGSA under a clause in the bill of lading which nullified any other provision of the bill that was invalid under such a compulsorily applicable law, to the extent of the invalidity. See *Konica Business Machines U.S.A., Inc. v. Intransit Container, Inc.* 1997 AMC 2685 at pp. 2690-2691 (Mass. Supr. Ct. 1996).

<sup>122</sup> See, for example, *Daval Steel Prods. v. M/V Acadia Forest* 683 F.Supp. 444 at p. 447, 1988 AMC 1669 at p. 1673 (S.D.N.Y. 1988); *Associated Metals & Minerals Corp. v. M/V Arktis Sky* 1991 AMC 1499 (S.D. N.Y. 1991); *Tuxpan Lim. Procs.*, 765 F. Supp. 1150, 1991 AMC 2432 (S.D. N.Y. 1991); *Francosteel Corp. v. M/V Deppe Europe* 1990 AMC 2962 (S.D. N.Y. 1990); *Assoc. Metals & Minerals v. The Arktis Sky* 1991 AMC 1499 (S.D. N.Y. 1991). Summary judgement granted for defendant, 1992 AMC 1217 (S.D. N.Y. 1992), reversed on other grounds 978 F. 2d 47, 1993 AMC 509 (2 Cir. 1992); *Ilva U.S.A v. M/V Botic* 1993 AMC 240 (E.D. Pa. 1992), *aff’d* 998 F. 2d. 1003, 1993 AMC 2445 (3 Cir. 1993); *Francosteel Corp. v. M/V Pal Marinos* 885 F.Supp. 86 at p. 90, 1995 AMC 2327 at p. 2330 (S.D. N.Y. 1995); *J.C.B. Sales v. M/V Seijin* 921 F. Supp. 1168, 1996 AMC 1507 (S.D.N.Y. 1996), *aff’d* 124 F.3d 132, 1997 AMC 2705 (2 Cir. 1997); *Itel Container v. M/V Titan Scan* 1997 AMC 1568 (S.D. Ga. 1996), *aff’d in part, reversed in part*, 139 F.3d 1450, 1998 AMC 1965 (11 Cir. 1998), cert denied sub nom. *Mammoet Shipping B.V. v. Sky Shipping Ltd.* 525 U.S. 962, 1999 AMC 2999 (1998); *MacSteel Int’l USA Corp. v. M/V Ibn Abdoun* 154 F.

has contained confusing or ambiguous paramount clauses, thus permitting the court to apply the *contra proferentem* rule of statutory construction against the carrier who drafted the bill and in favour of the cargo interests subjected to it.<sup>123</sup> Ambiguity in the bill of lading is sometimes resolved in favour of the application of COGSA, however.<sup>124</sup>

When COGSA applies by its own force, it of course supersedes statutes enacted by the American states,<sup>125</sup> and the common law.<sup>126</sup>

### 3) The United Kingdom

The United Kingdom adopted the Hague/Visby Rules by the *Carriage of Goods by Sea Act 1971*<sup>127</sup> which came into force on June 23, 1977<sup>128</sup> and at the same time repealed the *Carriage of Goods by Sea Act 1924*.<sup>129</sup> The 1971 Act applies to all bills of lading issued in the United Kingdom or to any bill of lading issued in any Visby Rules

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Supp. 2d 826 at p. 831, note 7, 2001 AMC 2841 at p. 2846, note 7 (S.D. N.Y. 2001). But see also *Nippon Fire & Marine Ins. Co. v. M.V. Tourcoing* 167 F.3d 99 at p. 102, 1999 AMC 913 at p. 916 (2 Cir. 1999), where because the bill of lading on a shipment from Japan to the U.S. called for U.S. COGSA, the Court ignored the mandatory character of the Japanese Hague/Visby Rules and applied COGSA.

<sup>123</sup> See, for example, *Daval Steel Products v. M/V Acadia Forest* 683 F.Supp. 444 at p. 447, 1988 AMC 1669 at p. 1672 (S.D. N.Y. 1990); *Francosteel Corp. v. M/V Deppe Europe* 1990 AMC 2962 at p. 2967 (S.D. N.Y. 1990); *Francosteel Corp. v. M/V Pal Marinos* 885 F. Supp. 86 at pp. 89-90, 1995 AMC 2327 at pp. 2329-2330 (S.D. N.Y. 1995); *Konica Business Machines U.S.A., Inc. v. Intransit Container, Inc.* 1997 AMC 2685 at p. 2691 (Mass. Supr. Ct. 1996). *Contra proferentem* was not invoked to support the higher Visby limits in *Francosteel Corp. v. M/V Kapetan Andreas G* 1993 AMC 1924 (S.D. N.Y. 1993), or in *Acciai Speciali Terni USA, Inc. v. M/V Berane* 2002 AMC 519 (D. Md. 2002), however.

<sup>124</sup> See *Valmet Materials v. Nedlloyd* 1993 AMC 1243 at p. 1245 (M.D. Fla. 1993), where COGSA was invoked by a paramount clause in the bill of lading and was applied to a shipment from Finland (a Hague/Visby state) to the U.S., despite another clause in the same bill of lading which invalidated any provision of the bill inconsistent with a law that could not be departed from by contract. As a consequence, the COGSA package limitation, rather than the higher Hague/Visby package/kilo limitations were applied. But see also *Konica Business Machines U.S.A., Inc. v. Intransit Container, Inc.* 1997 AMC 2685 at pp. 2690-2691 (Mass. Supr. Ct. 1996), where a similar inconsistency clause in a bill of lading covering a shipment from Japan (a Hague/Visby state) to the U.S. was held to override another clause in the bill limiting the carrier's liability for loss or damage to the \$500 U.S. COGSA package limitation.

<sup>125</sup> *Varian Assoc. v. C. G. T.* 1980 AMC 450 at p. 458 (State of Cal. Ct. of Appeal 1979); see, however, *Colgate Palmolive v. Dart Canada* 724 F.2d 313, 1984 AMC 305 (2 Cir. 1983), cert. denied *sub nom. Global Terminal & Container Services, Inc. v. Colgate Palmolive Co.* 466 U.S. 963, 1984 AMC 2402 (1984).

<sup>126</sup> *Ibid.* See also *Crispin Co. v. Lykes Bros. Steamship Co.* 134 F. Supp. 704 at p. 706, 1955 AMC 1613 at p. 1616 (S.D. Tex. 1955); *B.F. McKernin & Co. v. U.S. Line* 416 F. Supp. 1068 at p. 1071, 1976 AMC 1527 at pp. 1529-1530 (S.D.N.Y. 1976); *National Automotive Publications v. United States Lines* 486 F. Supp. 1094 at pp. 1099 and 1101-1102, 1982 AMC 2299 at pp. 2304 and 2305-2306 (S.D.N.Y. 1980); *St. Paul Fire & Marine Ins. v. Marine Transp. Serv. Sea-Barge Group, Inc.*, 727 F.Supp. 1438 at p. 1442 (S.D. Fla. 1989). See also *Expeditors International of Washington, Inc. v. Crowley American Transport, Inc.* 117 F. Supp.2d 663 at p. 667, 2001 AMC 518 at p. 521 (S.D. Ohio 2000): "When COSGA is applicable, no remedy exists under state law or general maritime law for breach of contract, negligence, or conversion."

<sup>127</sup> 1971 U.K. c. 19.

<sup>128</sup> U.K. Statutory Instrument, 1977 No. 981, *Carriage of Goods by Sea Act 1971 (Commencement) Order 1977*.

<sup>129</sup> (1924) 14 & 15 Geo. 5, c. 22.

contracting state. Sect. 1(6)(b) makes a non-negotiable receipt (waybill) subject to the Rules by force of law if:

- (a) it is marked non-negotiable;
- (b) it constitutes a contract of carriage of goods by sea, and
- (c) it contains an express provision that the Rules are to govern as if the receipt were a bill of lading;<sup>130</sup>

United Kingdom courts at times recognize the foreign law of carriage of goods by sea.<sup>131</sup> In *The River Gurara*,<sup>132</sup> for example, Colman, J. applied the Hague Rules, in force under legislation at various West African ports, and as incorporated in standard-form bills of lading of the shipping line in question. As a result, a certain clause of these bills, which effectively lessened the carrier's liability contrary to the Rules by redefining "package", was struck down as invalid under art. 3(8). In *The Chanda*,<sup>133</sup> the Hague Rules of the West German Commercial Code, incorporated by reference in a bill of lading covering the shipment of an asphalt drying and mixing plant from Germany to Saudi Arabia, were applied by Hirst, J. to break the then German package limitation of 1,250 DM, where the plant's control cabin, containing delicate electronic and computerized equipment, was damaged during a storm at sea, as a result of its unauthorized deck carriage and inadequate lashing.

In *The Morviken*,<sup>134</sup> however, a case involving a shipment from the U.K. to which the Hague/Visby Rules compulsorily applied, the House of Lords refused to give effect to a clause in the bill of lading which made Dutch law (and therefore the Hague Rules) the proper law of the contract of carriage, because to have done so would have lessened the carrier's liability under the Hague/Visby Rules and thereby contravened art. 3(8).

In *The Benarty*,<sup>135</sup> on the other hand, the Court permitted a transfer of the suit to Djakarta, resulting in the carrier being able to lessen his liability below the amount provided under English law. Though the damaged cargo had been shipped from London (and continental European ports), the Court held that the transfer of jurisdiction resulting in a decreased liability did not contravene art. 3(8) of the Hague/Visby Rules because the carrier was seeking to rely on a statute limiting the shipowner's liability based on tonnage, not a package limitation. Since art. 8 of the Hague/Visby Rules used the words

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<sup>130</sup> See *The European Enterprise* [1989] 2 Lloyd's Rep. 185 at p. 189 (per Steyn, J.). On this point, Steyn, J. disagreed with the earlier decision of Lloyd, J. in *The Verschroon* [1982] 1 Lloyd's Rep. 301 at pp. 304-305. Steyn, J.'s position is questioned by Wilson, 4 Ed., 2001 at p. 189.

<sup>131</sup> In *Ocean S.S. Co. v. Queensland State Wheat Bd.* [1941] 1 K.B. 402, (1940) 68 Ll. L. Rep. 136, a shipment was carried from Australia to England and the bill of lading invoked English law. The English Court of Appeal held the clause invalid in the light of the Australian *Sea-Carriage of Goods Act, 1924*, sect. 9(1). See, however, the chauvinistic position taken by the Privy Council in *The Halcyon Isle* [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221, in respect of foreign maritime liens. See Tetley, *M.L.C.*, 1 Ed., 1985, chap. 29, "Conflict of Maritime Lien Laws"; Tetley, *Int'l Conflict* 1994, at pp. 569-573.

<sup>132</sup> [1996] 2 Lloyd's Rep. 53.

<sup>133</sup> [1989] 2 Lloyd's Rep. 494 at p. 505.

<sup>134</sup> [1983] 1 Lloyd's Rep. 1 at p. 6 (H.L.).

<sup>135</sup> [1984] 2 Lloyd's Rep. 244 (C.A.).

“any statute”, that article meant that an applicable foreign limitation of liability statute, such as the Indonesian Commercial Code, was not affected by the Hague/Visby Rules.

#### 4) France

France adopted the Hague Rules for *international* carriage by a law dated April 9, 1936,<sup>136</sup> amended by the Visby Rules 1968 on July 8, 1977<sup>137</sup> and the Visby S.D.R. Protocol 1979 on April 3, 1987.<sup>138</sup> International waybills are subject to the Hague/Visby Rules if the latter have been incorporated into the contract of carriage by a paramount clause.<sup>139</sup>

On April 2, 1936,<sup>140</sup> France adopted a law for *domestic* carriage. The Law of April 2, 1936 was replaced by the Law of June 18, 1966,<sup>141</sup> which applies to chartering and affreightment in general, as well as to the domestic carriage of goods by sea under bills of lading and similar documents of title. Domestic waybills (*lettres de transport maritime*) are also subject to the Law of June 18, 1966. The Law of June 18, 1966 was amended by the Law of December 21, 1979<sup>142</sup> and the Law of December 23, 1986<sup>143</sup> in order to comply with the Visby Rules 1968/1979.<sup>144</sup> The Law of June 18, 1966, as amended, applies, not just to the tackle-to-tackle period, but also before loading (from the time the carrier takes charge of the goods) and after discharge until delivery (art. 27).

The Law of June 18, 1966 also constitutes a residual regime for those cases where the international convention, adopted in 1936 and amended later in 1977, does not apply.<sup>145</sup> There is a great similarity between the *Harter Act* as a residual regime to COGSA in the U.S. and the Law of June 18, 1966 as the residual regime to the

<sup>136</sup> Law of April 9, 1936; Dalloz 1937.4.14. The Convention was promulgated by the Decree of March 25, 1937; Dalloz 1937.4.16.

<sup>137</sup> The Visby Protocol 1968 was ratified by France on March 10, 1977, came into force on June 23, 1977 and was published by Decree no. 77-809 of July 8, 1977 (J.O. July 20, 1977, p. 3839). The official French text of the Visby Rules 1968 is reproduced in DMF 1977, 614.

<sup>138</sup> The Visby S.D.R. Protocol 1979, in force internationally as of February 14, 1984, came into force for France on February 18, 1987 and was published by Decree no. 87-235 of April 3, 1987 (J.O., April 5, 1987, p. 3848). For the consolidated French text of the Hague Rules 1924, as amended by the Visby Protocol 1968 and the Visby S.D.R. Protocol 1979, see DMF 1987, 562.

<sup>139</sup> See chap. 45, “Waybills”. See Rodière, *Traité, Affrètements et Transports, Mise à jour 1978*, para. 743 bis; P.Y. Nicholas, *supra*, DMF 1982, 579 at p. 583. See also Cour *dAppel de Toulouse*, May 13, 1977, DMF 1977, 721, where the Law of June 18, 1966 was held to apply rather than the international convention.

<sup>140</sup> Law of April 2, 1936; Dalloz 1937.4.1.

<sup>141</sup> Law no. 66-420 of June 18, 1966 (J.O. June 24, 1966, p. 5206) and Decree no. 66-1078 of December 31, 1966 (J.O. January 11, 1967, p. 483) and Decree no. 67-268 of March 23, 1967 (J.O. April 1, 1967, p. 3194), which latter decree fixed the per package limitation of liability.

<sup>142</sup> Law no. 79-1103 of December 21, 1979 (J.O. December 22, 1979, p. 3231).

<sup>143</sup> Law no. 86-1292 of December 23, 1986 (J.O. December 24, 1986, p. 15,542).

<sup>144</sup> Also Decree no. 79-1111 of December 21, 1979 (J.O. December 22, 1979, p. 3251), modifying the Decree of March 23, 1967 and establishing a higher per package and per kilo limitation of liability.

<sup>145</sup> See P.Y. Nicolas, «*Les règles de la Haye peuvent-elles encore s'appliquer aux transports internationaux de marchandises par mer stipulés au départ ou à destination des ports français?*» DMF 1982, 579 at p. 583.

international convention (the Hague/Visby Rules) in France. Both the *Harter Act* and the Law of June 18, 1966 apply from the period the carrier takes custody of the goods until proper delivery.

France being itself party to the Hague/Visby Rules, carriage from another Hague/Visby Rules state to France would be subject to those Rules in a French court, because, under the French Constitution of 1958, once France ratifies and publishes an international convention, the convention becomes part of French national law and prevails over any inconsistent provision of that law.<sup>146</sup> French judges are therefore bound to apply the Hague/Visby Rules where one or more of the conditions of application prescribed by art. 10 of the Rules exist; viz., where the bill of lading is issued in a Hague/Visby state, where the carriage is from such a state or where those Rules are incorporated by reference into the bill by a paramount clause. The Rome Convention on the Law Applicable to Contractual Obligations 1980,<sup>147</sup> binding on France and the other member states of the European Union, confirms this position, in providing that it "...shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party." (Rome Convention 1980, art. 21).

The Law of June 18, 1966 purports to apply to carriage to and from France where the contract is not subject to any international convention binding on France. Art. 16, first para., of that Law provides:

« Art. 16 Le présent titre est applicable *aux transports*, effectués au départ ou à destination d'un port français, qui ne sont pas soumis à une convention internationale à laquelle la France est partie et en tout cas aux opérations de transport qui sont hors du champ d'application d'une telle convention. » (Emphasis added).

(free translation)

« Art. 16 : This title is applicable to contracts of carriage, from or to a French port which are not subject to an international convention to which France is party and in any case to carriage operations which fall outside the scope of application of such a convention. » (Emphasis added)

Although art. 16, first para., of Law no. 66-420 has not been repealed, there is reason to believe that, as a conflicts rule, it may now be a "dead letter", in view of the coming into force in France on April 1, 1991 of the Rome Convention on the Law Applicable to Contractual Obligations 1980.<sup>148</sup> Under the Rome Convention 1980, which

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<sup>146</sup> By art. 58 of the Constitution of the Fifth Republic, treaties or agreements duly ratified or approved by France shall, upon their publication, have an authority superior to that of national laws, provided that the other contracting party or parties have implemented them. See Tetley, *Int'l Conflict*, 1994 at p. 104 and French authorities cited there.

<sup>147</sup> Adopted at Rome, June 19, 1980 and in force April 1, 1991 (EEC 80/934, O.J.E.C. October 9, 1980, No. L 266/1 to L 266/7).

<sup>148</sup> *Cour de Cassation*, February 2, 1999 (*The London Express*), DMF 2000, 132, report Rémy, observations P. Godin, perhaps the last French decision to apply art. 16 to an international carriage situation, under a contract concluded only a few days prior to the coming into force of the Rome

propounds uniform choice of law rules binding on all courts of European Union countries in contractual matters, contracts are governed by the law expressly chosen by the parties or the choice of which may be inferred from the terms of the contract and the circumstances of the case (art. 3(1)). Failing such an express or inferred choice, the contract is rebuttably presumed to be governed by the law with which it is most closely connected (art. 4(1)). By virtue of a special presumption, contracts for the carriage of goods are rebuttably deemed to be most closely connected with the country where the carrier has his principal place of business, provided that that country is also where the place or loading or of discharge or the principal place of business of the consignor is situated (art. 4(4)).<sup>149</sup> That presumption is disregarded, however, if the circumstances of the case as a whole indicate that the contract is more closely connected with another country (art. 4(5)).<sup>150</sup>

French courts, applying art. 3(1) of the Rome Convention 1980 on express choice of law, would therefore apply the Hague Rules to carriage from a Hague Rules country, because the paramount clause which bills of lading subject to these Rules must contain would constitute such an express choice.<sup>151</sup>

Carriage from a country not subject to either the Hague or Hague/Visby Rules would no longer be subject automatically to the French Law of June 18, 1966 by virtue of its art. 16. Rather, such a contract of carriage would be governed, as prescribed by the Rome Convention 1980, either by: a) the law specified by the parties (if any) (art. 3(1)); or b) the law inferred as applicable by the terms of the contract and the circumstances of the case (art. 3(2)); or c) the most closely connected law (art. 4(1)). The special presumption of art. 4(4) could be invoked in cases where its conditions were met. But that presumption could be overridden if the circumstances pointed to a more closely connected law (art. 4(5)).

Carriage from a country subject to the Hamburg Rules is discussed below.

### Summary - France

(1) The Hague/Visby Rules apply in France:

- a) when the bill of lading (or other contract of carriage) has been issued in France,  
or
- b) when it has been issued in any contracting state, or
- c) when the carriage is from a port in France or from any port in a contracting state, or

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Convention 1980 on April 1, 1991. The commentators stress that, for contracts concluded after that date, the Convention, rather than art. 16 of the 1966 Law, would govern the determination of the applicable law.

<sup>149</sup> See, for example, *Cour d'Appel de Paris*, September 9, 1999 (*The Bonastar II*), DMF 1999, 829, observations P.-Y. Nicolas.

<sup>150</sup> See R. Achard, "La Convention de Rome du 19 juin 1980", DMF 1991, 452 at p. 454; Tetley, *Int'l Conflict*, 1994 at p. 712.

<sup>151</sup> See commentary by P. Bonassies, DMF Hors série No. 5, 2001, no. 70 on the decision of the *Cour de Cassation*, December 2, 1999 (*The World Apollo*), DMF 2001, 308.

d) when the contract of carriage expressly incorporates the Hague/Visby Rules.

(2) France would apply the Hague Rules to carriage from a state that had adopted the Hague Rules, by virtue of the required Hague Rules paramount clause in the contract of carriage, and the Rome Convention 1980.

(3) The residuary Law of June 18, 1966 as amended would apply to all domestic contracts of carriage; it would therefore apply to:<sup>152</sup>

- a) carriage by sea where the port of loading and port of discharge are French and the shipper and the carrier are French;
- b) the periods in France before loading and after discharge carriage;<sup>153</sup>
- c) carriage where a bill of lading or similar document of title is neither issued nor contemplated;<sup>154</sup>
- d) carriage of live animals;
- e) carriage of goods on deck when such carriage is declared in the contract;<sup>155</sup>
- f) carriage of an extraordinary character, in the sense of art. 6 of the Hague Rules, where a non-negotiable receipt is issued and is so marked;

(4) International carriage where the bill of lading or similar document of title has been issued in a state which is not a “Contracting State” to the Hague or Hague/Visby or Hamburg Rules or where the goods have been shipped from such a state, would be governed by the law identified by applying the conflict of law rules found in the Rome Convention 1980, rather than by art. 16, first para., of the French Law of June 18, 1966, which prevailed prior to the coming into force of the Convention on April 1, 1991.<sup>156</sup>

(5) Furthermore, independently of any international character of the contract of carriage, French law will govern whatever conservatory or executory measures are to be taken against the cargo in France (art. 16, second para.), as well as the rules of prescription when the action is taken in France (art. 16, third para).

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<sup>152</sup> See chap. 45, “Waybills”. See Rodière, *Traité, Affrètements et Transports, Mise à jour 1978*, para. 743 bis; P.Y. Nicholas, *supra*, DMF 1982, 579 at p. 583. See also *Cour d’Appel de Toulouse*, May 13, 1977, DMF 1977, 721, where the Law of June 18, 1966 was held to apply rather than the international convention.

<sup>153</sup> *Cour d’Appel d’Aix*, May 18, 1973, DMF 1975, 308.

<sup>154</sup> *Cour d’Appel de Toulouse*, May 13, 1977, DMF 1977, 721.

<sup>155</sup> *Cour d’Appel de Paris*, May 26, 1978, *Bulletin des transports*, no. 1862, p. 188, with comment by Rodière.

<sup>156</sup> P. Bonassies, in *Le droit positif français en 1991*, DMF 1992, 3 at pp. 4-6, nevertheless argues that there may still be a narrow opening for the continued application of art. 16, first para., if the French judge, in an international case involving a shipment to or from France subject to no international convention binding on France decided that art. 16 constituted a mandatory rule of the French forum, within the meaning of art. 7(2) of the Rome Convention 1980, thus displacing the otherwise applicable foreign law designated by the conflict rules of the Convention. Such a position does not, however, appear to have been taken in French case law, however. See *Tribunal de Commerce de Paris*, September 23, 1999 (*The Bonastar II*), *Revue Scapel* 2000, 74, commentary P. Bonassies, DMF Hors série No. 5, 2001, no. 71 (Rome Convention applied to determine law applicable to bill of lading contract covering a shipment subject to neither the Hague, Hague/Visby nor Hamburg Rules).



## 5) Canada

Canada adopted the Hague Rules into national law in 1936 by the *Water Carriage of Goods Act*,<sup>157</sup> later known as the *Carriage of Goods by Water Act*.<sup>158</sup> The 1936 statute made the Hague Rules applicable in the Canadian coasting trade as well as also outbound from Canadian ports.<sup>159</sup>

In 1993, the Canadian Parliament enacted another *Carriage of Goods by Water Act*,<sup>160</sup> which repealed and replaced the 1936 Act and gave effect to the Hague/Visby Rules where they applied under their own art. 10,<sup>161</sup> as well as in the coasting trade,<sup>162</sup> all pending the coming into force in Canada of the Hamburg Rules.<sup>163</sup> The advisability of moving to the Hamburg Rules was to be determined by Parliament at five-year intervals, on the basis of a “consideration” of the question by the Minister of Transport of Canada, the submission of his report on the matter to both Houses of Parliament, the review of the report by the relevant Parliamentary committee, and a report by that committee back to the House of Commons, which would take the final decision.<sup>164</sup> The first such review process, which the statute required to be completed by December 31, 1999, led to the decision that Canada should continue to adhere to the Hague/Visby Rules, the international regime of cargo liability in force among the country’s major trading partners.<sup>165</sup>

In 2001, the *Marine Liability Act*<sup>166</sup> in turn repealed and replaced the 1993 statute.<sup>167</sup> Part 5 of the *Marine Liability Act*, entitled “Liability for Carriage of Goods by Water” (sects. 41-46), continues to give effect to the Hague/Visby Rules,<sup>168</sup> pending the coming into force of the Hamburg Rules,<sup>169</sup> while providing for further five-year reviews

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<sup>157</sup> S.C. 1936, c. 49. Canada, however, neither ratified nor acceded to the Brussels Convention of August 25, 1924.

<sup>158</sup> R.S.C. 1985, c. C-27 (repealed).

<sup>159</sup> *Ibid.*, sect. 2. See also *Brereton v. KLC Freight Services Ltd.* (1997) 115 O.A.C. 149 (Ont. C.J. Gen. Div.).

<sup>160</sup> S.C. 1993, c. 21, in force May 6, 1993.

<sup>161</sup> *Ibid.*, sect. 7(2)(a).

<sup>162</sup> *Ibid.*, sect. 7(2)(b).

<sup>163</sup> *Ibid.*, sect. 7(1) and (2) and Schedule I (giving the force of law to the Hague/Visby Rules) and sect. 8(1) and (2) and Schedule II (giving the force of law to the Hamburg Rules).

<sup>164</sup> *Ibid.*, sects. 4 and 5.

<sup>165</sup> In September 1999, the Ministry of Transport of Canada published a Consultation Paper, entitled “Carriage of Goods by Water Act (1993)” (No. TP 13476), recommending that Canada retain the Hague/Visby Rules until the next review period, ending by January 1, 2005, particularly because those Rules applied among most of Canada’s trading partners, and because a move to the Hamburg Rules (to which few major shipping nations had become party) was seen as likely to exacerbate the trend towards unilateral action by countries which had enacted their own, particular carriage of goods by sea legislation, thus making international uniformity of law in the field of marine cargo liability regimes more difficult to attain.

<sup>166</sup> S.C. 2001, c. 6, in force August 8, 2001.

<sup>167</sup> *Ibid.*, sect. 130.

<sup>168</sup> *Ibid.*, sects. 41, 43(1) and Schedule 3.

<sup>169</sup> *Ibid.*, sects. 41, 43(4), 45 and Schedule 4.

of the advisability of replacing the former Rules with the latter ones, this review to involve consideration by the federal Minister of Transport and the submission of a report setting out the results of the consideration to both Houses of Parliament. The first such review is to be completed no later than January 1, 2005.<sup>170</sup>

Canada's *Marine Liability Act*, at sect. 43(1), provides for the Hague/Visby Rules to have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in art. 10 of those Rules. Art. 10 makes those Rules apply to the carriage of goods by sea: a) from ports in Hague/Visby states, or b) under bills of lading issued in such states, or c) where the parties have incorporated those Rules by reference into their contract of carriage. Sect. 43(1) of the *Marine Liability Act* therefore gives the force of law to the Hague/Visby Rules in Canada, not only in respect of shipments under bills of lading and similar documents of title outbound from Canada, but also in respect of such shipments inbound to Canada from other Hague/Visby states,<sup>171</sup> as well as shipments between Hague/Visby states (other than Canada) and from Hague/Visby states to non-Hague/Visby states (e.g. the U.S.<sup>172</sup>). The same provision would also make the Rules compulsory in regard to shipments from non-Hague/Visby States under bills of lading issued in Hague/Visby States, and to bills of lading covering shipments between any states if the bills called for the Hague/Visby Rules or some national law making those Rules applicable.<sup>173</sup>

Sect. 43(3) of the *Marine Liability Act* defines "Contracting State" in art. 10 of the Hague/Visby Rules, so as to include Canada itself (which has never ratified or acceded to

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<sup>170</sup> *Ibid.*, sect. 44. It is interesting to compare these Canadian provisions with those in force in Australia. In its *Carriage of Goods by Sea Act 1991*, No. 160 of 1991 (Cth.) (in force October 31, 1991), Australia provided for the automatic coming into force of the Hamburg Rules within three years of entry into force of the statute, unless each House of the Australian Parliament in the meantime passed a resolution to the contrary, delaying the entry into force for three years more (see sects. 2(2), (3) and (5) of the 1991 Act as originally adopted). Such a resolution was passed in October 1994, delaying the coming into force of the Hamburg Rules until 1997. In that year, on the basis of a recommendation from the Cargo Liability Working Group, the 1991 Act was amended by the *Carriage of Goods by Sea Amendment Act 1997*, No. 123 of 1997 (Cth.) (in force September 15, 1997), followed by the *Carriage of Goods by Sea Regulations 1998*, Statutory Rule 174 of 1998 (in force July 1, 1998), under which the "Hamburg Rules trigger" was replaced by a system of periodic reviews similar to that provided for by Canada's former *Carriage of Goods by Water Act* of 1993 and its present *Marine Liability Act*. Should Australia not give the force of law to the Hamburg Rules according to that process by 2007, however, the provisions of the 1991 Act containing the Rules will be repealed. See *Carriage of Goods by Sea Act 1991*, sects. 2(3) and 2A, as amended by sect. 3 and Schedule 1 of the 1997 Act; Gaskell et al., 2000 at para. 1.13.

<sup>171</sup> See, for example, *Town Shoes Ltd. v. Panalpina Inc.* (1999) 169 F.T.R. 267 at p. 273 (Fed. C. Can.).

<sup>172</sup> See, for example, *Sidmar v. Fednav International Ltd.* [1996] ETL 794 (Fed. C. Can.), upheld (1997) 211 N.R. 143 (Fed. C.A.), leave to appeal to the Supreme Court of Canada denied, September 18, 1997, [1997] S.C.C.A. No. 227, where it was common ground between the parties that the Hague/Visby Rules, which were in force in Belgium, applied compulsorily, under Canada's *Carriage of Goods by Sea Act* of 1993 to a bill of lading for goods shipped from Belgium to the U.S.

<sup>173</sup> See, for example, *Thyssen Canada Limited v. Mariana Maritime S.A.* [2000] 3 F.C. 398 at p. 413, 2001 AMC 769 at p.777 (Fed. C.A.), application for leave to appeal dismissed with costs and without reasons, [2000] S.C.C.A. No. 257, November 9, 2000, where it was doubted (although not decided) that the Hamburg Rules of the country of shipment (Romania) could be the proper law of a bill of lading contract which expressly incorporated the terms of a voyage charterparty calling for the law of England, under which the Hague/Visby Rules apply compulsorily.

the Rules), as well as any state which is not a “Contracting States” in that formal sense, but which has nevertheless given the force of law (i.e. by national legislation) to the Brussels Convention 1924 and the Visby Protocol of 1968, regardless of whether such a state gives the force of law to the Visby S.D.R. Protocol of 1979. This wide definition secures a wide scope of application of the Hague/Visby Rules, under sect. 43(1) of the *Act*.<sup>174</sup>

Where sect. 43(1) of the *Marine Liability Act*, as extended by sect. 43(3), does not subject the contract of carriage compulsorily to the Hague/Visby Rules, Canadian courts must apply their own conflict of law rules to determine the law governing the bill of lading contract. It is the Canadian conflicts practice to apply foreign substantive law where it is the proper law of the contract,<sup>175</sup> provided that such law does not violate Canadian international public order (or public policy) or mandatory rules<sup>176</sup> and is not invoked in order to evade the proper law or proper jurisdiction.<sup>177</sup> On this basis, Canadian courts give effect to the express choice of a foreign carriage of goods by sea law (e.g. U.S. COGSA in inbound shipments to Canada from the U.S. or the Hague Rules in shipments from Hague Rules nations to Canada<sup>178</sup>) if that foreign law is specifically stipulated by the bill of lading or if the choice is implied. Otherwise, the court will seek the proper law of the contract of carriage, evaluating the contacts (connecting factors) of the case to determine the law with which it has the closest and most real connection.<sup>179</sup>

<sup>174</sup> A similar provision was in the 1993 *Carriage of Goods by Water Act*, at sect. 7(3).

<sup>175</sup> See, for example, *Ontario Bus Industries Inc. v. The Federal Calumet* [1992] 1 F.C. 245, (1991) 47 F.T.R. 149 (Fed. C. Can.), upheld (1992) 150 N.R. 149 (Fed. C.A.), decided before 1993, when Canada was still a Hague Rules state. In that case, the Court applied the Belgian Hague/Visby Rules to a bill of lading issued in Germany (a Hague Rules state) where the shipment was from a Belgian port, on the ground that Belgium was more closely connected to the contract of carriage than Germany, so that Belgian law was the proper law of the contract. The *contra proferentem* rule of interpretation of contracts was also invoked to support the decision, as was the rule that the law of the place of performance should govern the performance in one country of a contract made in another. A similar decision would now be arrived at more directly, on the basis that the shipment was from a Hague/Visby nation, by applying sect. 43(1) of the *Marine Liability Act*, referring to art. 10(b) of the Hague/Visby Rules.

<sup>176</sup> In *Dominion Glass Co. Ltd. v. The Anglo-Indian* [1944] S.C.R. 409, [1944] 4 D.L.R. 721, a bill of lading issued in Canada invoked English law, and the Supreme Court of Canada held that the former Canadian *Water Carriage of Goods Act* (which then gave the force of law in Canada to the Hague Rules) applied. *Vita Food Products* [1939] A.C. 277, (1939) 63 Ll. L. Rep. 21, 1939 AMC 257, [1939] 2 D.L.R. 1 (P.C.) was specifically disapproved by Kerwin J., who noted that a Canadian Court would find the Canadian Act mandatory. See also Tetley, *Int'l Conflict*, 1994 at p. 317.

<sup>177</sup> For examples of the rejection of foreign law by Canadian courts on the grounds of evasion of the properly applicable law, see Tetley, *Int'l Conflict*, 1994 at p.315, note 115. See also J.-G. Castel and J. Walker, *Canadian Conflict of Laws*, 5 Ed., Markham and Vancouver, 2002 at para. 31.2.a.

<sup>178</sup> See, for example, *The Ebn Al Waleed* [2000] 1 Lloyd's Rep. 270 at p. 273 (Fed. C. Can.), giving effect to the Hague Rules as enacted in the Turkish Commercial Code of 1956, rather than to an earlier Turkish enactment of the same Rules, in a shipment from Turkey to Canada, where the bill of lading specified the Hague Rules as enacted in the country of shipment. See also *Itochu Canada v. The Fu Ning Hai* (1999) 173 F.T.R. 203 at p. 205 (Fed. C. Can. per Hargrave, P.), giving effect to a bill of lading paramount clause invoking the former Canadian *Water Carriage of Goods Act* of 1936 (the Hague Rules) in a shipment from Korea to Canada, despite another clause calling for Korean law to govern claims arising under the bill.

<sup>179</sup> See *Richardson International, Ltd. v. The MYS Chikhacheva* [2001] 3 F.C. 41 at p. 56 (Fed. C. Can.), citing *The Federal Calumet*, *supra*, and holding that Canadian courts, applying Canadian conflict of law rules, determine the applicable law according to a two-step process: “1. Where the parties expressly or by

The *Marine Liability Act* also gives the Rules the force of law in respect of the carriage of goods by water within Canada<sup>180</sup> (i.e. in the Canadian coasting trade), unless no bill of lading is issued and the contract of carriage stipulates that the Rules do not apply (sect. 43(2)).<sup>181</sup> In the national coasting trade, therefore, the Rules may be contracted out of by express language to that effect inserted in a non-negotiable carriage document (e.g. a waybill), even in respect of ordinary commercial shipments. Without an express term setting aside the Rules, however, waybills would be subject to the Rules in Canadian cabotage.

Waybills used in international carriage are subject to the *Marine Liability Act*,<sup>182</sup> except in the rare case of compliance with the conditions of art. 6 of the Rules, in respect of extraordinary commercial shipments carried pursuant to a special agreement between the shipper and the carrier.<sup>183</sup>

## VI. Incorporation by Reference

The Hague Rules or the Hague/Visby rules may be incorporated into a contract of carriage<sup>184</sup> or even a charterparty,<sup>185</sup> or may be made to apply before loading<sup>186</sup> or after discharge<sup>187</sup> by a clause in the contract applying the Rules to the contract. Whether the Rules will have precedence over the other terms of the contract depends on the terms of

implication choose the system of law that is to govern the contract, that will normally be held to be the proper law of the contract. 2. Where the parties have not chosen the proper law, the court determines, in light of all the circumstances, the system of law with which the contract has the closest and most real connection.” See also J.-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5 Ed., Markham and Vancouver, 2002 at para. 31.2.d.

<sup>180</sup> By sect. 43(2), the Hague/Visby Rules apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada.

<sup>181</sup> A similar provision was contained in the 1993 *Carriage of Goods by Water Act*, at sect. 7(4).

<sup>182</sup> See Chap. 45, “Waybills”.

<sup>183</sup> See the discussion at section IV(4), *supra*.

<sup>184</sup> The paramount clause is the usual method but it has been held that the inclusion of a Hague Rules paramount clause in an Argentina to U.S. bill of lading did not provide the shipper with a fair opportunity to declare the shipment's actual value and thus the carrier could not rely on the per package limitation of COGSA: *DB Trade Intl. v. Astramar* 592 F. Supp. 1215, 1985 AMC 1476 (N.D. Ill. 1984). A paramount clause must be sufficiently explicit to make the shipper aware that liability is limited to a particular amount.

<sup>185</sup> See Chap. 2, “Application of the Rules to Charterparties”. For an example, see *U.S. v. Ocean Bulk Ships, Inc.* 248 F.3d 331 at p. 335, 2001 AMC 1487 at p. 1488 (5 Cir. 2001).

<sup>186</sup> 46 U.S.C. Appx. 1307. See also *Miller Export Corp. v. Hellenic Lines* 534 F. Supp. 707, 1982 AMC 1890 (S.D. N.Y. 1982); *Ironfarmers Parts & Equipment v. Compagnie Generale Maritime* 1994 AMC 2915 at p. 2917 (S.D. Ga. 1994); *Fireman's Fund Ins. Co. v. Tropical Shipping & Construction Co., Ltd.* 254 F.3d 987 at pp. 995-996, 2001 AMC 2474 at p. 2482 (11 Cir. 2001).

<sup>187</sup> 46 U.S.C. Appx. 1307. See also *B.F. McKernin & Co. v. U.S. Lines*, 416 F. Supp. 1068 at p. 1071, 1976 AMC 1527 at pp. 1529-1530 (S.D. N.Y. 1976); *Toshiba International Corp. v. M/V Sea-Land Express* 841 F. Supp. 123 at p. 125, 1994 AMC 995 at p. 996 (S.D.N.Y. 1994); *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.* 32 F. Supp.2d 118 at pp. 128-129, 1998 AMC 334 at p. 345 (S.D. N.Y. 1997); *M.C. Machinery Systems, Inc. v. Maher Terminals, Inc.* 2001 AMC 927 at p. 929 (N.J. Supr. Ct. 2000); *Hartford Fire Ins. Co. v. The OOCL Bravery* 230 F.3d 549 at p. 557, 2001 AMC 25 at p. 33 (2 Cir. 2000). See Chap. 27, “Discharge Properly and Carefully.”

the incorporating clause, the terms of the statute itself and the rules of construction of the court deciding the matter. This question is dealt with in detail, elsewhere.<sup>188</sup>

## VII. COGSA, the Harter Act and State Law - U.S.

### 1) Introduction

COGSA<sup>189</sup> applies of its own force “from the time when the goods are loaded on to the time when they are discharged from the ship”<sup>190</sup> ... “in foreign trade.”<sup>191</sup> Where it applies, COGSA furnishes the exclusive remedy, leaving no room for any “common law” claims for breach of contract or negligence or bailment.<sup>192</sup> The *Harter Act*<sup>193</sup> applies of its own force a) to the pre-loading period and the post-discharge period in foreign and domestic trade, and b) also to the domestic trade itself, i.e. to carriage of goods between ports of the United States or its possessions.<sup>194</sup>

State law in general terms applies ashore before the application of the *Harter Act* at loading and after the application of *Harter Act* at discharge.

COGSA, the *Harter Act* and state law overlap on occasion when one or the other is incorporated by reference. It is therefore useful to study the interaction of the three laws.

### 2) COGSA - incorporation by reference

<sup>188</sup> See Chap. 45, “Waybills”. See also *Hanover Ins. v. Shulman* 581 F.2d 268, 1979 AMC 520 (1 Cir. 1978), where COGSA was incorporated into a New York to Puerto Rico bill of lading and the (\$50 per shipment) limitation in the bill of lading was rejected as being so low as to offend public policy. The Federal Court of Appeal of Canada arrived at much the same decision in *The Doroty v. Atlantic Consolidated Foods Ltd.* [1981] 1 F.C. 783, (1980) 35 N.R. 160, affirming [1979] 1 F. C. 283, 1978 ETL 550.

<sup>189</sup> Act of April 16, 1936, c. 229, 49 Stat. 1207, 46 U.S. Code Appx. 1300-1315.

<sup>190</sup> COGSA sect. 1(e), 46 U.S. Code Appx. 1301(e); *B. Elliott (Canada) Ltd. v. John T. Clark & Son* 704 F.2d 1305 at p. 1307, 1983 AMC 1742 at p. 1744 (4 Cir. 1983); *Wemhoener Pressen v. Ceres Marine Terminal, Inc.* 5 F.3d 734 at p. 738, 1993 AMC 2842 at p. 2848 (4 Cir. 1993).

<sup>191</sup> COGSA sect. 13, 46 U.S. Code Appx. 1312; *PPG Industries v. Ashland Oil Co- Thomas Petro. Tr. Div.* 527 F.2d 502 at p. 505 (3 Cir. 1975); *Wirth, Ltd. v. S.S. Acadia Forest* 537 F.2d 1272 (5 Cir. 1976); *Mikinberg v. Baltic S.S. Co.* 988 F.2d 327 at p. 330, 1993 AMC 1661 at p. 1664 (2 Cir. 1993).

<sup>192</sup> *Miller Export Corp. v. Hellenic Lines, Ltd.* 534 F.Supp. 707 at pp. 710-711, 1982 AMC 1890 at pp. 1893-1982 (S.D.N.Y. 1982); *St. Paul Fire and Marine Ins. Co. v. Marine Transportation Services Sea-Barge Group* 727 F. Supp. 1438, at p. 1442 (S.D.Fla. 1989); *ETS Gustave Brunet S.A. v. M/V Nedlloyd Rosario* 929 F. Supp. 694 at p. 709 at note 12, 1997 AMC 803 at p. 826 at note 12 (S.D. N.Y. 1996); 1995 AMC 2573, at pp. 2574-2575, 882 F.Supp. 1079 at pp. 1082-83 (S.D. Ga. 1995); *Sail America Foundation v. M/V T.S. Prosperity*, 778 F.Supp. 1282 at p. 1285, 1992 AMC 1617 at p. 1621, (S.D.N.Y. 1991).

<sup>193</sup> Act of February 13, 1893, c. 105, 27 Stat. 445; 46 U.S. Code Appx. 190-196.

<sup>194</sup> *Harter Act* sect. 1, 46 U.S. Code Appx. 190, read with COGSA sect. 13, 46 U.S. Code Appx. 1312. See *Antilles Ins. Co. v. Transconex, Inc.* 862 F.2d 391, 1989 AMC 984 (1 Cir. 1988).

COGSA has often been incorporated by reference into contracts in order to govern situations outside its scope.<sup>195</sup> Thus it has been made to apply to domestic trade<sup>196</sup> and beyond the tackle-to-tackle period in foreign commerce.<sup>197</sup> The period of responsibility clause,<sup>198</sup> which is often woven into the paramount clause of the bill of lading, makes COGSA apply prior to loading and subsequent to discharge and throughout the entire period when the goods are in the custody of the carrier. This is important since damage to cargo often occurs during the loading and discharging operations.

### 3) The Harter Act

In both domestic and international carriage the *Harter Act*<sup>199</sup> applies to the pre-loading period (i.e. from receipt of the goods<sup>200</sup> to the actual loading) and to the post-discharge period<sup>201</sup> (i.e. as soon as the cargo has left the ship's tackle<sup>202</sup> until proper

<sup>195</sup> See for example *Grace Line, Inc. v. Todd Shipyards Corp.* 500 F.2d 361 at p. 371 (9 Cir. 1974), where the parties contracted to provide COGSA's coverage to the carrier's agent; see also *North River Ins. Co. v. Fed Pac Line* 647 F.2d 985, 1982 AMC 2963 (9 Cir. 1981), cert. denied, 455 U.S. 948, 1982 AMC 2110 (1982).

<sup>196</sup> COGSA sect. 13 fourth para., 46 U.S. Code Appx. 1312 ("Provided, however, that ...."); *Fireman's Ins. Co. v. Gulf Puerto Rico Lines* 349 F. Supp. 952 (D.P.R. 1972); *Archilla v. Smyth Worldwide Movers* 106 D. P.R. 538 (1977); *Commonwealth Petrochemicals, Inc. v. S.S. Puerto Rico* 607 F.2d 322 at p. 325, 1979 AMC 2772 at p. 2778 (4 Cir. 1979); *Home Ins. v. Puerto Rico Maritime Shipping Authority* 524 F. Supp. 541, 1982 AMC 1897 (D.P.R. 1981); *Ins. Co. of North Am. v. Puerto Rico Marine Mgmt.*, 599 F.Supp 199 (D.P.R. 1984); *Soto v. Caribe Shipping* 1992 AMC 1365 at p. 1371 (P.R. Supr. Ct. 1991); *Expeditors Int'l of Washington, Inc. v. Crowley American Transport, Inc.* 117 F. Supp..2d 663 at p. 668, 2001 AMC 518 at p. 523 (S.D. Ohio 2000).

<sup>197</sup> COGSA sect. 7, 46 U.S. Code Appx. 1307. See, for example, *Leather's Best v. S.S. Mormaclynx* 451 F.2d 800 at p. 807, 1971 AMC 2383 at p. 2390 (2 Cir. 1971); *B. Elliott (Canada) Ltd. v. John T. Clark & Son* 704 F.2d 1305 at p. 1307, 1983 AMC 1742 at p. 1744 (4 Cir. 1983); *Mori Seki USA, Inc. v. M.V. Alligator Triumph* 990 F.2d 444 at p. 447, 1993 AMC 1521 at p. 1523 (9 Cir. 1993); *Ironfarmers Parts & Equipment v. Compagnie Generale Maritime* 1994 AMC 2915 at p. 2917 (S.D. Geo. 1994); *Farrell Lines Inc. v. Columbus Cello-Poly Corp.* 32 F.Supp.2d 118 at pp. 122-123, 1998 AMC 334 at p. 336 (S.D. N.Y. 1997); *Hartford Fire Ins. Co. v. M/V OOCL Bravery* 230 F.3d 549 at p. 557, 2001 AMC 25 at p. 33 (2 Cir. 2000); *Fireman's Fund Ins. Co. v. Tropical Shipping & Construction Co. Ltd.* 254 F.3d 987 at p. 995, 2001 AMC 2474 at p. 2482 (11 Cir. 2001).

<sup>198</sup> It should be noted that the court will only allow COGSA to apply to the pre-loading period if the parties agree to this. The bill of lading must not be issued unilaterally and the period of responsibility clause must not be really an attempt by the carrier to change a pre-existing bilateral agreement: *Davis Elliott Intern. v. Pan American Container* 705 F.2d 705 (3 Cir. 1983). See also *Miller Export Corp. v. Hellenic Line Ltd.* 534 F. Supp. 707 at pp. 710-711, 1982 AMC 1890 at p. 1894 (S.D. N.Y. 1982); *Junior Gallery, Ltd. v. Neptune Orient Lines Ltd.* 1999 AMC 565 at p. 571 (S.D. N.Y. 1998).

<sup>199</sup> The *Harter Act* does not operate during the tackle-to-tackle period where COGSA operates *ex proprio vigore*: *Chester v. Maritima del Litoral S.A.* 586 F. Supp. 192 at p. 198 (E.D. Wis. 1984). See also *Garner Industries v. Wallenius Lines and Gulf Motorship, Inc.* 1989 AMC 2688 at p. 2689 (Tex. Ct. of Apps., 14 Cir., 1988): "The Harter Act applies to the entire period of the contract of carriage, except for those periods covered by COGSA."

<sup>200</sup> In *Baker Oil Tools, Inc. v. Delta S. S. Lines, Inc.* 562 F.2d 938 at p. 941 (5 Cir. 1977), the *Harter Act* was held to apply from when the carrier's clerk accepted delivery of the goods and signed the dock receipt. In *General Motors Corp. v. Pennsylvania Railroad Co.* 357 F. Supp. 646 (S.D. N.Y. 1973) the connecting ocean carrier, which did not receive actual notice of the arrival of the cargo at its pier and signed no dock receipt, was held not liable for the loss of cargo since it did not have custody of the cargo.

<sup>201</sup> *The Monte Iciar* 167 F.2d 334 at p. 336 (3 Cir. 1947); *Caterpillar Overseas S.A. v. S.S. Expedito* 318 F.2d 720 at p. 723, 1963 AMC 1662 at pp. 1666 (2 Cir. 1963), cert. denied, 375 U.S. 942, 1963 AMC 2697

delivery).<sup>203</sup> Accordingly, even where COGSA is extended by the bill of lading so as to apply during these periods, any provision of COGSA incompatible with the *Harter Act* is invalid.<sup>204</sup>

Although “proper delivery”<sup>205</sup> is not defined by statute, it has been held to be either “actual” or “constructive delivery”. In *Orient Overseas Line v. Globemaster*,<sup>206</sup> it was held that:

“‘Proper delivery’ within the provisions of [the *Harter Act*] means either actual or constructive delivery. Actual delivery consists in completely transferring the possession and control of goods from the vessel to the consignee or his agent. Constructive delivery occurs where the goods are discharged from the ship upon a fit wharf and the consignee receives due and reasonable opportunity to remove the goods or put them under proper care and custody.”

Constructive delivery therefore requires discharge on a fit wharf, due notice to the consignee of the vessel’s arrival and a reasonable opportunity for the consignee to take possession of the goods personally or through an agent, all subject, of course, to local port law, custom or regulation.<sup>207</sup>

This does not mean, however, that the *Harter Act* applies up to the moment when the consignee comes and actually picks up the goods. In *Morse Electro Products Corp. v.*

(1963); *British West Indies Produce, Inc. v. S.S. Atlantic Clipper* 353 F. Supp. 548 (S.D. N.Y. 1973) where the *Harter Act* was held to govern a damage claim arising from negligent discharge of the goods to an unheated and unprotected pier controlled by the carrier.

<sup>202</sup> *Isthmian Steamship Co. v. California Spray-Chemical Corp.* 290 F.2d 486 at p. 489 (9 Cir. 1961), where the *Harter Act* was held to apply from the time when the cargo left the ship’s tackle until proper delivery. Accord: *U.S. v. Ultramar Shipping Co., Inc.* 1988 AMC 527 at pp. 539-540 (S.D. N.Y. 1987).

<sup>203</sup> *Allstate Ins. Co. v. Imparca* 646 F.2d 169 (5 Cir. 1981); *Black Sea & Baltic General Ins. Co. v. S. S. Hellenic Destiny* 500 F. Supp. 677 (S.D.N.Y. 1980).

<sup>204</sup> The predominance of the *Harter Act* over any other law in respect of the pre-loading and post-discharge periods is provided for by COGSA itself at 46 U.S.C. Appx. 1311. See also *Uncle Ben’s Int’l Div. Of Uncle Ben’s, Inc. v. Hapag-Lloyd Aktiengesellschaft* 855 F.2d 215 at p. 217, 1989 AMC 748 at pp. 750-751 (5 Cir. 1988), holding that where the parties contractually extend COGSA to the periods covered by the *Harter Act*, “... any inconsistency with the *Harter Act* must yield to the *Harter Act*”; see also *Sabah Shipyard v. M/V Harbel Tapper* 178 F.3d 400 at p. 407, 2000 AMC 163 at pp. 170-171 (5 Cir. 1999), cert. denied, 528 U.S. 1048 (1999).

<sup>205</sup> *Harter Act*, sect. 1, 46 U.S. Code Appx. 190.

<sup>206</sup> 365 A. 2d 325 at p. 335, 1976 AMC 2365 at pp. 2373-2574 (Ct. Sp. App. Md. 1976). See the same definitions approved in *B. Elliott Ltd. v. John T. Clark & Son* 704 F.2d 1305 at p. 1308, 1983 AMC 1742 at p. 1745 (4 Cir. 1983); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.* 5 F.3d 734 at p. 742, 1993 AMC 2842 at p. 2853 (4 Cir. 1993); *Jagenberg, Inc. v. Georgia Ports Authority* 882 F. Supp. 1065 at pp. 1076-1077, 1995 AMC 2333 at pp. 2349-2350 (S.D. Ga. 1995); *Colgate Palmolive Co. v. M/V Atlantic Conveyor* 1997 AMC 1478 at p. 1481 (S.D. N.Y. 1996); *M.C. Watkins v. M/V London Senator* 112 F. Supp. 2d 511 at p. 518, 2000 AMC 2740 at p. 2749 (E.D. Va. 2000).

<sup>207</sup> *Black Sea & Baltic General Ins. Co. v. S.S. Hellenic Destiny* 575 F. Supp. 685 at pp. 687-688 (S.D. N.Y. 1983).

*S. S. Great Peace*,<sup>208</sup> the Court held that the *Harter Act* ceased to govern once the consignee had been notified of the discharge of the cargo to a fit and proper pier.<sup>209</sup>

#### 4) Conflict between COGSA and the Harter Act

COGSA contains two provisions directly relating to the *Harter Act* - sect. 12, entitled<sup>210</sup> “Harter Act Remains Applicable Before Loading and After Discharging Cargo”, and sect. 13, fourth para., entitled<sup>211</sup> “Application in Domestic Trade Optional.” From the foregoing provisions one may conclude that, when COGSA is incorporated by reference into a contract of carriage in the domestic trade, the *Harter Act* is not superseded before loading and after discharge<sup>212</sup> but that it is superseded by COGSA during the tackle to tackle period in international trade.<sup>213</sup> “Under COGSA”, as stated in *Eutectic Corp. v. M/V Gudmundra*, “the liability of the carrier prior to loading and after discharge is made subject to the *Harter Act*.”<sup>214</sup>

<sup>208</sup> 437 F. Supp. 474 at pp. 486-487 (D. N.J. 1977).

<sup>209</sup> In *David Crystal, Inc. v. Cunard Steam-Ship Co.* 339 F.2d 295, 1965 AMC 1292 (2 Cir. 1964), a clause in the bill of lading providing that the carrier's liability would cease when delivery was made from the ship's deck and that, if the consignee did not immediately receive the goods, the carrier could abandon them on the wharf, was held null and void as being contrary to the *Harter Act*. The Court held that the carrier was a bailee and remained liable for the safety of the goods while they were on the pier. See also *B. Elliott (Canada) Ltd. v. John T. Clark & Son* 542 F. Supp. 1367 at p. 1373 (D. Md. 1982).

<sup>210</sup> 46 U.S. Code Appx. 1311.

<sup>211</sup> 46 U.S. Code Appx. 1312.

<sup>212</sup> See *R.L. Pritchard & Co. v. S.S. Hellenic Laurel* 342 F. Supp. 388 at p. 391 (S.D. N.Y. 1972), where the Court stated: “Insofar as the provisions of COGSA are inconsistent with the *Harter Act*, they cannot be incorporated into a bill of lading to cover the responsibilities of the carrier after discharge and before delivery of the cargo.” See also *M.C. Machinery Systems, Inc. Maher Terminals, Inc.* 2001 AMC 927 at p. 930, note 3 (N.J. Supr. Ct. 200): “...COGSA does not prevent a carrier or shipper from entering into an agreement as to liability prior to loading or after discharge, and accordingly, parties may agree to extend the COGSA provisions to cover the time when the goods are in the carrier's possession prior to loading and subsequent to discharge. However, COGSA is not to be construed as superseding the *Harter Act* or any other applicable law insofar as they relate to the duties, responsibilities, and liabilities of the carrier before goods are loaded or after they are discharged from the ship. Thus, provisions of the Carriage of Goods by Sea Act that are inconsistent with the *Harter Act* provision prohibiting stipulations in bills of lading relieving from negligence liability cannot be incorporated into a bill of lading to cover responsibilities of the carrier after discharge and before delivery of cargo. 70 Am. Jur. 2d *Shipping* § 692 (1987).”

<sup>213</sup> COGSA sects. 1(e), 2, 12 & 13, all taken together. See *China State Construction v. Ambyth Shipping* 1991 AMC 771 at p. 775 (Guam Supr. Ct. 1990); *Ins. Co. v. Fed Sea/Fed Pac Line* 647 F.2d 985 at p. 987, 1982 AMC 2963 at p. 2965 (9 Cir. 1981), cert. denied, 455 U.S. 948, 1982 AMC 2110 (1982); *Sunkist Growers, Inc. v. Adelaide Shipping Lines* 603 F.2d 1327 at pp. 1333-1334, 1979 AMC 2787 at p. 2795, (9 Cir. 1979), cert. denied, 444 U.S. 1012, 1980 AMC 2102 (1980).

<sup>214</sup> 367 F. Supp. 681 at p. 685 (S.D. N.Y. 1973); *Philip Morris v. Amer Shipping Co.* 748 F.2d 563, 1986 AMC 276 (11 Cir. 1984); *Vistar S.A. v. MIV Sea Land Express*, 774 F. 2d 1339, 1986 AMC 392 (5 Cir. 1985). The *obiter dictum* in *The Vale Royal*, 51 F. Supp. 412 (D. Md. 1943), where COGSA was said to supersede the *Harter Act* because COGSA is the later act (at p. 424) would seem to be incorrect as is the decision in *North River Insurance Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985 at p. 987, 1982 AMC 2963 at p. 987 (9 Cir. 1981), cert. denied, 455 U.S. 948, 1982 AMC 2110 (1982), where the Court stated, in an off-hand way without any justification, that “When COGSA is incorporated by contract, it, rather than the *Harter Act*, controls.” See also *Cigna Insurance Asia Pacific v. Expeditors International of Washington* 2002 AMC 1085 at p. 1092 (C.D. Cal. 2001).



In *Sklut Hide and Furs v. Prudential Lines*,<sup>215</sup> the Court held that COGSA could not be applied to render enforceable a clause relieving the carrier from responsibility for cargo loss prior to delivery when such a clause would be null and void under the *Harter Act*. In *Allstate Ins. Co. v. International Shipping Corp.*,<sup>216</sup> COGSA, including its one-year delay for suit, was incorporated into the contract of carriage. Yet the carrier was denied the one-year delay for suit defence. Since the damage had occurred prior to loading, the *Harter Act*, and not COGSA, controlled. The *Harter Act* did not incorporate a statute of limitations and therefore the action was not time-barred.

In *U.S. v. Ultramar Shipping Co, Inc.*,<sup>217</sup> a case involving loss of a wheat cargo shipped from the U.S. to Bangladesh following the cargo's discharge into a lighter and before its delivery, the defendant ocean carrier was not permitted to benefit from certain defences under COGSA (notably the "q" clause), despite its incorporation into the bill of lading by a paramount clause, where the defences concerned were not recognized under the *Harter Act*, which applied to the post-discharge loss.

In *B. Elliott (Canada) Ltd. v. John T. Clark & Son*,<sup>218</sup> a clause stating that the warehouseman was acting solely as agent of the consignee rather than of the carrier was held null and void as being contrary to the *Harter Act*. Though the warehouseman was therefore held liable, the Court decided that COGSA's one-year delay for suit incorporated into the bill of lading *did* apply. This result, which differs with *Allstate, supra*, can be explained by the fact that, in this case,<sup>219</sup> land-based law rather than the federal maritime law (i.e. the *Harter Act*) applied. Under the applicable state law, the warehouseman, as the carrier's agent or independent contractor, was entitled to all the defences that were available to the carrier under the bill of lading, including COGSA's one year delay for suit. Thus the bill of lading and COGSA covered the terminal operations and the action was time-barred.

## 5) State law and COGSA

After "proper delivery," the *Harter Act* no longer governs. Yet the carrier (or more likely his agent) may still have custody over the goods despite the fact that proper or constructive delivery has occurred, as for example when the consignee has been afforded a fair opportunity to remove the goods but has not done so.<sup>220</sup> Since the period of responsibility clause very often specifies that COGSA governs throughout the entire

<sup>215</sup> 537 F. Supp. 266, 1986 AMC 960 (D. Del. 1982). See, however, *Gold Medal Trading Corp. v. Atlantic Overseas Corp.*, 580 F. Supp. 610 at p. 614 (S.D. N.Y. 1984), where the Court, while recognizing that COGSA's \$500 per package limitation did not apply to a post discharge loss because the *Harter Act* applied, nevertheless gave effect to a clause in the bill of lading which allowed the carrier to limit his liability to \$500 per package, since the clause did not violate the *Harter Act*.

<sup>216</sup> 703 F.2d 497 at p. 499 (11 Cir. 1983). See also *Home Ins. v. Puerto Rico Maritime Shipping Authority* 524 F. Supp. 541 at p. 546 (D.P.R. 1981), where, even though COGSA was incorporated, its one year time for suit defence was not available to the carrier since the *Harter Act* applied *ex proprio vigore*.

<sup>217</sup> 1988 AMC 527 at p. 530 (S.D. N.Y. 1987).

<sup>218</sup> 542 F. Supp. 1367 at p. 1374 (D. Md. 1982). See also *Koppers Co., Inc. v. S/S Defiance* 542 F. Supp. 1356 (D. Md. 1982).

<sup>219</sup> There was diversity of jurisdiction; therefore 28 U.S. Code sect. 1332 applied.

<sup>220</sup> *Philipp Bros. Metal Corp. v. S.S. Rio Iguazu* 498 F. Supp. 645 (S.D. N.Y. 1980).

time the goods are in the custody of the carrier, COGSA could continue to operate even though the *Harter Act* has ceased to do so, provided the bill of lading still governs liability. Though by this time the carrier will likely have discharged his obligations under the contract of carriage,<sup>221</sup> the carrier in possession of the goods may be liable as bailee for negligence in the storage of the goods<sup>222</sup> or vicariously liable for his agent's negligence.<sup>223</sup> Do the provisions of COGSA apply to limit such liability? In *B.F. McKernin & Co. v. U.S. Lines*,<sup>224</sup> COGSA was held to apply even during land transportation between Philadelphia and Newark. The Second Circuit in *Philipp Bros. Metal Corp. v. S.S. Rio Iguazu* held that COGSA did not apply to limit the stevedore's liability as bailee but avoided the question whether COGSA could limit the carrier's vicarious liability by finding that the stevedore had not been acting as the carrier's agent at the time of the loss.<sup>225</sup> Whether COGSA can apply or not after proper delivery probably depends on state law. In New York or Maryland, state law would make the defences and limitations under COGSA applicable.<sup>226</sup>

Previously it was thought that the period of responsibility clause was sufficient to displace applicable state law in favour of COGSA.<sup>227</sup> In *Colgate Palmolive v. Dart Canada*, however, the Second Circuit held that, when the application of COGSA is extended beyond tackle-to-tackle, it applies merely as a contractual term.<sup>228</sup> Thus when state law conflicts with contractual limitation of liability based on COGSA, state law predominates.<sup>229</sup> Although the Second Circuit continues to cling to this doctrine,<sup>230</sup> some other Circuits and lower courts in the United States are reverting to the view that the contractual extension of U.S. COGSA to the pre-loading and/or post-discharge periods gives COGSA precedence over any inconsistent law of the U.S. state of loading or discharge.<sup>231</sup> Other decisions avoid the effect of *Colgate Palmolive* by distinguishing that decision from the case at bar.<sup>232</sup>

<sup>221</sup> *Calcot, Ltd. v. Isbrandisen Co.* 318 F.2d 669 at p. 673 (1 Cir. 1963).

<sup>222</sup> *David Crystal, Inc. v. Cunard S.S. Co.* 223 F. Supp. 273 at p. 288 (S.D. N.Y. 1963).

<sup>223</sup> *Consolidated Cork Corp. v. Jugoslavenka Linijska Plovidba* 318 F. Supp. 1209 (S.D. N.Y. 1970). See, however, *Mitsui & Co. v. Honduras* 1979 AMC 2880 (S.D. N.Y. 1979).

<sup>224</sup> 416 F. Supp. 1068 at p. 1071 (S.D. N.Y. 1976).

<sup>225</sup> 658 F.2d 30 at p. 32 (2 Cir. 1981).

<sup>226</sup> *B. Elliott (Canada) Ltd. v. John T Clark & Son* 542 F. Supp. 1367 at p. 1374 (D. Md. 1982). See Joanne Zawitoski, "Limitation of Liability for Stevedores and Terminal Operators Under the Carrier's Bill of Lading and COGSA" (1985) 16 JMLC 337 at p. 342.

<sup>227</sup> *Miller Export Corp. v. Hellenic Lines* 534 F. Supp. 707 at pp. 710-711.

<sup>228</sup> 724 F.2d 313 at p. 315, 1984 AMC 305 at p. 307 (2 Cir. 1983).

<sup>229</sup> 724 F.2d at pp. 315-316, 1984 AMC at p. 309. See, however, the strong dissent by Van Graafeiland, Ct. J. See also *Moonwalk Intl, Inc. v. S/S Seatrain Italy* 1985 AMC 1270 (S.D. N.Y. 1984).

<sup>230</sup> *Roco Carriers Ltd. v. M/V Nurnberg Express* 899 F.2d 1292 at pp. 194 and 1297, 1990 AMC 913 at pp. 916 and 920-921 (2 Cir. 1990); *Citrus Marketing Board v. J. Lauritzen* 943 F.2d 220 at p. 224, 1991 AMC 27705 at p. 2711 (2 Cir. 1991); *New York Marine v. S/S Ming Prosperity* 920 F. Supp. 416 at p. 421, 1991 AMC 1161 at p. 1168 (S.D. N.Y. 1991).

<sup>231</sup> *Gebr. Bellmer KG. v. Terminal Servs. Houston, Inc.* 711 F.2d 622, 1986 AMC 607 (5 Cir. 1983); *Assicurazioni Generali v. D'Amico* 766 F.2d 485, 1986 AMC 1051 (11 Cir. 1985); *Barretto Peat, Inc. v. Luis A. Ayala Colon Successors Inc.* 896 F.2d 656 (1 Cir. 1990); *St. Paul Fire and Marine Ins. Co. v. A.P. Moller Inc.* 1996 AMC 2012 (N.J. Super. C. 1996); *Jagenberg Inc. v. Georgia Ports Authority* 882 F. Supp. 1065 at p. 1071, 1995 AMC 2333 at p. 2340 (S.D. Ga. 1995), citing *Wemhoener*, 5 F.3d 734 at p. 740, 1993 AMC 2842 at p. 2851 (4 Cir. 1993); *Paszatory v. Croatia Lines* 918 F. Supp. 961 at p. 968, 1996

COGSA should apply when it is extended by contract to the period prior to loading and/or the period between discharge and delivery, at least in contracts of carriage concluded in the “foreign trade”. COGSA, as America’s international regime of carriage of goods by sea, properly pre-empts domestic state law in respect of such carriage and its application better comports with the expectations of the parties to such international shipments. As the Fourth Circuit declared in *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, “...contractual incorporations of COGSA into foreign bills of lading should be construed according to federal law.”<sup>233</sup>

### VIII. The Hamburg Rules - application

The Hamburg Rules 1978<sup>234</sup> attempt to resolve the defects in the application of the Hague and Hague/Visby Rules:

1) The Hamburg Rules apply to “all contracts of carriage by sea” at art. 2(1), and not merely to bills of lading or similar documents of title.

2) The Hamburg Rules apply:

- a) when the port of loading is in a contracting state, at art. 2(1)(a), (similar to art. 10(b) of the Hague/Visby Rules);
- b) when the port of discharge is in a contracting state, at art. 2(1)(b), (this is not too dissimilar to the inwards and outwards application of COGSA<sup>235</sup>);
- c) when one of the optional ports of discharge is in a contracting state, at art. 2(1)(c);
- d) when the bill of lading or other document is issued in a contracting state, at art. 2(1)(d), (similar to art. 10(a) of the Hague/Visby Rules);
- e) when the Hamburg Rules are incorporated by reference, at art. 2(1)(e), (similar to art. 10(c) of the Hague/Visby Rules).

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AMC 1189 at p. 1199 (E.D.Va. 1996). See generally Chap. 24: “Load Properly and Carefully”, *infra*, and Chap. 27: “Discharge properly and Carefully”, *infra*.

<sup>232</sup> See, for example, *Halm Industries v. Timur Star* 1985 AMC 391 (S.D. N.Y. 1984), where, by distinguishing *Colgate Palmolive*, a non-vessel-operating common carrier (NVOCC) was found to be entitled to the COGSA package limitation in respect of loss that occurred at an unknown time during the NVOCC’s period of responsibility during a partly inland and partly international shipment carried under a multimodal bill of lading which provided that such unknown losses would be deemed to have occurred during the ocean carriage and thus be subject to COGSA. See also *St. Paul Fire and Marine Ins. Co. v. A.P. Moller Inc.* 1996 AMC 2012 (N.J. Supr. C. 1996), where the defendant was found to be acting not as a warehouseman subject to state law (as in *Colgate Palmolive*) but rather as a stevedore and agent of the carrier, and as such entitled to benefit from the COGSA package limitation in respect of pre-loading damage to a drilling rig.

<sup>233</sup> 5 F.3d 734 F.3d. at p. 740, 1993 AMC 2842 at pp. 2851 (4 Cir. 1993). The *Wemhoener* court also suggested that a different rule might apply in purely domestic cases.

<sup>234</sup> United Nations Convention on the Carriage of Goods by Sea adopted at Hamburg on March 30, 1978, and in force November 1, 1992.

<sup>235</sup> 46 U.S. Code Appx. 1300 (preamble).

Art. 2(2) of the Hamburg Rules (echoing art. 10 of the Hague/Visby Rules) specifies that they apply regardless of the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

3) The Hamburg Rules do not apply to charterparties by art. 2(3), but do apply to bills of lading pursuant to a charterparty when the bill of lading governs the relations between the carrier and the third party holder of the bill of lading. This is similar to art. 1(b) and art. 5, paragraph 2, of the Hague and Hague/Visby Rules.

4) The Hamburg Rules, at art. 2(4), specifically apply to goods carried in a series of shipments during an agreed future period.

5) The Hamburg Rules at art. 4 apply from “port to port”. This is an intelligent provision but it unfortunately contains loopholes. Art. 4(2)(a)(ii) gives a simple exception - the carrier is not responsible until he receive the goods from the port authority or other third party pursuant to law or regulation. At delivery, in virtue of art. 4(2)(b)(ii), there is an even broader exception available to the carrier, who may avoid responsibility by “contract” or “usage”. The carrier may therefore contract out of responsibility after tackle by a general clause in the bill of lading or may try to invoke custom.

Thus in jurisdictions such as Canada, for which art. 4 was intended, and which do not have obligatory statutes imposing responsibility on the carrier before loading and after discharge (as in the U.S. and France), art. 4 could be not much more than tackle to tackle.

Conflicts of law relating to the coming into force of the Hamburg Rules have begun to arise in various countries<sup>236</sup> since the Rules came into force internationally on November 1, 1992, notably France. France signed the Hamburg Convention in 1979 and authorized its approval by Law no. 81-348 of April 15, 1981,<sup>237</sup> but has not yet ratified it. There have been three major approaches to conflicts of law involving the Hamburg Rules in French courts.<sup>238</sup> A few decisions have given effect to the Hamburg Rules as if they were “self-executing” norms (i.e. simply because one or more their conditions of application, as defined in art. 2(1)(a) to (e), were met).<sup>239</sup> At the other extreme are

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<sup>236</sup> See, for example, *Compania Sud Americana de Vapores S.A. v. I.T.O. Corp of Baltimore* 940 F. Supp. 855, 1997 AMC 362 (D. Md. 1996), where the American court recognized that a court in Chile, where the Hamburg Rules would apply inbound, would invalidate a bill of lading clause calling for U.S. COGSA in respect of a shipment from the U.S., as well as the one-year COGSA time-bar.

<sup>237</sup> J.O. April 16, 1981, p. 1074.

<sup>238</sup> For a detailed analysis of these three approaches, see P.-Y. Nicolas, “*Les Règles d’Hambourg devant les tribunaux français*” DMF 1998, 547.

<sup>239</sup> *Tribunal de Commerce de Paris*, September 10, 1997 (*The Ain Oussera*), DMF 1998, 585, commentary by P.-Y. Nicolas, where the Hamburg Rules were declared directly applicable to a contract of carriage of goods from the U.S.A. (a Hague Rules state) to Egypt (a Hamburg Rules state) on the grounds that the Hamburg Rules, under art. 2(1)(b), were mandatorily applicable to carriage inbound to Egypt. The court’s choice of law analysis disregarded the paramount clause in the bill of lading (issued in the U.S.), which called for U.S. COGSA 1936, which law is also compulsorily applicable to outbound shipments from U.S. ports in the foreign trade.

judgments refusing to apply the Hamburg Rules, even in cases where their conditions of application (under art. 2) were met, because France is not party to them.<sup>240</sup> Yet other decisions have given effect to the Rules where designated as applicable by the parties, as required by French conflict of law rules.

The current position in France appears to be that the Hamburg Rules cannot be directly applied by French judges, even where one of the conditions of their art. 2(1)(a) to (e) is fulfilled, because France has not ratified the Hamburg Convention, with the result that its provisions are not (yet) mandatory rules of the French forum.<sup>241</sup> They may, however, be applied indirectly, in accordance with French (i.e. Rome Convention 1980) conflict rules, where the parties to the contract of carriage have expressly selected the national law of a Hamburg Rules state, and where those Rules apply to the contract in question, pursuant to one of the paragraphs of art. 2(1)(a) to (e).<sup>242</sup> The Hamburg Rules themselves (rather than a national enactment of them) may also be incorporated by reference in the contract of carriage as contractual terms, in which case any of their provisions which are more favourable to cargo interests than those of the Hague or Hague/Visby Rules, would be effective.<sup>243</sup> Absent any such express or implied choice of law, the Hamburg Rules forming part of the law of a country could also be given effect in France if they were determined by a French court to constitute the law of the country most closely connected with the contract of carriage, under art. 4(1), 4(4) and/or 4(5) of the Rome Convention 1980, or possibly as mandatory rules of a closely connected country, under art. 7 of the same treaty.<sup>244</sup>

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<sup>240</sup> *Tribunal de Commerce de Marseille*, February 15, 1994 (*The G & C Admiral*), *Revue Scapel* 1994, 105; *Cour d'Appel de Paris*, December 3, 1997 (*The Teesta*), DMF 1998, 588, commentary P. Bonassies, upheld by the *Cour de Cassation*, March 28, 2000, DMF 2000, 920, observations P. Bonassies.

<sup>241</sup> *Cour d'Appel de Paris*, December 2, 1998 (*The Lucy*), DMF 1999, 732, observations P.-Y. Nicolas; *Cour d'Appel d'Aix*, December 2, 1999 (*The World Apollo*), DMF 2001, 308, observations by P.-Y. Nicolas. See also the Hamburg Rules themselves, at art. 30(3), providing: "Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded *on or after the date of the entry into force of this Convention in respect of that State.*" (Emphasis added).

<sup>242</sup> *Cour de Cassation*, December 7, 1999 (*The Vassili Klochkov and the Klim Voroshilov*), DMF 2000, 903, observations Le Louer; commentary by P. Bonassies, DMF Hors série No. 5, 2001, no. 70, where the Court interpreted a complex paramount clause in the relevant bills of lading as invoking the national law of Sierra Leone, the country of discharge, which had become party to the Hamburg Rules, although without having first denounced the Hague Rules 1924. Accordingly, the bill of lading contracts covering shipments inbound to that country were held to be governed by the Hamburg Rules, under their art. 2(1)(b).

<sup>243</sup> See P.-Y. Nicolas, « *Les Règles d'Hambourg devant les tribunaux français* » DMF 1998, 547 at p. 566; see also Nicolas' commentary on *The World Apollo*, *supra*, DMF 2001, 308 at p. 312. For a similar view in the United Kingdom, see Gaskell et al., 2000 at para. 2.52, note 170.

<sup>244</sup> See commentary by P. Bonassies on the *Cour de Cassation*'s decision in *The Teesta*, *supra*, DMF 2000, 920 at p. 922. Bonassies also notes, however, that the Rome Convention could also be applied so as to displace the Hamburg Rules in some cases, for example, if they were found to violate the French concept of public order as understood in international relations (Rome Convention, art. 16).