

INTERNATIONAL CARRIAGE OF GOODS BY SEA
(Course No. CMPL 515 – CRN 53 or 2659)

Profs. Tetley and Wilkins

Examination – Friday, December 15, 2006

Notes for Suggested Answers

QUESTION ONE

1) In Fraser River Pile & Dredge Ltd. v. Can-Dive Services, Ltd., the Supreme Court of Canada extended the principled exception to the privity of contract doctrine of Canadian common law first announced in London Drugs v. Kuehne & Nagle beyond the employer-employee context, so as to permit a third party to benefit from a contract between two contracting parties if: a) the contracting parties clearly intended the relevant contractual provision to benefit the third party; and b) if the activities performed by the third party seeking to rely on the contractual provision were the very activities contemplated as coming within the scope of the contract in general or the provision in particular. The ratio decidendi of Fraser River could simplify the benefiting of stevedores under bills of lading issued in Canada, because it would seem to eliminate the need, under Lord Reid's agency theory supporting Himalaya clauses, as formulated in Midland Silicones v. Scruttons Ltd. (1962), to prove the carrier's authority to contract as agent of the stevedore or the stevedore's subsequent ratification of the contractual benefits and the need to establish that consideration had moved from the stevedore. Under Fraser River, the stevedore clearly identified in the bill of lading Himalaya clause as an intended third party beneficiary of the carrier's limitations and exemptions would appear entitled to enjoy those protections as long as it was performing the very stevedoring activities contemplated by the bill of lading at the time of the cargo loss or damage.

2) The traditional view is that a sea waybill, because it is not a negotiable document of title, is not a "contract of carriage" within the meaning of art. 1(b) of the Hague and Hague/Visby Rules. Nevertheless, there is a cogent argument why a sea waybill issued in Canada for carriage of goods to Taiwan is properly subject to the Hague/Visby Rules enacted by Canada's *Marine Liability Act*, S.C. 2001, c. 6, by virtue of the interplay between arts. 2, 3(8) and 6 of those Rules read together, unless, as provided in art. 6, the goods concerned are "particular goods" that are not "ordinary commercial shipments" and are carried under a special agreement between shipper and carrier, evidenced by a non-negotiable receipt issued and marked as such (i.e. a waybill). In this case, art. 6 of the Rules does not apply to permit contracting out of the Rules, because wheat shipped from Canada is an ordinary commercial shipment, so that its carriage to Taiwan, even under a waybill expressly stating that no international convention on the carriage of goods by sea applies, would nevertheless be subject to the Hague/Visby Rules, which apply compulsorily to contracts for the carriage of goods outbound from Canada, under the *Marine Liability Act*, sect. 43(1). The Rules are of public order under art. 3(8). It is

only in respect of shipments in the Canadian coasting trade that the Rules may be contracted out of by providing in the waybill that those Rules do not apply (*Marine Liability Act*, sect. 43(2)).

3) The International Safety Management Code (ISM Code) establishes a new, international standard of ship operation, which, among other things, requires shipowners, ship managers and bareboat charterers to adopt and implement a Safety Management System for their vessels, to prepare plans and procedures designed to promote the safety of navigation and environmental protection and to report on and remedy deficiencies. In consequence, deficiencies in vessels or in their management which may have formerly qualified as errors of management, if they constitute violations of the ISM Code and/or the shipowner's Safety Management System, may henceforth be held to constitute failures of due diligence to make the ship seaworthy before and at the beginning of the voyage, within the meaning of art. 3(1) of the Hague and Hague/Visby Rules, thus breaching the carrier's "overriding obligation" of due diligence in regard to seaworthiness (see *Maxine Footwear* (1959)). The non-diligent carrier would then be precluded from benefiting from the defences of art. 4(2)(a) to (q) of the Hague and Hague/Visby Rules, including art. 4(2)(a), the exception which excuses errors of management of the ship, as well as errors of navigation. The rigorous requirements of the ISM Code with respect to crew training may also reduce the incidence of errors of management, where the Code and the Safety Management System are properly applied and enforced.

4) The United Kingdom's *Carriage of Goods by Sea Act 1924*, U.K. 1924, c. 50, empowers the consignee to sue the carrier in contract, where the consignee is the "lawful holder" of a bill of lading (sect. 2(1)(a)), regardless of whether or not the consignee becomes owner of the goods upon or by reason of the consignment or endorsement of the bill and regardless of who suffers the loss, whereas under Canada's *Bills of Lading Act*, R.S.C. 1985, c. B-4, sect. 2, first enacted in 1889 and modeled on the U.K.'s former *Bills of Lading Act 1855*, the consignee's right of suit against the carrier in contract is dependent on the consignee becoming owner of the goods upon or by reason of the consignment.

5) Despite the English Court of Appeal's decision in *The Petko Voivoda*, and similar decisions of the Seventh Circuit and some district courts in the United States under corresponding provisions of U.S. COGSA, the words "in any event" in art 4(5)(a) of the Hague/Visby Rules should not affect the liability of the carrier of goods by sea for deliberately stowing goods on deck contrary to the wishes of the shipper. Such action is rightly considered to be a fundamental breach of the contract of carriage (see *The Pembroke* and *ETS*) which should deprive the carrier of the exemptions and limitations of both the Rules and the contract of carriage. This is particularly so, because art. 4(5)(e) of the Hague/Visby Rules contains a limited fundamental breach rule, thus indicating that the words "in any event" in art. 4(5)(a) are not intended to preserve for the carrier the protections of the Rules where he has fundamentally breached the contract by unreasonable geographic deviation or unjustified deck carriage. The words "in any event" in art. 4(5)(a) of Hague/Visby are better interpreted to mean that the carrier may continue

to benefit from the Hague/Visby package/kilo limitations even where he cannot prove any of the exceptions to liability of art. 4(2)(a) to (q) or where the cargo loss or damage has resulted from the carrier's failure to exercise due diligence before and at the beginning of the voyage, as required by art. 3(1).

6) The Hamburg Rules distinguish the "carrier" at art. 1(1) (i.e. the contracting carrier) from the "actual carrier", defined by art. 1(2) to mean "any person to whom the performance of the carriage of goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted." In consequence, even where the bill of lading issued by a time charterer or its agent contains a demise clause or an identity of carrier clause portraying the shipowner alone as the carrier, the time charterer would nevertheless qualify as an "actual carrier" under the Hamburg Rules, because, as held in *Canastrand Industries Ltd. v. The Lara S* (1993), it ordinarily performs some of the duties of the carrier in a joint venture with the shipowner (e.g. it often issues the bill of lading on its own form, collects the freight for its own account, supervises the loading, stowage and discharge of the cargo, directs the ship's movements and appoints ship's agents at the different ports of call). As an "actual carrier", the time charterer would therefore be jointly and severally liable with the shipowner for cargo loss or damage under art. 10(4) of the Hamburg Rules and the bill of lading would have to identify the time charterer as a carrier, as required by art. 15(1)(c).

7) Case management in Canada is moving the traditional adversarial (accusatorial) procedure of common law courts closer to the traditional investigative (inquisitorial) procedure of civilian judicial systems. Case management requires the judge or prothonotary to play a more active role in the conduct and scheduling of the proceedings (through dispute resolution conferences, mediation, early and neutral evaluations and mini-trials) and, in particular, it requires the parties, at the pre-trial settlement conference, to make full and early disclosure of all the evidence in their possession on which they intend to rely at trial. As a result, the order and burden of proof in marine cargo claims tried in the Federal Court or the Federal Court of Appeal in Canada are affected, because a party in a case management context will find it difficult, if not impossible, to defer presenting relevant evidence in its possession on particular facts, on the ground that the burden of proof of this or that particular fact lies with the other party or that such and such a fact need only be proven at trial. The order of proof under the Hague and Hague/Visby Rules is one thing, but it is subject to the order of proof under the relevant court rules, as seen in the Federal Court of Appeal's decision in The Ralph Misener.

QUESTION TWO

Cozy Wear Ltd.
Halifax, Nova Scotia

Re: Cargo Claim – Lost and Damaged Sweaters Carried aboard the
M/V Birch Star

Dear Claims Manager:

Thank you for sending this claim. If there are other facts and documents (not in the Examination Question), which you may suspect are pertinent, please advise us in writing without delay and send copies.

I. The Facts in Brief

- 1) Ship owned by Birch Shipping and time chartered to Fast Freight.
- 2) FOB sale of 400 sweaters from Warm Togs to Cozy Wear.
- 3) Packing of 100 sweaters in four cartons by shipper; each carton partly torn.
- 4) Clean b/l issued by time charterer's agent "for the master", showing 4 cartons containing 100 sweaters; no weight shown.
- 5) B/l on time charterer's form; time charterer collects freight for its account.
- 6) B/l contains identity of carrier clause, Himalaya clause and non-responsibility clause excusing negligence of carrier's servants, agents and independent contractors.
- 7) Four cartons stowed in ship's cargo hold no. 2.
- 8) Shipment from Felixstowe to Halifax in February.
- 9) Severe storm on N. Atlantic; seawater entering cargo hold no. 2 through hatch
- 10) Damage to 2 of 4 cartons; 50% loss of market value of \$50. per sweater.
- 11) Previous defective closing of hatch covers by reputable ship repairer hired by shipowner.
- 12) Post-discharge storage in Halifax by terminal operator hired by shipowner.
- 13) Terminal operator's watchman leaving warehouse door unlocked.
- 14) Theft of 2 undamaged cartons of sweaters from warehouse.

II. Jurisdiction

The Federal Court of Canada has jurisdiction over the claims because Birch Shipping and Fast Freight have head offices in Halifax; the cargo was delivered there; and the ship can be arrested there. Strong Guys is also based in Halifax, where the goods were stored after discharge.

III. Applicable Law

The U.K.'s Carriage of Goods by Sea Act 1971 (enacting the Hague/Visby Rules) would apply to the liability of the carrier for the 2 cartons damaged at sea, because the b/l was issued in England for shipment from England (Hague/Visby Rules, art. 10). Canada recognizes foreign law. As a Hague/Visby state, under the Marine Liability Act (2001), sect. 43, Canada will give effect to those Rules where, as in this case, the bill of lading is issued in a Hague/Visby Contracting State or the shipment is from a Contracting State (art. 10(a) and (b) of the Hague/Visby Rules).

The U.K.'s Carriage of Goods by Sea Act 1992 would normally govern rights of suit under this b/l issued in England for shipment from Felixstowe. That statute does not, however, include nominate bills of lading (sect. 1(1)(a)). The Canadian Bills of Lading Act could also apply, in any case, where the suit is taken in Canada.

Canadian maritime law would govern the liability of Strong Guys, the terminal operator, for short-term pre-delivery storage in Halifax of the 2 cartons that were stolen (as in The Buenos Aires Maru (1986)).

IV. What is the Contract and Who May Sue

The contract of carriage is evidenced by the clean on-board b/l.

You, Cozy Wear, have the right to sue the carrier in contract under the Canadian Bills of Lading Act, assuming that you have become owner of the sweaters upon or by reason of the consignment of the bill of lading to you (sect. 2). In any event, you also have the right to sue the carrier in contract, because you bore the risk of the shipment, as FOB buyer, from ship's rail in Felixstowe. You may also have the right to sue if you were owner of the sweaters under the contract of sale at the time of their damage and loss, as well under the definition of "Merchant" in the b/l, which normally includes the consignee and owner among others. You would also be able to sue the carrier in tort (see Delano) as owner of the goods in question. Your action against Strong Guys Ltd. would also be in tort.

V. Whom to Sue

You may sue the shipowner (Birch Shipping) for the damage to the 2 cartons wetted at sea, because that company is the "carrier" according to the identity of carrier clause of the b/l, and because the b/l was issued by the time charterer's agent "for the master", thus binding the shipowner (The Berkshire (1973); Paterson Steamships (1951); Delano Corp. (1965)).

You may have greater difficulty suing the time charterer (Fast Freight) as carrier for the damage to those 2 cartons because of the identity of carrier clause, which has been upheld by the Federal Court of Canada in Union Carbide (1997) and by the Federal Court of Appeal in Jian Sheng (1998). Nevertheless, the clause is arguably invalid under art. 3(8) of the Hague and Hague/Visby Rules as relieving or lessening the carrier's liability contrary to the Rules, a position supported by earlier Canadian decisions (e.g. Canadian Klockner in Federal Court (1973) and CN Marine (Fed. C.A. 1990)). In fact, both the shipowner and the charterer are arguably the "carrier" because they both participate in performing carrier's duties (see the Federal Court's decision in Canastrand (1993)). In particular, the b/l was issued on Fast Freight's form and that company collected the freight.

VI. The Cause of the Loss/Damage

The proximate cause of the wetting of the two cartons at sea was the ingress of seawater into cargo hold no. 2, which was caused by the negligence of the ship repairer's employee in securing the hatch cover of that hold at the end of the repair work.

VII. Lack of Due Diligence

The defective closing of the hatch cover was a lack of due diligence to make the ship seaworthy (and cargoworthy) before the voyage (art. 3(1)(a) of the Hague/Visby Rules), for which the shipowner and time charter as carrier are jointly and severally liable, because due diligence is an overriding obligation of the carrier (Maxine Footwear (1959)) and is non-delegable (The Muncaster Castle (1963)). Therefore the carrier remains liable for the lack of due diligence of the ship repairer's employee.

VIII. Insufficiency of Packing

The lack of due diligence of the carrier in making the ship seaworthy before the voyage, being an overriding obligation of the carrier (Maxine Footwear) overcomes the defence of insufficiency of packing (Hague/Visby Rules art 4(2)(n)) which the carrier may allege, based on the shipper's packing of the sweaters into partly torn cartons before loading.

Moreover, the fact that Fast Freight issued a clean bill of lading to Warm Togs which has now been transferred to you estops the carrier from denying that the torn cartons were in apparent good order and condition at loading, because under art 3(4) of the Hague/Visby Rules, the rebuttable presumption of good order and condition resulting from the issue of a clean bill of lading becomes conclusive evidence of that order and condition against the carrier when the bill is transferred to a holder in good faith.

IX. Perils of the Sea

Severe storms are expected on the North Atlantic in February and therefore the storm in this case does not constitute an exculpatory peril under art. 4(2)(c) of the Hague/Visby Rules (see Goodfellow Lumber Sales (1971) and many other Canadian decisions).

In any case, the carrier's lack of due diligence to make the ship seaworthy before the voyage as regards the watertightness of the hatch cover would overcome any defence of perils (see The Zim Marseilles (1998)).

X. Liability of the Terminal Operator

You should also take suit against Strong Guys as terminal operator for the loss of the 2 cartons stolen from its warehouse, which was caused by the omission of its night watchman to lock the warehouse doors.

Strong Guys is benefited by the non-responsibility clause of the b/l in respect of its post-discharge operations, through the Himalaya clause of the bill of lading, as in The Buenos Aires Maru. The clause expressly excuses negligence (thus meeting the first test of Canada Steamship Lines v. The King (1952), so that it might be held to relieve Strong Guys Ltd. from all liability for the theft of the two cartons in question. Nevertheless, the act of the night watchman (an employee of Strong Guys) in this case in forgetting to lock the door as his duties required, was arguably an act of gross negligence (*faute lourde*) on

his part, as defined by Pothier, being a failure to show that level of care to the affairs of others which even the least careful and most stupid of people would not fail to devote to their own affairs. Such gross negligence should preclude the watchman's employer, Strong Guys, from relying upon the non-responsibility clause of the b/l in this case, which excuses only (simple) negligence (see Ceres Stevedoring – The Cleveland) (1973). Although that was a decision rendered in Quebec, you should try to argue that its holding regarding gross negligence is part of "Canadian maritime law", which includes both common law and civil law elements, and is therefore applicable to the theft of the 2 cartons from the warehouse in Halifax. There is a risk, however, that the Federal Court in Halifax will uphold the clause and discharge Strong Guys from all liability, as the Supreme Court of Canada did in The Buenos Aires Maru (1986).

XI. Quantum of Damages

The packages here are the cartons, rather than the individual sweaters (as per the bill of lading).

The A.S.M.V. of the 200 sweaters in the 2 cartons wetted at sea was $200 \times \$50 = \$10,000$. Can. Their A.D.M.V. was 50% of that sum, or \$5,000. So the total loss of these sweaters amounted to \$5000. Can.

There is no evidence that the carrier acted with intent to cause the damage or acted recklessly and with knowledge that the damage would probably result. So the limitation of art. 4(5)(e) of the Hague/Visby Rules would apply. Therefore, you would be able to claim only 666.67 S.D.R.'s for each of the two cartons (being the packages as described in the b/l) = $2 \text{ cartons} \times 666.67 \text{ S.D.R.'s} = 1333.34 \text{ S.D.R.'s} \times \$2.00 \text{ Can. per S.D.R.} = \2666.68 .

The A.S.M.V. of the 200 sweaters in the 2 cartons stolen from the warehouse was $200 \times \$50$. Can. = \$10,000 Can. and their A.D.M.V. was zero, because they arrived undamaged in Halifax. Because the non-responsibility clause (arguably) does not excuse the terminal operator's gross negligence, you should claim the full \$10,000. in respect of the stolen sweaters from Strong Guys. As indicated above, however, if your gross negligence argument is rejected and the negligence clause is upheld, you would be unable to recover any damages from Strong Guys Ltd.

You should therefore claim against Birch Shipping and Fast Freight jointly and severally the sum of \$2, 266.68. You should also claim against Strong Guys Ltd. the sum of \$10,000.

XII. Conclusion

May I suggest that you attempt to settle the claims on the above basis. Failing such settlement, I recommend you take suit in the Federal Court of Canada, in contract and in tort, against Birch Shipping and Fast Freight *in personam* and the BIRCH STAR *in rem*, as soon as that ship can be arrested, in respect of the claim for the wetted

sweaters. You should also join Strong Guys as defendant *in personam* in the same action, in respect of your claim in tort against that company for the theft of the stolen sweaters. In order to be timely as against the shipowner, charterer and ship, the action must be taken within one (1) year of the date of the date the shipment was delivered to Halifax (i.e. no later than February 21, 2007), as required by art. 3(6) of the Hague/Visby Rules. In such action, I would recommend that you claim the above-mentioned sums, plus pre-judgment interest at commercial rates from the date of the damage/theft, compounded semi-annually, plus costs and survey fees.

Thank you again for sending me this fyle. Please send your instructions without delay.

Yours sincerely