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**MULTIMODAL CARRIER LIABILITY IN THE U.S. AND CANADA: TOWARDS
UNIFORMITY OF APPLICABLE RULES?
(Tome I of II)**

par

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Thèse de Doctorat effectuée en cotutelle

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ET

Faculté de Droit et de Sciences Politiques de l'Université de Nantes

Thèse présentée à la Faculté des études supérieures de l'Université de
Montréal en vue de l'obtention du grade de
Docteur en Droit (LL. D.)

et à

la Faculté de Droit et de Sciences Politiques de l' Université de
Nantes en vue de l' obtention du grade de Docteur

Septembre 2003

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Université de Montréal
Faculté des études supérieures

et

Université de Nantes
Faculté de Droit et de Sciences Politiques

Cette thèse intitulée:

**MULTIMODAL CARRIER LIABILITY IN THE U.S. AND CANADA: TOWARDS
UNIFORMITY OF APPLICABLE RULES?**

(Tome I of II)

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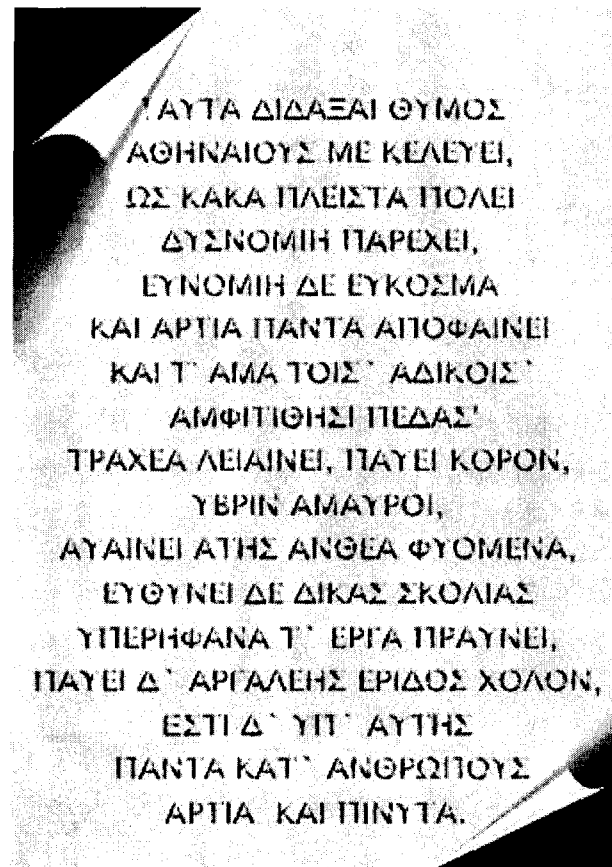
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Eunomia

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*These things my spirit bids me teach the men of Athens:
that Dysnomia (bad lawmaking) brings countless evils for the city,
but Eunomia (good lawmaking) brings order and makes everything proper,
by enfolding the unjust in fetters, smoothing those things that are rough, stopping
greed, sentencing hybris to obscurity making the flowers of mischief to wither,
and straightening crooked judgments. It calms the deeds of arrogance
and stops the bilious anger of harsh strife. Under its control, all things are proper
and prudence reigns human affairs*



ΣΟΛΩΝ - SOLON
The Lawmaker of Athens
(died 559 B.C.)

ABSTRACT

From its inception, *intermodal* transport of goods has served trade, shippers and carriers, radically increasing transactions of *goods* worldwide. Multimodal carrier liability rules, however, have not evolved with the same rhythm and remain fragmented cross-modally and cross-country. This is also the case of the U.S. and Canada. The need to seek uniformity of applicable rules in these two countries led us to the comparative analysis of unimodal (land-ocean) rules in these two countries. Guided by past failed initiatives (1980 United Nations Convention on International Multimodal Transport), the *European* intermodal reality, transport deregulation, *pragmatism*, *fairness* in the relation between the carrier and the shipper and *Law & Economics* principles, we used *harmonization*, *codification* and *contractualism* in advancing our suggestions on uniform multimodal carrier liability rules.

Key words: *intermodal, goods, pragmatism, fairness, Law & Economics, harmonization, codification, contractualism, Europe.*

RESUMÉ

Dès sa naissance, le transport *intermodal* a servi le commerce, les chargeurs et les transporteurs, augmentant de façon importante le transport des *marchandises* au niveau mondial. Pourtant, les règles de responsabilité du transporteur multimodal n'ont pas évolué au même rythme et restent fragmentées à travers les modes et les pays. C'est aussi le cas des États-Unis et du Canada. Le besoin de chercher l'uniformité des règles applicables nous a conduit à l'étude comparée des règles unimodales (terrestres-maritimes) dans ces deux pays. Guidés par l'échec des initiatives passées (Convention de Nations Unies sur le Transport Multimodal International des Marchandises, 1980), la réalité intermodale *européenne*, la déréglementation du transport, *le pragmatisme*, *la justice* dans le rapport entre le transporteur et le chargeur et *l'analyse économique de droit*, nous avons utilisé *l'harmonisation*, *la codification* et *le contractualisme* en vue d'avancer nos suggestions sur des règles de responsabilité uniformes du transporteur multimodal.

Mots Clés: *intermodal, marchandises, pragmatisme, justice, analyse économique de droit, harmonisation, codification, contractualisme, Europe.*

TABLE OF CONTENTS

Abstract/Resumé.....	iv
Table of Contents.....	v
Principle Abbreviations	viii
Acknowledgements.....	ix
Introduction	1
1) <i>The Core and Frame of our Thesis (central question, object and goals)</i>	7
2) <i>The Foundations of our Thesis: Pragmatism, Fairness, Law & Economics</i>	11
I Part: International, Regional and Domestic Views of Multimodal Carrier Liability: Lessons to be learnt	43
Chapter I: International and Regional Multimodal Carrier Liability Patterns: The 1980 UN Multimodal Convention and the EU Multimodal Carrier Liability Pattern	43
Section I: From the 1980 United Nations Convention on International Multimodal Transport Onwards	44
Par. 1: The 1980 United Nations Convention on International Multimodal Transport	45
A. <i>The Genesis and Essence of the 1980 Multimodal Convention</i>	47
B. <i>Basis of M.T.O. Liability Towards the Shipper</i>	50
C. <i>Limitation of M.T.O. Liability Towards the Shipper</i>	54
Par. 2: The FIATA Multimodal Transport BOL (1992 MM or FBL)	60
A. <i>1992 MM (FBL) General Liability Traits</i>	61
B. <i>1992 MM (FBL) Liability Provisions</i>	63
Par. 3: The ‘Provisional Remedy’ of Insurance Companies in Multimodal Transport	68
A. <i>Cargo, Liability and Self-Insurance</i>	69
B. <i>Do Insurance Companies Render Obsolete Uniformity Initiatives of Multimodal Carrier Liability?</i>	77
C. <i>Interplay of Regulatory Policies on Carrier Liability and Insurance Premiums</i>	81
Section II: The European Union (EU) Multimodal Carrier Liability Pattern	85
Par. 1: The Focus of the Common European Transportation Policy on Liberalization of Transport Services	86
A. <i>Motor Transport</i>	88
B. <i>Rail Transport</i>	89
C. <i>International Ocean Carriage</i>	92
Par. 2: Absence of a Uniform European Multimodal Carrier Liability Regime	97
A. <i>International Land Carriage in EU Member States (CMR and COTIF/CIM)</i>	99
a) <i>Formalist Regime</i>	100
b) <i>Vague Provisions</i>	102
B. <i>International Ocean Carriage in EU Member States (Visby Rules)</i>	103
a) <i>Formalist regime</i>	104
b) <i>Vague Provisions</i>	104
Conclusion.....	113
Chapter II: U.S. and Canadian Transport Deregulation and its Effect on Multimodal Carrier Liability	114
Section I: U.S. and Canadian Land Transport Deregulation and its Effect on Carrier Liability	116

Par. 1: U.S.	117
<i>A. General Effects of U.S. Motor and Rail Transport Deregulation</i>	117
<i>a) The Rules</i>	117
<i>b) The Practice</i>	119
<i>B. Contractual Uniformity of U.S. Land Carrier Liability following Deregulation</i>	123
<i>C. The Fair Opportunity Doctrine</i>	127
Par. 2:Canada	132
<i>A. General Effects of Canadian Motor and Rail Transport Deregulation</i>	133
<i>a) Rail</i>	133
<i>b) Motor</i>	135
<i>B. Contractual or Statutory Uniformity of Canadian Land Carrier Liability Provisions?</i>	136
<i>a) Rail Carriers-Contractual Uniformity</i>	136
<i>b) Motor Carriers-Statutory Uniformity</i>	138
<i>c) Incorporation by reference</i>	145
<i>Conclusion</i>	146
Section II: U.S. and Canadian Ocean Transport Deregulation and its Effect on Carrier Liability	147
<i>Conference Immunity-Intermodalism</i>	147
Par. 1: U.S. and Canada	150
<i>A. General Effects of U.S. and Canadian Ocean Transport Deregulation</i>	152
<i>B. Statutory Uniformity of U.S. and Canadian Ocean Carrier Liability</i>	158
Par. 2: Fair Opportunity Doctrine (U.S.) and Sufficient Notice Test (Canada)	160
<i>Conclusion</i>	165
Part II: Multimodal Carrier Liability in the U.S. and Canada: Analysis and Uniformity Suggestions	167
Chapter I: Analysis of Multimodal Carrier Liability in the U.S. and Canada	167
Section I: Basis of Multimodal Carrier Liability in the U.S. and Canada	168
<i>U.S. Multimodal Uniformity Initiative (The draft COGSA 1998)</i>	169
Paragraph 1: Overview of the Basis of Multimodal Carrier Liability in the U.S. and Canada	174
<i>A. Overview of U.S. and Canadian Motor Carrier Basis of Liability</i>	174
<i>B. Overview of U.S. and Canadian Rail Carrier Basis of Liability</i>	179
<i>C. Overview of U.S. and Canadian Ocean Carrier Basis of Liability</i>	182
<i>Seaworthiness/Care for Cargo</i>	185
Paragraph 2: Comparative Analysis of Multimodal Carrier Liability Exceptions in the U.S. and Canada	189
<i>A. Liability Exceptions due to Third Party Actions</i>	189
<i>B. Liability Exceptions due to Natural Causes</i>	195
<i>a) Force Majeure Concept and Carrier Liability Exceptions</i>	201
<i>b) Force Majeure Clauses-Common Law</i>	202
<i>C. Cargo, Vessel, Shipper Fault</i>	204
<i>D. Ocean Specific Liability Exceptions</i>	210
Section II: Limitation of Multimodal Carrier Liability in the U.S. and Canada	230
Paragraph 1: Limitation of Motor Carrier Liability	230
<i>A. U.S. Motor Carrier Limitation of Liability</i>	230
<i>B. Canadian Motor Carrier Limitation of Liability</i>	232
<i>C. Loss of U.S. and Canadian Motor Carrier Limitation Benefit</i>	234
Paragraph 2: Limitation of Rail Carrier Liability	237
<i>A. Canadian and U.S. Rail Carrier Limitation of Liability</i>	238

<i>B. Loss of Canadian and U.S. Rail Carrier Limitation Benefit</i>	241
Paragraph 3: Limitation of Ocean Carrier Liability	242
<i>A. Canadian and U.S. Ocean Carrier Limitation of Liability</i>	242
<i>B. Loss of Canadian and U.S. Ocean Carrier Limitation Benefit</i>	249
<i>Conclusion</i>	253
Chapter II: Suggestions on Uniformity of Multimodal Carrier Liability in the U.S. and Canada	255
Section I: General Suggestions on Uniformity of Multimodal Carrier Liability in Canada and the U.S	255
Paragraph 1: Gradual, pragmatic uniformity	256
<i>A. Ocean v. land carrier liability pattern</i>	257
<i>B. Contractual definition of multimodal carrier liability?</i>	260
<i>C. Contractual document of voluntary adoption</i>	263
Paragraph 2: General liability provisions	266
Section II: Suggestions on the Basis of Multimodal Carrier Liability in the U.S. and Canada	268
Paragraph 1: Presumption of Fault or Presumption of Liability?	268
Paragraph 2: Liability Exceptions	275
<i>A. Ocean specific liability exceptions</i>	277
<i>B. Common land-ocean liability exceptions</i>	281
Paragraph 3: The Concept of Force Majeure	287
Section III: Suggestions on Limitation of Multimodal Carrier Liability in the U.S. and Canada	290
Paragraph 1: Uniformity of Liability Amounts and Measures	291
<i>A. Approximation of cross-country unimodal limitation measures</i>	291
<i>B. Approximation of cross-country unimodal limitation amounts</i>	297
Paragraph 2: Loss of the Limitation Benefit	300
<i>A. Loss of the Limitation Benefit: Necessary?</i>	301
<i>B. Ocean v. Land Loss of Carrier Limitation Benefit</i>	302
<i>Conclusion</i>	307
Paragraph 3: Economic Analysis of Suggestions	308
<i>A. Allocation of Risks, Costs and our Suggestions</i>	308
<i>B. Other suggestions</i>	314
Conclusion	322
Bibliography	325
Annexes	Tome II

PRINCIPLE ABBREVIATIONS

ATA: American Trucking Association
 BOL/BsOL: Bill(s) of Lading
 BNSF: Burlington Northern Santa Fe Railways
 CAN/CAD: Canada/Canadian Dollar
 CDACI: Centre de Droit des Affaires et du Commerce International
 CIFFA: Canadian International Freight Forwarders Association
 CMI: Comité Maritime International
 CN/CP: Canadian National/Canadian Pacific
 CMR: Convention on the Contract for the International Carriage of Goods by Road
 COGSA: Carriage of Goods by Sea Act
 COGWA: Carriage of Goods by Water Act
 COTIF/CIM: Consolidated Text of the Convention concerning International Carriage by Rail
 CSA: Canada Shipping Act
 CTA: Canada Transportation Act
 CUBOL: Canadian Uniform Bill of Lading
 DOT: Department of Transportation
 EBP: Equal Bargaining Power
 EEC/EC/EU: European Economic Community/European Community/ European Union
 FBL: FIATA Bill of Lading
 FIATA: International Federation of Freight Forwarders Associations (FIATA
 BOL = 1992 MM = FBL)
 FHWA: Federal Highway Administration
 FMC: Federal Maritime Commission
 ICC: Interstate Commerce Commission
 ICCTA: Interstate Commerce Commission Termination Act
 IMO: International Maritime Organization
 IMMTA: International Multimodal Transport Association
 LDD: Loss, Damages, Delay
 MCA: Motor Carrier Act
 MLA: Marine Liability Act
 MVTA: Motor Vehicle Transport
 MTO: Multimodal Transport Operator
 NAFTA: North American Free Trade Agreement
 NS: Norfolk Southern
 OSRA: Ocean Shipping Reform Act
 SCEA: Shipping Conferences Exemption Act
 SDR: Special Drawing Rights
 STB: Surface Transportation Board
 TCM: Transport Combiné des Marchandises
 TIRRA: Trucking Industry Regulatory Reform Act
 UN: United Nations
 UNIDROIT: International Institute for the Unification of International Law
 U.S./USD: United States/United States Dollar
 USCA: United States Code Annotated
 UTMTBL: Uniform Transborder Motor Freight Through Bill of Lading
 UP: Union Pacific

ACKNOWLEDGEMENTS

The present study should not be attributed to its author alone but also to the persons whose knowledge and/or presence have contributed directly or indirectly to its realization.

This is so true for my directors, Pr. Guy Lefebvre and Pr. Yves Tassel who have guided my thoughts, answered my multiple questions and supported my ideas and work throughout my doctoral studies. This is also true for the people of different educational and/or technical background whom I interviewed during my thesis, contributing to its completion. Specific thanks are due, in this regard, to the attorneys François Rouette in Montréal/Québec and Jean-Michel Morinière in Nantes, France. Many thanks are further due to the University of Montréal and the University of Nantes as well as the members of the jury who have made the realization of the *co-tutelle* possible. Finally, the help of Monique Sultan in making this thesis a book is deeply appreciated.

The presence of Canadian and French students who have worked close to me at the University of Montréal and the University of Nantes in the past few years has created a pleasant environment, where productive thought and writing could flourish. I deeply thank them for this.

Words cannot easily describe the unconditional, endless and productive love and support given to me by my family. Day in and day out, rise or fall, their thoughts and actions are with me as well as with my brother and sister. To them and what they stand for I owe all I am or will ever be.

Introduction

Today, international shipments of goods in Canada, North America and worldwide are commonly transported by vessel, motor, train or plane (unimodal transport) or by a combination of different modes of transportation (multimodal transport)¹. Although there is no consensus on the definition of intermodal transportation today, multimodal, 'combined', intermodal' or 'door-to-door' transport appear to be synonymous terms involving the shipment of cargo or people through more than one mode of transportation during a single, seamless journey².

While we see vestiges of intermodalism in antiquity, its global manifestation is traced back to the 1960s when the advent of container trade dramatically changed the transportation industry³. It is surprising to note that multimodal transportation did not develop in response to demands of the cargo interests but, rather, due to competition and economic pressures on the transport industry⁴. Intermodal carriage has performed satisfactorily in the last half of the 20th century as logistics has grown

¹ Although not as developed as unimodal and, specifically, motor transport, multimodal transport at the NAFTA level is rapidly and steadily on the increase. *IMC Market Activity Report* (2000) online: Intermodal Association of North America Homepage (press releases) <<http://www.intermodal.org/pr/pr-2nqtr.html>> (last visited: 20th Oct. 2000). See also U.S., D.O.T., *The Freight Story* (2002) online: U.S. Department of Transportation Homepage <www.ops.fhwa.dot.gov/freight/publications/freight%20story/freight.pdf> (last visited: Nov. 27, 2002).

² W. Brad Jones, Richard Cassady, Royce O. Bowden, "Symposium on Intermodal Transportation: Developing a Standard Definition of Intermodal Transportation" (2000) 27 *Transp. L. J.* 345 at 349. This is the definition of multimodal carriage which, as limited to the transportation of goods, we will adopt in the present study. It does not refer to multimodal carrier liability rules which are quite complicated in practice as we are going to affirm later. Seamless means that transitions between modes occur smoothly with minimal delay. *Ibid* at 350. We will use the terms 'multimodal', 'intermodal' and 'combined' carriage interchangeably and give them the same meaning as herein explained.

³ Samuel Robert Mandelbaum, "International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay" 5 *J. Transnat'l L. & Pol'y* 1 at 4 and Jonathan B.L.K. Jervell III, Anthony Perl, Patrick Sherry, Joseph S. Szyliowicz, "Symposium on Intermodal Transportation: Intermodal Education in Comparative Perspective" (2000) 27 *Transp. L. J.* 419 at 420. Containers are large metal boxes that can be loaded and sealed at the exporters plant, shipped by truck or train to the port, lifted onto a container ship by a dockside crane and stacked in specially designed slots. The container is then unloaded at destination. This occurs without directly handling the cargo inside the container. *Ibid* and Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 12 and 5 and 12-13. Even though historically multimodalism main focus has been restricted to containers, our present thesis will concern containerized and non-containerized multimodal shipments.

⁴ The whole purpose and *raison d'être* of the international transportation industry is to serve international commerce. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

to a profession integrating deregulation of transport services⁵. While once rare, multimodal transport is used even more today to speed deliveries and reduce handling costs, serving, in this way, the exploding expansion of trade at the regional and the international level⁶.

The principal instrument of shipment of goods in unimodal transport is the ‘bill of lading’ (BOL), ‘bill of loading’ as it was once called⁷. Transport under a BOL is one of the oldest and most international forms of transportation of cargo⁸. This document may serve three functions: it is proof of the contract of carriage, it acknowledges receipt of the shipment by the carrier and, when negotiable, it is a document of title controlling possession of the goods in the hands of its holder⁹.

⁵ Logistics was originally a military term used to describe the organization of moving, lodging and supplying troops and equipment. It was somewhat broader than transport since it covered everything needed to deliver troops and equipment to the right place at the right time and in the right condition. Modern business logistics is based on exactly the same concept and sets out to deliver exactly what the customer wants, at the right place, time and price. Very often transport is a major component of the ‘supply-chain’ which delivers to the customer the goods and services needed. *Transport, Logistics and All That* (2001) online: The Institute of Logistics and Transport (ILT) Homepage <<http://www.iolt.org.uk/whoweare/allthat.htm>> (last visited: July 23, 2001).

⁶ (World, per container throughput) : the number of movements taking place in port has grown from zero in 1965 to 225.3 million moves in 2000. Container traffic is forecast to more than double from 1997 to 2006 to around 1 billion tons. It is also to note that in 2000, the value of manufactured goods exported globally has risen to 75% of all goods exported. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 6. See also “Why Integrated Transport Systems?” *OECD Observer* (1998) online: LEXIS (World ALLWLD). Thomas R. Denniston, Carter T. Gunn, Alfred E. Yudes, “Liabilities of Multimodal Operators and Parties other than Carriers and Shippers” (1989) *Tul. L. Rev.* 517 at 518.

⁷ W. Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 215.

⁸ *Ibid.*

⁹ The contract of transport is not an ordinary contract. Its specificity resides in:

- a) the presence of three contracting parties: the shipper, the carrier and the consignee even though most of the time the former and the latter are the same persons, the consignee being shipper’s agent.
- b) the nature of the contract: the transport contract can be of a commercial nature, (this is often the case when the shipper is a merchant), or of a hybrid nature (when the shipper ships goods outside of commercial activities). Jean Pineau, *Le Contrat de Transport Terrestre, Maritime et Aérien*, (Montréal: Editions Thémis 1986) at 15 and 17.
- c) being a contract of adhesion or a standardized contract. A standard form contract is a printed contract in which there are many blanks to be completed with information supplied by both parties. The speed with which the transport transaction is completed is a common feature to all modes of transport, especially where sea carriage is concerned. Being an adhesion contract, BOL provisions *usually favour the carrier*. William Tetley, “Evasion/Fraude à la Loi and Evasion of Law” (1994) 39 *McGill. L. J.* 303 note 4. See also UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at 15.

‘Negotiable’ BsOL are commonly used in sea carriage¹⁰. On the contrary, in land transport ‘non-negotiable’ or ‘Straight’ bills are more frequently encountered¹¹.

Multimodal shipments worldwide frequently move under a ‘Multimodal or Combined Transport Bill of Lading’ (or ‘through’ BOL) that covers the ‘door-to-door’ journey or under multiple unimodal BsOL¹². ‘Through’ BsOL do not differ from unimodal bills in their general characteristics except for the fact that they are generally negotiable documents “without which international trade would soon be brought to a standstill”¹³.

Usually, -not always-, the issuing carrier of a ‘through’ BOL agrees to be responsible for the cargo from the point of delivery to the point of final destination even if the damage occurs in segments of the journey not covered by him¹⁴. In this case, issuing carrier liability is determined by the regime applicable to the carrier where the damage actually occurs since the *damage is evident*¹⁵. When multiple unimodal BsOL are issued to cover the door-to-door journey and evident damage occurs, the carrier performing the stage in question will be held liable. In both cases of ‘through’ and multiple unimodal BsOL, the fate of the intermodal shipper

¹⁰ For ocean BsOL as documents of title in Canada and world wide see the very often cited case *Champlain Sept-Iles Express Inc. v. Metal Coating Continuous Color Coat Ltd.* (1982), 38 O.R. (2d) 182 (Ont. Pr. C.). For the U.S. see “Carriers” *Am. Jur.* (2000) online: WESTLAW (TP-ALL).

¹¹ In Canada, truck BsOL are not documents of title. In the U.S., however, we may encounter an ‘order’ truck bill by way of exception. For instance, shippers of goods with destination Mexico occasionally request negotiable BsOL for protection against insolvent buyers in Mexico and, also, because of the extended transit times at the U.S.-Mexican border. Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Maya, *Transportation and Practice in North America*, (Tuscon, Arizona: National Law Center for Inter-American Free Trade, 1996) at 4.

¹² William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 927. The denomination ‘through bills’ is also used for unimodal successive carries. For instance, the ‘pure ocean through bill of lading’ and ‘ocean through bill of lading’ involve successive ocean carriers. *Ibid.* This type of ‘through’ bills will not retain our attention.

¹³ William J. Coffey, “Multimodalism and the American Carrier” (1989) 64 Tul. L. Rev. 569 at 588-589. This is also the case when ‘through’ bills only concern land intermodal transport.

¹⁴ William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 927. When the multimodal journey includes a sea leg of transportation, the sea carrier is almost always the issuing carrier. William J. Coffey, “Multimodalism and the American Carrier” (1989) 64 Tul. L. Rev. 569 at 586. In this respect, we have to note that the international multimodal channel in the U.S. and Canada is dominated by ocean carriers who have long taken a leadership role in intermodal transport worldwide constituting the clear channel captain. John C. Taylor, «Conflict, Power and Evolution in the Intermodal Transportation Industry’s Channel of Distribution» (2000) 4/1/00 Transp. J. 517 at 519.

¹⁵ William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 928.

depends on the portion of the intermodal route where the damage occurs and the liability principles applicable to it¹⁶.

In case of *concealed damage* in the presence of a 'through' BOL, the terms of the bill contain most frequently, although not always, a presumption that the loss occurred on the ocean carrier leg of the transportation¹⁷. Generally, not always, when the issuer of the intermodal through bill accepts responsibility for the cargo from the point of origin to the point of final destination, then no matter where the loss occurred, the cargo owner can hold the issuing carrier liable for the damage¹⁸. However, issuing carrier is entitled to the benefit of liability provisions applicable to his leg of the transportation¹⁹. When non-through BsOL are issued, the cargo owner may not always be able to establish which, if any, of the carriers received the cargo in good condition and delivered it damaged (shipper *prima facie* case)²⁰. Thus, the cargo owner may not be able to recover from any carrier for the damage²¹.

In reality, multimodal transportation today is almost entirely the domain of the international freight forwarding industry²². Freight forwarders or multimodal

¹⁶ Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233. See combined transport Bills of Lading provisions in *Annex I, Table No. 1* at i-xvii.

¹⁷ Consequently, the cargo owner may recover from someone. Jack G. Knebel Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562, 563 and 567. Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233. Concealed damage is damage produced during the multimodal journey when it cannot be determined in what stage of the journey the damage actually occurred. This may be the case when the carrier ships sealed containers where he cannot verify the condition of the goods therein contained. Proof of receipt of goods in good condition makes part of the *prima facie* case the shipper has to make against the carrier in case of damaged goods. William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 142. In the present study we oppose 'concealed damage' to 'evident damage' since, in the latter case, it is obvious in what stage of the journey the damage took place.

¹⁸ Jack G. Knebel Savoie Blocker "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 563-564.

¹⁹ See *ibid* at 563 and doctoral thesis of Nicole Lacasse, *International Multimodal transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 78 for the case of the ocean carrier. For ocean BsOL and tariffs provisions see *Annex No. 1, Table No. 3*.

²⁰ Jack G. Knebel, Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 562. Also, if the carrier makes reservations on the BOL as to the description of the goods made by the shipper or the shipment in general, the *prima facie* case is not established.

²¹ *Ibid*.

²² *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1998) online: Forwarder Law Homepage <<http://www.forwarderlaw.com/feature/multim.htm>> (last modified: Nov. 26, 1999).

transport operators²³ agree to be responsible for the complete movement of the goods and may carry the goods on their own vehicle for one stage of the journey or, simply procure performance of the entire contract through sub-contracting with other carriers²⁴. They arrange for the door-to-door transport of goods and act as principals (contracting carriers) vis-à-vis shippers or as their agents in sub-contracting with performing carriers who actually transport shipper's goods²⁵. While liability of unimodal carriers is governed by various conventions and national laws, freight forwarder liability is not subject itself to any convention or national law but is rather determined by contracts²⁶. Although freight forwarders may frequently undertake intermodal carriage of goods as principals, their contractual relationship with the shipper has tended to be that of an agency²⁷.

Even though, when acting as principals, freight forwarders are liable for evident or concealed damage where ever these might occur, they attempt to contract out as much responsibility as possible²⁸. In this way, they try to shift their liability to the limited extent of liability imposed on the performing carrier opting, therefore, for

²³ Freight forwarders perform a number of services ancillary to the carriage (customs clearance of the goods, warehousing) and also the contract for carriage. Even though the terms 'freight forwarders' and 'multimodal transport operators' are, most frequently, used as synonymous and as such will be used in the present study, they have also created challenges in legislative and commercial issues. *Ibid* and *Mandate of CIFFA's Seafreight Committee* (1999) online: CIFFA abbreviations Homepage <http://www.ciffa.com/aboutciffa_mandateseafreight.html> (last visited: continuously). One should note that ship owners, charterers, terminal operators, inland depots, Non-Vessel Operating Carriers, air cargo operators and container lessors can also be freight forwarding agents. A.M. Stirling, "Insurance for Through Transport Operators" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 2.

²⁴ Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5.

²⁵ Freight forwarders may act in their traditional role of shipper agents (paying freight charges, insurance, custom duties) or as principals (contractors) arranging the carriage in their own name. In the latter case, freight forwarders are liable to the shipper as carriers. William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 692s. For the role of freight forwarders under French and Canadian law see the doctoral thesis of Nicole Lacasse, *International Multimodal transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 110-240.

²⁶ *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1999) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/Feature/multim.htm>> (last modified: Nov. 26, 1999).

²⁷ C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 2-3.

²⁸ William Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 692s. and Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International,

a fragmented, rather than a uniform, liability regime applicable to the intermodal carriage²⁹. This further confuses the already chaotic multimodal carrier liability regime and makes necessary the examination of existing conventions governing unimodal carriers in considering uniformity³⁰.

For these reasons, multimodal transportation has given rise to commercial world's dissatisfaction with myriad and inconsistent rules to govern it³¹. The multiple contractual relationships involved in multimodal transport of goods frequently lead to court rulings that tend to treat essentially similar disputes inconsistently³². The ensuing complexity is overwhelming to small businesses-shippers since the need to use lawyers or additional cargo insurance to resolve these complexities may, in some cases, cost enough to make the shipment uneconomical³³.

Small shippers are not the only ones to have suffered from the confusing rules of multimodal carrier liability. As we are going to affirm, cargo and liability insurers, the main pillars of today's multimodal transport are faced, themselves, with the multiplicity of national and modal applicable legal regimes and can get entangled

1997) at 5-6. The identity of the responsible person towards the shipper, (whether it is the carrier or the freight forwarder), will not retain our attention in the present study.

²⁹ Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 5 and at 6-7. E. C., (Eur.Com.), *The Economic Impact of Carrier Liability on Intermodal Transport* (2001) online: Europa Homepage http://europa.eu.int/comm/transport/library/final_report.pdf (last visited: Dec. 5, 2001). Jan Ramberg, *Unification of the Law of International Freight Forwarding* (2001) online: UNIDROIT Homepage <<http://www.unidroit.org/english/publications/review/articles/1998-1.htm>> (last visited: Jan. 10, 2001). Freight forwarders have traditionally avoided carrier liability by declaring that they do not act as common carriers but merely as shipper agents transferring, in this way, liability to individual carriers involved in multimodal transport. Evasive freight forwarder liability as a carrier, has qualified him as the 'legal Pimpernel Smith': "They Seek him here, They Seek Him There, Those Frenchies Seek Him Everywhere. Is He In Heaven, Is He In Hell, That Damned Illusive Pimpernel?". *Ibid.*

³⁰ Hugh M. Kindred, Mary R. Brooks, *Multimodal Transport Rules* (Hague: Kluwer Law International, 1997) at 6-7. De Wit Ralph, *Carrier Liability and Documentation in Multimodal Transport* (D. Jur. Thesis, Law Faculty of the Vrije Universiteit at Brussels, 1993) [published by Informa Law and is part of the Lloyd's Shipping Law Library] at 865-868.

³¹ Thomas R. Denniston, Carter T. Gunn, Alfred E. Yudes, "Liabilities of Multimodal Operators and Parties other than Carriers and Shippers" (1989) Tul. L. Rev. 517 at 519.

³² *Ibid.* Under the present regulatory framework both the incidence and the extent of carrier liability may depend crucially on a) whether a loss can be attributed to a particular stage and mode of transport; b) on which of a considerable number of potentially applicable rules and/or regulations is considered to be relevant by a court or arbitral tribunal in a given forum. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (G n ve: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 10.

³³ Kurosh Nasseri, "The Multimodal Convention" 19 J. Mar. L. & Com. 231 at 233-234.

in very expensive disputes, often resulting in court decisions³⁴. The resulting unpredictability and subjectivity of judge's decisions do not facilitate transport nor promote trade. The current situation creates pressure for simplification of legal rules involved in multimodal transport³⁵.

Having made our introductory remarks on what some of the main legal concerns are in the area of multimodal transport, we will now proceed to announce the manner in which the rest of our introduction will be organized. Our *first part* will consist in formulating the central question of our thesis (search of uniformity of intermodal carrier liability) followed by general remarks on its object and goals. In the *second part* of our introduction we will comment on concepts and theories, which are at the very foundation of the present analysis and uniformity suggestions: pragmatism, fairness and Law & Economics.

1) The Core and Frame of our Thesis (central question, object and goals):
The present analysis revolves around the search of uniformity of applicable legal rules and practices. The need for uniformity at the domestic or/and the international level is not new or sector-specific. Its interdisciplinary and international reach renders this concept common place among scientists and practitioners in practically every field of study.

Our search of uniformity concentrates, more specifically, on rules and practices applicable to multimodal carrier liability (*uniformity-rationae materiae*) in the U.S. and Canada (*uniformity-rationae loci*). Absent uniform laws to govern multimodal transport in these two countries, exploration of domestic unimodal carrier liability rules and their intermodal applications constitute focal themes of the present study. This means to say that our analysis will be limited to the study of

³⁴ "Liability Limbo" *J. Com.* (2000) online: WESTLAW (Newsletters). See also "Europe's Cargo Insurance Lottery" *Am. Shipper* (1997) online: LEXIS (World, ALLWLD). *Infra* at Part I, Chapter I, Section I, Par. 3(B).

³⁵ Thomas R. Denniston, Carter T.Gunn, Alfred E. Yudes, "Liabilities of Multimodal Operators and Parties other than Carriers and Shippers" (1989) *Tul. L. Rev.* 517 at 519.

freight forwarders liability as principals and not as agents³⁶. In this respect, we will only concentrate on ocean-land (motor and rail) intermodal carriage taking place at the international -not purely domestic- level.

Moreover, it is not our intention to explore all aspects of multimodal carrier liability. We will only concentrate on the ‘basis’ of intermodal carrier liability - which basically includes carrier liability exemptions- and his statutory or contractual limitation of liability provisions. The reason for this is that, from a legal point of view, these two areas of carrier liability constitute the very essence of the law governing carriage of goods. It is certain that other areas of carrier liability, (i.e. duration of journey, prescription of claims, identity of the liable carrier), are not negligible in importance but one cannot treat all subjects within the frame of a doctoral dissertation.

Our task would have probably been easier had we undertaken our study in a region such as Europe where legal developments in one country influence neighbouring countries, shaping, in this way, the evolution of the continent³⁷. In effect, despite their geographical proximity and common law tradition³⁸, (with the exception of the civil law³⁹ province of Québec), the U.S. and Canada have been relatively immune to influences from each other⁴⁰. This is said to pertain to the deeply held U.S. belief that the American way is the best so that there is no need to

³⁶ Because we concentrate mostly on unimodal carrier liability laws, the presence of freight forwarders will not be very much felt in the present study. Our reference to ‘carrier liability’ or ‘carrier’ directs to ‘freight forwarder liability as a carrier’ but also to unimodal carrier liability within the context of a multimodal journey.

³⁷ Stephen Zamora, “NAFTA and the Harmonization of Domestic Legal Systems” (1995) 12 *Ariz. J. Int’l. Comp. L.* 401 at 404.

³⁸ (U.S. and Canadian) common law principles find their origins in English law. Common law was created over seven centuries ago during the reign of King Henry II of England. For a discussion on common law origins and influences before this point in time see John A. Makdisi, “The Islamic Origins of Common Law” (1999) 77 *N. C. L. Rev.* 1635 at 1637-1638.

³⁹ Civil law systems, as this is the case of most European country laws, find their origins in Roman law. *Infra* at 23. On the history of the Québec civil code see *infra* note 869. Ancient Greek Law was the precursor and the intellectual source of Roman Law of the classical period (*ius Greco-Romanum*). *Greek Constitution, Government and Legislation* (2002) online: Jurist Law Homepage-Pittsburgh University <<http://jurist.law.pitt.edu/world/greece.htm>> (last visited: June 20, 2003).

⁴⁰ Stephen Zamora, “NAFTA and the Harmonization of Domestic Legal Systems” (1995) 12 *Ariz. J. Int’l. Comp. L.* 401 at 404.

import foreign influence at the legal, economic or political field⁴¹. Canada, on the other hand, has looked to Great Britain and France for legal models due to historical and political reasons⁴². We are looking, therefore, at two largely common law countries with distinctive legal mentalities. The individuality of the Canadian civil law province of Québec adds to the diversified cultural and legal picture and further complicates our analysis.

Moreover, the plethora of legal sources containing carrier liability provisions in the two neighbouring countries is considerable and constitutes a source of complications. The multiplicity of sources is due to the absence of a uniform multimodal carrier liability regime but is also attributed to the federal-state structure of the two countries. In effect, since multimodal transport is not regulated as such, we have to go through the study of unimodal transport sources of law and determine their multimodal applications. In Canada, international motor and rail transport regulation is split between federal and provincial governments but federal regulation is much more extensive in rail than in motor transport where provincial regulation is omnipresent⁴³. International ocean carriage in Canada is subject to a uniform set of rules. We refer to the Hague-Visby Rules (Visby Rules)⁴⁴ reproduced in the Canadian Marine Liability Act⁴⁵, applicable today. Land transport in the U.S. is

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ For motor transport see Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Maya, *Transportation and Practice in North America*, (Tucson, Arizona: National Law Center for Inter-American Free Trade, 1996) at 6. The Canadian federal government has the power to regulate inter-provincial and international trucking but federal regulatory abandonment in this field has made motor transport a provincial responsibility. This does not mean to say that the federal government has abstained from regulating motor transport. Ron Hishhorn, *Trucking Regulation in Canada: a Review of Issues* (Ottawa: Economic Council of Canada, 1981) at 18. For rail: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime et Aérien* (Montréal: Editions Thémis, 1986) at 9. *Infra* at 132s.

⁴⁴ The *Visby Rules* consist of two Protocols amending the *Hague Rules* (August 25, 1924): *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968*; and *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, December 21, 1979* [hereinafter *Visby Rules*] online: Admiralty Law Homepage <<http://www.admiraltylaw.com/hague/html>> (last modified: February 3, 1999). *Annex No. II, Table No. 3* at cli.

⁴⁵ S. C. 2001, c. 6. [hereinafter *MLA*]. This act contains many different parts such as carriage of passengers, personal injuries and fatalities, rewrite and update of Part XIV of the *Canada Shipping Act*. However, in Schedule III it reproduces the *Visby Rules* that Canada applied from 1993-2001 through the *Carriage of Goods by Water Act*, S.C. 1993, c. 21 [hereinafter *COGWA*].

regulated by federal acts that apply to international carriage only if the ‘through BOL’ is issued in the U.S.⁴⁶. International ocean carriage, on the other hand, is subject to the Hague Rules, Visby Rules predecessor, enacted in the U.S. by the Carriage of Goods by Sea Act (COGSA)⁴⁷. To the dispersed material regulating multimodal transport we have to add the importance of case law precedent in dictating rules of law in both Canada and the U.S. as well as the need to watch over for applicable transportation practices on the ground.

Finally, in seeking uniformity of the multimodal carrier liability rules we believe that one has to be taught from currently ongoing and past unfruitful initiatives already made in this area at the regional and the international level. Thus, for instructive purposes and for the sake of the ultimately desired international uniformity of multimodal transport rules, the failed international initiative of the 1980 Multimodal Convention⁴⁸ and European laws on multimodal carrier liability will be commented on.

The overall complexity of the present study is not negligible. In effect, we are not only venturing in a comparative analysis of carrier liability principles concerning three different modes of transport. We are undertaking this cross-modal analysis in two different countries on the basis of federal or provincial statutes and regulations as well as case law and practices that all compose the multimodal carrier liability regime in the U.S. and Canada. Discovering material of unimodal carrier liability in two different countries, detecting their multimodal applications, grouping them together, comparing them, making suggestions on uniformity and, giving them, as much as possible, an international and pragmatic perspective, is not an easy task.

⁴⁶ *Carmack Amendment* 49 U.S.C. par. 14706(a)(1) (1906). See *infra* at 179 for Carmack Amendment geographical scope.

⁴⁷ *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, Brussels Aug. 25, 1924, 120 L.N.T.S. 155 (entered into force on June 2, 1931) [hereinafter Hague Rules]. *COGSA*: Ch. 229, ss. 1-16, 49 Stat. 1207 (1936) (codified at 46 U.S.C. app. Ss. 1300-1315 (1995)) [hereinafter 1936 *COGSA*]. We will later comment on the *COGSA* reform initiative. *Infra* at 169.

⁴⁸ *United Nations Convention on International Multimodal Transport of Goods*, May 24, 1980 U.N.DocTD/MT/CONF.17 (not yet in force) [hereinafter 1980 Multimodal Convention].

In undertaking such a complicated study, our objective is to make suggestions on uniform multimodal carrier liability provisions in the U.S. and Canada. We will not go as far as propose a uniform liability regime. Years of negotiations have not achieved the entering into force of uniform multimodal carrier liability rules at the international, regional or bilateral levels so as to aspire at the creation of such rules by the present study. Our suggestions constitute only the starting point in the overall procedure of rendering uniform intermodal carrier liability rules. Completion of our uniformity suggestions should make the object of further and intense negotiation among interested parties.

Although not easy to achieve, uniformity presents considerable advantages. It involves elimination of the plethora of unimodal and domestic carrier liability rules and promotes trade by subjecting multimodal carriers to one applicable regime at the domestic, regional or international level⁴⁹. Despite the absence of data supporting this suggestion, a uniform intermodal liability regime is said to reduce litigation and transportation costs (especially costs associated with evidentiary enquiries, claims handling) promoting efficient multimodal operations⁵⁰.

2) *The Foundations of our Thesis: Pragmatism, Fairness, Law & Economics:* Our uniformity suggestions on multimodal carrier liability in the U.S. and Canada will be based on two great, albeit not always compatible, in practice, principles. Pragmatism (realism)⁵¹ and fairness of our proposals as applicable in the relation

⁴⁹ Uniform international law is a boon to international commerce and thereby contributes substantially to creating conditions that foster both national and international economic growth. One of the greatest proofs of this is the European Union that, since 1957, has created a single market in goods and services among its member-states. William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions-How to Adopt to International Convention" (2000) Tul. Mar. L. J. 775 at 798.

⁵⁰ *Ibid* at 797 and *Intermodal Transport Liability* (1999) online: Interpool Homepage <http://www.interpool.com/tcl/_disc1/00000050.htm> (last visited: October 19, 2001) for litigation costs. "Europe's Cargo Insurance Lottery" *Am. Shipper* (1997) online: LEXIS (World, ALLWLD). UN (Economic and Social Council), Inland Transport Committee (Working Party on Combined Transport) *Possibilities for Reconciliation and Harmonization of Civil Liability Regimes Governing Combined Transport* (1999) online: UNECE Homepage <http://www.unece.org/trans/new_tir/wp24/documents/wp.24-99-2e.pdf> (last visited: Nov. 12, 1999) for transportation costs. See also *infra* at 33s and at Part II, Chapter II, Section III, Par. 3.

⁵¹ The terms 'pragmatism' and 'realism' will be used interchangeably in the present study since they are defined in very similar ways in everyday language. 'Realism' is defined as an inclination or attachment to what is real and is opposed to idealism. 'Pragmatism' (deriving from the Greek word *πράγμα*: act, deed, thing)

between carriers and shippers. The ‘Law and Economics’ doctrine is also an important consideration we will take into account in formulating our proposals and that we will later develop in our introduction and suggestions. As our analysis unfolds, we will see how these principles condition adoption of our suggestions by the interests involved in negotiations, which is what counts at the end of the day when negotiating multimodal carrier liability issues⁵².

Pragmatism, as we are going to affirm, marks a direction to be followed but does not set concrete game rules. This is why this concept will translate into the notions of *approximation (harmonization), codification and contractualism/formalism* which, along with fairness, are situated at the very heart of our suggestions and our overall analysis. Whenever in conflict, pragmatism, (or its component principles), will usually overrule fairness⁵³. However, when the out casting of fairness to favour pragmatism leads to patently unjust results burdening carriers or shippers, we will re-establish fairness to its position provided that such a measure does not void pragmatism of its very essence⁵⁴.

This subordinates the fairness concept to that of realism. Such a conclusion can be easily explained! Fairness is a great principle law is intended to serve, but it

is defined as the method of treating history in which the phenomena are considered with special reference to their causes antecedent conditions and results, and to their practical lessons. *Shorter Oxford English Dictionary*, (Oxford University Press, 1933) s.v. ‘realism’ and ‘pragmatism’. See also Edward L. Rubin, “Scholars, Judges and Phenomenology: Comments on Tamanaha’s Realistic Socio-Legal Theory” (2000) 32 Rutgers L. J. 241 at 242. Mentioned definition of ‘pragmatism’ is compatible with the one adopted in the present study. *Infra* at 13-14.

⁵² Federal and state/provincial governments and their committees, which usually are organized along modal lines, reflect, most frequently, carrier interests. This is so, even though modes of transportation exist only to serve customers who, in the case of freight transportation, are shippers. Conflict between carrier and shipper interests in the transport industry, therefore, creates a classic stalemate causing governmental inaction. “The Proceedings” (1998) 25 Transp. L. J. 261 at 282, Joseph S. Szyliowicz, “Intermodalism: the Challenge and the Promise” (2000) 27 Transp. L. J. 299 at 309 and Samuel Robert Mandelbaum, “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: a U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnat’ l. L. & Pol’ y 1 at 27.

⁵³ For a specific example see the conflict between ‘formalism’ (more protective of shipper interests) and ‘contractualism’ (favouring more free market principles certain carriers may take advantage of) and the preponderance given, in principle, to the latter concept. *Infra* at 25s.

⁵⁴ See *infra* at 301s on our rejection of authors suggestion that competition rules and insurance companies should substitute for legal concepts such as intentional or willful faults that lead to loss of carrier limitation benefit. However, in an imaginable scenario where all, or most, modes in the U.S. and Canada abolish loss of carrier liability limitation provisions in theory and practice, insisting on the fairness of loss of carrier liability provisions voids pragmatism of its very essence.

raises its fist against knife's cutting edge and is doomed to fail when it is not given realistic applications. It is certain that we want the weaker shippers to stand on an equal basis when dealing with carriers⁵⁵. However, proposing a mandatory liability regime favouring shippers as was the case of the 1980 Multimodal Convention, will simply result in this proposal being a dead letter, easily rejected by powerful carrier and liability insurer interests as it happened with the said convention⁵⁶. This is why priority has to be given to a pragmatic uniformity approach in the present study, without neglecting, however, fairness. As Mr. Robert D. Kaplan⁵⁷ said: "Realists run foreign policy, idealists comment from the sidelines".

We will now proceed to analyze the notions of pragmatism, its component concepts and fairness.

Different countries and branches of human sciences define pragmatism or realism in different ways⁵⁸. We align ourselves with the definition of Mr. Robert D. Kaplan that opposes realism to idealism and defines former as "a perspective of description or prescription in which tangible power is the determining feature of policy, not some conception of a better or perfect world"⁵⁹. In other words, pragmatism considers existing realities and elaborates rules that stay close to ground practice while advancing solutions that produce the desirable result, in our case, uniformity of multimodal carrier liability. We will not, therefore, achieve uniformity in our study by elaborating rules too remote from present realities.

⁵⁵ On shipper weaker position in the transport contract see *supra* note 9 and accompanying text and *infra* at 159-160.

⁵⁶ This Convention was crafted by shipper countries (third world developing countries) and proposed a uniform multimodal carrier regime not sanctioned in practice by sea-faring nations that participated to the negotiations. "Liability Limbo" (2000) online: WESTLAW (Newsletters). This is one of the reasons that led to the non-adoption of the said convention. *Infra* at 53s.

⁵⁷ Robert D. Kaplan, "The Coming Anarchy; Shattering the Dreams of the Post-Cold War" (2000) 23 Hous. J. Int'l L. 219 at 222. Robert D. Kaplan is a journalist and author of articles and books on policy matters. Even though the comment is made on foreign policy, it is really adapted to the very essence of the present study. Multimodalism is also an international affair involving great conflicting interests and is depended on governmental policy decisions.

⁵⁸ Neither the philosophical community nor the legal community have arrived at a settled, agreed upon definition of pragmatism. Pragmatism can be more feasibly described than defined. Matthew A. Edwards, "Posner Pragmatism and Payton Home Arrests" (2002) 77 Wash. L. Rev. 299 at note 39 and at note 52.

⁵⁹ Robert D. Kaplan, "The Coming Anarchy; Shattering the Dreams of the Post-Cold War" (2000) 23 Hous. J. Int'l L. 219 at 222.

Our reasoning is explained by the fact that past uniformity initiatives in our field of study were unsuccessful, partly because they were remote enough from ground multimodal practice that their practical effects on carriers, shippers or their insurers were too difficult to predict⁶⁰. It is also true that rules emanating from ground practice have a better chance of surviving political (governmental) scrutiny upon which their adoption is dependent. These are the reasons why we will always verify that our suggestions stay close enough to ground practice while serving uniformity.

Realism may indicate the need to consider tangible realities, but it fails to determine its tools to achieve such goal. This is why we will make harmonization, codification, formalism/contractualism, all concepts successfully applicable today on the ground, the component elements of the pragmatism notion that we will analyze as follows.

Harmonization: Uniformity, unification and harmonization of domestic legal principles are concepts commonly used but not unanimously defined by doctrine.

Before defining uniformity we should note that this concept has been used with respect to laws of different countries as well as laws of different sectors within the geographic limits of one country⁶¹. In this sense, uniformity is a two-dimensional concept in being both geographic and sectarian. This is an important affirmation to make considering the fact that we are seeking uniformity of cross-modal and cross-border transport laws and practices.

Uniformity has been defined as the process of ‘conforming to one rule, mode, pattern or unvarying standard, not different at different times and places; applying equally to all within a class; sameness’⁶². The definition varies, however, according to the field of study and authors subjective views of this concept. For instance, in

⁶⁰ We refer here to the 1980 Multimodal Convention, *infra* at 52s.

⁶¹ Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Maya, *Transportation and Practice in North America* (Tucson, Arizona: National Law Center for Inter-American Free Trade, 1996) at 63.

⁶² Blacks Law Dictionary (6th ed.1990) s.v. “uniformity”.

criminal law there are institutions that have adopted the less ambitious definition of ‘similar sentences for similar conduct by similar offenders, or treating similar cases alike’⁶³; for bankruptcy purposes uniformity has been defined as ‘taking the same measures inside bankruptcy as outside bankruptcy procedures’⁶⁴.

The lack of precision and clarity in defining this concept goes even further. Certain authors argue that the concepts of unification and harmonisation are synonymous, if not inclusive of the concept of uniformity⁶⁵. Others, place the uniformity concept at the top of the pyramid as being the goal to be achieved, with harmonisation and unification being its vehicles⁶⁶. The concept is, therefore, polysemous when defined alone or in connection with other concepts such as unification and harmonisation.

In turn, the unification and harmonisation concepts are not only ambiguous in their interaction with the notion of uniformity. Their definitions are also far from being clear.

Historically, authors were using the term ‘unification of law’ rather than ‘harmonisation’ to achieve uniformity⁶⁷. While there is no precise definition of the unification concept, this term illustrates the need for a “‘line-to-line’ identity of laws between two or more communities”. It corresponds to what has been called ‘complete’ uniformity⁶⁸. In this respect, certain authors have argued that unification -

⁶³ Definition of the U.S. sentencing Commission as reported by Lisa M. Rebello, “Sentencing under the Federal Sentencing Guidelines” (1992) 26 Suffolk. U. L. Rev. 1031 at note 6.

⁶⁴ *Hanover Nat. Bank v. Moyses*, 186 U.S. 183 (U. S. S. C. 1902).

⁶⁵ “Uniformity or harmonization is the adoption of a single set of rules”. Steven Walt, “Novelty and the Risk of Uniform Sales Law” (1999) *Virg. J. Int’l. L.* 671 at 674.

⁶⁶ For harmonization see Boris Kozolchyk, “The UNIDROIT Principles as a Model for the Unification of the Best Contractual Practices in the Americas” (1998) *Am. J. Comp. L.* 151 at 151. For unification see Wayne R. Lafave, Jerold H. Israel and Nancy J. King “An Overview of the Criminal Justice Process (Localism)” (1999) 1 *Crim. Proc.* s. 1. 9(b) stating that unification was spurred, among other factors, by the need to achieve greater uniformity.

⁶⁷ Brian R. Opeskin, “The Architecture of Public Health Law Reform: Harmonization of Law in a Federal System” (1998) 22 *Mel. U. L. Rev.* 337 at 338. For sea carriage and international conventions see Brandon I. Milhorn, “*Vimar Seguros y Reaseguros v. M/V Sky Reefer: Arbitration Clauses in BOL under the COGSA*” (1997) 30 *Cornell Int’l. L. J.* 173 at 174.

⁶⁸ *Ibid* and Benjamin Geva, “Uniformity in Commercial Law: is the UCC Exportable?” 29 *Loy. L. A. L. Rev.* 1035 at 1037: “the effect of unification is to make substantive law one and the same for all jurisdictions in all or selected areas”.

as opposed to harmonization- of laws is, to a large extent, utopian even within one nation⁶⁹. Others, maintain that unification does not entail ‘complete’ uniformity but permits variances in the applicable rules⁷⁰.

More recently, there has been a discernible shift away from the unattainable goal of unification towards the less ambitious but undeterminable notion of harmonisation⁷¹. This concept has been referred to as ‘levelling the playing field’ by its proponents⁷². Less precise in its content than unification, it is ‘as infinite in its configurations as are potential problems of law’⁷³. In this respect, harmonisation has been defined as the ‘bringing together of two or more standards’⁷⁴, ‘standardisation of any number of trade criteria’⁷⁵, ‘legally binding measures that enact substantially similar legal rules’⁷⁶, ‘approximation’ of laws and policies of Member States’⁷⁷. This last definition of harmonisation appears to be less ambitious than that of ‘complete’ uniformity or ‘line to line’ identity certain authors attribute to the unification concept⁷⁸. Finally, there are authors who claim that harmonisation constitutes a unification tool where others argue that unification serves the harmonisation process⁷⁹.

⁶⁹ Hannu Honka, “Harmonization of Contract Law through International Trade: a Nordic Perspective” (1996) 11 Tul. Euro. Civ. L. F. 11 at 12.

⁷⁰ Wright & Miller, “Admiralty and Maritime Claims” (1998) 12A Fed. Prac. & Proc. Civ. 2d App. E (WESTLAW-Tp-all).

⁷¹ Brian R. Opeskin, “The Architecture of Public Health Law Reform: Harmonization of Law in a Federal System” (1998) 22 Mel. U. L. Rev. 337 at 338.

⁷² Margaret Renee Herman, “Are we Learning from the Mistakes of Environmentalists?” (1999) 16 Ariz. J. Int’l & Comp. L. 543 at 543.

⁷³ Stephen Zamora, “NAFTA and the Harmonization of Domestic Legal Systems” (1995) 12 Ariz. J. Int’l. Comp. L. 401 at 404.

⁷⁴ Alexander M. Donahue, “Equivalence: Not quite close Enough for the International Harmonization of Environmental Standards” (2000) 30 Env. L. 363 at 367.

⁷⁵ Margaret Renee Herman, “Are we Learning from the Mistakes of Environmentalists?” (1999) 16 Ariz. J. Int’l & Comp. L. 543 at 543.

⁷⁶ Patrick J. Murray, “The Adequacy Standard under Directive 95/46/EC” (1998) 21 Fordham Int’l L. J. 932 at note 26.

⁷⁷ Art. 94 and 95(1) of the consolidated version of the *Treaty of Rome*, a Treaty that established the European Community (*infra* note 422). This treaty set up institutions and decision-making mechanisms through which both national interests and a European Community view could find their expression. From that time onwards, the EC was the major axis around which the movement for a united Europe turned.

⁷⁸ David George Anderson, “The New International Economic Order” (1993) 87 Am. Soc’y. Int’l. Proc. 459 at 467.

⁷⁹ It has been noted i.e. that unification of conflict rules is not feasible without foregoing harmonisation of laws. Hans Kuhn, “Multi-state and International Secured Transactions under Revised article 9 of the U.C.C.” (2000) 40 Va. J. Int’l. L. 1009 at 1095. In transportation law, however, the harmonisation process has been

From the stated above, we conclude that definitions of the ‘harmonization’ and ‘unification’ concepts differ, terms used to define them are often vague and the interaction between the two concepts is indefinite. Based on mentioned doctrinal definitions, it is not even clear today whether harmonisation and unification are two distinct processes.

For the purpose of the present analysis, uniformity is placed at the top of the pyramid as the objective to be attained with harmonisation of cross-border and cross-modal transport rules and practices constituting its vehicle. We will use the concept of unification as one of harmonisation tools since it is frequently used in this way in the area of transport. Unification, for us, will involve a ‘line-to-line’ identity of rules and practices of certain carrier liability principles (‘complete’ uniformity)⁸⁰.

It is on the European Union (EU)⁸¹ definition and methods of harmonisation that our study will be based. This model of harmonisation has been qualified as the most successful of its kind⁸². The EU harmonisation concept refers to ‘approximation’ of rules⁸³. In this sense, harmonisation is designed to achieve ‘compatibility’, ‘convergence’ of laws of various jurisdictions and facilitate cross-border dealings in a framework that allows retention of individual laws⁸⁴.

Following the example of the harmonization concept, ‘approximating’, ‘converging’, ‘rendering compatible’ are terms of some ambiguity⁸⁵. Some authors consider these terms synonymous of the concept of harmonisation⁸⁶. Others, admit that they differ from the harmonisation concept but have difficulty in delineating the

argued to include unification and standardisation of transport documents used in transport. Dr. Boris Kozolchuk, Gary T. Doyle, Lic. Martin Gerardo Olea Maya, *Transportation and Practice in North America*, (Tucson, Arizona: National Law Center for Inter-American Free Trade, 1996) at 88. For sea carriage W. Tetley, “Uniformity of International Private Maritime Law” (2000) 24 Tul. Mar. L. J. 775 at 787.

⁸⁰ *Supra* at 15 and *supra* note 79 for authors opinion.

⁸¹ On the EU see *infra* at 18.

⁸² Alexander M. Donahue, “Equivalence: Not Quite Close Enough for the International Harmonization of Environmental Standards” (2000) 30 Env. L. 363 at 368.

⁸³ *Supra* note 77 and accompanying text.

⁸⁴ Benjamin Geva, “Uniformity in Commercial Law” (1996) 29 Loy. L. A. L. Rev. 1035 at 1037.

⁸⁵ Anita Bernstein, “Strict Products Liability Attempted in the European Community” (1991) 31 Va. J. Int’l. L. 673 at 695.

⁸⁶ EU material as reported by *ibid.*

shades of meaning of these terms⁸⁷. Certain authors distinguish approximation from harmonisation identifying the former concept with a more intensive process of integration than the latter concept⁸⁸. For the purposes of the present study, we will consider the approximation concept as synonymous of the notion of harmonisation and both terms will denote presence of converged rules (‘levelling the playing field’) and not ‘line-to-line’ identity of laws (adopted definition for the unification concept).

It may be that our harmonisation concept does not seek the ‘line-to-line’ identity of rules attributed to the unification notion. Our more modest approach is more realistic, more pragmatic since it is based on making similar rules already applicable on the ground. This makes our task more feasible and its end product more likely to succeed in practice.

We will now turn our attention to the important question of how approximation (harmonization) of laws is achieved at the EU level since our suggestions find an important source of inspiration in the EU harmonization methods. At the European -as well as the international- level, authors refer to ‘formal’ or ‘negotiated harmonisation’ to designate a process whose end product derives from extensive negotiations among national authorities⁸⁹. These negotiations take place within the frame of European institutions and result in the elaboration of acts such as directives and regulations. Both these acts constitute secondary sources of EU law⁹⁰. European directives are the vehicle of harmonisation of Member-State laws whereas regulations constitute the unification tool of EU law⁹¹. In other words,

⁸⁷ *Ibid* at note 21.

⁸⁸ D. Lasok and J. Bridge as reported by *ibid*.

⁸⁹ Patrick Glenn, “Harmonization of Private Law Rules between Civil and Common Law Jurisdictions” *Droit Comparé et Unification du Droit* (Montréal: Institute of Comparative Law, 1990) 1 at 4.

⁹⁰ Hermann Niessen, “Harmonization des Normes Comptables: Réalisations et Perspectives OCDE”, *Harmonization des Normes Comptables dans la Communauté Européenne* (Paris: OCDE 1985) 85 at 86. Treaties that founded the EU and its institutions such as the *EC Treaty* are primary sources of EU law whereas regulations, directives, recommendations, decisions are acts of the EU institutions and constitute, therefore, secondary sources of law.

⁹¹ EU regulations are acts elaborated by European institutions, binding in all their elements, of general application and directly applicable to the citizens and entities of all Member-States. Kluwer Graham & Trotman, *Introduction to the Law of the European Communities* 2d ed (Netherlands: Kluwer Law and

whereas directives modify rules of national law approximating, converging them, regulations create rules of EU law⁹².

Under Article 249 of the consolidated version of the *EC Treaty*, a directive is binding as to the results to be achieved but leaves the choice of form and methods of implementation to the national authorities⁹³. Periodically, European institutions will examine directives with the aim of tightening their provisions, thus, achieving greater convergence⁹⁴. In this way, ‘formal’ harmonisation is achieved at the European level preserving, to a large extent, the individuality of Member-State laws and procedures⁹⁵.

A directive may achieve approximation by adopting terms common to all Member State laws and finding a ‘middle ground’ solution where these laws diverge⁹⁶. It cannot be denied, however, that the Community institutions may have authority to introduce, in certain matters, completely new rules⁹⁷. In this case, it may be doubted whether such a process can be termed as ‘approximation’ of rules in the way this is defined in the *EC Treaty*⁹⁸.

Apart from the process of European ‘formal’ harmonisation, there is also the subtler ‘informal’ harmonisation that we also find at the international level⁹⁹. This has been argued to be a less interventionist, less creative and uncoordinated form of

Taxation Publishers 1989) at 193. ‘Binding in all their elements’ as opposed to directives ‘binding as to their goals’; ‘of general application’ means of ‘general, non-individualized character of the situation to which it applies’ as opposed to ‘leaving to national authorities the choice of form and methods’; ‘directly applicable’ to Member-States as opposed to directives ‘applicability through Member-States implementation measures’.

Ibid.

⁹² Dominic Lasok, Panayotis Soldatos, *Les Communautés Européennes en Fonctionnement 1981* (Brussels: Établissements Emile Bruyant) at 175.

⁹³ On the consolidated version of the EC Treaty see *infra* note 422.

⁹⁴ “Banking: Capital Requirements Directive” *EUBUSLAW* (1995) online: WESTLAW (Newsletters).

⁹⁵ Martin Broodman, “The Myth of Harmonization of Laws”, *Droit Comparé et Unification du Droit* (Montréal: Institute of Comparative Law, 1990) 1 at 3.

⁹⁶ Anita Bernstein, “Strict Products Liability Attempted in the European Community” (1991) 31 *Va. J. Int’l. L.* 673 at 696.

⁹⁷ Dominic Lasok, Panayotis Soldatos, *Les Communautés Européennes en Fonctionnement 1981* (Brussels: Établissements Émile Bruyant) at 175.

⁹⁸ *Ibid.*

⁹⁹ The following in ‘informal harmonization’ are reported by Patrick Glenn, “Harmonization of Private Law Rules between Civil and Common Law Jurisdictions” *Droit Comparé et Unification du Droit* (Montréal: Institute of Comparative Law 1990) 1 at 4.

harmonisation. In effect, this concept does not involve the conscious, creative, co-ordinated intervention of human institutions that ‘formal’ harmonisation entails. It takes place in a less interventionist manner through doctrine, teaching and case law, the latter being of great importance to our study. ‘Informal’ harmonisation does not create a harmonized rule through negotiation in the way ‘formal’ harmonization does. Rather, it ‘effectuates a [common] understanding’ of differing legal concepts and practices within one country but also of existing gaps between concepts of different legal systems (civil-common law). Nowadays, ‘informal’ approximation of applicable rules is becoming popular among practitioners at the international level who favour more and more the presence of an informal common legal ground¹⁰⁰.

In borrowing the European model of harmonisation of laws, we do not seek to achieve the same degree of economic and regulatory integration as in the EU. When possible, however, we will follow European directives approach in approximating unimodal and domestic rules and practices on carrier liability (‘formal harmonisation’) as well as case law principles on the issue (‘informal harmonization’). For instance, albeit not without exceptions, identical cross-modal and cross-country carrier liability exemptions will constitute the unified -not uniform- rules that our harmonisation concept encompasses. This corresponds to the, common to all Member States, EU directives provisions and to our view that the unification concept constitutes a harmonisation tool. Even when we adopt a total new provision despite the presence of common cross-modal and cross-country liability legislation, EU approximation methods provide support to our choice since this also occurs with directives at the European level¹⁰¹.

Where cross-modal and cross-country liability rules differ we will search for the EU directive ‘middle ground’ solution¹⁰². This will constitute one of our

¹⁰⁰ Franz Werro, “L’Harmonization des Règles de Droit Privé entre les Pays de Droit Civil et Pays de Common Law” *Droit Comparé et Unification du Droit* (Montréal: Institute of Comparative Law) 1 at 16.

¹⁰¹ *Supra* at 18s. See, for instance, our suggestion for the abolition of the nautical fault liability exception that we find in both the Hague and the Visby Rules. Such suggestions will always be justified. Part II, Chapter II, Section II, Par. 2.

¹⁰² However, not wanting to greatly distance ourselves from present reality, we will not too frequently have recourse to ‘middle solution’ approximation measures.

approximation methods provided that the solution it advances is pragmatic and fair¹⁰³. When convergence of applicable rules and practices has already been excluded by interests involved in negotiations or/and national authorities, or where no specific rule applies cross-modally and cross-country or even where we opt for one country's or mode's rule over the other, our task is rendered difficult. In such a case, we opt for the rule more respectful of our general objectives (pragmatism and fairness), inviting national authorities to consider it¹⁰⁴. Where search of such a rule proves fruitless we maintain the status quo and invite parties to negotiate.

Both types of 'formal' and 'informal' harmonisation do not translate into the application of 'one rule' (line-to-line uniformity) to all modes or countries concerned. Rather, they both refer to the adoption of 'one adapted rule' to the legal specificities of domestic or sectarian laws and practices, including cultural, modal, economic, political diversities. These do not always require undertaking approximation efforts. For instance, ocean carrier liability exemptions such as 'perils of the sea' or 'saving or attempting to save life or property at sea' cannot be sacrificed on the altar of harmonisation just because they are not encountered in land transport (ocean specific)¹⁰⁵. They should be maintained and applied to the sea carrier in multimodal transport. In the same way, countries cultural or legal identity as reflected in their statutes and judicial perceptions has to be respected to the maximum degree possible in harmonizing, when this does not put in danger the very existence of harmonization solutions and our objectives. We refer here mostly to the civil law province of Québec that frequently applies different or varied rules when

¹⁰³ See, for instance, the approximation of the principles of presumption of fault and presumption of liability, adopted liability limitation measures, adopted loss of carrier limitation benefit, *Annex No. III, Table No. 12* at cc-cci. This convergence does not follow any specific approximation pattern but is dependent on the nature of the specific measures in question. This seems also to be the case with EU Directives on many issues necessitating harmonization. Interview of the author with the personnel of the European Commission in Athens, Greece (Summer 2001).

¹⁰⁴ See, for instance, suggestions on concealed damage *Annex No. III, Table No. 12* at cc-cci and approximation of limitation of liability amounts (Part II, Chapter II, Section III, Par. 1 (B)).

¹⁰⁵ On the specificity of maritime law see the very interesting article of Pr. Yves Tassel, "La Spécificité du Droit Maritime" (2000) online : Université de Nantes-Centre du Droit Maritime et Océanique Homepage <www.droit.univ-nantes.fr/labos/cdmo/nept/nep21_1.pdf> (last visited : June 20, 2003). The author stresses the fact that although maritime law cannot subsist without general law principles underpinnings, it has specificities that distinguish it from these principles. *Ibid.*

compared to the U.S. and Canadian common law provinces. Respect for modal and cultural differences in harmonizing results in uniform rules rich in connotations and respectful, to the maximum degree permitted by approximation methods, of individuality¹⁰⁶.

Distinguishing between rules that are subject or not to harmonization and coming up with the right ‘adapted rule’ respecting individuality while being, at the same time, pragmatic and fair is not an easy task. It involves a careful comparative study of far more than the mere black-letter rules of various jurisdictions prior to the actual drafting¹⁰⁷. It presupposes close monitoring of practices that shape, influence or complement existing rules¹⁰⁸. Today, exact same wording of international conventions is often interpreted in different ways at the domestic level¹⁰⁹. Uniformity, therefore, does not automatically result from agreeing on the same words but, rather, from agreeing on the same interpretation and practice of employed terms¹¹⁰. Lack of close elaboration of existing rules and practices risks lack of consensus of the contracting parties.

Codification: Undertaking harmonisation efforts presupposes the presence of clear, well defined cross modal and cross-country rules and practices. At present, lack of clarity of the liability rules applicable to the multimodal carrier is characteristic of this type of transportation. Moreover, rules that govern multimodal transport in Canada and the U.S. are dispersed in legislation, regulations, case law and practices. Detecting, therefore, the applicable rules and practices is not always easy and may involve a long and painful procedure of verification. It clarifies,

¹⁰⁶ As William Tetley has noted: “When uniform laws concern extremely divergent rules.... or do not respect cultural or other diversities, they lead to a regulatory amalgam that distances itself from the reality of things and has little, if any, chances of survival”. William Tetley, “Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions (2000) Tul. Mar. L. J. 775 at 778. Martin Boodman, “The Myth of the Harmonization of Laws”, *Droit Comparé et Unification du Droit* (Montréal: Institute of Comparative Law 1990) 1 at 3.

¹⁰⁷ William Ewald, “Comparative Jurisprudence: What Was it Like to Try a Rat?” (1995) 143 U. Pa. L. Rev. 1889 at note 173.

¹⁰⁸ Kenneth L. Port, “Trademark Harmonization” (1998) 2 Marq. Intell. Prop. L. Rev. 33 at 40.

¹⁰⁹ *Infra* at Part I, Chapter I, Section II, Par. 2(A)(b) and Par. 2(B)(b) for divergent interpretations of the CIM, CMR and the Visby Rules given at the European level and at 247 for the U.S. ‘customary’ freight unit.

however, legislation applicable to multimodal transport, provides the only way possible for a constructive comparison of cross-country and cross-modal legal regimes offering, at the same time, an incentive for harmonisation in proclaiming potential grounds of convergence. In the present study, when confronted with the need to harmonize unclear rules and practices, we will proceed to their ‘codification’ in order to clarify them (for instance ‘shipper sophistication’ concept elements, fair opportunity doctrine, ‘sufficient notice’ test) before proceeding any further. We (will) also invite the legal community to make codification of legal concepts and transport practices a permanent task in order to facilitate harmonization efforts. This makes codification a harmonisation tool and as such we perceive it in the present study. This brings us to the definition of this concept.

Etymologically, the term ‘codification’ is a combination of the term ‘codex’ and the Latin verb ‘facere’ (to do)¹¹¹. Historically, codification was part of the history of European countries following the tradition of Roman law and the model of the Codex Justinianus (6th Century A.D.)¹¹². Since most of the European countries trace their legal origins to Roman law, the concept of codification has, historically, been part of European countries legal order¹¹³. This is not the case of common-law jurisdictions such as England, the United States and Canada (with the exception of the province of Québec) that delayed to embrace this concept but finally put it in practice, albeit to a much lesser degree than that of European civil law countries¹¹⁴. In effect, whereas civil law thinking is highly structured and systematized, common

¹¹⁰ William Ewald, “Comparative Jurisprudence: What Was it Like to Try a Rat?” (1995) 143 U. Pa. L. Rev. 1889 at note 173.

¹¹¹ Gunther A. Weiss, “The Enchantment of Codification in the Common Law World” (2000) 25 Yale Int’l L. J. 435 at 448. The term itself appeared for the first time in June 1815 when Beutham wrote a letter to Tsar Alexander I in which it distinguished normal legislation from codification. Interestingly enough, at that time, the Prussian (1794), French (1804) and Austrian (1811) codes already existed. *Ibid* at 448-449.

¹¹² Daphne Barak-Erez, “Codification and Legal Culture: in Comparative Perspective” (1998) 13 Tul. Euro Civ. L. F. 125 at 126.

¹¹³ *Ibid* at 126s.

¹¹⁴ *Ibid* at 127-129.

law rejects systematization and takes pride in its pragmatic flexibility rather than its logical sequence¹¹⁵.

As with the notions of uniformity, unification and harmonisation, the concept of codification is unclear and polysemous¹¹⁶. According to certain authors ‘scientific codification’ envisions a task of ‘ascertaining’ and declaring’ existing international law¹¹⁷. This definition seems to be consistent with the following ones: ‘the process of compiling, arranging and systematizing the laws of a given jurisdiction or of a discrete branch of law into an ordered code’¹¹⁸; or ‘the body of law laid out systematically and comprehensively’¹¹⁹. Mentioned definitions of the codification concept, however, appear more modest than the ones of: ‘a regulation that is meant to be lasting, comprehensive and concluding and that leaves no scope in adjudication for shaping the law’¹²⁰. Or that of ‘the book of law that claims to regulate not only without contradiction but also exclusively and completely the whole of the law or at least a comprehensive part of it’¹²¹. The latter definition being the most ambitious among all others, attributes to the concept of codification an extensive regulatory reach and a dominating presence.

For the purpose of the present study, codification will involve the process of ‘ascertaining’ and declaring’ existing international law, providing, in this way, a comprehensive and systematic presentation of the currently applicable intermodal carrier liability rules and practices in Canada and the U.S.. In this sense, codification constitutes an ongoing (systematic) process of ‘compiling, arranging and

¹¹⁵ William Tetley, “Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions” (2000) Tul. Mar. L. J. 775 at 804-805. The author refers to the ‘concise’ style of civil law as compared with the ‘precise’ style typical of common law. *Ibid* at note 135.

¹¹⁶ Gunther A. Weiss, “The Enchantment of Codification in the Common Law World” (2000) 25 Yale Int’l L. J. 435 at 451.

¹¹⁷ Scott L. Cunningham, “Do Brothers Divide Shares Equally?” (2000) U. Pa. J. Int’l. L. 131 at note 86.

¹¹⁸ As reported in Gunther A. Weiss, “The Enchantment of Codification in the Common Law World” (2000) 25 Yale Int’l L. J. 435 at 451.

¹¹⁹ *Ibid*

¹²⁰ *Ibid* at 449s.

¹²¹ *Ibid*.

systematizing' applicable rules and practices with the objective of declaring the legal 'status quo'¹²².

It may be that the definition of the codification concept adopted herein is not as ambitious as the ones that attribute to this notion a regulatory power sweeping in its reach and exclusive in its presence. It is conform, however, with its use in the present study as a harmonisation tool destined to clarify confusing applicable intermodal laws and practices rather than 'regulate the whole of the law or a comprehensive part of it'.

To take a specific example we will refer to the judicial consideration of shipper sophistication in contracting carrier liability. As we are going to affirm, shipper sophistication refers to shipper experience in transporting goods, an experience left to courts appreciation on the basis of different adopted criteria. Today, certain U.S. courts consider shipper sophistication in giving effect to non-conspicuous contractual limitative clauses that condition carrier liability. Canadian case law generally follows the same principle. Other U.S. courts, however, conclude that carriers should always give shippers written notice of BOL liability provisions, notwithstanding shipper sophistication. Recently, certain of these courts have consistently considered shipper sophistication in rendering their decisions. There is, therefore, a discernible trend in U.S. case law to favour shipper sophistication in sanctioning contractual limitation of carrier liability provisions as Canadian courts generally seem to do¹²³.

Our effort of declaring, clarifying involved case law at the domestic level and identifying dominant trends in our effort to achieve 'informal' harmonisation of intermodal carrier liability rules in the U.S. and Canada amounts to a codification effort. Once codification takes place, comparison of case law conclusions is made easier enhancing, at times, the already existing trend towards uniformity. Following

¹²² Note that we are using three of the above-mentioned definitions in constructing our notion of codification. As we have stated all these definitions are compatible.

¹²³ Part I, Chapter II, Sec. 2, Par. 2 and Sec. 1, Par. 1(C) and 2(B)(c).

the ancient Greek saying: “Το σοφόν σαφές και το σαφές σοφόν” (The wise is clear and the clear is wise).

Successful implementation of our suggestions largely depends on their clarity. This is why we will try to make our suggestions as clear as possible to the reader. This may not always be easy or even possible to achieve since our suggestions do not enter in great detail permitting, therefore, presence of ‘loose ends’. We will try, however, to deploy our best efforts towards this end.

Certain authors content that the success of codification resides in its ‘external’ conditions, mainly the history of legal system and the underlying cultural background¹²⁴. In this respect, it is said that one of the main reasons why codification has been successful in European countries is their common legacy of Roman law¹²⁵. As we have affirmed, however, U.S. and Canadian law do not find their origins in Roman law (except for the Canadian Province of Québec). Moreover, we have noted the difference in mentality in the two countries, shaping respective laws. For these reasons, it does not seem that codification of applicable rules and practices to the multimodal carrier will successfully serve harmonisation following mentioned authors reasoning.

However, we have to take into account that the retained definition of the concept of codification is less ambitious than the one of regulating the whole of multimodal carrier liability in the two countries¹²⁶. Codification for us aims solely at clarifying confusing rules and practices. For this purpose, the need for common legal origins is not of great importance, the concept serves its purpose notwithstanding the legal background¹²⁷.

¹²⁴ Daphne Barak-Erez, “Codification and Legal Culture: in Comparative Perspective” (1998) 13 Tul. Euro Civ. L. F. 125 at 129.

¹²⁵ *Ibid.*

¹²⁶ Daphne Barak Erez notes that codification is customarily defined as the ‘legislative reform which is comprehensive and professes to encompass an entire legal field’, giving, therefore, to this term a more ambitious meaning than the one herein adopted. *Ibid* at 125.

¹²⁷ *Supra* at 24-25.

Formalism/Contractualism: The last notions that we perceive as component concepts of pragmatism, which is located at the very foundations of the present study, is ‘contractualism’ and ‘formalism’. In making suggestions on uniform multimodal carrier liability rules, we make the assumption that the principle of freedom of contract, the focal point of transport deregulation¹²⁸, as well as the need to maintain mandatory rules, quite common in the area of ocean carrier liability, have to be taken into account.

‘Formalism’ and ‘contractualism’ are far from being clearly defined concepts. ‘Formalism’ in contract law has been defined in different ways: ‘how formalities are a perennial part of legal culture’¹²⁹, ‘written rules of international or domestic communities’¹³⁰, ‘strict adherence to the letter of contract’¹³¹ or ‘the notion that the proper judicial decision can be deduced from a pre-existing set of rules’¹³². These are descriptive definitions of ‘formalism’ that contrast the more theoretical, still imprecise definitions of uniformity or harmonisation.

‘Contractualism’, on the other hand, has been opposed to ‘formalism’ and attached to: the ‘deliberate policy choice that brings in judicial intervention in case of breach of contract’¹³³; or, the freedom of contract’ (laissez-faire policies) and the moral element of ‘sanctity of promises’ (*pacta sunt servanta*)¹³⁴. Certain authors deny moral aspects of contractual obligations as being part of the concept¹³⁵.

¹²⁸ Part I, Chapter II of the present study comments exclusively on transport deregulation.

¹²⁹ Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration of Form” (2000) Colum. L. Rev. 94 at 151.

¹³⁰ Bardo Fassbender, “Charter as Constitution of the International Community” (1998) 36 Colum. J. Transna’ l L. 529 at 616.

¹³¹ Walter Johnson, “Inconsistency, Contradiction and Complete Confusion: the Everyday Life of the Law of Slavery” (1997) 22 Law & Soc. Inquiry 405 at 407.

¹³² Catherine L. Fisk, “Lochner Redux: the Renaissance of Laissez-faire Contract in Federal Common Law of Employee Benefits” 56 Ohio. S. L. J. 153 at 161. In this sense, see also Denis Patterson, “Conscience and the Constitution Constitutional Interpretation” (1993) 93 Colum. L. Rev. 270 at note 22.

¹³³ Catherine L. Fisk, “Lochner Redux: the Renaissance of Laissez-faire Contract in Federal Common Law of Employee Benefits” 56 Ohio. S. L. J. 153 at 161.

¹³⁴ Fuller theory as reported by Duncan Kennedy, “From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s Consideration of Form” (2000) Col. L. Rev. 94 at 160.

¹³⁵ Cohen theory as reported by *ibid.* See also Scanlon’s version of contractualism as reported by Richard Craswell, “Against Fuller and Perdue” (2000) 67 U. Chi. L. Rev. 99 at 113.

Our view of ‘formalism’ corresponds more to that of ‘the notion that a judicial decision can be deduced from a pre-existing set of rules’. In transportation law, this would translate into the presence of statutory rules that regulate carrier liability, leaving little margin to contractual provisions. Such is the case, for instance, of U.S. and Canadian ocean carrier statutory prohibition of contractual agreements that limit carrier liability below statutory limits. This view of formalism is beneficial to shippers because regulatory provisions generally protect them against carrier abuses (regulatory ‘safety net’) and the certainty they provide to carriers and shippers as to the applicable rule reduces litigation costs¹³⁶.

However, extended regulation and policies in any sector constitute impediments to free trade and also translate into governmental costs to supervise implementation of the applicable rules¹³⁷. This is argued to have been the case of carrier liability rules before deregulation took place and one of the main reasons why the U.S. and, later, Canada decided to proceed to transport deregulation¹³⁸. In effect, formalism burdens carriers with obligations (i.e. obligation to publish and get governmental approval of terms and conditions of carriage) that entail implementation costs and obstruct the flow of commerce.

Our view of contractualism is conform to the definition of a laissez-faire policy (freedom of contract) derived from political intent and resulting in judge’s intervention¹³⁹. Transport deregulation has given way to freedom of contract in defining carrier liability, especially in the U.S.¹⁴⁰. It has brought, therefore, contractualism in the definition of carrier liability even though the degree to which

¹³⁶ Catherine L. Fisk, “Lochner Redux: the Renaissance of Laissez-faire Contract in Federal Common Law of Employee Benefits” 56 Ohio. S. L. J. 153 at 206. The author further notes that an additional explanation for the presence of formalism is a hostility to overt judicial intervention. *Ibid* at 224.

¹³⁷ Robert A. Bejesky, “Exchange Rates Stability: Domestic and International Institutions Enhancing Credibility of Government Intervention Policy” (1999) 8 MSU-DCL J. Int’l. L. 673 at note 20.

¹³⁸ *Infra* at Part I, Chapter II.

¹³⁹ *Supra* at 28 and accompanying text.

¹⁴⁰ *Infra* at Part I, Chapter II, Section I, Par. 1(B).

parties can contractually define latter differs from mode to mode and from country to country¹⁴¹.

The new trend has undeniably promoted trade in liberating carriers from burdensome obligations such as tariff publication and ensuing governmental approval of their terms and conditions of carriage. On the other hand, however, it has produced pernicious effects on shippers, the weakest party in the transport contract. In effect, due to deregulation shippers, especially small shippers, may easily fall pray to non-published, non governmentally controlled carrier advantageous BOL provisions¹⁴². Often, such cases end up before the courts where uncertainty reigns over the presence and the amount of compensation.

Despite this fact, any harmonization initiative of present carrier liability rules does not have a chance of survival in today's world if it does not take into account transport deregulation and its effects on carrier liability. Transport deregulation and, therefore, 'contractualism' in defining carrier liability is a tangible reality and it is here to stay! There seems to be no turning back from this trend even if one may view it as a 'necessary evil' or simply as 'necessary' in today's world. As such, and because our analysis is based on realism, deregulation and contractualism will be taken into account in formulating our suggestions.

What we will try to accomplish in the present study is to balance out the forces of contractualism and formalism in order to attain the optimal degree of trade facilitation and shipper protection, while advancing, at the same time, pragmatic suggestions. In this sense, contractualism will correspond to the general objective of trade facilitation we are committed to in our study, whereas formalism will reflect more shipper protection.

¹⁴¹ I.e. on the basis of international conventions such as the Hague or the Hague-Visby Rules, the carrier cannot contractually limit its statutory limitation of liability amount. It can only contractually increase it. This is not the case of land transport where parties can contractually define carrier liability either by increasing or by limiting it with the exception of the Province of Québec. *Infra* at Part I, Chapter II on transport deregulation.

¹⁴² *Infra* at Part I, Chapter II, Section I, Par. 1(B).

Our quest for conciliation of contractualism and formalism should not be confused with present shipper demand for re-regulation of carrier liability¹⁴³. We are seeking transport re-regulation, but not the type that will simply bring back some regulatory shipper protective measures destined to put an end to shippers outcry. What we are looking for is a well-planned transport reform that will be based on the right dosage of shipper protective regulation without over burdening carriers or impeding trade¹⁴⁴.

In this regard, we will give contractualism the predominant role governments intended for it in pursuing transport deregulation by making it a vital part of our proposal even if, at times, (small) shipper interests have to be compromised. By doing so, we do not seek to disadvantage shippers but to respond to the need of providing flexibility in transport transactions to serve both carriers and shippers (pragmatism). Where shipper protection has to be compromised on the altar of pragmatism, we will try to compensate such loss by providing shipper protective measures in other fields of carrier liability and we will also stress the importance of the judicial ‘safety net’. We refuse, however, to sacrifice shipper protection as indifferently and carelessly as governments have done in proclaiming contractualism as the most important vehicle of trade facilitation¹⁴⁵. This brings us to the discussion of the fairness concept that, along with pragmatism, constitutes the very foundations of our analysis and condition interested parties consent in negotiations.

Domestic or international legislation define substantive fairness in different ways. Depending on the country, the province or state within a country, the transport mode, legislation may be more or less shipper protective. Case law does not define

¹⁴³ *Infra* at 122 (Part I, Chapter II) for an example of shipper demand for re-regulation.

¹⁴⁴ Kevin P. Lane, “Hong-Kong Endgame and the Rule of Law” (1997) 18 U. Pa. J. Int’l. Econ. L 811 at 914-915.

¹⁴⁵ International uniformity initiatives must reflect the standard of fairness most compatible with the international contract or marketplace transaction in question. Boris Kozolchyk, “The UNIDROIT PRINCIPLES as a Model for the Unification of the Best Contractual Practices in the Americas” (1998) 46 Am. J. Comp. L. 151 at 155. In this respect, it has also been asserted that international conventions concerning carriage of goods and passengers were drafted not only to balance commercial interests but also to protect potentially weaker parties serving, in this respect, fairness. Hannu Honka, “Harmonization of Contract Law through International Trade” (1996) 11 Tul. Euro Civ. L. For. 112 at 118-119. See also *supra* at 12-13.

substantive fairness with much precision. Courts different holdings on fairness have resulted in the presence of ‘majority rulings’ in practice¹⁴⁶. Also, judges often hold that an agreement which makes an unequal division of income or wealth does not render the agreement unenforceable¹⁴⁷.

Some commentators believe that substantive fairness¹⁴⁸ is “justifiable only if it narrows, or does not widen the existing inequality of persons and/or states entitlements”¹⁴⁹. The presumption in favour of equalization may be rebutted only by a showing that the rule in question will benefit the long-term expectations of the least fortunate group in society¹⁵⁰. Others, define substantive fairness in more absolute terms such as: i) the equal distribution of resources among all constituents; ii) distribution of resources according to each person's merits or input and iii) distribution of resources according to some priority principle such as each person's needs (distribution rule)¹⁵¹.

Some authors have suggested that a harmonized balance should be kept between the absolute substantive fairness and the presently dominating forces (free market, deregulation, contractualism, globalization) that tend to disregard, if not

¹⁴⁶ Henry H. Perritt, “Comprehensive Wrongful Dismissal Legislation: Is Legislation Needed?” *JW-Employee Dismissal L. & Prac. s. 9. 3* (1992) online: WESTLAW (Newsletters).

¹⁴⁷ Gail Frommer Brod, “Premarital Agreements and Gender Justice” (1994) 6 *Yale J. L. & Feminism* 229 at 259-260.

¹⁴⁸ Substantive fairness is to be opposed to procedural fairness. In evaluating procedural fairness, a court should ordinarily look to the negotiation process in an attempt to gauge its candor, openness and bargaining balance. Substantive fairness introduces into the equation, concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible. In more simple words, procedural fairness requires full and fair disclosure, free and voluntary consent. Substantive fairness requires fairness to each party. “Court Approval of Settlements” (2002) 2 *RCRA and Superfund: A Prac. Guide with Forms*, 2d § 13:5 (WESTLAW-Tp-all).

¹⁴⁹ Richard W. Parker, “The Use and Abuse of Trade Leverage to Protect the Global Commons: What we can Learn from the Tuna-Dolphin Conflict” (1999) 12 *Geo. Int'l. Env'tl. L. Rev.* 1 at 80. We are merely phrasing here some of the many doctrinal definitions of substantive fairness.

¹⁵⁰ *Ibid.*

¹⁵¹ Ortwin Renn, Thomas Webler, Hans Kastholz, “Procedural and Substantive Fairness in Landfill Siting: A Swiss Case Study (1996) 7 *Risk* 145 at 146. In other words, we are reasoning in terms of ‘corrective justice and accountability’. “Court Approval of Settlements” (2002) 2 *RCRA and Superfund: A Prac. Guide with Forms*, 2d § 13:5 (WESTLAW-Tp-all). The justice and fairness concepts will be used as synonymous in the present study.

discard it¹⁵². We align ourselves with this approach. Deregulation, a well settled-in trend that we do not search to undo in the present study, may favour a free market economy. However, it leads to excesses when fairness in the relation between carriers and shippers is not preserved.

It is the duty of jurists, lawyers, judges and legislators to preserve the regulatory and judicial ‘safety net’ to protect shippers following deregulation, since it is shippers who are the weaker party in the contract of carriage¹⁵³. It is also the duty of the legal community to protect carrier from over-protective shipper regulation that may be installed to counter the adverse effects of transport deregulation towards the shipper¹⁵⁴. In embracing the deregulatory trend it is very important, therefore, to impede its excesses either against shippers or against carriers and, for the rest, regulate in such a manner that will not give shippers or carriers one-sided benefits. In so doing, it is evident that we do not seek to serve parochial interests of shippers, carriers or insurers. Our ultimate goal is not to take sides but to serve transport and trade¹⁵⁵ based on pragmatism and fairness to both carriers and shippers.

One could wonder, however, whether we actually advantage the weakest party in the transaction (the shipper, mainly the small shipper) in perceiving fairness as a concept intended to impede excesses or refrain to give one-sided benefits either to carriers or to shippers. The answer is probably negative when reasoning in absolute terms. In effect, in the present study we do not make a clear, positive contribution to shipper protection. We simply try to impede, to the best of our

¹⁵² William Bradford, « Save the Whales v. Saving the Makah: Finding Negotiating Solutions to Ethnodevelopmental Disputes in the New International Economic Order (2000) 13 St. Thomas L. Rev. 155 at 219. This seems to correspond to the former doctrinal view on narrowing inequality of persons or states.

¹⁵³ *Supra* note 9.

¹⁵⁴ Even though not relevant to transport deregulation, it is said that one of the advanced reasons why the 1980 Multimodal Convention, a convention destined to govern multimodal carriage at the international level, failed was that carriers never consented to its shipper protective provisions. For further elaboration of this affirmation see *infra* at Part I, Chapter I, Section I, Par. 1.

¹⁵⁵ “...uniformity... is not an end in itself but is dependent on a valid *raison d’être*. Promoting international trade provides the most obvious reason for harmonizing purposes”. Hannu Honka, “Harmonization of Contract Law through International Trade: a Nordic Perspective” (1996) 11 Tul. Euro. Civ. L. F. 111 at 113.

ability, possible carrier excesses and not give carriers one-sided benefits in formulating our suggestions. We believe this to be a good start in a deregulatory environment which tends to sweep away shipper protections. Later, more complete and elaborated suggestions could advance more shipper-protective solutions.

If we were to define the essence of our study in two words, we would say that we are pursuing harmonisation of cross-border and cross-country multimodal carrier liability rules containing the right dosage of formalism and contractualism to advance trade and balance shipper and carrier interests. Balancing, negotiation, balancing! This is the bottom line of our study. Balancing different harmonization solutions, ‘contractualism’ and ‘formalism’, shipper and carrier interests in order to achieve universal consent of uniform proposals. To this we should add our quest for economically cost-effective suggestions, an element that invites us to ponder over the ‘Economic Analysis of Law’ doctrine or, following another denomination, the ‘Law and Economics’ doctrine.

‘Law and Economics’ does not merely regroup the branches of law that govern economic activities: international or domestic commercial activities, banks and currency, competition, enterprises¹⁵⁶. It goes much further than this. It finds various legal concepts on subtle economic givens and presents the economic perspective of legal notions¹⁵⁷. In this way, legal treatments of law are seen as particular manifestations of the interrelation between law and the economy¹⁵⁸. This permits the legal community to better comprehend legal notions and expand its reasoning¹⁵⁹. For instance, comprehending how allocation of risks works out between carrier and shipper insurers provides a better comprehension of cargo and

¹⁵⁶ Ejan Mackaay, *L’Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 140 and at 9-10.

¹⁵⁷ *Ibid* at 9-10.

¹⁵⁸ Nancy J. Whitmore, “The Evolution of the Intermediate Scrutiny Standard and the Rise of the ‘Bottleneck Rule’ in the Turner Decisions” (2003) 8 *Comm. L. & Pol’y* 25 at 36.

¹⁵⁹ Ejan Mackaay, *L’Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 140 and at 9-10.

liability insurance but also the necessary basis for making appropriate suggestions on uniform liability rules¹⁶⁰.

The doctrine's basic assumption is that we ought to make our welfare on the basis of efficiency, that is cost-minimizing outcomes¹⁶¹. Efficiency has been defined in many scientific ways but we will herein choose the following one: "A rule is efficient if it maximizes profits from market transactions"¹⁶².

Following this definition it has been argued that an effective transportation system is a vital factor in insuring the efficiency of an economic system as a whole¹⁶³. In effect, in economic terms, intermodal transportation may be thought of as a process for transporting freight and passengers by means of a system of interconnected networks involving various combinations of modes of transportation, in which all of the components are seamlessly linked and efficiently combined¹⁶⁴. Today, governmental documents and officials mostly reason in economic terms when referring to intermodal transportation¹⁶⁵. In this respect, the benefits of

¹⁶⁰ 'Law and Economics' is grounded in the belief that law is a function of the economy and that the economy is a function of law. Nancy J. Whitmore, "The Evolution of the Intermediate Scrutiny Standard and the Rise of the 'Bottleneck Rule' in the Turner Decisions" (2003) 8 Comm. L. & Pol'y 25 at 36. For the economic analysis of allocation of risks between carrier and cargo insurers see *infra* at Part I, Chapter I, Sec. III, Par. 3(C).

¹⁶¹ Leonard R. Jaffey, "Symposium: The Future of Law and Economics: The Trouble with Law and Economics" (1992) 20 Hofstra L. Rev. 777 at 787 and 779. Robert F. Blomquist, "Witches Brew: Some Synoptical Reflections on the Supreme Court's Dangerous Substance Discourse, 1790-1998" (1999) 43 St. Louis L. J. 297 at 462. See also Jason Scott Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules" (1990) 100 Yale L. J. 615 at 615 and Chris William Sanchirico, "Deconstructing the New Efficiency Rationale" (2001) 86 Cornell L. Rev. 1003 at 1005.

¹⁶² Leonard R. Jaffey, "Symposium: The Future of Law and Economics: The Trouble with Law and Economics" (1992) 20 Hofstra L. Rev. 777 at 779. Another definitions of efficiency refer to the Pareto Optimum, (A state is optimum if any change would hurt at least one person, help no-one), or Pareto Superior (A move is more efficient if it makes at least one better fixed and nobody worse off). *Ibid.* This is the first and basic theorem of welfare economics and the core of the legitimacy of the market as an allocation mechanism. Simon Deakin, Jonathan Michie, *Contracts, Co-operation and Competition* (London: Oxford University Press, 1997) at 309.

¹⁶³ Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 440.

¹⁶⁴ *Ibid.*

¹⁶⁵ U.S. Code states with respect to Transportation: "It is the policy of the United States Government to develop a National Intermodal Transportation System that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy and will move individuals and property in an energy efficient way. The National Intermodal Transportation System shall consist of all forms of transportation in a unified, interconnected manner, including the transportation systems of the future, to reduce energy consumption and air pollution while promoting economic development and supporting the United States' pre-eminent position in international commerce"(49 USC, Ch. 55, Sec. 5501,

intermodal transportation are analyzed within the framework of the cost-benefit analysis or its related techniques¹⁶⁶.

Contribution of intermodal transportation to the economic growth of a country is not economically insignificant¹⁶⁷. When merely calculating the effect of improvements made to intermodal transportation we find that a one-time 10% increase in the basic characteristics of the transportation network due to intermodal transportation results in a permanent increase of the economy's growth rate¹⁶⁸. More specifically, it was found that a simultaneous 10% increase in the frequency of transportation and the transportation network expansion as a result of intermodal transportation, generated 682\$ billion dollars in Canadian Gross Domestic Product over the period of 50 years (approximately 13.64 billion dollars per year)¹⁶⁹.

The interrelation of transport and the economy is easily explained. Transport is not an end in itself and its benefits depend on the facilitation of the economic activities [production, consumption, leisure (transport as a socio-economic phenomenon), dissemination] that it is intended to serve¹⁷⁰. Improvements in intermodal transportation, and this is said to include improvements to liability principles governing multimodalism¹⁷¹, lead to the fall of total production costs and consumer prices (reasoning on welfare economics) with empirical analysis showing

1998). In Canada, David Collenette, Transport Minister of Canada noted in 1997: "Intermodalism today is about safe, efficient transportation by the most appropriate combination of modes" David Collenette, "Speaking Notes for Transport Minister David Collenette" (The Summit on North American Intermodal Transportation, 1997). See also Anthony F. Arpaia, "A Noteworthy Drift in the Economics of Transportation - The Implications of Baltimore & Ohio Railroad Co. V. United States" (1953) 102 U. PA. L. R 80 at 89 stating that the objective of national transportation policy is to promote sound, efficient transportation.

¹⁶⁶ Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 439.

¹⁶⁷ *Ibid* at 450.

¹⁶⁸ *Ibid* at 449.

¹⁶⁹ *Ibid*. Gross domestic product is defined as the total market value of all final goods and services produced in a country in a given year, equal to total consumer, investment and government spending, plus the value of exports, minus the value of imports. Gross Domestic Product includes only goods and services produced within the geographic boundaries of a country, regardless of the producer's nationality. Gross National Product does not include goods and services produced by foreign producers but does include goods and services produced by U.S. firms operating in foreign countries. *Gross Domestic Product* (2003) online: Insurers Words Homepage <<http://www.investorwords.com/cgi-bin/getword.cgi?2240>> (last visited: 22 Jan. 2003).

¹⁷⁰ Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 Transp. L. J. 439 at 449.

that eventually consumers benefit more than producers from having an effective intermodal transportation in place¹⁷². This is because this type of transportation operates an increase in the volume of transported goods¹⁷³, a reduction in logistic costs of current operations, an expansion of the transportation network¹⁷⁴ and a better accessibility to input and output markets¹⁷⁵. Reduced transit time, reduced vehicle maintenance, reduced pernicious environmental effects and operation costs are other benefits of intermodal transportation one has to consider¹⁷⁶. All these features of through transport have important implications for and influences on international trade facilitation¹⁷⁷.

Apart from the interrelation of transport and the economy, there is the interrelation of economics and liabilities of the parties involved in the transport contract. It has been asserted that the economic aim of any law relating to the contract of carriage should be to encourage custodians of goods in transit to take the more economically productive precautions¹⁷⁸. However, taking precautions costs money, which is included in the cost of transport and adds to the cost of the goods at

¹⁷¹ J.A. Raven "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

¹⁷² Dr. Yuri V. Yevdokimov, "Measuring Economic Benefits of Intermodal Transportation" (2000) 27 *Transp. L. J.* 439 at 441 and 449 for the details of the empirical analysis.

¹⁷³ Because of the advent of containers, cargo consolidation, increase in the frequency of transportation, transport companies mergers. *Ibid* at 442-443.

¹⁷⁴ Empirical evidence shows that transportation costs increase at an increasing rate with increase in tonnage per trip but are increasing at a decreasing rate with increase in mileage. Since expansion of the network due to intermodal transportation is associated with an increase in the overall mileage, it eventually leads to a decreasing average total cost of transportation by pushing the volume of transportation toward an efficient scale. This phenomenon arises because of initial excess capacity of transportation vehicles and fixed facilities which is due to technical requirements. *Ibid* at 443-444.

¹⁷⁵ Intermodal transportation expands the market reach of businesses (accessibility to output) and permits access to a greater variety of specialized labour skills and different inputs such as capital, labour, transportation and natural resources (accessibility of input). *Ibid* at 444. For a more economical analysis of these variables see the whole article.

¹⁷⁶ *Ibid* at 440. In effect, through transport is designed and operated with a view to reducing total transport time from origin to destination through elimination of traditional delays between transport modes. Moreover, the opportunity for intermediate access to the transported goods is diminished through the transport of goods by containers. J. A. Raven, "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

¹⁷⁷ J.A. Raven "Through Transport-The Role of Trade Facilitation" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 4.

¹⁷⁸ Leslie Tomasello Weitz, "International Maritime Law: the Nautical Fault Debate" (1998) 22 *Mar. Law.* 581 at 584.

destination¹⁷⁹. Economic cost created by arbitration, legal costs and burden of proof rules produces the same effect¹⁸⁰. These expenditures would be unproductive if they exceed the cost of any loss or diminution in the value of the goods in transit which would have occurred if the precautions had not been taken¹⁸¹.

Moreover, following ‘Law and Economics’ reasoning, freely negotiated bargains best serve efficiency since they tend to maximize wealth doing away with regulatory controls, restrictions and costs¹⁸². On the contrary, immutable legal rules such as parties sophistication, the degree of notice, consent, public policy, justice made to the interests involved in the transport contract are principles that create an obstacle to achieving efficiency and against which ‘Law and Economics’ scholars have fought long and hard¹⁸³. In this way, ‘Law and Economics’ comes to the defence of the structure of private power against legal alteration and postulates that justice is what power can get in the market¹⁸⁴. This has made certain authors argue that ‘Law and Economics’ central trouble is its disregard for feelings, values and personal preferences disguising reality as an economic clockwork¹⁸⁵.

One could argue that since our analysis aims at facilitating trade and efficiency, we adopt the ‘Law and Economics’ theory and reject notions such as shipper sophistication, public policy, or fairness in the relation of the parties involved in the transport contract. We cannot deny that the ultimate goal of the present thesis is to serve trade and efficiency and that to achieve this we do place

¹⁷⁹ Robert Hellawell, “The Allocation of Risk Between Cargo Owner and Carrier” (1979) 27 Am. J. Comp. L. 357 at 363.

¹⁸⁰ *Ibid.* at 367.

¹⁸¹ *Ibid.*

¹⁸² Leonard R. Jaffey, “Symposium: The Future of Law and Economics: The Trouble with Law and Economics” (1992) 20 Hofstra L. Rev. 777 at 789 and 831. Economists often assert that law serves a market economy best when it concentrates on three principal tasks: enforcing contracts, defining property rights and punishing fraud. Richard Shell, “Contracts in the Modern Supreme Court” (1993) 81 Calif. L. Rev. 431 at 431.

¹⁸³ Richard Shell, “Contracts in the Modern Supreme Court” (1993) 81 Calif. L. Rev. 431 at 499 and Warren J. Samuels, A. Allan Schmid, *Law and Economics, An Institutional Perspective* (Hingham, Massachusetts: Martinus Nijhof Publishing, 1981) at 51.

¹⁸⁴ Warren J. Samuels, A. Allan Schmid, *Law and Economics, An Institutional Perspective* (Hingham, Massachusetts: Martinus Nijhof Publishing, 1981) at 51.

¹⁸⁵ Leonard R. Jaffey, “Symposium: The Future of Law and Economics: The Trouble with Law and Economics” (1992) 20 Hofstra L. Rev. 777 at 814.

ourselves in a market economy context. But many limits exist. We do not uncontrollably embrace the principle of freedom of contracting and we do not run afoul values such as fairness, parties sophistication, notice or public policy.

Our perception of serving trade and efficiency is founded on the adoption of pragmatic uniformity suggestions many of which constitute market economy ('law and economics') principles (for instance, deregulation) that tend to infest the transport industry today. In this sense, market economy principles are compatible with the concept of pragmatism herein adopted. To these principles, however, we inject the maximum dose of justice so as to fairly balance conflicting interests present in the transport contract. In this way, we maintain public policy considerations, shipper sophistication, notice and generally strive to keep a fair balance of interests involved in the transport contract without losing track of the present economic and legal reality as well as the need to achieve uniformity.

Our hypothesis is not totally unfounded on the basis of the 'Law and Economics' doctrine. There are 'Law and Economics' authors who have suggested that cost-effectiveness and contractual carrier liability has to take into account equality of bargaining power and, therefore, shipper sophistication and experience in the transport contract¹⁸⁶. Transport contracts find, here, common ground with the sales of goods contracts. In both sales and transport contracts carriers (or sellers) may be of a superior bargaining power to shippers (or buyers), especially non-experienced, low income ones, because of the sophistication of the former and the frequency with which they engage in dealings with the latter¹⁸⁷. Moreover, carriers

¹⁸⁶ Werner Z. Hirsch, *Law and Economics* (1999) 3rd ed. (San Diego, California: Academic Press, 1999) at 124. It has been noted that developing the economic analysis of law, we observe a surprising correspondence between justice and efficiency. In many cases, principles we think of as just correspond fairly closely to rules that we discover are efficient. David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 22.

¹⁸⁷ See Werner Z. Hirsch, *Law and Economics* (1999) 3rd ed. (San Diego, California: Academic Press, 1999) at 124 for a more detailed analysis of the sales contract.

(or sellers) might be more accommodating to wealthy shippers (or buyers) from whom they expect repeated purchases than poorer ones¹⁸⁸.

Taking into account the balance of power between the two parties, 'Law and Economics' authors have developed strategies destined to reduce sellers or buyers transaction costs. Such strategies are easily transposable to the carrier-shipper relationship. They are mostly contractual remedies consisting in adding protective clauses such as waiver of defence clauses or termination at will clauses when such contractual modifications are permitted¹⁸⁹.

Even so, one could argue that the cost-effectiveness argument persists with respect to our suggestions since the latter are not limited to mere consideration of shipper sophistication. It is true that while we are trying to define pragmatic uniformity rules we are not always considering market-oriented and, therefore, cost-effective principles and concepts. From the analysis that will follow in the present thesis we can overall conclude that our suggestions follow a slow, costly procedure of harmonization of modal and domestic laws, adoption of a network system of liability and codification of case law holdings. Moreover, we are going to adopt the principle of carrier presumption of fault to form the basis of multimodal carrier liability. This principle is more adapted to the nature of the multimodal carriage and is, therefore, more pragmatic than the principle of presumption of liability. However, it is the principle of presumption of liability that seems to be more cost-effective than the principle of presumption of fault that we adopt¹⁹⁰.

From such a perspective, our suggestions seem to lack cost-effectiveness considerations. The reason for the choices made in this regard, is that we have seen ambitious, presumed efficient, past uniformity initiatives to have failed to reach industry consensus. We are of the opinion that only gradual, less ambitious suggestions can ultimately reach uniform multimodal carrier liability rules. In other

¹⁸⁸ Werner Z. Hirsch, *Law and Economics* (1999) 3rd ed. (San Diego, California: Academic Press, 1999) at 124.

¹⁸⁹ *Ibid* at 127-129.

words, whenever a choice has to be made between cost-effective and pragmatic uniformity suggestions we overall opt for the latter solution, mindful of the viability of our proposals. Of course, one could challenge the viability of costly uniform intermodal liability suggestions arguing that costly and protracted negotiating procedures do not favour adoption of proposed rules.

However, and despite lack of empirical data, we believe that the end product of uniformity efforts will largely increase economic growth and maximum protection of contracting parties when compared to its costs. If, as we have seen, an improvement of 10% in the frequency or network expansion of multimodal transportation results in an increase of 13.64 billion dollars of the Canadian Gross Domestic Product per year, facilitation of trade that will result from a uniform multimodal carrier liability regime can only produce gains disproportionately higher to the improvement effected. Moreover, we have seen that litigation and transportation costs will be reduced as a result of a uniform multimodal carrier liability regime¹⁹¹. Increase of economic benefits and decrease of costs of intermodalism make adoption of our suggestions worthwhile in the long run despite their costly nature and implementation process. Finally, we should note that once we sketch our ‘costly’ multimodal carrier liability suggestions we will advance sub-suggestions that will take into account cost-effective considerations such as the adoption of a contractual document instead of elaboration of a convention¹⁹². These tend to alleviate the overall costly nature of the general suggestions herein made.

We can, therefore, conclude that ‘Law and Economics’ provides an important element to take into account when considering uniformity of multimodal carrier liability. However, this doctrine is not the Alpha and the Omega of our reasoning. Nuances have to be made when considering pragmatism, fairness and efficiency in the way mentioned above.

¹⁹⁰ *Infra* at Part II, Chapter II, Sec. II, Par. 1.

¹⁹¹ *Supra* at 11 commenting on the advantages of uniformity.

¹⁹² *Infra* at 314-315.

In order to be able to formulate our suggestions, we will compare the rules and practices applicable to carriers across modes and borders as well as their applications to multimodal carriage. In this respect, we should reiterate the importance we attribute to the identification, the clarification of rules and practices that govern multimodal carriage (codification) considering the lack of comprehensive, clear-cut laws in this field. In effect, three fourths of our study concentrate on the presentation of rules and practices that shape today the field of multimodal carrier liability. The first part of our two-part study will be dedicated to analysing different aspects of multimodal carrier liability. The 1980 Multimodal Convention, the ongoing European Union efforts to provide for uniformity of multimodal carrier liability rules, the FIATA Bill of Lading, a document successfully applicable today at the European and the international levels, the role of insurance companies in multimodal transport and transport deregulation in the U.S. and Canada. In our second part we will focus on the details and instructive comparison of the currently applicable multimodal (or, rather, unimodal) carrier liability rules in Canada and the U.S. (Chapter I, Part II). It is only in the last Chapter of our study that we will advance our suggestions towards uniformity of multimodal carrier liability (Part II, Chapter II).

Our analysis is empirical since it is based on elements that compose the present reality to advance suggestions towards uniformity of intermodal carrier liability. A variety of sources appear at the basis of our study: primary sources such as international unimodal and multimodal conventions that have entered or not into force as well as domestic transportation acts and regulations. Currently applicable acts, regulations and conventions will help us present the legal status quo in the field of multimodal carrier liability. Secondary sources of law are very rich, diverse and of prime importance to our analysis. They involve case law, articles, interviews, newsletters, journals, publications, official documents, transport companies documentation in civil and common law jurisdictions in the U.S., Canada as well as internationally. Secondary sources will serve two functions: they will help analyze and complement primary sources provisions giving the most updated version of

prevailing rules and practices in the area of unimodal or multimodal carrier liability. They will also provide a comparative and critical view of primary sources of law used in the present study. In brief, primary and secondary sources will help us decompose and criticize the elements of the present multimodal carrier liability reality (aposynthesis) upon which we will later base our suggestions on uniformity (synthesis).

Our effort to suggest ways towards uniformity of multimodal carrier liability in Canada and the U.S. may involve a slow, painful and complicated study. Considering, however, the complexity of the sector, we believe that the task we are undertaking constitutes the only guarantee of success for creating a uniform multimodal carrier liability regime. The present analysis is divided in two parts. The first part, intended to give the reader a global view of forces shaping intermodal carrier liability at the international, regional and domestic (U.S./Canada) level is entitled:

Part I: International, Regional and Domestic Views of Multimodal Carrier Liability: Lessons to be Learnt.

Based on the analysis made in the first part of our thesis, we will proceed to the cross-modal and cross-country comparative analysis of multimodal carrier liability in the U.S. and Canada and the formulation of our uniformity suggestions in the second part.

Part II: Multimodal Carrier Liability in the U.S. and Canada: Analysis and Uniformity Suggestions

**Part I: International, Regional and Domestic Views of Multimodal Carrier
Liability: Lessons to be Learnt**

Due to the international reach of intermodalism, uniformity of multimodal carrier liability in the U.S. and Canada does not simply entail a comparative study of cross-modal laws between the two countries. It also involves observing international and regional intermodal carrier liability patterns, understanding basic insurance mechanisms upon which multimodal carriage is dependent for its function and transport deregulation. In this way, we will be able to ‘grasp’ the rhythm of the sector to be able to proceed later, more internationally and industry conscious, to the analysis of multimodal carrier liability in Canada and the U.S. and the formulation of our suggestions. This is why we propose focusing on the international (1980 Multimodal Convention) and regional (European experience of multimodal carrier liability) legal reality of intermodal carriage in the first chapter of our analysis, **Chapter I**. In our second chapter, we will focus on U.S. and Canadian transport deregulation and its effect on multimodal carrier liability, **Chapter II**.

**Chapter I: International and Regional Multimodal Carrier Liability
Patterns: The 1980 UN Multimodal Convention and the EU Multimodal
Carrier Liability Pattern¹⁹³**

Geographic barriers are unknown to intermodalism. To be able to talk about cross modal (ocean-land) and cross country (U.S./Canada) uniformity of multimodal carrier liability one has to be taught from past failed and present ongoing international or regional initiatives made towards this end¹⁹⁴.

This is the objective of the present chapter! Comment, first, on past failed international uniformity initiatives on intermodal carrier liability -1980 United

¹⁹³ The abbreviations UN and EU stand for United Nations and European Union respectively.

¹⁹⁴ UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 19. The UNCTAD Report states that to bring about change one has to understand how stakeholders perceive the status quo and why past attempts at uniformity failed.

Nations Multimodal Convention-, the presently applicable FIATA BOL contractual document and the role of insurance companies in intermodal transport **Section I**. Seek guidance, second, from uniform intermodal carrier liability patterns that may exist at the regional level. The EU will retain our attention in this respect since, because of the age and geography of the ‘old continent’¹⁹⁵, multimodalism is more liable of being well developed at the European level than elsewhere **Section II**.

Section I: From the 1980 United Nations Convention on International Multimodal Transport Onwards

Recognizing the importance of multimodal transport for international trade as well as the need to provide for uniformity of liability rules governing it, three sets of model rules have been elaborated since 1975, with the 1980 United Nations Convention on International Multimodal Transport¹⁹⁶ receiving, among them, the greatest attention¹⁹⁷. This Convention, intended to be a model of

¹⁹⁵ *Infra* at 85-86. Europe, also known as the ‘Old Continent’ is the cradle of Western Culture which started with ancient Greece and was later succeeded by the Roman Empire. Archaeological finds reveal the high level of development of these two ancient civilizations. The latest papyrus (πάπυρος) written in Greek language dates 7,000 before J.C.. *The Power of Greek Words* (2000) online: Add GR Homepage <<http://www.addgr.com/art/grwords/power.htm>> (last visited: Feb. 20, 2001). *Map of Europe* (2002) online: Map-Europe Homepage [http://www.map-europe.com/#About Europe](http://www.map-europe.com/#About%20Europe) (last visited: May 2, 2002).

¹⁹⁶ *United Nations Convention on International Multimodal Transport of Goods*, May 24, 1980, U.N. Doc. TD/MT/CONF/17 [hereinafter 1980 Multimodal Convention]. This Convention was the first of its kind to be prepared under the auspices of the United Nations Conference On Trade and Development (UNCTAD). Among its objectives appear: ‘development of smooth, economic and efficient multimodal transport services’, ‘facilitating the orderly expansion of world trade’ and ‘equitable provisions concerning the liability of multimodal transport operators’ (introductory remarks (b)). *Annex No. II, Table No. I* at cxiv for the text of the Convention.

The United Nations Conference on Trade and Development (UNCTAD) is a permanent organ of the General Assembly of the U.N.. Its aim is to promote international trade and economic development, especially those of developing countries. Although ports, maritime and connected inland transport make necessarily part of UNCTAD general objectives, it was following decisions of various UN bodies that the whole spectrum of multimodal transport operations was made part of UNCTAD functions. Harmonization of the legal framework of multimodal transport are among the objectives of UNCTAD. *Multimodal Transport* (1995) online: *UNCTAD Organization Homepage* <<http://www.unctad.org/en/subsites/multimod/mt2brf0.htm>> (last visited: April 28, 2001).

This international organization is perceived to be the vehicle for the attempts of the developing countries to achieve a ‘New International Economic Order’. This concept refers to the application of the principle of equality among nations. The principle of equality under the new economic order does not apply in an absolute way so that each country is granted exactly the same benefits as another country. Rather, equality is respected by granting to the poorer nations more benefits than those granted to richer countries. Overall equality is, therefore, achieved. For general information on UNCTAD see *About UNCTAD* (2000) online: <<http://www.unctad.org/en/aboutorg/aboutorg.htm>> (last visited: April 16, 2001).

¹⁹⁷ Samuel Robert Mandelbaum, “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, *Hague-Visby*, *Hamburg* and the *Multimodal Convention*” (1995) 5

unification of international multimodal transport rules¹⁹⁸, is not in force today since only 10 out of the thirty countries required have signed it¹⁹⁹. **Par. 1.** The 1980 Multimodal Convention not having been adopted, contractual documents, such as the FIATA BOL, have been elaborated and are successfully used at the international level **Par. 2.** Cargo and liability insurers secure the smooth operation of multimodal carriage for carriers and shippers. **Par. 3.**

Par. 1: The 1980 United Nations Convention on International Multimodal Transport. The 1980 Multimodal Convention is generally considered to be a companion treaty of the 1978 Hamburg Rules, in force today, and applicable solely to ocean carriers of goods or to the ocean leg of the multimodal journey (art. 1.6)²⁰⁰. At present, the U.S. is in the process of amending anti-quoted 1936 Carriage of Goods by Sea Act (COGSA)²⁰¹ by adopting a hybrid regime between the Visby and the Hamburg Rules, which will govern U.S. international ocean carriage and, to a certain extent, intermodal carriage²⁰². The COGSA reform is presently delayed in

J. Tansat' l L. & Pol'y 1 at 20. The three initiatives are: the 1975 International Chamber of Commerce Uniform Rules for a Combined Transport Document, the 1990 UNCTAD/ICC Rules on Multimodal Transport Documents and the 1980 *Multimodal Convention*. *Ibid*. We will later comment on the 1990 UNCTAD/ICC Rules when dealing with the FIATA Bill of Lading. *Infra* at Part I, Chapter I, Section I, Par. 2.

¹⁹⁸ The term 'unification' is used by Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America*, (Tucson, Arizona: National Law Center for Inter-American Free Trade, 1996) at 77 and 82 and is compatible with our definition of the concept which proposes a 'line-to-line' identity of international legal rules governing multimodal transport. *Supra* at 15s.

¹⁹⁹ The ten countries that have acceded or ratified the document are: Burundi, Chile, Georgia, Lebanon, Malawi, Mexico, Morocco, Rwanda, Senegal, Zambia. Norway and Venezuela have simply signed the document. Interview of the author with UNCTAD personnel (August 26, 2003). The fact that the 1980 *Multimodal Convention* is not likely to come into force in the near future is not unusual for private international law conventions. For instance, the 1924 *Hague Rules* were not adopted by Canada and the U.S. until 1936 and 1937 respectively. William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 193.

²⁰⁰ William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. R.193 at 212-213. Rolf Herber, «The European Legal Experience with Multimodalism» (1989) 64 Tul. L. Rev. 611 at 622. The *United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)*, March 30, 1978, A/Conf.89/13 U.N.T.S., U.N. Doc., 1978 [hereinafter 1978 *Hamburg Rules*] entered into force on November 1st, 1992 since the 20 signatures required for this purpose were obtained on that date. Today, the 1978 *Hamburg Rules* have entered into force in 28 countries which are not big seafaring nations. *Status of the Hamburg Rules* (March 2003) online: University of Oslo Homepage <<http://www.jus.uio.no/lm/un.conventions.membership.status/un.sea.carriage.hamburg.rules.1978.html>> (last modified: March 20, 2003). 1978 Hamburg Rules are not in force in the U.S. or Canada.

²⁰¹ Ch. 229, 49 Stat. 1207 (1936) (codified as amended at) 46 U. S. C. App. [ss] 1300-1315 (1988) [hereinafter COGSA].

²⁰² We are talking about draft COGSA 1998 that we will develop later in greater detail. *Infra* at 169s.

Congress due to the strong opposition of foreign (including Canadian) ship owners and renowned maritime law experts and practitioners²⁰³.

One cannot but wonder why Canada, a shipper nation heavily dependent on its exports²⁰⁴, has not ratified the 1980 Multimodal Convention or/and the 1978 Hamburg Rules²⁰⁵. It is said that due to the small number of countries willing to ratify the convention and Canadian shipping industry opposition, Canada withheld ratification²⁰⁶. If the COGSA reform is finally adopted by Congress, however, it is likely that the 1980 Multimodal Convention will follow and that, following the U.S. initiative, other countries will do same²⁰⁷. Because of the eventuality of future adoption of the 1980 Multimodal Convention by the U.S. and Canada, of the attention this Convention has drawn and because of the lessons we learn through its study, we will presently examine its basic liability principles. The genesis and Essence of the 1980 Multimodal Convention (A), the basis of M.T.O. liability towards the shipper (B) and the limitation of M.T.O. liability towards the shipper (C).

²⁰³ *Ibid.*

²⁰⁴ While Canada's major trading partner is the United States, its major sea-borne trade goes to non-U.S. destinations, mainly Japan, the E.C. and the Soviet Union. Hugh M. Kindred, Ted L. McDorman, Mary R. Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 272. See also graphs and text in: Canada: Ministry of Transport, *Carriage of Goods by Water Act* (1999) online: Transport Canada Homepage <<http://www.tc.gc.ca/pol/en/cargoregime/cogwareportparliament.htm>> (last visited: April 4, 2001). Since the 1980 Multimodal Convention is said to favor shippers (*infra* at 48), the question of non adoption of the said convention by Canada is easily raised.

²⁰⁵ The *Marine Liability Act 2001*, S. C. 2001 c. 6 (2001) [hereinafter 2001 MLA] contains, in Schedule III, a carbon copy of the Visby Rules applicable in Canada. *Marine Liability Act* (2001) online: Canadian Department of Justice <<http://laws.justice.gc.ca/en/M-0.7/>> (last modified: August 31, 2001). See also *supra* note 45.

²⁰⁶ Interview of the author with an International Relations expert at Transport Canada (April 27, 2001). Part V provision 44 of the 2001 MLA requires the government to decide, by Jan. 1, 2005 and every five years afterwards, if necessary, whether the 1978 Hamburg Rules (incorporated in Schedule 4 of the act) should come into force. This has not occurred so far since Canada would like to move in concert with the United States, its largest trading partner. Samuel Robert Mandelbaum, «Creating Uniform Liability Standards for Sea Carriage of Goods» (1996) 23 *Transnat'l. L. J.* 471 at 492. See also *Cutting the Apron Strings* (2003) online: The Maritime Advocate Homepage <www.maritimeadvocate.com/19_cana.ph> (last visited: June 18, 2003).

²⁰⁷ «Obviously, a decision by the U.S. to ratify the Convention would change th[e] picture. As the most significant trading nation in the world, such a decision by the United States would doubtless lead to a similar action by other countries, developed as well as developing». Kurosh Nasseri, «The Multimodal Convention» (1998) 19 *J. Mar. L. & Com.* 231 at 244.

A. The Genesis and Essence of the 1980 Multimodal Convention: Until 1980, international conventions and national laws were designed to regulate carriage of goods by one particular mode of transportation (unimodal transport)²⁰⁸. Unimodal laws and conventions were premised on the assumption that international carriage of goods occurred primarily on a single mode of transportation, while the use of other transportation modes was incidental and, therefore, involved a different and separate legal relationship.

With the emergence of containerization in the 1950s and the common belief that the application of various documents and liability rules to the uninterrupted movement of goods across international borders was likely to hamper international trade, the need for an international legal regime for intermodal transport begun to emerge²⁰⁹. Especially small businesses were often overwhelmed by the additional costs incurred to pay lawyers and/or additional insurance to resolve complexities which often rendered the shipment uneconomical²¹⁰.

It is not entirely clear when the first efforts to devise an intermodal legal regime were made. The formal negotiating history of the Multimodal Convention begun with the TCM²¹¹ Draft Convention in the early 1970s, a document voluntary in its application, applying a ‘network system’ of liability in case of evident damage and proposing a uniform limit of liability in case of concealed damage²¹². Because *de facto*, multimodal carrier liability rules already followed a network system of

²⁰⁸ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L & Com. 231 at 231 and 232.

²⁰⁹ *Ibid* at 234.

²¹⁰ *Ibid* at 223-224. See also *United Nations Conference on Trade and Development*, «The Economic and Commercial Implications of the Entry into Force of the *Hamburg Rules* and the *Multimodal Convention*» (New York: 1991) at 44.

²¹¹ French acronym for *Transport Combiné des Marchandises* (Combined Transport of Goods). The Convention was the culmination of at least a decade of intergovernmental negotiations within the UNCTAD and the International Maritime Organization (IMO). William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 574. This document is the successor of the ‘Rome Draft TMC Convention’, which was elaborated under the auspices of the United Nations Economic Commission for Europe. Nicole Lacasse, “Le Transport Multimodal International des Marchandises. Etude Comparative des Droits Canadiens et Français” (1988) [unpublished: archived at the University of Nantes under micro-fiche number : 88.57.06285/88] at 330.

²¹² William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 235.

liability, ratification of the TMC Draft Convention was not considered worthwhile²¹³. Also, the voluntary nature of these rules demonstrated their weakness in achieving the objective of uniformity and efficiency in multimodal transportation²¹⁴.

Negotiations were later continued under the United Nations Conference on Trade and Development (UNCTAD)²¹⁵. Ten years after the beginning of intergovernmental negotiations, the 1980 Multimodal Convention was adopted. Even though the kind of transportation supplied by developed countries was taken into account in drafting the Convention, its most significant provisions were crafted by shipper developing countries²¹⁶.

The 1980 Multimodal Convention covers exclusively international multimodal transport of goods (art. 1.1) provided that the place of taking charge or delivery is located in a contracting state (art. 2)²¹⁷. The very essence of the convention is that multimodal transportation is covered by one contract of carriage with the shipper, one responsible party towards the shipper (a new entity called the

²¹³ *Ibid* at 235-236.

²¹⁴ *Ibid* at 235.

²¹⁵ *Ibid* at 236. On UNCTAD see *supra* note 196 and accompanying text. On the details of the intermediary steps in adopting the 1980 Multimodal Convention see the well documented analysis of Nicole Lacasse, "Le Transport Multimodal International des Marchandises. Etude Comparative des Droits Canadiens et Français" (1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 330-331.

²¹⁶ William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 194. Developing nation's early support of a uniform liability system reflected a belief that the traditional principles of division of responsibility for cargo loss and damage were disadvantageous to their essentially shipper nature. *Ibid*.

The significant role of these nations in drafting the Convention is noted early on, by UNCTAD's statement of principle enunciated in its first session in 1964: «All countries should cooperate in devising measures to help developing countries to build up maritime and other means of transport for their economic development, to insure the unhindered use of international transport facilities, the improvement of terms of freight and insurance for the developing countries...» *Ibid* at 200.

²¹⁷ If multimodal transport is limited within the boundaries of one country or merely to pick-up and delivery of cargo to be transported under a unimodal contract of carriage, the Convention does not apply. See *Annex No. II, Table No. 1* at cxvi for the text of the 1980 Multimodal Convention. For more details on the general conditions of application of the 1980 Multimodal Convention see Nicole Lacasse, "Le Transport Multimodal International des Marchandises. Étude Comparative des Droits Canadiens et Français" (1988) [unpublished: archived at the University of Nantes under micro-fiche number : 88.57.06285/88] at 337-355.

Multimodal Transport Operator (MTO)) and one set of MTO liability rules towards the shipper²¹⁸.

What has been described as the great success of the 1980 *Multimodal Convention* is that it divides multimodal carriage into two levels of legal relationships: one between the shipper and the M.T.O. (freight forwarder-contracting carrier)²¹⁹ and the other between the MTO and the underlying ‘actual’ or performing carrier²²⁰. The intermodal shipper deals only with the MTO who acts as a principal towards him during the entire journey and this relationship is governed by the 1980 Multimodal Convention²²¹. When the MTO indemnifies the shipper, he may bring a subrogated action against the underlying ‘actual’ carrier²²². These are underlying carriers to whom the MTO may have entrusted in whole, or in part, performance of its transportation contract with the shipper²²³. The relation between the MTO and the underlying carriers will be governed by the unimodal liability regime based on what

²¹⁸ William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. R. 193 at 208. The objective to be attained, in this respect, was that of one transport document, one liability regime and one compensation amount. Marie Tilche, Andrée Chao, “Transport Combiné/Multimodal: Responsabilité de l’Opérateur” (1994) 2570 Bull. Transp. Log. 430 at 438. This concept of uniformity corresponds to our retained definition of unification. As we are going to confirm, the 1980 Multimodal Convention comes very close to the proposed uniformity (unification) model in maintaining one multimodal document, one basis of MTO liability but not always one liability limitation amount.

²¹⁹ The MTO is the new entity created by the 1980 *Multimodal Convention*, non-existent in the 1978 *Hamburg Rules*. According to art. 1(2) of the Convention, the MTO is any person who, on his own behalf or through another person acting on his behalf, concludes a multimodal transport contract and *acts as a principal*, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations and who assumes responsibility for the performance of the contract. For the freight forwarder as contracting carrier see Peter Jones, *Principal, Forwarder* (1999) online: CIFFA Homepage <<http://www.forwarderlaw.com/index/princrit.htm>> (last modified: July 9, 1999).

²²⁰ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 237. The term ‘actual carrier’ is also used in the 1978 Hamburg Rules to designate the carrier to whom performance of the contract of carriage has been entrusted by the (contracting) carrier (Hamburg Rules, article 1(2)). Under the 1978 Hamburg Rules the contracting carrier is liable for the whole carriage, including these portions performed by the actual carrier. However, the shipper can hold the actual carrier liable. The same thing is provided for by the 1980 Multimodal Convention (see i.e. art. 20.2) but the emphasis is placed on the action against the MTO.

²²¹ Frank P. DeGiulio, “Terminal Operations and Multimodal Carriage: History and Prognosis” (1989) 64 Tul. L. Rev. 281 at 353.

²²² Samuel Robert Mandelbaum, «International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules» (1995) 5 J. Transnat’l. L. & Pol’y 1 at 21.

²²³ The MTO may also be the performing carrier. William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 210. The Multimodal Transport Contract is defined in article 1(3): it is the MTO’s undertaking «to *perform* or to *procure* the performance of international multimodal transport» from the time of receipt to the time of delivery».

is provided for in the contracts the MTO has concluded with them²²⁴. Under the 1980 Multimodal Convention, therefore, unimodal liability regimes remain unaffected (network system of liability), but their complexity is left in the hands of experts who professionally engage in multimodal transport²²⁵. This provides for a combination of a network system of liability between the MTO and the underlying carrier(s), with a uniform set of liability rules to govern the relationship between the MTO and the shipper.

Since it is the 1980 Multimodal Convention provisions which govern the relation between the M.T.O. and the shipper, they will mainly draw our attention.

B. Basis of M.T.O. Liability Towards the Shipper: As we have affirmed, the 1980 Multimodal Convention is considered to be the companion treaty to the 1978 Hamburg Rules²²⁶. Both these sets of rules base carrier liability on the principle of presumption of fault²²⁷. In effect, art. 16(1) of the 1980 Multimodal Convention provides that the M.T.O. shall be liable for loss or damage to the goods, as well as for delay in delivery if the harm-causing event took place while the goods were in his charge:

‘unless the multimodal operator proves that he, his servants or agents ... took all measures that could reasonably be required to avoid the occurrence and its consequences’²²⁸.

The presumption of fault is destroyed if proof is made that all measures

²²⁴ *Ibid* at note 73. Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 TLN. L. R. 281 at 353. Kurosh Nasser, *The Multimodal Convention* (1998) 19 J. Mar. L. & Com. 231 at 237.

²²⁵ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L & Com. 231 at 237.

²²⁶ *Supra* at 45.

²²⁷ On the principle of presumption of fault when compared with that of presumption of liability see detailed analysis *infra* at Part II, Chapter II, Section II, Par. 1.

²²⁸ 1980 *Multimodal Convention, basic principles* (in (d)) explicitly states that this set of rules is based on the principle of presumption of fault. *Annex No. II, Table No. 1* at cxv. We find the exact same provision -with minor changes in the terms used- in article 5(1) of the 1978 *Hamburg Rules*. According to the common understanding contained in the *Final Act of the United Nations Conference on the Carriage of Goods by Sea*, (1978) art. 5, U.N. Doc. A/CONF. 89/13 Annex II, 1978, *Hamburg Rules* art. 5 is based on the presumption of fault principle: «It is the common understanding that the liability of the carrier...is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule».

that could *reasonably* be required to avoid the occurrence and its consequences were taken by the M.T.O. (1980 Multimodal Convention or the ocean carrier for the 1978 Hamburg Rules) and his servants. Specific liability exemptions ('litany' of liability exemptions), currently present under the Hague and the Visby Rules do not make part of the 1980 Multimodal Convention. This is primarily and most significantly the case of the 'nautical fault' defense, a liability exemption that has traditionally benefited ocean carriers under the Hague and the Visby Rules, distancing ocean carriage from land transport liability regimes²²⁹.

Certain authors argue that abolition of the list of excepted perils benefits shippers since carriers have no longer ready-made excuses to oppose to shipper claims²³⁰. Others, note that the 1978 Hamburg Rules and the 1980 Multimodal Convention principle of presumption of fault benefits carriers since the Hague and Visby Rules 'litany' of liability exemptions favors clarity in the relation between the carrier and the shipper and promotes, therefore, extra-judicial settlement of disputes²³¹.

They argue that under the principle of presumption of fault, the Hague and the Visby Rules list of liability exceptions will still exonerate carriers since it is doubtful that courts will not consider *precedent* on the excepted perils in this regard²³². However, apart from the cases where the absence of carrier fault is

²²⁹ Leslie Tomasello Weitz, «The Nautical Fault Debate» (The Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code) (1998) 22 TLN. M. L. J. 581 at 591. W. Tetley, *Marine Cargo Claims*, 3d ed. (Montréal: International Shipping Publications, 1988) at 398 and René Rodière, Emmanuel du Pontavice, *Droit Maritime* 12th ed. (Paris: Dalloz, 1997) at 345-346. For a more detailed analysis of this type of fault see *infra* at 223s.

²³⁰ Hugh M. Kindred, Ted L. McDorman, Mary R. Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 283.

²³¹ George F. Chandler, «COGSA, Hague-Visby and Hamburg Rules» (1984) 15 J. Mar. L. & Com. 230 at 244-245.

²³² *Ibid.* See also *infra* at Part II, Chapter II, Section II, Par. 1 for additional authority on this point. Arguments have been made, however, that the removal of the *Hague Rules* defenses under the 1978 *Hamburg Rules* might weaken ship owner position because courts will not consider the *Hague Rules* liability exceptions. Eun Sup Lee, «Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance» 4 ILSA J. Int'l & Comp. L. 153 at 164-165. According to the author, only speculation can be made today as to the effects of the *Hamburg Rules* on carrier liability as these rules have not yet been generally adopted. *Ibid* at 155. The lack of clarity and uncertainty of 1980 *Multimodal Convention* effects on the basis of liability appear among convention's weaknesses. Hugh M. Kindred, Ted L. McDorman, Mary R.

evident, there are a number of occurrences where uncertainty reigns as to carrier liability under the principle of presumption of fault: i.e. damage or loss due to water damage, insufficient ventilation, overrun engines, pilferage, overheating²³³. In these instances, authors maintain that carrier will probably not be exempted under the *Visby Rules* but can bring proof of his absence of fault under the Hamburg Rules and the 1980 Multimodal Convention (carrier protective provision)²³⁴. No certainty as to this conclusion is provided, however, by these rules.

Uncertainty is accentuated under the presumption of fault principle, which raises, yet, another question. Under the *Hague* and the *Visby Rules* proof of a carrier exoneration cause suffices to exempt him from liability before the burden of proof shifts to the shipper to prove carrier negligence. On the contrary, the presumption of fault principle may require proof of absence of any type of fault on the part of the presumed liable party even when such absence of fault is not related to a specifically invoked cause of loss²³⁵. When absence of fault has to be established at all levels and not simply with respect to a specific cause of loss -as under the principle of presumption of liability- before the burden of proof shifts to the shipper, the presumption of fault principle may disadvantage carrier interests. This shipper protective analysis of mentioned principle counters carrier protective analysis of same as mentioned above and furthers confusion as to what the prescribed by the 1980 Multimodal Convention liability regime would give in practice.

Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 302.

²³³ George F. Chandler, «COGSA, Hague-Visby and Hamburg Rules» (1984) 15 J. Mar. L. & Com. 230 at 244-245.

²³⁴ *Ibid.* See also *infra* at Part II, Chapter II, Section II, Par. 1 for a more detailed analysis of the principle of presumption of fault. Thesis of Nicole Lacasse, *International Multimodal Transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 366-367. The negotiating history of the Convention are demonstrative examples of the fact that developed countries interests were represented in its provisions. Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 247-248.

²³⁵ *Ryssok v. Hôpital Royal Victoria* (1995), A. Q. no. 1606 (S. C. Que.), *Harbour Commission of Montréal v. Albert M. Marshall* (1908), 2 Ex. C. R. 178 (Exc. C. C.), *Nolan v. Rhodes et al.* (1980), 27 O. R. (2d) 609 (Ont. C. A.), *Boxenbaum v. Wise* (1994), S. C. R. 292 (S. C. C.). On the presumption of fault principle see also *infra* at Part II, Chapter II, Section II, Par. 1 and interview with Pr. Yves Tassel at the Université de Nantes (March 28, 2003) e-mail: ytassel@hotmail.com

Strongly entrenched in their position against the 1980 Multimodal Convention (and the 1978 Hamburg Rules), (ocean) carriers and their insurers vehemently opposed it, attacking it on the grounds of lack of clarity, uncertainty as to its economic effects and its being shipper-protective²³⁶. On the other hand, the shipping community supported it²³⁷. Commercial interests and country delegations also resisted 1980 Multimodal Convention mandatory character and its government administered requirements²³⁸ (governmental consultations, custom provisions), and

²³⁶ The probable shift of commercial risks on the carrier is a consideration to take into account with respect to this convention. Hugh M. Kindred, Ted L. McDorman, Mary R. Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 325. Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 243 and at 246 for said carrier arguments. See also UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 23 for the uncertainty factor. Ocean carriers, in particular, were virtually unanimous in their opposition to its adoption. This is normal since, in multimodal transport, the contracting carrier will, most frequently, be the ocean carrier and, therefore, held liable to the shipper for the whole multimodal journey (under 1980 Multimodal Convention provisions). “Liability Limbo” *J. Com.* (2000) online: WESTLAW (Newsletters). See also “Europe’s Cargo Insurance Lottery” *Am. Shipper* (1997) online: LEXIS (World, ALLWLD).

An analogous argument has been made with respect to countries refusal to adopt the 1978 *Hamburg Rules* due to the ‘certainty’ supposedly afforded by the precision and detailed enumerations of the *Hague* and the *Visby Rules*. William Tetley, “Maritime Law as a Mixed Legal System” (1999) 23 Tul. Mar. L. J. 317 at 349. In fact, according to the view of many respondents, (governments, intergovernmental, non-governmental organizations and industry experts), to an UNCTAD questionnaire, it is this close association of the 1980 Multimodal Convention with the Hamburg Rules specifically concerning the basis, limitation of carrier liability and uniform provisions that led many shipping nations to oppose former. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 25.

²³⁷ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 243.

²³⁸ William Coffey, “Multimodalism and the American Carrier” (1989) 64 Tul. L. Rev. 569 at 577. The author believes that this is the main reason why the convention was not finally adopted and that there is little support for its adoption today. *Ibid.* See also William Driscoll, Paul B. Larsen, “The Convention on International Multimodal Transport of Goods” (1982) 57 Tul. L. Rev. 193 at 217s for more details on public law provisions. For instance, the 1980 Multimodal Convention invites the contracting states to align their customs transit documents with a standard form goods declaration attached to the Convention itself. *Ibid.* at 221-222. Respondents, (governments, intergovernmental, non-governmental organizations and industry experts), interviewed by UNCTAD have expressed the opinion that inclusion of customs provisions in the 1980 Multimodal Convention is an inappropriate complicating factor. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 25. See also the interesting arguments of Rolf Herber, “The European Legal Experience with Multimodalism” (1989-1990) 64 Tul. L. Rev. 611 at 622. There were, and still are, additional reasons for the lack of support for the 1980 *Multimodal Convention*. A number of Convention’s articles have been attacked on technical grounds, reflecting widespread differences in approaches to liability, jurisdiction, limitation and documentation questions. Since the 1980 *Multimodal Convention* and the 1978 *Hamburg Rules* are related treaties, major interest groups adopted the same position with respect to both. William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 577.

preferred resolving problems through private arrangements. U.S. authorities did not adopt a clear position to the controversy²³⁹.

Divergence of carrier and shipper interests due to the lack of clarity as to the effects of latter convention's provisions and its mandatory character are elements we need to take into account in pursuing uniformity²⁴⁰. This is the reason why we believe that suggestions on uniform multimodal carrier liability rules at the domestic, regional or international level have to be debated from a carrier and a shipper point of view before they are finalized. It is, also, for this reason that we consider that application of a liability regime which gradually approximates existing rules sanctioned by practice will be necessary as a transition stage before adoption of a regime similar to that of the 1980 Multimodal Convention.

C. Limitation of M.T.O. Liability Towards the Shipper: The 1980 Multimodal Convention provides that the M.T.O. is always liable towards the shipper for the amount established by the Convention in case of concealed damage as well as in case of evident damage (loss, damage or delay, LDD) where another international treaty, convention, or law provides for lower liability limits (art. 18-19)²⁴¹. This means that if LDD occurs during a particular stage of transportation, the applicable national rules governing that stage shall establish the limits of liability only if they are more strict (on the carrier) than those of the 1980 Multimodal Convention (art. 19)²⁴².

²³⁹ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 244. The U.S. administration has adopted the wait-and-see policy with respect to the 1980 *Multimodal Convention* recommending further study of its provisions before its ratification. There is also some perception within the U.S. Administration that the 1978 *Hamburg Rules* have to come into effect before the 1980 *Multimodal Convention*. This, however, is neither explicitly nor implicitly provided for. *Ibid* at 246 and Rolf Herber, «The European Legal Experience with Multimodalism» (1989) 64 Tul. L. Rev. 611 at 622-623.

²⁴⁰ Because carrier and shipper interests are polarized with regard to adopting a uniform multimodal transport convention on liability, it seems very difficult, if not impossible, to achieve a uniform multimodal transport convention. *Multimodal Liability: Extracts from a Statement by the CIFFA Seafreight Committee* (1999) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/Feature/multim.htm>> (last modified: Nov. 26, 1999).

²⁴¹ See also Samuel Robert Mandelbaum, «International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, *Hague-Visby*, *Hamburg* and the *Multimodal Convention*» (1995) 5 J. Transnat' l. L. & Pol'y 1 at 21.

²⁴² Authors call this system modified network system. Driscoll William, Larsen Paul B., «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 236.

Art. 18 of the Convention defines M.T.O. limitation of liability towards the shipper. It uses a formula reflecting both a gross weight and a per package/shipping unit approach (art. 18(1))²⁴³ and specifically recognizes containers as packages according to their enumeration in the multimodal transport document itself (art. 18.2(a))²⁴⁴. A uniform limitation amount of M.T.O. liability is established in case of delay and equals two and a half times the freight payable but not exceeding the total freight payable under the multimodal transport contract (art. 18(4))²⁴⁵. For the rest, the 1980 Multimodal Convention establishes an exception to the principle of uniformity²⁴⁶. In effect, if the multimodal journey comprises an ocean segment M.T.O. liability equals the higher of 920 SDR²⁴⁷ per package or other shipping unit or 2.75 SDR per kilo. However, if the multimodal journey does not comprise an ocean segment, the recoverable amount equals 8.33 SDR per kilo²⁴⁸. These provisions constitute the floor but not the ceiling of M.T.O. liability,

²⁴³ *Annex No. II, Table No. 1* at cxxiv. We also find the limitation measures ‘package or unit’ in the *Hague* and the *Visby Rules*. On the discussion of what constitutes a ‘package’ or a ‘unit’ under these sets of rules see *infra* at 244s.

²⁴⁴ *Annex No. II, Table No. 1* at cxxiv. See also the thesis of Nicole Lacasse, *International Multimodal transport of Goods. Comparative Study of Canadian and French Laws* (D. Jur. Thesis, University of Paris 1, 1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 370. This provision is almost identical to *Visby Rules* art. 4(5)(c) and William J. Coffey, “Multimodalism and the American Carrier” (1989) 64 Tul. L. Rev. 569 at 576.

²⁴⁵ *Annex No. II, Table No. 1* at cxxiv-cxxv.

²⁴⁶ Nicole Lacasse, “Le Transport Multimodal International des Marchandises. Etude Comparative des Droits Canadiens et Français” (1988) [unpublished: archived at the University of Nantes under micro-fiche number: 88.57.06285/88] at 370.

²⁴⁷ The acronym ‘SDR’ stands for Special Drawing Rights and its value, defined by the International Monetary Fund (IMF) and announced almost daily, is based, for the period 2001–2005, on a basket of currencies [U.S. dollar, Japanese yen, Pounds Sterling and, effective on Jan.1, 2001, the EURO (replacing the Deutch mark and French franc)] representing countries with the largest exports of goods and services. SDR appears among the most widely used currencies in international transactions. Since the SDR does not react to inflation declining, therefore, in real terms ever since its birthday, 1979, the basket is reviewed every five years to ensure that the component currencies are representative of those used in international transactions. *Special Drawings Rights* (2001) online: International Monetary Fund <<http://www.imf.org/external/np/exr/facts/sdr.HTM>> (last modified: continuously). SDR value seems to have slightly fluctuated through the years. On June 11, 2003 1 SDR = 1.41944 \$USD and 1 SDR = 1.92036 \$CAD while on July 26, 2002, 1 SDR = 1.338\$USD and 1 SDR = 2.122\$CAD. On April 12, 2001, the SDR value equaled 1 SDR= 1.26563000\$USD and 1 SDR=1.97425000 \$CAD whereas on February 23, 1999 the value of 1 SDR equated 1.3 \$USD and 2.03 \$CAN. We will herein make our calculations on the basis of SDR value on January 16, 2002, the date of our last updating of calculations herein used. On this date, 1 SDR = 1.253610 \$USD and 1 SDR = 1.999140\$CAD, amounts that do not greatly vary with respect to those applicable today. *Currency Values in Terms of Special Drawing Rights (SDRs)* (1999) online: International Monetary Fund Homepage <<http://www.imf.org/external/np/tre/sdr/drates/0701.htm>> (last modified: continuously).

²⁴⁸ *Annex No. II, Table No. 1* at cxxiv. William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. R. 193 at 236-239.

meaning that contracting parties can set higher, but not lower liability limits (art. 18(6)). The benefit of liability is extended to M.T.O. servants or agents but both the M.T.O. and its servants will lose the limitation of liability benefit in case of damage caused intentionally, recklessly or with knowledge that damage will probably result for their personal acts (art. 21)²⁴⁹.

Compared to the currently applicable sea and land carrier rules in Canada and the U.S., the 1980 Multimodal Convention applies the highest limits of carrier limitation of liability:

<i>Multimodal Convention</i> (1980):	920 SDR ²⁵⁰ = 1153.3\$USD or 1839.2\$CAD per package or other shipping unit or 2.75 SDR = 3.44\$USD or 5.49\$CAD per kilo
(not yet in force)	
absence of sea carriage:	8.33 SDR = 10.44\$USD or 16.65\$CAD per kilo

The Hamburg Rules (art. 6(1)(a)) provide for the following ocean carrier limitation of liability: 835 SDR per package or 2.75 SDR per kilogram whichever is higher.

<i>The Hamburg Rules</i> (1978):	835 SDR = 1046.76\$USD or 1669.28\$CAD per package or other shipping unit or 2.5 SDR = 3.13\$USD or 4.99\$CAD per kilo
(in force today)	

The Visby Rules (art. 4(5)(a)) provide for ocean carrier limitation of liability: 666.67 SDR per package or 2 SDR per kilo whichever yields the higher recovery for the shipper:

<i>Visby Rules</i> :	666.67SDR = 835.7\$USD or 1332.7\$CAD per package or unit or 2 SDR = 2.50\$USD or 3.99\$CAD per kilo
(In force in Canada)	

Under the Hague Rules (art. 4.(5)) the limitation of liability is 100 pounds gold sterlings per package.

<i>The Hague Rules</i> (1924):	100£sterling = 500\$USD, 500\$CAD ²⁵¹ per package or unit
(In force in the U.S.)	

²⁴⁹ This provision, that we also encounter in the *Visby Rules*, will make the object of a more detailed study later. See *infra* at Part II, Chapter I, Section II, Par. 3(B).

²⁵⁰ For the SDR value taken into account see *supra* note 247.

²⁵¹ William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 890.

Finally, in Canada, motor carriers limit their liability to 4.41\$CAD per kilo while their U.S. counterparts generally apply the contractually uniform amount of 25\$USD per pound, even if regulatory requirements hold them liable for the actual loss or injury to the property²⁵². Rail carriers in both the U.S. and Canada are not subject to statutory limitations and are, thus, held liable for the whole value of the damaged goods except if they contractually modify their liability²⁵³.

We conclude, therefore, that 1980 Multimodal Convention liability limits are definitely greater than their Visby and Hague Rules counterparts as well as currently applicable Canadian motor carrier liability limitations. They are also set at about ten percent higher scale than the Hamburg Rules limits²⁵⁴, fueling the dispute between shipper and ocean carrier interests.

Proposing cross-modal and cross-country M.T.O. liability limitations has given rise to irreconcilable positions between carrier and shipper interests to a point that one should wonder whether the task of elaborating uniform multimodal carrier liability rules is worth considering, at least for the time being. As authors have suggested, the possibility of producing a commonly acceptable convention depends on how serious delegates feel the impediments to international multimodal transportation are, and whether international legislative action is likely to remove them²⁵⁵. Such an agreement was not present during 1980 Multimodal Convention negotiations with regard to M.T.O. basis of liability, nor with regard to M.T.O. limitation of liability.

The important question to be answered, in this respect, is whether an

²⁵² Boris Kozolchyk, Gary T. Doyle, Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tucson: National Law Center for Inter-American Free Trade, 1996) at 52. *Infra* at Part II, Chapter I, Section II, Par. 1(A)(B).

²⁵³ See *infra* at Part II, Chapter I, Section II, Par. 2(A) for contractually uniform limitations applied by U.S. and Canadian railways for container or non-container cargo and which compare, with difficulty, to ocean carrier limitations.

²⁵⁴ Samuel Robert Mandelbaum, "International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, *Hague-Visby*, *Hamburg* and the *Multimodal Convention*" (1995) 5 *J. Transnat'l. L. & Pol'y* 1 at 21.

²⁵⁵ William J. Driscoll, "The Convention on International Multimodal Transport: a States Report" (1977-1978) 9(4) *J. Mar. L. & Com.* 441 at 458.

international convention should maintain a practically unified mandatory liability regime to govern multimodal transport with liability limitation amounts set higher than those currently applicable to land or sea transport. The negotiating history of the 1980 Multimodal Convention advises that one should refrain from making great leaps forward due to the uncertainty the newly established reality may create in practice and the ensuing hesitation of interests involved in negotiations to sanction proposed measures. This does not mean to say that uniformity of multimodal carrier liability rules is untenable. It simply suggests that until negotiating parties are ready to consider uniformity under the model proposed by the 1980 Multimodal Convention, a more modest approach needs to be adopted to achieve the desired result²⁵⁶. Our suggestion to maintain the status quo and work on the approximation of already applicable unimodal liability rules may provide a useful suggestion towards uniformity of multimodal carrier liability.

Nowadays, various countries and entities are contemplating or working on intermodal liability rules, with no concrete or agreed upon harmonization output made thus far²⁵⁷. The recently (2001) CMI released ‘Model Transport Law’ also known as ‘UNCITRAL Preliminary Draft Instrument on Transport Law’ or ‘CMI/UNCITRAL Draft Instrument’ following its approval by UNCITRAL, attempts to regulate multimodal carrier liability among other topics such as electronic communication, freight, liens, negotiability²⁵⁸.

²⁵⁶ In this respect, Pr. Jan Ramberg notes that aware that mandatory regulation would be rejected out of hand by strong and influential business interests, a more flexible solution should be sought. Jan Ramberg, *Unification of the Law of Freight Forwarding* (2001) online: UNIDROIT Organization Homepage <<http://www.unidroit.org/english/publications/review/articles/1998-1.htm>> (last modified: Jan. 10, 2001).

²⁵⁷ 34 countries around the world either have or are contemplating different intermodal liability conventions and a handful of global bodies are elaborating a single multimodal carrier liability regime. “Liability Limbo” *J. Com.* (2000) online: WESTLAW (Newsletters). Among the international bodies appear: the UNCITRAL (UN Commission on International Trade Law), the UNCTAD (UN Conference on Trade and Development), the UNECE (UN Economic Commission for Europe) all being sister agencies, as well as the CMI (Comité Maritime International) a federation of maritime lawyers. All present European Member-States as well as Canada and the U.S. are members of the UNECE. The UNECE plan to create a uniform intermodal liability regime was put on hold at the request of the UNCITRAL on grounds that the CMI was developing a broad based multimodal transport convention (the ‘Model Transport Law’) we herein comment on.

²⁵⁸ On December 10, 2001 the Comité Maritime International (CMI) adopted its “Final Draft Instrument on Issues of Transport Law” after 3 ½ years of meetings, conferences, questionnaires, long drafting sessions and international conferences. The CMI final Draft Instrument was immediately delivered to UNCITRAL that sanctioned it. The new ‘UNCITRAL Preliminary Draft Instrument on Transport Law’ [hereinafter Draft

The Draft Instrument stipulates that if damage happens between two or more modes of transport or if damage is concealed the limitation amounts in the instrument apply²⁵⁹. Limitation amounts, however, have not yet been agreed upon. The general approach taken towards uniformity by the Draft document is the extension of the maritime regime (i.e. liability exceptions) to the whole transport chain²⁶⁰. This, and the possibility to ‘opt out’ of the whole convention by any of the parties to the contract along the route break uniformity suggested by the convention²⁶¹. Instrument’s definitions are viewed as broad or confusing, in brief, unacceptable by doctrine. The document is under concerted attack by international bodies and doctrine that question its intermodality, content, clarity and harmonization of currently applicable rules²⁶².

Pr. Tetley wonders whether it is realistic to expect to draft nine or ten international conventions (multimodal carriage, electronic commerce, freight...) as the Draft Instrument intends to do when the international community has failed to agree on the Hamburg Rules or the 1980 Multimodal Convention dealing with door-

Instrument] was dated January 8, 2002. The draft document was intended to be a multi-purpose convention, an extremely ambitious project. William Tetley, *Let’s Have a Two Track Approach* (2002) online: Tetley Law Homepage <<http://tetley.law.mcgill.ca/maritime/uncitralcomment.htm>> (last modified: continuously). The *Draft Instrument* can be found online: Tetley Homepage <<http://tetley.law.mcgill.ca/uncitral.htm>> (last modified: continuously).

²⁵⁹ Peter Jones, *Box Score on FIATA Submissions to UNCITRAL* (March 21, 2003) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/Feature/uncitral7.htm>> (last modified: March 21, 2003).

²⁶⁰ Santanu Sanyal, “The Multimodal Debate” *Business Line (The Hindu)* (2003) online: WESTLAW (Newsletters). Liability exceptions in the Draft Instrument have been drafted from a sea carriage point of view. It has been argued that most issues on which there is serious disagreement become less pressing, if not academic, if UNCITRAL members decide that the convention is to apply to sea transport only. As reported by Peter Jones, *CMI Mantle is Taken Up by UNCITRAL-Another Step Closer to a New International Convention* (2002) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/Feature/fiauncit.htm>> (last visited: June 30, 2002).

²⁶¹ William Tetley, *Let’s Have a Two Track Approach* (2002) online: Tetley Law Homepage <http://tetley.law.mcgill.ca/maritime/uncitralcomment.htm> (last modified: continuously).

²⁶² *Ibid.* Santanu Sanyal, “The Multimodal Debate” *Business Line (The Hindu)* (2003) online: WESTLAW (Newsletters), “CMI Model Transport Law under Scrutiny” *Ll. List. Int’l* (2002) online: WESTLAW (Newsletters). *UNECE Comments to the UNCITRAL Draft Instrument* (2002) online: Tetley Law Homepage <<http://tetley.law.mcgill.ca/unece.htm>> (last modified: continuously) stating that the draft instrument is based purely on maritime provisions and insisting on harmonization of North-American and European laws on the issue. *UNECE Ad-Hoc Expert Group on Civil Liability in Multimodal Transport* (2002) online: UNECE Homepage <http://www.unece.org/trans/new_tir/wp24/documents/wp24-0206e.pdf> (last visited: March 5, 2002).

to-door transit?²⁶³ Our answer to this question is that we can perhaps not write nine or ten multimodal conventions on said issues but we may endeavour to draft just one on multimodal liability inspired by currently successfully applicable documents such as the FIATA BOL that we will examine as follows. This seems also to be the opinion of many of UNCTAD respondents who broadly support preparation of a multimodal transport instrument based on rules which are currently used in commercial contracts, such as the UNCTAD/ICC Rules for Multimodal Transport Documents which inspired the FIATA BOL²⁶⁴.

Par. 2. The FIATA Multimodal Transport BOL (1992 MM or FBL): Pending ratification of the 1980 *Multimodal Convention*, the UNCTAD elaborated contractual multimodal documents in collaboration with commercial parties and international bodies²⁶⁵. Reference is herein made to the 1992 FIATA Multimodal Transport Bill of Lading (or MM for short)²⁶⁶ issued by the Multimodal Transport

²⁶³ William Tetley, *Let's Have a Two Track Approach* (2002) online: Tetley Law Homepage <<http://tetley.law.mcgill.ca/maritime/uncitralcomment.htm>> (last modified: continuously).

²⁶⁴ UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Généve: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 32. Virtually all (98%) respondents, (industry representatives, experts, governmental, non-governmental, inter-governmental organizations), would support any concerted efforts towards a new international instrument. For the UNCTAD/ICC Rules being the source of inspiration of the FBL see *infra* at 63.

²⁶⁵ Tilleke & Gibbins, "Trend of Multimodal Transport Law in the ASEAN" (1997) online: Tilleke & Gibbins Homepage <<http://www.tginfo.com/publications/maritime/multimodal.htm>> (last visited: March 12, 2001). FIATA (*infra* note 266) considers that a mandatory convention on multimodal transport, as proposed by the UNCITRAL/CMI, is neither necessary nor appropriate at this time. *Box Score on FIATA Submissions to CMI Conference* (2001) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/cmisin1.htm>> (last modified: Feb. 16, 2001).

²⁶⁶ Peter Jones, *FIATA Legal Handbook on Forwarding* 2st ed. (Toronto: Republic Communications Inc., 1993) at 31. In the present study we will use the denomination FBL (FIATA Bill of Lading) or 1992 MM to indicate the FIATA Bill of Lading, as both denominations are commonly used. FIATA is the International Federation of Freight Forwarders Associations -Fédération Internationale Des Associations de Transitaires et Assimilés- which is based in Zurich. It comprises national associations of more than 100 countries representing more than 40,000 freight forwarders. Diana Faber, "The Problems Arising from Multimodal Transport" (1996) L. M. C. L. Q. 503 at note 2. FIATA authorizes national associations of freight forwarders, which constitute independent entities, to print consecutively numbered FBLs to permit the identification of the originator of the document. A freight forwarder (M.T.O. in the 1992 MM) can only issue a BOL if he is member of the national freight forwarders organization. Peter Jones, *FIATA Legal Handbook on Forwarding* (Canada: International Federation of Freight Forwarders Association 1991) at 27. In Canada, CIFFA (Canadian International Freight Forwarders Association) constitutes the national entity of freight forwarders. Interview of the author with a CIFFA regulatory division responsible. *Annex No. 1, Table No. 2* at xviii for the 1992 MM.

Operator (M.T.O.), the Nor-Cargo BOL, the Capricorn Service BOL or the ONLINE-BILL issued by the carrier²⁶⁷.

In this part of our study we will concentrate on the 1992 MM²⁶⁸ which is currently used with great success at the international level (FBL)²⁶⁹. This document greatly facilitates trade, is recognized internationally by banks and provides certainty to shippers and carriers²⁷⁰. More specifically, we will focus on its general liability traits (A) and, later, its liability provisions (B).

A. 1992 MM (FBL) General Liability Traits: Although contractual documents elaborated after failure of the 1980 Multimodal Convention tried to define a uniform

²⁶⁷ K. Bernauw, "Current Developments Concerning the Form of Bills of Lading" (1997) 32 Eur. Transp. L. 145 at 147. See also Marie Tilche, Andrée Chao, "Transport Combiné/Multimodal: Responsabilité de l'Opérateur" (1994) 2570 Bull. Transp. Log. 430 at 439-440.

²⁶⁸ *Annex No. 1, Table No. 2* at xviii. The 1992 FBL finds its origins in the 1960 UNIDROIT Draft Convention that held liable, for the first time at the international level, the freight forwarder as a carrier when he acted as a cargo consolidator (assembly of a number of cargo from different shippers and distribution to different consignees), charged a fixed price for the transport or issued a so-called 'titre de commission'. However, the draft convention never materialized. FIATA later put in practice contractual documents such as the 1971 FIATA Combined Transport Bill of Lading, the predecessor of the 1992 MM and was fiercely opposed by risk distribution and insurance companies that worked satisfactorily on the European continent. But a choice had to be made whether the freight forwarder really should join the family of carriers in order to market his services efficiently or remain in the category of intermediaries. The choice has been made with the introduction and wide acceptance of the 1992 MM and, nowadays, no one would suggest that the choice was unwise. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 40-41. Relatively recently, the 1996 FIATA Model Rules for Freight Forwarding Services (*Annex No. 1, Table 2(bis)* at xix), influenced by the 1990 UNCTAD/ICC Rules, were elaborated in order to bridge the different views of the freight forwarder as a principal and as an intermediary for services other than the carriage of goods: storage, packing, handling, distribution, services (art. 2.1) for which the freight forwarder is responsible but which were subject to national laws, leading to a proliferation of national legal rules applicable on the issue. When adhered to by the parties, these rules supercede contractual documents (art. 1.2.). Since the 1996 FIATA Model Rules are voluntary, it remains to be seen to what extent they will be used in national freight forwarding conditions. Jan Ramberg, *International Commercial Transactions* (Stockholm: Kluwer Law International, 2000) at 189 and 190. Jan Ramberg, *The FIATA Model Rules on Freight Forwarding Services* (2000) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/ramberg3.html>> (last modified: Dec. 3, 2001). In the present study, we will mainly refer to the 1992 MM provisions that concern multimodal carriage.

²⁶⁹ Most of the roughly 600.000 sets issued a year are issued in industry countries. Interview of the author with CIFFA personnel (forwarded document from FIATA) (April 3, 2003). Even if the MM is the world's most frequently used combined transport document (used in more than 60 countries) it is not used in Canada mainly because of the onerous liability terms FBL contains. In effect, the FBL 8.33 SDR per kilo land carrier liability limitation amount corresponds to 16.6\$CAD per kilo, much higher than the currently applicable Canadian 4.41\$CAD per kilo motor carrier liability limitation. Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Republic Communications Inc., 1993) at 30, Aviva Freudmann, "Divergent Paths Taken to Unify Cargo Liability Rules" *J. Com.* (1999) online: LEXIS (J. Com).

²⁷⁰ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Rep. Communications Inc., 1993) at 32 and *Shipping* (2002) online: Schenker Stinnes Logistics Homepage <<http://www.schenker.co.th/faqtext.htm#forwarder>>(last modified: continuously).

multimodal carrier liability regime, they essentially maintained a ‘network’ system of liability²⁷¹. Moreover, they all contain different combinations of the principles of presumption of fault and presumption of liability and also apply different liability limitation amounts²⁷². Finally, these are documents of voluntary application but mandatory in their provisions²⁷³. In other words, they offer a minimum set of liability rules that the contracting parties cannot modify once they decide to adhere to them. This may not characterize uniformity of liability laws (“Au royaume du contractuel on trouve peu d’uniformité”)²⁷⁴. As we are going to confirm, however, these documents provide a first step towards uniformity of multimodal carrier liability regime.

The 1992 MM (FBL) is a BOL issued by the M.T.O. (freight forwarder-contracting carrier) in negotiable or non-negotiable form²⁷⁵. Although the FBL may, under certain conditions, also be used for combined land transport, it was primarily designed for transport operations with ocean transport as their core segment²⁷⁶. In issuing this document, the M.T.O. becomes the contracting carrier who uses the services of unimodal carriers (actual or performing carriers) to effectuate the multimodal journey²⁷⁷. In this way, the 1992 MM forms the contract of carriage and the M.T.O. becomes responsible as a carrier towards the shipper²⁷⁸. This translates

²⁷¹ Marie Tilche, Andrée Chao, “Transport Combiné/Multimodal: Responsabilité de l’Opérateur” (1994) 2570 Bull. Transp. Log. 430 at 438-440.

²⁷² *Ibid* at 440. See table of the author at 439 for illustrative examples.

²⁷³ Aviva Freudman, “No easy answer” *J. Com* (2000) online: WESTLAW (Newsletters).

²⁷⁴ Marie Tilche and André Chao, “Transport Multimodal: Responsabilité de l’Opérateur” (1994) 2570 Bull. Transp. Log. 430 at 438.

²⁷⁵ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Rep. Communications Inc., 1993) at 37. The FBL is negotiable unless it specifically states that it is non-negotiable. *What Makes a BOL Negotiable* (1998) online: Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/feature/ucpnegot.htm>> (last visited: March 23, 2001). Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 52. On the M.T.O. as contracting carrier see *supra* at 49. A marked ‘non-negotiable’ FBL must be presented to the carrier for delivery of the goods at destination. Interview of the author with CIFFA personnel (April 3, 2003).

²⁷⁶ Interview of the author with CIFFA personnel (forwarded document from FIATA) (April 3, 2003).

²⁷⁷ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Republic Communications Inc., 1993) at 29. However, Clause 1 of the 1992 MM (*Annex No. 1, Table No. 2* at xviii) provides that, notwithstanding its heading, the document can apply to the unimodal transport of goods. This is because adoption of the 1992 MM rests upon a voluntary agreement between the parties and not upon international or national law provisions. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 50.

²⁷⁸ See comments of Pr. Jan Ramberg on 1992 MM Clause 2.2 on the liability of the freight forwarder as a principal. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 51. Under the 1996

into liability of a principal not an agent and, as such, the 1992 MM presents great interest for our study²⁷⁹. It also gives shippers a considerable advantage since use of only one document of carriage with only one person being held liable towards the shipper for the whole multimodal journey provide for shipper certainty and signal uniformity²⁸⁰. In turn, the M.T.O. may recover from the ‘actual’ carriers whatever amount he paid to the claimant-shipper, based on the documents issued to him by each one of them²⁸¹.

B. 1992 MM (FBL) Liability Provisions: 1992 MM proposes a set of liability rules that incorporates 1990 *UNCTAD/ICC Rules* which are, in turn, based on the *Visby Rules*²⁸². Anything in the FBL which is contrary to the afore-mentioned Rules should be null and void²⁸³. The main characteristics of the 1992 MM is that, *first*, it gives priority to mandatory domestic legislation and second, it provides for a combination of a ‘uniform’ and a ‘network’ system of liability²⁸⁴. More specifically, the 1992 MM maintains:

FIATA Model Rules (art. 6-8), however, the freight forwarder may be responsible as a principal or as an agent. He acts as a principal not only when he is the performing carrier but also when there is an express or implied undertaking to assume carrier liability (art. 7.1). *Annex No. 1, Table No. 2* at xviii. Freight forwarders can generally act as principals or as agents. *Supra* note 25. The interest in making this distinction is that as principal, the freight forwarder is in breach of contract despite making all reasonable efforts to provide the requested service, ‘reasonable efforts’ being the only obligation of an agent. Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Republic Communications Inc., 1993) at 22. For the criteria to be taken into account in determining whether a freight forwarder acts as a principal or an agent see *ibid* at 22-23 and William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications 1988) at 694-695. See also the Canadian case *Bertex Fashions Inc. v. Cargonaut Canada Inc.* (1995), F. C. J. No. 827 (F. C. C.) applying these criteria.

²⁷⁹ We have already stated that the present study only focuses on carrier liability rules. *Supra* at 7.

²⁸⁰ *Multimodal Transport* (1995) online: UNCTAD Organization Homepage <<http://www.unctad.org/en/subsites/multimod/mt2brf0.htm>> (last visited: April 2, 2001).

²⁸¹ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Rep. Com/tions Inc., 1993) at 40-45.

²⁸² Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 61. The 1990 *UNCTAD/ICC Rules* for Multimodal Transport Documents presently represent world commercial practice in the field of multimodal transport. These rules replace their predecessor, the 1973 *UNCTAD/ICC Rules* for Multimodal Transport Documents. See *UNCTAD RULES for Multimodal Transport* (1999) online: International Chamber of Commerce Homepage <http://www.iccwbo.be/Le_President/Publications/Rapports_annuels/Rapport_Int_99/body_rapport_int_99.html> (last visited: March 8, 2001).

²⁸³ Jan Ramberg, *The FIATA Model Rules on Freight Forwarding Services* (2000) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/ramberg3.html>> (last visited: Dec. 3, 2001).

²⁸⁴ K. Bernauw, “Current Developments Concerning the Form of Bills of Lading” (1997) 32 *Eur. Transp. L.* 145 at 147 and Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 42. *Box Score on FIATA Submissions to CMI Conference* (2001) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/cmisin1.htm>> (last modified: Feb. 16, 2001).

i) carrier liability rules *compulsorily applicable* at the domestic level in case of localized and concealed damage (Clause 7.1-paramount clause²⁸⁵ and Clause 8.6(a)). This means that unimodal mandatory conventions or laws enacted at the domestic level supersede 1992 MM clauses and apply to a particular stage of the multimodal journey in case of damage²⁸⁶. In their absence, 1992 MM Rules apply²⁸⁷. This is an important observation considering that over 85% of damages in multimodal transport occur at an unknown place²⁸⁸.

Considering the fact that the *CMR*, *CIM* and the *Visby Rules* are enacted at the national level by the majority of the EU Member-States, these conventions supersede 1992 MM clauses in case of localized LDD (loss-damage-delay)²⁸⁹. This denotes a network system of liability. If the place of damage is not known, (i.e. concealed damage), then no convention or mandatory law applies to the M. T. O.²⁹⁰. It should be apparent, therefore, that in the case of concealed damage it is logically impossible for national legislation to override FBL documents principles²⁹¹.

²⁸⁵ *Annex No. 1, Table No. 2* at xviii for the 1992 MM provisions. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 60-65. Specific reference is made in the 1992 MM to the *Hague, Visby Rules* and the U.S. COGSA (Clauses 7.2 and 7.3 and 8. 6(b) respectively). According to Pr. Jan Ramberg this is because there are countries that require parties to make specific reference to these rules in their contractual documents before putting them into effect. *Ibid* at 42.

²⁸⁶ On the contrary, 1980 *Multimodal Convention* art. 19 sanctions mandatory domestic legislation only with respect to more strict domestic limitation of liability amounts. *Supra* at 49-50 and at 54. The 1992 MM follows the 1990 *UNCTAD/ICC Rules* and, thus, maintains a network system of liability in principal and a more uniform liability regime by way of exception. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 42 and Peter Jones, *FIATA Legal Handbook on Forwarding* 2st ed. (Toronto: Republic Communications Inc., 1993) at 31.

²⁸⁷ *Ibid.*

²⁸⁸ Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 *Tul. L. Rev.* 611 at 626.

²⁸⁹ Peter Jones, *FIATA Legal Handbook on Forwarding* 2st ed. (Toronto: Republic Communications Inc., 1993) at 30-31 and 41-42 and Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 58-59 on delay. Delay damages are limited, under 1992 MM art. 8.7, to twice the amount of the freight, as is the case of 1990 *UNCTAD/ICC Rules*.

²⁹⁰ Interview of the author with a transportation attorney authority on the issue, (April 2, 2003).

²⁹¹ *Ibid.* The transportation attorney interviewed notes that there is one possible exception to this conclusion: certain Forwarding Codes may be applicable to concealed damage and override FBL provisions. The freight forwarder cannot derogate from its responsibilities under the code because he has issued a transport document. *Ibid.*

ii) a network system of liability when domestic mandatory laws do not take effect²⁹². This network system is based on the principle of presumption of fault ('reasonable diligence'-Clause 6. 2) accompanied by a set of liability exemptions applicable throughout the modes (Clause 6. 5) and which are similar, not identical, to the ones of the *COTIF/CIM*, *CMR* and the *Visby Rules*²⁹³. The additional liability exemptions of 'fire' and 'nautical fault' apply in case of sea carriage or inland navigation portion of the multimodal journey (Clause 6.6)²⁹⁴. They signify respect of cross modal diversities that we do not find in the 1980 *Multimodal Convention*²⁹⁵.

Liability limitation amounts under the network system of liability equal (*CMR*) 8.33 SDR per kilo when no sea or inland waterways segment is included in the multimodal journey (clause 8.5). Otherwise, *Visby Rules* limitations of 2 SDR per kilo or 666.67 SDR per package or unit apply (Clause 8.3)²⁹⁶. We find the same respect for modal diversities in defining MTO limitation of liability in the 1980 *Multimodal Convention* (art. 18(1)(3))²⁹⁷. In all cases where the shipper has declared

²⁹² *Box Score on FIATA Submissions to CMI Conference (2000)* online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/cmisin1.htm>> (last modified: Oct. 24, 2000).

²⁹³ *Annex No. I, Table No. 2* at xviii for the 1992 MM provisions and *Annex No. III, Table No. 4* at clxxxvi for our comparative table of liability exceptions at the European level. From a comparison of *CMR* art. 17, *COTIF/CIM* art. 36, *Visby Rules* art. 4 and 1992 MM art. 6(5) we conclude that all liability exemptions contained in the 1992 MM are present in mentioned conventions except for 1992 MM art. 6(5)(e) exemption 'strikes and lock-outs' that we find in the *Visby Rules* but not in the *CMR* or the *COTIF/CIM*. This exemption, however, could easily fall under the two conventions general principle of presumption of fault (art. 17(2) and 36(2) respectively). Note also that there are several *Visby Rules* liability exemptions which make not part of the 1992 MM list of sea carrier liability exemptions: saving or attempting to save life or property at sea, perils of the sea, quarantine restrictions.

²⁹⁴ *Annex No. I, Table No. 2* at xviii.

²⁹⁵ In effect, in proclaiming the principle of presumption of fault (art. 16), the 1980 *Multimodal Convention* does not contain specific sea carrier liability exemptions or any list of carrier liability exemptions for that matter. On the contrary, the 1992 MM retains ocean specific carrier liability exemptions.

²⁹⁶ *Annex No. I, Table No. 2* at xviii. Same compensation provisions are provided for by the 1990 UNCTAD/ICC Rules, *Annex No. III, Table No. 4* at clxxxvi. See table of Marie Tilche and André Chao, "Transport Multimodal: Responsabilité de l'Opérateur" (1994) 2570 Bull. Transp. Log. 430 at 439 on the approximation.

²⁹⁷ Both the 1980 Multimodal Convention [art. 18(3), see *supra* at Part I, Chapter I, Section I, par. 1] and the 1992 MM maintain a specific limitation (8.33 SDR) in case damage occurs during a multimodal journey that does not contain an ocean segment. This is perhaps one of the reasons why it is argued that many of the provisions of the 1980 Multimodal Convention are applied in practice. Thomas J. Schoenbaum, *Multimodal Carriage of Goods* 3d ed. (U.S.: West Group, 2002) at par. 10-4. On this point see also UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Genève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 19.

the value of its goods, he can recover for actual damages up to the amount of the declared value (Clause 8.3 *in fine*)²⁹⁸.

Finally, 1992 MM Clause 8.9 denies the benefit of statutory limitation of liability in case of 'personal act or omission of the freight forwarder done with intent to cause damage or recklessly and with knowledge that damage will probably result'. Proof of ordinary negligence by the claimant will not suffice in this respect²⁹⁹. Rather, intentional or willful misconduct attributed to the freight forwarder itself or at the managerial level and not to other servants or agents will operate loss of his limitation benefit³⁰⁰.

Overall, one should refrain from viewing the 1992 MM as a uniform set of rules. This document is really based on a 'network system' of liability and is less ambitious than the regime proposed by the 1980 *Multimodal Convention*³⁰¹. In this way, 1992 MM provisions do not comfort shipper uncertainty on the amount of compensation he may receive.

Moreover, 1992 MM liability provisions have not always worked smoothly in practice³⁰². In effect, based on the document's provisions, freight forwarders may escape liability absent shipper objection. For instance, the 1992 MM provides that

²⁹⁸ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Republic Communications Inc., 1993) at 41. Pr. Jan Ramberg states that declarations of value are rare because of the presence of cargo insurance and because cargo insurers seldom insist on shippers making declarations of value. Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 64. See also *infra* at 240 on declaration of value.

²⁹⁹ Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 66. See also *infra* at Part II, Chapter I, Section II, Par. 3(B) for Visby Rules identical provision. The similarity of provisions may be attributed to the fact that the 1992 MM is, in reality, based on the *Visby Rules*. *Supra* at 63. No decisions have been found on the 1992 MM on this point. Generally, case law on the 1992 MM is very scarce.

³⁰⁰ *Ibid* and *infra* at 249s.

³⁰¹ In effect, contrary to the 1992 MM, the 1980 Multimodal Convention gives preponderance only to more strict, than conventions provisions, domestic laws. 1992 MM voluntary nature opposes 1980 Multimodal Convention mandatory character and brings the 1992 MM closer to the TCM draft, the predecessor of the 1980 *Multimodal Convention*. *Supra* at Part I, Chapter I, Section I, Par. 1. As we have affirmed, the draft convention was never adopted because its voluntary nature was viewed as a weakness and because it did not really distance itself from the practice which was already based on a network system of liability. *Ibid*. This contrasts the huge success the 1992 MM has known in practice and affirms our conviction that multimodal carrier liability rules should stem from the practice before being sanctioned by an international convention.

³⁰² Aviva Freudmann, "Divergent Paths Taken to Unify Cargo Liability Rules" (1999) *J. Com.* online: LEXIS (News). The author refers to FIATA obscure law with respect to multimodal carrier liability rules it prescribes.

absent shipper special declaration for timely delivery of goods, the freight forwarder will not be liable (Clause 6.2). According to Pr. Jan Ramberg, this clause is equivalent to a full disclaimer of liability for delay³⁰³. However, courts may interpret the requirement for special declaration informally so that shippers may, in the end, recover for damages from delay³⁰⁴. Also, the principle of presumption of fault delineating the basis of carrier liability is not always clear on specific events that do not fall under the list of specific liability exemptions³⁰⁵. Finally, 1992 MM jurisdiction clause may also be disputed in court as to whether it will be given effect³⁰⁶. The need for alert shippers becomes, therefore, evident. It is probably based upon this fact that national and supra-national authorities envisage, today, reform of underlying liability regimes in multimodal transport³⁰⁷.

Despite the lack of clarity and contractual nature of 1992 MM, we have affirmed that, contrary to the 1980 *Multimodal Convention*, this document successfully applies today to the international multimodal carriage of goods³⁰⁸. This can be attributed to the fact that the 1992 MM is a document that derives from, and is sanctioned by, currently applicable rules and practices keeping sight, at the same

³⁰³ Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 58.

³⁰⁴ Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed (Toronto: Republic Communications Inc., 1993) at 42. See also *Delay, Generally* (1999) online: Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/index/delay.htm>> (last modified: July 8, 1999).

³⁰⁵ *Supra* at 50s. Subjectivity of judicial consideration is possible i.e. in case of theft. Peter Jones, *Impossibility of Performance* (2000) online: Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/index/imposs.htm>> (last modified: April 2, 2001). Richards Butler, "Trade Law Uniformity Remains Out of Reach" *Ll. List. Int'l* (1999) online: LEXIS (Transp. News) noting that a judge has noted that FBL provisions are not as illuminating as one would think. When a container is missing there may appear to be about five parties sparring about who is to blame.

³⁰⁶ 1992 MM Clause 19 (and 1996 Model Rule 19) maintains that parties are free to provide for jurisdiction clauses, absent which, suit will be brought before the courts of the freight forwarder principal place of business and the law of that place will apply to decide the case. Pr. Jan Ramberg and attorney Mr. Peter Jones argue that most transportation documents contain jurisdiction clauses and that clauses of this kind are usually upheld by national courts. However, there are different factors that may lead to uncertainty as to the 1992 MM jurisdiction clause. There are some countries where there is legislation that denies efficiency to jurisdiction clauses. In effect, courts generally have discretion to ignore a jurisdiction clause that would result to the detriment of the claimant. There are jurisdictions that will apply law different from their own, in such a manner that a choice of law clause in the 1992 MM would be useful. Peter Jones, *Jurisdiction* (2003) online: Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/index/juris.htm>> (last visited: June 29, 2003) and Jan Ramberg, *The Law of Freight Forwarding* (Switzerland: FIATA, 1994) at 76.

³⁰⁷ Aviva Freudmann, "Divergent Paths Taken to Unify Cargo Liability Rules" *J. Com.* (1999) online: LEXIS (J. Com.).

³⁰⁸ *Supra* at 61 for the document's successful implementation.

time, of the ultimate goal, namely, uniformity of legal terms and conditions of multimodal transport. In this respect, cautious steps towards uniformity are taken by this document in respecting cross-modal (ocean specific liability exceptions) and cross-country (preponderance of domestic legislation) diversities.

Because of its successful implementation and its modest approach, 1992 MM will be taken into account in contemplating uniformity of multimodal carrier liability in the present study³⁰⁹. Lack of clarity of 1992 MM clauses and the document's voluntary nature constituting its greatest weaknesses are simply topics that should trigger further elaboration.

Par. 3: The 'Provisional Remedy' of Insurance Companies in Multimodal Transport: Despite the absence of a uniform intermodal carrier liability regime, transport deregulation and the impossibility, at times, to forecast the presence and/or amount of shipper compensation, intermodalism flourishes today. This is attributed to the presence of insurance companies³¹⁰.

Making suggestions on uniformity of multimodal carrier liability without understanding insurance mechanisms and the economics of insurance is the equivalent of determining chess moves by rolling dice³¹¹. The economics of insurance make reference to the 'Law and Economics' doctrine.

According to 'Law and Economics' principles, when risk prevention measures are less costly than the reduction of risk their adoption operates, one should adopt them³¹². When there is no means to prevent risk of loss or damage to the transported goods, one should either assume the risk, transfer it to a third party

³⁰⁹ Authors suggest that 1992 MM use should be promoted in practice. Peter Jones, *FIATA Legal Handbook on Forwarding* 2nd ed. (Toronto: Republic Communications Inc., 1993) at 48.

³¹⁰ William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 578. William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. Rev. 193 at 198-199. The author maintains that cargo and liability insurance are key factors in maintaining a workable system in intermodal transport.

³¹¹ Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 Univ. of Chicago L. Rev. 1337 at 1355.

³¹² Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 173.

or insure it³¹³. The primary function of insurance is not to prevent the happening but to indemnify the party whose property is at risk so that he will suffer no financial loss if his goods are destroyed or damaged³¹⁴. It is this insurance option which, as applicable to carrier liability and cargo insurance, we will herein develop.

Transportation of cargo involves risk. Theoretically, the entire risk of loss or damage could be assigned either to the carrier or to the shipper³¹⁵. Risk is, in practice, allocated between them, with the possibility for each party to purchase insurance to cover its portion of the risk³¹⁶. Today, it is carrier and shipper insurers that will, most often, take over settling of claims in case of damage to or loss of the goods in multimodal transport³¹⁷. By acting as a means of risk-shifting, insurance companies represent a form of indemnification that provides security against loss to the insured. We frequently refer to three types of insurance when commenting on the transport of goods: cargo insurance, liability insurance and self-insurance that we will examine as follows³¹⁸(A). We will later ponder over the questions whether insurance companies render obsolete uniformity initiatives of multimodal carrier liability (B) to finally focus on the interplay of regulatory policies on carrier liability and insurance premiums (C).

A. Cargo, Liability and Self-Insurance: These three types of insurance are similar in that they all cover risks of loss or damage of the same goods. They differ in the identification of the contracting parties and of the covered risks³¹⁹. Liability insurance covers carrier liability for loss or damage during carriage while cargo insurance covers economic loss resulting from loss or damage to the goods. Self-

³¹³ We assume the risk when there is no other solution we can adopt. An example that illustrates deviation of risks to a third party is that of the inability of Canadian fishermen to fish because of exhaustion of stocks of fish in the oceans which is reflected on the community as a whole by means of governmental allocations to fishermen. *Ibid.*

³¹⁴ John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 1.

³¹⁵ On this possibility see *infra* at Part II, Chapter II, Section III, Par. 3(B).

³¹⁶ Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 Am. J. Comp. L. 403 at note 13.

³¹⁷ Ronald Gift Mullins, "Insurance" *J. Com.* (2000) online: WESTLAW (Newsletters).

³¹⁸ *Ibid.*

³¹⁹ Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J. Int'l & Comp. L. 153 at 156.

insurance has developed in recent years and provides carriers and shippers with an alternative risk financing strategy that involves carriers or shipper's own assumption of risks in an attempt to lower insurance costs³²⁰.

To overcome the complexities of international multimodal transport, shippers may need to have recourse to a lawyer or to purchase additional cargo insurance (shipper's option)³²¹. Cargo insurance is typical in multimodal transport and constitutes a form of property insurance ordinarily paid promptly on proof of loss without regard to liabilities which may be the subject of later disputed claims among insurers³²². It can be purchased through an insurance broker that provides truck or/and marine cargo insurance³²³. This type of insurance is said to be provided by the shipper and the premiums the latter pays are based on a multiplicity of factors such as individual shipper's losses and claims, method of shipment, type of packing, nature of cargo, the physical characteristics of the undertaken journey, carrier increase or decrease of liability limitations and the 'pool' of catastrophe losses³²⁴. Cargo insurance may also be provided by the carrier if the shipper chooses to pay higher freight or purchases excess cargo insurance in return for full recovery guaranteed from the carrier in case of damage³²⁵.

Most cargo insurance policies cover goods for 'all risks' during the entire door-to-door transport³²⁶. Despite its name, this 'all risks' policy may not provide

³²⁰ U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 3) (last visited: June 23, 2001).

³²¹ Kurosh Nasser, «The Multimodal Convention» (1998) 19 *J. Mar. L & Com.* 231 at 234.

³²² Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 *Transp. L. J.* 471 at 502. A cargo policy has been described as "fundamentally an agreement to pay a sum on the happening of an event; when that event has definitely taken place in accordance with the terms of the contract, the payment becomes due." Raymond P. Hayden, Sanford E. Balick, «Marine Insurance: Variety Combination and Coverages» (1991) 66 *Tul. L. Rev.* 311 at 319.

³²³ "Valuable Lessons in Insuring Costly Cargo" *Bus. Times* (2000) online: WESTLAW (Newsletters).

³²⁴ Henry Samuel, "Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.) and Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 *ILSA J. Int'l & Comp. L.* 153 at 155 and note 5.

³²⁵ Eun Sup Lee, «Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance» (1997) 4 *ILSA J. Int'l & Comp. L.* 153 at 161-162.

³²⁶ Henry Samuel, "Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.).

full coverage of shipper's goods³²⁷. Limits exist as to the duration and extent of the insurance coverage. Consequently, shippers are rarely fully compensated in case of damage³²⁸. Because of cargo insurance, shippers in multimodal transport can collect immediately from cargo underwriters even when the ship that caused the loss has no defense³²⁹. Cargo insurers will then bring a subrogated claim against the liability insurer³³⁰.

Carrier liability coverage differs from mode to mode and country to country but it is always limited to the extent of carrier 'legal liability'³³¹. Cargo insurance will respond for the rest³³². Liability insurance will always compensate a shipper in case carrier liability is clear³³³. In case of dispute or uncertainty, the resolution of financial responsibility for loss generally becomes a matter for negotiation and settlement between the insurance companies involved in the particular occurrence³³⁴.

Liability insurance is mandatory for U.S. and Canadian motor carriers in order to obtain their operating license³³⁵. Contracting liability insurance may be a

³²⁷ Defining the precise coverage afforded under a typical cargo policy is a three dimensional process. First, the policy perils clause will define the breadth of coverage in terms of fortuities insured. Second, the temporal aspect of coverage (for what duration of transit does coverage apply). Third, the financial extent of recovery may be determined not only by the policy's limit but also by its average terms as well. Raymond P. Hayden, Sanford E. Balick, «Marine Insurance: Variety Combination and Coverages» (1991) 66 Tul. L. Rev. 311 at 320-321.

³²⁸ «Europe's Cargo Insurance Lottery» *Am. Shipper* (1997) online: LEXIS (World, ALLWLD).

³²⁹ M.E. de Orchis, «Maritime Insurance and the Multimodal Muddle» (1982) 17 Eur. Transp. L. 691 at 704.

³³⁰ *Ibid.*

³³¹ «India: Mumbai Customs Notification Contrary to Trade Logic» *Bus. Line* (1999) (Hindu) online: WESTLAW (Newsletters). Lee R. Russ, *Couch on Insurance* 3d. ed (U.S.: Thomson Information Services, 1998) at note 8. 5.

³³² *Ibid.* See also William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 Tul. L. Rev. 569 at 574.

³³³ William Driscoll, Paul B. Larsen, «The Convention on International Multimodal Transport of Goods» (1982) 57 Tul. L. R. 193 at 198-199.

³³⁴ *Ibid.*

³³⁵ U.S. 1980 *Motor Carrier Act*, 49 U.S.C. 13906. The minimum insured liability amount for U.S. motor carriers equals 750.000\$USD even though, in practice, most carriers exceed this coverage by buying 1\$USD million liability insurance. Benjamin Armistead, «Working with Underwriters on Trucking Accounts» *Am. Ag. & Broker* (2000) online: WESTLAW (Newsletters). The reason for the additional insurance is that the minimum required insurance limits often constitute insufficient protection for carriers and expose them to catastrophic losses. U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 4) (last visited: April 28, 2001). For Canada see Sec. 9(1)(g) and 9(2) of the *Motor Vehicle Transport Act*. In Canada, motor carrier minimum liability insurance differs from province to province. On the insurance requirement in Québec see *Règlement sur les Exigences Applicables aux Documents d'Expédition et aux Contrats de Location et de Services* (2001) online : Québec Government Homepage

time-consuming, fastidious procedure involving filing of various documents and careful assessment of motor carrier history of losses upon which the amount of the premiums will be based³³⁶. Even if disparities between the U.S. and Canadian insurance systems still exist³³⁷, Canadian and U.S. truckers can freely cross each other's borders thanks to a mutually agreed upon insurance system³³⁸. This translates into the presentation of a 'yellow card' by both U.S. and Canadian truckers at the border, which guarantees free access to the neighboring countries territories³³⁹.

Canadian and U.S. railways must carry liability insurance in order to obtain a certificate of fitness to operate in their respective countries³⁴⁰. U.S. and Canadian railways are self-insured up to a certain amount beyond which (valuable goods) they contract liability insurance³⁴¹. Both U.S. and Canada have held that self-insurance

<http://www2.mtq.gouv.qc.ca/marchandises/camionnage/lourds/reglement_documents.pdf> (last visited: June 18, 2003) implementing the *Loi sur les Transports* L. R. Q. c. T - 12 a. 5 par. n and r.

³³⁶ See the enlightening article of Benjamin Armistead, "Working with Underwriters on Trucking Accounts" *Am. Agent & Broker* (2000) online: WESTLAW (Newsletters) on computerized data available or needed to determine carrier situation before contracting liability insurance.

³³⁷ I.e., while U.S. insurers are regulated by State governments, Canadian insurers are subject to both federal and provincial authorities. The Federal government regulates Mexican insurers. *Insurance Coverage Mires "Three Nation Truck Traffic: But Canada, U.S. and Mexico Seek Solutions"* *J. Com.* (1997) online: LEXIS (World, ALLWLD).

³³⁸ "Insurers Join Mexican Border Traffic Snarl" *J. Com.* (1999) online: LEXIS (World, ALLWLD).

To gain entry into the United States, a Canadian, as well as a Mexican motor carrier must file certificates of financial responsibility and have proof of liability insurance. To provide these, a Canadian insurer typically enters into an agreement with an American insurer under which the U.S. firm does the necessary filings for the Canadian company and provides proof of insurance. "Insurance Coverage Mires Three-Nation Truck Traffic; but Canada, U.S. and Mexico Seek Solutions" *J. Com.* (1997) online: LEXIS (World, ALLWLD). "NAFTA Officials, Insurers Drive to Resolve Truck Cover Disparity" *J. Com.* (1998) online: LEXIS (World, ALLWLD).

³³⁹ The 'yellow card' is a document that guarantees liability coverage on each side of the border. "NAFTA Officials, Insurers Drive to Resolve Truck Cover Disparity" *J. Com.* (1998) online: LEXIS (World, ALLWLD), Jennifer Rossi Auwarter, «A New Era of Motor Carrier Regulation: Open Borders and New Liabilities» *National Confectioners Logistics Council Summer Conference* (San Diego: National Confectioners Logistics Council, 2002).

³⁴⁰ Canada: Sec. 92 of the 1996 *Canada Transportation Act*. U.S.: Interstate Commerce Commission (ICC) requirement Thomas Gale Moore, *Clearing the Track* (1996) The Cato Review of Business & Government Homepage <<http://www.cato.org/pubs/regulation/reg18n2f.html>> (last visited: April 11, 2001).

³⁴¹ U.S.: Interview of the author with a Railway Economy Expert (April 7, 2001). On the contrary, motor carriers usually do not have the asset base to self-insure. *Ibid.* See also Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters). Canada: Interview of the author with a Railway expert at the Canadian Transportation Agency (April 9, 2001). According to the information advanced the amount of self-insurance greatly varies from mode to mode and company to company, depending on the amount the company wants to set aside and the risks it wants to cover-, and always needs to be approved by the Canadian Transportation Agency. We will further comment on self-insurance as follows. The CTA expert also notes that in the U.S., railway liability insurance policies can easily reach 300 million \$USD dollars whereas in Canada these policies approximate, on average, 100\$CAD million for passenger transport and 50 million \$CAD for cargo transport.

qualifies, in legal terms, as adequate insurance in the field of transportation³⁴². Thanks to mergers and agreements between U.S. and Canadian railways, cargo transported by rail goes through the border without any delays³⁴³.

Self-insurance is used by large carriers and shippers in order to respond to liability and cargo claims respectively and reduce the costs associated with contracting cargo or liability insurance³⁴⁴. Small companies will not easily self-insure because they do not have significant amounts of cash available³⁴⁵. Despite its name and the frequent use of the terms ‘insure(d)’ or ‘insurance’ with respect to it, - terms used mainly for convenience purposes-, self-insurance does not involve insuring carriers or anyone, for that matter³⁴⁶. It, actually, refers to internal funding of potential risks by a carrier or group of carriers whereby reserves are set aside to *indemnify* shippers in case of potential claims³⁴⁷. There is no contract between the

³⁴² U.S. U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. Department of Transportation Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 3) (last visited: April 28, 2001) on the conditions upon which carriers can self-insure (mainly proof of financial condition). Canada: interview of the author with a railway expert at the Canadian Transportation Agency (April 9, 2001).

³⁴³ Interview of the author with an Expert on Shipments of Dangerous Goods at Transport Canada (April 9, 2001). On the increase of rail way crossings see “In Good Shape” *Trib. Bus. News* (2000) online: WESTLAW (Newsletters). For motor and rail transport, this always presupposes that there is no problem with customs at the border. Customs seem not to care about carrier liability insurance documentation but, rather, about whether the goods described in the BOL are conform with the Manifest of Shipment and whether the Carrier is recognized (known). Interview of the author with the customs personnel in Montréal for the transport of goods between the U.S. and Canada (April 9, 2001).

³⁴⁴ Shippers can self-insure freely whereas carrier liability insurance and, therefore, self-insurance, if they choose to self-insure for liability, is mandatory. Self-insurance is not specific to the field of transportation. Giant corporations have traditionally used self-insurance or self-insurance pools to avoid the existing marketplace. *Truckers Struggle as Insurance Costs Near Crisis Level* (2000) online: Truckings Electronic Newspaper Homepage <www.ttnews.com> (last modified: May 31, 2000). For the reasons why businesses have recourse to self-insurance see “Hard Market may Set Off Captive Explosion” *The National* (2001) online: WESTLAW (Newsletters).

³⁴⁵ Even though there is no link between self-insurance and prosperity, one could argue that self-insurance is a sign of prosperity in the sense that a considerable amount of money is needed to pay claims. Interview of a self-insurance expert at Indiana University (April 5, 2001). However, ideas that promote self-insurance of middle-size businesses exist. “Beef Up Image” *J. Com.* (1986) online: WESTLAW (Newsletters). *Insurance Carriers Seek Liability* (2002) Superior Bulk Logistics Homepage online: superiorbulklogistics.com/DrivingForce/2002/June/page2.html (last visited: June 18, 2003).

³⁴⁶ *Self Insurance* (2003) online: Indiana University-Office of Risk Management Homepage <http://www.Indiana.edu/~riskmgmt/SelfInsurance.htm> (last visited June 26, 2003). The majority of U.S. courts have held that self-insurance is not insurance at all. Lawrence I. Brandes, “Several Special Problems of Self-Insurance” (1987) 439 PLI/Comm 345 (WESTLAW-Tp-all).

³⁴⁷ *Ibid.* See also Lawrence Brandes, “Techniques of Self-Insurance 1987” (1987) 439 PLI/Comm 345 (WESTLAW-Tp-All) and U.S. D.O.T., *Cargo Liability Study* (August 1998) online: U.S. D.O.T. Homepage <ostpxweb.dot.gov/policy/carmack/cgolia.pdf> at (Chapter 3) (last visited: April 28, 2001).

carrier or shipper and the insurance company but, rather, a policy to set aside funds owned by them, that remain their property, without need to have recourse to outsiders³⁴⁸. The amount to be set aside will mainly depend on the history and anticipation of claims³⁴⁹.

Self-insurance presents the great advantage of cost-effective management of risks³⁵⁰: first, it avoids administrative overheads and underwriting profits that insurance companies habitually carry. Second, it permits direct access to re-insurance markets and lucrative returns from the investment of ‘premiums’ that, otherwise, an insurance company would have retained. Finally, it leaves carriers free to manuscript their own policy to cover their potential liability. One could also validly argue that since the carrier in question sets aside its own money to indemnify shippers, it has more interest in that there will be no damage to its cargo than if it had contracted liability insurance with a third-party³⁵¹.

Ship owner liability insurance is mandatory in Canada and the U.S. only in case of pollution³⁵². However, the great risks associated with ocean carriage have rendered ocean carrier liability insurance necessary for all types of damage³⁵³. Protection and Indemnity Clubs (P&I Clubs)³⁵⁴ cover the majority of ocean carriers worldwide (ship owner or charterer) to the extent of their ‘legal liability’, in return

³⁴⁸ Interview of the author with a self-insurance expert at Indiana University (April 5, 2001).

³⁴⁹ *Self-Insurance Can Cut Health Care Costs-If you can Handle the Risk* (1999) online: Business Week Homepage <<http://www.businessweek.com/smallbiz/news/date/9909/f990903c.htm?scriptFrame>> (last visited: April 4, 2001). Other factors, such as the domestic or international nature of the transportation or the nature of goods habitually transported, will also determine the amount to be set aside and will condition governmental (national agencies) approval of the carrier self-insurance plan (when insurance is a mandatory requirement for carriers).

³⁵⁰ Sam Friedman, “Hard Market May Set Off Captive Explosion” *The National* (2001) online: WESTLAW (Newsletters). In certain cases, self-insurance may also offer tax advantages. *Captive Insurance Defined* (1998) online: Insurance Bermuda Homepage online: <<http://www.Bermuda-insurance.org/bim/home.nsf/pages/Define.htm>> (last visited: Feb. 4, 2001).

³⁵¹ *Ibid* and “Iowa Train Derailment” *Gannett News Service* (2001) online: WESTLAW (Newsletters).

³⁵² Canada: Sec. 684(1) of the 1996 *Canada Shipping Act*. U.S.: Sec. 33 USC 2716 of the *Oil Pollution Act*.

³⁵³ F.N. Hopkins, *Business and Law* (Glasgow: Brown, Son & Ferguson Ltd. 1989) at 640.

³⁵⁴ P&I Club insurance is widespread among ship owners. Approximately nine out of ten ocean-going ships are currently entered in a P&I Club. This type of insurance covers third party liabilities and expenses arising from owning ships or operating ships as principals. The major P&I Clubs belong to the International Group of P&I Clubs which exists to arrange collective insurance and reinsurance for them. *About the UK P & I Club* (1999) online: UK P & I Club Homepage <<http://www.ukpandi.com/>> (last visited: March 25, 2001).

for premiums paid by the carrier and which are usually based on a member's 'loss ratio', i.e. his statistical results reflecting loss experience over a given number of years³⁵⁵. Insured's 'loss ratio' is, therefore, a factor both cargo and liability insurers take into account in determining the amount of premiums³⁵⁶.

In effect, cargo and liability insurers divide potential purchasers (shippers and carriers respectively) into groups, classifying them according to their probability of loss (expected losses) and the magnitude of losses they may occur³⁵⁷. Insureds with similar expected losses are placed in the same risk class so that each may be charged the same rate (premium)³⁵⁸. Expected losses are a prediction of insured's actual losses³⁵⁹. However, actual losses vary from expected losses because calculations of the latter normally do not, and cannot be based on all relevant variables and because expected losses are only the predictable component of any individual's or enterprise's actual loss³⁶⁰. Random losses -losses occurring by chance- are taken into account by insurance companies but are only imperfectly predicted³⁶¹. All insureds share the risk of random losses but pay premiums on an individual basis for

³⁵⁵ M. E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 704. In case of ship owners or other carriers starting a multimodal service and assuming liability door-to-door, P & I underwriters have difficulty in calculating insurance premiums since there is no loss experience to cite. One underwriter who was asked how the rate for multimodal transport was determined said: "I look out the window". *Ibid* at 707.

³⁵⁶ See *supra* at 70 for cargo insurance.

³⁵⁷ Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 67. John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center) 1 at 5 for cargo insurance. See also W. Kip Viscusi, "The Economics of Insurance Law" (1988) Northwestern Univ. L. Rev. 871 at 872-873. State laws limit distinctions insurance companies may draw in categorizing policyholders (i.e. distinctions based on race). It is generally argued that classification of insurance policyholders on immutable characteristics such as age, race and sex are particularly controversial and do not promote risk-averse behavior. *Ibid*.

³⁵⁸ Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 68. For further details on how insurers determine the premium rates see Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 177-178 and 180-181. The more narrowly insurers can define risk pools, the more efficient the insurance is. To earn higher profits, insurers have an incentive to classify insureds according to their expected accident costs and to adjust premiums accordingly. By doing so, the insurer can offer low-damage insureds lower premiums, while charging high-damage insureds higher premiums. Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University, 1998) at 198.

³⁵⁹ Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 69.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid*.

expected losses³⁶². In this way, the carrier and shipper are really protected against unusually large losses such as those arising out of a sinking or other serious marine casualty³⁶³.

Risk spreading of independent risks on a pool of insured persons is the principal characteristic of cargo and liability insurance as of insurance in general³⁶⁴. In this manner, insurance substitutes a reduced and certain cost for an important but uncertain one³⁶⁵. It is generally conceded today that such loss spreading by insurance is socially beneficial and does not undermine any remaining deterrence or penal aspects of liability law³⁶⁶. The premium of insurance enters into the final cost of the goods at the point of delivery³⁶⁷.

In multimodal transport, liability insurance follows the principles of the fragmented carrier liability regime. If a freight forwarder is used by the shipper, freight forwarders mandatory liability insurance does not always provide adequate coverage in case of damage³⁶⁸. If it is an ocean carrier who provides the intermodal journey, P&I Clubs generally cover door-to-door shipments up to the limits provided in the Hague and the Visby Rules or certain other standard terms under

³⁶² *Ibid* at 77.

³⁶³ *Ibid* at 74.

³⁶⁴ Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 174 and 179.

³⁶⁵ *Ibid*.

³⁶⁶ James M. Fischer, "The Presence of Insurance and the Legal Allocation of Risk" (1996) 5 Conn. Ins. L. J. 1 at 6.

³⁶⁷ John Isaacs, "Cargo Insurance in Relation to Through Transport" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 1.

³⁶⁸ Ian Putzger, *Forwarders Urged to Provide Enough Cover* (1997) online: CAN Homepage <<http://web3.asia1.com.sg/timesnet/data/cna/docs/cna2394.html>> (last visited: 04/06/01). In Canada i.e. only recently did the Canadian International Freight Forwarder Association (CIFFA) raise member requirement to carry liability insurance from 100.000\$CAD to 250.000\$CAD. *Qualifications* (2003) online: CIFFA Homepage <www.ciffa.com/become_qualifications.asp> (last visited: June 20, 2003). The same obligation to provide for liability insurance up to the amount of 750.000\$USD exists in the U.S. (same as mandatory requirement for motor carriers). James Giermanski, David Neipert, Jeffrey Kinsler, «The Re-regulation of Freight Forwarders in the U.S.A. and its Impact on the U.S.A.-Mexico Border» (2000) 9-WTR Currents: Int'l Trade L. J. 11 (LEXIS-Newsletters) (no pages). The insurance requirement is stated in U.S.C. Title 49, Subtitle 4, Part B, Chapter 139, Sec. 13906 as reported by *U.S. Code Collection* (2003) online: Cornell University-Legal Information Institute Homepage <<http://www4.law.cornell.edu/uscode/49/13906.html>> (last visited: Feb. 8, 2003).

international conventions or national laws³⁶⁹. In case the ship owner wishes to contract more onerous terms or stricter liability he must seek cover for the excess elsewhere³⁷⁰. Because shippers do not frequently know who is to blame (concealed damage) or the amount of compensation in case of loss or damage occurring during the multimodal journey, they are better off buying cargo insurance for their goods to compensate for the inadequacy of carrier liability insurance³⁷¹.

The need for cargo insurance in multimodal transport becomes imperative following transport deregulation because of the intensification of competition among carriers and between carriers and transport intermediaries over providing liability insurance for the whole multimodal journey³⁷². In effect, under the heat of competition for cheaper freight charges and absent governmental control, some U.S. motor carriers 'neglect' safety standards and liability coverage³⁷³. To be certain against the eventuality of loss, shippers are strongly recommended to contract cargo insurance for their goods.

B. Do Insurance Companies Render Obsolete Uniformity Initiatives of Multimodal Carrier Liability? Authors argue that because of the presence of insurance companies, parties in multimodal transport have moved well beyond the need for a mandatory international convention³⁷⁴. The fact that carrier liability is not only doubly but also triply insured by the forwarder, the agent and the carrier is a bonanza for the insurance industry and a quite securing fact for shippers (dual, triple

³⁶⁹ Liability coverage for door-to-door shipments is a policy P&I Clubs have adopted since 1973. A.M. Stirling, "Insurance for Through Transport Operators" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 3.

³⁷⁰ *Ibid.*

³⁷¹ "New Cargo Pact with CAN Maritime Spices through Transport" *Ll. List. Int'l.* (2000) online: LEXIS (Transp. News) and Henry Samuel, "The Right Insurance Policy Vital to Protect your Exported Goods" *J. Com.* (1994) online: LEXIS (J. Com.).

³⁷² Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters).

³⁷³ *Ibid.* The author asserts that, in California, 25% of liability insurance companies for truckers are fraudulent. Other carriers buy out-of-shore liability insurance that is cheaper and hard to punish. *Ibid.* While competition is fierce and profits are slim or non-existent, concerns intensify that spending on safety will be the first item reduced. U.S., U.S. DOT-Federal Highway Administration, *Key Freight Transportation Challenges-Safety* (2003) online: Department of Transportation Homepage <ops.fhwa.dot.gov/freight/publications/freight%20story/safety.htm> (last modified: Feb. 13, 2003).

³⁷⁴ William J. Coffey, «Multimodalism and the American Carrier» (1989) 64 *Tul. L. Rev.* 569 at 578.

or overlapping insurance)³⁷⁵. Moreover, with carrier and shipper consolidation, carriers and shippers can benefit from advantageous insurance terms and premiums following deregulation³⁷⁶.

However, double or triple insurance to cover the same risk (overlapping insurance) increases transportation costs. Further, purchase of additional cargo insurance by shippers -if they have been wise enough to take out cargo insurance- or use of a lawyer to overcome the complexities of multimodal carrier liability regime, may cost enough to make the shipment uneconomical³⁷⁷. Shippers, particularly small shippers, may be overwhelmed by the additional cost³⁷⁸. It was probably for this reason that the then Chief of UNCTAD Trade Facilitation Section, Mr. Hans Carl, affirmed that shippers, particularly the smaller ones who lack the necessary sophistication to protect themselves, require introduction of a single and uniform multimodal transport liability regime which will eliminate these variances³⁷⁹.

The present system is not only burdensome on shippers but also on carriers and cargo/liability insurers. Because cargo insurance does not cover all risks³⁸⁰, or in case of suspicion of carrier negligence, shippers, or rather, their insurers have to deal with the multiplicity of legal regimes governing multimodal transport in settling or

³⁷⁵ Richards Butler, "Trade Law Uniformity Remains out of Reach" *Ll. List. Int'l* (1999) online: WESTLAW (Newsletters). It is often the case that there is an overlap in the insurance coverage of goods in intermodal transport: four different persons may insure the same risk to the goods for a specific stage of a multimodal journey. Margo D. Beller, "Deregulation Hightens Competition" *J. Com.* (1993) online: WESTLAW (Newsletters).

³⁷⁶ I.e., small shippers within a shippers association can take advantage of value-added services such as cargo insurance and inland transport provisions. "Save on Freight, Gain on Services with a Shippers Association" *Mang. Exp.* (2002) online: WESTLAW (Newsletters).

³⁷⁷ Kurosh Nasser, «The Multimodal Convention» (1998) 19 *J. Mar. L. & Com.* 231 at 234. "U.S., EU Seek Harmony in Transport Rules" *J. Com.* (1998) online: LEXIS (World, ALLWLD).

³⁷⁸ *Ibid.* From an insurance point of view, therefore, small shippers are disfavored by the current regime. See also *infra* at 159 (deregulation).

³⁷⁹ Interview of the author with Hans Carl, President, at the time, of the International Multimodal Transport Association (IMMTA) Trade Facilitation Section (March 26, 2001) e-mail: hans.carl@infonie.fr. See also "Liability Limbo" *J. Com.* (2000) online: WESTLAW (Newsletters) and Sandra Speares, "Law: Plea for Implementation of Global Legislation on Multimodal Transport: Marine Insurance" *Ll. List. Int'l* (1999) online: WESTLAW (Newsletters).

³⁸⁰ What is certain is that risks which arise from international transportation are not at the present time covered clearly or completely. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 9. *Supra* at 70-71.

litigating their claims³⁸¹. Even though litigation on insurance coverage and settlement of transport claims is generally settled, insurance companies can get entangled in very expensive disputes before the courts³⁸². Courts are, therefore, left to resolve the legal complexities of multimodal transport and carrier liability insurance regimes³⁸³. To cover for the uncertainty of recovery, cargo and liability insurers raise insurance premiums³⁸⁴.

Moreover, it is recommended to insurers to reinsure their risks with a super-insurer like Lloyd's (reinsurance) whose risks are more diversified than theirs, or to form a consortium with other insurers so as to form a more diversified pool of risks³⁸⁵. Since cargo and liability insurers use one or several other insurers very often, they are burdened with additional costs, which add to the complexity of the applicable rules³⁸⁶. This is claimed to be definitely better than have gaps in the insurance coverage provided³⁸⁷. However, the unnecessary costs associated with the present system inevitably burden insurers and carriers, obstruct trade and are finally borne by consumers who purchase transported goods³⁸⁸.

³⁸¹ It should be noted, however, that the situation may not be qualified as tragic since carrier liability insurance is handled by legal experts who will, generally, not face extraordinary difficulties in dealing with claims and identifying the applicable legal regime. It is still, however, a rather complicated affair to deal with cargo and liability insurance claims in multimodal transport. "Chequered History of a Legal System Bedeviled by Political Confrontation" (2000) Ll. List. Int'l. Sp. Rep. 19 (WESTLAW-Newsletters). According to Pr. Ramberg, an overriding common carrier regime could solve this problem. Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: UNIDROIT Homepage <http://www.unidroit.org/english/publications/review/articles/1998-1.html> (last visited: March 19, 2001).

³⁸² Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45. "Europe's Cargo Insurance Lottery" *Am. Ship.* (1997) online: LEXIS (World, ALLWLD). See also Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: <http://www.unidroit.org/english/publications/review/articles/1998-1.htm> (last visited: March 19, 2001). See also "Liability Limbo" *J. Com.* (2000) online: WESTLAW (Newsletters).

³⁸³ Jan Ramberg, *Unification of the Law of International Freight Forwarding* (1998) online: <http://www.unidroit.org/english/publications/review/articles/1998-1.htm> (last visited : March 19, 2001).

³⁸⁴ "Liability Limbo" *J. Com.* (2000) online : WESTLAW (Newsletters). Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45.

³⁸⁵ Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 179.

³⁸⁶ "Europe's Cargo Insurance Lottery" *Am. Ship.* (1997) online: LEXIS (World, ALLWLD).

³⁸⁷ *Ibid.*

³⁸⁸ Michael F. Sturley, "Restating the Law of Marine Insurance: a Workable Solution to the Wilburn Boat Problem" (1998) J. Mar. L. & Com. 41 at 45.

Consequently, even if the status quo is said to benefit insurance companies, the granted advantage is not absolute³⁸⁹. The currently applicable insurance system burdens multimodal transport with unnecessary costs that uniformity of carrier liability regimes would, in all likelihood, avoid. Thus, the argument of efficiency in the rules of international trade and protection of small businesses, the *raison d'être* of the *Multimodal Convention*, persists, today, and is world wide in its reach³⁹⁰.

Chester Hooper reinforces this view by suggesting that all multimodal carriage should be governed by one set of laws³⁹¹. The author argues that the uniformity and predictability that would flow from such a system “would encourage quicker settlements and more efficient insurance placement”³⁹². In more economic terms, uniform intermodal carrier liability and proper allocation of risks between carriers and shippers, the latter to be examined as follows, reduce the risk born by the insureds and permit use of assets otherwise reserved to offset potential losses³⁹³. Hence, proper allocation of risks between carriers and shippers within a uniform setting of multimodal carrier liability rules will produce the optimal effect on a legal -because of the simplicity of applicable rules- and economic -because of cost-effectiveness (efficiency)- basis.

Constant pressure put on legislators and international organizations to adopt a uniform liability regime to apply to intermodal carriers and numerous efforts undertaken towards this direction, make present insurance mechanisms a ‘provisional remedy’ in securing the success of multimodalism. However, the security of the present reality and the uncertainty as to the effects of proposed changes sanction the saying: ‘there is nothing more permanent than a provisional

³⁸⁹ Kurosh Nasser, «The Multimodal Convention» (1998) 19 J. Mar. L. & Com. 231 at 233.

³⁹⁰ “U.S., EU Seek Harmony in Transport Rules” *J. Com.* (1998) online: LEXIS (World, ALLWLD). See also “Liability Limbo” *J. Com.* (2000) online : WESTLAW (Newsletters).

³⁹¹ Chester D. Hooper, «Legal Relationships: Terminal Owners, Operators and Users» (1989) 64 Tul. L. Rev. 595 at 595.

³⁹² *Ibid.*

³⁹³ Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University, 1998) at 196.

measure'. A permanent remedy is needed, nonetheless, to put an end to the legal complexities of the sector.

C. Interplay of Regulatory Policies on Carrier Liability and Insurance Premiums: Having addressed the question of whether uniformity initiatives merit consideration despite the presence of insurance companies, we now turn our attention to the effects of regulatory carrier liability policies on insurance premiums³⁹⁴. Addressing this issue will give us more insight on the effects of different regulatory policies on insurance companies, their expected reaction to such policies and the right approach to adopt in formulating suggestions on multimodal carrier liability.

One may reasonably ask why insurers, carriers and shippers should argue about whom will an eventual reform favor since, whatever the change may be, the cost of insurance will be passed on from carriers to shippers or vice-versa and will be spread among policyholders³⁹⁵. Through such a system of allocation of risks the overall cost of insurance remains same whatever the change in the liability pattern may be.

In effect, if multimodal carrier liability was to increase, liability insurance premiums would naturally increase and cargo insurance premiums would decrease as cargo insurer would experience a higher level of recovery from the carrier³⁹⁶. Carriers would, then, seek to offset such additional expense by a raise of freight

³⁹⁴ Authors have raised the question of division of risks between carriers and shippers with respect to the multimodal carriage but also that of complete coverage of cargo owners risks. C. W. G. Wilson, "Through Transport: The Role of the Freight Forwarder" *Through Transport Seminar* (London: London Press Center, 1978) 1 at 9.

³⁹⁵ Opinion of maritime lawyer as reported by Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 *Transp. L. J.* 471 at note 225. On the spreading of risk among policyholders see Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 *Univ. of Chicago L. Rev.* 1337 at 1355-1356.

³⁹⁶ Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 *Transp. L. J.* 471 at note 225 and David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Transp. L. J.* 73 at 102.

charges³⁹⁷. This would lead, in turn, to a raise of cargo insurance premiums since carrier liability is an element that composes cargo insurance premiums. Such a raise would, ultimately, burden the consumer since transport costs are integrated in the price of the good³⁹⁸. Inversely, (de)regulatory decrease of carrier liability would inevitably lead to an increase in use of cargo insurance and, therefore, of cargo insurance premiums. More cargo policies would, then, be sold because of the low liability limits and courts would probably not have to deal with interminable litigation since claims not clearly attributed to the carrier would not be worth pursuing³⁹⁹. Overall, whatever the shift in the carrier liability, liability and cargo insurance premiums will balance out one another.

Insurance mechanisms, however, do not always reflect the mathematical accuracy of the above-described allocation of risks mechanism because of the characteristics of cargo and liability insurers. In effect, liability insurers, mainly P&I clubs, are said to operate more cost-effectively, therefore, more easily absorbing losses than cargo insurers⁴⁰⁰. So, in case of increase of carrier liability from current levels, liability insurers, especially maritime insurers, may fear that the entire cost of insurance may not be passed on to shippers⁴⁰¹. At the same time, many shippers, especially large shippers who insure under favorable cargo insurance terms, may

³⁹⁷ M.E. de Orchis, "Maritime Insurance and the Multimodal Muddle" (1982) 17 Eur. Transp. L. 691 at 706. Carrier insurance premiums are part of the freight structure. Brien D. Ward, "Admiralty: Failure to Deliver Cargo Does Not Constitute Unreasonable Deviation Under COGSA" (1986) 60 Tul. L. Rev. 849 at note 10.

³⁹⁸ See Robert Force, "A Comparison of the *Hague*, *Hague-Visby* and *Hamburg Rules*: Much Ado about it?" 70 Tul. L. Rev. 2051 at 2087 for this argument with respect to the *Hamburg Rules*. See also *supra* at 70 for carrier liability being an element of cargo insurance premiums.

³⁹⁹ Interview of the author with CIFFA personnel (April 10, 2001). Transportation costs include: freight, additional services (charge/discharge, declaration of value, weighing, cleaning and disinfecting the vehicle), expenses related to the contract of transport such as crew, repairs, provisions, bunkers, insurance premiums and taxes. Change of the itinerary, immobilization of the vehicle for reasons non-imputed on the carrier lead to a readjustment of the transport price. Marie Tilche, "Prix de Transport: Délais et Incidents" (1999) 2814 Bull. Transp. L. 622 at 626.

⁴⁰⁰ Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) J. Int'l & Comp. L. 153 at note 2 and Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395. The authors admit, however, that in the absence of sufficient empirical data, this conclusion cannot be confirmed with certainty. *Ibid.*

⁴⁰¹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395. See also David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 102 where the author notes that in case of carrier liability increase, increased freight rates may or may not offset reduced cargo insurance rates.

fear that the consolidation of risk onto carriers may provide latter with an excuse to inflate rates⁴⁰².

On the other hand, limiting carrier liability (i.e. deregulation) will not necessarily result in a corresponding increase of cargo insurance premiums in the short or the long run. In effect, defining cargo insurance premiums is not an exact science and its cost is far from being low. Cargo insurers do not have reliable statistics available so that premiums are set according to the account (whether it is a large or small policy, whether the insured is a new client etc.) as well as intuition⁴⁰³. What's more, carrier and cargo insurance are typically underwritten at different places and may respond to market pressures differently⁴⁰⁴. Consequently, whatever the change in the liability pattern may be, it is not certain that allocation of risks mechanisms will work at the benefit of liability or cargo insurers.

Yes, but one could argue that individual insurers and, thus, carriers and shippers are not interested in the above described overall picture of risk allocation in order to adopt a proposed change in the liability pattern but, rather, in how such a change will affect their individual situation. Even on this level, however, there is no uniform answer. Each insurer may react differently to a shift in the carrier liability. In effect, there are authors who argue that even though it is probable that, for instance, P&I clubs will raise their premiums and cargo insurers will lower them as a result of an increase in ocean carrier liability, it is uncertain whether the former will raise their freight rates consequently⁴⁰⁵. Freight raise depends on the competitive situation of each carrier⁴⁰⁶. It may be that there are many cases where

⁴⁰² Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 394-395.

⁴⁰³ *Ibid* at 394. *Supra* at 70 on the 'objective' factors influencing insurance premiums.

⁴⁰⁴ Unlike P&I coverage, cargo insurance is normally underwritten at the place of the origin of the goods and, therefore, most of the time there are two different markets involved. James H. Holenstein, "The Allocation of the Burden of Proof in Marine Fire Damage Cases" (1983) 50 U. of Chicago L. Rev. 1146 at 1168 and note 138.

⁴⁰⁵ Robert Hellawell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 366.

⁴⁰⁶ *Ibid* at 363.

carriers will not raise their rates to recapture their entire increase of insurer premiums⁴⁰⁷. Thus, one cannot generalize on this issue.

Overall, shifting liabilities will not necessarily shift costs correspondingly between carriers and shippers. Above-mentioned highly subjective elements vitiate supposedly absolute repercussion of carrier liability mechanisms and obstruct predictability of effects of a uniform multimodal carrier liability regime on insurance premiums.

It is normal, therefore, that insurers oppose change of the current liability pattern as was the case of the 1980 *Multimodal Convention*, especially when the *status quo* is workable and profitable⁴⁰⁸. Uncertainty of the consequences of such changes on the insurance companies at the individual as well as at the industry level coupled with the accommodating present reality, with(e)old consideration of such initiatives⁴⁰⁹.

⁴⁰⁷ *Ibid* at 366-367.

⁴⁰⁸ Authors further state that these and other efforts to restructure distribution of risks between cargo and liability insurance have not gained momentum presumably because the insurance market is not yet prepared for such restructuring as these initiatives seem to suggest. Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) L. M. C. L. Q. 178 at 186.

⁴⁰⁹ Insurers are also skeptical about changing their business practices following a reform. Hugh M. Kindred, Ted L. McDorman, Mary R. Brooks, Norman G. Letalik, William Tetley, Edgar Gold, *The Future of Canadian Carriage of Goods by Water Law* (Halifax: Dalhousie University 1982) at 302.

Section II: The European Union (EU) Multimodal Carrier Liability Pattern

The European Union (EU)⁴¹⁰ constitutes, today, the largest single market in the world⁴¹¹. With the current increase of trading activities, transport services in Europe are predicted to increase by 2.3% and 1.6% for the periods 2000-2005 and 2005-2010 respectively⁴¹².

European geography demands multimodal transport⁴¹³. In effect, a glance at the map of Europe shows that some countries are islands, like England, Ireland and Malta. Some countries, like Scandinavia, are divided by straits from the rest of the continent or have river boundaries⁴¹⁴. Very often, therefore, road carriers have to use other modes of transport such as ferries to cross bodies of water or railways in case i.e. of railway tunnels⁴¹⁵. Time saving,⁴¹⁶ and beneficial environmental effects⁴¹⁷ are

⁴¹⁰ The E. U. -previously known as the European Economic Community (E. C. C.) (*infra* note 422)- is an institutional framework for the construction of a united Europe. It comprises three separate communities: the European Coal and Steel Community (established in 1951); the European Atomic Energy Community (EUR. ATOM) and the European Economic Community (E. E. C.), both established in 1957 by the Treaty of Rome. The objective was to unite the nations of Europe economically after the World War II so that another war among them would be unthinkable. Fifteen European countries are currently members of the E. U.: United Kingdom, France, Greece, Germany, Austria, Netherlands, Belgium, Luxemburg, Italy, Spain, Ireland, Sweden, Finland, Portugal, Denmark. *EU in Brief* (2002) online: E. U. Homepage <<http://www.eurunion.org/profile/EnlargementMap.jpg>> (last modified: continuously). The European Union is now preparing its largest enlargement from 15 to 25 countries, the 10 additional countries are set to join on May 1st, 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia. *Enlargement* (2003) online: Europa Homepage <www.europa.eu.int/comm/enlargement/enlargement.htm> (last modified: continuously).

⁴¹¹ Alex Orr, "It's Time to Fly the Flag for Europe" *Evening News-Scotland* (2002) online: WESTLAW (News).

⁴¹² Alfred Erdlinger, *The Choice of Transport System in Today's Liberalized Road/Rail Environment* (1999) online: UIRR Homepage (Issues) <<http://www.uirr.com/english/english.htm>> (last visited: May 7, 1999).

⁴¹³ Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 Tul. L. Rev. 611 at 611. U.S., Department of Transportation, *Towards Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U.S. DOT Homepage <http://www.ops.fhwa.dot.gov/freight/institut/inter/eu_us2.pdf> (last visited: July 11, 2001) indicates that due to European geography it is easier to efficiently combine different modes in the U.S. rather than in Europe where distances are shorter.

⁴¹⁴ With the programmed enlargement of the EU to 10 new Central and Eastern European countries (*supra* note 410) multimodal transport will greatly increase as six out of the ten multimodal transport corridors service the region. John E. Thompson, Eddy DeClerq, Katsuhide Nagayama, "International Intermodality Aspects of the Bosnia and Herzegovina Transport Master Plan" *ITE J.* 2430 (2002) online: WESTLAW (All-News).

⁴¹⁵ Rolf Herber, "The European Legal Experience with Mulitmodalism" (1989-1990) 64 Tul. L. Rev. 611 at 615.

⁴¹⁶ M. Burkhardt, *Combined Perspectives for Road and Rail* (1999) online: U. I. R. R. Homepage <<http://www.uirr.com/english/english.htm>> (last visited: May 9, 2001).

the main factors that contribute to the increase of combined transport at the European level.

Because of Europe's geographical features, the legal problems that inherently arise from the use of intermodalism were discovered earlier in the 'old continent' than elsewhere⁴¹⁸. One would think, therefore, that European multimodal transport law could provide a sample guide for development of multimodal transportation law elsewhere⁴¹⁹. This is not, however, the case, Europe today is in search of multimodal carrier legislation.

In this part of our study, we will comment on the Common European Transportation Policy focus on liberalization of transport services **Par. 1** before concentrating on multimodal carrier liability in Europe **Par. 2**.

Par. 1. The Focus of the Common European Transportation Policy on Liberalization of Transport Services: While much of the international traffic today remains regulated by bilateral or multilateral agreements, the EU constitutes an exception by providing a single, liberalized motor transport sector and partially liberalized air and maritime transport industries⁴²⁰. European transportation regulation mainly concentrates on liberalization of transport services and its corollaries, competition and anti-trust laws, are formulated and apply, for the most part, separately to air, maritime, rail and inland waterways rather than intermodally⁴²¹.

⁴¹⁷ Combined transport is environmental friendly entailing a 90% decrease in atmospheric emissions, a 95% decrease in casualties from accidents and a substantial contribution to noise reduction compared with road transport. At the time of the political crisis and war in the former Yugoslavia it was stated that countries on the periphery of Europe understood that they could not afford to build their transport systems on only one or two modes, especially on road transport. In other words, political instability contributed to the development of the multimodal transport in Europe. *Ibid.*

⁴¹⁸ Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 Tul. L. Rev. 611 at 611.

⁴¹⁹ *Ibid* at 611.

⁴²⁰ Arbault Marie Laurence, *Transport Multimodal en Droit Communautaire* (D. Jur. Thesis, Lille III, 1996) [unpublished : archived at Lille III ISSN: 0294-176796/PA01/0311 Fiche 3851.24931198] at 162.

⁴²¹ *Ibid* at 247-249. Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 Tul. L. Rev. 611 at 611. *Politique de Transport: L'Europe en Retard* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-300.html>> (last visited: Dec.12, 2001).

One of the four freedoms provided by the *Treaty of Rome* (EC Treaty)⁴²² and constituting the pillars of the EU, is that nationals of each Member-State are legally entitled to provide (transport) services in other Member States in the same conditions as nationals of these States do⁴²³. Consequently, transportation services at the EU level must obey the general provisions of the *Treaty of Rome*, i.e. competition (articles 81 to 86) and state aid provisions (articles 87 to 89)⁴²⁴. Title V (art. 70-80) of the same Treaty, sets out the general objectives of a *Common European Transportation Policy* and invites the European Council to define this policy so as to ensure competition in the common market⁴²⁵. It took European

⁴²² *Treaty for the Establishment of the European Economic Community*, Mar. 25, 1957 298 U.N.T.S. 11 [hereinafter E. E. C. Treaty] amended by the *Treaty Establishing the European Community*, Feb. 7, 1992, O. J. (C 224) 1. The 1957 *Treaty of Rome* -signed by France, Germany, Italy, Belgium, the Netherlands and Luxembourg- established the European Economic Community (E.E.C.). It constitutes one of the foundation stones of the E. U.. The Treaty has been amended numerous times and its 1992 amendment through the Maastricht Treaty transformed the E. E. C. to the E. U.. We will herein comment on the consolidated text of the 1957 *E. C. Treaty* as established through its last amendment taking place in 2001 with the *Treaty of Nice* that advanced EU integration. As a result, reference herein made to the EC Treaty or Treaty of Rome directs to the Consolidated Version of the Treaty Establishing the European Community. Consolidated *EC Treaty* articles referred to herein have not really changed in content through *E. C. Treaty's* various amendments. For the consolidated text of the 1957 *Treaty of Rome* under its last amendment see *Consolidated Version of the Treaty on the European Union and of the Treaty Establishing the European Community* (26 Feb. 2001), online: EU Homepage <<http://europa.eu.int/eur-lex/en/treaties>> (last modified: continuously) [hereinafter EC Treaty or Treaty of Rome]. The consolidated text entered into force on Feb. 1, 2003 and can also be found in the Official Journal of the EU OJ C325, 24 Dec. 2002.

⁴²³ Mario Riccomagno, "The Liberalization in Access to Maritime Transport Markets in the European Union" (1997) 32 *Eur. Transp. L.* 537 at 538. The four freedoms are: the freedom of movement of persons, of goods, of capital and of services.

⁴²⁴ Alain Alexis, "Transports Ferroviaires et Concurrence: Les Principaux Apports de la Directive No. 91/440" (1993) 28 *Eur. Transp. L.* 499 at 499. State aid provisions are intended to promote competition as regulated by said articles. Articles 87s concern state aids applicable to maritime and air transport. Land transport aids are concerned with article 77. Francis Lefebvre, *Mémento Pratique: Communauté Européenne 1998-1999* (Montréal: Éditions Francis Lefebvre, 1997). The articles refer to the consolidated version of the Treaty of Rome.

⁴²⁵ Article 3 (f)(g) of the *Treaty of Rome* provides that: "...[t]he activities of the Community shall include...(f) the adoption of a common policy in the field of transport; (and) (g) the institution of a system ensuring that competition in the common market is not distorted".

A common European policy is a policy defined by European institutions [European Council with the support (co-decision) of the European Parliament]. Regulations, Directives and Decisions, the classical vehicles of European Council decision making are used in this respect. These acts are directly applicable at the national level and take priority over national law. More than proposing inter-state rules, these acts define a structured supra-national set of rules that supercede national laws. Jean-Louis Bergel, "Méthodes de Coordination des Textes et Droit des Transports" (1995) 30 *Eur. Transp. L.* 13 at 17-18. For regulations and Directives see *supra* note 90, 91 and accompanying text.

A common European policy exists in the fields of transport, agriculture and commerce. The founders of the European Community realized that economic development would give way to an increase in transportation services throughout Europe that would present a potential obstacle to the liberalization of commerce. Moreover, transport, as agriculture, is characterized by a number of inevitable governmental interventions which impose limits on certain community policies and require, therefore, the establishment of specific rules.

institutions some time to launch a Common European Transportation policy but this finally occurred in the mid-eighty's following two European Court of Justice decisions⁴²⁶.

Because of the general provisions of the *Treaty of Rome* and EU regulation in the area of transport a sound and effective competition policy based on liberalization of transport services is pursued at the European level⁴²⁷. Tariffication of transport services, vehicle (technical) standards, minimum duty on fuel, access to the profession, are all regulated at the European level⁴²⁸. We are talking today about an almost total liberalization of transport services of goods⁴²⁹. We will herein comment on motor (A), rail (B), and ocean (C) transport liberalization at the European level.

A. Motor Transport: At present, motor carriage is still the dominant mode of transportation in Western Europe⁴³⁰ while in Central and Eastern Europe the road mode is shortly going to become dominant⁴³¹.

Motor transport at the European level has been totally liberalized, more so than sea and rail carriage and is subject, therefore, to minimal Member-States restrictions⁴³². To facilitate internal traffic of goods and avoid congestion following

This is why agriculture and transport are the only areas intended to be subject to common European policies. Mario Riccomagno, "The Liberalization in Access to Maritime Transport Markets in the European Union" (1997) 32 Eur. Transp. L. 537 at 538.

⁴²⁶ The Common European Transport Policy was developed due to a European Court of Justice decision that condemned the Council under art. 232 (former article 175) of the *E. C. Treaty* for having failed, in breach of article 71(1)(a) and (b) (former art. 75(1)(a) and (b)) to provide for freedom to supply services in inland navigation. Jill Aussant, "Cabotage and the Liberalization of the Maritime Services Sector" (1993) 28 Eur. Transp. L. 347 at 347-348. In 1985, another European Court of Justice decision on the free circulation of goods and persons within the EC constituted the driving force for European Council to proclaim, the same year, the free access to the motor transport market of goods at the E.C. level. *La Difficile Naissance de la Politique Commune des Transports* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-3001.html#toc9>> (last visited: Oct. 30, 2000).

⁴²⁷ Nick Maltby, "Multimodal Transport and E.C. Competition Law" (1993) L. M. C. L. Q. 79 at 80 at 87 and thesis of Arbault Marie Laurence, *Transport Multimodal en Droit Communautaire* (D. Jur. Thesis, Lille III, 1996) [unpublished : archived at Lille III ISSN: 0294-176796/PA01/0311 Fiche 3851.24931198] at 162.

⁴²⁸ Speech of Alain Rathery *La Politique Commune des Transports: Situation Actuelle et Perspectives* (30 Mars 1997) online: ECTM Homepage (Speeches) <<http://www.oecd.fr/cem/online/speeches/arclti.pdf>> (last visited: March 3, 2000).

⁴²⁹ Nick Maltby, "Multimodal Transport and E.C. Competition Law" (1993) L. M. C. L. Q. 79 at 80.

⁴³⁰ Jack Short, *Road Freight Transport in Europe: Small Policy Concerns and Challenges* (1999) online: ECMT Homepage (Speeches) <<http://www.oecd.fr/cem/online/speeches/Jsver99.pdf>> (last visited: April 4, 2001). See also "EU Ministers Meet" *Austria Today* (2002) online: WESTLAW (All-news).

⁴³¹ *Ibid.*

⁴³² Progressive liberalization of the motor carrier industry started in the 1980's. Today, admission to the profession is only subject to qualitative criteria by E.U. Member States so that once a motor freight carrier is

liberalization of motor carriage, different approaches have been taken by different Member States⁴³³. However, these measures have not been sufficient to address traffic bottlenecks, congestion, delays in the delivery of goods, increase in freight and environmental damage at the European level⁴³⁴. Transport networks at the European level face chronic congestion with 10% of the road network affected every day by traffic jams and 20% of the rail network experiencing bottlenecks⁴³⁵.

B. Rail Transport: Rail transport of goods is much more developed in Western than in Eastern Europe⁴³⁶. With the programmed enlargement of the EU to 10 Eastern European countries, rail will raise in importance since forty per cent, a percentage almost equal to that of the U.S., of the freight market in the Central and Eastern Europe moves by rail as compared with eight per cent within the EU⁴³⁷. This

established in one Member State, it enjoys free access to the road freight transport markets throughout the E.U.. Quantitative restrictions imposed by Member States are temporary restrictions present in case of crisis, when there is overcapacity in supply for a long period, a great number of carriers suffer from financial imbalances or their survival is endangered and no market improvement is expected in the short or medium term. *EC Legislation on Road Transport in Accession Candidate Countries* (2001) online: World Bank Homepage <http://www.worldbank.org/transport/roads/rdt_docs/annex9.pdf> (last visited: Oct. 22, 2001).

⁴³³ France, for instance, has opted for urban planning, and the new law (Plans de Déplacements Urbains: PDU) requires cities to draw up a plan for urban movement where they should include freight movements. Other countries have opted for urban distribution centers to undertake urban freight delivery. Germany follows a model based on the initiative of private transport companies where all operators deliver to a central depot with the final distribution being done by one particular company. Denmark has combined public and private initiative in its distribution model based on licenses given by authorities to transporters that meet certain criteria. Finally, Monaco's model is based on a concession of internal traffic services by the town to one transport company responsible for the movement of goods within the city. The cost of the concession was supposed to be born by the municipality and the traders but the latter never contributed their part of the share. Jack Short, *Freight Transport in Cities* (1998) online: ECMT Homepage, (Speeches) <<http://www.oecd.org/cem/online/speeches/JSamst98.pdf>> (last visited: April 15, 2001).

⁴³⁴ Congestion should also be attributed to the fact that a non-negligible part of European motor carriage takes place in towns. According to a 1998 report, 10-12% of vehicle traffic occurs in towns and up to 70% of all trucks are situated in towns. At the European level, traffic of goods concerns mostly movements within the city (internal movement of goods) at daytime. Jack Short, *Freight Transport in Cities* (1998) online: ECMT Homepage, (Speeches) <<http://www.oecd.org/cem/online/speeches/JSamst98.pdf>> (last visited: April 11, 2001). "Europe View: Transport Key to EU Expansion" *J. Com.* (2003) online: WESTLAW (Newsletters). Congestion is hitting all modes and affects intermodalism. "Intermodalism: Rail Freight Terms see Light at the End of the Tunnel" *Ll. List. Int'l* (2001) online: WESTLAW (Newsletters). "European Diary" *Transport Europe* (2002) online: WESTLAW (Newsletters). This seems also to be the case with the programmed enlargement of the EU to 10 new countries. *Enlargement* (2001) online Europa Homepage europa.eu.int/comm/enlargement/docs/newsletter/weekly_140901.htm (last visited: June 16, 2003).

⁴³⁵ "EU Freight Shake" *Ll. List. Int'l* (2001) online: LEXIS (Transp. News) and John E. Thompson, Eddy DeClerq, Katsuhide Nagayama, "International Intermodality Aspects of the Bosnia and Herzegovina Transport Master Plan" *ITE J.* (2002) online: WESTLAW (All-News).

⁴³⁶ *Newsletter* (1998) online: ECMT Homepage <<http://www.oecd.org/cem/events/letter6e.pdf>> (last visited: April 11, 2001).

⁴³⁷ *White Paper "European Transport Policy for 2010 : Time to Decide"* (2001) online: Europa Homepage <http://europa.eu.int/comm/energy_transport/en/lb_en.html> (last modified: Aug. 9, 2002) and *Enlargement*

mode of transport has special features that distinguish it from road and air transport: mode-specific technical standards, dominant monopoly market, strong national budget contributions and undeniable security constraints⁴³⁸.

Despite these constraints, liberalization of rail transport came about with the Council's Directive 91/440/E.E.C. of July 29, 1991⁴³⁹. This Directive established the premises for transposing the rail transport sector, which is organized along national lines, is hyper regulated and dominated by state-owned companies, to a European market focusing on competition. The main purpose of the Directive 91/440/E.E.C. was to set up the conditions for the liberalization and competition between rail companies providing for total opening of national networks in 2008⁴⁴⁰.

Recently, the first package of rail liberalization measures came into force on May 15, 2003 at the European level⁴⁴¹. We refer to directive 2001/12/EC on liberalization of international freight services, directive 2001/13/EC on rail company licenses and directive 2001/14/EC on allocation of rail infrastructure capacities, rail infrastructure charges and safety certification⁴⁴². The first directive, of greatest

(2001) online: Europa Homepage <europa.eu.int/comm/enlargement/docs/newsletter/weekly_140901.htm> (last visited: June 16, 2003). A White Paper announces the intention of the Commission, which is at the source of the European legislative process, to come forward with a series of measures proposed on this issue. This is the last of a series of White Papers that the European Commission has adopted in the field of transport. It is for the first time in history that the EU places, with the present White Paper, customer's demands at the heart of its transport strategy. For the implementation of this paper the European Commission is proposing 60 or so measures. *Ibid* and *La Difficile Naissance de la Politique Commune des Transports* (1999) online: French Senat Homepage <http://www.senat.fr/rap/r00-300/r00-3001.html#toc9> (last visited: Oct. 30, 2000).

⁴³⁸ "Europe des Transports: Liberalization et Harmonization" (1999) 2810 Bull. Transp. Log. 538 at 541.

⁴³⁹ OJL237, 24.08.1991. It can also be found on the web under <www.europa.eu.int/comm/competition/state_aid/legislation/91/237-en.htm/> (last visited: April 19, 2002).

⁴⁴⁰ The Directive is characterized by four fundamental principles: management which is independent from the State; financial rationalization; the separation between infrastructure and operation (similar to road and air transportation); and free access, by at least two associated rail companies, to rail infrastructure of other Member States (article 2). Alain Alexis, "Transports Ferroviaires et Concurrence: Les Principaux Apports de la Directive No. 91/440" (1998) 28 Eur. Transp. L. 499 at 507. Later, amendments to the said Directive and other directives followed, further liberalizing E. U. railways. "Commission to Push for Further Harmonization and Liberalization" *Eur. Report* (2002) online: WESTLAW (Newsletters).

⁴⁴¹ "Transport Council-Agreement on Rail Liberalization" *Eur. Report* (2003) online: WESTLAW (All-News).

⁴⁴² Said directives can be found in the Official Journal of the European Communities: OJL75/1 15.3.2001, OJL75/26 15.3.2001, and OJL75/29 15.3.2001 respectively. These can also be found on the web. *Transport Division, UNECE Trans-European Railway Project* (2003) online: UNECE Homepage <www.unece.org/trans/main/ter/tereu.html> (last modified: Jan. 16, 2003) and under *General Report 2001, Annexes* (2001) online: European Union Homepage <www.europa.eu.int/abc/doc/off/rg/en/2001/cod0406.htm#pt06950> (last modified: March 28, 2003). See

interest to the present study, amended above-mentioned 91/440/E.E.C. in liberalizing international freight services and proposed that rail companies issued with a E.U. license should enjoy access to the trans-European rail freight network which handles 79-80% of EU rail freight traffic⁴⁴³.

Presently, the European Commission is proposing a new (second) rail package, modifying existing European regulation on the issue and primarily aiming at completing the opening of the rail freight market by extending access rights to all national and international traffic⁴⁴⁴. A proposal for a recommendation concerning the EU accession to the International Freight Transport Convention (COTIF) is therein contained⁴⁴⁵.

Despite railway 'liberalization'⁴⁴⁶, the sector is still under market-entry barriers, is subject to state aids that do not foster intermodal competition and there

also "Rail Transport-International Freight Sector Open to Competition from March 15" *Eur. Rep.* (2003) online: WESTLAW (Newsletters).

⁴⁴³ The second directive extends European licensing rules to all EU-based rail companies and not only to those offering international transport services or international combined goods transport activities. The third directive offers a precise definition of the entitlements of rail companies and infrastructure managers and provides for other infrastructure related measures. *Ibid* and "Clear Tracks Ahead for EU Rail Freight" *Agence France-Presse* (2003) online: WESTLAW (All-News). European Commission has stressed the fact that it will take required action to ensure Member States compliance and on July 10, 2003 it sent reasoned opinions to ten Member-States which have not complied with said directive. "Reasoned Opinion Against Ten Member States Concerning Rail Package on Infrastructure" *Agence Europe* (2003) online: WESTLAW (Newsletters), "Tracks Clear for Freight Rail Transport in Europe" (2003) *Sweet & Maxwell Ltd* online: LEXIS (LRDI). The trans-European rail freight network is an agreed upon rail network comprising key corridors (summing up to 50.000 kilometers of tracks) along the European continent -either within one country or internationally- to which licensed rail operators meeting safety standards are granted access to run. Operators must also be allowed to extend services along branch lines linking the main network to ports or important terminals within a certain distance. Neil Buckley, "EU-Wide Boost for Rail Freight" *Fin. Times* (1999) online: WESTLAW (Newsletters), "Proposals for Infrastructure and Safety" *European Voice* (2003) online: WESTLAW (Newsletters).

⁴⁴⁴ The Council of the EU Transport Ministers also secured a political agreement on a common position on the second European railway package dealing mainly with railway opening of international freight competition and cabotage by 2006 and 2008 respectively. "Commission to Push for Further Harmonization and Liberalization" *Eur. Report* (2002) online: WESTLAW (Newsletters). France opposed the second package of rail liberalization and with Belgium and Luxemburg it voted down the text. *Ibid* and "Cross-Border Liberalization is on Track" *Lloyd's List International* (2003) online: Westlaw (Newsletters). Marion Monti, "Building Up Steam" *Daily Deal* (2002) online: WESTLAW (Newsletters).

⁴⁴⁵ "Transport Council Progress Expected on Maritime Safety and Railways" *Eur. Report* (2003) online: LEXIS (News) and "Transport Council-Agreement on Rail Liberalization" *Eur. Report* (2003) online: WESTLAW (All-News).

⁴⁴⁶ At the insistence mainly of France, least enthusiastic about the new series of measures, the use of the term 'liberalization' is frequently avoided. Neil Buckley, "EU-Wide Boost for Rail Freight" *Fin. Times* (1999) online: WESTLAW (Newsletters).

are Member States with severe structural problems in this sector⁴⁴⁷. In combined transport, motor traffic congestion and rail carrier tariffs have given the impression that combined rail-road transport is economically inefficient at the European level⁴⁴⁸.

The present reality should not be viewed as discouraging. A key element of European transport policy is to foster the growth of shipping and intermodal transport in a bid to shift cargo off the continent's congested roads⁴⁴⁹. Moreover, although it is certain that the Commission will continue to take into account the specifics of the railway sector in considering further liberalization of the industry, regulatory reform through injection of competition measures at the European level is an on-going process⁴⁵⁰. Finally, Member-State laws seem to consider more and more rail liberalization. In Germany, for instance, over 90% of rail freight is carried by companies other than Deutsche Bahn⁴⁵¹ while other European Member States are continuously introducing competition rules in their railway sector⁴⁵². Railway consolidation through mergers and acquisitions furthers competition and invites European legislation on the issue⁴⁵³.

C. International Ocean Carriage: International ocean carriage of goods at the European level involves foreign trade of the EU Member States (representing 90% of

⁴⁴⁷ "Europe View: Transport Key to EU Expansion" *J. Com.* (2003) online: WESTLAW (Newsletters) stating that the EU under performing state railways is the main reason why rail's share of the freight market has crashed, allowing trucking to climb at 70%. For state aids see U.S., Department of Transportation Report, *Toward Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U. S. DOT Homepage <http://www.ops.fhwa.dot.gov/freight/institut/inter/eu_us2.pdf> (last visited: July 11, 2001) at 12. See however, reduction of state aids in 12 out of the 15 European Member States as reported by "Latest ScoreBoard Shows Falling Subsidies Levels" *Eur. Rep.* (2003) online: WESTLAW (All-News). See also *supra* at 90.

⁴⁴⁸ The modal shift is not occurring. Marion Monti, "Building Up Steam" *Daily Deal* (2002) online: WESTLAW (Newsletters).

⁴⁴⁹ "Financial Incentives Loom for Port Customers in Move to Boost Volumes" *Ll. List Int'l* (2002) online: WESTLAW (Newsletters).

⁴⁵⁰ Marion Monti, "Building Up Steam" *Daily Deal* (2002) online: WESTLAW (Newsletters).

⁴⁵¹ "Rail Transport-International Freight Sector Open to Competition from March 15" *Eur. Rep.* (2003) online: WESTLAW (Newsletter).

⁴⁵² Jack Short and Stephen Perkins, *Transport Policy in Europe* (1997) online: ECMT Homepage (Articles) <<http://www.oecd.org/cem/online/articles/jschina.pdf>> (last visited: April 21, 2001), Marion Monti, "Building Up Steam" *Daily Deal* (2002) online: WESTLAW (Newsletters) and "Keep out of Logistics" *Ll. List Int'l* (2003) online: WESTLAW (All-news).

⁴⁵³ Marion Monti, "Building Up Steam" *Daily Deal* (2002) online: WESTLAW (Newsletters).

the EU international trade) as well as ocean trade among Member-States⁴⁵⁴. A noted neglect to regulate ocean shipping was observed at first on the part of the European institutions since it took them approximately 25 years to draft and enforce competition rules in the maritime sector. The delay may be attributed to the fact that until 1973, the European Community was a continental block of countries with about 90% of transport carried by road, railway or inland waterways⁴⁵⁵. Since 1973, the accession of seafaring countries to the European Community has transformed its geography in a way that, after said year, nearly 90% of trade between the Member States was sea borne with almost no competitive land transport alternative⁴⁵⁶. The programmed enlargement of the E.U. to 10 new countries, among which appear Cyprus and Malta, is foreseen to step up shipping and maritime regulation on safety⁴⁵⁷.

Four regulations constitute the pillars of European shipping legislation and are mostly concerned with competition and antitrust ocean carriage legislation⁴⁵⁸.

⁴⁵⁴ Mario Riccomagno, "The Liberalization in Access to Maritime transport Markets in European Union" (1997) 32 Eur. Transp. L. 539 at note 2. Overall, the opportunities for ocean shipping in Europe are much greater than in NAFTA where land transport reigns. The European Commission has stated: "As the largest world trading entity, the Community should not be excessively dependent on third country fleets for its imports and exports, losing control and influence on the price and quality of transport to and from its territory". As reported by Vincent J. G. Power, "EC Maritime Policy" (1996) 31 Eur. Transp. L. 179 at 185.

⁴⁵⁵ Helmut Kreis, "European Community Competition Policy and International Shipping" (1992) 27 Eur. Transp. L. 155 at 157. The *Treaty of Rome* has dedicated only one provision on the issue inviting the Council of Ministers to decide 'whether and to what extent rules for sea and air transport will be adopted' (article 80). Mario Riccomagno, "The Liberalization in Access to Maritime Transport Markets in the European Union" (1997) 32 Eur. Transp. L. 537 at 538.

⁴⁵⁶ Helmut Kreis, "European Community Competition Policy and International Shipping" (1992) 27 Eur. Transp. L. 155 at 156-157. Until 1973 and the accession of the United Kingdom, Ireland and Denmark, the EU was a continental block. After 1973, however, 90% of all export/import between old and new Member-States (United Kingdom, Ireland and Denmark acceded to the E. C. in 1973, Greece in 1981 and Austria, Finland and Sweden in 1995), became sea borne with almost no competition from land transport services. Thus, trade shipping became considerably more important than it was before 1973. *Ibid* and see *History of the European Union* (2003) online: European Union Homepage europa.eu.int/abc/history/index_en.htm (last modified: April 2003).

⁴⁵⁷ *White Paper "European Transport Policy for 2010 : Time to Decide"* (2001) online: Europa Homepage <http://europa.eu.int/comm/energy_transport/en/lb_en.html> (last modified: Aug. 9, 2002) and *Enlargement* (2001) online Europa Homepage europa.eu.int/comm/enlargement/docs/newsletter/weekly_140901.htm (last visited: June 16, 2003). With the enlargement, the EU shipping fleet is to increase substantially since the flags of Cyprus and Malta represent a tonnage almost equivalent to that of the current EU fleet. *Ibid*. See *supra* note 437 on the White Paper on Transport Issues.

⁴⁵⁸ Unfair pricing practices in maritime transport are concerned by European Regulation 4057/87 O.J. L378/14 31.12.86. Co-ordinated action to safeguard free access to cargo in ocean trades by European Regulation 4058/86 O.J. L378/21 31.12.86. Freedom to provide international maritime services ('liner' and 'tramp' shipping of passengers or goods) is concerned by European Regulation 4955/86 O.J. L378/1 31.12.86.

One of them concerns competition rules and liner conferences⁴⁵⁹ and subjects conference price fixing agreements to article 81(3) of the *Treaty of Rome*, exempting them from the prohibitive principle of article 81(1)(prohibition of horizontal price fixing) and according them anti-trust immunity⁴⁶⁰.

However, and contrary to U.S. law, the European Commission and European Council have taken the view that multimodal transport price fixing between the conference or members of the conference (acting individually or jointly) and inland carriers is not permitted under existing law because the block exemption for liner conferences does not cover it⁴⁶¹. Commission's decision was meant to protect shippers since the Commission is not known to sympathise with horizontal price fixing which the above-mentioned proposal entails⁴⁶². Proponents of the Commission's view suggest that shipping regulations were intended to apply 'only to international *maritime* services from or to one Community ports' (art. 1.2)⁴⁶³. Opponents of the Commission's decision argue that multimodal transport operations

Competition rules and liner conferences are subject to a 4056/86 European Regulation (O.J. L378/4 31.12.86.).

⁴⁵⁹ For conferences see *infra* at 147s. According to European regulation 4056/86 art. 1.3(b) a liner conference is defined as: "a group of two or more vessel-operating carriers which provides international liner services for the carriage of cargo on a particular route or routes within specified geographical limits and which has an agreement or arrangement, whatever its nature, within the framework of which they operate under uniform or common freight rates and any other agreed conditions with respect to the provision of liner services". For the European regulation see *Index Page* (1986) online: Europa Homepage <http://www.europa.eu.int/eur-lex/en/consleg/index_1986.html> (last modified: continuously).

⁴⁶⁰ European Regulation 4056/86 O.J. L378/4 31.12.86, *Index Page* (1986) online: Europa Homepage <http://www.europa.eu.int/eur-lex/en/consleg/index_1986.html> (last modified: continuously). Helmut Kreis, "European Community Competition Policy and International Shipping" (1992) 27 Eur. Transp. L. 155 at 157. See also *infra* at 147s.

⁴⁶¹ European Commission Decision, 1999/243/EC, OJ L 095 09.04.1999 rendered on Sep. 16, 1998 and relating to the application of art. 81 and 82 of the *EC Treaty* to the Trans-Atlantic Conference. Found also under *Commission Decision, Case No IV/35.134*, (1998) online : Europa Homepage <http://europa.eu.int/eur-lex/en/lif/reg/en_register_082010.html> (last visited: Sept. 6, 2003). Hoffa James P., "Shipping and Anti-trust" *Cong. Testimony* (2002) online: WESTLAW (Newsletters). See also Philippe Rutley, "Les Transports Multimodaux à l'Épreuve des Règles Communautaires de la Concurrence" (1995) 47 *Droit Marit. Fr.* 868s. As a result, art. 81(1) of the *EC Treaty* prohibiting collective agreements remains the rule with respect to multimodal carriage. William Hathaway, "Toward a Greater Regulatory Harmony" (1995) 30 *Eur. Transp. L.* 729 at 731s.

⁴⁶² Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the E. E. C. and the U. S.: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 183-184.

⁴⁶³ Helmut Kreis, "European Community Competition Policy and International Shipping" (1992) 27 *Eur. Transp. L.* 155 at 167. Nick Maltby, "Multimodal Transport and E.C. Competition Law" (1993) *L. M. C. L. Q.* 79 at 83.

and through-rate fixing are integral part of the conferences activities and cannot be dissociated from the Regulation⁴⁶⁴. In effect, ‘through rates’ applied by conference members cover the cost of inland transport, terminal handling, warehousing and customs clearance, as well as the blue water leg⁴⁶⁵.

Today, the European Commission is considering reviewing the regulation on the conference’s exemption from Europe’s competition rules to see whether its benefits are justified, also with regard to Europe’s major trading partner’s legislation such as the U.S.⁴⁶⁶.

Apart from modal European competition and anti-trust regulation incidentally affecting intermodal transport, as this is the case of conference (members) price fixing of inland rates, European institutions confirm, today, their traditional support to developing multimodalism at the regional level⁴⁶⁷. Their actions, however, do not reveal presence of an embracing and dynamic European intermodal policy but, rather, modest, area-specific initiatives in this field⁴⁶⁸. Indicative of the modesty of European intermodal initiatives, in this regard, is the fact that the central comment on the EU internet page entitled ‘Intermodal Transport Policy’ is the Marco Polo

⁴⁶⁴ Helmut Kreis, “European Community Competition Policy and International Shipping” (1992) 27 *Eur. Transp. L.* 155 at 167.

⁴⁶⁵ Nick Maltby, “Multimodal Transport and E.C. Competition Law” (1993) *L. M. C. L. Q.* 79 at 83.

⁴⁶⁶ Janet Porter, Roger Hailey, “Shippers Vow no Let-up in War Against Cartels” *Ll. List.* (2002) online: LEXIS (Transp. News). Hoffa James, “Shipping and Anti-Trust” *Congr. Test.* (2002) online: WESTLAW (Newsletters). *Infra* at 149s for U.S. laws.

⁴⁶⁷ «European Parliament Approves Four Reports» *Eur. Rep.* (2001) online: WESTLAW (Newsletters). *Supra* at 92.

⁴⁶⁸ Examples of fragmented E.U. initiatives that have already taken place in the field of intermodalism are: European Directive 92/106/C.E., OJL368 17.12.1992 that establishes common European rules for certain types of intermodal transport among Member States and liberalized access (only) to all intermodal carriage at the European level from July 1, 1993. *Un Souci Affirmé de Rééquilibrage entre les Modes* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-3005.html#toc24>> (last visited: Dec. 12, 2001). For the Directive 92/106/CE see *Council Directive 92/106/CE* (1992) online: Europa Homepage <http://europa.eu.int/eur-lex/en/consleg/main/1992/en_1992L0106_index.html> (last modified: June 3, 2003). Currently, European institutions are envisaging amending said directive in order to enhance multimodal transport. *Combined Transport of Goods between Member States* (2003) online: European Union Homepage <europa.eu.int/scadplus/leg/en/lvb/l24089.htm> (last modified: daily).

On EU financial aid to intermodalism that only Italy massively makes use of and an infrastructure policy which is not really developed today see Marie Laurence Arbault, “Transport Multimodal en Droit Communautaire” (1996) [unpublished: archived at Lille III ISSN: 0294-176796/PA01/0311 Fiche 3851.24931198] at 162 and 171.

program⁴⁶⁹. This program was created to fund innovative multimodal projects offering alternatives to road haulage, whether rail, short sea shipping or inland waterway in order to reduce road congestion and improve the environmental performance of the whole transport system⁴⁷⁰. The Marco Polo project carries a budget of 75 million Euros over the period 2003-2006, (an ‘absolute minimum’ to yield anticipated results according to the Transport Commissioner), and is currently going through the co-decision adoption process with project selection beginning in the second half of 2003 continuing during 2004⁴⁷¹.

Moreover, European Commission’s White Paper entitled ‘European transport policy for 2010 : time to decide’, makes integration and revitalization of all modes of transport great objectives for the next ten years to come⁴⁷². This, along with the

⁴⁶⁹ *Marco Polo Calls for Proposals* (2002) online: Europa Homepage http://europa.eu.int/comm/transport/intermodal/minibudget2002_en.htm (last modified: daily). Marco Polo replaces its predecessor, the more modest PACT program which ended in the year 2001, had lasted for the nine years, had been granted a more modest budget of 53 million Euro and had had a more modest approach than Marco Polo. In effect, the Marco Polo intends to effectuate a modal shift (that PACT did not really tackle), to overcome structural barriers and to develop learning programs. *Ibid.*

Current European intermodal transport policy focuses on the Marco Polo project, directives found in *supra* note 468 and Carrier Liability Study. Overall, a fragmented and relatively ‘young’ policy considering the history and age of the continent. *Combined Transports* (Sept. 6, 2003) online: Europa Homepage <<http://europa.eu.int/scadplus/leg/en/s13000.htm#COMBINEMARCH>> (last modified: daily).

⁴⁷⁰ *The Marco Polo Program, Executive Summary*, (2003) online: Europa Homepage <europa.eu.int/comm/transport/marcopolo/summary_en.htm> (last modified: May 23, 2003). “Regulation (EC) No 1382/2003 of the European Parliament and of the Council of 22 July 2003 on the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo Program)” *Celex* (Aug. 2, 2003) online: WESTLAW (Newsletters).

⁴⁷¹ “Transport Council Common Position on Marco Polo Program” *Eur. Rep.* (2003) online: WESTLAW (All-News) and *The Marco Polo Program* (2003) online: Europa Homepage europa.eu.int/comm/transport/marcopolo/index_en.htm (last modified: continuously). “Transport Council-Ministers Agree on a Mini-Budget on Marco Polo” *Eur. Report* (2002) online: WESTLAW (All-news), “Marco Polo Embarks on a Long Journey” *Ll. List Int’l* (2002) online: LEXIS (Transp. News) and “Ministers Debate White Paper and Trans-European Networks” *Eur. Report* (2002) online: LEXIS (Transp. News). For projects retained recently under the Marco Polo program see “Marco Polo, La Commission Financera Trois Projets sur Dix” (Feb. 21, 2003) *JMM* 3 at 14.

⁴⁷² *White Paper "European Transport Policy for 2010 : Time to Decide"* (2001) online: Europa Homepage <http://europa.eu.int/comm/energy_transport/en/lb_en.html> (last modified: Aug. 9, 2002). See *supra* note 437) on the White Paper on Transport Issues. In this respect, the development of Trans-European networks (connection of cross-modal and cross-country transport network to serve the European continent) is an important part of the implementation of the EU Common Transportation Policy and should be made gradually by the year 2010, especially considering the enlargement of the EU. John E. Thompson, Eddy DeClerq, Katsuhide Nagayama, “International Intermodality Aspects of the Bosnia and Herzegovina Transport Master Plan” *ITE J.* (2002) online: WESTLAW (All-News) and *Revision of the Trans-European Transportation Networks TEN-T Community Guidelines* (2003) online: Europa Homepage europa.eu.int/comm/transport/themes/network/English/len.ten.htm (last modified: May 25, 2003), “European Commission Welcomes the Naples Charter” *Eur. Union Press Releases* (2003) online: WESTLAW (Newsletters).

plethora of European Commission, Council and Parliament recommendations, communications, proposals, incentives or even ‘demands and conditions’ on developing intermodalism, are all located on the right track but do not have binding force⁴⁷³. For all these reasons, the ‘common’ intermodal European transport ‘policy’ has been qualified as a ‘politique embryonnaire’⁴⁷⁴. As a result, intermodalism in Europe today is a complicated business governed in part by the rules of the fifteen Member States, the European Union and international conventions⁴⁷⁵.

Overall, authors argue that the common European transport policy has developed disproportionately to the transport growth level⁴⁷⁶ and that latter is unsustainable so that, in some years, Europe will not be able to cope if regional institutions do not intervene⁴⁷⁷.

Par. 2. Absence of a Uniform European Multimodal Carrier Liability

Regime: Multimodal transport in the EU has been defined as ‘the door-to-door transport of goods effectuated on two or different modes of transport’⁴⁷⁸. According

⁴⁷³ “European Parliament Approves Four Reports” *Eur. Rep.* (2001) online: WESTLAW (Newsletters) on Parliament’s outlined ‘demands and conditions’. *Combined Transport: Intermodality of Goods* (1997) online: European Union Homepage <<http://europa.eu.int/scadplus/leg/en/lvb/l24179.htm>> (last modified: July 5, 2000) on European Commission communication on the need to develop specific aspects of intermodal carriage. “Shipping Without Borders” *Log. Mgmt & Distr. Rep.* (1998) online: LEXIS (Transp. News) on European Transport Directorate to develop incentives so as to promote intermodal carriage. *Politique de Transport: L’Europe en Retard* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-300.html>> (last modified: Dec. 12, 2001). In the summary of EU transport regulation on this internet page, only liberalization of transport services indicates presence of EU regulation in this field. On EU intermodalism, harmonization in this field, transport security and infrastructure we find words as regulatory ‘encouragement’, ‘modesty’, ‘preoccupation’, ‘deficiency’ respectively. *Ibid.*

⁴⁷⁴ *Un Souci Affirmé de Rééquilibrage entre les Modes* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-3005.html#toc24>> (last modified: Dec. 12, 2001). It is only with the enlargement of the European Union that a work group was formed to identify the priority projects of the transport network to serve the European Union. “Un Groupe de Travail va Identifier les Projets Prioritaires du réseau de transport dans l’ Union Elargie » (Jan. 17, 2003) JMM 3 at 11.

⁴⁷⁵ U.S., Department of Transportation, *Toward Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U. S. DOT Homepage http://www.ops.fhwa.dot.gov/freight/institut/inter/eu_us2.pdf (last modified: July 11, 2001). E.U. law is superior to Member-States law and it is only international law that overpowers it.

⁴⁷⁶ “Logistics and Freight in Crisis as EU still Grappling with Intermodalism” *Ll. List. Int’l* (2000) online: WESTLAW (Newsletters) and *Politique de Transport: L’Europe en Retard* (1999) online: French Senat Homepage <<http://www.senat.fr/rap/r00-300/r00-300.html>> (last modified: Dec. 12, 2001). Arbault Marie Laurence, *Transport Multimodal en Droit Communautaire* (D. Jur. Thesis, Lille III, 1996) [unpublished: archived at Lille III ISSN: 0294-176796/PA01/0311 Fiche 3851.24931198] at 251.

⁴⁷⁷ *Ibid.*

⁴⁷⁸ As reported by Dominique Malecot, “Transport Intermodal: Les Avis se Suivent les Problèmes Demeurent” (1997) 2724 Bull. Transp. Log. 710 at 719.

to authors, this definition implies that a uniform multimodal carrier liability regime does not exist at the regional level⁴⁷⁹. In effect, if such a regime existed, the definition would contain additional terms that would refer to the liability of the operator for the entire transport⁴⁸⁰. In reality, following reports made at the European level on the importance of creation of a uniform multimodal carrier liability regime, the European Commission examined the costs of absence of such a regime and economic benefits of implementing a voluntary intermodal liability pattern⁴⁸¹. In 2001, the Commission concluded that a harmonized multimodal carrier liability regime would reduce costs and facilitate trade at the European level and internationally⁴⁸². The European Energy and Transport Directorate staff informs us, however, that the EC has not foreseen at the moment any concrete action as follow up of Commission report but will attentively follow the work and the initiatives performed at the international level⁴⁸³.

As with every intermodal transaction, sea, air, road and rail carriage in the EU Member States are subject, each, to mandatory liability regimes (network system)⁴⁸⁴.

⁴⁷⁹ Hans Carl, "Future Developments in the Regulatory Aspects of International Multimodal Transport of Goods" (IUMI 125th Anniversary Conference in Berlin, 17 September 1999) [unpublished].

⁴⁸⁰ *Ibid.*

⁴⁸¹ "Trade Law Uniformity Remains out of Reach" *Ll. List Int'l* (1999) online: LEXIS (Transp. News). The European Commission set up, in 1995, a task force on intermodality which carried out consultations with the industry and, as a result of the report which it produced, intermodal liability had been earmarked by the Commission as an area which needed further examination. This was followed up by Commission's appointing a group of legal experts from European universities that produced a draft report dated July 1998. E. C. (Eur. Com.) Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Morón-Bovio, Ramberg, de Wit, Zunarelli, "Intermodal Transportation and Carrier Liability", final report, June 1999 (European Commission financed study; E. C. Contract NR. EI-B97-B27040-SIN6954-SUB). The Commission then invited representatives of various organizations to a 'hearing' on intermodal liability and the draft report was circulated with the papers for this hearing. In the minutes of the hearing was declared European Commission's commitment on this issue. *Ibid.*

⁴⁸² European Commission Report, *The Economic Impact of Carrier Liability on Intermodal Freight Transport* (2001) online: Europa Homepage <http://europa.eu.int/comm/transport/library/final_report.pdf> (last visited: May 12, 2001). The report made a detailed economic analysis of costs due to the absence of a harmonized liability regime. It recognized the weaknesses of the present multimodal carrier liability regime, namely, uncertainty of the amount of compensation or identity of the responsible carrier and proposed harmonization of existing European laws on the issue. *Ibid.*

⁴⁸³ Interview of the author with the European Energy and Transport Directorate, Intermodality and Logistics Section staff (July 18, 2002).

⁴⁸⁴ U.S., Department of Transportation, *Towards Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U.S. DOT Homepage <http://www.ops.fhwa.dot.gov/freight/institut/inter/eu_us2.pdf> (last visited: July 11, 2001) at 8-9 and at 37-39.

Because of this and the fact that most transportation in Europe is international, we will take a look at international unimodal conventions to determine the legal rules applicable to multimodal carriage⁴⁸⁵. In this respect, we will concentrate on international land carriage (A) and then on international ocean carriage (B).

A. International Land Carriage in EU Member States (CMR and COTIF/CIM):

In Europe, motor carriage between two different countries of which at least one is a contracting party, is governed by the *CMR*⁴⁸⁶ or national legislation closely modelled on it⁴⁸⁷. Rail transport of goods over the territories of at least two countries and exclusively over state operated lines (art. 1.1), is subject to the *CIM*, known as *COTIF/CIM* under its current version⁴⁸⁸. *COTIF/CIM* is in force in all fifteen

⁴⁸⁵ Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 Tul. L. Rev. 611 at 614.

⁴⁸⁶ *CMR: La Convention Relative au Contrat de Transport International des Marchandises par Route (the Convention on the International Carriage of Goods by Road)*, 19 May 1956, online: Excite.com Homepage <<http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956/doc.html>> (last modified: Feb. 20, 1990) [hereinafter *CMR*].

⁴⁸⁷ This is the case of Spain, the Netherlands and Germany. Germany adopted, in 1998, a *CMR*-based transport law applicable to all -not only motor- modes of transport (multimodal). Belgium applies the *CMR* not only to the international transport of goods by road but also to the national road transport of goods. E. C. (Eur. Com.), Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Morön-Bovio, Ramberg, de Wit, Zunarelli, "Intermodal Transportation and Carrier Liability" final report, June 1999 (European Commission financed study; EC Contract NR. EI-B97-B27040-SIN6954-SUB).

⁴⁸⁸ *COTIF: Convention Relative aux Transports Internationaux Ferroviaires (Convention Concerning International Carriage by Rail)*, May 9 1980, (last version-entered into force: May 1, 1985) online: Excite.com database <<http://www.unece.org/trade/cotif/Welcome.html>> (last visited: Sept. 28, 2002) [hereinafter *COTIF/CIM*]. The first step towards this act was made with the 1890 International Convention Concerning the Carriage of Goods by Rail, abbreviated in its French heading, *CIM*. The Convention has been revised repeatedly ever since with its last version, *COTIF/CIM*, being adopted in 1980. In reality, it is *COTIF* that comprises *CIM* and *CIV* provisions in two appendices so that the name of the convention was later changed to *COTIF*: Appendix A governs international rail transport of passengers (*CIV*) and Appendix B contains provisions on international rail transport of goods (*CIM*). *Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV)*. *Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM)*. Rolf Herber, "The European Legal Experience with Multimodalism" (1989-1990) 64 Tul. L. Rev. 611 at 612. In *Cour de Cassation*, Dec. 9 1997, *Sté Transfesa v. Sté Socodis Conditionnement et a.* 2733 Bull. Transp. Log. 887 (1997) the French Supreme Court held that before applying national laws to international rail carriage of goods we should first determine if the *CIM* applies. *COTIF* was amended in 1999 in Vilnius, after several years of negotiations and the new convention is expected to come into force in 2004. The revisions extent convention's objectives, widen membership criteria and, for rail carriage of goods, (*CIM*) remove the obligation to file tariffs and permit greater contractual freedom. *CIM* amendments do not directly affect liability issues. *Revision of COTIF (1999)* online: Comité International des Transports <http://www.cit.ch/e/FR_Comm02_99b.htm> (last modified: Oct. 29, 1999). The revised texts can be found in: *Protocole de Vilnius (1999)* online: OTIF Homepage <http://www.otif.org/f/publ_prvil.htm> (last modified: Sept. 4, 2001).

European Member States as well as other countries of the European continent⁴⁸⁹. All fifteen European Member-States have also acceded to the *CMR* and almost all have ratified it⁴⁹⁰.

The *CMR* was modelled, to some extent, after the *COTIF/CIM* but the two conventions are not identical⁴⁹¹. In case of multimodal transport, the *CMR* will apply to the road stage of the multimodal journey except if the goods are not unloaded from the vehicle during the non-road leg of the voyage, in which case, the *CMR* will govern the whole journey (*CMR* article 2). *COTIF/CIM* does not contain a provision comparable to *CMR* art. 2 so that this convention is not applicable to multimodal transport⁴⁹². For the rest, both conventions define a formalist regime coupled with vague provisions.

a) *Formalist Regime*: The *CMR* is mandatory in all its elements. Contracting parties cannot “directly or indirectly derogate from the provisions of the Convention” (article 41). Consequently, parties cannot contractually limit or increase motor carrier liability which equals 8.33 SDR per kilo (art. 23(3))⁴⁹³. In other words, the *CMR* advances a formalist liability pattern and is, thus, classified among the international formalist liability regimes which constitute the exception, rather than the rule⁴⁹⁴. However, as majestic as the *CMR* may seem, it leaves room

⁴⁸⁹ *Convention Concerning International Carriage by Rail (COTIF)*, May 9 1980, online: COTIF Homepage <<http://www.unece.org/trade/cotif/>> (last visited: Sept. 6, 2003). EU is now considering ratifying the COTIF as part of the second railway liberalization package. *Supra* note 445 and accompanying text.

⁴⁹⁰ *CMR Convention*, 19 May 1956, online: CMR Convention Homepage, <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booxi_b-boo/xi_b_11.html> (last modified: in 1998). As we have seen, however, some European countries, i.e. Germany and Spain have adopted legislation closely modeled on the *CMR*. *Supra* note 487 and accompanying text.

⁴⁹¹ Rolf Herber, “The European Legal Experience with Multimodalism” (1989-1990) 64 Tul. L. Rev. 611 at 613.

⁴⁹² *Ibid* at 613 and at 619-620. For *CMR* art. 2 see *Annex No. III, Table No. 4* at clxxxviii.

⁴⁹³ The convention prevents any departure from its stipulations. Jan Ramberg, *The Future of International Unification of Transport Law* (1998) online: Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/feature/ramberg2.htm>> (last modified: March 6, 2001). According to Pr. Jan Ramberg, this *CMR* article is intended to protect small or medium sized trucking companies against excessive claims from their customers. Jan Ramberg, *International Commercial Transactions* 2nd ed. (Stockholm: Kluwer Law International, 2000) at 181. Purchase of increased carrier liability through declaration of value is, however, permitted (art. 23, 24, 26). Saul Sorokin, “Changing Concepts of Liability” (1982) 17 FORUM 710 at 715. For the SDR international measure unit see *supra* note 247.

⁴⁹⁴ In this way, the convention makes part of the international ‘ordre public’ which, contrary to its domestic level counterpart, constitutes the exception rather than the rule. Marie Tilche, “Droit Routier et Ordre Publique” (1994) 2562 Bull. Transp. Log. 286 at 297. According to a European transportation law professor

to parties freedom of contracting in several areas⁴⁹⁵: fill in the gaps of the convention⁴⁹⁶; provide for jurisdiction clauses as long as they refer to associated -to the convention- countries jurisdictions; contractually modify the provisions of art. 37-38 on the attribution of liability and contribution among carriers (for the latter, see *CMR* art. 40).

The regime followed by the *COTIF/CIM* is also formalist, thus, ‘not...subject of derogations’ [*COTIF/CIM* art. 3.3 (General Provisions)]. This means that shipper protective rail carrier liability limitation amount of 17 SDR per kilo of gross weight cannot be tampered with by carrier and shipper (art. 40(2)). Formalism under the *CIM* is justified by the fact that European countries railways are state owned and the monopole of railway services they largely enjoy is counterbalanced by their obligation to carry merchandise subject to the conditions of the *COTIF/CIM*⁴⁹⁷. *COTIF/CIM*, however, is more lenient than the *CMR* since it permits contractual modifications that lead to an increase or reduction of railway tariff charges under certain conditions (article 6.7 and 6.4 respectively)⁴⁹⁸. For the rest, parties can contractually fill in the gaps of the convention and provide for jurisdiction clauses⁴⁹⁹.

CMR art. 41 ‘is exceptional and contrary to competition law’. Interview of the author with a European transportation law professor (April 5, 2001).

⁴⁹⁵ For all the following see Marie Tilche, “Droit Routier et Ordre Public” (1994) 2562 *Bull. Transp. Log.* 286 at 298-299.

⁴⁹⁶ *Ibid.* On this see also Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) *L. M. C. L. Q.* 36 at 64 and *infra* at 102s on *CMR* gaps.

⁴⁹⁷ *Ibid.* For more details on the raison d’être of formalism and contractualism see Josef Wick, John Favre, *Le Droit International des Transports par Chemins de Fer* (Neuchatel, Suisse: Imprimerie Nouvelle E.G. Chave S.A. 1975) at 108.

⁴⁹⁸ Article 6.4 provides that reductions in charges or other concessions may be granted for the purpose of railway or public services, or for charitable purposes and on the condition that comparable conditions are granted to users in comparable circumstances. In practical terms, this provision concerns tariff reductions for the transport of military, postal, municipal or administration material. Josef Wick, John Favre, *Le Droit International des Transports par Chemins de Fer* (Neuchatel, Suisse: Imprimerie Nouvelle E.G. Chave S.A. 1975) at 109. From the very first draft, the *COTIF/CIM* provided that all agreements between railways and users that provided for reduced rates were ‘null and void’ and, therefore, prohibited. *Ibid.* at 108. The ‘more strict’ *CMR* does not permit any derogation from convention’s provisions in the relation between the carrier and the shipper but only in the attribution of liability and contribution among carriers. *Supra* at 101.

⁴⁹⁹ Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) *L. M. C. L. Q.* 36 at 64. Even though jurisdiction clauses should apply uniformly, a practical difference may exist because these conventions provisions may be interpreted differently in different jurisdictions. *Ibid.* *Cargo and Transit Newsletter* (1999) online: Hilldickinson Homepage <http://www.hilldickinson.com/marine&transit/cargo_news_letters/CARGNEWS2.htm> (last visited: April 14 1999).

b) *Vague Provisions*: Both the *CMR* and the *COTIF/CIM* do not escape divergent court interpretations. An example is provided by the general *CMR* and *COTIF/CIM* liability exemption “*circumstances which the railway could not avoid and the consequences of which it was unable to prevent*” (Sections 17.2 and 36.2 respectively)⁵⁰⁰.

In Belgium and France, some courts have equated this *CMR* and *COTIF/CIM* defence to the concepts of ‘force majeure’ or ‘cas fortuit’⁵⁰¹ and are, therefore, very strict on the carrier⁵⁰². In England, on the other hand, courts interpretation of the said defence has evolved over time. Where it initially implied a duty of reasonable care on the part of the carrier, in *Silber (J.J.) Ltd v. Islander Trucking Ltd*⁵⁰³ the court adopted the position that the expression ‘could not avoid’ means ‘could not avoid even with the utmost care’. This degree of care is situated between the common law standard of reasonable care that England otherwise adopts and the French requirement of force majeure⁵⁰⁴. This decision also echoes the view of the Austrian Supreme Court (OGH) which requires ‘the utmost reasonable care compatible with good sense’ and to which the English court referred in rendering its decision⁵⁰⁵. As a result, the degree of care imposed on the motor and rail carrier by French courts under the *COTIF/CIM* and the

⁵⁰⁰ Along with this provision both conventions contain specific carrier liability exceptions in said articles.

⁵⁰¹ In civil law systems, the concepts of force majeure and fortuitous event are used interchangeably. Boris Kozolchyk, Martin L. Ziontz, «A Negligence Action in Mexico: an Introduction of the Application of Mexican Law in the United States» (1989) 7 *Ariz. J. Int’l. & Com. L.* 1 at 28. A subtle distinction of no great practical importance exists, however, between the two terms. *Infra* note 991.

⁵⁰² Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) *L. M. C. L. Q.* 36 at 61-62. Author notes that *CMR* wording copied *COTIF/CIM* art. 27.2 of 1952 that replaced previous *COTIF/CIM* reference to force majeure to avoid use of national terms. This fact reveals drafters intention to avoid the ‘force majeure’ term. *Ibid*. While absence of carrier fault requires proof of reasonable care on his part, ‘force majeure’ sets a higher standard of care and requires proof that a prudent person (carrier) is found in the impossibility to act in another way. Maurice Tancelin, *Des Obligations: Actes et Responsabilités*, (Montréal: Wilson & Lafleur Ltée, 1997) at 409. In the present part of our study, France (civil law) and England (common law) will be the European countries we will mostly refer to. Very frequently, however, the laws of other European jurisdictions will come into play to support our analysis.

⁵⁰³ (1985), 2 *Ll. Rep.* 243 (Q. B. D.)(Comm. C.).

⁵⁰⁴ In *Silber (J.J.) Ltd v. Islander Trucking Ltd* (1985), 2 *Ll. Rep.* 243 (Q. B. D.)(Comm. C.) the English court rejected the French standard of ‘force majeure’ and the common law requirement of ‘due diligence’ on the grounds that the *COTIF/CIM* and *CMR* do not use national law concepts since both conventions draftsmen wanted to avoid them. Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) *L. M. C. L. Q.* 36 at 62-63.

⁵⁰⁵ *Silber (J.J.) Ltd v. Islander Trucking Ltd* (1985), 2 *Ll. Rep.* 243 at 247. German courts have also made similar statements. Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) *L. M. C. L. Q.* 36 at 63.

CMR is greater than its English and Austrian counterparts. Lack of uniform judicial interpretation ensues.

The *CMR* has been described in France as a product of Switzerland (the convention was drafted in Geneva) which, like a celebrated Swiss cheese, is full of holes⁵⁰⁶. This is not only apparent from divergent case law holdings on the degree of carrier liability but also from *CMR* article 23.4 which provides that the responsible carrier must pay, in addition to carriage charges, ‘*other charges incurred in respect of the carriage of the goods*’⁵⁰⁷. There have been reported to be 12 judicial interpretations of this provision at the European level⁵⁰⁸. This has made authors note: “he who knows *CMR* of only one country does not know *CMR*”⁵⁰⁹.

B. International Ocean Carriage in EU Member States (Visby Rules): Most EU Member-States have adopted the *Visby Rules*⁵¹⁰. Although it is certain that these rules can apply to the sea leg of multimodal transport, there is no provision that governs the interaction between sea carriage and other modes as is the case of the *CMR* art. 2⁵¹¹. The *Visby Rules* define a formalist regime coupled with several vague provisions.

⁵⁰⁶ Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) L. M. C. L. Q. 36 at 64. Vague provisions also exist in *COTIF/CIM* and the *Visby Rules* but the said denomination was used for the *CMR*.

⁵⁰⁷ *COTIF/CIM* article 40.3 contains an analogous, although more precise, provision: “The railway shall in addition refund carriage charges, customs duties and other amounts incurred in connection with carriage of the lost goods”. See also our table at *Annex No. III, Table No. 4* at clxxxix. Selected examples are herein taken to demonstrate both conventions vague provisions.

⁵⁰⁸ In the English case *James Buchanan & Co. v. Babco Forwarding & Shipping (U.K.)* (1978), A. C. 141 (H. L.) the court held that there is no gap in the legislation and that a duty paid by the plaintiff-shipper was part of ‘*other charges incurred in respect of the carriage of the goods*’. Authors argue that it is typical of English courts to be reluctant to detect gaps in the legislation because they do not want to enter into the alien waters of teleological interpretations that their European neighbors invariably use in case of gaps. Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) L. M. C. L. Q. 36 at 64. Instead, they complement the conventions provisions by national legislation. In this respect, English courts have earned the more demeaning title of ‘emus’ because ‘there is none so blind as will not see’. On the contrary, Austrian and certain German courts have been described as ‘eagles’ in spotting cracks and crevices in the domain of the *CMR*. *Ibid.*

⁵⁰⁹ R. Wijffels, “Legal Interpretations of the *CMR*: the Continental Viewpoint” (1976) 11 Eur. Transp. L. 461 at 494.

⁵¹⁰ For the *Visby Rules* see *supra* note 44. The *Visby Rules* have, so far, been ratified by eleven European Member-States: Belgium, Denmark, Finland, France, Greece, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom. Germany applies a national law based on the *Visby Rules* even though it has not ratified them. However, Ireland and Portugal apply the 1924 Hague Rules whereas Austria has ratified the Hamburg Rules. *International Conventions* (2003) online: Infomare Homepage <<http://www.infomare.it/dbase/convuk.htm>> (last modified: July 17, 2003).

⁵¹¹ *Supra* at 100-101.

a) *Formalist Regime*: article 3.8 of the *Visby Rules* declares ‘null and void’ any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability. This provision was intended to eliminate former sea carrier practices to contractually limit or exclude their liability and is narrowly construed to permit contractual increase, but not limitation of carrier liability. Despite this fact, the *Visby Rules* are said to favour carriers, mainly because of the ‘litany’ of liability exceptions and relatively low liability limitation amounts they provide⁵¹².

b) *Vague Provisions*: Contrary to the *CMR* and the *COTIF/CIM*, the *Visby Rules* apply, overall, uniformly in the countries that have given them effect, even though their provisions are not immune to court interpretations⁵¹³. The *Visby Rules* maintain the principle of presumption of liability (*presomption de responsabilité*) to hold the carrier liable for LDD (loss-damage-delay) to the goods while in its charge⁵¹⁴. National courts have transposed convention wording of specific liability exceptions accompanying this principle into national language and concepts. The prominent *Visby* liability defence ‘perils of the sea’ provides an illustrative example.

Contrary to the U.S. courts that regard ‘perils of the sea’ as events of *extraordinary nature* that cannot be *foreseen or guarded against*⁵¹⁵, the Anglo-

⁵¹² Saul Sorkin, “Changing Concepts of Liability” (1982) 17 FORUM 710 at 714. While *COTIF/CIM* limits rail carrier liability to 17 SDR per kilo of gross weight, *CMR* maintains half this limitation amount (8,33 SDR) to benefit motor carriers and the *Visby Rules* provide for a 2 SDR limitation amount per kilo of gross weight or 666.67 SDR per package. With the exception of *COTIF/CIM*, therefore, the amounts of carrier liability are very low with ocean carriers benefiting from the lowest limitation. The shipper protective rail carriage limitation amount is said to pertain to the fact that European railways are run by governments, less worried about economic profit than private businesses. Rolf Herber, “The European Legal Experience with Multimodalism” (1989) 64 Tul. L. Rev. 611 at 621.

⁵¹³ William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 620. We should note, in this regard, that the *Visby Rules* were intended to overcome interpretative differences in the Hague Rules by several specific amendments. Jurgen Basedow, “Common Carriers Continuity and Disintegration in U.S. Transportation Law” (1983) 13 Transp. L. J. 1 at 34.

⁵¹⁴ Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) L. M. C. L. Q. 36 at 47. Also Marie Tilche, “Conventions Terrestres: Comparaison *CMR/CIM*” (1995) 2617 Bull. Transp. Log. 421 at 421; (accompanying table at 423). For more details on this principle and our perception of it see *infra* at Part II, Chapter II, Section II, Par. 1. *Annex No. III, Table No. 4* at clxxxvi for a comparative table made by the author of *CMR*, *COTIF/CIM*, and *Visby Rules* liability exceptions.

⁵¹⁵ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 438 and *infra* at 197s.

Australian⁵¹⁶ approach is that a sea peril may not be of *extraordinary nature*⁵¹⁷. Moreover, English courts have generally been reluctant to tie this defense to the *foreseeability* of the peril⁵¹⁸ so that a carrier who is not negligent in the precautions it takes to meet a foreseeable peril-cause of damage, will probably be exculpated⁵¹⁹.

French courts have traditionally been very strict on the carrier in maintaining that ‘perils of the sea’ cannot benefit him except if they constitute ‘force majeure’ incidents, that is to say, external events (to the carrier), unforeseeable and insurmountable⁵²⁰, though not of extraordinary nature (as in the U.S.)⁵²¹.

⁵¹⁶ Australia gave effect to the *Visby Rules* in 1991 by repealing the *Sea Carriage of Goods Act of 1924* and replacing it by the *Sea Carriage of Goods Act of 1991* ("COGSA"). This Act contained two Schedules: Schedule 1 contained the *Hague-Visby Rules* and Schedule 2 the *Hamburg Rules* to replace the *Visby Rules*, in late 1994, unless steps were taken to delay their entry into force. In 1994, the entry into force of the *Hamburg Rules* was delayed for three years. On July 1, 1998, the *Carriage of Goods by Sea Regulations 1998* (the "Regulations") came into force, amending the 1991 *Carriage of Goods by Sea Act* and the *Visby Rules*. The new rules constitute a hybrid version of the *Hague, Visby* and the *Hamburg Rules*.

⁵¹⁷ *Great China Metal Industries C. Ltd. v. Malaysian International Shipping Corporation Berhad* 1998 (1999), 1 Ll. Rep. 512 at 519 (H. C. Australia) on Anglo-Australian case law. English courts follow the statutory definition of ‘perils of the sea’: ‘fortuitous accidents or casualties of the seas’. *The ‘Marel’* (1992), 1 Lloyd’s Rep. 402 (Q. B. D.) (Comm Ct). For a comparison of the U.S. and English case law on interesting issues of proof of the ‘perils of the sea’ see Thomas J. Schoenbaum, “Warranties in the Law of Marine Insurance” (1999) 23 Tul. L. J. 267 at 306.

⁵¹⁸ Harry Apostolakopoulos, *Perils of the Sea* (1999) online: South Texas Law Review Homepage <http://www.stcl.edu/lawrev/Articles/Peril_of_the_Sea/peril_of_the_sea.html> (last modified: Jan. 25, 2000) referring to English authority cases on the issue like *The Xantho* (1887), 12 App. Cas. 503 and the recent Australian case *Great China Metal Industries C. Ltd. v. Malaysian International Shipping Corporation Berhad* 1998 (1999), 1 Ll. Rep. 512 at 529 (H. C. of Australia). See also John Levingston, *Peril of the Sea* (1999) online: International Commercial Law Homepage <<http://www.anu.edu.au/law/pub/icl/transcon/PeriloftheSea.htm>> (last visited: March 31, 2001). However, some English courts have held that foreseeability of the weather is a factor to be considered when deciding a peril of the sea case. See i.e. *W. Angliss & Co. v. P.O. Steam Navigation Co.* (1927), 28 Ll. L. Rep. 202 at 204 and few other cases in the same sense as reported by the said article.

⁵¹⁹ *Ibid.* In *Great China Metal Industries C. Ltd. v. Malaysian International Shipping Corporation Berhad* 1998 (1999), 1 Ll. Rep. 512 at 529 (H. C. Austr.) the court refers to the *Titanic* -when commenting on the Anglo-Australian view of the ‘perils of the sea-’, which was sunk by a sea peril even though the presence of icebergs in the relevant latitude was reasonably foreseeable and the collision could have been avoided by reducing the speed of the ship. *Ibid.* See also *infra* at 198s.

⁵²⁰ «...cause étrangère: ce fait doit être extérieur à l’auteur allégué du dommage et non à la chose dont il est censé avoir la garde». Maurice Tancelin, *Des Obligations: Actes et Responsabilités*, (Montréal: Wilson & Lafleur Ltée, 1997) at 408s. Also see *infra* at Part II, Chapter I, Section I, Par. 2(B)(b). On the traditional view of French courts see Paul Chauveau, «Rétrospective d’actualités» (1977) 29 Droit. Marit. Fr. 3 at 9. See also Pierre Bonassies, “Droit Positif Français en 1986” Droit Marit. Fr. (1987) at note 51 and *C. Bordeaux*, Oct. 9 1985, *Sté Rhein Mass v. Cie Camat*, 2201 Bull. Transp. Log. 410 (1986) at 410.

⁵²¹ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 439s.

Unforeseeability, therefore, has traditionally been taken into account in concluding on the presence of ‘force majeure’⁵²².

However, French case law on this point may be changing influencing, in this way, solutions that may be adopted at the international or at the domestic level. The traditional stance of French courts insisting on the unforeseeability element of the sea peril is less obvious today since, some French courts have argued that a ‘peril of the sea’ does not need to be unforeseeable (English case law) and insurmountable as long as it is extra-ordinary in nature (U.S. case law) and there is absence of fault of the carrier (U.S./England)⁵²³. According to this view, foreseeable events may not render the carrier liable except if there is another fault on his part (Anglo-Australian view). In other words, there are French cases that seem to approximate common law case law by borrowing elements from English and U.S. cases being, at the same time, more lenient on the carrier than before⁵²⁴.

To the more apparent and divergent court interpretations of ‘perils of the sea’, we can add the more subtle case law distinctions of the *Visby Rules* art. 4.5(e), *CMR* art. 29 and *COTIF/CIM* art. 44⁵²⁵ conditioning carrier loss of the limitation of liability benefit. The *Visby Rules* and the *COTIF/CIM* waive carrier right to limitative conditions when he acts ‘with *intent* to cause such loss or damage, or *recklessly and with knowledge* that such loss or damage will probably result’⁵²⁶. In French civil law tradition, this expression generally translates into ‘dol’ and an ‘inexcusable fault’

⁵²² Maurice Tancelin, *Des Obligations: Actes et Responsabilités*, (Montréal: Wilson & Lafleur Ltee, 1997) at 408.

⁵²³ The new definition of ‘perils of the sea’ is said to constitute a variation of the ‘force majeure’ concept: *Cour d’ Appel*, Aix, May 9 1973, *Koudekerk* 25 *Droit Marit.* Fr. 654 (1973); *Cour d’ Appel*, Aix, Feb. 27 1985, *Liberty* 39 *Droit Marit.* Fr. 147 (1987); *Cour d’ Appel*, Aix, June 11 1974, *Esbern Snare* 27 *Droit Marit.* Fr. 720 (1975); *Cour d’ Appel*, Aix, Feb. 23 1993 *Saint-Louis* 46 *Droit Marit.* Fr. 370 (1994). In the above-mentioned cases unforeseeability is not considered to be a fault. These cases explain that it was not the intention of the drafters of the *Visby Rules* to be so strict on the carrier as to subject liability exceptions to the concept of ‘force majeure’. *Cour d’ Appel*, Paris, Feb. 2 1971, *Armorique* 23 *Droit Marit.* Fr. 222 (1971) on the traditional ‘peril of the sea’ ‘force majeure’ view of French courts.

⁵²⁴ See the interesting opinion of Paul Chauveau, «Rétrospective d’actualités» (1977) 29 *Droit Marit.* Fr. 3 at 9.

⁵²⁵ The revision of the *COTIF/CIM* to conform the loss of the limitation of liability provision with the majority of the international transport conventions came into force on June 1, 1991. After the 1999 *COTIF* revision (*supra* note 488), *COTIF/CIM* art. 44 has become art. 36. *CIM* (1999) online: OTIF Homepage <<http://www.otif.org/f/pdf/ru-cim-1999-f.pdf>> (last visited: Sept. 5, 2001).

respectively⁵²⁷. Common law courts reason on the basis of willful misconduct⁵²⁸. *CMR* art. 29 denies carrier the benefit of statutory limitations in case of 'willful misconduct or default equivalent to willful misconduct'. This expression is less descriptive than *COTIF/CIM* art. 44 and *Visby Rules* art. 4.5(e). Civil law systems are not familiar with the concept of willful misconduct and translate *CMR* expression into 'dol' or 'faute équivalente au dol'⁵²⁹. As we are going to confirm, the discrepancy in the legal terms used and judicial interpretations add to the complexity of the applicable concepts.

The French concept of 'dol' used by courts under the *CMR*, *COTIF/CIM* and the *Visby Rules* derives from the Latin word 'dolus' and implies an act or omission intentionally committed to cause harm⁵³⁰. Germany follows the same principle⁵³¹.

⁵²⁶ The same analytical description is found in the French version of these conventions. *Ibid.*

⁵²⁷ The civil law concept of 'inexcusable fault' summarizes the descriptive *Visby Rules* provision 'recklessly and with knowledge that damage will probably result'. 'Dol' is surely considered as a form of intentional fault within both sets of rules. René Rodière, Emmanuel du Pontavice, *Droit Maritime* 3d ed. (Paris: Editions Dalloz, 1997) at 124 and 359. Switzerland, for instance, explicitly refers to 'dol ou faute lourde' in its domestic federal law implementing *COTIF/CIM* art. 44. *CIM* (2000) online: Confederatio Helvetica Homepage <http://www.admin.ch/ch/f/rs/0_742_403_1/ta44.html#fn1> (last visited: June 16, 2002). In the present part of our study, reference to civil law will mainly involve French law unless otherwise provided.

⁵²⁸ This is certainly the case of common law courts with respect to all these conventions. Saul Sorkin, "Changing Concepts of Liability" (1982) 17 *FORUM* 710 at 714-715 and note 28. The author refers to the *COTIF/CIM*, *CMR* and art. 25 *Warsaw Convention* (as amended by its 1995 Protocol). *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 261 U.N.T.S. 423 [hereinafter *Warsaw Convention*].

⁵²⁹ The French version of the *CMR* can be found in *CMR* (2000) online: Lucien Peczynski Attorney Homepage http://www.peczynski.com/TXT/tp/txt/1956_05_19_cmr.htm (last visited: Jan. 16, 2000).

One could argue that civil law 'dol' translates into common law 'fraud'. However, 'fraud' is considered comprised in the concept of 'dol' which includes both devious intent and the scheme or material means through which that intent is carried out. Saul Litvinoff, "Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion" (1989) 50 *La. L. Rev.* 1 at 50. In effect, in the Anglo-American legal terminology the word "fraud" refers to the devious or malicious intent -which is usually more clearly signified in the expression "fraudulent intent"-, while the word "misrepresentation" is used to allude to the material means through which the "fraud" is implemented. France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) *Loy. L. A. Int'l. L. J.* 813 at 824. Since 'dol' does not amount exactly to common law 'fraud', the concept of willful misconduct is used to describe the former.

⁵³⁰ *Tribunal de Grande Instance*, 1954, *Gallais v. Aero Maritime* 1954 R. F. D. A. 184. As reported by Loryn B. Zerner, "Tseng v. El al Israel Airlines and Article 25 of the Warsaw Convention: A Cloud left Uncharted" (1999) 14 *Am. U. Int'l. L. Rev.* 1245 at note 30. In certain cases, however, French courts have adopted an extensive interpretation of the element of intent denoting intent to commit an act, not necessarily intent to injure. French Supreme Court decisions: *Cour de Cassation*, Cass. civ. 1, Feb. 4, 1969, 1969 D. S. Jur. 601 note J. Mazeaud and *Cour de Cassation*, Cass. civ. 2, Oct. 22, 1975, 1976 D. S. Jur. 151 note J. Mazeaud as reported by Pierre Legrand, "Judicial Revision of Contracts in French Law: a Case Study" (1988) 62 *Tul. L. Rev.* 963 at 1012-1013. See also France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) *Loy. L. A. Int'l. L. J.* 813 at 824 and note 92.

In the Canadian province of Québec that follows civil law tradition, the concept of 'dol' exists and denotes presence of an intentional fault. Case law and doctrine, however, are not clear on whether it is intent to cause

Wanton or willful misconduct, common law terms that substitute for the French term 'dol', is thought to involve either deliberate intention to injure or action in reckless disregard of the consequences⁵³². In other words, the *CMR*, *COTIF/CIM* and the *Visby Rules*, they all operate loss of carrier limitation benefit in common and civil law in case of intentional fault (translated into 'dol' in French).

However, willful misconduct reference to 'reckless acts' places the concept between the concepts of simple negligence and 'dol'⁵³³. It is probably to reconcile this conceptual discrepancy (dol-willful misconduct) that the *COTIF/CIM* and the *Visby Rules* refer to acting '*recklessly and with knowledge* that such loss or damage will probably result' and the expression 'faute equivalente au dol' (default equivalent to willful misconduct) is used by the *CMR*⁵³⁴. The question rises, however, whether the concepts of 'faute equivalente au dol' and '*recklessly and with knowledge* that

the harm or intent to proceed to the act that really counts for intentional fault to exist. *Caisse Populaire Desjardins Belvedere v. Assurance Generale des Caisses Desjardins* (1998), A. Q. no.1476 (C. Sup. Que.), *Chamberland v. Masse* (1999), J. Q. no. 6019 (Que. S. C.) refer to an intent to cause damage. 'Dol' is defined with respect to the concept of intentional fault by Québec courts and denotes a clear intention to harm by act or omission destined to defraud. *Sté de Fiducie de la Banque Hong-Kong v. Dubord Construction Inc.* (1998), A. Q. no.492 (C. Sup. Que.). However, Jean Pineau, Danielle Burman, Serge Gaudet, *Théorie des Obligations* (Montréal: Éditions Thémis 1996) at par. 459 indicates that 'intentional fault 'exists when there is a 'dishonest act'.

⁵³¹ France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) *Loy. L. A. Int'l. L. J.* 813 at 824 and at note 92. Reference is made, by the author, to the German Civil Code. *Ibid.*

⁵³² England: The vast majority of cases examined on this issue conclude in the same way. *The Thomas Cook Group Ltd. and Others v. Air Malta Co. Ltd. (Trading AS Air Malta)* [1997], 2 Ll. Rep. 399 (Q. B. D.) Bin Cheng, "Willful Misconduct from Warsaw to Hague and from Brussels to Paris" (1977) *Annals. Air & Space L.* 55 at 64-65, Craig A. Morgan, "Legitimate Responses to Aerial Intrusion in Time of Peace" (1984) 78 *Am. Soc'y. Int'l. L. Proc.* 15 at 22. U.S.: The elements of "wanton or willful misconduct" are that the defendant consciously or intentionally performs an act or omission ("willful") knowing or, with reckless indifference ("wanton") as to the probable injury. James Fisher, Debra Miller, "Personal Injury Law" (1997) *Ind. Prac., Personal Injury Law & Practice* § 3.68 online: WESTLAW (Tp-all). However, authors note that willful misconduct does not involve *intent to injure but intent to do the act* and under conditions that a reasonable man would know, or have reason to know, that such conduct would, in a high degree of probability, result in substantial harm to another. "Wanton, Willful or Reckless Misconduct" (2001) 57A *Am. Jur. 2d Negligence* § 267 at note 79 (WESTLAW-Tp-all). See also *infra* at Part II, Chapter I, Section II, Par. 1(C), Par. 2(B) and Par. 3(B) for Canada and the U.S. on intentional fault. *Supra* note 530 for the concept of intentional fault in the Province of Québec.

⁵³³ "Wanton, Willful or Reckless Misconduct" (2001) 57A *Am. Jur. 2d Negligence* §267 at note 79 (WESTLAW-Tp-all).

⁵³⁴ Reasoning by analogy to the *Warsaw Convention* art. 25 debate before adoption of this provision containing same conditions on carrier loss of the limitation benefit. Randi Lynn Rubin, "The Warsaw Convention: Capping the Value or Life?" *Tem. Int'l & Comp. L. J.* 189 at 198 and Barbara Buono, "The Recoverability of Punitive Damages under the Warsaw Convention in Cases of Willful Misconduct: is the Sky the Limit?" (1989-1990) 13 *Fordham Int'l L. J.* 570 at note 51. In the English cases *Gefco Ltd. v. Mason* (2000), 2 Ll. L. Rep. 555 (Q. B. D.) and *Thomas Group Ltd v. Air Malta Co.Ltd* (1997), 2 Ll. Rep. 399 (Q. B. D.) the court stated that *CMR* art. 29 is probably derived from the *Warsaw Convention*.

such loss or damage will probably result' (default equivalent to willful misconduct) are given the same meaning by national courts in Europe.

French courts have baptised the *Visby Rules* provision 'recklessly, with knowledge that damage will probably result' (common law willful misconduct) 'faute inexcusable'⁵³⁵. This is a well-known concept in France⁵³⁶. It exists when there is *dolus eventualis*⁵³⁷, that is to say 'conscience (not intent) of the probability of damage and its acceptance without justifiable reason'. By definition, a 'faute inexcusable' is situated in between the civil law concepts of 'dol' and 'faute lourde'⁵³⁸ and operates loss of *Visby Rules* limitation benefit.

⁵³⁵ *Cour de Cassation*, Cass. Com., Jan. 4 2000, "GIE Scadoa et a. v. Sté Navigation et Transports" 2830 Bull. Transp. Log. 32 (2000) for an inexcusable fault within the *Visby Rules*. (air carriage) *Cour de Paris*, Paris, March 22 2000, *SA Cie Helvetia v. Sté Finnair* 2849 Bull. Transp. Log. 410-411 (2000).

⁵³⁶ 'La Loi Badinter' (Badinter Act) on traffic accidents uses victim's 'inexcusable fault' exclusive cause of damage to exonerate the defendant-driver. On July 5, 1985 the French Supreme Court quashed 11 Court of Appeals decisions holding in favor of the defendant driver and defining inexcusable fault as: 'a voluntary fault of exceptional gravity, exposing its author, without valid reason, to danger of which he should have been aware'. *Cour de Cassation*, Cass. civ. July 2, 20, 1987 (11 cases), BULL. CIV. II, No. 160, 161. These decisions stressed the fact that an inexcusable fault should be narrowly construed as the exception to the rule of defendant's liability. Andre Tunc, "'Loi Badinter'-On Traffic Accidents and Beyond" (1991-1992) Tul. Civ. L. Forum 27 at 35-36. See also Laurie Kazan-Allen "Asbestos Compensation in Europe" (2000) 15 NO. 10 Mealey's Litig. Rep.: 38 at 38 on the concept of 'inexcusable fault' as applied to employment contracts in France.

⁵³⁷ Pr. Yves Tassel, "Le Dommage Element de la Faute" (La Responsabilité en Droit Maritime Hellenique et International, Piraeus, Greece, June 6-9, 2001) (2001) Antonios N. Sakkoulas Publishers. See also France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) Loyola L. A. Int' l. L. J. 813 at 824. Along with the element of conscience, authors explain that there should be very serious misconduct of the carrier where the standard of care is defined by regulation or, otherwise, based on the reasonableness standard. *Ibid.*

Québec law puts in practice the 'inexcusable fault' concept on the basis of the *Visby Rules*. French 'faute inexcusable' can be said to correspond to the Québec concept of 'faute intentionnelle' that denotes intent to cause harm but also an 'outrageous misconduct with perfect conscience, or at least extreme probability, of the probable harmful consequences'. See *Chamberland v. Masse* (1999), J. Q. no. 6019 (C. Sup. Que.). and *Caisse Populaire Desjardins Belvedere v. Assurance Generales des Caisses Desjardins Inc.* (1998), A. Q. no.1476 (C. Sup. Que.). In the same sense for Canada: *Ontario Bus Industries Inc. v. Federal Calumet* (1991), A. C. F. No. 535 (F. C. C.) (*Visby Rules*). Air carriage case law seems to use the denomination 'faute inexcusable': *Swiss Bank v. Air Canada, Swissair and Swiss Air Transport Co. Ltd.* (1982), 1 C. F. 756 (F. C. C.) (*Warsaw Convention*).

⁵³⁸ Louis Segur, *La Notion de la Faute Contractuelle en Droit Civil Français* (Bordeaux: 1954) at 149. Common law presents a more practical view of things. For example, when damage to the goods is caused because the driver fell asleep on the wheel in broad daylight, that alone is insufficient to constitute willful misconduct because of the absence of proof of actual awareness by the driver that he needed rest. It would be sufficient, however, to constitute 'faute lourde' (gross negligence). Malcolm Clarke, "The Transport of Goods in Europe: Patterns and Problems of Uniform Law" (1999) L. M. C. L. Q. 36 at 60. We will later examine the concept of *faute lourde*.

Even though *COTIF/CIM* art. 44 uses the same analytical definition of ‘faute inexcusable’ we find in the *Visby Rules*, French case law only interprets it as ‘faute lourde equivalente au dol’ and not as a ‘faute inexcusable’⁵³⁹. In other words, for the same *Visby* and *COTIF/CIM* provision, French courts give different interpretations, namely, ‘faute inexcusable’ for the former act and ‘faute lourde’ for the latter act.

French version of *CMR* art. 29, on the other hand, refers to a ‘faute equivalente au dol’ to disallow carrier the benefit of statutory limitations. In this respect, French, as well as German, Austrian and Greek courts, apply the maxim *culpa lata* (faute lourde) *dolo aequiparatur* (‘faute lourde equivalente to dol’)⁵⁴⁰. Because of court interpretations of *COTIF/CIM* and *CMR* provisions, definition of ‘faute lourde’ becomes of essence. In effect, the more liberal its definition, the less frequently will the carrier be able to benefit from statutory limitations⁵⁴¹.

As in the case of ‘faute inexcusable’, a ‘faute lourde’ (or gross negligence, its common law version)⁵⁴² lacks the element of intent. On the other hand, however, French ‘faute lourde’ does not require consciousness of the eventual damage but, rather, outrageous or highly reckless misconduct that approximates ‘dol’⁵⁴³. The

⁵³⁹ «Transport Ferroviaire et Faute Lourde» (1995) 2596 Bull. Transp. Log. 34. *Cour d' Appel*, Amiens, March 12 1996, *Sté Sernam v. Sté Doneco* 2671 Bull. Transp. Log. 558-559 (1996). *Cour de Paris*, Paris, Oct. 25 2000, *Cie GAN et a. v. Generali Transports* 2881 Bull. Transp. Log. 131 (2001). For the definition of ‘faute lourde’ in France see *infra* note 543. The situation seems to be the same in case of rail transport of passengers. See «10 Questions sur le Retard Ferroviaire» (1997) 2689 Bull. Transp. Log. 38.

⁵⁴⁰ Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) L. M. C. L. Q. 36 at 60. This maxim is not country specific but is commonly used in civil law jurisdictions. This is the case of the Canadian province of Québec where courts frequently refer, in this sense, to French cases or doctrine: *Industries J.S.P. v. Bois Franc Royal* (1988), A. Q. No 1430 (C. A. Que). See Canadian case *Swiss Bank v. Air Canada, Swissair and Swiss Air Transport Co. Ltd.* (1982), 1 C. F. 756 (F. C. C.) and its very enlightening comment on civil and common law concepts on the issue. See also *infra* note 543 and at 237.

⁵⁴¹ Pierre Legrand, “Judicial Revision of Contracts in French Law: a Case Study” (1988) 62 Tul. L. Rev. 963 at 1014.

⁵⁴² William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 126.

⁵⁴³ French case law has defined *faute lourde* as: ‘une negligence d'une extrême gravité, *confinant au dol* et denotant l'inaptitude du transporteur, maître de son action, à l'accomplissement de l'action contractuelle qu'il avait acceptée’. *Cour de Cassation*, Cass. com., Feb. 26 1985, *Sté Soditrans c. Groupe des Assurances Nationales* 2149 Bull. Transp. Log. 270 (1985); see also case law in 2449 Bull. Transp. Log. (1991) 674 at 688; 2507 Bull. Transp. Log. 86 (1993) at 88s (table of risks and French case law after 1985). For the French concept of ‘faute lourde’ see also Louis Segur, *La Notion de la Faute Contractuelle en Droit Civil Francais* (Bordeaux: 1954) at 149. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime et Aérien* (Montréal: Les Editions Thémis 1986 at 319). The French definition of ‘faute lourde’ should be opposed to the new definition of ‘faute lourde’ adopted by the Code Civil of Québec that does not refer any more to ‘dol’ but to outrageous misconduct or high degree of negligence. See *Cie de Volailles Maxi Ltee v. Empire Cold Storage Co.* (1995),

apparently clear theoretical definition of ‘faute lourde’ and ‘faute inexcusable’ poses problems in practice.

It is not only that French cases reason on a ‘faute lourde equivalente au dol’, - within the *COTIF/CIM*-, and ‘faute inexcusable’, -within the Visby Rules-, to operate loss of carrier statutory limitations even though both acts use the same analytical description of carrier fault on this point. It is also that in describing *CMR* ‘faute equivalente au dol’ (faute lourde), French cases refer to carrier *consciousness* of damage or carrier *deliberate* acts while *conscious* of probable risks, and occasionally use the term ‘*inexcusable negligence*’⁵⁴⁴. These definitions approximate the ‘faute lourde’ concept to the concept of ‘faute inexcusable’. We should also note that, contrary to what *CMR* and *COTIF/CIM* French case law seems to indicate, there is a tendency in France to confine *faute lourde* within well-defined limits⁵⁴⁵. It ensues that, even though *COTIF/CIM* and the *Visby Rules* describe an inexcusable fault, French courts reason on the basis of a ‘faute lourde’ within the *COTIF/CIM* matching, in theory, though not always in case law, *CMR* prescriptions.

Overall, the concepts used in the different acts are similar but not identical. A ‘faute inexcusable’ (willful misconduct) is considered to be an extreme form of, or an aggravated ‘faute lourde’ (gross negligence)⁵⁴⁶ where the element of intent is

A. Q. no. 731 (C. A. Que.) defining ‘faute lourde’ as ‘une *faute* particulièrement *grossière, inexcusable* et qui dénote un complet mépris des intérêts d’autrui’. See also *supra* note 540 and *infra* at 235.

⁵⁴⁴ In *Cour de Cassation*, Cass. Com., March 28 2000, *Cie Réunion Européenne et a. v. Sté Danzas et a.* 2845 Bull. Transp. Log. 332 (2000) the French Supreme Court decided that the carrier ‘could not have ignored the risk of damage’ (consciousness). In the same sense, see *TC Paris*, Paris, Sept. 18 2000, *Axa Global Risks v. Sté Le Transalpin* 2881 Bull. Transp. Log. 131 (2001). In *Cour de Paris*, Paris, Sept. 5 2000, *Cie GAN et a. v. Generali Transports* 2871 Bull. Transp. Log. 837 (2000), the trial court in Paris defined ‘faute lourde’ as a ‘fault referring to inexcusable negligence’; in *Tribunal de Grande Instance*, Nancy, May 5 1999, *Cie Helvetia v. Cilomate Transports et a.* (1999) 2831 Bull. Transp. Log. 50 (2000) the trial court of Nancy referred to carrier ‘*deliberate* (thus, conscious if not intentional) acts’.

⁵⁴⁵ Reference made to French law by the Canadian case *Swiss Bank Corp. v. Air Canada, Swiss Air & Swiss Air Transport* (1982), 1 C. F. 756 (F. C. C.).

⁵⁴⁶ Matthew R. Pickelman, “Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time?” (1998) 64 J. Air L. & Com. 273 at note 39. The same conclusion with respect to willful misconduct and gross negligence is reached by English courts on the basis of *CMR* provisions: *Graham v. Belfast and Northern Counties Railway Co.* (1901) 2 I. R. 13 as reported by *Laceys Footwear Ltd. v. Bowler Int’l Freight Ltd.* (1997), 2 Ll. Rep. 369 (C. A.).

slightly more increased than in case of gross negligence⁵⁴⁷. Still, the two concepts do exist independently.

French courts strict stance towards the carrier in denying him *CMR* or *COTIF/CIM* statutory limitations by mere proof of ‘faute lourde’ is followed by other European Member-States⁵⁴⁸ and leads to lack of uniformity. In effect, Anglo-American case law may be familiar with the concept of ‘faute lourde’ (gross negligence) and define it in a similar way to civil law courts⁵⁴⁹. However, common law jurisdictions do not use the concept of gross negligence within the context of mentioned acts and are not, for the rest, familiar with the maxim *culpa lata dolo aequiparatur* equating gross negligence to ‘dol’. Contrary to French and other civil law European countries complicated case law principles on the issue, common law applies the same substantive conditions to carrier loss of liability limitations under the *COTIF/CIM*, *CMR* and the *Visby Rules*: willful misconduct.

Informal (judicial) harmonization of conditions for carrier loss of statutory limitations is imperative in order to provide security to both carriers and shippers as

⁵⁴⁷ Jeanine Feriancek, “Liability for Negligence?” (1996) 11-SUM Nat. Resources & Env’t 58 at 60. Also, reference made to French law by the Canadian case *Swiss Bank Corp. v. Air Canada, Swiss Air & Swiss Air Transport* (1982), 1 C. F. 756 (F. C. C.) on this issue.

⁵⁴⁸ Greek courts i.e. apply the maxim ‘culpa lata dolo aequiparatur’ and have, therefore, decided that *CMR* art. 29 refers to ‘faute lourde’, conduct less serious than willful misconduct. *Supreme Court of Greece*, March 12, 1998, *Ethniki Ltd Liability Insurance Co. v. Proodos Ltd.* (1998) 34(1) Eur. Transp. L 100 (1999). Since 1993, German courts follow the same principle on the basis of the *CMR*. Alex Mittelstaedt, “*CMR-Faute Lourde du Transporteur Allemand*” (1997) 2706 Bull. Transp. Log. 360. However, Belgian courts have eliminated defaults ‘equivalentes au dol’ and consider only ‘dol’ as valid grounds for denying carrier statutory limitation of liability provisions. *Hof Van Cassatie Van Belgie (Belgium Supreme Court)*, Mars 30, 2000, *Cigna Insurance Co. of Europe v. Transport Nijs bvba* 35(3) Eur. Transp. L. 392 (2000). *Hof Van Beroep Te Gent (Gent Court of Appeal)*, March 3, 1992, *N.V. Transport Maenhout v. Io Raemaekers Chr. 2o N.V. Belgalco*. 27 Eur. Transp. L. 847 (1992). Malcolm Clarke, “The Transport of Goods in Europe: Patterns and Problems of Uniform Law” (1999) L. M. C. L. Q. 36 at 59.

⁵⁴⁹ In the U.S., gross negligence has been defined as: ‘the entire want of care or extreme degree of risk amounting to a *conscious indifference* to the right or welfare of a person’. *Transportation Insurance Co. v. Moriel*, 879 S. W. 2d 10 (Tex. S. C. 1994). Although different state courts define gross negligence differently, this Texan case is very frequently cited. On the issue of contractual exculpatory clauses, gross negligence has been defined as ‘reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing’. *Red Sea Tankers Ltd. v. Papachristidis* (1997), 2 Ll. Rep. 547 (Q. B. D.). Note that in this definition gross negligence comprises the element of intentional acts (not damage). On this point, see also the U. S. case *Stump v. Commercial Union*, 601 N. E. 2d 327 (Indiana S. C. 1992).

to the applicable rules in this area⁵⁵⁰. This is not only necessary between civil and common-law jurisdictions but is also true for courts within one legal system. Although it is certain that even if uniformity is attained judges will always enjoy a non-negligible margin of freedom in defining the conditions determinative of the presence or absence of carrier liability, these conditions will, at least, converge. We believe that the existing divergence in case law is not irremediable since all jurisdictions are familiar with the concepts used by mentioned acts and apply them even though they interpret them differently. What is needed is guidance of the path European courts should follow towards uniformity of multimodal carrier liability conditions. This guidance cannot derive from within a country or country's traditions or historical antecedents but, rather, from supra-national regulatory or judicial entities.

Conclusion

To make a synopsis of the very essence of the diverse topics we have treated in the present chapter, we conclude that: first, uniformity of multimodal carrier liability rules at the international and regional level is needed in order to remedy the weaknesses of the multimodal carrier liability regime. Various conventions and court interpretations create serious gaps in the applicable 'network' system of liability, something that furthers the already existing uncertainty in the relation between shippers and carriers. Second, the 1980 *Multimodal Convention* teaches us that approximation, rather than unification of multimodal rules, has to be taken into account in considering uniformity. This process has to take place at a slow pace and cautiously balance shipper and carrier interests. In this respect, the 1992 MM can provide useful lessons in contemplating uniformity of multimodal carrier liability without distancing ourselves from currently applicable unimodal rules.

⁵⁵⁰ E. C. (Eur. Com.) Asariotis, Bull, Clarke, Herber, Kiantou-Pampouki, Morün-Bovio, Ramberg, de Wit, Zunarelli, "*Intermodal Transportation and Carrier Liability*", final report, June 1999 (European Commission financed study; EC Contract NR. EI-B97-B27040-SIN6954-SUB)).

Chapter II: U.S. and Canadian Transport Deregulation and its Effect on Multimodal Carrier Liability

We are living in an era where promotion of international competition and facilitation of trade constitute the cornerstones of governmental policies throughout the industrialized world. Increase of trade implies development of multimodal transport, a common objective of European, U.S. and Canadian authorities⁵⁵¹.

However, European countries insist on political considerations in promoting multimodalism whereas the North-American transport market is more motivated by economic considerations⁵⁵². In effect, in Canada and the U.S., it is shippers that determine transport conditions and the transport market is forced to follow the demand (consumer market). On the contrary, European transport policy may oppose shipper demand to favor long standing economic convictions⁵⁵³.

Despite this fact, shippers, carriers and insurers in both North America and Europe are all concerned with the cost of transportation services⁵⁵⁴. In this respect, U.S. and Canadian transport 'deregulation'⁵⁵⁵ have enhanced competition bringing

⁵⁵¹ It is imperative that the evolution of intermodal transport in North America positions the economy of the continent so that it is capable of meeting the increasing competition from Europe and Asia. Although efforts have been made in this regard by governments and private initiatives, the increase in volume of freight traffic may well overtake the scale of past accomplishments. Joseph Szyliowicz, Andrew R. Goetz, Paul S. Dempsey, "The Vision, the Trends and the Issues" (1998) *Transp. L. J.* 255 at 257. For Europe see *supra* at 85. See also U.S. D. O. T. Report, *Toward Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U.S. DOT Homepage (last visited: July 11, 2001).

⁵⁵² Dominique Malecot, "Transport Combiné: Les Vertus du Dialogue" (1997) 2700 *Bull. Transp. Log.* 246 at 258". The author notes that, compared with the U.S., Europe is a 'Boeing 747' facing 'Concord'. *Ibid.*

⁵⁵³ *Ibid.* See *infra* at 149s and *supra* at 94 on the European prohibition of agreements between conference members and inland carriers, which are allowed in the U.S. and subject to judicial scrutiny in Canada.

⁵⁵⁴ Mary R. Brooks, "The Ocean Container Carrier Market: Is it Segmentable?" (Center for International Business Studies Dalhousie University, 1993).

⁵⁵⁵ Although not found in all dictionaries, the term 'deregulation' can be defined as 'the act or process of removing restrictions and regulations'. *Webster's Ninth New Collegiate Dictionary*, (Thos. Allen & Son Limited, 1987) s.v. "Deregulation". Some authors suggest that this definition is not very accurate because deregulation does not imply removal of regulation but merely a change in style: deregulation, they argue, is not anarchy it is the best form of regulation. Canada, Canadian Transport Commission, T.H.N. Welburn, "Deregulation Good or Bad" (Ottawa: Canadian Transport Commission Press, 1980) Volume 4 at 17. See also Mariel Zuniga and Martha Trejo, "Desregulacion no es Anarquia" *Reforma* (1997) online: WESTLAW (Int'l Mat.-Mex.). Deregulation can be opposed to regulation which aims to control prices and entry into markets. J. Luis Guasch, Robert W. Hahn, "The Costs and Benefits of Deregulation: Implications for Developing Countries" *World Bank Res. Observer* (1999) online: WESTLAW (Newsletters).

about lower rates and, consequently, lower transportation costs. Deregulation has also largely contributed to increase door-to-door service in the transport of freight in the two countries, with cargo and liability insurers adapting to the new status quo⁵⁵⁶. The beneficial effects of the new trend have made deregulation very popular in almost all parts of the world⁵⁵⁷.

Our deregulation analysis will focus on U.S. and Canadian modal deregulation, specifically land (motor, rail) (**Section I**) and ocean (**Section II**) deregulation and its effects on carrier liability⁵⁵⁸.

Despite our limited focus to U.S. and Canadian ocean and land transport deregulation, there are several lessons to be learned from U.S. air cargo transport deregulation (1978) that preceded its land and ocean counterparts in the U.S. and Canada. As predicted by its proponents, the initial years of air carriage deregulation brought an influx of new carriers driving prices down and forcing older established carriers to match the lower rates of new carriers⁵⁵⁹. Several air carriers were forced out of business and mergers were indispensable to strengthen the position of others in the competitive market⁵⁶⁰. The recent trend towards concentration of major air carriers at selected U.S. airports has resulted in an airline exercising market power, limiting competition, imposing conditions of carriage such as fares and reducing the level of service⁵⁶¹.

Air transport deregulation has led to the conclusion that, although indispensable, transport ‘laissez-faire’ policies cannot be absolute⁵⁶². Some aspects

⁵⁵⁶ “Mergers Yield Improved Service” *World Trade* (2000) online : WESTLAW (Newsletters).

⁵⁵⁷ This is true for the NAFTA and the European countries. It is also true for Asian countries. “Malaysia Calls for Rules Change to Ease Cross Border Trade” *Asian Pulse* (1999) online: WESTLAW (Newsletters).

⁵⁵⁸ Mention of deregulation effects on the ‘door-to-door’ transport and specific regulation or case law applicable, in this respect, will always be made within each mode of transport.

⁵⁵⁹ Christopher Clott, Gary S. Wilson, “Ocean Shipping Deregulation and Maritime Ports” (1999) 26 *Transp. L. J.* 205 at 208.

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid* at 207. On relatively recent air freight high rates see Tom Stundza, “Surcharges, Surcharges” *Purchasing* (2001) online: WESTLAW (Newsletters).

⁵⁶² Federico Videla Escalada & Hector A. Perucchi, “Les Problèmes Juridiques et Administratifs de la Déréglementation du Transport Aérien” (1994) 19 *Ann. Air & Space. L.* 633 at 647.

of transport (such as security, technical standards or carriers large-scale vertical integration) have to be regulated to permit reliable transport services and extended, healthy competition among carriers⁵⁶³. Transport competition in air carriage has to be governed by reasonable tariffs, prohibition of abusive agreements between air companies and prohibition of monopolies⁵⁶⁴.

Section I: U.S. and Canadian Land Transport Deregulation and its Effect on Carrier Liability

Today, 80 to 90% of trade between the U.S. and Canada takes place by rail and truck transportation. Trucking, however, forms the basic form of freight transportation among the NAFTA parties⁵⁶⁵. Because of the importance of land carriage of goods in the U.S. and Canada we will now concentrate on the U.S. land transport deregulation and its effects on carrier liability (**Par. 1**) before examining its Canadian counterpart (**Par. 2**).

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.* The definition of the term ‘tariffs’ will prove useful to the present study: tariffs are the rules and rates pursuant to which a carrier is engaged to carry freight. They classify cargo according to commodity and establish rates for freight charges (tariff-rates) for those commodities according to distances, weight, size and other factors. Almost every form of BOL ‘incorporates by reference’ applicable tariffs. Rates can be tariff or non-tariff, the latter being enforceable in case tariffs do not exist, case that constitutes the exception to the rule. John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 38 and 202.

⁵⁶⁵ Kenneth D. Boyer, “American Trucking, NAFTA and the Cost of Distance” (1997) 53 *Ann. Am. Acad. Pol. & Soc. Sci.* 55 at 55-56. A comprehensive range of goods are shipped by road (refrigerated cargo, small, less-than-truck-load shipments of general merchandise), with only large quantities of bulk commodities mainly reserved to rail. Canadian Transportation Law Reporter, *Canada-U.S.-Mexico* (Toronto: CCH Canadian Ltd. 1997) at 100-405. U.S., USDA, *Rural Transportation: Services and Deregulation* (2003) online: United States Department of Agriculture <www.ers.usda.gov/Briefing/Transport/Transdereg.htm> (last modified: May 27, 2003). Every year, roughly ten million trucks cross the United States-Canadian border carrying about 70 percent of the total value of all U.S.-Canada trade in goods. U.S. Embassy in Canada, Economic Section, *Economic Trends and Outlook* (1999) online: Transport Homepage <<http://www.tradeport.org/ts/countries/canada/trends.html>> (last visited: May 21, 2001). From 1992 to 1999, exports of goods by road from Canada to the U.S. has increased from 57.9 to 62.7 billion dollars whereas imports of goods by truck has fallen from 80.8 to 80.0 billions dollars. Rail corresponding numbers have fallen. Canada, Department of Transportation, *Transportation in Canada 1999* (Annual Report) (Ottawa: Transport Canada, 1999). Within the NAFTA region, truck traffic has increased approximately 10% per year since 1991 and rail service has expanded at almost twice that rate. Susan L Bradbury, “Planning Transportation Corridors in post-NAFTA North America” (2002) 4/1/02 *J. Am. Plan. A.* 137 (WESTLAW-Newsletters).

Par. 1. U.S.: In the U.S., motor carrier deregulation began with the 1980 *MCA*⁵⁶⁶ and rail carrier deregulation commenced with the 1980 *Staggers Act*⁵⁶⁷. Unlike trucking, rail deregulation took place not so much to encourage more competition, as to reduce governmental expenses given the former dependence of rail transport on the public sector⁵⁶⁸. For the rest, U.S. rail and motor deregulation have had, with some variances, similar general effects.

We will, therefore, examine the general effects of U.S. motor and rail transport deregulation (A) before focusing on land carrier liability following deregulation (B) and the ‘fair opportunity’ doctrine (C).

A. General Effects of U.S. Motor and Rail Transport Deregulation: a) The rules: The 1980 *MCA* did not abolish the publication requirement of motor carrier tariffs with the Interstate Commerce Commission (ICC now STB)⁵⁶⁹ but dispensed with regulatory control of motor carrier applicable tariffs as to the reasonableness of rates⁵⁷⁰. The U.S. 1980 *Staggers Act* had the same effect⁵⁷¹. Later acts also abolished

⁵⁶⁶ Transport deregulation in the U.S. began in 1970 with rail passenger services and airlines. Motor transport deregulation followed in 1980 with the adoption of the 1980 *Motor Carrier Deregulation Act*, Pub. L. No. 96-296, 94 Stat. 793 (1980) (amending various portions of the *Interstate Commerce Act*) [hereinafter *MCA*]. Its amendments, the 1994 *Trucking Industry Regulatory Reform Act* Pub. L. No. 96-296, 108 Stat. 803 (1994) (amending various portions of the *Interstate Commerce Act*) [hereinafter *TIRRA*] and the *Interstate Commerce Commission Termination Act of 1995*, Pub. L. No. 96-296, 94 Stat. 793 (1995) [hereinafter *ICCTA*], followed.

⁵⁶⁷ Pub. L. No. 96-448, 94 Stat. 1895 (1980) [hereinafter *Staggers Act*] (amending various portions of the *Interstate Commerce Act*). This act was later amended by the *Interstate Commerce Commission Termination Act of 1995*, Pub. L. No. 96-296, 94 Stat. 793 (1995) [hereinafter *ICCTA*] (amending various portions of the *Interstate Commerce Act*), also applicable to motor transport.

⁵⁶⁸ Christopher Clott, Gary S. Wilson, “Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation” (1999) 26 *Transp. L. J.* 205 at 208. To this, we should add economic considerations such as governments need to resolve chronic cash shortages, inefficient operations and substandard service, and aging equipment and infrastructure.

⁵⁶⁹ The ICC was created by the *Interstate Commerce Act* (*ICA*) to implement its provisions. The 1887 *ICA* codified common law principles applicable to land transport. The *Interstate Commerce Commission Termination Act of 1995* (*ICCTA*) abolished the ICC and replaced it by the Surface Transportation Board (STB) that came into being in 1996. The Board’s primary goal is to facilitate commerce by providing an effective forum for dispute resolution and facilitation of appropriate business transactions. *Contracting with the United States Department of Transportation* (2003) online: Surface Transportation Board Homepage <<http://osdbuweb.dot.gov/MP/contract13.htm>> (last visited: April 21, 2003).

⁵⁷⁰ Christopher P. Chilstrom, “The Negotiated Rates Doctrine” (1990) 16 *Wm. Mitchell. L. Rev.* 743 at 768.

⁵⁷¹ U.S., D. O. T. *Cargo Liability Study*, online: U.S. DOT Homepage <<http://ostpxweb.dot.gov>> (last visited: January 2000).

land carrier publication requirement of applicable rates⁵⁷². Absence of carrier obligation to inform their customers is said to be one of the most onerous results of deregulation⁵⁷³.

Still, today, U.S. motor and railway rates must be reasonable but proof of lack of reasonableness, burdening the shipper, is a hard one to make⁵⁷⁴. Prior to these acts, land carriers were obliged to file their tariffs with the ICC, which had the authority to examine their reasonableness⁵⁷⁵. The filing requirement facilitated shippers in anticipating applicable rates whereas regulatory control guaranteed stability of rates.

Although absence of governmental control over U.S. land carrier rates following deregulation may fuel ardent discussions, it is of little practical value to those involved in intermodal carriage because inland portions of most intermodal movements have long been exempted from governmental (ICC today STB) regulation (filing of rates or governmental control)⁵⁷⁶. As such, they remain purely contractual and are not, therefore, affected by (de) regulatory changes⁵⁷⁷.

⁵⁷² The 1995 *ICCTA* (*supra* note 569) also abolished motor and rail tariff filing requirement. U.S. D. O. T. *Cargo Liability Study*, online: U.S., DOT Homepage <<http://ostpxweb.dot.gov>> (last visited: January 2000) and Russell G. Donaldson, "Notice Requirements" (1979) (current through 2000) 45 A. L. R. Fed. 12 (WESTLAW-Newsletters).

⁵⁷³ William Augello, *Logistics Issues Your Providers Usually Don't Talk About* (1999) online: Supply Chain & Logistics Journal Homepage <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000).

⁵⁷⁴ Rail: 49 U.S.C. 10701(a) (*Staggers Act*). Under this act, a shipper may file a complaint with the Surface Transportation Board (STB) but it must prove unreasonableness of rates on the basis of "market dominance over the transportation to which the rate applies". This is a difficult proof to make because it requires proof of no effective rail, truck or barge alternative, known as intermodal competition. Also, the railroad may counter that there is product or geographic competition. Finally, this is an expensive and time consuming process reserved to very sophisticated, 'committed' shippers. Frank Wilner, "A Slight Setback" *Traffic World* (2001) online: WESTLAW (Newsletters). Jack G. Knebel, Denise Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 548. *Staggers Rail Act (Rate Reasonableness)* online: C.U.R.E. Homepage <<http://www.railcure.org/stag7.htm>> (last visited: Nov. 2000). Motor: 49 U.S.C.A. § 14706.c.(1)(A). Reasonableness of rates is not statutorily defined so that courts occupy the field. Stephen Wood, "Multimodal Transportation: an American Perspective on Bill of Lading Issues and Carrier Liability" (1998) 46 Am. J. Comp. L. 403 at 411.

⁵⁷⁵ Saul Sorkin, "Limited Liability in Multimodal Transport and the Effect of Deregulation" (1989) 13 Tul. Mar. L. J. 285 at 286-287 and 288.

⁵⁷⁶ Knebel Denise Savoie Blocker, "U.S. Statutory Regulation of Multimodalism" (1989) 64 Tul. L. Rev. 543 at 548. From 1989 until today, the Interstate Commerce Commission (I.C.C., now Surface Transportation Board (S.T.B.)), has exempted almost all inland intermodal transportation provided by rail and truck from

Because of land transport deregulation, U.S. land carriers and shippers can also bargain for rates with contract terms remaining absolutely confidential, not available to the public lacking, therefore, transparency⁵⁷⁸. Today, nearly all railway contracts for the transport of goods are confidential⁵⁷⁹.

b) *The practice*: Following U.S. motor deregulation, a number of older carriers either merged with competitors or were forced out of business⁵⁸⁰. Rates initially declined from 15% to 25% in the early years of deregulation to increase later once deregulation had taken full effect⁵⁸¹. Motor carrier deregulation seems to have followed the effects of U.S. air deregulation, (increased tariffs-high concentration)⁵⁸². However, the trucking industry has different characteristics from air and sea carriage.

governmental regulation. The term intermodal is defined as "of or relating to the connection between rail service and other modes of transportation, including all parts of facilities at which such connection is made". A "railroad" is defined to include intermodal equipment used by or in connection with it. The transportation of empty intermodal cargo containers is specifically exempted from regulation. *Ibid* at 550, Paul Stephen Dempsey, "The Law of Intermodal Transportation: What it Was, What it Is, What it Should Be" (2000) 27 *Transp. L. J.* 367 at 406-407 and Saul Sorkin, "Limited Liability in Multimodal Transport and the Effect of Deregulation" (1989) 13 *Tul. Mar. L. J.* 285 at 289.

⁵⁷⁷ Interview of the author with a regulation expert in the U.S. Office of Intermodalism (Nov. 5, 2001). Even before their exemption from governmental regulation, no significant rate regulatory jurisdiction was exercised over the rail portion of through rates by the government. Knebel Denise Savoie Blocker, "U.S. Statutory Regulation of Multimodalism" (1989) 64 *Tul. L. Rev.* 543 at 548-549.

⁵⁷⁸ This seems to be the practice of mentioned transport companies. *Motor*: Interview of the author with American Freightways Tariff personnel (May 23, 2002) asserting that liability terms can be negotiated within confidential contracts. *Motor Carrier Liability* (1999) online: Augello, Pezold & Hirschman P.C. Homepage <<http://www.transportlaw.com/aph/indexbar.jpg>> (last visited: June 3, 2000) on the presence of confidential contracts on U.S. motor carrier industry. *Rail*: 49 U.S.C. § 10713 (*Staggers Act*). Following the Staggers Act, a railroad carrier has to file only two documents with the STB: the confidential contract and a contract summary. The summary, but not the contract, is made available to the public. René Sacasas, "The Filed Tariff Doctrine: Casualty or Survivor of Deregulation?" (1990) 29 *Duq. L. Rev.* 1 at note 30.

⁵⁷⁹ Michael F. McBride, "Statutory Authority For Railroad Transportation Contracts in the Staggers Rail Act of 1980" (1997) 18 *E. Min. L. Found* s 7.02. Michael F. McBride, "The Nuts and Bolts of Railroad Transportation Contracts" 18 *EMLF* s 7.02 (2000) online: WESTLAW (Newsletters). "Railway Users Want End to 'Illegal' Billing System" *The Hamilton Spectator* (2002) online: WESTLAW (All-News).

⁵⁸⁰ Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports" (1999) 26 *Transp. L. J.* 205 at 208. Concentration also occurred between U.S. and Canadian trucking companies. A good example of this is the 1997 15\$USD million purchase of Reimer Express Lines (Winnipeg, Manitoba) by Roadway Express (Akron, Ohio). "Canada: Services Trucking Market Indus. Sect. Anal." (1998) online: WESTLAW (Newsletters). *Ibid*.

⁵⁸¹ Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports" (1999) 26 *Transp. L. J.* 205 at 208 commenting on truck and rail transport.

⁵⁸² *Supra* at 115-116.

Contrary to the airline deregulation, high competition and the resulting *low* motor carrier *tariffs* are the distinctive traits of motor carrier post-deregulation period⁵⁸³. In effect, today, the motor carrier industry is an extremely competitive sector in the U.S. and Canada⁵⁸⁴, with carriers operating on razor thin margins of profit or loss since they are competing on service rather than on price⁵⁸⁵. The stiff competition has driven prices down and has resulted in almost negligible (0.3 percent) price increases since 1990⁵⁸⁶. It is true that the lower value of the Canadian dollar when compared with the U.S. dollar gives Canadian truckers a competitive pricing advantage over U.S. firms⁵⁸⁷.

However, the ability of U.S. trucking services to leverage their size and fleet management capabilities help to level the playing field in this expanding services sector⁵⁸⁸. In this sense, strong competition among U.S. and U.S.-Canadian motor carriers as well as competition from railways have resulted in the application of very low tariffs in the U.S. motor sector⁵⁸⁹. On the other hand, it is uncertain whether the motor carrier industry will grow highly concentrated in the future. According to commentators this depends on different factors such as trucking companies sophistication, managing techniques and not merely on their capital⁵⁹⁰.

⁵⁸³ Interview of the author with a transportation journalist, (Nov. 9, 1999).

⁵⁸⁴ Canada: "Services Trucking Market" *Indus. Sector Analysis* (1998) online: WESTLAW (Newsletters). Only the U.S. counts with 400.000 trucking companies. Interview of the author with a regulation expert at the American Trucking Association, (ATA) (November 8, 1999) and U.S., DOT-FHWA, *Key Freight Transportation Challenge-Safety* (2003) online: U.S. Department of Transportation Homepage <ops.fhwa.dot.gov/freight/publications/freight%20story/safety.htm> (last modified: Feb. 13, 2003) stating that in 1990 there were 216.000 interstate motor carriers operating in the U.S. whereas in 1999 the number increased to 517.000.

⁵⁸⁵ Interview of the author with a transportation journalist, (Nov. 9, 1999).

⁵⁸⁶ "Canada: Services Trucking Market" *Indus. Sector Analysis* (1998) online: WESTLAW (Newsletters).

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Interview of the author with a transportation journalist, (Nov. 9, 1999). Studies undertaken before motor deregulation in Canada showed that trucking rates were 9 to 12% lower in provinces without regulation than in provinces with regulation.

⁵⁹⁰ Interview of the author with a regulation expert at the American Trucking Association (ATA) (November 8, 1999).

U.S. Congress was anticipating consolidation of U.S. rail carriers because of bankruptcies, mergers and acquisitions⁵⁹¹. It did not, however, foresee that from 66 major railways in 1980, the provider pool would shrink to seven with only four of these serving most of the market after deregulation⁵⁹². These major U.S. rail carriers abandoned unprofitable lines that were destined to serve small shippers in remote areas, with the objective to handle the largest shippers⁵⁹³. Small shippers were then forced to shift to trucks to transport their goods to major rail pick-up points⁵⁹⁴. With the shift, shippers had to adapt to the specifications of the mode and this was causing additional costs apart from being time consuming⁵⁹⁵.

To avoid shipper frustration and competition from the trucking industry, commentators argue that railways and truckers should work together to provide intermodal transport⁵⁹⁶. The ‘intermodal lunacy’, as it is called, will lower costs and increase profitability⁵⁹⁷. Even though the two sectors seem, so far, unwilling to cooperate, the fact that some motor carriers use intermodal rail service proves that the two modes could work together to benefit shippers⁵⁹⁸.

⁵⁹¹ Ronald N. Cobert, Esq. Senior Partner Grove, Jasiewicz and Cobert, *Ocean Shipping Reform: What It Means for Shippers' Associations* (August 19, 1998), online: Ocean Shipping Reform Homepage <<http://www.gicobert.com/cobert898.html>> (last visited: 24 August 1998).

⁵⁹² “The Americas: U.S. regulators jolt a U.S. Canadian Rail Merger off Track” *Wall Str. J.* (2000) online: WESTLAW (Newsletters).

Today, the NAFTA railway corridor comprises U.S., Canadian and Mexican companies that control the region through mergers, associations and acquisitions: Through acquisitions Kansas City Southern Rail has created a rail line that runs from Canada to Mexico. Canadian National acquisition of the Illinois Central Corp. has created a rail network that will cross the United States from the Canadian border to the Gulf of Mexico and cross Canada from the Atlantic to the Pacific (rail giant). The Union Pacific and the Tex-Mex (Ferro-Sur) share the huge gateway to Mexico at Laredo, which alone accounts for about eighty percent of rail shipments between Texas and Mexico. See also *NAFTA Railway Map* (1999) online: NAFTA Railway Map Homepage <http://www.kcsi.com/cor_m.html> (last visited: 23 July 1999). For herein examined rail companies geographical reach see *Annex No. III, Table No. 1* at clxxviii-clxxxii.

⁵⁹³ U.S., Congressional Record (Senate) “Opening of Session 132” *Cong. Rec. S16957-01* (1986).

⁵⁹⁴ Ken Cottrill, “Temperature Rising” *J. Com.* (2000) online: WESTLAW (Newsletters).

⁵⁹⁵ *Ibid.* Theodore Prince, “Don’t Expect Less Transport Trauma in 2000” *J. Com.* (2000) online: WESTLAW (Newsletters).

⁵⁹⁶ John Gallagher, “Holding Pattern” *J. Com.* (2000) online: WESTLAW (Newsletters).

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.* and Charles T. Connors, James G. Cunningham, J. B. Hunt, Robert H. Maisch, “Motor Carrier Panel” (2001) *Transp. L. J.* 473 at 473 and “Barriers to Intermodal System” (1998) *Transp. L. J.* 245 at 247.

Rail deregulation brought about competition in prices that were formerly maintained artificially low, with subsequent increase of the volume of transported goods by rail and by a combination of modes⁵⁹⁹. In effect, rail rates are, overall, very competitive to, albeit lower than, motor rates⁶⁰⁰. Since railways are more efficient than trucks in terms of energy, handling and space capacity, rail rates have to be lower than motor's, considering also that rail service is slower and not provided door-to-door⁶⁰¹. Although very competitive with motor rates, U.S. rail rates have considerably increased after deregulation and, for a long time, shipper frustration due to high applicable rates and poor service was unprecedented and attributed to railway consolidation and their apathy stance towards shipper regarding rates and improvement of service⁶⁰². The situation on U.S. railway rates and service seems to have much improved today⁶⁰³. Despite this fact, some shippers still believe the rails are using 'oligopolistic' or 'monopolistic' positioning to pass through excessive rate increases and perceive the rail's service gap to trucking competitors as too great⁶⁰⁴.

High rates and carrier concentration have left many shippers wondering if they were really better off than before the *Staggers Act*⁶⁰⁵. Even though

⁵⁹⁹ John Jinkner, "The Staggers Act Introducing competition to the railroads: A timeline of deregulation's impact" (1998) online: Staggers Act Homepage <<http://www.altavista.com/cgi-bin/query?q=staggers+act&kl=XX&pg=q>> (last visited: April 3, 2000).

⁶⁰⁰ Interview of the author with a transportation journalist (Dec. 10, 2001). Rail rates are 20-30% lower than motor rates. Interview of the author with CN Rates personnel, (Dec. 3, 2001).

⁶⁰¹ Interview of the author with a transportation journalist (Dec. 10, 2001).

⁶⁰² Michael W. Blaszak, "Boost Rail Competition or Preserve it?" *Trains Magazine* (2001) online: WESTLAW (Newsletters). John Gallagher, "The Merger Question" *J. Com.* (2000) online: WESTLAW (Newsletters). On average, shippers are ready to pay higher rates if this corresponds to improved service. John Gallagher, "It's the Service Stupid" *J. Com.* (1999) online: WESTLAW (Newsletters).

⁶⁰³ Deregulation works. U.S. railroads now produce more service more efficiently than ever before and at lower average rates than ever before. Larry Kaufman, "Let's Remember why the Railroads were Deregulated" *Trains Magazine* (2002) online: WESTLAW (All-News). "Are Shippers Using More or less Rail?" *Trains Magazine* (2002) online: WESTLAW (Newsletters), "Intermodal Transportation Systems" *Congr. Test.* (2002) online: WESTLAW (Newsletters).

⁶⁰⁴ "Are Shippers Using More or less Rail?" *Trains Magazine* (2002) online: WESTLAW (Newsletters) on railroads oligopoly due to shrinkage of the sector. Monopoly of a railway company exists in certain segments of the haul, called the bottlenecks. "Check for Weapons" *Traffic World* (2001) online: WESTLAW (Newsletters).

⁶⁰⁵ Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation" (1999) 26 *Transp. L. J.* 205 at 208. With a monopoly hold on so many customers the railroads can get away with doing this. "Weary and Wary Captive Rail Shippers View Railroad Olive-Branch Bids with Suspicion" *Traffic World* (2001) online: WESTLAW (Newsletters).

recent railway rates and service improvements seem to have quelled the fire of deregulation, there are shipper associations that argue that STB must re-regulate the sector to insure competition⁶⁰⁶. Shippers intention does not seem to be shared by U.S. governmental authorities since there seems to be no traction on the Capitol Hill for reregulation, or, at least, not as ominous as certain shippers would like to portrait⁶⁰⁷.

B. Contractual Uniformity of U.S. Land Carrier Liability following Deregulation: Despite deregulation, all U.S. land carriers, including those involved in intermodal carriage, must still offer liability terms consistent with the Carmack Amendment⁶⁰⁸ common law provisions and the fair opportunity doctrine⁶⁰⁹.

The *Carmack Amendment* holds land carriers absolutely liable for property loss or damage unless there is shipper ‘written consent’ to limit their liability⁶¹⁰.

⁶⁰⁶ Neil Franz, Esther d’ Amico, “Shippers Call for Stricter STB Rules” *Chem. Week Ass.* (2000) online: WESTLAW (Newsletters).

⁶⁰⁷ Clayton Boyce, “Back to the Fight” *Traffic World* (2002) online: WESTLAW (Newsletters). On the need for reregulation, *Rail Privatization Spreading* (1999) online: National Center or Policy Analysis Homepage <<http://www.ncpa.org/pi/internat/pd040899h.htm>> (last visited: April 7, 2000). There are authors who argue that rail ‘re-regulation’ would put the industry back into an environment that nearly resulted in the destruction of the industry. “Are Shippers Using More or less Rail?” *Trains Magazine* (2002) online: WESTLAW (Newsletters).

⁶⁰⁸ The 1906 *Carmack Amendment* [34 STAT. 595 (1906) codified as amended at 49 U. S. C. par. 14706, 10730 and 11707] is applicable today to land transport (motor and rail) along with the 1995 *Interstate Commerce Commission Termination Act* (ICCTA). Both these acts constitute modifications of the 1887 *Interstate Commerce Act* (ICA) that initially codified common law land transport rules in the U.S.. *Supra* note 569.

⁶⁰⁹ Jack G. Knebel Denise Savoie Blocker, “U.S. Statutory Regulation of Multimodalism” (1989) 64 *Tul. L. Rev.* 543 at 549.

⁶¹⁰ 49 U.S.C. par. 14706 (c)(1)(A)(*Carmack Amendment*). See also S. 49 para. 11700(c)(3) of the 1980 *Staggers Act* (rail). The Carmack Amendment uses the expression ‘express agreement’ which means a written or electronic declaration of the shipper to accept carrier limitation of liability or written agreement between the carrier and the shipper. “Inadvertence Clauses: Another View” *J. Com.* (1998) online: LEXIS (World ALLWLD). Before this statute, motor and rail carriers were held absolutely liable even in the presence of contractual limitation of their liability. *Pennsylvania Railroad Co. v. Hughes*, 191 U. S. 477 (U. S. Pa. 1903) as reported by *Hubbard v. AllStates Relocation Services Inc.*, 114 F. Supp. 2d 1374 (S. D. Ga. 2000).

Pr. Augello explains that the roots of common carrier liability have been found in early roman transportation contracts about A. D. 150. Carrier liability is a form of the law of bailments under which the carrier is held to strict liability because it has complete knowledge and control of the goods during transit. U.S. law adopted these concepts of strict liability when Congress provided for federal preemption of state laws governing interstate railroads in the 1906 Hepburn Act, which included the Carmack Amendment. In 1916, Congress required the Interstate Commerce Commission to approve released rates which allowed carriers to reduce their liability in return for lower rates on the condition that the rates differentials were reasonable. William J. Augello, “The Evolution of Liability Limitations” *Log. Man. & Distr. Rep.* (2001) online: WESTLAW (Newsletters).

Since land carrier deregulation abolished governmental control over land carrier applicable tariffs, land carriers and shippers can contractually define liability terms in those tariffs without having to worry about governmental control.

One would think that absent governmental control over land carrier tariffs following U.S. motor and rail deregulation, motor and rail carriers would apply liability limitations and provisions that would differ from one company to the other on the basis of transported goods. This is, however, not so and virtually all motor carriers today apply a maximum limitation of 25\$USD ‘per pound, per piece lost or damaged’ or 100.000\$USD ‘per shipment’ whichever is lower (contractual uniformity)⁶¹¹. The two major U.S. railway companies we will herein examine, (BNSF and NS)⁶¹², maintain intermodal tariff limitations rising to 250.000\$USD ‘per shipment’ or actual value of the goods contained in containers, whichever is lower. These limitations are indicative of the multimodal rail limitations generally applicable by U.S. railways (contractual uniformity)⁶¹³. They are usually contained in carrier tariffs, are incorporated in the BOL and are available only upon shipper request since, following deregulation, there is no mandatory requirement for U.S. land tariff publication⁶¹⁴.

Exceptions to these uniform contractual provisions (contractual uniformity) exist and differ according to the commodity and the carrier so that shippers should always consult carrier tariffs when they decide to ship goods⁶¹⁵. For instance, U.S. motor carriers may limit their liability to the lowest released value amount stated in the carrier tariff when the shipper *fails to declare* goods value on the bill of lading

⁶¹¹ William J. Augello, *Logistics Issues Your Providers Usually do not Talk About* (1999) online: Supply Chain & Logistics Journal <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000). See also *Annex No. I, Table No. 4* at l-iv for BsOL provisions and tariffs and *infra* at Part II, Chapter I, Section II, Par. 1(A). This is the informal harmonization we have talked about, *supra* at 20s.

⁶¹² For the BNSF and NS railways see *infra* note 856 and accompanying text and Part II, Chapter I, Section II, Par. 2.

⁶¹³ *Annex No. I, Table No. 6* at lxvi-lxxxviii for U.S. tariffs and *infra* at Part II, Chapter I, Section II, Par. 2 for further details.

⁶¹⁴ *Supra* at 118-119 on absence of necessary publication of U.S. land tariffs.

⁶¹⁵ William Augello, “Avoid the Liability-Limitation Trap” *Log. Man. & Distr. Rep.* (2001) online: WESTLAW (Newsletters).

(inadvertence clause)⁶¹⁶ circumventing, in this way, the statutorily required *express* (written) *consent* in contracting carrier liability⁶¹⁷. Despite Interstate Commerce Commission (ICC, now STB) and some case law affirmations that inadvertence clauses are lawful beyond the shadow of a doubt⁶¹⁸, there are cases that reject inadvertence clauses when the carrier does not bring the limitation to shipper attention⁶¹⁹.

Carrier limitation of liability without shipper knowledge or consent, the exception to the principle of contractual uniformity⁶²⁰, and rate increase, are the two thorns in U.S. motor deregulation⁶²¹. They may lead to a BOL being only *used to acknowledge receipt* of the freight and identify the entity for delivery⁶²². The new era of transport deregulation demands, therefore, alert shippers who will ask for

⁶¹⁶ According to the 1980 Motor Carrier Act, carrier offers "released value rate" when it charges shipper discounted rate in exchange for limitation on carrier's liability in event of loss or damage. 49 U.S.C.A. § 10706(b)(3)(C). A typical inadvertence clause reads: "If the shipper fails or declines to execute the above statement or designates a value exceeding 25.00\$USD per pound, shipment will not be accepted, but if the shipment is inadvertently accepted, it will be considered as being released to a value of 5.00\$USD (or of 2.50\$USD) per pound and the shipment will move subject to such limitation of liability". Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America*, (Tucson, Arizona: National Law Center for Inter-American Free Trade, 1996) at 17. In this respect, see the interesting provision in the American Freightways tariff herein annexed *Annex No. 1, Table No. 4* at 1. Inadvertence clauses are, most of the time, selectively applicable to specific high value commodities and are intended to protect the carrier. This is probably because most shippers are reluctant to agree to liability limitations out of fear that this will encourage carriers to be careless with their cargo. Interview of the author with a Traffic World journal analyst (Sept. 14, 2000). See also Colin Barrett, "Inadvertence Clauses in Canada?" *Traffic World* (2000) online: LEXIS (Transp. News).

⁶¹⁷ "ICC Rejects Complaint on Freight Liability" *J. Com.* (1989) online: LEXIS (World, ALLWLD). On Carmack 'express' (written) agreement see *supra* at 123-124. We have not encountered inadvertence clauses in U.S. rail carriage.

⁶¹⁸ "ICC Rejects Complaint on Freight Liability" *J. Com.* (1989) online: LEXIS (World, ALLWLD), Colin Barrett, "Questions and Answers" *Distribution* (1997) online: WESTLAW (All-News) for the ICC and *Mechanical Technology v. Ryder Truck Lines*, 776 F. 2d 1085 (2nd Cir. 1985) for case law.

⁶¹⁹ This is done on the basis of the fair opportunity doctrine (*infra* at Part I, Chapter II, Section I, Par. 1(C)). *Toledo Ticket Co. v. Roadway Express Inc.* (1998) 133 F. 3d 439 (6th Cir. 1998). See also *Travelers Property and Cas .Co. v. Interstate Heavy Hauling Co. Inc.*, 2000 WL 900482 (D. C. Or 2000). Both cases concern inadvertence clauses incorporated by reference in the BOL. On this point, interview of the author with a Traffic World analyst (Sept. 14, 2000).

⁶²⁰ Inadvertence clauses are rather the exception than the rule. Interview of the author with a Traffic World analyst (September 14, 2000) who noted that contractual uniformity is the principle and inadvertence clauses the exception but people tend to make a big fuss about exceptions to the rule when they are shipper abusive creating, thus, news. See also Colin Barrett, "Inadvertence Clauses in Canada?" *Traffic World* (2000) online: LEXIS (Transp. News).

⁶²¹ Ann Saccomano, "Liability Back and Forth" *J. Com.* (2000) online: WESTLAW (Newsletters).

⁶²² *Ibid.*

copies of their contract with the carrier so that they be aware of the conditions of carriage therein provided⁶²³:

[a]sk for copies of the tariffs. It is tedious, slow, painful and not a lot of fun, but the alternative of finding that you have cost your company one big bunch of money because you didn't check out a tariff provision is most likely going to be a lot less enjoyable.

Large shippers in motor and multimodal transport have the negotiating skills and clout to negotiate contractual terms and deal with carrier contractual practices as they frequently deal with them⁶²⁴. It is mainly small, unsophisticated shippers who lack the leverage and/or sophistication to negotiate with the carrier that run the risk of being ruined by liability losses in the present deregulation era⁶²⁵. Although it is usually shipper's responsibility to identify acceptable multimodal transport terms and conditions through issuance of his own BOL, many do so by identifying proposed carrier terms and conditions of carriage⁶²⁶. Overall, following deregulation, the transport contract remains a contract of adhesion favouring carrier because of

⁶²³ *Motor Carrier Bill Of Lading: Contract Or Receipt?* (1998) online: <<http://www.allenlund.com/article8.htm>> (last visited: 24 February 1998). "Beware of Changing Coverages: Shippers must Read Fine Print on Bill of Lading, Contracts and Rules Tariffs" *J. Com.* (1998) at 4 *in fine* online: LEXIS (World, ALLWLD).

⁶²⁴ Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules* (Massachusetts: Kluwer Law International, 1997) at 24. Freedom of contract may well lead carriers to dislike non-mandatory rules, as it would allow more sophisticated competitors to take the upper hand. Jan Ramberg, *The Future of International Unification of Transport Law* (1998) online: Forwarder Law Homepage <<http://www.forwarderlaw.com/feature/ramberg2.html>> (last modified: March 6, 2001). Deregulation can result in large shippers negotiating on an equal basis with or being more powerful than carriers. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is it?" 73 at 76-77.

⁶²⁵ William J. Augello, Pres. Of the Shippers National freight Claims Council as reported by "TCPC Celebrates" 25 *Traffic World* (1999) online: WESTLAW (Newsletters). *Norfolk Southern Railroad v. Chatman*, 244 U.S. 276 (S. C. 1917) stating that tariffs must not be cunningly made to entangle small, unsuspecting, inexperienced shippers. There is a tendency among cargo owners to rely on the word of, and personal relationship with, the multimodal operator's sales personnel that the terms of the carriage are standard in the industry. Small shippers and consignees correctly believe that they have little clout in altering the standard business practices of large multimodal companies like shipping lines and insurance providers. This results in cargo owners being poorly positioned in case of dispute. Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules* (Massachusetts: Kluwer Law International, 1997) at 18. On sophistication and equal bargaining power see *infra* notes 641, 685, 812 and 714 and accompanying text. Small shippers represent 70% of U.S. exports and are distinguished from large shippers on the basis of the volume of the shipment. Interview of the author with a *Traffic World* analyst (September 14, 2000).

⁶²⁶ Shippers seldom visit the offices of carriers or multimodal operators to examine their terms and conditions of liability. The first time a cargo owner examines in detail the full details of the transport contract may be when there is a claim for loss or damage. Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules* (Massachusetts: Kluwer Law International, 1997) at 19-20.

shippers inadvertence or lack of equal bargaining power with the carrier to negotiate alternate terms⁶²⁷.

Shipper protective mechanisms (i.e. shipper alliances, shipper-carrier alliances, and shipper information guides) have been put into place to provide for shipper protection⁶²⁸. These, however, do not provide shippers with a well-rounded 'safety net' since unanticipated charges, penalties or unrecoverable transit losses can still surprise them⁶²⁹:

It would be more advisable to consult a transportation consultant or attorney for a review of product classification, packaging, rates and routings....

As with railway deregulation, commentators suggest that re-regulation is needed to put an end to the current situation⁶³⁰.

C. The Fair Opportunity Doctrine: We have noted that there are U.S. cases that reject inadvertence, but also carrier limitative, clauses on the basis of the 'fair opportunity' doctrine⁶³¹, a judicial creation whose origins are found in railway cases⁶³².

The *Carmack Amendment* imposes absolute liability upon carriers for the actual loss or damage to property unless there is shipper *express* (written) *consent* to limit carrier liability⁶³³. In the absence of shipper written agreement to carrier liability limitations, courts may conclude that shipper *express consent* is not present

⁶²⁷ *Ibid* at 21 and *supra* note 9.

⁶²⁸ *Ibid* at 19-20. Shippers National Freight Claim Council, an entity composed of shippers that banded together to provide shippers with guidance to shipping goods. Also, Road Express has published a "Guide to the Basics of Shipping and Receiving" destined to shippers.

⁶²⁹ *The Transportation Consumer Protection Council, Inc.*, (1998) online: The Transportation Law Center Homepage <<http://www.transportlaw.com/current/td13.htm>> (last visited: September 2, 1998).

⁶³⁰ "TCPC Celebrates 25" *Traffic World* (1999) online: WESTLAW (Newsletters). *Supra* at 122-123 for rail re-regulation.

⁶³¹ *Supra* note 619 and accompanying text.

⁶³² *New Haven & Hartford Railroad v. Nothnagle*, 421 F. Supp. 249 (D. C. Conn. 1976). Richard W. Palmer Frank P. DeGiulio, "Terminal Operations and Multimodal Carriage: History and Prognosis (1989) 64 Tul. L. Rev. 281 at 295-296.

⁶³³ *Supra* at 123s.

and ‘fair opportunity’ to agree on the terms and conditions of carriage is not given to him⁶³⁴.

The ‘fair opportunity’ doctrine translates into a two-prong test for the carrier: first, the carrier must provide shipper with notice of his limitative conditions. Second, the carrier must provide shipper with opportunity to declare value so that the shipper makes ‘an absolute, deliberate and well-informed choice’ in agreeing to limit carrier liability⁶³⁵. Before deregulation took place, the statutory requirement of tariff filing and publication was deemed to charge all shippers with notice of carrier limitative conditions therein contained⁶³⁶. Shipper failure to declare value was presumed to be deliberate acceptance of the filed released value⁶³⁷. Following deregulation, publication of rates is no longer required and the shipper is not, therefore, charged with notice of the rate structure⁶³⁸. Ever since, the judicial ‘fair opportunity’ doctrine has gained in importance and whether the shipper has notice or not of carrier limitative conditions depends upon the facts of the case and not upon the presence of regulation⁶³⁹. It also depends on the jurisdiction before which the case is presented since ‘fair opportunity’ does not enjoy uniformity of judicial consideration in the application of its composing elements.

Certain courts will give effect to non-conspicuous (‘buried’) BOL limitation clauses (i.e. inadvertence clauses) and/or absence of declaration of value

⁶³⁴ Motor: *Anton v. Greyhound Van Lines Inc.*, 591 F. 2d 103 (1st Cir. 1978) (authority case). Rail: *Yamazen U.S.A. v. Chicago and Northwestern Transp.*, 790 F. 2d 621, 623 (7th Cir. 1986). See also *Union Pacific R.R. Co. v. Burke*, 255 U. S. 317 (U. S. S. C. 1921) and *Mitchell v. Union Pacific Railroad*, 242 F. 2d 598 (9th Cir. 1957).

⁶³⁵ Motor: *Bio-Lab Inc. v. Pony Express Courier Corp.*, 911 F. 2d 1580 (11th Cir. 1990) citing *Anton v. Greyhound Van Lines* 591 F. 2d 103 (1st Cir. 1978). Rail: *Quasar Co. v. Atchison*, 632 F. Supp. 1106 (N. D. Ill. 1986). In reality, four are the requirements of the ‘fair opportunity’ doctrine: first, maintain a tariff that complies with prescribed federal guidelines (substantial compliance), second, obtain shipper consent as to the choice of liability, third, give shipper ‘fair opportunity’ to choose between two or more levels of liability and fourth, issue a BOL prior to shipment. *Hughes v. United Van Lines*, 829 F. 2d 1407 (7th Cir. 1987) the authority case on this doctrine. In the present part, issuance of a BOL as part of the ‘fair opportunity’ doctrine will not retain our attention.

⁶³⁶ This was valid for all modes of transport. For motor see *Norpin Mfg. Co. v. CTS Con-Way Transp.*, 68 F. Supp. 2d 19 (D. Mass. 1999).

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid.*

in the presence of sophisticated shippers ('constructive notice')⁶⁴⁰. 'Constructive notice' is measured by what a reasonably prudent person should or could have reasonably anticipated based on its particular experience in the industry⁶⁴¹. Other courts, will require 'express' notice to be given to sophisticated shippers in the presence of non-conspicuous BOL limitation clauses and/or absence of declaration

⁶⁴⁰ Motor: *Mechanical Technology v. Ryder Truck Lines*, 776 F. 2d 1085 (2nd Cir. 1985) stated that sophisticated shippers are charged with notice of inadvertence clauses incorporated by reference in the BOL (non-conspicuous clause). *Rohner Gehrig Co. v. Tri-State Motor*, 923 F. 2d 1118 (5th Cir. 1991). *Carmana Designs v. North American Van Lines*, 943 F. 2d 316 (3rd Cir. 1991). Rail: *Kansas City Fire & Marine Ins. Co. v. Consolidated Rail Corp.*, 80 F. Supp. 2d 447 (D. C. 1999) where the court recognized the constructive notice test but did not apply it in the presence of a conspicuous BOL limitation clause. The case is based on motor cases such as *Mechanical Technology*.

'Constructive notice' jurisdictions are the *Fifth, Second, Eleventh and Fourth Circuits* that have adopted similar positions but a different gloss. Daniel A. Tadros, "COGSA Section 4(5) 'Fair Opportunity' Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity: Will the United States Supreme Court ever Provide Guidance?" (1992) Tul. Mar. L. Rev. 18 at 33. For the geographical areas of the U.S. Circuits see *Annex No. III, Table No. 1(bis)* at clxxxii.

⁶⁴¹ *Comsource Independent Foodservice Companies, Inc. v. Union Pacific R. Co.*, 102 F. 3d 438 (9th Cir. 1996) holding that shipper had extensive prior dealings with Union Pacific. *Sorensen Christian Industries v. Railway Exp. Agency Inc.*, 434 F. 2d 867 (4th Cir. 1970) stating that Sorensen is a sophisticated shipper having made an identical shipment with the same company some years ago. *Co-Operative Shippers, Inc. v. Atchison, Topeka and Santa Fe Ry. Co.*, 840 F. 2d 447 (7th Cir. 1988) stating that the shipper was holding himself out as a sophisticated shipper of at least equal commercial awareness with the carrier. See also (non-transport) Lee R. Russ, "Couch on Insurance" (3d. ed.) (*U.S.*) par. 162:24 (2000) online: WESTLAW (TP-ALL).

We should note, in this respect, that the terms *sophisticated, experienced, knowledgeable* shippers and parties of *equal bargaining power (EBP)* (for this see also *infra* notes 685, 812, 714) are often used in Canada and the U.S. with respect to (motor, rail and ocean) carrier liability. Both these terms involve equity considerations and are dependent on subjective judicial interpretations. U.S.: Going through approximately 250 cases on this question we have seen courts referring to 'abundant shipping experience' (in the presence of fifty, one hundred, two thousand prior shipping transactions); or even once before on the condition that it concerned an 'identical shipment for the same purpose': *Sorensen-Christian Industries Inc. v. Railway Exp. Agency, Inc.*, 434 F. 2d 867 (C. A. 1970). *Yang Machinery Tool Co. v. Sea-Land Service Inc.*, 58 F. 3d 1350 (9th Cir. 1995) held that the shipper was knowledgeable because it had contracted with the carrier over 100 times, *Travelers Indem. Co. v. Vessel Sam Houston*, 26 F. 3d 895 (9th Cir. 1994) referred to 1 previous shipment with same carrier. In *ZYX-Ware Intern. v. Federal Exp. Corp.*, 1994 WL 904684 (N. D. Cal. 1994) the court concluded that the shipper in question was experienced even though it had never shipped with the specific carrier. Canada: Canadian case law refers to a '60 year dealing with the specific carrier' or 'many prior shipments' without further precision. *N.S. Tractors & Equipment Ltd. v. Tarros Gage* [1986], F. C. J. No. 127 (F. C. C.), *Alberta Garment Manufacturing Co. v. Purolator Courier Ltd* (2000), A. J. No. 317 (Alta. Pr. C.). Experience in shipping should not be confounded with experience in commercial transactions in general. Canada: *Bombardier Inc. v. Canadian Pacific Ltd.* (1991), 7 O. R. (3d) 559 (Ont. C. A.) and U.S.: *Rohner Gehrig Co. v. Tri-State Motor*, 923 F. 2d 1118 (5th Cir. 1991). Proof of shipper sophistication in Canada and the U.S. constitutes the fact of shipper contracting its own insurance, negotiating rates with the carrier, issuing its own BOL or customarily limiting carrier liability. U.S.: *Travelers Indemn. Co. v. Vessel Sam Houston*, 26 F. 3d 895 (9th Cir. 1994) and *Norton v. Jim Phillips Horse Transp. Inc.*, 901 F. 2d 821 (10th Cir. 1989). For Canada see *Alberta Garment Manufacturing Co. v. Purolator Courier Ltd* (2000), A. J. No. 317 (Alta. Pr. C.) on the possibility to contract insurance and *Bombardier v. Canadian Pacific Ltd.* (1991), 7 O. R. (3d) 559 (Ont. C. A.) for the possibility to limit carrier liability.

of value ('actual notice')⁶⁴². Recently, however, 'actual notice' jurisdictions seem to have narrowed the gap present with 'constructive notice' jurisdictions in holding that shipper sophistication weakens the argument that carrier fails to provide express notice and/or declare value⁶⁴³. This judicial effort towards uniformity of U.S. case law may be attributed to shipper sophistication and the fact that carriers and shippers often deal with each other on a regular basis⁶⁴⁴. Courts effort to harmonize case law on the 'fair opportunity' doctrine 'constructive' and 'actual' notice test is also present in 'through' shipments⁶⁴⁵.

From the stated above, it seems that we are heading towards uniform U.S. 'fair opportunity' holdings on the basis of shipper sophistication. As judge Wiener noted in his dissent in *Rohner Gehrige Co. Inc. v. Tri-State Motor Transit*⁶⁴⁶, shipper sophistication is based on commercial awareness and is, therefore, subject to court subjective appreciation⁶⁴⁷. This creates uncertainty to shippers who, on the basis of the specific facts of each case and judges opinion, may or may not be viewed as sophisticated shippers. Because of this and the judicial transition we seem to be currently going through on the basis of the 'fair opportunity' doctrine, codification

⁶⁴² *Motor*: *Hughes v. United Van Lines*, 829 F. 2d 1407 (7th Cir. 1987), *Toledo Ticket Co. v. Roadway Express Inc.*, 133 F.3d 439 (6th Cir. 1998) and *Travelers Property and Cas. Co. v. Interstate Heavy Hauling Co. Inc.* (2000), 2000 WL 900482 (D. C. Or.). *Rail*: *Comsource Independent Food Serv. Co. Inc. v. Union Pacific Railway Co.*, 102 F. 3d 438 (9th Cir. 1996). The court argues that while *Comsource* was a sophisticated shipper the limitation of liability did not make part of the BOL and UP did not bring the limitation to shipper's attention. 'Actual notice' jurisdictions are the *Ninth, Seventh and Sixth* Circuits. For the geographical areas of the U.S. Circuits see *Annex No. III, Table No. 1(bis)* at clxxxii.

⁶⁴³ *Co-op Shippers Inc. v. Atchison, Topeka and Santa Fe Railway Co.*, 840 F. 2d 447 (7th Cir. 1988). In this case, the court referred to decisions of the Fifth Circuit (constructive notice) such as *Mechanical Technology supra* note 640. For the shift of case law (informal uniformity) see also *infra* Part I, Chapter II, Sec. II, Par. 2.

⁶⁴⁴ Mary L. Moreland, "COGSA Section 1304(5): 'Fair Opportunity Update'" (1996) Tul. Mar. L. J. 423 at 439 on ocean carrier cases. *Infra* at 162-163.

⁶⁴⁵ *Tempel Steel Corp. v. Landstar Inway Inc.*, 211 F. 3d 1029 (7th Cir. 2000) held that sophisticated shippers cannot be held to 'through' (U.S.-Mexico) motor BOL limitation clauses of which they have no 'actual notice'. The court further noticed that even if the court was to apply 'constructive notice' principles, the *Carmack Amendment* prohibits limitation of liability to 0\$ even in the presence of sophisticated shippers.

⁶⁴⁶ *Rohner Gehrige Co. v. Tri-State Motor*, 923 F. 2d 1118 (5th Cir. 1991)(dissent).

⁶⁴⁷ *Mechanical Technology Inc. v. Ryder Truck Lines Inc.*, 776 F. 2d 1085 (2nd Cir. 1985), *Toledo Ticket Co. v. Roadway Express Inc.*, 133 F. 3d 439 (6th Cir. 1990); *ZYX-Ware Intern. v. Chatman*, 244 U. S. 276 (U. S. N. C. 1917); *Carmara Designs Ltd. v. North American Van Lines Inc.*, 943 F. 2d 316 (3rd Cir. 1991); *Camara Corp. v. Preston Trucking Co., Inc.*, 18 F. Supp. 2d 112 (D. Mass. 1998). See *supra* note 641 on rail case law conclusions on shipper sophistication.

of future case law holdings on this doctrine and the need for shipper alertness will play an important role hereinafter in the intermodal shipment of goods⁶⁴⁸.

Following the ‘fair opportunity’ doctrine, carrier tariffs must also be incorporated in the BOL⁶⁴⁹. Both ‘actual’ and ‘constructive’ notice jurisdictions have concluded that substantial, rather than strict, compliance suffices in this respect⁶⁵⁰. Although incorporation by reference of carrier limitative conditions has been held to satisfy the ‘substantial compliance’ standard, judicial consideration of shipper sophistication will play a role in this regard⁶⁵¹.

Actual notice jurisdictions require BOL express indication (actual notice) of the rules incorporated by reference, without regard to shipper sophistication⁶⁵². Constructive notice jurisdictions have held that in case of shipper actual notice of the rules incorporated by reference, consideration of shipper sophistication is not necessary⁶⁵³. When inconspicuous BOL clauses incorporate tariffs by reference, shipper sophistication is a factor to consider in determining substantial

⁶⁴⁸ Arik A. Helman, “Limitation of Liability under COGSA: In the Wake of the ‘Fair Opportunity’ Doctrine” (2000) 25 Tul. L. J. 299 at 326 notes that, with respect to this doctrine, only a carefully phrased bill of lading can completely secure a carrier’s right under COGSA.

⁶⁴⁹ For substantial compliance as part of the ‘fair opportunity’ doctrine see *supra* at 128 and at note 635. Even though the doctrine requires substantial compliance with federal regulations, absence of latter following deregulation does not eliminate the doctrine’s prerequisite that now applies with respect to carrier tariffs. *Norpin Mfg. Co. v. CTS Con-Way Transp.*, 68 F. Supp. 2d 19 (D. Mass. 1999). In *Norpin* the court disaffirmed the railway case *Quasar Co. v. Atchison, Topeka and Santa Fe Rwy Co.*, 632 F. Supp. 640 (N. D. Ill. 1986) in that following deregulation the need for substantial compliance does not exist since tariffs are no longer filed with the government.

⁶⁵⁰ Motor: *Hughes v. United Van Lines Inc.*, 829 F. 2d 1407 (7th Cir. 1987) (authority case), *Phoner Gehrige Co. v. Tri-State Motor Transit*, 950 F. 2d 1079 (5th Cir. 1992) *Banos v. Eckerd Corp.*, 997 F. Supp. 756 (E. D. La. 1998). *Norton v. Jim Phillips Horse Transp. Inc.*, 910 F. 2d 821 (10th Cir. 1989). The carrier has the burden of proving that the bill is in substantial compliance. *Robinson v. Ralph G. Smith Inc.*, 735 F. 2d 186 (6th Cir. 1984). Rail: *Comsource Independent Food Serv. Co. Inc. v. Union Pacific Railway Co.*, 102 F. 3d 438 (9th Cir. 1996).

⁶⁵¹ Motor: *Banos v. Eckerd Corp.*, 997 F. Supp. 756 (E. D. La. 1998). Rail: *Comsource Independent Food Serv. Co. Inc. v. Union Pacific Railway Co.*, 102 F. 3d 438 (9th Cir. 1996), *Canon U.S.A. Inc. v. Norfolk Southern Railway Co.*, 936 F. Supp. 968 (N. D. Ga. 1997). Cases on incorporation by reference of tariffs in the BOL are much less frequently encountered in U.S. rail than in motor cases. Incorporation by reference is important because, today, BsOL may incorporate by reference applicable (intermodal) tariffs.

⁶⁵² *Comsource Independent Foodservice Companies Inc. v. Union Pacific R. Co.* 102 F. 3d 438 (9th Cir. 1996), *Esprit de Corp. v. Victory Exp. Inc.*, (1999) WL 9939 (N. D. Cal., 1999) California makes part of the 9th Circuit in the U.S. *Annex No. III, Table No. 1(bis)* at clxxxii.

⁶⁵³ *Rohner Gehrige Co. Inc. v. Tri-State Motor Transit*, 950 F. 2d 1079 (5th Cir. 1992), *Swift Textiles Inc. v. Watkins Motor Lines Inc.*, 799 F. 2d 697 (11th Cir. 1986).

compliance⁶⁵⁴. Overall, the general case law principles followed by courts in case of shipper notice of land carrier limitative provisions are also applicable in case of incorporation by reference within the frame of the fair opportunity doctrine.

We affirm, therefore, that there is courts division in considering shipper sophistication as part of the substantial compliance test and, more broadly, of the ‘fair opportunity’ doctrine. We have also affirmed that judicial consideration of shipper sophistication to establish presence of the ‘fair opportunity’ doctrine is continuously rising in importance in both ‘actual’ and ‘constructive’ notice jurisdictions as a result of transport deregulation.

Par. 2. Canada: In Canada, motor and rail deregulation succeeded U.S. land carrier deregulation.

Canadian motor and rail transport deregulation started with the *Motor Vehicle Transport Act 1987 (MVTA)*⁶⁵⁵ and *National Transportation Act 1987*⁶⁵⁶ respectively and is still ongoing. The *MVTA* delegated to the provinces the authority to regulate interstate motor carriage⁶⁵⁷. This is why Canadian trucker liability provisions for cargo originating in or having both its origins and destination within Canada, are

⁶⁵⁴ “Rights and Remedies Common to Seller and Buyer” 67A *Am. Jur. 2d Sales* § 904 (2002) WESTLAW (Tp-all) and the air case *Sam L. Majors Jewellers v. ABX Inc.*, 117 F. 3d 922 (5th Cir. 1997).

⁶⁵⁵ R.S. 1985, c. 29 (3rd Supp.) [hereinafter *MVTA*]. Recent amendments and announcements of amendments to the *MVTA* focuse(d) on motor carrier safety performance. *Transport Minister Tables Amendments to the MVTA, 1987* (2001) online: Transportation Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h009e.htm> (last visited: January 31, 2001). *Motor Vehicle Transport Act 1987* (2001) online: Transport Canada Homepage <<http://www.tc.gc.ca/en/mediaroom/backgrounders/mvta.htm>> (last visited: Jan. 2001) and *Transport Minister Announces Motor Carrier Safety Regulations* (2003) online: Transport Canada Homepage <www.tc.gc.ca/mediaroom/releases/nat/2003/03-h040e.htm> (last modified: March 5, 2003).

⁶⁵⁶ R. S. 1985 c. 28 (3rd Supp.) [Repealed 1996, c. 10 s. 183]. The act imposed strict railway abandonment requirements which were lifted with the passage of the 1996 *Canada Transportation Act*, R.S.C. 1985, c. 17 (3rd Supp.).

⁶⁵⁷ *Amendments to the MVTA* (2001) online: Canadian Ministry of Transport Homepage <<http://www.tc.gc.ca/en/mediaroom/backgrounders/mvta.htm>> (last visited: May 25, 2001). For background information on Canada’s provinces regulation of the trucking industry see F.P. Nix, R. K. House & Associates Ltd., A.M. Clayton, Clayton, Sparks & Associates Ltd., *Motor Carrier Regulation: Institutions and Practices* (Ottawa: Economic Council of Canada, 1980) at 16.

provided for by the ‘Canadian Uniform Highway Bill of Lading’ (CUBOL) the result of an inter-provincial agreement⁶⁵⁸.

Deregulation of rail carrier liability took place with the *Canada Transportation Act 1996*⁶⁵⁹. Before deregulation took place in Canada, railroads were not as heavily regulated as their U.S. counterparts⁶⁶⁰. This is why authors argued that, following deregulation, private industries would not be able to do better than Canadian National (CN) and Canadian Pacific (CP), Canada’s major railway lines⁶⁶¹. Critics warned that deregulation was "one more step in the Americanization of Canada"⁶⁶².

As in the case of the U.S. we will first concentrate on the general effects of Canadian land transport deregulation (A) before pondering over its effects on land carrier liability (B).

A. General Effects of Canadian Motor and Rail Transport Deregulation: a) Rail: As in the U.S., deregulation of Canada's railway system permitted application of railway tariffs in the absence of governmental control or publication⁶⁶³ by the

⁶⁵⁸ CUBOL was elaborated in 1977 by the Inter-Governmental Canadian Conference of Motor Transport Administrators composed of the federal Minister of Transport and the provincial Ministers responsible for Motor Vehicle Administration. It was published in Canadian Manufacturer’s Association Transportation Circular 4654 of September 23, 1977. Canada, Canadian Manufacturer’s Association, *The Bill of Lading: What is Behind the Fine Print* (Canada: Canadian Manufacturer’s Association, 1979) at 11. All inbound freight originating in the U.S. will be carried pursuant to the form of the BOL approved by the ICC (now STB) and all Canadian interprovincial freight will be covered by the form of the BOL prescribed by the province. John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 28-29.

⁶⁵⁹ S.C. 1996, c. 10. In July 2001, Canada Transportation Act Review Panel in charge of a comprehensive review of the act (every) four years after its entry into force (1996), made recommendations on competition, mergers, commercial operations, e-business... rather than liability or insurance issues. *Final Report Released on Canada Transportation Act Review* (2001) online: Transportation Canada Homepage <<http://www.reviewcta-examenlrc.gc.ca/english/pages/whatsnew.htm>> (last visited: July 18, 2001). In response to many of the Panel’s recommendations, Canada’s transport Minister, David Collenette, introduced amendments to the Canada Transportation Act on February 25, 2003. *Transport Minister Releases Vision for Future of Canada’s Transportation System* (2003) online: Transport Canada Homepage <www.tc.gc.ca/mediaroom/releases/nat/2003/03-h013e.htm> (last modified: May 3, 2003).

⁶⁶⁰ J. Luis Guasch, Robert W Hahn, “The Costs and Benefits of Regulation: Implications for Developing Countries” *World Bank Research Observer* (1999) online: WESTLAW (Newsletters).

⁶⁶¹ Dan Lett, “Steel Life Line” *Can. Geographic* (1998) online: WESTLAW (Newsletters).

⁶⁶² *Ibid.*

⁶⁶³ Sec. 117 of the *Canada Transportation Act* on the absence of tariff mandatory publication with the government. On the presence of governmental control over rail carrier tariffs in the pre-deregulation era and its absence in the post-deregulation era see *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd.*

Canadian Transportation Agency⁶⁶⁴. It also opened the way for CN and CP railways to sell unprofitable lines to short line operators⁶⁶⁵. These two major Canadian railways, however, have been reluctant to give up their near monopoly over the rails⁶⁶⁶. Short-liners, being dependent for their existence on the large railway lines, have hesitated to challenge the CN and CP monopoly before the courts, even if they are given the right to do so under the *Canada Transportation Act 1996*⁶⁶⁷. In other words, Canadian railway deregulation did not lead to vertical integration of the sector, the duopoly or monopolistic situation was already in place before deregulation and remained practically unchanged after it⁶⁶⁸.

This does not mean that Canadian railways are not competitive. On the contrary, once deregulation took place, Canadian railway freight rates remained very competitive⁶⁶⁹. This is probably due to the 1995 CN privatization that made it the most efficient railway company in North America and also due to the company's expansion through mergers and acquisitions⁶⁷⁰. Even though it is said that lower shipping costs and good service have made Canadian railways more competitive and

(1994), M. J. No. 93 (Man. C. Q. B.). For the pre-deregulation period (in Québec) see *Les Tricots En Cell Ltee v. CNR* (1966), C. S. 561 (S. C. Que.) at 566 where the court decided that railway contractual limitation could not take effect absent Commission approval. The much more recent case *Royal Insurance Co. of Canada v. Canadian National Railway Co.* (1999), B. E. 99BE-416 (C. Que), however, applies the 1996 *Canada Transportation Act* art. 137 in deciding that rail carrier limitation of liability should be given effect in the absence of governmental control over a contractual agreement.

⁶⁶⁴ On this agency see *infra* note 746. However, in case of complaint, there will be a CTA arbitration procedure set in place. Interview of the author with Canadian Transportation Agency personnel (July 2, 2002).

⁶⁶⁵ Dan Lett, "Steel Life Line" *Can. Geographic* (1998) online: WESTLAW (Newsletters).

⁶⁶⁶ Dan Lett, "Strategic Rail Abandonment Short-line Operators Kept at Bay" *Winnipeg Free Press* (1998) online: WESTLAW (Newsletters). Under the *Canada Transportation Act* railways are not obliged to sell their lines. *Ibid.*

⁶⁶⁷ *Ibid* and Lawrence Kaufman, "Some Rail Officials are Starting to Ask the Right Questions" (2000) online: LEXIS (Transp. News).

⁶⁶⁸ "Canadian Pacific Railway Ltd.-Globe Says Shippers Cheer Changes as CNR, CPR Complain" *Canada Stockwatch* (2003) online: WESTLAW (All-News).

⁶⁶⁹ Peter Holle, "The Americas: U.S. Regulators jolt a U.S.-Canadian Rail Merger off Track" *Wall. St. J.* (2000) online: WESTLAW (Newsletters). In 2002, it was noted that Canadian railways have benefited shippers substantially, providing them better service, lower rates and competitively strong rail industry.

⁶⁷⁰ We refer to the CN 1998 acquisition of Illinois Central that expanded the company's southern focus. Contrary to the U.S. railway mergers that did not go too well, CN mergers and acquisitions went quite smoothly and service has stayed the same. *Ibid.* See also *supra* note 592 and accompanying text for railway mergers and acquisitions within NAFTA.

prosperous than their U.S. counterparts⁶⁷¹, Canadian shippers have long complained about railways poor rail service and rates⁶⁷². Recently, the federal government proposed amendments to the Canada Transportation Act intended to ‘manage the monopoly’ to allow free market discipline to take prominence, promoting competition among Canadian and U.S. railways⁶⁷³. Amendments are viewed by railways as re-regulation of the industry while shippers argue that their choices will expand in what is often a rail service monopoly⁶⁷⁴.

b) *Motor*: In Canadian motor transport, governmental control over carrier tariffs during the pre-deregulation period varied from province to province⁶⁷⁵. It is the *Motor Vehicle Transport Act 1987 (MVTA)* that deregulated motor transport so that, today, motor carriers in Canada do not publish their tariffs with the provincial governments nor are they obliged to publish them at their place of business⁶⁷⁶. This,

⁶⁷¹ “CN to Challenge CTA Decision in Ferreoquus Application” *Canada Stockwatch* (2002) online: WESTLAW (Newsletters), the very interesting article of Tom Murray, “The Secret to CN’s Success” *Trains Magazine* (2002) online: WESTLAW (All-News) and “Crown Corporation v. Private Company CNR” *Winnipeg Free Press* (2000) online: WESTLAW (Newsletters). This is despite the fact that the former pay 40% more taxes than the latter. Alex Binkley, “Needed Transport Policy” *J. Com.* (1999) online: WESTLAW (Newsletters). See *supra* at 122s for U.S. rail concentration.

⁶⁷² Courtney Tower, “Canada Plan Divides Shippers, Railroads” *J. Com.* (2003) online: WESTLAW (All-News). Tom Murray, “The Secret to CN’s Success” *Trains Magazine* (2002) online: WESTLAW (All-News). As a Canadian Transportation Agency member of personnel suggests, shippers today insist on service and rates rather than negotiation of carrier liability. Interview of the author with a Canadian Transportation Agency member of personnel (May 22, 2001). Negotiation of rail carrier liability is a secondary issue. Interview of the author with a Canadian Pacific Contracts Responsible (May 22, 2001) attributing this also to the fact that railways have much less accidents than motor carriers so that shippers are more concerned with rates and service rather than liability.

⁶⁷³ “Canadian Pacific Railway Ltd.-Globe Says Shippers Cheer Changes as CNR, CPR Complain” *Canada Stockwatch* (2003) online: WESTLAW (All-News) and Courtney Tower, “Canada Plan Divides Shippers, Railroads” *J. Com.* (2003) online: WESTLAW (All-News). The government amendments are expected to give more discretion to the Canadian Transportation Agency to rule on shipper complaints against the railroads.

Ibid.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ F.P. Nix, R.K. House & Associates Ltd., Mississauga A.M. Clayton, Clayton, Sparks & Associates Ltd., Regina “Motor Carrier Regulation: Institutions and Practices” (Ottawa: Economic Council of Canada Working Paper, 1980) at 85.

⁶⁷⁶ *Motor Vehicle Transport Act 1987*, R.S. 1985 c. 29 (3rd Supp.) and *supra* note 655. It is this act that abolished the publication requirement of Canadian motor carrier tariffs. Interview of the author with the Department of Federal Motor Carriers personnel (May 31, 2001). The province of Québec abolished publication of tariff requirement with the January 13, 1988 decree No. 5088 modifying the *Loi sur le Transport* to conform it with federal standards. Interview of the author with a Québec Ministry of Transport-Motor Carrier Section member of personnel (May 31, 2001). Prior to the federal act, provincial requirements existed for the publication of tariffs with provincial governmental authorities. See i.e. John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 38 for the pre-deregulation period.

however, did not affect CUBOL provisions that still remain in place⁶⁷⁷. The presence of a uniform BOL has not left Canadian carriers great margins of manoeuvre on contractual modification of Canadian motor carrier liability.

B. Contractual or Statutory Uniformity of Canadian Land Carrier Liability Provisions? Canadian rail carriage follows U.S. pattern of contractual uniformity of rail carrier liability provisions. Canadian motor carriers, on the other hand, oppose statutorily uniform liability provisions to U.S. contractually uniform ones.

a) Rail Carriers-Contractual Uniformity: The *National Transportation Act 1987*⁶⁷⁸ and its successor, the *Canada Transportation Act 1996*, applicable today, maintain the principle of freedom of contracting in delineating carrier liability⁶⁷⁹. This is conform with the U.S. *Staggers Act* that follows the same principle of freedom of contracting.

What's more, rail carriers in Canada can, and in most cases do, enter in confidential contracts with shippers pursuant to deregulation⁶⁸⁰. As is the case in the U.S., the terms of these contracts are confidential and, therefore, not made available for inspection to the public⁶⁸¹. Finally, when a carrier does not enter into a

⁶⁷⁷ The 1987 legislation deregulates motor transport in other areas, such as motor carrier licensing or tariff publication but not in the area of carrier liability. On motor carrier licensing nation-wide procedures under the MVTA see Canada, Ministry of Transport, *Freedom to Move in Canada's New Transportation Environment*, (Ottawa: Ministry of Transport, 1988) at 8.

⁶⁷⁸ R.S.C. 1987, c. 28 s. 335.

⁶⁷⁹ S.C. 1996 c. 10, Subsec. 137(1) provides: "A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers". The Act is accompanied by a regulation implementing it: *Railway Traffic Liability Regulation* SOR/91-488 [subsequent amendments (1993 and 1998)] available online: Canadian Department of Transportation <<http://www.tc.gc.ca/Actsregs/ct-ltc/ct6.html>> (last modified: April 4, 2003). *Lufty Ltd. v. C.P.R.* (1973), F. C. 1115 (F. C. C.) for the formerly applicable rules to railway carriage and *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd.* (1994), DRS 94-12120 (Man. C. Q. B.) for the passage from regulation of rail carrier liability to deregulation. On recent amendments of the act see *supra* note 659.

⁶⁸⁰ See s. 116(2) and s. 120 of the 1996 *Canada Transportation Act* on confidential contracting. Today, in Canada, three fourths of all railway contracts for the transport of goods are confidential contracts. Canadian legislation on confidential contracting resulted from competition with U.S. rail carriers who, following the *Staggers Act*, were entering into confidential contracts putting at a disadvantage Canadian railway carriers. Interview of the author with a Québec Ministry of Transport analyst (Nov. 24, 2000). "Railway Users Want End to Illegal Billing System" *The Hamilton Spectator* (2002) online: WESTLAW (All-News).

⁶⁸¹ *Ibid. Supra* at 119.

confidential contract with the shipper and decides to issue a tariff, this tariff must be made available for public inspection but it is not subject to governmental control⁶⁸².

In all cases, rail carriers in Canada can contractually limit their liability⁶⁸³. In this way, the two major Canadian railways CN (Canadian National) and CP (Canadian Pacific) apply the same liability limitation amounts for the contents of their international intermodal container shipments. 10.000\$CAD for a container under 40 feet, 20.000\$CAD for a container over 40 feet or ocean carrier liability under the ocean BOL⁶⁸⁴. Application of these limitations depends on whether ‘sufficient notice’ of these is given by the carrier to the shipper on the basis of latter’s sophistication, equal bargaining power with the carrier and parties intention, all these being interrelated concepts⁶⁸⁵. In this way, knowledgeable shippers are deemed to have notice of BOL limitations and possibility to declare value even

⁶⁸² Richard Lande, *Railway Law and the National Transportation Act* (Ontario: Butterworths Canada Ltd., 1989) at 85.

⁶⁸³ Section 137 of the 1996 *Canada Transportation Act*. Interview of the author with CP Legal Section (May 23, 2001).

⁶⁸⁴ *Annex No. 1, Tables No. 7, 8* at xc-xci and xcvi and *infra* at Part II, Chapter I, Section II, Par. 2(A) for CN and CP tariffs. The two railway provisions are similar but not identical. This is contractual uniformity (informal harmonization). *Supra* at 20.

⁶⁸⁵ *Spencer v. CPR* (1913), 13 D. L. R. 836 (Ont. S. C.), (multimodal) *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd.* (1995), DRS 95-10083 (Man. C. A.), *Québec Liquor Corp. v. Dart Europe* (1979), F. C. J. No. 518 (F. C. C.) par. 32-33 the latter deciding on parties intention. Parties’ intent and sophistication are interrelated concepts. *Supra* note 641 and *infra* notes 685, 714, 812 for parties intention. Shippers with ‘equal’ or ‘relatively equal’ bargaining power (EBP) to the carrier are negotiating on an equal footing with him. This is opposed to an ‘extreme’ disparity of bargaining power between carriers and shippers. *U.S.: Automobile Logistics Productivity Import Systems Inc. v. Burlington Motor Carriers Inc.*, 906 F. Supp. 446 (E. D. Tenn. 1997). In *Canada* the term is also used in commercial and transport cases: *Alberta Garment Manufacturing Co. v. Purolator Courier Ltd* (2000), A. J. No. 317 (Alta. Pr. C.). EBP shippers are large shippers who overcome the inequality of bargaining power inherent to a contract of adhesion (transport contract) because of the volume of their shipments and nature of their cargo rather than their sophistication. Mary R. Brooks, “International Competitiveness Assessing and Exploiting Competitive Advantage by Ocean Container Carriers” Discussion Papers in International Business No 105, Dalhousie University, Halifax (1992). Theoretically, therefore, shipper sophistication contributes but is not synonymous to EBP. See, in this respect, *U.S. Mechanical Technology Inc. v. Ryder Trucks Lines Inc.*, 776 F. 2d 1085 (2nd Cir. 1985) holding that shipper sophistication is based on commercial awareness and should be distinguished from EBP. *Canada*: interview with Smith Stephen (Professor of contract law, McGill University) tel: 514-395-6635. In practice, however, case law in the neighbouring countries uses these terms interchangeably. *U.S.: Marvin Lumber and Cedar Co. v. PPG Industries*, (1998) WL 1056973 (D. Minn. 1998) using the frequently employed expression ‘knowledgeable parties of EBP’. *Canada*: interview with Smith Stephen (Professor of contract law, McGill University) 27 September 2000, tel: 514-395-6635. *Alberta Garment Manufacturing Co. v. Purolator Courier Ltd* (2000), A. J. No. 317 (Alta. Pr. C.) stating that the parties had EBP since the shipper was sophisticated.

though they have not directly dealt with the carrier⁶⁸⁶. This test approximates U.S. ‘constructive notice’ test applicable within the context of the fair opportunity doctrine for contractual limitation of carrier liability⁶⁸⁷.

b) Motor Carriers-Statutory Uniformity: CUBOL provisions are much more clearly defined than their U.S. counterparts⁶⁸⁸. In effect, whereas U.S. motor carriers apply today contractually uniform liability limitations, their Canadian counterparts maintain statutorily uniform liability limitations, 4.41\$CAD per kilo or 2.00\$CAD per pound, incorporated in the CUBOL (statutory uniformity)⁶⁸⁹. It is not only that Canadian motor limitations are lower and more clearly defined than their U.S. counterpart (25.00\$USD per pound)⁶⁹⁰. It is also that U.S. motor carriers make use, today, of the same BOL as before deregulation making reference to ‘filed rates’ despite abolition of the latter⁶⁹¹. This makes U.S. BsOL less shipper appealing.

We have seen that contractual limitation of U.S. land carrier liability can work at shipper detriment in the post-deregulation period (i.e. inadvertence clauses). We have also seen that validity of contractual limitative clauses depends upon court willingness to consider or not shipper sophistication, whether this concerns the substantial compliance test or, generally, the ‘fair opportunity’ doctrine⁶⁹². In Canada, uniform CUBOL provisions give rise to the following two questions: first, we wonder whether CUBOL provisions are mandatory or whether they can be contractually modified by agreement between the carrier and the shipper. We

⁶⁸⁶ (intermodal) *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd.* (1995), DRS 95-10083 (Man. C. A.), *Aims International Freight Inc. v. Burlington Northern Customs Brokerage Inc.* (1989), B. C. J. No. 1034 (B. C. S. C.).

⁶⁸⁷ *Supra* at 128s.

⁶⁸⁸ Interview of the author with a transportation law attorney in Montréal (Dec. 6, 1999).

⁶⁸⁹ John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 29. While it is true that departures from CUBOL provisions exist from one province to the other, terms and conditions of motor carriage in Canada are ‘essentially the same’. *Ibid* at 12 and Canada, Canadian Manufacturer’s Association, *The Bill of Lading: What is behind the Fine Print* (Canada: Canadian Manufacturer’s Association, 1979) at 11. *Annex No. I, Table No. 5* at lv-lxv and *supra* note 658 and accompanying text for CUBOL and *infra* at Part II, Chapter I, Section II, Par. 1(B) for further analysis. Statutory uniformity corresponds more to ‘formal’ harmonization as herein presented, *supra* at 20.

⁶⁹⁰ *Infra* at Part II, Chapter I, Section II, Par. 1(B) for further details.

⁶⁹¹ Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America*, (Tuscon, Arizona: National Law Center for Inter-American Free Trade, 1996) at 51.

wonder, more specifically, whether ‘inadvertence clauses’ or, generally, limitation of liability clauses may be encountered in the Canadian BOL. Second, if contractual limitation of Canadian motor carrier liability is possible, under what conditions does it take effect? In other words, do we apply the U.S. ‘fair opportunity’ doctrine and ‘substantial compliance’ test in Canadian motor carriage?

Since CUBOL provisions were intended to create uniform inter-provincial liability terms and conditions of motor carriage, contractual limitation of carrier liability should normally not be permitted since it would put in danger the uniformity the document was intended to advance. However, CUBOL clause 18 provides that:

*Subject to article 19 any alteration, or addition, or erasure in the bill of lading shall be signed or initialled by the consignor or his agent and the originating carrier or his agent and unless so acknowledged shall be without effect*⁶⁹³.

The word ‘alteration’ could be interpreted as contractual limitation or increase of carrier liability. John S. McNeil argues, in this respect, that there is no prohibition in the legislation against the carrier negotiating special terms and ‘*bargain either by way of addition to or deletion of the statutorily prescribed conditions*’⁶⁹⁴. He adds that ‘*it would require strong legislative language in order to arrive at the conclusion that the freedom of contract that exists at common law has been removed*’ (contractualist document)⁶⁹⁵.

In this sense, common law provinces case law frequently mentions the possibility of contractual limitation of carrier liability, often citing McNeil on this issue. For instance, in Nova Scotia Supreme Court case *Chet’s Transport Inc. v.*

⁶⁹² *Supra* at Part I, Chapter II, Section I, Par. 1(C).

⁶⁹³ Clause 19 provides that in case of difference between the actual weight of the shipment and the weight mentioned on the BOL, the carrier can modify the weight shown on the BOL. This modification of the BOL provisions does not need shipper consent since it is based on a matter of pure fact rather than being dependent on shipper agreement. See *Annex No. 1, Table No. 5* at lv-lxv.

⁶⁹⁴ John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell 1997) at 59. The author makes specific reference to contractual limitation of carrier liability. *Ibid* at 60. Also interview of the author with a transportation attorney in Montréal (Dec. 6, 1999).

⁶⁹⁵ John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 60.

Seaway Distributors Ltd. and Alberta provincial court case *Banks v. Budget Transfer Ltd.*⁶⁹⁶, the courts cite *verbatim* McNeil and state: ‘*where a carrier has negotiated a contract reducing his liability...he has the onus probandi...*’. Without specifically citing McNeil, another case states that ‘*any limitation of the motor carrier's liability ...could only be made by an agreement (between the carrier and the shipper)*’⁶⁹⁷. The court refers to the landmark case *Belbin at al. v. S.M.T. (Eastern Ltd)*⁶⁹⁸ that, following English and Canadian railway cases on the issue, held that the carrier did not give shipper sufficient notice and shipper had no actual or constructive knowledge of carrier limitative conditions⁶⁹⁹. In the absence of shipper *actual* knowledge of limitative conditions (communication given to shipper by the carrier), shipper *constructive* knowledge was examined by the court on the basis of his physical condition (defective eyesight), his ability to read and understand English and his (*lack of*) *experience* in transporting goods⁷⁰⁰. This leads to the conclusion that contractual limitation of CUBOL liability provisions is possible in Canadian common law provinces and its implementation is based on the ‘sufficient notice’ test which depends, among other things, on shipper experience (prior dealings) with the carrier⁷⁰¹.

⁶⁹⁶ (1987), N. S. J. No. 368 (N. Sc. S. C.) and (1986), A. J. No. 1367 (Alta. Pr. C.) respectively.

⁶⁹⁷ *Clark v. Sameday Courier* (1992), 126 N. B. R. (2d) 330 (Q. B.). More recently, *Rinehart v. United Parcel Services of Canada Ltd.* (1997), A. N.-B. no. 224 (N. Br. P. C.) cited *Clark* on the same issue. *Bank of Montréal v. Over land Freight Lines Ltd.* [1989], B. C. J. No. 572 (B. C. S. C.) held that contractual limitations will be taken into account by courts.

⁶⁹⁸ (1947), 21 M. P. R. 105 (N. B. S. C.). The case was later cited by *Clark v. Sameday Courier* and *Rinehart v. United Parcel Services of Canada* (1992), 126 N. B. R. (2d) 330 (Q. B.) already mentioned herein.

⁶⁹⁹ The New Brunswick court referred to *Spencer v. Canadian Pacific Railways* (1913), 13 D. L. R. 836 (Ont. S. C.)(headnote).

⁷⁰⁰ *Belbin at al. v. S.M.T. (Eastern Ltd)* (1947), 21 M. P. R. 105 (S. C. N. B.) at 110 and at 124-125 (*in concreto* examination). In this respect, the court cited numerous English cases such as *Parker v. Southeastern Railway Co.* (1877), L. R. 2 C. P. D. 416 (C. A.) (*ibid* at 114) and *Marriott v. Yeoward Brothers* (1909), 79 L. J. K. B. 114 at 118 (K. B. D.) referring to the *Parker* case (*ibid* at 115). On shipper's sophistication in Canada and the U.S. see *supra* notes 641, 685 and *infra* notes 714, 812.

⁷⁰¹ Pr. Smith Stephen adds that presence of *sufficient notice* also depends on how unusual or onerous the clause in question is. In this respect, see *Tilden Rent-a-Car v. Clendenning* (1978), 18 O. R. 2d 601 (Ont. C. A.) where in the presence of sophisticated contracting parties but very onerous clauses the court invalidated these clauses. See also *Nor-Tec Electric Ltd. v. EJB Holdings Inc.* (1998), DRS 98-17447 (Man. Q. B.) where in a commercial contract sophisticated parties are not found to have notice of substantial liability provisions typed in small print. *Eagle Dancer Enterprises Ltd. v. Southman Printing Ltd* (1992), 6 B. L. R. 2d 45 (B. C. S. C.) for *sufficient notice* in general. Pr. Stephen notes, however, that courts will frequently conclude that

The ‘sufficient notice’ test is not far from the U.S. ‘constructive notice’ test used in relation with land carrier contractual limitation of liability (fair opportunity doctrine). In effect, both ‘sufficient notice’ and ‘constructive notice’ tests are based on shipper sophistication to determine shipper notice of carrier limitative conditions, thus, their applicability to the shipper⁷⁰².

Article 8 of the 1999 regulation governing motor BsOL in the province of Québec provides that BOL clauses therein mentioned are the *minimal clauses* that a BOL may contain⁷⁰³, said to be *d’ordre public*⁷⁰⁴. In this respect, the prevailing view seems to indicate that ‘minimal’ (*d’ordre public*) BOL clauses prevent parties from going below the statutorily defined limitation of 4.41\$CAD per kilo, although

sophisticated shippers are deemed to have knowledge of onerous contractual clauses. Interview of the author with Professor Smith Stephen Professor at McGill University (Sept. 28, 2000) tel: (514) 398-6635.

⁷⁰² *Supra* at Part I, Chapter II, Section I, Par. 1(C) for the constructive notice test of the fair opportunity doctrine. Note that U.S. doctrine and case law will sometimes use the terms *sufficient notice* and *fair opportunity* as mutually explanatory. Michael Sturley, “An overview of the considerations involved in handling the cargo case” (1997) Tul. Mar. L. J. 263 at 344-345. See also “Cases: COGSA” (1994) Mar. L. Pract. 720 at 730.

⁷⁰³ *Règlement sur les Exigences Applicables aux Connaissements*, Nov. 3, 1999 online : Institut Canadien d’Information Juridique Homepage <<http://www.ijcan.org/qc/regl/rcqc/20030530/r.q.t-12r.6/tout.html>>. This regulation implements the *Loi sur les Transports* (1998) L. R. Q. c. T-12, a. 5(n) and contains, in Annex II, the *minimal provisions* of the motor BOL. Annex II of said regulation reproducing BOL Model provisions be found in *Annex No. 1, Table No. 5* at lxiii. It is the *Loi sur le Camionage* (1998) L. R. Q. C-5.1 s. 80(7.1) that originally provided for the content of the BOL. This act, however, was abolished by the *Loi Concernant les Propriétaires et Exploitants des Vehicules Lourds* (1998) L.R.Q. c. 40 and its BOL provisions were only revived by the above-mentioned *Loi sur les Transports*. See also case law: *Les Agences de Kamouraska Inc. v. Speedway Express Ltd.* (1983), C. P. 206 (C. P.); *Cigna Assurance Cie du Canada v. Catlen Transport* (1998), A. Q. no. 2924 (C. S. Que.); *Hydro-Québec v. Grant Float Services Inc.* (1987), J. E. 87-1018 (C. S.-Montréal).

⁷⁰⁴ *Transport Brazeau Inc. v. Mometal Inc.* (1985), J.E. 85-497 (C.P.) held that, generally, transport laws serve general welfare and are, therefore, ‘d’ordre public’. As it was stated in *Mongrain v. Auger et autres* (1967), B.R. 332 at 334, the concept of ‘ordre public’ is varied and relative. In effect, it may be very difficult to determine if the legislator intended a specific rule to serve public welfare, in which case it would be ‘d’ordre public’, or private interests, in which case it would not be ‘d’ordre public’. The case further states that when doubt exists, it is wiser to say that the rules are not ‘d’ordre public’. *Ibid.*

There seem to be two views of what the consequences of non-compliance with statutory ‘ordre public’ BOL clauses may be. According to the first one, the contract will be null and void as contrary to the ‘ordre public’. Following the second one, the contract will be given effect but the carrier who will not respect its statutory obligations will not be able to benefit from the statutorily protective provisions. In trying to avoid nullity of the document (adherence to the first version of ‘ordre public’) certain Québec courts declare BOL clauses not d’ordre public’ deciding, however, in the end, that non-compliance with BOL clauses (not ‘d’ordre public’) will deprive carrier from the limitation of liability benefit. *Les Agences de Kamouraska Inc. v. Speedway Express Ltd.* (1983), C. P. 206 (C. P.) where the BOL did not contain the statutory limitation of liability amount. Based on the *Kamouraska* holding the same conclusion was reached in *Hydro-Québec v. Grant Float Services Inc.* (1987), J. E. 87-1018 (C. S.-Montréal).

contractual increase of carrier liability is not prohibited⁷⁰⁵. However, in sanctioning regulatory reference to ‘minimal’ provisions, *Les Agences de Kamouraska Inc. v. Speedway Express Ltd.* stated that BOL Clause 18 allows contractual modifications (i.e. limitations or increases) of carrier liability, such modifications also constituting ‘minimal’ provisions⁷⁰⁶. This holding leaves judges a great margin of appreciation in considering contractual increase as well as limitation of carrier liability⁷⁰⁷.

The more recent case *Trafi-Tech Inc. v. Transport All Type/Division de Jerry Cohen Forwarders Ltd*⁷⁰⁸ sets aside the *Kamouraska* holding on the grounds that the latter referred to legislation not in force at the time of the *Trafi-Tech* decision. The court explained that the 1999 Québec regulation on motor carriers and art. 2034 of the 1994 Québec Civil Code (stating that a motor carrier can limit its liability only within the conditions prescribed by law), were not in force at the time of the *Kamouraska* holding that based its decision on interpretation of prior regulations. The court finally found that it is courts that should interpret legal provisions and, therefore, art. 10 of the BOL and the said regulation. It concluded that shipper

⁷⁰⁵ The concept ‘minimal provisions’ accompanied by the ‘ordre public’ concept appear very frequently in case law in the province of Québec and prohibit going below (or beyond -depending on the context-) the ‘minimal’ regulatory provisions. For transport cases referring to minimal provisions and the ‘ordre public’ concept as applied by case law see *supra* notes 703, 704. (non-transport case) *Comité Paritaire de l’ Industrie du Meuble v. A.J.S.L.M. Corp.* (1991), J. E. 91-1552 (C. A. Qué.) held that the employer cannot increase the minimum work hours provided for in governmental decrees since these provisions are d’ *ordre public* and they establish *minimal provisions*. *Habitations Desjardins du Centre-Ville v. Lamontage* (1996), J. E. 96-2060 (C. Qué.) held that tacit renunciation of ‘*ordre public*’ provisions is not possible. Reasoning by way of analogy, inadvertence clauses would probably be prohibited in the province of Québec. *Libarian v. Goulet* (1995), J. E. 95-1078 (C. S. Qué.) held that minimal insurance coverage provided for by legislation is ‘*d’ordre public*’ and every contract must contain provisions at least equal to the ones provided by legislation. Also, interview of the author with Pr. Lefebvre, Professor at the University of Montréal (May 15, 2001) tel : (514) 343-7202.

⁷⁰⁶ (1983), C. P. 206 (C. P.) at 209-210. We remind the reader that BOL clause 18 is entitled *Alterations* and governs modification of the BOL by the carrier and the shipper. *Supra* at 139.

⁷⁰⁷ Mr. François Rouette, the attorney that pleaded the *Kamouraska* case defending the carrier, affirms that there is no doubt, in private law practice, that contractual limitation of motor carrier liability may be given effect in the province of Québec. Interview of the author with François Rouette, transportation law attorney in Québec City and Montréal, Flynn Rivard & Associates (Nov. 27, 2000) tel: (514) 288-7156 and (418) 692 3751.

⁷⁰⁸ (1999), J. Q. no. 2571 (C. Q.). This is the only case that refers to the *Kamouraska* holding.

compensation should be based on the weight of the lost items and not on the weight of the total shipment as BOL clause 10 states⁷⁰⁹.

On the basis of the *Trafi-Tech* holding we opine that the latter did not overrule *Kamouraska* in its substance. On the contrary, each one of these two cases complements the other. *Trafi-Tech* merely made explicit the legal limits of motor carrier liability (1999 regulation, BOL clauses) and invited courts to interpret their provisions, something that both *Trafi-Tech* and *Kamouraska* decisions do for BOL Clauses 10 and 18 (*‘legal limits of carrier liability’*) respectively. Both courts interpretations of said clauses should be considered valid under the present state of case law in the Province of Québec. We disagree with *Trafi-Tech* conclusion that *Kamouraska* referred to outdated legislation, at least as far as the issue of contractual limitation of carrier liability is concerned, simply because the same principles on the issue (concept *d’ordre public, minimal provisions*) were in force at the time of both cases holdings even though contained in different enactments. The *Kamouraska* holding concluded that contractual limitation of carrier liability is possible whereas the *Trafi-Tech* holding did not reason on this precise issue but, rather, interpreted clause 10. It did not consider the *Kamouraska* holding simply because it was based on laws not applicable at the time and did not go further to consider the substance of applicable laws at the time of the *Kamouraska* case as far as liability limitation is concerned, or otherwise.

In reasoning this way, we understand and should make clear that even if we admit the validity of the *Kamouraska* holding, this case represents the minority view in Québec case law which, generally, does not sanction contractual limitation of carrier liability clauses. The fact that we have found no Québec cases sanctioning contractual limitation of carrier liability is proof that in Québec, as in Canada for that

⁷⁰⁹ *Ibid.* Clause 10 of the BOL states motor carrier liability limitation amounts and does not comment on modification of carrier liability except for shipper declaration of value.

matter, contractual modification of motor carrier liability is not often used⁷¹⁰. However, permissive language in the *Kamouraska* holding may lead, one day, to sanctioning contractual limitation of carrier liability in Québec as this is currently done before the courts of Canadian common law provinces⁷¹¹. If courts sanctioned contractual limitation, shipper sophistication would undoubtedly be considered in giving them effect⁷¹².

Overall, Canadian and U.S. courts seem to sanction contractual limitation of motor carrier liability, with the exception of the Canadian province of Québec that excludes this possibility despite permissive case law language existing in this respect. U.S. and Canadian common law jurisdictions take into account shipper sophistication in determining notice the latter has of contractual liability provisions. This is especially true considering the recent shift of U.S. ‘actual’ notice jurisdictions towards ‘constructive’ notice jurisdictions. We cannot but encourage, once again, the initiative of the Ninth Circuit to provide uniformity, not only at the domestic level but, also, with respect to the Canadian common law case law in adopting the constructive notice test.

For the sake of uniformity one could argue that Québec courts should align their case law with common law principles of contractual limitation of carrier liability. Such a suggestion, however, would increase uncertainty in the relation between motor carriers and shippers since, as we have seen, the latter may easily be ‘trapped’ in carrier advantageous BOL contractual limitations. This is not to say that generalization of Québec courts traditional view of prohibition of contractual limitation of carrier liability should be considered. The deregulation trend seems to

⁷¹⁰ Interview of the author with Canadian Transportation Agency personnel (Nov. 29 and Dec. 1, 2000) and Colin Barrett, “Inadvertence Clauses in Canada?” *Traffic World* (2000) online: LEXIS (Transp. News). The author attributes the absence of inadvertence clauses in Canada to the fact that Canadian motor carrier liability limits are lower than U.S. ones and that in the U.S. there has been no inter-state agreement on application of uniform liability provisions as it is the case in Canada. *Ibid.* See also *infra* note 1155 and accompanying text.

⁷¹¹ *Supra* at 139s.

⁷¹² Interview of the author with a transportation attorney in Montréal (Nov. 27, 2000).

have been well anchored in common law legislation and practices. Undoing this trend would go beyond the reach of what would be realistically feasible.

c) Incorporation by Reference: Contrary to U.S. courts, Canadian courts do not refer to motor or rail BOL ‘substantial compliance’ with regulatory provisions or tariffs. They regard, however, ‘incorporation by reference’ as a valid way to stipulate regulatory provisions or tariffs in a BOL provided that parties have reasonable opportunity to consider the referenced terms and to object. In this sense, courts apply the ‘sufficient notice’ test before sanctioning clauses incorporating by reference motor regulatory provisions or rail tariffs in the BOL, making shipper sophistication or contracting parties intent the corollary of ‘incorporation by reference’⁷¹³. Case law advises that parties intent and shipper sophistication in applying regulatory provisions are interrelated concepts⁷¹⁴.

It is evident, therefore, that Canadian courts will take into account shipper sophistication in giving effect to contractual limitation of land carrier liability and incorporation by reference of regulatory provisions or tariffs into a BOL. This is to be contrasted to U.S. cases which are divided between ‘actual’ and ‘constructive’ notice jurisdictions on the basis of the ‘fair opportunity’ doctrine with respect to contractual limitation of land carrier liability and ‘substantial compliance’. However, we can detect a developing tendency of U.S. courts to adopt the ‘constructive’ notice

⁷¹³ (intermodal) *Bombardier Inc. v. Canadian Pacific Ltd.* (1991), 7 O. R. (3d) 559 (Ont. C. A.) indicating that both carriers and shippers were sophisticated. (Motor): *Aurora TV and Radio Ltd v. Gelco Express Ltd.* (1990), 65 Man. R. (2d) 145 (Man. Q. B.), *M. A. N.-B. W. Diesel v. Kingsway Transports Ltd.* (1993), 15 O. R. (3d) 106 (Gen. Div.) and (non transport case) *G & W Electric Ltd. v. Commission Hydro-électrique du Québec* (1995), A. Q. no. 694 (C. A. Qué.) on shipper sophistication. John S. McNeil, *Motor Carrier Cargo Claims* 3d ed. (Toronto: Carswell, 1997) at 29-30 and at 32. In *Cornwall Gravel Company Ltd. v. Purolator Courier Ltd.* (1978), 18 O. R. (2d) 551 (Ont. S. C.) and *JWI Jewellery World International Ltd. v. Jarret Quinn Jewellers Ltd.* (1989), B. C. J. No. 2312 (B. C. S. C.) the court referred to parties intent and not shipper sophistication. For U.S. ‘substantial compliance’ test see *supra* at 131s.

⁷¹⁴ Parties’ sophistication is a variable to consider in determining their intent to include a specific provision in a contract. This is the case for the U.S. and Canada. Canada: *Bills Investments Ltd. v. First Investors Corp.* (1990), 72 D. L. R. (4th) 32 (Sask. C. A.). In the field of transportation see *Bombardier Inc. v. Canadian Pacific Ltd.* (1988), O. J. No. 1807 (S. C. Ont.) and *N.S. Tractors & Equipment Ltd. v. Tarros Gage* (1986) F. C. J. No. 127 (F. C. C.). U.S.: *New Hampshire Ins. Co. v. Seaboard Marine Ltd.*, 1992 WL 33861 (D. C. Fld. 1992).

test and, therefore, converge with Canadian case law in considering shipper sophistication.

Conclusion

Canadian motor and rail deregulation seems to have evolved more smoothly than its U.S. counterparts. In both countries, however, land (with the exception of Québec motor) carrier liability provisions can be subject to contractual limitation even though parties do not have frequently recourse to it since they have attained either contractual or statutory uniformity of carrier liability provisions. BOL 'incorporation by reference' of or 'substantial compliance' with land carrier tariffs or regulatory provisions is also possible in the U.S. and Canada.

Although U.S. land case law seems to be divided on the issue of considering or not shipper sophistication before giving effect to contractual liability limitations or provisions 'substantially complying' with tariffs or regulations, we note case law shifting towards consideration of shipper sophistication. Consideration of shipper sophistication is the rule in Canadian land cases in putting into effect contractual limitation of carrier liability provisions and incorporation by reference clauses. It is more than evident, therefore, that following land carrier deregulation in the U.S. and Canada the 'judicial safety net' based on shipper sophistication is increasingly rising in importance. Along with it, rise uncertainty of judges conclusions and the necessity of case law codification to increase clarity, stability in trade and shipper reliance on transportation services.

Section II: U.S. and Canadian Ocean Carrier Deregulation and its Effect on Carrier Liability

Ocean carriage is the main component of intermodal transportation and currently subject to international conventions governing terms and conditions of carriage. Even though not as popular and expedient means of transportation as trucks and rails, vessels are highly suitable for particularly large shipments and overall maintain very competitive rates with rail and motor carriers at the NAFTA level⁷¹⁵.

International ocean carriers in the NAFTA countries operate, since the 1870s, under a system of price-fixing cartels known as conferences⁷¹⁶. Member carriers of these conferences must adhere to a common tariff applicable by all members of the conference⁷¹⁷.

Conference Immunity-Intermodalism: Price-fixing conference agreements in the U.S., Canada, Mexico and Europe benefit from antitrust immunity⁷¹⁸. This is explained by conference's high investments in vessels, the need for regular prices at standard rates (economic reasons)⁷¹⁹ and the fact that most jurisdictions for which

⁷¹⁵ Canada, Canadian Transportation Law Reporter, *Canada-U.S.-Mexico* (Toronto: CCH International Press Ltd. 1997) at 100-425. To take probably an extreme example, for general cargo entering Mexico by sea exporters can expect a 4-5 day delay in addition to transit times of 10-20 days as goods are custom-cleared and move to importers warehouse. *Ibid.*

⁷¹⁶ Andrew M. Danas, *Globalization and the Future of the Federal Maritime Commission*, (1997) online: Grove, Jaskiewicz and Cobert Homepage <<http://www.gjacobert.com/amdtli97.html>> (last visited: May 23, 2001).

⁷¹⁷ "A key feature of conference operations is the control of price competition; member lines must adhere to a common tariff". Canada, Ministry of Transport, *Freedom to Move Act-A Framework for Transportation Reform* (Ottawa: Ministry of Transport, 1985) at 43-44.

⁷¹⁸ For Europe see (article 81(3) of the *Treaty of Rome*) and *supra* at 93s. Canada: *Shipping Conferences Exemption Act*, (1987) R. S. 1985, c. 17 (3d Supp.) Sec. 4. 1(a) maintained by the *Canada Shipping Act 2001*. U.S.: Sec. 7 of the 1994 *Shipping Act* as amended by the 1998 *Ocean Shipping Reform Act* online: Am. Shipper Homepage <http://www.americanshipper.com/Shipping_Act_1998.htm#section7> (last visited: May 24, 2001). For a more detailed analysis of the Canadian, U.S. and EEC legislation on conferences price fixing see Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141s. Antitrust laws prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce the competitive vigor of particular markets and predatory acts designed to achieve or maintain monopoly power. *Overview (Antitrust Division)* (2002) online: U.S. Department of Justice <<http://www.usdoj.gov/atr/overview.html>> (last modified: daily).

⁷¹⁹ European Commission, "Interim Report of the Multimodal Group" (Brussels, March 1996) at 11. The emergence of conferences was made in the hopes that they may prevent cut throat competition among

international ocean transportation is a vital link to other countries, have sanctioned conferences (political reason)⁷²⁰. Stability of rates for scheduled services enables shippers to know reasonably far in advance the cost of transporting their products and, therefore, their selling price on the market of destination whatever the time, vessel or conference ship owner involved⁷²¹.

Today, Canada, the U.S. and Europe are gravitating towards introducing more competition in conferences either through adopting more competitive provisions or through consideration of removing the anti-trust immunity that the conferences enjoy⁷²². The introduction of competition rules in the conference structure threatens their influence and existence⁷²³. The cautious approach taken today towards removal of the antitrust immunity is justified by avoidance of trade disputes, costly international litigation, service disruptions, financial uncertainty for shipping lines and ensuing costs that would ultimately be born by the consumer⁷²⁴.

Opponents of the collective ratemaking practices suggest that ocean rates are kept artificially high by conferences allowing, thereby, inefficient carriers to remain in business⁷²⁵. They are quick to point out that many conference members are already offering independent rate actions, service contracts to large or key customers and preferential treatment at key ports to differentiate their organisation on the basis of price and service⁷²⁶. Shipping lines and proponents of conferences argue that

steamship lines. Left unchecked, this destructive competition would lead to many maritime company failures and irregularities in shipping schedules. Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports" (1999) 26 *Transp. L. J.* 205 at 209.

⁷²⁰ Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 164.

⁷²¹ *Ibid.*

⁷²² *Ibid* at 187.

⁷²³ Harold J. Creel, "Shipping Antitrust Law" *Congr. Testimony* (1999) online: WESTLAW (Newsletters).

⁷²⁴ *Ibid.*

⁷²⁵ Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation" (1999) 26 *Transp. L. J.* 205 at 210. Opponents are mainly shippers or shipper associations. In effect, in many cases, conferences have been protecting carriers by flexing their muscles and increasing rates even when there is no shortage of container slots. Clayton Boyce, "What Goes Down" *J. Com.* (1999) online: WESTLAW (Newspapers).

⁷²⁶ Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation" (1999) 26 *Transp. L. J.* 205 at 210.

conferences stabilize rates, control capacity and maintain adequate profit levels for the ocean carrier industry. They add that bankruptcies caused by a free market pricing system would cause major disruptions in the timely movement of international commerce⁷²⁷.

Under the present state of affairs, antitrust immunity in the U.S. is granted in case of price-fixing agreements between two conferences or between a conference and an independent liner⁷²⁸. It also takes effect in the presence of international intermodal rates set by conference members *individually or jointly (consortium acting as a single entity)*⁷²⁹. This promotes the already present horizontal integration among sea and inland carriers in the NAFTA region⁷³⁰. However, agreements between 'the conference' and 'another mode' are not covered by the immunity⁷³¹.

In Europe, the European Commission has refused to extend conference's antitrust immunity to any type of price-fixing agreement with inland carriage except in case of an exemption⁷³². Agreements between independent liners and conferences⁷³³, inland carriers and conferences or inland carriers and conference members acting jointly (the latter permitted in the U.S.) are illegal in the EU that does not favour horizontal integration⁷³⁴. The EC exemption is granted only to agreements between conferences. In concluding in this way, the Commission has

⁷²⁷ *Ibid* at 209.

⁷²⁸ Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 187.

⁷²⁹ *Ibid* at note 173. The conference exemption does not apply to through carriage within the U.S.. Christopher Clott, Gary S. Wilson, "Ocean Shipping Deregulation and Maritime Ports" (1999) 26 *Transp. L. J.* 205 at 207.

⁷³⁰ For instance, the joint venture called Maersk-Rail Van LLC will strengthen the ocean shipping of the former company (Maersk) with the inland capacities of the latter (Rail Van LLC) throughout the NAFTA countries. John McLaughlin, "International: United States, Sea-Land and Maersk set for Intermodal Odyssey" *Lloyd's List. Int'l.* (1999) online: WESTLAW (Newsletters).

⁷³¹ Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 182 and at note 173 and Shashikumar N., Shatz G. L., "The Impact of U.S. Deregulatory Changes on International Intermodal Movements" (2000) *Transp. J.* 514.

⁷³² Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few major Issues" (1999) 26 *Transp. L. J.* 141 at 182 and at note 173.

⁷³³ This is the case most often present. *Ibid* at 189.

⁷³⁴ *Ibid* at 187. *Supra* at 94s.

considered that price stability that would result from intermodal price-fixing is not a sufficient argument for such a serious restriction on competition⁷³⁵.

Like the U.S., Canada provides for antitrust immunity of price-fixing agreements between conferences⁷³⁶. Price-fixing agreements between the conference and inland carriers are not covered by the immunity so that the matter is left in the hands of the courts to decide⁷³⁷. Likewise, agreements between independent liners and conferences are not within the scope of the immunity⁷³⁸. As in the U.S., however, agreements between inland carriers and conference members acting *individually or jointly (consortium)* are allowed in Canada⁷³⁹.

The variable scope of the ocean carriage antitrust immunity in the U.S., Canada and Europe has rendered contentious its very existence⁷⁴⁰. U.S. and Canadian ocean shipping deregulation **Par. 1** confirms the dismantling of conferences and the rising in importance of the 'fair opportunity' doctrine (U.S.) and the 'sufficient notice' test (Canada) **Par. 2**.

Par. 1. U.S. and Canada: To enhance competition of the already expanded shipping industry, the U.S. 1984 *Shipping Act* commenced ocean carrier deregulation that continued with 1998 *OSRA* (Ocean Shipping Reform Act-former Senate Bill S-414)⁷⁴¹, an act that did away with the remaining 1984 *Shipping Act* shipper

⁷³⁵ *Ibid* at 19. James P. Hoffa, "Shipping and Anti-trust" *Cong. Testimony* (2002) online: WESTLAW (Newsletters) noted that the European Commission held and a European Court affirmed that the members of a conference had infringed upon their ocean carrier antitrust exemption by "agreeing on prices for inland transport services as part of a multimodal transport operation for the carriage of containerized cargo between northern Europe and the Far East". See also *supra* at 94s.

⁷³⁶ Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 187.

⁷³⁷ *Ibid* at note 173.

⁷³⁸ *Ibid* at 183.

⁷³⁹ *Ibid* at 183.

⁷⁴⁰ *Ibid* at 187.

⁷⁴¹ *Shipping Act* 46 U.S.C. ss 1701-1721 (1984) and *Ocean Shipping Reform Act (OSRA)* Pub. L. 105-258 (46 U. S. C. ss 1701-18) (1998). The legislative procedure for the adoption of the OSRA 1998 started in 1995 with adoption of the OSRA 1995 by the House of Representatives. The legislation was stalled in the Senate that finally adopted an amended version of the act on October 9, 1998. The text finally adopted by the House of Representatives and the Senate is known as the *OSRA* 1998.

protections. Under the 1984 *Shipping Act* and until May 1, 1999 (entering into effect of 1998 *OSRA*), U.S. shipping conferences were operating under the control of the Federal Maritime Commission (FMC)⁷⁴². The FMC standard of review of conference agreements and tariffs was that they must not produce a reduction in competition, an unreasonable reduction in transportation service or an unreasonable increase in transportation costs⁷⁴³. *OSRA* changed the rules of the game.

In Canada, it is the *Shipping Conference Exemption Act 1987* (SCEA)⁷⁴⁴ that deregulated ocean transport. This act was intended to follow the U.S. 1984 *Shipping Act* and provide, therefore, for shipper protection⁷⁴⁵ and conferences control by the Canadian Transportation Agency (CTA)⁷⁴⁶. In 1995, when suggestions were made in the U.S. to revise the 1984 *Shipping Act*, Ottawa proceeded to an extensive review of the *SCEA* and decided to leave things alone, at least for the time being⁷⁴⁷. Canadian authorities argued that if U.S. *OSRA* became law, it would be likely that Canada would follow. It would not, however, take the lead⁷⁴⁸. In the post-*OSRA* period, Bill C-14⁷⁴⁹ amending the *SCEA 1987* to inject more competition to ocean transport and

⁷⁴² On the Federal Maritime Commission (FMC) see *Globalization and the Future of the Federal Maritime Commission*, (1997) online: Grove, Jaskiewics and Cobert Homepage <<http://www.gjacobert.com/amdtli97.html>> (last visited: August 24, 1998). "The FMC is an independent watchdog agency. Its primary mission is to regulate international container shipping in and out of the U.S. ports". "Clinton Picks Ex-Governor to fill 5th FMC spot" *J. Com.* (1999) online: LEXIS (World, ALLWLD).

⁷⁴³ Jack G. Knebel, Denise Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 *Tul. L. Rev.* 543 at 554-555. "Before disapproving controlled carrier's rate... Commission will examine whether market penetration or other injury to trade has resulted from rate, particularly if differential in total charges is not extreme". "American Jurisprudence" 70 *Am. Jur. 2d Shipping s 716* (1987) at 755 online: WESTLAW (Newsletters).

⁷⁴⁴ R.S.C. 1985, c. 17 (3rd Supp.).

⁷⁴⁵ Canada, Ministry of Transport, *Freedom to Move: A Framework for Transportation Reform* (Ottawa: Ministry of Transport, 1985) at 44.

⁷⁴⁶ The CTA is an independent, quasi-judicial tribunal that makes decisions on a wide range of economic matters involving federally-regulated modes of transportation (air, rail and marine), and has the powers, rights and privileges of a superior court to exercise its authority. Along with its roles as an economic regulator and an aeronautical authority, the Agency works to facilitate accessible transportation, and serves as a dispute resolution authority over certain transportation rate and service complaints. *Role and Structure of the Agency* (2002) online: Transport Canada Homepage <http://www.cta.gc.ca/about-nous/role_and_structure_e.html> (last modified: continuously).

⁷⁴⁷ "Canadians Catch Deregulatory Fever" *Am. Shipper* (1995) online: LEXIS (World, ALLWLD).

⁷⁴⁸ *Ibid.*

⁷⁴⁹ *Bill C-14* (2001) online: Canadian Parliament Homepage <http://www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-14/C-14_3/C-14TOCE.html> (last visited: Nov. 5, 2001). Part 15 of the Bill contains the amendments to the 1987 *SCEA*. *Ibid.* See also *Review of the SCEA* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/pol/en/scea/default.htm>> (last

overhauling the *Canada Shipping Act* (now called *CSA 2001*)⁷⁵⁰ received Royal Assent and entered into force on January 30, 2002⁷⁵¹. Bill's amendments of the 1987 *SCEA* closely mirror those of the U.S. *OSRA*⁷⁵².

We will presently comment on the general effects of U.S. and Canadian ocean transport deregulation (A) before focusing on the statutory uniformity of U.S. and Canadian ocean carrier liability following ocean deregulation (B).

A. General Effects of U.S. and Canadian Ocean Transport Deregulation: On May 1, 1999 the U.S. *OSRA* came into force, saluted by carriers and high-volume shippers. The Canadian *CSA* followed in 2002, aligning Canadian law with the legislation of its major trading partner. Both U.S. and Canadian acts restrict governmental powers and diminish the importance of conferences by permitting electronic posting of ocean carrier tariffs, furthering confidential contracting and shortening notice period for conference members independent action⁷⁵³.

modified: June 13, 2002) and *SCEA 1987* (including amendments) (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002).

⁷⁵⁰ *Canada Shipping Act 2001*, 2001 S. C., c.26 [hereinafter *CSA*]. The *CSA* is a voluminous act that was used as a 'piggy bag' or 'convenience piece' to bring about *SCEA 1987* amendments. Interview of the author with a regulatory expert at the Canadian Transportation Agency (June 28, 2002).

⁷⁵¹ *Review of the SCEA* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/pol/en/scea/default.htm>> (last visited: June 13, 2002) and *SCEA 1987* (including amendments) (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002). Even though the Act has received Royal Assent, most of its provisions will not come into force until later date, when the regulations which will implement it will be prepared. Richard F. Southcott, Kimberly A. Walsh, "Canadian Maritime Law Update" (2002) 33 J. Mar. L. & Com. 293 at 293 and *Canada Shipping Act 2002* (2002) online: Transport Canada Homepage <www.tc.gc.ca/pol/en/Report/anre2002/8A_e.htm> (last visited: June 19, 2003). However, Act's provisions herein commented on (electronic filing, confidential contracts and 'independent action') are now 'in force'. Richard F. Southcott, Kimberly A. Walsh, "Canadian Maritime Law Update" (2002) 33 J. Mar. L. & Com. 293 at 296.

Even though the Canadian government was considering inclusion of a five-year 'sunset' provision of conferences antitrust immunity that would withdraw at the end of the fifth year, this provision was finally not included in the bill. Representatives of the Canadian Shippers Council (CSC) are concerned about the absence of a 'sunset' provision.

⁷⁵² *SCEA 1987* (including amendments) (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002) and "Liner Shipping Canada Spares the Conferences" *Ll. List. Int'l* (2001) online: WESTLAW (Newsletters).

⁷⁵³ "Liner Shipping Canada Spares the Conferences" *Ll. List. Int'l*. (2001) online: WESTLAW (Newsletters) and Constantine G. Papavizas, Lawrence I. Kiern, "1997-1998 U.S. Maritime Legislative Developments" (1999) 30 J. Mar. L. & Com. 487 at 489-490.

First, replacing the requirement "to file" ocean international transportation tariffs with the FMC by a new requirement "to electronically post" the said tariffs was intended to avoid delays, bureaucracy and governmental expenses⁷⁵⁴. Conferences today must publish their tariffs in automated systems of their choice and only inform the FMC and CTA of their location in order to facilitate publication of the list of locations on the web⁷⁵⁵. The governmental agencies retain jurisdiction to ensure that the tariff format and its accessibility and accuracy are reasonable and maintain their authority to enforce tariffs if necessary⁷⁵⁶. Canadian and U.S. *intermodal* tariffs do not have to be filed with the government following deregulation⁷⁵⁷. In other words, federal guidelines regarding rates still exist

⁷⁵⁴ U.S.: "STB's Closes Option of Filing U.S. Tariffs on FMC's System", *J. Com.* (1999) online: LEXIS (World, ALLWLD). See also Patricia L. Snyder, "The Proposed Ocean Shipping Reform Act of 1995: An Interim Report" (1995) 26 *J. Mar. L. & Com.* 545 at 546. Canada: *SCEA Amendments* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h033e.htm> (last visited: June 3, 2002), *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002), "Border Lines" *Log. Mgt & Distr. Rep.* (2002) online: WESTLAW (Newsletters). We have to note, in this respect, that 60% of Canada's liner trade moves on non-conference ships and, thus, outside a published tariff structure. "Canadians Catch Deregulatory Fever" *Am. Shipper* (1995) online: LEXIS (World, ALLWLD).

⁷⁵⁵ U.S.: Lisa H. Harrington, "Musing on the New Year" *Transp. and Distrib.* (1999) online: WESTLAW (Newsletters). Canada: *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002).

⁷⁵⁶ U.S.: Mary Kay Reynolds, *Ocean Shipping Reform Act Becomes Law* (2000) online: National Unaffiliated Shippers Association Homepage <<http://www.nusa.net/nusaact.htm>> (last modified: Dec. 8, 2000). Canada: *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002).

⁷⁵⁷ Canada: Interview of the author with a Canadian Transportation Agency tariff responsible (July 2, 2002). Although there is no legislation or regulatory framework in Canada specifically dealing with intermodal transportation, unimodal laws have provided support for certain intermodal operations as: presence of 'through' charges, ownership of trucking firms by railways and quoting on intermodal traffic by marine carriers. Canada, Department of Transportation, *Transportation in Canada, Annual Report* (1996) online: Transport Canada Homepage <http://www.tc.gc.ca/pol/en/anre1996/tc96_chapter_12.htm> (last visited: Nov. 6, 1996). U.S.: Charles A. James, "Shipping and Anti-trust" *Congr. Test.* (2002) online: WESTLAW (Newsletters). Before the 1998 *OSRA*, ocean carriers engaging in 'through' carriage had to file their 'through' rates with the FMC even though the inland division of through rates needed not to be stated and over which the Commission has no regulatory authority (*supra* at 118-119 on inland carrier exemption). It was the ICC (today Surface Transportation Board-STB) that retained jurisdiction over inland carrier portion of through rates. Joseph Monteiro, Gerald Robertson, "Shipping Conference Legislation in Canada, the European Economic Community and the United States: Background, Emerging Developments, Trends and a Few Major Issues" (1999) 26 *Transp. L. J.* 141 at 160. Jack G. Knebel, Denise Savoie Blocker, "United States Statutory Regulation of Multimodalism" (1989) 64 *Tul. L. Rev.* 543 at 549 and 553.

following deregulation but governmental control is put in the backseat behind private marketplace⁷⁵⁸.

Second, maintaining and furthering confidential contracting of the 1984 *Shipping Act* and 1987 *SCEA* respectively, also applicable to intermodal shipments⁷⁵⁹. Before the advent of these acts, volume discount arrangements, known as service contracts, had to be made public and were not, therefore, confidential⁷⁶⁰. As a result, other shippers with the same shipment volume could claim the same rates and terms of service. This does not mean that confidential contracts did not exist prior to said acts. They did exist, they were filed confidentially with the FMC (U.S.) and the CTA (Canada) but their essential terms, including rates, were made available to other similarly situated shippers⁷⁶¹.

Today, the essential terms of service contracts are kept absolutely confidential, allowing carriers to offer customers special discounts⁷⁶². On August 11,

⁷⁵⁸ Austin P. Olney, "A Report from the Marine Regulatory Front: Partly Cloudy with a Chance of Thunderstorm" (2001) 13 U. S. F. Mar. L. J. 91 at 98-99.

⁷⁵⁹ U.S.: Shashikumar Schatz, "The Impact of U.S. Regulatory Changes on International Intermodal Movements" *Transp. J.* (2000) online: WESTLAW (Newsletters). Canada: *SCEA Amendments* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h033e.htm> (last visited: June 3, 2002). For the *SCEA* amendments see *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002), "Border Lines" *Log. Mgt & Distr. Rep.* (2002) online: WESTLAW (Newsletters).

⁷⁶⁰ U.S.: "Deregulation Approaches; Shippers Try to Find Niche" *J. Com.* (1999) online: LEXIS (World ALLWLD). Canada: *SCEA Amendments* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h033e.htm> (last visited: June 3, 2002).

⁷⁶¹ U.S.: Andrew M. Danas, "Do Changing World Trade Patterns Require Changing of the World Trade Laws?" (1989) 22 Vand. J. Transnat'l L. 1035 at note 105. Canada: The 1987 *SCEA* provided in Section 22(2) on confidentiality: "...the information shall not be made public in such a manner as to be made available for the use of any business competitor of the persons to which the information relates". On the resemblances between the 1984 Shipping Act and 1987 *SCEA* provisions on this point see Mary R. Brooks, *Monitoring Transportation Regulatory Reform* (Canada: Ocean Institute of Canada, 1989) at 23-24.

⁷⁶² U.S.: "Deregulation Approaches; Shippers Try to Find Niche" *J. Com.* (1999) online: LEXIS (World ALLWLD). The one exception to this new confidentiality requirement are provisions of the bill which provide that organized labour would still be entitled to disclosure of all such information for purposes of monitoring their collective bargaining agreements with ocean common carriers. This was a concession granted by the bill's sponsors to remove the opposition of organized labour to the legislation". Ronald N. Cobert, Esq. Senior Partner Grove, Jasliewisz and Cobert, *Ocean Shipping Reform: What It Means for Shippers' Associations*, (August 19, 1998), online: Ocean Shipping Reform Homepage <<http://www.gjcobert.com/cobert898.html>> (last visited: 24 August 1998). Canada: *SCEA Amendments* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h033e.htm> (last visited: June 3, 2002) and *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002).

1999, a little bit after the coming into effect of the 1998 *OSRA*, the FMC chair noted that the industry was inundated by confidential contracts, changing the competitive environment in ocean carriage⁷⁶³. This confirms the saying that the 1998 *OSRA* and the *CSA* 2001 bargain between carriers and shippers translates into antitrust immunity for carriers in exchange for confidential service contracts for shippers⁷⁶⁴.

Third, maintaining 1984 *Shipping Act* and *SCEA 1987* ocean liner independent action⁷⁶⁵, shortening the required notice period given to the conference before proceeding to the independent action and prohibiting conferences from disallowing its members to proceed to it⁷⁶⁶. New independent action provisions have been described as the ‘death knell’ of the traditional concept of conferences because they further conference members ability to individually negotiate with shippers and establish their own rates⁷⁶⁷.

In summary, it is argued that the new regime under the *OSRA* and the *CSA* 2001 “combines the freedom to establish rates without prior regulatory approval with the ability to make such arrangements confidential”⁷⁶⁸. In so doing, these acts diminish the influence of rate-setting conferences and mark the next step of ocean

⁷⁶³ U.S.: From 3,400 confidential contracts during May and June 1998 we passed to 15,000 such contracts in 1999 during the same months. *The Reform of Canadian Law Applying to Ocean Shipping Conferences* (1999) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/SCEA2.htm>> (last visited: Feb. 8, 2000). Bill Mongelluzzo, “With Albert A. Pierce, Executive Director of TSA and WTSA” *J. Com.* (2003) online: WESTLAW (All – News). Canada: “Federal Maritime Commission Says...” *J. Com.* (2003) online: WESTLAW (All-News).

⁷⁶⁴ Peter M. Tirschwell, “Shipping Regulation” *J. Com.* (1999) online WESTLAW (Newsletters).

⁷⁶⁵ Independent action permits an individual carrier or a group of carriers to sign a service contract with one or more shippers without the need to obtain conference permission ‘to provide specified services under specified terms and conditions’. Allen Evans Jackson, “In Support of Exempting Non-Vessel Operating Common Carriers from Tariff Filing” (1993) 1 *Geo. Mason. Indep. L. R.* 289 at 297 and at note 30.

⁷⁶⁶ U.S.: The notice requirement for independent action was shortened from 10 to 5 days. Ron Jacobsen, “Shipping Antitrust Law” (1999) online: WESTLAW (Newsletters). Canada: The notice requirement for independent action was shortened from 15 to 5 days. *SCEA Amendments* (2001) online: Transport Canada Homepage <http://www.tc.gc.ca/releases/nat/01_h033e.htm> (last visited: June 3, 2002) and *SCEA 1987* (2002) online: Transport Canada Homepage <<http://www.tc.gc.ca/Actsregs/scea-ldcm/scea.html>> (last visited: June 24, 2002).

⁷⁶⁷ Charles A. James, “Shipping and Antitrust” *Cong. Testimony* (2002) online: WESTLAW (Newsletters). Today, discussion agreements with nonbinding rate-making authority have essentially replaced traditional conferences. Before *OSRA* and *CSA* 2001, ocean conferences had notice well in advance of their members independent action and exercised pressure on them to abort the action. Ron Jacobsen, “Shipping Antitrust Law” (1999) online: WESTLAW (Newsletters).

⁷⁶⁸ “Missing Marketing” *J. Com.* (1998) online: LEXIS (World ALLWLD).

and intermodal transport⁷⁶⁹. Because of the new provisions on confidential contracting and independent action, conference members have stopped setting rates through conferences and have switched to individual contracts with shippers⁷⁷⁰. Competition is, therefore, gradually eroding the conference structure which constitutes carriers and shippers 'safety net'. The new status quo favours the stronger of each group, carriers and shippers.

What's more, the U.S. Congress is considering, some years now, passage of the Fair Market Antitrust Immunity Reform Act, (the FAIR Act), which would repeal the anti-trust immunity ocean carriers have enjoyed so far⁷⁷¹. Supporters of the Act argue that the anti-trust immunity allows ship lines to establish land-water rates for containers and dictate 'take-it-or-leave-it' rates for harbour truckers⁷⁷². While there is no industry unanimity on the issue, chances that Congress would reopen the 1998 OSRA to repeal the anti-trust immunity are rated slim to non-existent⁷⁷³.

Before enactment of the 1998 OSRA, the system of antitrust immunity and governmental oversight over conference practices avoided the sort of excessive concentration encountered in railway transport⁷⁷⁴. Ocean deregulation led to a surge of mergers, alliances and acquisitions over the last years⁷⁷⁵. Unlike railway vertical integration and despite recent consolidations, however, the liner shipping industry remains highly fragmented and competitive like the U.S. motor carrier sector years after deregulation took place⁷⁷⁶.

⁷⁶⁹ Abdul Latiff Abdullah, "A Strong Wind Needed for Reform" *Bus. Times* (2000) online: WESTLAW (Newsletters).

⁷⁷⁰ The Inter-American Freight Association's membership has dwindled eight lines, about half the number the conference had nine months ago. Terry Brennan, "Another Shipping Conference Disbands" *J. Com.* (1999) online: WESTLAW (Newsletters).

⁷⁷¹ R. G. Edmonson, "It's not Going Away" *J. Com.* (2002) online: WESTLAW (All-News), R. G. Edmonson, "Familiar Tune at Anti-Trust Hearing" *J. Com.* (2002) online: WESTLAW (All-News).

⁷⁷² *Ibid.*

⁷⁷³ *Ibid.*

⁷⁷⁴ Harold J. Creel, "Shipping Antitrust Law" *Congr. Testimony* (1999) online: WESTLAW (Newsletters).

⁷⁷⁵ U.S.: Harold Creel, "Federal Maritime Commission" *J. Com.* (2002) online: LEXIS (Transp. News). "Ocean Shipping Surprises Dead Ahead" *Log. Man. Distr. Rep.* (2000) online: LEXIS (Trans. News).

⁷⁷⁶ Philip Damas, "Who's making money?" *Am. Shipper.* (2000) online: WESTLAW (Newsletters). See *supra* at 120s. for motor transport.

One would hope that ocean shipping deregulation would follow motor carrier ‘rate wars’ offering shippers the lowest rates possible⁷⁷⁷. This, however, did not occur. U.S. rates were overall stabilized during the year 1999 by imposing hefty rate increases on the large import volumes which were offset by low export volumes and correspondingly low export rates⁷⁷⁸. For the year 2000 ocean rates seem to have risen⁷⁷⁹ while in 2003 carriers seem to be taking a hard line on rates with shippers seeking to minimize costs⁷⁸⁰. If carriers continue with rate increases shippers will be left wondering why they have anti-trust immunity that is supposed to stabilize rates⁷⁸¹.

Commentators argue that, eventually, ocean carriers will be under tremendous pressure to give below market sweetheart deals to their largest shippers⁷⁸². In this case, ocean carriers may want to recover their lost profits on large shippers from small shippers⁷⁸³. If this occurs, deregulation’s primary effect will be to eliminate protections for small and medium-sized shippers contained in 1984 *Shipping Act* and *SCEA 1987*⁷⁸⁴. Small and middle-size shippers will then become the victims of such deregulation⁷⁸⁵.

⁷⁷⁷ *Supra* at 120 for motor carriage.

⁷⁷⁸ Theodore Prince, “Don’t Expect Less Transport Trauma in 2000” *J. Com.* (2000) online: WESTLAW (Newsletters) and Philip Damas, “Who’s making money?” *Am. Shipper.* (2000) online: WESTLAW (Newsletters).

⁷⁷⁹ Overall, it seems that in the first years after *OSRA* both carriers and shippers are content with profits and rates respectively “Hitting the Sweet Spot?” *Traffic World* (2001) online: WESTLAW (Newsletters).

⁷⁸⁰ Bill Mongeluzzo, “Rates Going UP” *J. Com.* (2003) online: WESTLAW (All-News).

⁷⁸¹ “Radar Screen” *J. Com.* (2002) online: WESTLAW (All-News).

⁷⁸² We have to note that shippers number one worry (at 31%) in ocean shipping is price. Time-on performance comes second (with 22%) followed by quality and service. Jack Lucentini, “Secrets Unlikely, Survey Suggests” *J. Com.* (1999) online: WESTLAW (Newsletters).

⁷⁸³ “It is safe to say that our ocean shipping industry affects all of us in the United States as currently 96% of our international trade is carried on board ships ... (the need) to protect in the global commerce of the 21st Century the 70% of U.S. exports that small shippers produce”. U.S., Senate Proceedings and Debates of the 105th Congress, *Ocean Shipping Reform Act of 1997* (April 21, 1998) 144 Cong. Rec. S3306-01 at 10 and 29.

⁷⁸⁴ The 1984 Shipping Act took a number of years to draft and represents a delicate balance between all segments of the international shipping industry, large shippers, small shippers, ports, U.S. and foreign carriers, labour and transportation intermediaries. Unlike 1984 act, the *OSRA* was drafted by large shippers and large carriers without any input by those who will be the most affected by the bill: small shippers and their representatives. The leaders of the United States Congress have acknowledged that the bill is not good for small to medium-sized shippers. Ronald N. Cobert, Esq. Senior Partner Grove, Jaslawisz and Cobert, *Ocean*

B. Statutory Uniformity of U.S. and Canadian Ocean Carrier Liability: Under Hague and Visby Rules article 3(8) enacted through U.S. *COGSA*⁷⁸⁶ and Canadian *Marine Liability Act* (MLA)(Schedule III)⁷⁸⁷ respectively, ocean carriers cannot contractually limit their liability beyond the statutorily provided 500\$USD per package or ('customary freight' (COGSA)) unit (COGSA/Hague), or 666.67 SDR per package or unit or 2 SDR per kilo of gross weight of goods lost, whichever is higher (MLA/Visby)⁷⁸⁸. These acts provide for statutory uniformity of ocean carrier liability at the domestic level, as is the case with Québec motor carrier liability. They also mark the particularity of ocean carriage with respect to U.S. and Canadian land transport where contractual limitation of carrier liability is sanctioned by statutes and/or courts (with the exception of Québec motor carrier (case) law).

U.S. *OSRA* confidential contracting provisions resulted in large shippers benefiting from contractual increases of carrier liability saddling small shippers, who lack the leverage vis-à-vis carriers, with the more carrier-caring statutory limitations⁷⁸⁹. Worst, because of 1998 *OSRA* and *CSA* 2001 confidential contracting

Shipping Reform: What It Means for Shippers' Associations, (August 19, 1998), online: Ocean Shipping Reform Homepage <<http://www.gjacobert.com/cobert898.html>> (last visited: 24 Aug. 1998).

⁷⁸⁵ *Ibid.* For these reasons, small shippers opposed U.S. *OSRA*. Robert W. Kasteloot, "El Nino, Y2K, and Other Cyclical Phenomena" *Sea Power* (1999) online: WESTLAW (Newsletter).

⁷⁸⁶ *Carriage of Goods by Sea Act*, Ch. 229, ss 1-16, 49 Stat. 1207 (1936) (codified at 46 U.S.C. app. ss 1300-1315 (1995)). *Supra* note 47. We find the same provision in art. III(8) of the *Hague-Visby Rules* and art. 28(1) of the *Multimodal Convention*.

⁷⁸⁷ The Canadian *Marine Liability Act* 2001, S. C. 2001, c. 6. [hereinafter MLA] contains, in Schedule III, a carbon copy of the Visby Rules applicable in Canada. These rules were enacted by the *Carriage of Goods by Water Act* 1993, S. C. 1993, ch. 21 [hereinafter COGWA] in Canada between 1993-2001. *Supra* notes 45, 46.

⁷⁸⁸ (art. 4(5)(a)) of MLA (Schedule III), the Hague and the Visby Rules and COGSA 46 U.S.C. par. 1304(5), the latter adding the prefix 'customary freight' to the Hague limitation measure 'unit'. For more details on the U.S. and Canadian limitations see *infra* at Part II, Chapter I, Section II. For the SDR unit see *supra* note 247. For some of these limitations see *Annex No. II, Table No. 2, 3, 4* at cxlii-clxvi.

⁷⁸⁹ Joseph Bonney, "Always Something New" *J. Com.* (2001) online: WESTLAW (All-News). "No Longer a Little Bill" (COGSA) *Am. Shipper* (2000) online: WESTLAW (Newsletters). I.e. large shippers can contractually agree to hold ocean carrier liable for 1.200\$USD whereas small shippers are imprisoned in the *COGSA* 500\$USD carrier limitation. *Ibid.* Joseph Bonney, "Time for the Ship to Sail" *J. Com.* (2001) online: LEXIS (Transp. News). Although in 2001 there had been reports that big shippers are using confidential contracts to force carriers to shoulder liability that goes beyond regular carriage, insurance representatives have responded that insurers have not seen the impact of such an incident. Joseph Bonney, "Always Something New" *J. Com.* (2001) online: LEXIS (Major Newspapers).

provisions, ocean carriers today can do away with their statutory limitations, putting at danger small shippers⁷⁹⁰.

The current situation calls for governmental intervention in the formulation of a uniform international legal regime that will address cargo shipment and liability issues⁷⁹¹. At present, however, there seems to be little incentive towards this end⁷⁹². U.S. governmental authorities are merely contemplating revision of the already antiquated *COGSA* to cover intermodal transportation and “provide an important baseline for individual negotiations and an important protection for small shippers”⁷⁹³.

We have seen that the trend following transport (land-ocean) deregulation has been undeniably the one of “get big or get out” for carriers⁷⁹⁴. Absent a satisfactory regulatory ‘safety net’ to protect small ocean shippers, the latter have recourse to shipper associations. These entities are membership associations that were formed in the 1960’s in order to inform small shippers and act as a lobby to enhance reforms in the legislation. Deregulation has made regulatory issues less significant and associations capability to provide small shippers greater bargaining power very important⁷⁹⁵. Through these associations small shippers insure favourable rates that

⁷⁹⁰ U.S. *OSRA* theoretically permits parties to a confidential contract ‘to agree to a greater or lesser amount as the maximum liability of those parties’. Authors note that this *OSRA* provision essentially exempts carriers from *COGSA* itself, permitting shippers to negotiate away the law despite prohibition of private acts contrary to public policy. *CIFFA Position Paper on U.S. COGSA* (1999) online: CIFFA Homepage <<http://www.forwarderlaw.com/feature/cifcogsa.htm>> (last visited: Feb. 20, 1999). “Panel Discussion of Carriage of Goods and Charter Parties” (1999) Tul. Mar. L. J. at 365 at 367. On this question see opposing opinion of Michael F. Sturley, “Proposed Amendments to the Carriage of Goods by Sea Act” (2000-2001) 18 U. S. F. Marit L. J. 1 at 22 and *infra* at 262-263. We have perceived no such practice so far.

⁷⁹¹ *Ibid.*

⁷⁹² “Little U.S. Appetite for Anti-trust Debate” *Ll. List* (2000) online: WESTLAW (Newsletters).

⁷⁹³ “No Longer a Little Bill” (*COGSA*) *Am. Shipper* (2000) online: WESTLAW (Newsletters). *Infra* at Part II, Chapter I, Section I.

⁷⁹⁴ Transport is not the only area affected by the trend of the present governmental laissez-faire policies. We find the expression ‘get big or get out’ in U.S. agricultural law. Small farmers have formed agricultural cooperatives in order to be able to negotiate on equal terms with big integrators. Hamilton Neil, “Industrialization of Agriculture”, (University of Arkansas School of Law [non-published], 1997-1998).

⁷⁹⁵ *Canada*: “Shippers Groups Hit Carrier Antitrust Surcharges” *J. Com.* (2002) online: WESTLAW (J. Com.) and “Rail Mergers, Trade and Federal Regulation in the U.S. and Canada” *Publius* (2002) online: WESTLAW (All-News). *U.S.*: “Save on Freight, Gain Services With a Shipper's Association” *Managing Exports* (2002) online: WESTLAW (Newsletters). Within shippers associations confidentiality of rates and

they would not have achieved otherwise had they negotiated on their own⁷⁹⁶. What's more, several shippers associations today are expanding beyond basic rate negotiation into value-added services such as consolidation and insurance, and into negotiation of contracts with customized provisions for space, equipment and inland transportation⁷⁹⁷. However, because shipper associations and intermediaries do not guarantee space⁷⁹⁸ and continue to face rate discrimination by carriers (i.e. refusal to deal or negotiate on confidentiality, voiding service contracts)⁷⁹⁹, most shippers today negotiate one-on-one with carriers for contract terms⁸⁰⁰.

Par. 2. Fair Opportunity Doctrine (U.S.) and Sufficient Notice Test (Canada): U.S. shipper judicial 'safety net' in ocean carriage is based on the 'fair opportunity' doctrine. This doctrine, the 'brain child' of U.S. courts, is the condition precedent to land and ocean carriers benefiting from statutory or contractual limitations⁸⁰¹. This does not necessarily mean that courts view uniformly what constitutes 'fair opportunity' in ocean carriage⁸⁰².

The Ninth Circuit requires ocean carriers to give shippers (sophisticated and non-sophisticated) 'actual notice' of the *Hague Rules* limitative conditions and the

terms of carriage is maintained. Bill Mongelluzzo, "Shippers Association Prospers on OSRA" *J. Com.* (2000) online: WESTLAW (Newsletters).

⁷⁹⁶ Albert Pierce, "New Pact means Less Red Tape" *Bus. Times* (2000) online: WESTLAW (Newsletters).

⁷⁹⁷ Joseph Bonney, "Strength in Numbers" *J. Com.* (2001) online: LEXIS (Transp. News).

⁷⁹⁸ "If I'm going to fight for space I'd like to deal directly with [the carrier]". Chris Gillis, Gordon Forsyth, "Ocean v. Air" *J. Com.* (1999) online: WESTLAW (Newsletters).

⁷⁹⁹ "Little Appetite for Anti-trust Debate" *Ll. List* (2000) online: WESTLAW (Newsletters). For specific examples see Ron Jacobsen, "Shipping Antitrust Law" (1999) online: WESTLAW (Newsletters).

⁸⁰⁰ U.S.: U.S., Federal Maritime Commission, *The Ocean Shipping Reform Act-An Interim Status Report* (2000) online: U.S. Department of Transportation Homepage <[www.fmc.gov/OSRA%20INTERIM%20STATUSUS%](http://www.fmc.gov/OSRA%20INTERIM%20STATUSUS%20)> (last visited: June 19, 2003). James Calderwood, "Happy Anniversary OSRA" *Transp. & Distribution*. (2001) online: WESTLAW (Newsletters) and Paul Spillenger, "No Surprises on OSRA" *J. Com.* (2000) online: WESTLAW (Newsletters). Large shippers are also negotiating one-to-one with carriers and they get better service this way. David Hannon, "Small Maritime Shippers Seek Volume Leverage" *Purchasing* (2002) online: LEXIS (Transp. News). Canada: "Canadian Shippers Council" *J. Com.* (2003) online: WESTLAW (All-News).

⁸⁰¹ Daniel A. Tadros, "COGSA Section 4(5) 'Fair Opportunity' Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity: Will the United States Supreme Court ever Provide Guidance?" (1992) *Tul. Mar. L. Rev.* 18 at 34. Laurence B. Alexander, "Containerization, the per Package Limitation, and the Concept of Fair Opportunity" (1986) *Mar. Law.* 124 at 134. *New Hampshire Ins. Co. v. Seaboard Marine Ltd.*, (1992) WL 33861 (S. D. Fla. 1992). *Supra* at Part I, Chapter II, Section I, Par. 1(C).

⁸⁰² Laurence B. Alexander, "Containerization, the per Package Limitation, and the Concept of Fair Opportunity" (1986) *Mar. Law.* 124 at 134.

possibility to declare higher value⁸⁰³. In other words, the BOL must contain ‘express (written) notice’ to all shippers that they may avoid the statutory 500\$USD package limitation by declaring higher value⁸⁰⁴. In this respect, incorporation by reference of *COGSA* limitations in a BOL does not provide ‘fair opportunity’ in ‘actual notice’ jurisdictions because recitation of statutory provisions is lacking⁸⁰⁵.

In recent years, the Ninth Circuit has been more lenient on its stance holding that required language needs not be present on the front of the BOL, may appear in fine print and a space for declaring value on the BOL may not be provided⁸⁰⁶. Moreover, clauses incorporating by reference statutory limitative provisions have also been sanctioned by ‘actual notice’ jurisdictions in certain cases⁸⁰⁷.

The most representative case on the new Ninth Circuit’s position is *Carman Tool & Abrasives Inc. v. Evergreen*⁸⁰⁸ where the court refused to expand the ‘fair opportunity’ doctrine to a shipper who had not seen carrier BOL until the shipment was gone. The court reasoned that, first, it would be unduly burdensome on the carrier to give ‘actual notice’ of BOL conditions to all shippers because of time

⁸⁰³ *Ibid* at 137. *Supra* at 129s. for the basics of the fair opportunity doctrine and the division of U.S. courts in ‘actual’ and ‘constructive’ notice jurisdictions in land carriage.

⁸⁰⁴ In this respect, an explicit BOL clause indicating that the shipper can avoid carrier limitation of liability by declaring higher value or incorporation of *COGSA* limitation of liability provisions has been held valid. Daniel A. Tadros, “*COGSA* Section 4(5) ‘Fair Opportunity’ Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity: Will the United States Supreme Court ever Provide Guidance?” (1992) Tul. Mar. L. Rev. 18 at 27. In *Gamma-10 Plastic Inc. American President Lines Ltd*, 32 F. 3d 1244 (8th Cir. 1995) it was indicated that ‘fair opportunity’ exists if language ‘to the same effect’ as the statute is included in the BOL. In the same sense, *Travelers Indem. Co. v. Vessel Sam Houston*, 26 F. 3d 895 (9th Cir. 1994).

⁸⁰⁵ *Royal Ins. Co. v. Sea-Land Service Inc.*, 50 F. 3d 723 (9th Cir. 1995). See also *Travelers Indem.Co. v. Vessel Sam Houston*, 26 F. 3d 895 (9th Cir. 1994). In this case, the court referred to a Clause Paramount incorporating by reference *COGSA* provisions. On the same position for U.S. land carriage see *supra* at 129s.

⁸⁰⁶ As reported by Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) Tul. Mar. L. J. 263 at 341 and *Mori Seiki USA Inc. v. M/V Alligator Triumph*, 990 F. 2d 444 (9th Cir. 1993) and *M/V Ocean Lynx*, 901 F. 2d 939 (11th Cir. 1990). Former case law requiring space for declaration: *General Elec. Co. v. M.V. Nedlloyd Rouen*, 618 F. Supp. 62 (S. D. N. Y. 1985) affirmed on appeal by *General Elec. Co. v. M/V Nedlloyd*, 817 F. 2d 1022 (2nd Cir. 1987). See also *Vegas v. Delta Steamship Line Inc.*, 1982 A. M. C. 595 (S. D. Fla. 1980).

⁸⁰⁷ I.e. in *Royal Insurance Co. v. Sea-Land Service Inc.*, 50 F. 3d 723 (9th Cir. 1995) the court held that a BOL clause Paramount and a clause extending ocean carrier liability to stevedores suffice to provide ‘actual notice’ to shipper that *COGSA* applies to the ocean carrier and the stevedores. This was not the case before as it is evidenced by *Pan Am. World Airways Inc. v. California Stevedore & Ballast Co.*, 559 F. 2d 1173 (9th Cir. 1978).

⁸⁰⁸ 871 F. 2d 897 (9th Cir. 1989).

constraints and distance (public policy considerations). Second, shippers were sophisticated and had, or should have had, precise knowledge of the BOL limitation⁸⁰⁹. The *Carman* case has been consistently, albeit not exclusively, followed by the Ninth Circuit even in the case of a ‘through’ BOL extending ocean carrier limitations to land carriers⁸¹⁰.

Authors attribute ‘actual notice’ jurisdiction lenience to shipper sophistication and they observe that the Ninth Circuit seems to be moving towards Fifth Circuit standards⁸¹¹. In effect, the Fifth Circuit has held that *any* BOL reference to *COGSA* creates ‘fair opportunity’ to declare higher value (constructive notice) in the presence of sophisticated shippers⁸¹². In concluding this way, certain courts refer to

⁸⁰⁹ *Ibid.*

⁸¹⁰ Through bills: *Bordeaux Wine Locators Inc. v. Matson Navigation Co.*, 185 F. (3d) 865 (9th Cir. 1999) held that fair opportunity exists in the presence of experienced shippers where the ocean carrier fails to issue a BOL before shipment, that bill applying ocean liability limitations to the motor leg of the journey. In *Russell Stover Candies Inc. v. Double VV Inc.*, 1997 WL 809205 (D. Kan. 1997) a ‘through’ BOL was issued and fair opportunity to declare value was held to exist in the presence of sophisticated shippers. Both cases referred to the *Carman* case.

⁸¹¹ Chester D. Hooper, “Carriage of Goods and Charter Parties” (1999) 73 Tul. L. Rev. 1697 at 1725. Mary L. Moreland, “COGSA Section 1394(5): ‘Fair Opportunity’ Update” (1996) Tul. Mar. L. J. 423 at 439 and at note 51.

To counter this authors argument, *International Fire & Marine Ins. Co. Ltd. v. Silver Star Shipping America Inc.*, 951 F. Supp. 913 (D. C. 1997) explains that the *Carman* holding focal point is that notice, whether actual or constructive, is not dependent on BOL physical delivery. This case stated that there is no Ninth Circuit pronounced intention to abandon the ‘actual notice’ requirement but merely to dictate whether ‘fair opportunity’ exists in the absence of a BOL. This case simply shifts away, refuses to expand application of the ‘fair opportunity’ doctrine in case of absence of a BOL. As reported by Arik A. Helman, “Limitation of Liability under COGSA: In the Wake of the ‘Fair Opportunity’ Doctrine” (2000) 25 Tul. L. J. 299 at 323.

⁸¹² *General Elec. Co. v. M/V Nedlloyd*, 817 F. 2d 1022 at 1029 (2nd Cir. 1987), *Neiman Marcus Group Inc. v. Quast Transfer Inc.* No. 98-C-3122 (U. S. D. C. 1999), N.D. III E. D. *Pearson v. Leif Hoegh & Co.* 953 F. 2d 638 (4th Cir. 1992), *Henley Drilling Co. v. McGee* 36 F. 3d 143 (1st Cir. 1994). See also Daniel A. Tadros, “COGSA Section 4(5) ‘Fair Opportunity’ Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity: Will the United States Supreme Court ever Provide Guidance?” (1992) Tul. Mar. L. Rev. 18 at 33. This includes incorporation by reference. See the interesting observation of Arik A. Helman, “Limitation of Liability under COGSA: In the Wake of the ‘Fair Opportunity’ Doctrine” (2000) 25 Tul. L. J. 299 at 324 that, although arguments can be made to the contrary, ‘constructive notice’ jurisdictions will not consider shipper sophistication if, first, inspection of the bill of lading by the court is not deemed to provide ‘fair opportunity’ to the shipper.

On shipper’s sophistication see *supra* notes 641, 685, 714. We have to note here that in ocean carriage judges have also held that experienced shippers who have never shipped under *COGSA* may not be considered sophisticated. *Pan American World Airways Inc. v. California Stevedore & Ballast Co.* 559 F. 2d 1173 (C. A. 1977), *Tampella Ltd. Boiler Div. v. M/V Norlandia* WL 149627 (S. D. 1988).

the Ninth Circuit *Carman* case⁸¹³. ‘Through’ BsOL are not an exception to ‘constructive notice’ holdings and will also refer to the *Carman* case⁸¹⁴.

According to commentators, the inter-circuit conflict undermines domestic and international uniformity⁸¹⁵. This denotes the weakness of the judicial ‘safety net’. They content that it is the responsibility of the Supreme Court to intervene and provide uniformity as well as align the U.S. judicial system with foreign judicial systems⁸¹⁶. Up to now, the Supreme Court refuses to address the inter-circuit conflict by denying certiorari in cases brought before it⁸¹⁷. Considering, however, the shift of the Ninth Circuit towards the Fifth Circuit, Supreme Court intervention may be rendered superfluous.

Canadian courts will validate contractual extension of ocean carrier liability if this is conform with the intent of the parties, the latter being dependent, in turn, on shipper sophistication and equal bargaining power⁸¹⁸. Where a BOL is issued and no clear reference is therein made to international conventions or the shipper fails to declare value, shipper sophistication will always be taken into account in determining *sufficient notice* given to him of applicable limitations and of his right to declare value⁸¹⁹. This is also the case in the presence of a ‘through’ BOL where shippers fail to declare value or to notice liability provisions therein provided⁸²⁰.

⁸¹³ *Henley Drilling Co. v. McGee*, 36 F. 3d 143 (1st Cir. 1994).

⁸¹⁴ *Tamrock U.S.A. Inc. v. M.V. Maren Maersk*, (1995) WL 459254 (D. C. N. Y. 1995) concluded that ocean carrier limitations on a BOL were applicable to the motor segment of the journey in the presence of experienced shippers.

⁸¹⁵ Daniel A. Tadros, “COGSA Section 4(5) ‘Fair Opportunity’ Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity: Will the United States Supreme Court ever Provide Guidance?” (1992) Tul. Mar. L. Rev. 18 at 35. See also *Tampella Ltd, Boiler Div. v. M/V Norlandia*, (1988) WL 149627 (S. D. 1988).

⁸¹⁶ *Ibid.*

⁸¹⁷ Howard M. McCormack, “Uniformity of Maritime Law: History and Perspective from a U.S. Point” (1999) 73 Tul. L. Rev. 1481 at 1529. Arik A. Helman, “Limitation of Liability under COGSA: In the Wake of the ‘Fair Opportunity’ Doctrine” (2000) 25 Tul. L. J. 299 at 301.

⁸¹⁸ *N.S. Tractors & Equipment Ltd. v. Tarros Gage* (1986), F. C. J. No. 127 (F. C. C.). On the correlation of shipper sophistication, parties intention and equal bargaining power see *supra* notes 641, 685, 812, 714.

⁸¹⁹ *Consumers Glass Co. et al. v. Farrell Lines Inc. et al.* (1985), 53 O. R. (2d) 230 (Ont. H. C.) where the court concluded that incorporation by reference of a long form BOL in a short form BOL in the presence of shippers of equal bargaining power to the carrier, effectively incorporated statutory limitations contained in the long form bill. On Canadian equal bargaining power and sufficient notice test see *supra* notes 641, 685, 812, 714. *Failure to declare: N.S. Tractors & Equipment Ltd. v. Tarros Gage* (1986), F. C. J. No. 127 (F. C.

Very close to the U.S. *Carman* case factual scenario and revelatory of Canadian applicable case law on the issue, is Canadian ocean landmark case *Anticosti Shipping Co. v. St. Amand*⁸²¹. In this case, the Supreme Court of Canada applied the statutory liability limitations in the absence of issuance of a BOL prior to shipment. The court argued that there is no ground for implying a duty of sufficient notice on the part of the carrier even though the shipper never saw the BOL. It explained that parties contemplated, intended the issuance of a BOL and this was the main criterion to take into account in giving effect to ocean carrier limitations. Based on the facts of the case and shipper '*familiar[ity] with [carrier's] customary mode of undertaking transportation*' the court concluded on the presence of *parties intent* to issue a BOL⁸²².

In conformity with this holding, it has also been held that when a BOL is not issued or contemplated by the parties and language on shipping receipt does not show intent to limit carrier liability, international convention limitations do not apply⁸²³. Parties intent is an element based upon shipper 'familiarity' with BOL terms, in brief, his experience, sophistication in shipping. This conforms to our prior conclusion that parties sophistication and intent are interrelated concepts⁸²⁴.

When compared with U.S. case law on this point we note, once more, the division of U.S. courts on the basis of the 'fair opportunity' doctrine and the similarity of the Canadian 'sufficient notice' and the U.S. 'constructive notice' tests.

C.) where, in the presence of a BOL, the court applied statutory limitation of liability in the absence of value declaration by sophisticated shippers. In *N.S. Tractor & Equipment Ltd. et al. v. Coastal Shipping Ltd. et al.* (1986), 1 F. T. R. 243 (F. C. C.) sophisticated shippers failed to declare value on the issued BOL and the court applied statutory limitation provisions.

⁸²⁰ See *Bombardier and Promech supra* notes 685, 641. Also, in *Marubeni America Corporation v. Mitsui O.S.K. Lines* (1979), 2 F. C. 283 (F. C. C.) the Federal Court of Canada held that the inclusion of a Himalaya clause in the through BOL was applicable to the motor part of the journey in the presence of knowledgeable shippers.

⁸²¹ (1959), 19 D. L. R. 2d 472 (S. C. C.) an authority case cited by *N.S. Tractors & Equipment Ltd. v. The Tarros Gage* (1986), F. C. J. No. 127 (F. C. C.) and *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* (1974), S. C. R. 933 (S. C. C.).

⁸²² The court specifically stated that given the facts of the case, when the shipper asked carrier to ship his goods he could not possibly have had other terms in mind than those customarily used by the carrier company.

⁸²³ *R.K. Beattie Ltd. v. CN Marine Inc.* (1986), N. B. J. No. 897 (N. B. Q. B.).

The *Carman* case creates hopes of harmonization not only between the Ninth and the Fifth Circuit but also between the U.S. ‘fair opportunity’ doctrine and the Canadian ‘sufficient notice’ test.

In effect, in taking into account shipper sophistication to decide shipper notice of carrier limitation of liability, the Ninth Circuit (‘actual’ notice) shifted towards Fifth Circuit (‘constructive’ notice) standards. The ‘constructive’ (U.S.) and ‘sufficient’ (Canada) notice tests not being substantially different, they lead to the conclusion that U.S. and Canadian cases tend to have shipper sophistication as common denominator in considering shipper notice of carrier limitative provisions. As in the case of land carriage we confirm here, once more, the rising in importance of shipper sophistication taken into account by courts following deregulation.

Conclusion

Breezing through the 1980 *Multimodal Convention*, the EU multimodal carrier liability rules, U.S. and Canadian transport deregulation and cargo/liability insurance, we arrive at a common conclusion for all these highly diverse topics: for carriers, shippers and insurers worldwide, uncertainty reigns as to the applicable intermodal carrier liability rules and the effects of uniformity proposals so far made on this issue. This uncertainty, which may be attributed to the absence of uniform liability rules in multimodal carriage but also to the absence of globally accepted uniformity proposals, persists at the expense of shippers, particularly smaller ones. Under such a turbulent climate, the judicial safety net and its mechanisms providing for shipper protection rise in importance and call for cross-modal and cross-country uniformity of case law holdings.

Despite the 1980 *Multimodal Convention* ambitious uniformity approach of ‘one multimodal liability regime and one person liable towards the shipper’, it is the

⁸²⁴ We remind the reader that contracting parties sophistication and intent are interconnected equity concepts in both Canadian and U.S. case law. See *supra* note 714.

FBL much more modest network system of liability with preponderance given to mandatory national laws that seems to have gained acceptance on the ground. This is an element to take into account in formulating our suggestions.

Part II: Multimodal Carrier Liability in the U.S. and Canada: Analysis and Uniformity Suggestions

Cruising through international and regional multimodal carrier liability rules and delving into the more deep waters of transport economics influencing multimodal carrier liability, gave us a more spherical view of the forces shaping intermodalism worldwide. Our reasoning has matured through this international marine-land adventure and we are ready now to focus on the more painful but revealing comparative study of U.S. and Canadian multimodal carrier liability rules (**Chapter I**). This comparative study, materially supported by a plethora of cases and statutory provisions, constitutes the necessary condition precedent to our formulating uniformity suggestions on U.S. and Canadian multimodal carrier liability (**Chapter II**). Our suggestions are not merely based on cross-modal and cross-country (U.S./Canada) multimodal carrier liability analysis but are also founded on useful conclusions drawn from the first part of our study on international, regional and economical aspects of intermodalism.

Chapter I: Analysis of Multimodal Carrier Liability in the U.S. and Canada

Intermodalism in the U.S. and Canada follows the same general principles of fragmented legal rules, predominance of insurance companies and transport deregulation we encounter at the international and the regional level. Because of the two countries geographic proximity, one would think that at least unimodal carrier liability provisions would be similar cross-country, in the same way this is done in Europe through adoption of international conventions (i.e. CIM, CMR). As we are going to confirm this is not so in the U.S. and Canada! Strong differences but also remarkable resemblances exist cross-country when comparing unimodal carrier liability exceptions (**Section I**) and liability limitation provisions (**Section II**).

Section I: Basis of Multimodal Carrier Liability in the U.S. and Canada

In 1989, authors noted that multimodalism would continue to have profound effects on all segments of transportation and regional economies of scale as long as it is the perception of policymakers that its benefits outweigh alleged economic harm⁸²⁵. Fifteen years later, intensification of intermodal transport demonstrates the profitability and political preference given to multimodalism⁸²⁶. What's more, projections of intensification of trade between the U.S., Canada and Mexico are made for the future⁸²⁷. Still, lack of cooperation between the modes and denial of governmental bodies and their agencies to reason on intermodal, rather than on modal, terms are very much present at the North American level⁸²⁸. This does not match the need for faster, better, smarter and more profitable intermodal services⁸²⁹.

The September 11, 2001 New York air tragedy turned the focus of the American government towards a safer and more efficient transportation system for passengers and freight. Thereby, the U.S. and Canadian governments have increased spending on and safety measures of intermodal passenger and freight movements⁸³⁰.

⁸²⁵ Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 Tul. L. Rev. 281 at 358-359.

⁸²⁶ Joseph S. Szyliowicz, Andrew R. Goetz, Paul S. Dempsey, «The Vision, the Trends, the Issues» (1998) 25 Transp. L. J. 255 at 255. *Growth in Rail Intermodal Traffic Continues Throughout 2000* (2000) online: IANA Homepage-Press Releases <www.intermodal.org/pr/pr-R4900.html> (last visited: September 19, 2000). *Transportation in Canada-2000 Report-Freight Transportation-Rail Transportation* (2000) online: Transport Canada Homepage <www.tc.gc.ca/pol/en/report/anre2000/c0012ae.htm> (last modified: May 3, 2003). Interview of the author with the Intermodal Transportation Institute personnel of the University of Denver (Sept. 20, 2001) for intermodal rail transport.

⁸²⁷ U.S. Federal Highway Administration projects that between 1998-2020 freight moving between the U.S. and Canada will increase by 3.1%, 3.5% between the U.S. and Mexico and 3.4% internationally for the U.S. (*excepting Canada*). Look also at the graphical representation of projected U.S.-Canada truck traffic for 2020 as well as projected U.S. inland trade for 2020 at *Annex No. III, Table No. 2* at clxxxiii. For Canada, the overall projected increase in truck, rail and marine (domestic) transportation measured in tonnes-kilomètres for 1995-2020 is 1.9%, 1.3% and 0% in tonne-kilomètres respectively. *Annex No. III, Table No. 3* at clxxxiv-clxxxv.

⁸²⁸ Joseph S. Szyliowicz, «The North American Intermodal Transportation Summit in Perspective» (2000) 25 Transp. L. J. 344 at 346. In the U.S., the barriers to intermodalism start at the top. The executive and administrative functions of the federal government are organized principally by mode and are supported by a small but important office of intermodalism. «The Proceedings» (1998) 25 Transp. L. J. 261 at 291.

⁸²⁹ In effect, in the absence of an efficient intermodal system in the two countries, transportation costs rise and such inefficiencies could potentially cripple ability to compete at the international level. Christopher McMahon, «Challenges Facing America's Maritime and Intermodal Transportation» *Logistics Spectrum* (2001) online: WESTLAW (Newsletters).

⁸³⁰ U.S.: Interview of the author with the Intermodal Transportation Institute personnel at the University of Denver (Sept. 20, 2001). *Canada: Actions Taken in Response to September 11, 2001* (2003) online: Transport

It is ironic how multimodal transport is gracefully benefiting from the disgraceful terrorist attacks recently plaguing the American nation.

Intermodal shipments in Canada and the U.S. as well as internationally from/to the two countries, are most frequently subject to 'through' BsOL. 'Through' BsOL, as 'non-through' BsOL for that matter, subject multimodal shipments to a network system of carrier liability, an element that increases parties uncertainty⁸³¹. This uncertainty may be reduced if parties to the transport contract provide for a single law to govern all stages of transport (choice of law clause)⁸³².

U.S. Multimodal Uniformity Initiative (The draft COGSA 1998): Due to the uncertainty on the existence and amount of compensation, it is commonly agreed that it is of utmost importance to develop a uniform liability regime⁸³³. Recognizing several problem areas in the Hague Rules, –i.e. the outdated 500\$USD limitation, the U.S. specific 'customary freight unit' limitation measure- as well as the high improbability to enact the Visby or the Hamburg Rules due to the strong carrier opposition⁸³⁴, the U.S. drafted a document that adopts a hybrid regime between the two sets of rules reflecting the desire to arrive at a commercial compromise between

Canada Homepage <www.tc.gc.ca/majorissues/transportationsecurity/Actions.htm> (last modified: April 4, 2003).

⁸³¹ U.S.: *Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.* 224 N. Y. L. J. No. 92 (2nd Cir. 2000) vacating District court decision that apply U.S. COGSA to the whole multimodal journey ex proprio vigore. See also the Canadian case *General Motors v. Cast (1983) Ltd.* (1994), 1994 F. C. J. No. 225 (F. C. J.) and William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 936. Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 565. *Supra* at 3s.

⁸³² *Hartford Fire Insurance Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 224 N. Y. L. J. No. 92 (2nd Cir. 2000) mentioned *Stiegmeier v. Northwestern Growth Corp.*, WL 1670931 (S. D. N. Y. 2000) permitting a choice of law clause to stand so long as the law chosen has "sufficient contacts" with the transaction and assuming that the contract is not fraudulent and does not violate public policy. In the Canadian case *Canastrand Industries Ltd. v. Lara S* (1993), 2 F. C. 553 (F. C. C.) the issue was whether U.S. COGSA or the CMR would apply to the inland portion of the journey.

⁸³³ Leslie Tomasello Weitz, «The Nautical Fault Debate» (1998) 22 Tul. Mar. L. J. 581 at 594.

⁸³⁴ The Maritime Law Association has long advocated for the adoption of the Visby Rules while the Transportation Claims and Prevention Council, formerly known as Shippers National Freight Claim Council, has consistently called for ratification of the Hamburg Rules. Neither of the two groups has the power to enact their favored regime but each group has the power to block the adoption of the other group's regime. The U.S. Congress is simply unwilling to be caught in the middle of this dispute. Michael F. Sturley, «Proposed Amendments to the Carriage of Goods by Sea Act» (1996) Hous. J. Int'l. L. 609 at 614. For the latter assertion see also Leslie W. Taylor, «1999 Proposed Changes to the COGSA : How will they Affect the U.S. Maritime Industry at the Global Level ? » (1999) Int'l. Trade. L. J. 39 at 39.

carrier and shipper interests⁸³⁵. The new document, the U.S. Senate COGSA '98 and its current September 1999 draft [hereinafter draft COGSA 1998], is the 6th revision of the initial draft that is intended to apply to all U.S. water transport of goods, both domestic and foreign traveling to and from the U.S.⁸³⁶. Although congressional supporters gave the draft document a sympathetic ear, it was never written into a bill for lawmakers consideration⁸³⁷.

For this reason, we will merely insist on draft's provisions of particular interest to our study, such as its multimodal carriage provision (Sec. 2(a)(5)(A)(i)), the abolition of the 'nautical fault' defense (Sec. 9(c)(1)) and limitation of liability issues (Sec. 9(h)(1))⁸³⁸.

Sec. 2(a)(5)(A)(i) refers to transport by different modes and its presence is due to the desire to create a uniform liability regime to govern multimodal carriage. It succeeds its purpose, but only to a certain extent since it only applies to contracting, with the shipper, multimodal carriers (for instance, ocean carriers assuming liability for the door-to-door journey or freight forwarders acting as carriers), expressly excluding non-contracting carriers from its scope⁸³⁹. Not

⁸³⁵ The U.S. is not the only country that has attempted adoption of a hybrid regime: Australia (*supra* note 516), China, Slovenia are examples of the many countries that have successfully undertaken similar initiatives leading to proliferation of legal regimes in transportation. William Tetley, «The Proposed New U.S. Senate COGSA : the Disintegration of Uniform International Carriage of Goods by Sea Law » (1999) 1999 J. Mar. L & Com. 595 at 606s.

⁸³⁶ This includes water carriers before and after loading or discharge, up to now subject to the Harter Act. The draft does not apply to purely inland water carriage that remains governed by the Harter Act. History: From 1993 to 1996, the U.S. Maritime Law Association (MLA) prepared a new U.S. COGSA (U.S. MLA COGSA '96), presented to the U.S. Senate on April 21, 1998. Ever since, the Senate Subcommittee has drafted new texts, the very last ones being those of April 1999, June 1999 and the current September 1999 we will presently concentrate on. William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 597 and Michael McDaniel, *Proposed Changes to U.S. COGSA* (1998) online : Countryman & McDaniel Homepage <http://www.cargolaw.com/presentations_cogsa98.html> (last visited: Sept. 25, 2001). For the September 1999 COGSA draft see *Annex No. II, Table No. 4(bis)* at clxvi.

⁸³⁷ R. G. Edmonson, «Cargo Liability Reform is still Years Away but Progress is being Made» *J. Com.* (2002) online: LEXIS (J. Com.).

⁸³⁸ For other COGSA draft provisions see William Tetley, «The Proposed New U.S. Senate COGSA : the Disintegration of Uniform International Carriage of Goods by Sea Law» (Oct. 1999) 1999 J. Mar. L & Com. 595 at 597-598.

⁸³⁹ Tony Young, *Position Statement on Multimodal Liability* (1999) online : CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 30, 2001). It is Sec. 3(b) that expressly excludes from its scope 'interstate or foreign motor carrier or rail carrier who are not contracting carriers to the extent that the claim relates only to motor or rail carrier services'. The complex

applying to intermediate multimodal carriers (not contracting carriers) in case of a ‘through’ BOL since it is the initial carrier who makes arrangements with the shipper (contracting carrier), draft COGSA 1998 is said not achieve desired uniformity throughout the intermodal chain⁸⁴⁰.

The Hague and Visby ‘nautical fault’ defense does not make part of the draft COGSA (Sec. 9(c)(1)) list of liability exceptions⁸⁴¹. However, Sec. 9(d)(2) places ‘nautical fault’ burden of proof on the cargo claimant⁸⁴². This is an onerous burden of proof considering that shippers do not have access to the facts needed to prove the presence of the nautical fault⁸⁴³. Presumably shipper beneficial abolition of nautical fault is, therefore, lessened in practice.

Finally, draft COGSA 1998 adopts the Visby Rules limitation (Sec. 9(h)(1)) of 666.67 SDR ‘per package’ or 2 SDR ‘per kilo’, whichever is higher. This provision, although opposed by carriers, is said to be a clear improvement from the outdated Hague 500\$USD ‘per package’ limitation⁸⁴⁴. Even though it is argued that

phraseology of the draft document makes Pr. Tetley wonder whether it would have been better or at least less complicated to have adopted the 1980 Multimodal Convention. William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L. & Com. 595 at 600. Freight forwarders have expressed the view that the draft COGSA 1998 is not freight forwarder friendly. *Continuing Discussion between FIATA ad hoc Working Group on U.S. COGSA and Representatives of U.S. Interests Seeking Passage of New Law* (2002) online: Forwarderlaw Homepage online: <<http://www.forwarderlaw.com/feature/cogsapas.htm>> (last visited: March 13, 2002). Sec. 2(a)(2) of the draft bill defines contracting carriers as parties who contract with the shipper.

⁸⁴⁰ Aviva Freudmann, “Foreign Groups Seek to Derail COGSA Bill” *J. Com.* (2000) online: LEXIS (J. Com.). Tony Young, *Position Statement on Multimodal Liability* (1999) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 30, 2001).

⁸⁴¹ The nautical fault defense is one of the most controversial clauses of the draft document. R. G. Edmonson, “The COGSA Battle Resumes” *J. Com.* (2001) online: WESTLAW (Newsletters).

⁸⁴² Sec. 9(d)(2) provides: «In an action for loss or damage in which a party alleges that the master, mariner, pilot or servants of the ocean carrier were negligent in the navigation or management of the ship, the burden of proof is on the party to prove negligence in the navigation or management of the ship». Pr. Sturley explains the benefit of this COGSA provision in a practical manner by taking the example of a ship lost at sea due to master error in navigation (nautical fault) in part and a sea peril in part. Under the Hague and the Visby Rules both these causes would exonerate the carrier. If draft COGSA 1998 were to eliminate the ‘nautical fault’ defense, the carrier would have to prove the extent to which the loss is attributable to each cause to be partially exonerated. Under the draft COGSA, the intent was to divide the burden of proof between the carrier and the shipper so that shipper proves the nautical fault and carrier the peril of the sea. Michael F. Sturley, «Proposed Amendments to the Carriage of Goods by Sea Act» (1996) 18 Hous. J. Int’l. L. 609 at 632.

⁸⁴³ William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L. & Com. 595 at 601-602.

⁸⁴⁴ The Visby Rules are adopted by U.S. major trading partners. Frank Wilner, “Change for Liability” *Traffic World* (2000) online: WESTLAW (Newsletters). On carrier opposition, “The COGSA Battle Resumes” *J. Com.* (2001) online: WESTLAW (Newsletters).

there is no definition in the draft document of the term 'package', there are available statutory (Visby and draft COGSA) and case law guidelines to clarify this term⁸⁴⁵. However, the fact that this limitation only applies to contracting with the shipper intermodal carriers, reduces the importance of this uniform provision.

Supporters of the draft document welcome the U.S. initiative that works out an industry consensus, offers a reasonable increase in liability limits and brings dispute resolution to the U.S. where there is a U.S. connection to the incident⁸⁴⁶. They argue that if all affected commercial interests agree on the worked out compromise as they did with 1936 COGSA, Congress will adopt it⁸⁴⁷. However, industry consensus at the national and the international level has been elusive and prospects of passage of the draft COGSA 1998 in the current Congress appear dim⁸⁴⁸. The main problem area of the draft document is its 'extra-territorial' character and the fact the U.S. is trying to enact its own perspective of the 1978 *Hamburg Rules* adding, in this way, to the proliferation of regimes governing multimodal transport⁸⁴⁹. In effect, the draft document applies to all shipments

⁸⁴⁵ "A COGSA Compromise" *J. Com.* (2000) online : WESTLAW (Newsletters). Paul Edelman, "The Latest News from Washington" (2000) 3/28/2000 N. Y. Law. J. 3 (col. 1) (WESTLAW-Newsletters). Vincent de Orchis, *New United States Proposal* (2000) online: Maritime Advocate Homepage <http://www.maritimeadvocate.com/i10_usco.htm> (last visited: Feb. 10, 2000). *Infra* at 244s.

⁸⁴⁶ Courtney Tower, "The Long Arm of the Law" *J. Com.* (2000) online: WESTLAW (Newsletters). "Liability Limbo" *J. Com.* (2000) online: WESTLAW (Newsletters).

⁸⁴⁷ As reported by Michael F. Sturley, «Proposed Amendments to the Carriage of Goods by Sea Act» (1996) 18 Hous. J. Int'l. L. 609 at 661.

⁸⁴⁸ Courtney Tower, "The Long Arm of the Law" *J. Com.* (2000) online: WESTLAW (Newsletters) and William Augello, "What is Ahead for Logistics Professionals?" *Log. Mgmt.* (2001) online: WESTLAW (Newsletters) referring to the opposition of inland waterway interests and foreign vessel operators to the proposed draft document. A coalition of European and Asian ship owners argues that the U.S. draft COGSA jumps the gun on and undermines international efforts to create a uniform multimodal carrier liability regime. "A COGSA Compromise" *J. Com.* (2000) online : WESTLAW (Newsletters), Aviva Freudmann, "Foreign Groups Seek to Derail COGSA Bill" *J. Com.* (2000) online: WESTLAW (Newsletters). Authors have also referred to the draft COGSA as a 'nightmare' for merchants, practitioners, judges and foreigners to whom it will apply if this draft document becomes law. William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 597. Opponents of the draft COGSA asked Congress to stand by until the Comité Maritime International (CMI) develops a plan. Constantine G. Papavizas, Lawrence I. Kiern, "1999-2000 Legal Developments" (2001) 32 J. Mar. L. & Com. 349 at 367-368. The author probably referred to the 'CMI/UNCITRAL Draft Instrument', *supra* at 58s. On opposition to the draft COGSA see also *supra* note 839.

⁸⁴⁹ Courtney Tower, "The Long Arm of the Law" *J. Com.* (2000) online : WESTLAW (Newsletters). *Canada Board of Marine Underwriters 2000* (2000) online: Canada Board of Marine Underwriters Homepage <www.cbmu.com/CBMUMay00.htm> (last visited: March 13, 2000).

from/to the U.S. and leaves no choice to parties except for U.S. jurisdiction and U.S. arbitration for resolution of disputes⁸⁵⁰. That's unreasonable and certainly creates a conflict of jurisdiction with Canada⁸⁵¹.

Canadian freight forwarders, carriers and shippers opine that the 'extra-territoriality' of the U.S. law would add expense, inconvenience and occasion lost business to Canada, the biggest purchaser of U.S. goods and dependent on U.S. transportation and applicable laws⁸⁵². Moreover, Canadian government and the Canadian Maritime Law Association have protested about the fallacies of draft COGSA 1998⁸⁵³. Finally, Pr. Tetley states that U.S. drafters have been wrong not to act as jurists trying to produce the best law possible instead of drafting a report that reflected all the views of each national association but lacking international legal perspective⁸⁵⁴. He suggests that international interests should not negotiate with the U.S. Maritime Law Association since this will just have as effect to increase their clout before Congress⁸⁵⁵.

We are going to examine currently applicable laws and practices to the basis of multimodal carrier liability in the U.S. and Canada **Par. 1**, and then proceed to

⁸⁵⁰ William Tetley, «The Proposed New U.S. Senate COGSA : the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 604. Vincent de Orchis, *New United States Proposal* (2000) online: <http://www.maritimeadvocate.com/i10_usco.htm> (last visited: Feb. 10, 2000). Consequently, a Canadian or other shipper in Canada suffering loss or damage in Canada would be forced to take action in the U.S. since the shipment originates from or is destined to the U.S., where normally they would have a right to do it at home. Tony Young, *Position Statement on Multimodal Liability* (1999) online : CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 30, 2001).

⁸⁵¹ Courtney Tower, "The Long Arm of the Law" *J. Com.* (2000) online : WESTLAW (Newsletters). Tony Young, *Multimodal Convention : a Goal that Can't be Achieved?* (1999) online : Forwarderlaw.com Homepage <<http://www.forwarderlaw.com/feature/multyou.htm>> (last modified: Nov. 26, 1999).

⁸⁵² *Ibid.* William Tetley repeats the words of the late John F. Kennedy: 'Geography has made us neighbors, history has made us friends, economics has made us partners and necessity has made us allies. Those who nature has so joined together, let no man put asunder'.

⁸⁵³ William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 617. Transport Canada 1999 consultation paper on the revision of the 1993 COGWA to consider adoption of the Hamburg Rules retained COGWA as the governing statute for ocean carriage until the next review period, January 1, 2005. Tony Young, *Position Statement on Multimodal Liability* (1999) online : CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited : Nov. 30, 2001).

⁸⁵⁴ William Tetley, «The Proposed New U.S. Senate COGSA: the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 618.

⁸⁵⁵ *Ibid* at 619.

the comparative analysis of the multimodal carrier liability exceptions in the U.S. and Canada **Par. 2.**

Par. 1. Overview of the Basis of Multimodal Carrier Liability in the U.S. and Canada: In the absence of uniform multimodal carrier liability rules in the U.S. and Canada, unimodal carrier liability will make the object of the present analysis: U.S. and Canadian motor (A), rail (B) and ocean carrier (C) basis of liability. In general, similar liability principles -incorporated in BsOL/tariffs- seem to apply to land and ocean unimodal and said segments of intermodal carriage in each of these two countries. However, since cross-country intermodal tariff provisions are specific to multimodal carriage and are usually more explicit than BsOL liability terms, we will examine both BsOL and tariff provisions⁸⁵⁶.

A. Overview of U.S. and Canadian Motor Carrier Basis of Liability: As we have previously affirmed, Canada's interprovincial and international trucking is

⁸⁵⁶ The following seems to be the practice of mentioned transport companies as reported by persons interviewed and/or reference documents. For ocean transport this refers to the Hague (U.S.) and the Visby Rules (Canada) incorporated in BsOL or tariffs. Interview of the author with U.S. based SANCO Inc./IMOREX SHIPPING personnel (Dec. 21, 2001) and Canadian Maritime International shipment expert (Dec. 21, 2001). *Annex No. I, Table No. 3* at xxviii, xxxii, xlii.

The U.S. Burlington Northern and Santa Fe (BNSF/U.S.) and Canadian National (CN/CAN) Railways intermodal tariffs and unimodal BsOL will be herein examined but cross-references will also be made to U.S. Northern Suffolk (NS/U.S.) and Canadian Pacific (CP/CAN) railways intermodal tariffs and unimodal BsOL. For precedence of intermodal tariffs over BsOL provisions see *infra* at 182. Certain tariffs can be found electronically: CP *International Intermodal Tariffs* (2003) online: Canadian Pacific Railways Homepage <<http://www2.cpr.ca/TariffLi.nsf>> (last modified: Feb. 24, 2003). For the BNSF *Intermodal Rules and Policies Guide* (2002) online: BNSF Homepage <http://www.bnsf.com/business/iabu/pdf/intermodal_rules.pdf> (last modified: Aug. 1, 2002 (modifications marked in red)). For NS *Circular #2* (2003) online: NS Homepage for Intermodal Transport <http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/general/intermodal_rules_circular.pdf> (last modified: May 15, 2003). All these documents are found in *Annex No. I, Tables No. 6, 7, 8* at lxvi-xcix. Some history: For CN and CP railways see *supra* at Part I, Chapter II, Section I, par. 2 (A)(a). BNSF was created in 1995, is the product of mergers and covers the western two thirds of the U.S.. NS was founded in the 1800's, it is the product of more than 200 railroad mergers and serves the center-east part of the U.S. (Texas-East Coast). With these U.S. and Canadian railways we've got all of Canada and U.S. geographically covered. *Annex No. III, Table No. 1* at clxxviii-clxxxii.

U.S. American Freightways BOL and tariff liability provisions will be herein examined for U.S. motor transport. American Freightways Uniform Straight Bills of Lading (2001) online: American Freightways Homepage <http://www.af.com/Straight_BOL.pdf> (last modified: June 21, 2001). *Annex No. I, Table No. 4* at l-iii. American Freightways has been re-branded to FedEx Freight since June 3, 2002. We refer herein to company's documents employed before said date. In Canadian motor transport we will examine statutory provisions reproduced in the uniformly applied Canadian CUBOL. Interview of the author with Liaison Can / U.S. Courrier (1986) Inc. personnel (Dec. 21, 2001) and Canadian Manitoulin Transport personnel (Dec. 21, 2001). *Annex No. I, Table No. 5* at lv.

subject to the 1987 *Motor Vehicle Transport Act* (MVTA)⁸⁵⁷ that delegated to the provinces the authority to regulate in this field. Interprovincial agreement has led to the adoption of the ‘Canadian Uniform Highway Bill of Lading’ (CUBOL)⁸⁵⁸. CUBOL provisions apply to all interprovincial and international freight in Canada, the form of the bill is prescribed by the province where the carriage originates⁸⁵⁹ and its content is more or less uniform among provinces so that possible divergences are more of an academic, rather than of a practical, interest⁸⁶⁰.

CUBOL presumes carrier liability once shipper-claimant makes its *prima facie* case (proof of loss, receipt of goods in good condition by the carrier and delivery in bad condition)⁸⁶¹. Its clause 5 adopts common law carrier liability defenses with some enlargement⁸⁶²: i) acts of God, ii) Queen’s or public enemies, iii) riots, iv) strikes, v) defect or inherent vice in the goods, vi) act or default of the consignor owner or consignee, vii) authority of law, viii) quarantine and ix) natural shrinkage. If a carrier is to rely on one of these liability exemptions he must prove that the particular defense was the proximate cause of loss to which his, or his servants, negligence did not contribute⁸⁶³. The burden of proof will then shift again to the shipper to prove carrier, or carrier servant’s negligence. CUBOL clauses

⁸⁵⁷ *Motor Vehicle Transport Act*, (MVTA) R. S., 1985, c. 29 (3rd Supp.). On recent amendments of the Act see *supra* note 655.

⁸⁵⁸ *Supra* at Part I, Chapter II, Section I, Par. 2.

⁸⁵⁹ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 28 and 14.

⁸⁶⁰ *Ibid* at 29 and 12. This is why we will herein refer to the Provinces of Ontario, British Columbia and Québec motor carrier BsOL forms. *Annex No. 1, Table No. 5* at lv.

⁸⁶¹ *Calgary Tpt. Services Ltd. v. Pyramid Mgmt Ltd.* (1976), 71 D. L. R. (34) 234 (Alta. C. A.) citing John S. McNeil. John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 66-67. *Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co.* (1991), 55 B. C. L. R. (2d) 357 (B. C. S. C.). This is an ocean carriage case that refers to two U.S. multimodal (ocean-motor) transport cases and adopts their conclusions on burden of proof, explicitly stating the need to provide for uniform laws. *Annex No. 1, Table No. 5* at lv.

⁸⁶² John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 99. *Annex No. 1, Table No. 5* at lv and *Annex No. III, Table No. 5* at cxc.

⁸⁶³ *Chet's Transport Inc. v. Seaway Distributors Ltd.* [1987], N. S. J. No. 368 (N. S. S. C.) and *Calgary Tpt. Services Ltd. v. Pyramid Mngnt Ltd.* (1976), 71 D. L. R. (34) 234 (Alta.C.A.) citing John S. McNeil, John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 67. Dr. Boris Kozolchyk, Gary T. Doyle, Lic Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tuscon: National Law Center for Interamerican Free Trade, 1996) at 53.

In the present study, the concepts of negligence and of absence of fault will be used interchangeably since in civil law systems authors describe negligence as a variation of the concept of fault (involuntary fault). In common law systems, the concepts of ‘negligence’ and of ‘fault’ are, if not identical, at least very similar, with the concept of fault being inclusive of the concept of negligence. G.H. Treitel, *Frustration and Force*

contain permissive language sanctioning the principle of freedom of contract even though parties will rarely have recourse to it⁸⁶⁴. Contractual exclusion of carrier liability would probably be disallowed for public policy reasons⁸⁶⁵.

In the case CUBOL provisions are not applicable or not respected by the carrier, common law (and in the province of Québec, civil law) will apply⁸⁶⁶. Common law defenses include: i) acts of God, ii) acts of the King's enemies, iii) inherent vice of the goods (i.e. natural shrinkage) and iv) default of the shipper or the owner⁸⁶⁷. Carrier failure to use reasonable care in foreseeing or avoiding the consequences of those excepted perils will disallow him the benefit of these exceptions. Freedom of contract, recognized by common law, is only impaired by public policy considerations that prohibit exculpatory provisions completely releasing carrier from all liability⁸⁶⁸. Québec Civil Code⁸⁶⁹ (civil law) provisions (art. 2049) presume carrier liability when the shipper has made its *prima facie*

Majeure (London: Sweet & Maxwell, 1994) at 474 and France Ferrari, "Comparative Remarks on Liability for Ones Own Acts" (1993) *Loy. L. A. Int'l. L. J.* 813 at 825-826.

⁸⁶⁴ Québec courts have excluded the possibility of contractual limitation. *Supra* at Part I, Chapter II, Section I, Par. 2(B)(b).

⁸⁶⁵ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 60 and Canadian cases such as *Robertson v. Grand Trunk Railway Co. of Canada* (1895), 24 S. C. R. 611 (S. C. C.) referring to the U.S. authority case *Hart v. Pennsylvania*, 112 U.S. 331 (U. S. S. C. 1884) applicable on the matter. See, however, *Davies v. Alberta Motor Assn* [1991], A. J. No. 792 (Alta Pr. Ct) that held that contractual exclusion of liability will be permitted if both parties had knowledge of the clause and manifested clear intent to adopt it.

⁸⁶⁶ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 46 and 60.

⁸⁶⁷ *George C. Anspach Co. v. Canadian National Railway Co.* (1950), O. R. 317 (Ont. H. C.) as reported in *Banks v. Budget Transfer Ltd* [1986], A. J. No. 1367 (Alta. Pr. Ct). See also John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 99 and at 10.

⁸⁶⁸ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 60 and note 88 at 46.

⁸⁶⁹ The first Québec *Civil Code* was approved in 1866 and was greatly inspired by the contents of the French Civil Code (Code Napoléon). The official order had the word "Québec" replaced by the words "Lower Canada" so that the first Québec Civil Code was called "Civil Code of Lower Canada". The codifiers did opt for some parts of British law such as commercial law, maritime law and parts of English law of wills.

The *Civil Code of Québec* is nothing more than a huge provincial statute or law containing ten head-subjects. As such, it was subjected to a complete overhaul by the Québec government in the late-eighties. The reform took years but culminated in a new Québec Civil Code which went into effect on January 1, 1994. In the present study, we will refer to the 1994 Québec Civil Code provisions.

Some history: In 1663, when the French King assumed jurisdiction over the territory now known as Québec, he declared that the population would be subject to the "Custom of Paris." After Québec was ceded to the British in 1763, the English monarchy and their North American governors never did set down exactly which laws were to be applied in the territory of what was then known as New France. Legal chaos reigned. Matters got so bad that in 1786, one survey discovered that judges were applying French or English law depending on their nationality! In 1861, the National Assembly of Québec ordered a bilingual consolidation of Québec civil law. *Québec Civil Code* (1997) online: World Wide Legal Information Association Homepage <<http://www.wwia.org/ca-ccode.htm>> (last visited: March 24, 2001).

case⁸⁷⁰ and exonerate him in case of: i) *force majeure*, ii) inherent defect in the property, iii) natural shrinkage⁸⁷¹. Art. 2055 adds that iv) any omission of the shipper with respect to the goods does not render the carrier liable⁸⁷². Negligence on the part of the carrier or his agents in producing the damage will hold carrier partially or totally liable for the loss when this does not exceed the value of the goods (art. 2052)⁸⁷³. Moreover, carrier cannot exclude or limit his liability except subject to the conditions established by law (art. 2034). Since Québec BOL provisions are deemed ‘minimal’ by law, (this having been interpreted as ‘d’ordre publique’), contractual limitation or exclusion of carrier liability is not permitted by Québec courts⁸⁷⁴.

Motor carriers in the U.S. are subject to the 1906 Carmack Amendment, the 1980 *Motor Carrier Act*, the 1994 *Trucking Industry Regulatory Reform Act* and the 1995 *Interstate Commerce Commission Termination Act*, the three last acts setting in principles of contract to govern carrier liability⁸⁷⁵. In all cases, shippers may not recover if they do not make a *prima facie* case of receipt of goods in good condition, arrival in damaged condition and amount of damages⁸⁷⁶. This creates a presumption of carrier liability and shifts the burden of proof to the carrier who will be relieved from liability only if it can prove both its freedom from negligence with respect to

⁸⁷⁰ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 72 (transport terrestre). See also *Durand v. Transport de l'Épiphanie* (1986), R. J. Q. 610 (P. C.).

⁸⁷¹ Article 1675 of the former “Civil Code of Lower Canada” refers to both *force majeure* and *fortuitous event*. The 1994 Québec Civil Code uses only the term *force majeure*. We are going to study later the difference in the terms used. *Infra* note 991. With respect to the carriage of goods and persons the Québec Civil Code is divided in two sections: the first deals with the rules applicable to all means of transportation (art. 2040-2059), the second concerns specifically water transport rules (art. 2059-2079). Art. 2049 makes part of the first group. Note that the ‘force majeure’ liability exception exonerates carrier under the Québec motor BOL. *Annex No. 1, Table No. 5* at lxiii.

⁸⁷² The annotated Civil Code of Québec notes, below this article, that this is a new article that is inspired by international conventions.

⁸⁷³ See also Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 45.

⁸⁷⁴ *Supra* at Part I, Chapter II, Section I, Par. 2(B)(b).

⁸⁷⁵ *Supra* at Part I, Chapter II, Section I, Par. 1 for these acts. Currently, most U.S. large shippers and many smaller ones use contract carriage. *Ibid* at Par. 1(B) and Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 Am. J. Comp. L. 403 at 411.

⁸⁷⁶ 49 U. S. C. A. par. 11706 (Carmack Amendment) recited in *Missouri Pac. R. Co. v. Elmore and Stahl*, 84 S. C. 1142 (S. Ct. 1964). *Beta Spawn Inc. v. FFE Transportation Services Inc.*, 250 F. 3d 218 (3rd Cir. Pa. 2001). Proof is made by preponderance of evidence relying on direct or circumstantial evidence.

an excepted peril: i) an Act of God, ii) public enemy, iii) authority of law iv) act or omission of the shipper or owner v) inherent nature of the goods vi) delay due to stoppage in transit vii) natural shrinkage⁸⁷⁷. These liability exceptions are not all present in the Carmack Amendment but appear on the Uniform Straight Bill of Lading⁸⁷⁸, (also known as ‘long form’ bill), one of the U.S. BsOL forms motor carriers use today and which may incorporate and expand, but cannot vitiate, Carmack Amendment common law provisions⁸⁷⁹. The ‘short form BOL’ and the ‘Shipper-Provided Short Form BOL’ are BOL formats much more often encountered in practice, incorporating by reference Uniform bill’s terms⁸⁸⁰.

Possibility of contractual limitation of motor carrier liability has permitted U.S. motor carriers to attain contractual uniformity in the liability amounts applicable⁸⁸¹. The principle of contractual limitation contrasts Québec courts conclusions.

The Carmack Amendment restates common law provisions on land (motor, rail) carrier liability and takes effect when contractual provisions do not⁸⁸². Its

⁸⁷⁷ Dr. Boris Kozolchyk, Gary T. Doyle, Lic Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tuscon: National Law Center for Interamerican Free Trade, 1996) at 53. Current forms of Uniform Straight BsOL contain the additional exceptions of ‘riots’ and ‘strikes’. *Annex No. 1, Table No. 4* and *4(bis)* at liii-iv and *Annex No. III, Table No. 6* at cxcii.

⁸⁷⁸ *Annex No. 1, Table No. 4(bis)* at lii-iv. for a sample of such a bill. “Bills of Lading : The Choice is Yours” *Log. Mgmt* (2000) online: WESTLAW (Newsletters). This bill is the granddaddy of all BsOL formats having been lifted from the railroads in the mid-1930s. Sometimes referred to as the ‘long-form’ BOL because of its size (81/2 by 11 inch), this bill is published in the National Motor Freight Classification (NMFC) where all BOL in use by motor carriers must be published. *Ibid*.

⁸⁷⁹ *Federated Dept. Stores Inc. v. Brinke*, 450 F. 2d 1223 (5th Cir. 1971), *Capon Textile Trading Co. v. Consolidated Rail Corp.*, 538 F. Supp. 1083 (S. D. N. Y. 1982). Unlike U.S. rail carriers, U.S. motor carriers are not obliged to use a specific BOL format. *Infra* at 181. The additional exceptions on the Uniform bill do not vitiate the Carmack Amendment that allows contractual limitation of carrier liability under the 1980 Motor Carrier Act.

⁸⁸⁰ “Bills of Lading: The Choice is Yours” *Log. Mgmt* (2000) online : WESTLAW (Newsletters). The reason the ‘long form’ bill has been rendered obsolete is its requirement that the ‘terms and conditions’ be printed in full on the back (*in verso*), something that adds to the printing costs. The ‘short form BOL’ has no such requirement and the reverse side is left blank, but the shipper agrees he is familiar with the implied ‘Terms and Conditions’ of the long form. *Ibid*.

The ‘Shipper-Provided Short-Form Bill’, a non-negotiable bill published in the NMFC and giving shippers the authority to furnish their own BsOL, provides for an analogous provision binding both carriers and shippers. For more options of BsOL see *ibid*.

⁸⁸¹ See *supra* at Part I, Chapter II, Section I, Par. 1(A). Rip Watson, “Liability Meeting Held Key to NAFTA Market Access for Trucks” *J. Com.* (1995) online: WESTLAW (Newsletters).

⁸⁸² The Carmack Amendment was first applicable to U.S. railways, later extending its reach to motor carriers. It responds to the desire of Congress to provide uniform interstate carrier liability rules. After the passage of

geographical scope comprises a shipment originating in the U.S. with destination adjacent, to the U.S., countries and excludes transportation originating from an adjacent country, or transportation to or from a foreign country non-adjacent to the U.S.⁸⁸³. Otherwise, federal common law as existed before enactment of these acts applies. Since most inland intermodal cargo in foreign commerce excludes application of the Carmack Amendment, common law takes effect⁸⁸⁴. Common law, in reality codified by the Carmack Amendment, presumes motor carrier liability for loss or damage unless the loss or damage is caused by i) an act of God, ii) the public enemy, iii) the act of the shipper himself, iv) public authority v) inherent vice or the nature of the goods⁸⁸⁵. Under common law principles, negligent carriers cannot be exonerated⁸⁸⁶. Moreover, carriers can contract their liability but they cannot exempt themselves from liability for negligence⁸⁸⁷.

B. Overview of U.S. and Canadian Rail Carrier Basis of Liability: Railroads in Canada are subject to the 1996 *Canada Transportation Act* that redefined interprovincial and international carrier liability to conform it to the current deregulation environment⁸⁸⁸.

Section 137(1) of *Canada Transportation Act* permits shippers and railways to contractually define their liability absent which regulatory provisions will apply

the Carmack Amendment, the Supreme Court continued to follow the old general common law liability rules but transformed them into rules of federal common law binding in state and federal courts. *Morris v. Covan Worldwide Moving Inc.*, 144 F. 3d 377 (5th Cir. (La.) 1998).

⁸⁸³ Saul Sorkin, «Limited Liability in Multimodal Transport and the Effect of Deregulation» (1989) 13 Tul. Mar. L. J. 285 at 287 and 294.

⁸⁸⁴ Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 555. Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 555. Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 Tul. L. Rev. 281 at 325. The Carmack Amendment, however, preempts common law provisions. *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F. 2d 700, (4th Cir. 1993).

⁸⁸⁵ 49 U.S.C.A. § 11706 of the Carmack Amendment.

⁸⁸⁶ *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F. 2d 700 (4th Cir. (Md.) 1993).

⁸⁸⁷ Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 556. Authority case *Hart v. Pennsylvania*, 112 U.S. 331 (U. S. S. C. 1884) very frequently cited today by U.S. and Canadian courts (*supra* note 865) and *Household Goods Carriers Bureau v. I.C.C.*, 584 F2d 437 (D. C. Cir. 1984). See also *supra* note 645.

⁸⁸⁸ S. C. 1996 c. 10. *Supra* at Part I, Chapter II, Section I, Par. 2. On amendments of the act see *supra* note 659.

(Section 127(2))⁸⁸⁹. Both CN and CP BsOL issued for multimodal or unimodal shipments, reproduce the ‘Railway Traffic Liability Regulations’ liability exceptions that a rail carrier, presumed liable when shipper makes its *prima facie* case⁸⁹⁰, can invoke to be exonerated⁸⁹¹. i) act of God, ii) war or an insurrection, iii) a riot, strike or lock-out, iv) any defect in the goods, v) any act negligence or omission of the shipper or owner of the goods, vi) an authority of law, vii) a quarantine, viii) any differences in the weights of grain, seed or any other commodity that are caused by any natural shrinkage that occurs during the transportation of the goods and ix) any discrepancies in elevator weights of grain where the elevators are not operated by the carrier, unless certificates have been issued...in respect of the scales that are used to weigh the grain. To benefit from these exceptions, rail carrier must prove ‘freedom from negligence’ on its part and on the part of its servants with respect to it⁸⁹².

In case Canadian rail BOL clauses or rail tariffs do not apply or are not respected by the carrier, common law provisions will take effect, leading to application of the same principles as in the case of motor carriers⁸⁹³. In the civil law province of Québec, the same civil law provisions applicable to motor carriers will take effect with respect to rail since Civil Code provisions on ‘carriage of property’

⁸⁸⁹ Also *Promech Sorting Systems B.V. v. Bronco Rentals & Leasing Ltd* (1995), 123 D. L. R. (4th) 111 (Man. C. A.).

⁸⁹⁰ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 72. *Supra* note 861 and accompanying text for the *prima facie* case.

⁸⁹¹ Railway Traffic Regulations to the National Transportation Act, 14 Aug. 1991, Gaz. C. 1991, (Vol. 125 No. 18) 2544 at 2545 P. C. 1991-1435. *Annex No. I, Table No. 9* at civ-cxiii and *Annex No. III, Table No. 7* at cxiii for CP and CN BOL and liability exceptions.

⁸⁹² *Canadian Westinghouse Co. v. Canadian Pacific Railway Co.* (1925), S. C. R. 579 (S. C. C.).

⁸⁹³ *Supra* at 176-177 for motor carriers. *Canadian National Railway Co. v. Harris* (1946), S. C. R. 352 (S. C. C.). In *D.M. Duncan Machinery Company Limited v. Canadian National Railway Company et al.* (1951), O. R. 578 (Ont. H. C. J.) the court stated that under common law the carrier is responsible for all losses not occasioned by i) an act of God or of the King's enemies, ii) ordinary wear and tear or ordinary loss and iii) personal neglect, wrong or misconduct of the owner or shipper. *Willes J. in Blower v. Great Western Ry. Co.* (1872), 7 C. P. 655 as reported by *ibid.* *Grand Trunk Railway Co. of Canada v. Vogel* (1886), 11 S. C. R. 612 (S. C. C.) held that under common law, a rail carrier may contractually limit its liability but it cannot absolve himself from liability for negligence. See, however, *Guarantee Co. of North America v. Gordon Capital Corp.* [1999], 3 S. C. R. 423 (S. C. C.) that upheld such clauses since they were not deemed unconscionable.

apply to all modes of transport except for water transport which is subject to specific provisions⁸⁹⁴.

In the U.S., railways are subject to the *Carmack Amendment*, the 1980 *Staggers Act* and the 1995 *Interstate Commerce Commission Termination Act* that sanction the principle of freedom of contracting⁸⁹⁵. Although U.S. motor carriers are not required to use a Uniform Straight Bill of Lading, use of such a bill is mandatory for U.S. rail carriers⁸⁹⁶. This BOL will exonerate carrier in case of: i) act of God, ii) public enemy iii) the authority of law iv) the act or default of the shipper or owner, v) vice or defect in the property or natural shrinkage, vi) riots and strikes and vii) stoppage in transit upon the request of the shipper, owner or party entitled to make such request, viii) quarantine⁸⁹⁷. As with U.S. motor and Canadian motor and rail carriers, U.S. railways are presumed liable if the shipper makes its *prima facie* case⁸⁹⁸ and can only be exonerated by proving presence of an excepted peril and absence of carrier and servants negligence with respect to it⁸⁹⁹. Freedom of contracting is permitted but exclusion of liability for negligence is strictly forbidden⁹⁰⁰. In brief, rail carrier basis of liability rules do not greatly differ in the U.S. and Canada. When Uniform Straight BOL provisions do not take effect, the Carmack Amendment reciting common law provisions will. The same burden of proof⁹⁰¹, carrier defenses⁹⁰² and freedom of contracting rules as in the case of motor carriers will apply in this respect.

⁸⁹⁴ *Supra* note 871 and accompanying text.

⁸⁹⁵ *Supra* at Part I, Chapter II, Section I, Par. 1.

⁸⁹⁶ 49 C.F.R. § 1035.1(a). Colin Barrett, "Bills of Lading Revisited" *J. Com.* (2000) online: WESTLAW (Newsletters). "Bills of Lading: the Choice is Yours," *Log. Mgmt* (2000) online : WESTLAW (Newsletters). Also look at *C. A. R. Transp. Brokerage Co. Inc. v. Darden Restaurants Inc.*, 213 F. 3d 474 (9th Cir. Cal. 2000). *Supra* note 879 for U.S. motor carriers.

⁸⁹⁷ Uniform Straight BOL under Contract Terms and Conditions Sec. (1)(b). *Annex No. I, Table No. 9* at c and *Annex No. III, Table No. 7* at cxci.

⁸⁹⁸ *Condakes v. Southern Pac. Co.*, 303 F. Supp. 1158 (D. Mass. 1968). *Supra* note 861 and accompanying text for the *prima facie* case.

⁸⁹⁹ *Ibid. Sarno v. Southern Pac. Co.*, 277 F. Supp. 628 (D. Mass. 1967).

⁹⁰⁰ *Fine Foliage of Florida, Inc. v. Bowman Transp. Inc.*, 901 F. 2d 1034 (11th Cir. 1990), *American Cyanamid Co. v. New Penn Motor Exp. Inc.*, 979 F. 2d 310 (3rd Cir. (Pa.) 1992) and *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (U. S. S. C. 1964).

⁹⁰¹ *Missouri Pacific R.R. Co. v. Elmore & Stahl*, 377 U.S. 134 (U. S. S. C. 1964) stating common law principles as codified by the Carmack Amendment. *Supra* at 179 for motor carriers.

⁹⁰² *Ibid* and *Chemical Mfrs. Ass'n v. Department of Transp.*, 105 F. 3d 702 (C. A .D. C. 1997).

U.S. and Canadian international intermodal rail tariffs take precedence over BsOL provisions because of their specificity to the intermodal carriage and their contractual nature⁹⁰³. Said tariffs sanction the principle of carrier liability for negligence and not the BsOL principle of presumption of liability. This means that intermodal rail carrier is not presumed liable once shipper makes its *prima facie* case, but his negligence needs to be proven by the shipper and carrier can be exonerated for mere absence of negligence with respect to the loss or damage without proof of a specific exoneration cause⁹⁰⁴. In such a case, rail BsOL liability exceptions could be combined with the principle of carrier liability for negligence, as these exceptions constitute narrow duplications of this principle⁹⁰⁵. Depending on the railway company, a list of carrier exoneration causes similar to rail BsOL liability exceptions may appear in the rail tariff close to the principle of carrier liability for negligence, requiring proof of the specific cause of damage by the carrier⁹⁰⁶. We will affirm that, in this case, rail BsOL liability exceptions tend to regroup, by their generic terms, a number of rail tariff specific exoneration events. Since rail BsOL exoneration causes can be combined one way or the other with rail BsOL liability exceptions, both rail tariffs and BsOL will be herein examined.

C. Overview of U.S. and Canadian Ocean Carrier Basis of Liability:

Canadian international ocean carriage is subject to the 2001 *Marine Liability Act* (MLA) that implemented the *Visby Rules*⁹⁰⁷. U.S. international shipping is governed

⁹⁰³ We refer specifically to tariff liability provisions. Canadian National Railways (CN) intermodal tariff 7589-AN Item 300, Canadian Pacific Railways (CP) intermodal tariff 7690-E Items 00075, 00080, U.S. BNSF Intermodal Rules and Policies Guide Item 62 and Norfolk Southern (NS) Circular #2 Sec. 8.3.3. The same rail BsOL are used for unimodal and multimodal transport but intermodal rail tariffs take precedence over BsOL provisions. BNSF Intermodal Rules and Policies Guide Item 60, CN tariff 7589-AN Item 300 (13), NS Sec. 8. 2. See *Annex No. 1, Table No. 6, 7, 8* at lxvi-xcix.

⁹⁰⁴ See, for instance, BNSF Intermodal Rules and Policies Guide Item 62. *Annex No. 1, Table No. 6* at lxix. For a more detailed analysis see *infra* at Part II, Chapter II, Section II, Par. 1.

⁹⁰⁵ *Infra* at 221 ((q) exception) and Part II, Chapter II, Section II, Par. 1 for a more extended analysis of this reasoning.

⁹⁰⁶ U.S. BNSF Intermodal Rules and Policies Guide Item 62(1), CP rail tariff 7690-E Item 00075, NS Sec. 8.3.3(d) provide for these specific exoneration causes, specific but not exhaustive examples of carrier absence of negligence. This seems also to correspond to CP practice: Interview of the author with CP Freight Cargo Claims personnel (May 7, 2002). CN tariff only refers to carrier liability for negligence. *Annex No. 1, Tables No. 6, 7, 8* at lxvi-xcix and *Annex No. III, Tables No. 7, 8* at xciii-cxciv.

⁹⁰⁷ Canadian *Marine Liability Act* (S.C. 2001, c. 6.) contains, in Schedule III, a recast of the Visby Rules (*supra* at 9). Visby Rules apply outward from Canada (from any Canadian international port) and inward

by 1936 *Carriage of Goods by Sea Act* (COGSA)⁹⁰⁸ enacting the 1924 Hague Rules⁹⁰⁹. Both these acts cover ocean carrier liability from ‘tackle to tackle’ but parties in multimodal transport can provide that they apply to the land segment(s) of the multimodal journey or for the time agreed between the parties⁹¹⁰.

Hague and Visby Rules art. 3(4) provides that a bill of lading is *prima facie* evidence that goods were received by the carrier in apparent good order and condition (part of shipper *prima facie* case)⁹¹¹. This establishes a presumption of liability against the ocean carrier who can rebut it by proving: i) due diligence to make the vessel seaworthy before and at the beginning of the voyage and ii) a carrier defense⁹¹². Carrier defenses are more numerous than those encountered in land transport and, at times, specific to ocean carriage:

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
- b) Fire, unless caused by the actual fault or privity of the carrier.
- (c) Perils, dangers and accidents of the sea or other navigable waters.
- d) Act of God

from a foreign port in a contracting state or if the BOL is issued in such a state. (Visby Rules and 2001 MLA art. X). 2001 MLA can also be found in *Marine Liability Act* (2001) online: Canadian Department of Justice <http://laws.justice.gc.ca/en/M-0.7/> (last modified: August 31, 2001).

⁹⁰⁸ *Carriage of Goods by Sea Act*, ch. 229, 49 Stat.1207 (1936) (codified as amended at) 46 U. S. C. App. [ss] 1300-1315 (1988). The COGSA applies to ocean shipments to and from the United States (46 U.S.C. par. 1312).

⁹⁰⁹ Inland carriers in the U.S., –carriers intervening right before cargo is loaded onto the ship and after its discharge as well as water carriers in lakes, rivers, inland waters, intercoastal waterways- are governed by the 1893 Harter Act (46 U.S.C. par. 190-196). Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 Tul. L. Rev. 281 at 326.

⁹¹⁰ Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 554.

⁹¹¹ See also William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 133 and 142. U.S.: *U.S. v. Ocean Bulk Ships Inc.*, 248 F. 3d 331 (5th Cir. (Tex.) 2001) and *Polo Ralph Lauren L.P. v. Tropical Shipping & Const. Co. Ltd.*, 215 F. 3d 1217 (11th Cir. (Fla.) 2000). Canada: *Wirth Ltd. v. Belcan N.V.*(1996) [1996], F. C. J. No. 603 (F. C.) and *Voest-Alpine Canada Corp. v. Pan Ocean Shipping Co.* (1991), 55 B. C. L. R. (2d) 357 (B. C. S. C.).

⁹¹² In U.S. and Canadian ocean and land transport the cause of the loss or, absent proof of the exact cause, the circumstances of the loss (theory of probabilities) have to be identified. (ocean Can / U.S.): William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 365-366. The author cites decisions burdening the carrier with the proof that the excepted peril incident was a reasonable one, even though not proven in all details. *Ibid.* U.S.: Leslie Tomasello Weitz, “The Nautical Fault debate” (1998) 22 Tul. Mar. L. J. 581 at 583. *U.S. v. Ocean Bulk Ships Inc.*, 248 F. 3d 331 (5th Cir. (Tex.) 2001), *Skandia Ins. Co., Ltd. v. Star Shipping AS*, 2001 A.M.C. 1527 (S. D. Ala. 2001). Canada: (land) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 67 with the author adding that reasonable care to avoid the consequences of the excepted peril has also to be proven by the carrier at this stage. *Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd.* (1999) [1999], F. C. J. No. 1326 (F. C. C.). For the Hague and the Visby Rules see *Annex No. II, Tables No. 2, 3* at cxlii-clviii and *Annex No. III, Table No. 5* at cxc.

- e) Act of War
- f) Act of Public Enemies
- g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
- h) Quarantine restrictions.
- i) Act or omission of the shipper or owner of the goods, his agent or representative.
- j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- k) Riots and civil commotions.
- l) Saving or attempting to save life or property at sea.
- m) Wastage in bulk of weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- n) Insufficiency of packing.
- o) Insufficiency or inadequacy of marks.
- p) Latent defects not discoverable by due diligence.
- q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Art. 3(8) of both the Hague and the Visby Rules prohibits contractual limitation of carrier liability except as provided in the rules (i.e. declaration of value). The conflict with land laws is apparent since in both the U.S. and Canada land carriers can contractually limit their liability (except for Québec motor carriers).

When the Hague or the Visby Rules do not take effect, common law provisions do in Canada (including Québec) and the U.S.⁹¹³. When applicable to ocean carriers, common law presumes carrier liable for the whole value of the

⁹¹³ U.S.: (multimodal) *Tokio Marine & Fire Ins. Co. Ltd. v. Kaisha*, 25 F. Supp. 2d 1071 (C. D. Cal. 1997). *Tampella Ltd. Boiler Div. v. M/V NORLANDIA*, 1988 WL 149627 (S. D. Ga. 1998) and *Paszatory v. Croatia Line*, 918 F. Supp. 961 (E. D. Va. 1996). Canada: It is *ITO and Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.* (1986), 1 S. C. R. 752 (S. C. C.) (authority case) that held that maritime law is federal law, uniform across Canada and not the law of any province, thus, leaving little scope for the application of provincial legislation in this sphere. As a result, in the absence of federal legislation to govern maritime law, common law principles should apply in the province of Québec. As reported by William Tetley, "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807 at par. 16, Guy Lefebvre, "L' Uniformisation du Droit Maritime Canadien aux Dépens du Droit Civil Québécois: Lorsque l' infidélité se Propage de la Cour Suprême à la Cour d' Appel du Québec" (1997) 31 Rev. J. Thémis. 577 at par. 1 and André Braën, *Le Droit Maritime au Québec* (Montréal, Canada: Wilson & Lafleur Ltée, 1992) at 7 and at 270. *Ontario Bus Industries Inc. v. Federal Calumet* [1992], 1 F. C. 245 (F. C. C.) and *Canadian Pacific Forest Products Ltd.-Tahsis Pacific Region v. Beltimber* (1999) [1999], 4 F. C. 320 (F. C. C.). The water transport provisions of the Civil Code of Québec (art. 2059-2079), in force as of January 1, 1994.

damage or loss (presumption of liability) if the shipper makes its *prima facie* case⁹¹⁴. The carrier will be exonerated in the presence of common law liability defenses –i) acts of God, ii) Queen's enemies iii) inherent defect in goods themselves iv) default of shipper- provided he is not negligent⁹¹⁵ but contractual exclusion of carrier liability for negligence is not permitted⁹¹⁶.

The general principles of basis of ocean and land carrier statutory liability are, therefore, quite similar: same burden of proof, same presumption of carrier liability, same carrier proof of absence of negligence with respect to the cause of the loss. However, ocean carriers are granted *additional statutory protection* ('nautical fault', perils of the sea, saving life at sea, fire, 'catch-all exception). Moreover, U.S. and Canadian ocean carriers *cannot contractually limit* their liability while their land counterparts can with the exception of Québec motor carriers who are prohibited to do so. Finally, ocean carriers cannot invoke a liability exception if they do not prove *vessel seaworthiness* before and at the beginning of the journey. Before we enter into the comparative analysis of cross-country and cross-modal liability exceptions, we will focus on ocean carrier duty to provide a seaworthy vessel and ocean/land carrier duty to care for the cargo.

Seaworthiness/Care for Cargo: Both the Hague and the Visby Rules oblige carriers to exercise 'due diligence' to make the vessel seaworthy before and at the beginning of the voyage (art. 3(1) and 4(1)), a pre-condition to carrier invoking a COGSA or MLA liability exception (overriding obligations)⁹¹⁷. In land transport, a

⁹¹⁴ Canada: *Produits Alimentaires Grandma Ltée v. Zim Israel Navigation* (1987) [1987], F. C. J. No. 5 (F. C. C.) affirmed in appeal by *Produits Alimentaires Grandma Ltée v. Zim Israel Navigation Co.* (1988), F. C. J. No. 24 (F. C. A.). Even the Québec Civil code contains such a presumption in articles 2071 and 2072 on water transport. For the U.S.: *Matter of Intercontinental Properties Management S.A.*, 604 F. 2d 254 (4th Cir. (Va.) 1979). *Supra* note 861 and accompanying text for shipper *prima facie* case.

⁹¹⁵ U.S.: *Tokio Marine & Fire Ins. Co. Ltd. v. Kaisha*, 25 F. Supp. 2d 1071 (C. D. Cal. 1997), *Hanover Ins. Co. v. Shulman Transport Enterprises Inc.* 581 F. 2d 268 (1st Cir. 1978). Canada: *Canadian Pacific Forest Products Ltd.-Tahsis Pacific Region v. Beltimber* (1999), 4 F. C. 320 (F. C. C.).

⁹¹⁶ U.S.: Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 556, Thomas J. Schoenbaum, *Admiralty and Maritime Law* 3d ed. (U.S.: West Group, 2003) Chapter 10(A) at par. 10-4. Canada: *Canadian Pacific Forest Products Ltd v. Beltimber* (1999), 4 F. C. 320 (F. C. A.).

⁹¹⁷ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 371-374 and Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL.

corresponding obligation of roadworthiness (obligation to make vehicles or trains fit and safe for transport) exists but it does not constitute a condition precedent to carrier invoking a liability exception⁹¹⁸. However, reference to seaworthiness to determine whether a land vehicle is roadworthy relieving land carrier from negligence with respect to a liability exception, may be of assistance since the conditions under which a land vehicle is unroadworthy and a vessel unseaworthy present resemblances⁹¹⁹.

Seaworthiness must exist 'before and at the beginning' of the voyage so that unseaworthiness during intermediary stops is not taken into account (majority view)⁹²⁰. Its presence must be defined with respect to the loss⁹²¹. Seaworthiness has been defined as the state of the vessel in such a condition, with such equipment

M. Thesis, University of Montréal, 1986) at 75-78 [published in (1990) 31 *Les Cahiers de Droit* 81]. U.S.: *U.S. v. Ocean Bulk Ships Inc.*, 248 F. 3d 331 (5th Cir. (Tex.) 2001), *Hale Container Line Inc. v. Houston Sea Packing Co. Inc.*, 137 F. 3d 1455 (11th Cir. (Fla.) 1998). Canada: *Primex Forest Products Ltd. v. Harken Towing Co.* [1997], B. C. J. No. 1644 (B. C. S. C.), *Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd.* [1999], F. C. J. No. 1326 (F. C. C.), *Federal Insurance Co. v. Rail and Water Terminal (Québec) Inc.* [1980], C. S. 994 (S. C. Qué.).

⁹¹⁸ Canada: *Pacific Great Eastern Railway Co. v. Bridge River Power Co.* [1944], S. C. R. 196 (S. C. C.) which cites the New Zealand case *Trickett v. Queensland Insurance Co. Ltd.* [1936], A. C. 159 (authority case) in deciding that seaworthiness and roadworthiness are roughly comparable. (English case) *Clarke v. National Insurance and Guarantee Corporation, Ltd.* [1963], 2 Ll. Rep. 35 (C. A.) advancing more details on the comparison. U.S.: *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2nd Cir. 1983).

⁹¹⁹ English case *Clarke v. National Insurance and Guarantee Corporation, Ltd.* [1963], 2 Ll. Rep. 35 (C. A.) - very frequently citing New Zealand case *Trickett v. Queensland Insurance Co. Ltd.* [1936], A. C. 159, (an authority case on the parallel of the two concepts and referred to by Canadian case law) - states that overloading can determine unseaworthiness and unroadworthiness alike. It is carrier obligation to provide a roadworthy vehicle although this may not be explicitly stated. Craig E. Philip, Charles T. Connors, James G. Cunningham, J. B. Hunt Robert H. Maisch, «Motor Carrier Panel» (2001) 28 *Transp. L. J.* 473 at 478-479.

⁹²⁰ Canada: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 198 and *Plumper Bay Sawmills Ltd. v. Jericho Towing Ltd.* [1980], F. C. J. No. 406 (F. C. C.). However, in *Martel v. Fortier* [1995], F. C. J. No. 1713 (F. C. C.) the court followed British law and required proof of seaworthiness 'at the commencement of each stage' (stages doctrine). See the explicit rejection of the 'stages doctrine' in the U.S. very frequently cited *American Mail Line Ltd. v. U. S.*, 377 F. Supp. 657 (W. D. Wash. 1974) case. On the 'stages doctrine' and seaworthiness see the LL. M. thesis of Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 43s. [published in (1990) 31 *Les Cahiers de Droit* 81].

The exact moment when the vessel must be seaworthy cannot be precisely defined. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 377. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 198. However, doctrine and case law are unanimous in deciding that 'before and at the beginning of the voyage' refers at least to the moment when commencement of charging goods on board is about to take effect. Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 59 [published in (1990) 31 *Les Cahiers de Droit* 81].

⁹²¹ Canada/U.S.: William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 374.

and manned by such a master and crew that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage (due diligence)⁹²². This appreciation is based on industry standards and practices at the relevant time so long as these standards and practices are reasonable. In other words, whether a vessel is seaworthy is a question of fact⁹²³. Carrier will be held liable for servant's acts rendering the vessel unseaworthy (non-delegable duty)⁹²⁴. U.S. and Canadian common law principles impose an overriding duty of seaworthiness on the ocean carrier, in the same way statutory law does, but this duty is absolute and not based on due diligence⁹²⁵.

Note must be made, in this respect, of Hague and Visby Rules article 3(2) that puts the duty of 'properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried' on the carrier. This provision is not to be confounded with art. 3(1) of mentioned rules that also refers to carrier caring for the cargo but is limited in time to the period 'before and at the beginning of' the journey

⁹²² Hague and Visby Rules art. 3(1). Canada: *Martel v. Fortier* [1995], F. C. J. No. 1713 (F. C. C.), Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Editions Thémis, 1986) at 143. U.S.: *Henry v. Moore-McCormack Lines*, 134 F. Supp. 71 (S. D. N. Y. 1955). On the elements of vessel (un)seaworthiness (structural characteristics, equipment, crew competence, installations for the receipt and conservation of cargo) see the Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 1-35 [published in (1990) 31 *Les Cahiers de Droit* 81].

⁹²³ U.S.: *Ringering v. Compania Maritima De-La-Mancha*, 670 F. Supp. 301 (D. Or. 1987). Canada: *Martel v. Fortier* [1995], F. C. J. No. 1713 (F. C. C.) and *Scottish Metropolitan Assurance Co. v. Canada Steamship Line* [1930] S. C. R. 262 (S. C. C.). Vessel's latent defect which would have been revealed by a carrier diligent examination engages his liability if such defect renders vessel unseaworthy causing, thereby, damages to the goods. Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 38-39 [published in (1990) 31 *Les Cahiers de Droit* 81].

⁹²⁴ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 385 and Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 63 [published in (1990) 31 *Les Cahiers de Droit* 81]. U.S.: *Sabah Shipyard SDN. BHD. v. M/V Harbel Tapper*, 984 F. Supp. 569 (S. D. Tex. 1997) and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (U. S. S. C. 1946). Canada: *Primex Forest Products Ltd. v. Harken Towing Co.* [1997], B. C. J. No. 1644 (B. C. S. C.), *Plumper Bay Sawmills Ltd. v. Jericho Towing Ltd.* [1980], F. C. J. No. 406 (F. C. C.).

⁹²⁵ This is an implied warranty of seaworthiness (*de facto* seaworthiness) unless otherwise provided by contract. In the U.S., this *de facto* seaworthiness exists only in certain circumstances such as shipowner's liability to longshoremen employees, worker's compensation and wrongful death because of unseaworthiness or actions against ocean carriers. *American Dredging Co. v. Plaza Petroleum Inc.*, 845 F. Supp. 91 (E. D. N. Y. 1993) and *C. Itoh & Co. (America) Inc. v. M/V Hans Leonhardt*, 719 F. Supp. 479 (E. D. La. 1989) and *Grace Line Inc. v. Todd Shipyards Corp.*, 500 F. 2d 361 (9th Cir. (Cal.) 1974). Canada: *City of Alberni (The) v. Hunt, Leuchars, Hepburn, Ltd.* (1947) [1947], Ex. C. R. 83 (Ex. C. C.).

and only targets vessel seaworthiness. The latter is an overriding obligation whose disrespect impedes carrier from invoking art. IV liability exceptions of the same rules. The former provision does not refer to vessel seaworthiness but to the protection of cargo imposing on the carrier a higher than due diligence, though not absolute, standard of care that must be present throughout the journey⁹²⁶. It is not an overriding obligation so that carrier can invoke art. IV liability exceptions even though he did not fulfill art. 3(2) obligations⁹²⁷. As with vessel seaworthiness, Hague and Visby Rules art. 3(2) engages carrier liability for agent's and independent contractor's faults⁹²⁸. Further, contractual shifting of this carrier duty to the shipper is prohibited under Hague and Visby Rules art. III(8)⁹²⁹. However, if the shipper or its agent improperly stow goods on the ship or in a container, the carrier may be absolved from liability under the 'shipper fault' exception⁹³⁰.

This leaves pending the question of who bears the burden of proof of (un)seaworthiness and (un)roadworthiness. In all cases, the shipper must first make its *prima facie* case⁹³¹. The burden of proof will then shift to the ocean carrier who

⁹²⁶ This degree of care is very similar to that of an insurer of cargo. However, courts, particularly in the U. S., continue to refer to due diligence to care for cargo something that is patently wrong. Opinion of William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 531, 541 and 552 and 553.

⁹²⁷ This is said to be due to the Hague and Visby Rules proviso 'Subject to the provisions of art. IV' appearing before enunciating carrier duty of care for the cargo under art. 3(2) and which does not appear in the Hague and the Visby Rules art. III(1) or in COGSA par. 1303(2) corresponding provision. William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 543 and at 546.

⁹²⁸ William Tetley, *Tetley's Law and other Nonsense Chapter 26 Sec. 5 (Update of Marine Cargo Claims Volume)* (2002) online: Tetley's Law/McGill Homepage <<http://tetley.law.mcgill.ca/ch26.htm>> (last modified: continuously). U.S. and Canadian land transport render carrier liable for his or his agent's lack of care for the cargo throughout the journey, but the degree of care required in this respect is reasonable care and not a higher standard of care, the latter making easier shipper burden of proof. U.S.: *Crockett v. Uniroyal Inc.*, 592 F. Supp. 821 (M. D. Ga. 1984), *Eastern Wine Corp. v. New York Cent. R. Co.*, 355 F. 2d 30 (2nd Cir. 1966). Canada: *General Motors Corp. v. Cast (1983) Ltd.* (1994), F. C. J. No. 255 (F. C. C.), *Grand Trunk Railway Co. of Canada v. Vogel* (1886), 11 S. C. R. 612 (S. C. C.).

⁹²⁹ William Tetley, *Tetley's Law and other Nonsense Chapter 25 Sec. 5 (Update of Marine Cargo Claims Volume)* (2002) online: Tetley's Law/McGill Homepage <<http://tetley.law.mcgill.ca/ch25.htm>> (last modified: continuously). at Chapter 25, Sec. 5.

⁹³⁰ William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 545.

⁹³¹ Ocean U.S.-Canada: The following is based on William Tetley, *Marine Cargo Claims* 3d ed. (Montréal: International Shipping Publications, 1988) at 142-143 and 542-543. Land Canada: John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 67. Land U.S.: *Allied Tube & Conduit Corp. v. Southern Pacific Transp. Co.*, 211 F. 3d 367 (7th Cir. 2000). *Supra* note 861 and accompanying text for the *prima facie* case proof.

must establish vessel seaworthiness and the exoneration cause⁹³². Land carriers only need to prove the exoneration cause of the loss and absence of negligence in this regard⁹³³. It is only then that the burden of proof will shift again to the shipper to prove ocean, land or servant's absence of due diligence in the production of the damage.

Paragraph 2. Comparative Analysis of Multimodal Carrier Liability Exceptions in the U.S. and Canada: Although ocean carrier liability exceptions are inclusive of most land carrier exoneration causes in both countries, differences between them exist. Presently applicable carrier liability exceptions cross-modally and cross-country are placed in four categories: liability exceptions due to Third Party Actions Liability (**A**), Exceptions due to Natural Causes (**B**), Cargo, Vessel, Shipper Fault (**C**), and Ocean Specific Liability Exceptions (**D**). Three are the challenges in undertaking a comparative study of cross-country and cross-modal liability exceptions. First, find out if common or similarly phrased cross-modal and cross-country liability exceptions are applied in the same way by case law in both countries. Second, determine whether differently phrased or different cross-modal and cross-country liability exceptions have common areas of application. Third, study the ocean specific liability exceptions in the two countries and explain their absence in land BsOL or rail tariffs in both countries.

A. Liability Exceptions due to Third Party Actions: There is a category of liability exceptions which, with some variations, follows same wording throughout modes and countries and comes into play when extraordinary force is exerted upon the ship, ship owner or goods by concerted action of third persons, usually through forms of organized governments⁹³⁴. These are: authority of law, quarantine, acts of

⁹³² William Tetley, *Tetley's Law and other Nonsense Chapter 18 Sec. 4 (on sea perils) and Ch. 6(II)(1)*© (Update of Marine Cargo Claims Volume) (2002) online: Tetley's Law/McGill Homepage <<http://tetley.law.mcgill.ca/ch26.htm>> (last modified: continuously). The cause of the loss is proven by 'preponderance of evidence' and not by 'clear and convincing evidence'. *Ibid* at Ch. 6(II)(3). Even if, in theory, the carrier has to prove the cause of the loss because he is better placed to do so, in practice, both shipper and carrier are obliged to prove all the facts available to them. *Ibid* at Ch. 14, Sec. 8.

⁹³³ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 67.

⁹³⁴ Whearton Poor, *Poor on Charterparties and Ocean Bills of Lading* (N. Y.: Matthew Bender, 1968) at 185.

war, acts of public enemies, rulers of the world or seizure under legal processes, riots, civil commotions, insurrections⁹³⁵. To these we could probably add the theft of containers or other cargo related liability exceptions we encounter in some intermodal rail tariffs. For the most part, however, mentioned exceptions have generated little litigation and have received little discussion in the drafting of statutes and international conventions⁹³⁶.

The ‘*authority of law*’ liability exception that we find in Canadian and U.S. land BsOL and rail intermodal tariffs, has not been worded in exactly the same way in U.S. and Canadian ocean BsOL that employ the ‘arrest or restraint of princes, rulers of people or seizure under legal processes’ expressions⁹³⁷. Under all its different denominations, however, this liability exception is a valid defense for carriers when in-transit cargo damage occurs through intervention of *governmental authorities*⁹³⁸.

‘*Quarantine*’⁹³⁹ an explicit land and ocean BsOL and CP intermodal rail tariff liability exception, has been treated as an ‘authority of law’ (land) or ‘restraint of princes’ (ocean) liability exception by U.S. and Canadian doctrine and courts⁹⁴⁰.

⁹³⁵ *Ibid.* For all herein studied exceptions see *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv.

⁹³⁶ Michael F. Sturley, «An Overview of the Considerations Involved in Handling the Cargo Case» (1997) 21 *Tul. Mar. L. Rev.* 263 at 312.

⁹³⁷ In land transport, we also find terms as civil and military authority (BNSF tariff), confiscation of goods by government. Ocean terms ‘restraint of princes, rulers of people’, use archaic language taken from old insurance policies. M. E. DeOrchis, «Restraint of Princes : the Carrier Dilemma when trouble brews at foreign ports » (1980) 1980 *Eur. Transp. L* 3 at 5. *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxciv.

⁹³⁸ Cases found on the issue are limited to ocean carrier ones. See, in this regard, William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 448-449. Governmental intervention does not necessarily involve physical danger to the goods. ‘Reasonable apprehension’ (grounded fear) that if the carrier proceeds to an act there will be governmental interference suffices. However, mere rumors of possible governmental intervention are not good enough. M.E. DeOrchis, «Restraint of Princes : the Carrier Dilemma when trouble brews at foreign ports» (1980) 1980 *Eur. Transp. L* 3 at 5. U.S.: (ocean) *Northern Pacific Railway v. American Tobacco Co.*, 195 U.S. 439 (S. Ct. 1904), *New England Insurance Co. v. The Sarah Ann.*, 30 U. S. 345 (13 Pet. 400 1839) and *The Styria*, 186 U. S. 1 (S. Ct. 1902). Canada: (ocean) *Winchester v. Busby* (1889), 16 S. C. R. 336 (S. C. C.). Examples of restraint of princes: naval blockage or embargo, governmental acquisition of vessel, danger of confiscation of goods. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 164 and (English) T. G. Carver, *Carriage by Sea* 13th ed. (London : Stevens & Sons, 1982) at 225, sources of inspiration for both U.S. and Canadian case law.

⁹³⁹ ‘Quarantine’ is the space of forty days, or less quantity of time during which the crew, or cargo of a ship or vessel coming from a port or place infected or supposed to be infected by a disease, are required to remain on board after their arrival, before they can be permitted to land. The objective of the quarantine is to ascertain

'Seizure under legal processes' appears close to the 'restraint of princes, rulers or people' ocean liability exception and is not found in land transport since creditor claims on vessels or ocean cargo are much more frequent and onerous than those encountered on land⁹⁴¹. This ocean specific liability exception refers to the ordinary civil administration of justice on the basis of creditor's claims and does not, therefore, make integral part of the 'restraint of princes' exception⁹⁴². It can only be employed if the carrier could not have foreseen the seizure⁹⁴³.

'Acts of war' and 'public enemies' constitute two separate liability exceptions often appearing together in BsOL and tariffs because of their conceptual similarity⁹⁴⁴. The 'acts of war' liability exception is found in Canadian-U.S. ocean and Canadian rail BsOL, CP and BNSF intermodal tariffs but not elsewhere. More descriptive terms such as insurrections, rebellion, invasion may be used in this regard⁹⁴⁵. All these terms refer to acts committed by countries at war, country's civil

that the crew or cargo is not infected. *The Lectric Law Library's* (2002) online : Lectric Law Library Homepage <www.lectlaw.com/def.htm> (last modified: Feb. 28, 2002), s.v. 'Quarantine'.

⁹⁴⁰ Ocean-U.S./Canada: Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal: Les Presses de l' Université de Montréal, 1972) at 132. Ocean-U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 164 and note 78. M.E. DeOrchis, « Restraint of Princes : the Carrier Dilemma when trouble brews at foreign ports » (1980) 1980 Eur. Transp. L 3 at 5. Land-U.S.: Robert J. Pahl, "Understanding Motor Truck Cargo Insurance-an Overview" *Rough Notes* (2001) online : WESTLAW (Newsletters) even though the quarantine exception is not always found in U.S. motor BsOL or U.S. rail tariffs. *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv. The only Canadian case which seems permissive, though not dispositive, of the approximation of quarantine-restraint of princes exceptions is *Canadian International Paper Co. v. Manchester Concorde* [1981], F. C. J. No. 707 (F. C. C.). England: T. G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 175 (quarantine-restraint of princes) and 176. *Annex No. III, Tables No. 5, 6, 7* at cxc-cxciii.

⁹⁴¹ *Annex No. III, Table No. 5* at cxc. We found only an Australian land case mentioning this exception. *Thomas National Transport (Melbourne) Pty. Ltd. and Pay v. May & Baker (Australia) Pty. Ltd.* [1966], 2 Ll. Rep. 347 (HC. Aus.).

⁹⁴² For instance, a ship being arrested and detained by a creditor of the carrier with resulting damage to cargo belonging to third party. *Morrisey v. S.S.A. & J.Faith*, 252 F. Supp. 54 (N. D. Oh. 1965) as reported by William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at note 98 (Chapter 18). Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 164. It is not certain, however, if this exception concerns seizure of the vessel or of the transported goods. *Ibid.*

⁹⁴³ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 449. *Morrisey v. S.S.A. & J. Faith*, 252 F. Supp. 54 (N. D. Oh. 1965).

⁹⁴⁴ *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxciv. The 'act of war', 'act of public enemies' and 'arrest or restraint of princes, or rulers of the world or seizure under legal processes' liability exceptions can overlap to a certain extent. Restraint of princes may be an act performed for the prosecution of war. Likewise, an act performed in the prosecution of war might be an act of public enemy. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 164. M.E. DeOrchis, «Restraint of Princes: the Carrier Dilemma when Trouble Brews at Foreign Ports» (1980) 1980 Eur. Transp. L. 3 at 5.

⁹⁴⁵ *Annex No. III, Tables No. 5, 7, 8* at cxc-cxciii.

war or political strife against a nation⁹⁴⁶. U.S. and Canadian case law seem to conclude that war does not need to be declared in this respect, war like acts or anticipated state of war are enough to justify presence of this liability exception⁹⁴⁷.

‘Public enemies’ liability exception is found in all U.S. and Canadian BsOL and rail intermodal tariffs except in the Canadian rail BOL and CP intermodal rail tariff⁹⁴⁸. It appears in Canadian motor BOL close to the term ‘Queen’s enemies’ (or King’s enemies at common law), something that is generally not found in other land or ocean BsOL in the U.S. and Canada⁹⁴⁹.

English case law, source of inspiration for both jurisdictions and Canadian/U.S. doctrine, seems to conclude that Queen’s or King’s enemies are enemies of the state, countries at war thereof and, in general, public foreign enemies but it does not include organized or unorganized crime⁹⁵⁰. Even though Canadian

⁹⁴⁶ Michael Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal : Les Presses de l’ Université de Montréal, 1972) at 132 based on english case law. Robert J. Prah, “Understanding Motor Truck Cargo Insurance-an Overview” *Rough Notes* (2001) online: WESTLAW (Newsletters).

⁹⁴⁷ U.S.: *Eastern Air Lines Inc. v. McDonnell Douglas Corp.*, 532 F. 2d 957 (5th Cir. (Fla.) 1976) mentioning the ocean case *Claveresk*, 264 F. 276 (C. A. 1920). Canada: Although we found no *ad hoc* case for Canada, *Azevedo v. Markel Insurance Co. of Canada* [1998], A. J. No. 1134 (Alta. Q. B.) referred to a carrier liability insurance clause that defines ‘acts of war’ very extensively: «War, invasion, act of foreign enemies, hostilities (whether war be declared or not) civil war, rebellion, revolution, insurrection…» and *Canadian National Railway Company v. Canada Steamship Line* [1947], O. R. 585 (S. C. C.).

⁹⁴⁸ *Annex No. III, Table No. 5, 6, 7, 8 at cxc-cxiv*. Canadian land (specifically motor) cases on this exception refer to English case law. *W.R. Johnson & Co. v. Inter-City Forwarders Ltd.* [1946], O. J. No. 97 (Ont. S. C.) referring to *Shaw v. Great Western Railway* (1894), 1 Q. B. 373 (Q. B. D.) and *Fishery Products International Ltd. v. Midland Transport Ltd* [1994], N. J. No. 65 (Nfld. S. C.) referring to *Secretary of State for War v. Midland Great Western Rly Co. of Ireland* [1923], 2 I. R. 102 on this exception.

⁹⁴⁹ It has been suggested that Canadian motor carrier ‘Queen’s or public enemies’ exception refers to something more than ‘Queens enemies’, otherwise the term ‘public enemies’ would be superfluous. John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 102. However, according to Carver, ‘public enemies’ expression was presumably used in place of the more usual ‘act of King’s enemies’ in order to cover the case where the exception applies to a republican form of government. T. G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 537. In the English case *Secretary of State for War v. Midland Great Western Rly. Co. of Ireland*, [1923], 2 I. R. 102 judge Dodd, J. sided with Pr. Carver and after considering the history of the exception noted that this is also the case in the U.S.. We agree with the author’s view that the term public enemies is not superfluous but probably refers to a republican form of government. *Infra* note 1378.

⁹⁵⁰ This does not include robbers on land but may include pirates, robbers on the high seas or enemies of all nations. T. G. Carver, *Carriage by Sea* 13th ed. (London : Stevens & Sons, 1982) at 14, *Ham v. McPherson* (1842), 6 U. C. Q. B. (O. S.) (C. A.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 101-102. See also *Secretary of State for War v. Midland Great Western Rly Co of Ireland* [1923] 2 I. R. 102 and Michel Pourcelet aligned opinion. Michael Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal : Les Presses de l’ Université de Montréal, 1972) at 132.

and U.S. case law is sparse on the topic, Canadian cases conclude that the mere phrase ‘public enemies’ conjures up images of war, intrigue and rebellion and certainly does not include political protest of independent truckers⁹⁵¹.

The ‘riots’ and ‘strikes’ exceptions are present cross-modally and cross-country even though terms used in this respect may differ⁹⁵². They constitute two separate liability exceptions even though they often appear together in BsOL, commentaries and texts and, thus, in the present study. Even though case law is scarce on the issue, we learn that ocean transport ‘riots and civil commotions’ liability exception refers to civil wars or organized public uprising against the government⁹⁵³.

Although names may differ (picketing, labor stoppage or disturbance, lock-out), ‘strikes’ is a cross-modal and cross-country liability exception that exists when a *group of employees* acts in concert with respect to a *labor dispute*⁹⁵⁴. ‘Picketing’, ‘locks-out’, ‘stoppage of labor’, often appearing close to the ‘strikes’ exception, are strike related concepts with ‘stoppage of labor’ regrouping all mentioned terms⁹⁵⁵. A

⁹⁵¹ Canada: *Fishery Products International Ltd. v. Midland Transport Ltd* [1994], N. J. No. 65 (Nfld. C. A.) overturning the Newfoundland Supreme Court decision (*Fishery Products International Ltd. v. Midland Transport Ltd* [1992] N. J. No. 209 (Nfld. S. C.)). U.S.: authors argue that the expression ‘public enemies’ usually means a country hostile or at war with the ship’s flag country. Kenneth M. Klemm, «Forum Selection in Maritime Bills of Lading under COGSA» (1989) 12 *Fordham Int’l L. J.* 459 at note 27. This exception equally refers to the action of military or naval forces unconnected with either the carrier or the goods. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 164.

⁹⁵² *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv. Civil commotions, acts of civil disobedience, locks-out, labor disturbance or stoppage are some of the varied terms used cross-modally and cross-country. *Ibid.*

⁹⁵³ Michael Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal : Les Presses de l’ Université de Montréal, 1972) at 134.

⁹⁵⁴ Employees may be employees of the carrier, independent stevedores at the port of charge or discharge and the strike may be directed towards the carrier in question or carriers in general. *Ibid* at 133. Canada: *Fishery Products International Ltd. v. Midland Transport Ltd* [1994] N. J. No. 65 (Nfld C. A.) where various English and Canadian cases were mentioned. English case *Tramp Shipping Corporation v. Greenwich Marine Inc.* [1975], 2 ALL E. R. 989 (C. A.), mentioning said Canadian case, held that ‘strikes’ are motivated by ‘a rise in wages, improvement of conditions, support for other workers or for political changes; expression of sympathy or protest’. Same position is adopted in the U.S. where it is pointed out that a ‘strike’ is almost always a matter of money and can be ended by money payment although failure to do so does not hold the carrier liable. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 165 commenting on charterparties. See also *Hellenic Lines Limited v. Director General of India Supply Mission for and on Behalf of Union of India*, 452 F. 2d 810 (2nd Cir. (N. Y. 1971).

⁹⁵⁵ *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv. For stoppage of labor regrouping other mentioned causes: U.S.: *Kapiolani Hosp. v. N.L.R.B.*, 581 F.2d 230 (9th Cir. 1978). Canada: *Caron v. Canada (Employment and Immigration Commission)* [1991], 1 S. C. R. 48 (S. C. C.) explaining that if it is the employer who does not allow employees to work then the stoppage is called ‘lock-out’ and if it is the employees then it is called

strike directed against the government and not the employer has been held to constitute a 'strike' in the U.S. and Canada⁹⁵⁶. Moreover, under Canadian and U.S. ocean and land case law, a chain of consequential results of a strike of a group of employees may still qualify as a strike⁹⁵⁷. On the contrary, a public demonstration that brings disruption in a workplace does not constitute a strike, nor does a political demonstration by a group of independent truckers⁹⁵⁸.

Although all cross-modal and cross-country liability exceptions require proof of absence of negligence on the part of the carrier in order to take effect, absence of negligence becomes an explicit statutory condition under the U.S. COGSA 'strikes' exception, a provision intended to clarify rather than modify the Hague Rules on the issue⁹⁵⁹. Even in the presence of a 'Liberty Clause' -giving carrier the freedom to

'strike'. Picketing is legally defined in U.S. and Canadian case law as an activity intended to exert improper influence on secondary or neutral parties to come out to strike or to remain on strike. Canada: *Construction Royal Co. v. Royal Trust Co.* (1956), O. R. 911 (Ont. C. A.), *Husband Tpt. Ltd. v. C.N.R.* (1967), C. S. 589 (C. S. 589 (Que. S. C.)). U.S.: *International Union of Operating Engineers Local 150 AFL-CIO v. NLRB*, 47 F. 3d 218 (7th Cir. 1995) and *R.L. Coolsaet Const. Co. v. Local 150 Intern. Union of Oper. Engineers*, 177 F. 3d 648 (7th Cir. 1999).

Occasionally, U.S. land case law will refer to 'locks-out'. *Richter v. North American Van Lines Inc.*, 110 F. Supp. 2d 406 (D. Md. 2000) refers to locks-out as a boilerplate contract term and condition of a uniform household goods bill of lading also governed by the Carmack Amendment. In the same sense, see *Montgomery Ward & Co. v. Northern Pac. Terminal Co. of Or.*, 128 F. Supp. 475 (D. Or. 1953).

⁹⁵⁶ Canada land: *Fishery Products International Ltd. v. Midland Transport Ltd.* (1994), 113 D. L. R. (4th) 651 (Nfld. C. A.), and (non-transport) *Re United Glass and Ceramic Workers of North America et al. v. Domglas Limited et al.* (1978), 19 O. R. (2d) 353 (Ont. Div. C.) mentioned by the former and *Tenneco Canada Inc. (c.o.b. Albright & Wilson Americas) v. British Columbia Hydro and Power Authority* (1999), 1999 B. C. C. A. 415 (B. C. C. A.). U.S. Intermodal: Jane Massey Draper, «Coverage under all-Risk Insurance» (1995) 30 A. L. R. 5th 170 at par. 120.

⁹⁵⁷ Canada land: John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 102. Rebels or rioters have been found to fall both under this category. *Ibid* with reference made to an English case. U.S. land: *Missouri Pac. R. Co. v. Porter*, 273 U. S. 341 (U. S. S. C. 1964) for U.S. railway riots and strikes, *Southern Pac. Co. v. H. Rothstein & Sons*, 304 S. W.2d 383 (Tex. Civ. App. San Ant. 1957). Canada (ocean): 'Innocent carriers' victims of the 'strike' who are prevented from performing their contract of carriage can also invoke this exception. *Tenneco Canada Inc. (c.o.b. Albright & Wilson Americas) v. British Columbia Hydro and Power Authority* (1999), 1999 B. C. C. A. 415 (B. C. C. A.) mentioning U.S. (ocean) case *Dant & Russell v. Gray's Harbor Exportation Co.*, 106 F. (2d) 911 (9th Cir. 1939). See also Michael Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal: Les Presses de l' Université de Montréal, 1972) at 133.

⁹⁵⁸ Canada (land): *Fishery Products International Ltd. v. Midland Transport Ltd.* (1994), 113 D. L. R. (4th) 651 (Nfld. C. A.) overruling the lower court holding and *MacMillan Bloedel Ltd. v. British Columbia (Hydro and Power [1992]*, B. C. J. No. 2310 (B. C. S. C.) on the issue. U.S.: John A. Glenn, "Ally and Single Enterprise Doctrines in Secondary Boycott Cases (1972) 13 A. L. R. Fed. 466 par. 10 by reasoning *a contrario* to the ally doctrine as applied to picketed independent truckers customarily performing work for the struck employer. *Laborers' Intern. Union of North America Local 859 AFL-CIO v. N. L. R. B.*, 446 F. 2d 1319 (D. C. Cir. 1971).

⁹⁵⁹ COGSA Sec. 1304(j). William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at note 89 (Chapter 18). Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New

use his own judgement in case of danger of occurrence of a risk-causing event⁹⁶⁰ the carrier must ‘act reasonably under the circumstances’ (due diligence)⁹⁶¹.

B. Liability Exceptions due to Natural Causes: Apart from carrier liability defenses due to third party actions, there are other defenses that regroup natural causes of damage: the acts of God and sea perils liability exceptions⁹⁶². Their common characteristic is the absence of human agency in the production of damage that is, rather, due to natural causes.

Contrary to already examined liability exceptions whose denominations often vary, the ‘acts of God’ (theominia-vis major⁹⁶³) liability defense appears in the exact same terms in both land and ocean BsOL and intermodal rail tariffs in the U.S. and Canada⁹⁶⁴. Rests to determine if courts in both countries view it in the same way. Canadian⁹⁶⁵ and U.S. courts⁹⁶⁶ refer to the English case *Nugent v. Smith*⁹⁶⁷ to define ‘acts of God’:

York : The Foundation Press, 1975) at 165-166. *Southern Pac. Co. v. H. Rothstein & Sons*, 304 S. W. 2d 383 (Tex. Civ. App. San Ant. 1957), and *Mormacsaga (The) v. Crelinsten Fruit Co.* [1969], 2 Ex. C. R. 215 (Ex. Ct. C.) (Canadian case decided on the basis of U.S. case law).

⁹⁶⁰ Liberty clauses are purported to give carriers great discretion in their decisions and are common practice in international ocean carriage in the U.S., Canada and worldwide. *Drew Brown Ltd. v. Orient Trader (The)* [1974], S. C. R. 1286 (S. C. C.).

⁹⁶¹ *Mormacsaga (The) v. Crelinsten Fruit Co* [1969], 2 Ex. C. R. 215 (Ex. Ct. C.) a Canadian case decided on the basis of U.S. law and *Kroll v. Silver Line, Limited*, 116 F. Supp. 443 (N. D. Cal. 1953).

⁹⁶² Michael F. Sturley, «An Overview of the Considerations Involved in Handling the Cargo Case» (1997) 21 Tul. Mar. L. J. 263 at 310.

⁹⁶³ ‘Theominia’ is the Greek word (‘Theos’ means God and ‘menos’ means rage) for the ‘acts of God’ liability exception. See the English case *Nugent v. Smith*. (1875), 1 C. P. D. 19. Vis major (a greater or superior force; an irresistible force by law, a force majeure) is also used by U.S., Canadian and English cases. The beginning of the ‘act of God’ defense is an enigma but it is certain that the defense applies also to non-transport cases. As reported by Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 5 and 8.

⁹⁶⁴ *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv. The only exception constitutes the CP intermodal rail tariff that does not contain this liability exception although it is hard to imagine that, in practice, a rail carrier will not be exonerated on the basis of the ‘act of God’ liability exception under the principle of liability for negligence. BNSF rail tariff refers to specific ‘acts of God’ events apart from the ‘acts of God’ liability exception it adopts. *Annex No. I, Tables No. 6* at lxix and *Annex No. III, Table No. 8* at cxciv. Pr. Tetley states that this is a ‘catch-all’ liability exception. William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications, 1988) at 446.

⁹⁶⁵ The vast majority of Canadian cases on this exception explicitly refer to English cases and the *Nugent* holding. (railway) *Pleet v. Canadian Northern Québec Railway Co.* (1921), 50 O. L. R. 223 (Ont. C. A.), *Brookins v. C.N.R.* (1973), 43 D. L. R. (3d) 280 (P. E. I. S. C.), (ocean) *Turgel Fur Co. v. Northumberland Ferries Ltd.* (1966), 59 D. L. R. (2d) (N. S. S. C.) and *Kruger Inc. Et al. v. Baltic Shipping Co.* (1987), 11 F. T. R. 80 (F. C. C.). (motor) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 101.

‘natural causes, directly and exclusively, without human intervention [causing damage] and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him’ (*Nugent v. Smith*).

On the basis of this and other cases, a recent survey in the U.S. has concluded that there has been reluctance on the part of English and American cases to formulate a clear, rule-defined theory of what is to be accounted as an act of God in law⁹⁶⁸. Instead, case law has developed two essential features for the ‘acts of God’ liability exception⁹⁶⁹: first, it is a natural cause of damage that denotes absence of human contribution in producing the harm-causing event⁹⁷⁰. Second, and most important, ‘acts of God’ cannot be avoided or guarded against by any means which the carrier or servants could reasonably be expected to use⁹⁷¹. In this respect, the carrier must prove that the harm causing event was unforeseeable and irresistible (cumulative conditions translating into absence of negligence), that no foresight or endeavor of man reasonably to be expected would have prevented its production⁹⁷².

⁹⁶⁶ American courts adopted 200 years of English jurisprudence on this exception. Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 13. Referring to the *Nugent* holding and English case law: (ocean) *West Bros. Inc. v. Ressource Management Service*, 1970 A. M. C. 1434 (Ala S. C. 1970) *Hurricane Donna*, 1966 A. M. C. 1165 (1966) (railway) *Co-operative Shippers Inc. v. Atchison Topeka and Santa Fe Ry. Co.* (1985) 613 F. Supp. 788 (N. D. Ill.) and (motor-multimodal) *Anvil Knitwear Inc. v. Crowley American Transport Inc.*, 2001 A. M. C. 2382 (S. D. N. Y. 2001) the latter referring to ‘acts of God’ as natural events damaging cargo absent carrier negligence.

⁹⁶⁷ (1875), 1 C.P.D. 19.

⁹⁶⁸ Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 12.

⁹⁶⁹ The following is noted by T. G. Carver, *Carriage by Sea* 13th ed. (London : Stevens & Sons, 1982) at 11.

⁹⁷⁰ Human action must be purely passive. Canada: (motor) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 101, (rail) *Canada v. Canadian Pacific Railway Co.* [1965], 2 Ex. C. R. 222 (Ex. Ct. C.) U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 163.

⁹⁷¹ U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 163-164, Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 12. See also (motor-multimodal) *Anvil Knitwear Inc. v. Crowley American Transport Inc.*, A. M. C. 2382 (S. D. N. Y. 2001) (ocean) *Skandia Ins. Co. v. Star Shipping AS* A. M. C. 1527 (S. D. Alta 2001). Canada: (ocean) *Canada v. Blue Peter Steamships Co.* [1974], F. C. J. No. 314 (F. C. C.), *Canada v. Canada Steamship Lines Ltd.* [1950], S. C. R. 532 (S. C. C.) and *The Queen v. Federal Court of Canada* (1985), 2 F. C. 247 (F. C. C.).

⁹⁷² Canada: (railway) *Canada v. Canadian Pacific Railway Co.* [1965], 2 Ex. C. R. 222 (Ex. Ct. C.) on the basis of English law, (motor) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 101, (ocean) *Canada v. Blue Peter Steamships Co.* [1974], F. C. J. No. 314 (F. C. C.). U.S.: (ocean) *Skandia Ins. Co. Ltd. v. Star Shipping AS*, 2001 A. M. C. 1527 (S. D. Ala. 2001). For a very good case law analysis of the ‘acts of God’ legal meaning see non-transport case *Curtis v. Dewey*, 475 P. 2d 808 (Idaho 1970) as reported by Denis Binder, «Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort» 15 Rev. Litigation 1 at 12. These cases also reflect English case law on the issue. *Ibid.*

Unforeseeability consists in failing to direct one's mind to the potential consequences of one's actions (reasonableness standard)⁹⁷³. The defense is generally limited to truly unforeseeable events rather than situations involving unusual or extraordinary but not unprecedented impacts⁹⁷⁴. Advance in technology makes easier proof of foreseeability of weather conditions⁹⁷⁵. Irresistibility does not refer to carrier absolute impossibility to prevent the harm-causing event, proof of *reasonable precautions* taken suffices in this regard⁹⁷⁶. This is an objective standard test based on what a reasonable person under similar circumstances knew, or reasonably should have known⁹⁷⁷.

'Perils of the sea' is an ocean specific (Hague/Visby Rules) carrier liability exception that, like 'acts of God', has not been statutorily defined leaving definition of its content to the judges. Being an ocean specific carrier exoneration cause, it differs from 'acts of God', an exception that does not know modal boundaries. This, however, is not the only difference between the two exceptions. Even though both tend to overlap as external, natural causes of loss⁹⁷⁸, they differ in nature because

⁹⁷³ Canada: (motor) *Matheson v. Coughlin* [1989], P. E. I. J. No. 119 (P. E. I. S. C. T. D.), (ocean) *Plumper Bay Sawmills Ltd. v. Jericho Towing Ltd.* [1980], F. C. J. No. 406 (F. C. C.). U.S.: (motor) *Marjan Intern. Corp. v. V.K. Putman Inc.*, WL 541204 (S. D. N. Y. 1993), (rail) *Marriott Corp. v. Norfolk & W. Ry. Co.*, 319 F. Supp. 646 (E. D. Mo. 1970) holding that '5 or more inches of rain fell in 4-hour period, an occurrence which had not happened for 20 years...' constitutes an act of God. For more insight on the unforeseeability element see Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 8 and note 81. See *ibid* at 7 for English case law in the same sense.

⁹⁷⁴ *Bradford v. Stanley*, 355 So. 2d 328, 330 (Ala. 1978) as reported by Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 13. Although U.S. courts may frequently refer to the extraordinary nature of an 'act of God' event, this is done so as to determine whether the event is foreseeable, whether these are occurrences of common experience. *Shea-S & M Ball v. Massman-Kiewit-Early*, 606 F. 2d 1245 (D. C. Cir. 1979) and *Davis v. Ivey*, 112 So. 264 (Fla. 1927), as referred to by *Florida East Coast Ry. Co. v. U. S.*, 519 F. 2d 1184 (5th Cir. Fla. 1975).

⁹⁷⁵ As reported by John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 101. This also applies to all liability exceptions where foreseeability plays an essential role.

⁹⁷⁶ Canada: (railway) *Pleet v. Canadian Northern Québec Railway Co* (1921), 50 O. L. R. 223 (Ont. C. A.), (motor) *Eckersley v. Raitar Transport Ltd.* [1949], O.J. No. 266 (C.A.) and *Keystone Transports Ltd. v. Dominion Steel & Coal Co. Ltd.* (1942), S. C. R. 495 (S. C. C.). For a very good analysis of this element see (ocean) *Canada v. Blue Peter Steamships Co.* [1974], F. C. J. No. 314 (F. C. C.). U.S.: (ocean) *Skandia Ins. Co. Ltd. v. Star Shipping AS* 2001 A. M. C. 1527 (S. D. Ala. 2001), (motor) *Miller v. AAACON Auto Transport Inc.*, 447 F. Supp. 1201 (S. D. Fla. 1978), (railway) *Marriott Corp. v. Norfolk & W. Ry. Co.*, 319 F. Supp. 646 (E. D. Mo. 1970).

⁹⁷⁷ Denis Binder, « Act of God ? or Act of Man ? : a Reappraisal of the Act of God Defense in Tort » (1996) 15 Rev. Litigation 1 at 17.

⁹⁷⁸ Scrutton as mentioned by Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal : Les Presses de l' Université de Montréal, 1972) at 124 and 131. William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 446.

‘sea perils’ must result from the action of the sea [perils *of the sea*] and not simply be encountered at sea [perils *at sea*] whereas ‘acts of God’ comprise both types of events⁹⁷⁹.

Influenced by English law on the issue, the Supreme Court of Canada held, in *Keystone Transports Ltd. v. Dominion Steel & Coal Co. Ltd.*, that a ‘sea peril’ a) should not be attributed to someone’s negligence and b) *needs not be extraordinary in nature* or arise from irresistible force in the sense of arising from causes which are uncommon⁹⁸⁰. Rough seas, violent waves and winds, a common sea peril, are not always extraordinary in nature⁹⁸¹. On the contrary, American sea perils are *events of extraordinary nature* that arise from the ‘irresistible force or overwhelming power of the event which cannot be guarded against by the ordinary exertions of human skill and prudence’⁹⁸². U.S. Supreme Court, however, has not been overly helpful as to what precisely constitutes an event of such extraordinary nature, this is a matter of fact for the courts to decide depending on the circumstances of each case⁹⁸³.

⁹⁷⁹ ‘Il ne s’agit pas des dangers qui surviennent en mer mais de ceux qui en proviennent’. Pr. René Rodière on sea perils, Scrutton and Colinviaux. It is also noted that the ‘perils of the sea’ concept is used much as we use the ‘dangers of the streets’ expression by which we mean not necessarily dangers arising from the street itself but dangers which are peculiarly incident to being in or passing along the streets. Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit canadien, américain et anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 123 and 164-165. T. G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 164. I.e. rain, thunders and storms or damage by rats, cockroaches are not perils of the sea but perils at sea since they are encountered at sea rather than resulting from its action. On the contrary, a ship striking a sunken rock, floods, icebergs earthquakes, blizzards constitute perils of the sea and acts of God at the same time. Winds may also constitute sea perils. U.S.: Melissa K. Stull, ‘Act of God’ (1962) 1 Am. Jur. 2d Act of God § 5 and Michael F. Sturley, «An Overview of the Considerations Involved in Handling the Cargo Case» (1997) 21 Tul. Mar. L. J. 263 at 310. Canada: John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 101 on ocean carriage.

⁹⁸⁰ (1942) S. C. R. 495 (S. C. C.), *Charles Goodfellow Lumber Sales Ltd. v. Verreault* [1971], S. C. R. 522 (S. C. C.), a leading Canadian case on sea perils, *Kruger Inc. v. Baltic Shipping Co.* [1988], 1 F. C. 262 (F. C. C.), *Cleveland v. Sunderland Marine Mutual Insurance Co.* [1987], N. S. J. No. 364 (N. S. S. C.) and *Consolidated Mining and Smelting Co. of Canada v. Straits To* [1972], F. C. 804 (F. C. C.), all based on English law. Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 125. T. G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 166 and English case *The Xantho* (1887), 12 A. C. 503 (H. L.) holding that sea perils are neither the natural action of the waves and winds causing normal wear and tear nor extraordinary violent winds or waves.

⁹⁸¹ Carver adds that presence of unknown rocks to mariners cannot be an extraordinary peril, but a wreck upon such rocks is a sea peril. T. G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 166.

⁹⁸² *Underwriters at Lloyd's v. Labarca*, 260 F. 3d 3 (1st Cir. 2001), *Thyssen Inc. v. S.S. Eurounity*, A. M. C. 1638 (2nd Cir. 1994), Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Found/Press, 1975) at 162.

⁹⁸³ William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 436-437. Herbert R. Baer, *Admiralty Law of the Supreme Court* 3rd ed. (Charlottesville, Virginia: The Michie

For the rest, both Canadian and U.S. cases hold that carrier or servant's negligence (except for servants nautical fault) will disallow him the benefit of this exception⁹⁸⁴. The damage may either result from negligence⁹⁸⁵ and not from a sea peril or from negligence in not i) foreseeing or ii) guarding against a sea peril (cumulative conditions). Unforeseeability of the sea peril is an important element in exculpating U.S. or Canadian ocean carrier under this exception⁹⁸⁶. In effect, a seaworthy vessel should be able to withstand reasonably expectable (foreseeable) sea perils. Irresistibility, insurmountability of the harm-causing event refers to events that cannot be guarded against by exercise of reasonable care⁹⁸⁷.

Apart from the extraordinary character of U.S. sea perils, therefore, both the U.S. and Canada reason on the same terms. We cannot but disagree, in this respect, with Pr. Tetley opinion that U.S. courts have adopted the strictest view in defining sea perils while English courts have followed a less strict stance with Canadian

Company, 1979) at 525. What is certain is that the Supreme Court can find authority to support both majority and dissenting opinions as to whether the forces of nature meet the standard of sea perils. *Ibid* at 526-527.

⁹⁸⁴ U.S.: *J. Gerder & Co. v. S.S. Sabine Howaldt*, 437 F. 2d 580 (2nd Cir. 1971), *Jordan Int'l v. Piran*, 1975 A. M. C. 130 (S. D. N. Y. 1974). Canada: *Transports Ltd. v. Dominion Steel & Coal Co. Ltd* (1942), S. C. R. 495 (S. C. C.).

⁹⁸⁵ *The City of Khios*, 13 F. Supp. 7 (S. D. N. Y. 1936) held that damage to the goods was the result of improper stowage rather than a sea peril.

⁹⁸⁶ U.S.: The overwhelming majority of American courts have employed (un)foreseeability when determining presence of a sea peril and only some courts have looked at other factors besides foreseeability. Harry Apostolakopoulos, *Navigating in Perilous Water: Examining the 'Peril of the Sea' Exception to Carrier's Liability under COGSA for Cargo Loss Resulting from Severe Weather Conditions* (1999) online : South Texas Law College Review Homepage <http://www.stcl.edu/lawrev/Articles/Peril_of_the_Sea/peril_of_the_sea.html> (last modified: Jan. 25, 2000). *Thyssen Inc. v. S.S. Eurounity*, A. M. C. 1638 (2nd Cir. 1994). Canada: *Consolidating Mining & Smelting Co. v. Straits Towing Ltd.* (1972), 2 F. C. 804 (F. C. C.) and *Carling O'Keefe Breweries of Canada Ltd. v. CN Marine Inc.* [1990], 1 F. C. 483 (F. C. C.) on sea peril foreseeability. Wind velocity, time of year, geographical location, damage to ship and other vessels in the vicinity will be taken into account by the court. William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 436 (U. S.) and at 439 and *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* (1973), 2 Ll. Rep. 469 (S. C. C.). In contrast, British and Commonwealth courts allow coverage even for foreseeable sea perils. *Supra* at 104s.

⁹⁸⁷ Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal : Les Presses de l' Université de Montréal, 1972) at 126-127. Canada: *Charles Goodfellow Lumber Sales Ltd. v. Verreault* (1971), 1971 R. S. C. 522 (S. C. C.), *Kruger Inc. v. Baltic Shipping Co* [1988], 1 F. C. 262 (F. C. C.) citing Goodfellow, *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* [1974], S. C. R. 933 (S. C. C.) and *Bastos du Canada Ltée v. Guilbault Transport Inc.* (1978), 1978 C. A. 393 (F. C. C.). On this case, see Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 206. William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 439. U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York : The Foundation Press, 1975) at 162, *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397 (U. S. S. C. 1889).

courts being the most lenient of all⁹⁸⁸. On the contrary, we embrace the opinion of Mr. Apostolopoulos that comparative case law on sea perils can be described as a spectrum where one end is defined by North-American (U.S.-Canadian) approach barring defense where a foreseeable storm causes the damage. The other end is occupied by the Angloaustralian approach which denies foreseeability a determinative role while the middle part is dominated by major European maritime nations intermediate approaches⁹⁸⁹. This is why the ‘sea perils’ exception is said to be carrier best but least dependable friend⁹⁹⁰.

In the civil law province of Québec and, generally, in civil law systems, land (and ocean) carrier liability exceptions due to third party actions as well as those due to natural causes constitute force majeure (superior force) or fortuitous cause (cas fortuit) events⁹⁹¹. What’s more, in the French version of Canadian land BsOL and

⁹⁸⁸ William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 431.

⁹⁸⁹ Harry Apostolopoulos, *Navigating in Perilous Water : Examining the ‘Peril of the Sea’ Exception to Carrier’s Liability under COGSA for Cargo Loss Resulting from Severe Weather Conditions* (1999) online : South Texas Law College Review Homepage <http://www.stcl.edu/lawrev/Articles/Peril_of_the_Sea/peril_of_the_sea.html> (last modified : Jan. 25, 2000). For this reason, Mr. Apostolopoulos argues that doing away with the ‘foreseeability’ test in the U.S. and Canada for the sake of international uniformity will not only be harmful to nations economies but will also not achieve its purpose. *Supra* at 105s for the Anglo-Australian approach and *infra* note 1363 for European laws.

⁹⁹⁰ William Tetley, *Marine Cargo Claims* (Canada: International Shipping Publications 1988) at 431. Herbert R. Baer, *Admiralty Law of the Supreme Court* 3rd ed. (Charlottesville, Virginia : The Michie Company, 1979) at 523.

⁹⁹¹ We have seen that in the province of Québec international ocean carrier liability is subject to common law provisions so that the *force majeure* concept should not be used with respect to the ocean carriage. Still, land transport documents in Québec maintain the concepts of ‘force majeure’ and ‘fortuitous’ events, terms that are used interchangeably in civil law tradition. Articles 152 and 165 of the Mexican law ‘Vias Generales de Comunicacion’ exonerate carrier in case of force majeure or fortuitous events. “Transporte, Responsabilidad en el Contrato de Transporte. Pruebas» Jurispr. Corte Suprema Mex (LEXIS-Mexico-Jurisprudencia). Boris Kozolchyk, Martin L. Zientz, ‘A Negligence Action in Mexico: an Introduction of the Application of Mexican Law in the United States’ (1989) 7 Ariz. J. Int’l Comp. L. 1 at 28. This is also the case of France (art. 1148 of the French Civil Code), Louisiana and even the U.S. where reference is made to both terms. Before its 1994 revision, Québec Civil Code art. 1072 contained same provision while after 1994, art. 2037 (land transport) and art. 2072 (water carriage) only refer to the force majeure concept. It is generally stated that modern codes have eliminated either one or the other member of the traditionally compound expression. Saúl Litvinoff, “Fortuitous Events v. Irresistible Force” (2001) 5 La. Civ. L. Treat. 16.93.

Even though the terms ‘force majeure’ and ‘fortuitous event’ may be used interchangeably, there is a subtle distinction between them. In the force majeure concept (also known as objective force majeure) the notion of ‘fault or act of person’ is absent. On the other hand, a fortuitous event (or subjective force majeure) is always associated with the fault or act of the carrier. The fortuitous event refers to an event which is external, unforeseeable, irresistible, non-imputable to the carrier, the latter element not being part of the force majeure concept. Maurice Tancelin, *Des Obligations: Actes et Responsabilités* (Montréal : Wilson & Lafleur Ltee, 1997) at 408.

Québec Civil Code ocean carrier provisions, force majeure constitutes a separate carrier liability exception substituting for land/ocean ‘acts of God’/‘acts de Dieu’ exception and other Visby Rules exoneration causes⁹⁹².

a) *Force Majeure Concept and Carrier Liability Exceptions*: Under the principle of presumption of liability (*obligation de resultat*)⁹⁹³ applicable to motor and ocean intermodal carriers, liability exceptions are limitatively defined with some of them presenting the characteristics of force majeure, namely, being external⁹⁹⁴, reasonably unforeseeable and irresistible (unsurmountable) causes of damage⁹⁹⁵. This is the case, for instance, of the ‘acts of God’, ‘public enemies’, ‘acts of war’, ‘authority of law’, ‘quarantine’ exoneration causes⁹⁹⁶. Pr. Jean Pineau argues that

⁹⁹² French version of Canadian land BsOL translates the ‘act of God’ liability exception into ‘force majeure (or cas fortuit) and not ‘acte de Dieu’. *Annex No. 1, Tables 5 and 9* at lxiii and cv. Note also that 2001 MLA (Schedule III) ‘act of God/acte de Dieu’ as well as other liability exceptions (act of war, act of public enemies, arrest or restraint of princes...the (q) exception) are replaced by the force majeure concept in art. 2072 (water transport) and art. 2049 (land carriage) of the Québec Civil Code. For a detailed analysis see *infra* at 288s. For rejection of the *q* exception by civil law systems see *infra* at 221.

⁹⁹³ On this civil law principle see our suggestions *infra* at Part II, Chapter II, Section II, Par. 1.

⁹⁹⁴ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 53-54. An external cause of damage is external to the author, its business and activities and not merely external to the object causing the damage while under carrier control. Maurice Tancelin, *Des Obligations : Actes et Responsabilités* (Montréal : Wilson & Lafleur, 1997) at 408. *Eastern Coated Papers Ltd. v. Syndicat des Employers de Metier* (1986), A. Q. no. 1012. (Qué. C. A.), *Shawinigan v. Lemay* (1981), 1982 C. A. 131 (Qué. C. A.), *Desrochers v. P.G. du Québec* (1977), R. P. 304 (Qué. S. C.), *Roberge v. Hydro-Québec* (1977), C. P. 246 (C. P.), *Louis Clément Ltée v. Sotramont Inc.* (1982), J. E. 82-639 (Qué. S. C.). The U.S. state of Louisiana, to a large extent a civil law jurisdiction, follows the same principle on the issue. Saúl Litvinoff, ‘Events Recognized as Fortuitous’ (2001) 5 La. Civ. L. Treat. § 16.31.

⁹⁹⁵ Unforeseeability and irresistibility do not burden the carrier with an absolute duty to prevent the event but merely require him to take all reasonable measures to foresee and prevent the occurrence of the loss. Unforeseeability: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 206s. and 52. *Leopold v. IbeX Developments Ltd.* (1977), C. S. 629 (Qué. S. C.) and *Simoneau v. Côté* (1981), C. P. 123 on the ‘authority of law’ exception. Irresistibility: *St Timothée v. Hydro-Québec* (1999), J. E. 99-1804 (Qué. S. C.), *Louis Clément Ltée v. Sotramont Inc.* (1982), J. E. 82-639 (Qué. S. C.). For strikes and employers negligence see *Dubreuil v. Ville de Montréal* (1988), R. R. A. 752 (Qué. S. C.). Planiol et Ripert as reported by Saúl Litvinoff, ‘Bad Faith Of The Obligee’ (1999) 6 La. Civ. L. Treatise, Law Of Obligations § 5.31. Unless otherwise provided by the parties impossibility to execute needs to be absolute, not merely onerous. *Canada Starch Co. v. Gill & Dufus (Canada) Ltd.* (1990), R. L. 602 (C. A.), *Otis Elevator Co. v. A. Viglione & Bros. Inc.* (1981), J. E. 81-92 (Qué. C. A.), *Commission des Normes du Travail v. Manufacture Sorel Inc.* (1984), C.S. 747 (Qué. C. A.), *C.S.R. de la Baie des Chaleurs v. Sanitor Ltée* (1978), J. E. 78-919 (Qué. S. C.).

⁹⁹⁶ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 206. Saúl Litvinoff reasons on the basis of French force majeure concept when defining it as an event that *does not involve any fault of the obligee* (shipper), could not have been foreseen or resisted by the obligor (carrier), prevents performance by the obligor relieving him of liability for his failure to perform. Saúl Litvinoff, ‘The Code Napoleon and French Doctrine (Obligations)’ (1999) 6 La. Civ. L. Treat. (Obligations) § 5.31. So, ocean and land shipper fault or assimilated therein liability exceptions (inadequacy of marks, numbers...) do not make part of the force majeure concept. For a more exhaustive comparison see *infra* at Part II, Chapter II, Section II, Par. 3.

even though today courts are more lenient in concluding on irresistibility and unforeseeability, it is certain that the simple presence of an exoneration cause will not absolve the carrier if there is fault on his part⁹⁹⁷.

On the basis of studied case law, the Québec force majeure requirements of unforeseeability and irresistibility of the harm-causing event are identical to U.S. and Canadian absence of negligence requirement when referring to specific liability exceptions⁹⁹⁸. This does not mean to say that the absence of negligence and the force majeure concepts are synonymous. In effect, even if authors argue that force majeure ‘external cause of damage’ element is not very essential⁹⁹⁹, absence of negligence does not require the presence of an external cause of loss as force majeure does¹⁰⁰⁰.

b) Force Majeure Clauses-Common Law: The necessity to explicitly mention land and ocean BsOL liability exceptions instead of using the force majeure concept to exonerate carrier stems from the fact that English law ignores the concept of force majeure¹⁰⁰¹. In reality, there is a common law and Uniform Commercial Code (U.S.) force majeure doctrine but claimants are more likely to recover on the basis of contractual force majeure clauses than on the basis of the doctrine itself¹⁰⁰². Instead

⁹⁹⁷ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 208.

⁹⁹⁸ See i.e. acts of God and sea perils liability exceptions *supra* at 195s.

⁹⁹⁹ Jean Louis Beaudouin, Pierre Gabriel Jobin, *Les Obligations* 5th ed. (Cowansville, Québec: Les Editions Yvon Blais, 1998) at 698-699. The author argues that ‘strikes’ may constitute an internal, to the carrier, cause of damage, still, they will exonerate him. Also, art. 1470 of the Québec Civil Code does not refer to this element in describing the force majeure concept. A subtle distinction needs to be made in this respect: although not essential, it is certain that an internal cause of damage to the debtor will exonerate him less easy than an external cause of damage since the former is more easily foreseeable and resistible.

¹⁰⁰⁰ *Infra* at Part II, Chapter II, Section II, Par. 1 and Par. 3 for the comparison herein made.

¹⁰⁰¹ Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien, Américain et Anglais)* (Montréal : Les Presses de l’ Université de Montréal, 1972) at 131.

¹⁰⁰² P. J. M. Declercq, “Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability” (1995) 15 J. L. & Com. 213 at 217-218. Susan Zachos, *Gas Purchase Contracts: Equitable Remedies for Breach* (1987) 24 Hous. L. Rev. 991 at 1012. The common law standard of recovery is quite strict under the force majeure doctrine as it will provide remedy only where extreme hardship has been established. Robert E. Coltin, “Force majeure: Does it Really Work?” 14 Real Estate L. J. 279 at 279-280. Michael B. Victorson and James S. Chase, “How to Interpret Insurance and Indemnification Provisions in Mining Contracts” (1993) 14 E. Min. L. Found par. 7.03. The common law concept of ‘force majeure’ has developed over the years starting off as a contractual synonym of the common law doctrine of legal impossibility and moving, with time, in the direction of impracticability. P. J. M. Declercq, “Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability” (1995)

of attempting to articulate a definition of the force majeure concept, force majeure contractual clauses enumerate a laundry list of excusable events that can be contractually modified¹⁰⁰³. These clauses are not really popular in transportation contracts probably because of the precision of presently applicable BOL carrier exception clauses and, for ocean carriage, ocean carrier prohibition of contractual limitation of carrier liability.

Force majeure clauses concern unforeseeable and irresistible events (absence of negligence) as the civil law force majeure concept does¹⁰⁰⁴. However, force majeure clauses enumerate specific abnormal risks exonerating debtor while civil law force majeure concept contains a non-exhaustive list of exculpating occurrences responding to specific criteria¹⁰⁰⁵. This does not mean to say that the force majeure concept is necessarily broader in scope than a force majeure clause, they are just different in nature. Force majeure clauses events may not be external to the carrier and may cover inherent vice, elements that do not make part of the civil law force majeure concept¹⁰⁰⁶. Moreover, even though many force majeure clauses contain a 'reasonable control' language to indicate absence of (carrier) negligence, this is not always the case and the drafter could also specify the reasonable control language or even decide to exempt certain faults or negligent acts of the parties¹⁰⁰⁷. In other

15 J. L. Com. 213 at 214. Michael W. Graff, "The Determination of Property Rights in Public Contracts" (1998) 38 Nat. Res. J. 197 at note 159. Analysis of these theories exceeds the scope of the present study.

¹⁰⁰³ The most prevalent force majeure clause events are: acts of God, fire, flood, acts of civil disobedience, war, riot, nuclear disaster, labor disputes, acts of governments, unusual climatic conditions, acts of a public enemy, explosion, or power failure. H. Ward Classen, "Judicial Intervention in Contractual Relationships under the Uniform Commercial Code and Common Law" (1991) 42 S. C. L. Rev. 379 at 394.

¹⁰⁰⁴ This is to be taken into account in drafting a force majeure clause. Robert E. Coltin, "Force majeure: Does it Really Work?" 14 Real Estate L. J. 279 at 279-280. P. J. M. Declercq, "Modern Analysis of the Legal Effects of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 J. L. Com. 213 at 233, 236 and 238.

¹⁰⁰⁵ It has been stated that a civil law contract is more succinct in defining force majeure since the tendency is not to clarify or embellish established concepts such as force majeure. John D. Crothers, 'Recent Experience in Project Finance and Privatization in Africa' (2000) 809 PLI/Comm 519. *Canada Starh v. Gill and Duffus (Canada) Ltd.* (1983), J. E. 84-88 (S. C. Qué.).

¹⁰⁰⁶ *River Terminals Corp. v. U. S.*, 121 F. Supp. 98 (E. D. La. 1954) reciting hull insurance contract provisions covering inherent vice. On the comparison of the two concepts see *infra* at Part II, Chapter II, Section II, Par. 3.

¹⁰⁰⁷ P. J. M. Declercq, "Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) J. L. Com 213 at 248. Force majeure clauses can be statutorily provided and even though their language was once regarded precise and of strict construction, it is now increasingly

words, force majeure clauses are contractual clauses that parties can tailor to their needs and which do not have to respond to the rigid conceptual criteria of the civil law force majeure concept. Being so malleable in nature, force majeure clauses and the civil law concept of force majeure cannot be effectively compared.

C. Cargo, Vessel, Shipper Fault: Another category of carrier liability exceptions comes under the category of cargo (inherent vice), vessel (latent defect) and shipper faults.

Although names may differ cross-modally and cross-country, Canadian and U.S. ocean and land BsOL and intermodal rail tariffs refer to the inherent vice liability exception¹⁰⁰⁸. Initial remarks need to be made in this respect: in Canadian and U.S. land transport, reference to inherent vice always concerns the transported goods or containers (intermodal rail tariffs), not the transport vehicle (truck, vessel, wagon)¹⁰⁰⁹.

Canadian and U.S. ocean and land transport cases refer to the ‘inherent nature or quality’ of the goods when defining inherent vice under its various denominations¹⁰¹⁰. The most common form of inherent vice is natural shrinkage that

recognized by courts as malleable. *Ibid* at 233. Harold F. Moore, “Force Majeure and Indonesia’s Economic Woes” (2001) 1240 PLI / Corp 463.

¹⁰⁰⁸ *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxciv. Art. 2049 of the Québec Civil Code refers to ‘vice propre du bien’. The vast majority of cases on this exception concern ocean rather than land transport. ‘Inherent defect’ is a term frequently used by U.S. and less by Canadian courts that seem to refer more to ‘inherent vice’. U.S.: William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 480. Canada: *David Oppenheimer & Associates v. Arizona (The)* [1974], F. C. J. No. 902 (F. C. C.) and *Canadian Pacific Forest Products Ltd.-Tahsis Pacific Region* [1999], 4 F. C. 320 (F. C. A.). We will retain the term ‘inherent vice’ for all these terms used.

¹⁰⁰⁹ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 479 and Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 313. It has also been held that the CMR prohibits consideration of the vehicle’s inherent vice. *C. Pau*, Pau, March 17, 2003, *Groupama Transport et a. c. Cie Helvetia et a.* 2985 Bull. Transp. Log. 323-324 (2003).

¹⁰¹⁰ For instance, the presence of invisible bacteria in the cargo, discoloration of chemical products because of the transport, deterioration of perishable goods. Canada: (motor) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 103, (ocean) *Gulf Canada Resources Ltd. v. Merlac Marine Inc.* [1994], O. J. No. 282 (Ont. C. J.). U.S.: (rail) *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U. S. 134 (U. S. S. C. 1964) (authority case frequently cited), (ocean) *Vana Trading Co. v. S.S. Mette Skou*, 556 F. 2d 100 (2nd Cir. 1977) and (motor) *Mulay Plastics, Inc. v. Grand Truck W. R.R. Co.*, 822 F. 2d 676 (7th Cir. 1987) citing the *Missouri* holding. So, this exception does not only refer to a defect in nature of the goods but also to the very nature of the goods that may be liable to deterioration. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 208. See the interesting opinion of Pr.

certain BsOL and tariffs will reproduce as such or in other, more descriptive terms that may appear along with or, separately from, the inherent vice liability exception¹⁰¹¹. Natural shrinkage refers to the loss of weight of transported goods (i.e. oil, wine) due to temperature conditions, the length of the journey, the nature of the goods...¹⁰¹².

As with previous liability exceptions, the cause of the loss and absence of carrier and servant's negligence with respect to the inherent vice must be proven¹⁰¹³. Both require highly factual proof to be made¹⁰¹⁴. Absence of negligence implies absence of reasonable care to detect (unforeseeability) and prevent (irresistibility) the inherent vice unless special care for the cargo is explicitly or implicitly required, in which case the carrier will be held to a higher standard of care¹⁰¹⁵.

In container trade, if the container is provided, packed and sealed by the shipper the carrier has only general knowledge of the goods therein contained as well as container condition and will generally not be held liable except if there is

Tetley on the issue. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 480, Thomas G. Carver, *Carriage by Sea* 13th ed. (London: Stevens & Sons, 1982) at 15.

¹⁰¹¹ *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxciv. For a very descriptive definition of natural shrinkage see CN/CP BOL in *Annex No. III, Table No. 7* at cxci and *Annex no. I, Table No. 9* at civ and ccvii. On the assertion that natural shrinkage is a form of inherent vice see *Secretary of Agriculture v. United States*, 350 U. S. 162 (U. S. S. C. 1956), a U.S. railway case making reference to other cases.

¹⁰¹² Calculation of natural shrinkage is established on the basis of a percentage of weight wastage tolerated and accepted by custom. Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien, Américain et Anglais)* (Montréal : Les Presses de l' Université de Montréal, 1972) at 115.

¹⁰¹³ U.S.: *cause of loss*: William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 480. *Negligence: Insurance Co. of North America v. M/V Frio Brazil*, 729 F. Supp. 826 (M. D. Fla. 1990). On the distinction between carrier negligence and inherent vice see U.S. *Propeller Niagara v. Cordes*, 62 U. S. (21 How. 1859) 7. Canada: *N. M. Paterson & Sons Ltd. v. Cargill Grain Co.* [1968], 1 Ex. C. R. 199 (Ex. Ct. C.) citing English case law on the issue.

¹⁰¹⁴ Robert Mottley, "Chilling out Handling Refrigerated Cargo" *Am. Shipper* (2000) online: WESTLAW (Newsletter).

¹⁰¹⁵ U.S.: "Cargo Claims" *CFMIC § 25.01* (1997) online: WESTLAW (Newsletters). (ocean) *The Poleric*, 25 F.2d 843 (4th Cir. 1928), *U. S. Fire Ins. Co. v. M.V. Asia Friendship*, 495 F. Supp. 244 (S. D. N. Y. 1980) and William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 484 on the special care for the cargo. (Railway) *Missouri Pacific Railroad Co. v. Elmore & Stahl*, 377 U. S. 134 (U. S. S. C. 1964). Canada: In (rail-motor) *Premium Grain & Seed Ltd. v. Finora Canada Ltd* [1999], S. J. No. 382 (S. C. Q. B.) on both *unforeseeability and irresistibility* of the harm, (ocean) *Produits Alimentaires Grandma Ltée v. Zim Israel Navigation Co.* (1987) (1987), [1987] F. C. J. No. 5 (F. C. C.) affirmed in appeal *Produits Alimentaires Grandma Ltée v. Zim Israel Navigation Co.*, (1988) F. C. J. No. 24 (F. C. A.). *Crelinsten Fruit Co. v. Maritime Fruit Carriers* [1974], F. C. J. No. 709 (F. C. C.) and *Attorney-General of Canada et al. v. Flying Tiger Line, Inc.* (1987), 61 O. R. (2d) 673 (Ont. H. C. J.) on the special care required for certain types of cargo.

negligence in his attempt to detect them¹⁰¹⁶. On the contrary, if the carrier provides container and packs container contents he has reasonable opportunity to verify container good working condition and goods quality, so that he will generally be held liable unless he can prove cargo's inherent vice¹⁰¹⁷.

Because shipper is better informed than carrier on goods condition at the time of the shipment, courts expect him to ultimately prove absence of inherent vice¹⁰¹⁸. This is, no doubt, a heavy burden of proof placed on the shipper. Moreover, although in cargo damage cases a clean BOL will generally be sufficient proof of apparent goods condition at the time of shipment, a clean BOL is not enough to support shippers *prima facie* case with respect to inherent vice¹⁰¹⁹.

The ocean specific Hague and Visby Rules 'latent defect' exception (art. 4(2)(p)) only refers to vessel or cargo handling equipment latent defects¹⁰²⁰ not discoverable by carrier due diligence (explicit condition)¹⁰²¹. With respect to this

¹⁰¹⁶ (ocean) William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 489 for U.S. cargo inherent vice and *Project Hope v. M/V IBN SINA*, 96 F. Supp. 2d 285 (S. D. N. Y. 2000) for latent container defect. (rail) *Masonite Corp. v. Norfolk and W. Ry. Co.*, 601 F. 2d 724 (4th Cir. (Va.) 1979) and (motor) *United States v. Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953) where it was decided that even if it is contractually provided that carrier is not obliged to inspect freight containers for internal defects he is liable for damage caused by container defects reasonably known or discoverable. BNSF Tariff Item 65.2.a.5 specifies that the railway will not be held liable for non-inspection of container defects provided by the shipper. *Annex No. I, Table No. 6* at lxxi. Canada: CN 7589-AN Tariff, Item 300(5), (8) and CP 7690-E Item 00080 (C), (F) at *Annex No. I, Tables No. 7, 8* at xci and xcvi. (multimodal), *Lutfy Ltd. v. Canadian Pacific Railway Co.* [1973], F. C. 1115 (F. C. C.) and *Atlantic Sugar Ltd. v. Paul G. Palsson Partrederi* [1981], F. C. J. No. 908 (F. C. C.) for cargo inherent vice and (ocean) *Capilano Trading Post Ltd. v. Sea-Land Service Inc.* [1985], B. C. J. No. 858 (B. C. Co. Ct.) for container defect.

¹⁰¹⁷ *Ibid.* William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 489.

¹⁰¹⁸ U.S.: (ocean) *American Tobacco Co. v. Goulandris*, 281 F. 2d 179 (2nd Cir. 1962), *C. Itoh & Co. (America) Inc. v. Hellenic Lines Ltd.*, 470 F. Supp. 594 (S. D. N. Y. 1979), *Gillespie & Co. v. Continental Ins. Co.* 1958 A. M. C 2437 (N. Y. S. C. 1958). Canada: (ocean) *Produits Alimentaires Grandma Ltée v. Zim Israel Navigation* [1987], F. C. J. No. 5 (F. C. C.) affirmed in appeal, (intermodal-land) *Premium Grain & Seed Ltd. v. Finora Canada Ltd* [1999], S. J. No. 382 (S. C. Q. B.).

¹⁰¹⁹ U.S.: (ocean) *The Daido Line v. Thomas P. Gonzalez Corp.*, 299 F. 2d 669 (9th Cir. 1962), *Letanino Co. v. S.S. Hellas*, AMC 40 (S. D. N. Y. 1966), *GTS Industries S.A. v. S/S "Havtjeld"*, 68 F. 3d 1531 (2nd Cir. N. Y. 1996), (motor) *Matthews-Carr v. Brown Exp.*, 217 S. W.2d 75 (Tex. Civ. App. 1948). Canada: (ocean) *Produits Alimentaires Grandma Ltée. v. Zim Israel Navigation Co. et al.* (1988) affirmed in appeal, 86 N. R. 39 (F. C. A.) (often cited), *Francosteel Corp. v. Fednav Ltd.* [1990], F. C. J. No. 810 (F. C. C.).

¹⁰²⁰ U.S.: *Sony Magnetic Prod. v. Merivienti O/Y*, A. M. C. 1259 (1st Cir. 1989), *Container Schiffsreederei T.S. Columbia New Zealand v. Corporation of Lloyd's*, 1981 A. M. C. 60 (S. D. N. Y. 1980) as reported by Michael F. Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 313 and note 336. Canada: *Scottish Metropolitan Assurance Co. v. Canada Steamship Lines Ltd.* (1930), S. C. R. 262 (S. C. C.). *Annex No. III, Table No. 5* at exci.

¹⁰²¹ U.S.: *Tata Inc. v. Farrell Lines*, 1987 A. M. C. 1764 (S. D. N. Y. 1987) as reported by Michael F. Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at

liability exception, not often used in practice, authors talk about *in transit* seaworthiness since reasonable care with respect to said ‘latent’ defect has to be exercised during the voyage while art. IV(1) and art. III(1) vessel seaworthiness requires proof of reasonable care before and at the commencement of the journey¹⁰²². Even though ‘inherent vice’ may appear in a force majeure clause¹⁰²³ and vessel ‘latent defect’ has been argued to constitute a force majeure event, neither inherent vice nor latent defect seem to constitute force majeure incidents under civil law¹⁰²⁴.

Inherent vice frequently appears together with shipper fault in case law as alleged carrier defenses¹⁰²⁵. However, these two exceptions appear separately in BsOL and intermodal tariffs. Like inherent vice, shipper fault is found in U.S. and Canadian land and ocean BsOL and intermodal rail tariffs under a variety of names¹⁰²⁶. Unlike inherent vice, however, a clean BOL establishes shipper *prima facie* case in case of shipper fault¹⁰²⁷.

313 and note 337. Canada: *Scottish Metropolitan Assurance Co. v. Canada Steamship Lines Ltd.* (1930), S. C. R. 262 (S. C. C.).

¹⁰²² Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 209 and Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal, 1972) at 116. *Supra* note 923 for vessel latent defect leading to unseaworthiness.

¹⁰²³ *River Terminals Corp. v. U. S.*, 121 F. Supp. 98 (E. D. La. 1954). *Supra* at Part II, Chapter I, Section I, Par. 2(B)(b) for force majeure clauses and inherent vice.

¹⁰²⁴ Although it is argued that vessels latent defect and inherent vice can be classified as a force majeure event, Paul Chauveau disagrees with such a classification. Paul Chauveau, *Traité de Droit Maritime* (Paris: Librairie Technique, 1958) at 559. See also Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 55. This is probably why inherent vice and natural shrinkage are separate exoneration causes from force majeure under art. 2049 (land transport) and art. 2072 (water transport) of the Québec Civil Code. Certain U.S. cases have assimilated ‘inherent vice’ to an ‘act of God’ (force majeure event): cases reported by Henry N. Longley, *Common Carriage of Cargo* (San Francisco, California: Matthew Bender, 1967) at 134.

¹⁰²⁵ René Rodière, Emmanuel Du Pontavice, *Droit Maritime* 12nd ed. (Paris : Éditions Dalloz, 1997) at 351. For instance, shipments need specific conditions of carriage absent which they are deteriorated in nature or characteristics and shipper fails to indicate these to the carrier. Inversely, in the English case *Gee & Garham Ltd v. Whittall* (1955), 2 L. L. L. R. 562 (Q. B.) the court held that ‘inadequate packing (normally a shipper fault) brings the case under the plea of inherent vice of the goods’. As reported by Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal) at 107 and at 111. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 488.

¹⁰²⁶ *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxiv. For specific BNSF provision in *Annex No. I, Table No. 6* at lxvi (Shipper responsibilities). See also Québec Civil Code art. 2054, 2055 (land transport) and art. 2064, 2065 (water transport).

¹⁰²⁷ This only applies if the carrier provides the container and issues a clean bill, in which case he is generally liable for inadequate packing and marking of the goods therein contained. If a clean BOL is issued for sealed

Shipper fault refers to shipper failure to develop a plan to meet the extremes of movements normally expected and to include a factor of safety against the unexpected¹⁰²⁸. In this respect, much more specific is statutory ocean and land transport case law making shipper the guarantor of packing¹⁰²⁹ and of accuracy of marks¹⁰³⁰ (Hague and Visby Rules art. IV(2)(n) and (o)), accuracy of numbers, quantity and weight so that inaccurate declarations or absence of notification of cargo characteristics by the shipper will normally exonerate carrier¹⁰³¹. All shipper faults involve highly complicated factual scenarios¹⁰³². Shipper fault will only exonerate carrier in his dealings with the shipper, it will not apply towards third

containers, a *prima facie* case is not made by a clean BOL since goods are not in *apparent* good order. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 272 and *supra* note 1020.

¹⁰²⁸ Canada: *Beloit Canada Ltée v. Neptune Orient Lines Ltd.* (1988), 10 A. C. W. S. (3d) 146 (F. C. C.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 109, *Bodnoff v. Canadian Pacific Railway Co.* [1946], S. C. R. 392 (S. C. C.) on shipper or shipper agent's fault. U.S.: *Tubacex Inc. v. M/V Risan*, 45 F. 3d 951 (5th Cir. 1995). Other definitions of shipper fault also exist.

¹⁰²⁹ This is one of the earliest ocean carrier defenses and still predominant within the Hague and the Visby Rules. It refers to both insufficient or defective packing. Sufficient packing is normal or customary packing in trade, (depending on the nature of the goods, the way the packing was made, packing usages and other variants of the journey) that prevents all but the most minor damage under normal conditions of care and carriage. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 491 (based on U.S. case law). U.S.: (ocean) *The Rita Sister*, A. M. C. 910 (E. D. Pa. 1946), (rail) *Masonite Corp. v. Norfolk and W. Ry. Co.* 601 F. 2d 724 (4th Cir. 1979), (truck) *United States v. Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953). Canada: (motor) *Northern Industrial Carriers Ltd. v. Jasper Millwork Ltd* [1978], A. J. No. 720 (Alta. D. C.), (railway) *D.M. Duncan Machinery Co. Ltd. v. Canadian National Railway Co.* (1951), O. R. 578 (Ont. H. C.), (ocean) *Pakistan National Shipping Corp. v. Canada (C.A.)* [1997], 3 F. C. 601 (C. A. F.).

¹⁰³⁰ See also Hague and Visby Rules art. 3(5). To permit goods identification, each package delivered to carrier is marked with a set of initials, or a geometrical sign or both. The name and address of the consignee are rarely put on the package. The 'mark' is copied on the BOL, a copy of which is always taken on the voyage and when it is time to unload the packages, these are 'cut out of the herd' by their 'brands'. Grant Gilmore, Charles L. Black, *The Law of Admiralty* 2nd ed. (New York: The Foundation Press Inc., 1975) at 167. Marks must be made clearly and legibly. Parties can contractually agree on what will constitute sufficient marking on the goods but they cannot contractually designate circumstances of insufficient marking that will exonerate the carrier. Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal, 1972) at 110. On sufficient marking see U.S.: *Super Service Motor Freight Co. v. U. S.*, 350 F. 2d 541 (6th Cir. 1928), Canada: *Canadian Klockner Ltd. v. D/S A/S Flint* [1973], F. C. 988 (F. C. C.).

¹⁰³¹ See also Hague and Visby Rules art. 3(5). U.S.: "Act or Fault of Shipper or Consignee (American Jurisprudence)" (2000) 13 Am. Jur. 2d Carriers § 418. (rail) *Greisler Bros. Inc. v. Packerland Packing Co. Inc.*, 392 F. Supp. 206 (E. D. Wis. 1975), (motor) *Pilgrim Distributing Corp. v. Terminal Transport Co. Inc.*, 383 F. Supp. 204 (S. D. Oh. 1974). Canada: (truck) *Keystone Fisheries Ltd. v. Lefbrook & Mid-West Truck Lines Ltd.* (1959), 16 D. L. R. (2d) 680 (Man. C. A.), (rail) *FW. Pirie Co. v. C.N.R.* (1943), S. C. R. 275 (S. C. C.). See also art. 2066 (water transport) and art. 2055 par.1 (land transport) of the Québec Civil Code and *American Motorists Insurance Co. v. Aerocon Freight Forwarders* (1994), J. E. 94-749 (Qué. S. C.).

¹⁰³² Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Éditions Thémis, 1986) at 207. Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal) at 106. John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 108-109.

parties (i.e. consignees) in good faith who will be compensated by the carrier even in the presence of shipper fault¹⁰³³.

Carrier exoneration towards the shipper is always conditioned on his and his servant's absence of negligence (unforeseeability, irresistibility) with respect to shipper fault¹⁰³⁴. However, it results from U.S. and Canadian statutory law and cases that if shipper *fraudulently*, for U.S. and Canadian land transport¹⁰³⁵, *fraudulently and knowingly* for U.S. COGSA (Sec. 1304(5)), or just *knowingly* for Canadian MLA (Schedule III, art. 4.5(h)), Hague (4(5) *in fine*) and Visby Rules (5(h))¹⁰³⁶, misstates the *nature* or the *value* of the goods", carrier will not be held liable towards third parties or the shipper¹⁰³⁷. Although '*fraudulently and knowingly*' means that the carrier is initially obliged to prove that the shipper not only knew of the misstatement but also intended to deceive and to benefit himself at the expense of

¹⁰³³ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 454 and 493. In the same sense see art. 2055 par. 2 (land transport) of the Québec Civil Code rendering carrier liable towards third parties in case of shipper act or omission and inherent vice.

¹⁰³⁴ Canada: (rail) *Canadian Westinghouse Co. v. Canadian Pacific Railway Co* [1925], S. C. R. 579 (S. C. C.), *D.M. Duncan Machinery Co. Ltd. v. Canadian National Railway Co.* (1951), O. R. 578 (Ont. H. C.), (motor) John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto : Carswell, 1997) at 108 and (ocean) *Gulf Canada Resources Ltd. v. Merlac Marine Inc.* [1994], O. J. No. 282 (Ont. C. J.). U.S.: (rail) *Masonite Corp. v. Norfolk and W. Ry. Co.* 601 F. 2d 724 (4th Cir. 1979), (ocean) *F. J. McCarty Co. v. Southern Pac. Co.* 289 F. Supp. 875 (N. D. Cal. 1968), (truck) *United States v. Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953). On motor transport comparative law see Dr. Boris Kozolchyk, Gary T. Doyle, Lic Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tuscon: National Law Center for Interamerican Free Trade, 1996) at 57.

¹⁰³⁵ U.S. land: *Mass v. Braswell Motor Freight Lines Inc.*, 577 F. 2d 665 (9th Cir. 1978). Canadian land: (motor) *Paine Et Ux. v. Tippet-Richardson Ltd. et al.* (1966) (1966), 54 W. W. R. 420 (B. C. S. C.), mentioned but distinguished by the more recent case (motor) *Drake v. Bekins Moving and Storage Co.* [1982], B. C. J. No. 1020 (B. C. Co. Ct). *Royal Bank v. Hale* (1962), 30 D. L. R. (2d) 138 (B. C. S. C.), *Prudential Trust Co. Ltd. v. Cugnet* (1956), S. C. R. 914 (S. C. C.) and *Drake v. Bekins Moving and Storage Co.* [1982], B. C. J. No. 1020 (B. C. Co. Ct.). Art. 2053 (land transport) of Québec Civil Code exonerates land carrier in case shipper makes a 'deliberately misleading declaration ...of the nature or value of the goods' (implying fraud). (motor) *Pigeon v. Purolator Courrier Ltée* (1994), J. E. 95-316 (Qué. C.), *Oppenheim v. Walter Pelly Transport (1985) Inc.* (1999), J. E. 99-1494 (S. C. Qué.).

¹⁰³⁶ *Annex No. II, Tables No. 2, 3, 4* at cxlvi, clv and cxlii respectively. Canada: William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 455, 456 and *Sherrit Gordon Mines Ltd. v. Garifalia (The)* [1990], F. C. J. No. 401 (F. C. C.). See also Québec Civil Code art. 2067 (water transport). U.S.: (ocean) William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 456s. *A Fortune v. S.S. Irisg Larch* (1973) 503 F. 2d 952 (S. D. N. Y.) and *Southwestern Sugar & Molasses Co v. the Eliza Jane Nicholson*, 138 F. Supp. 1 (S. D. N. Y. 1956).

¹⁰³⁷ *Knowingly* indicates that shipper did not act through accident, mistake or ignorance but through knowledge that he had or should have had on the nature or/and value of the goods. No need of specific intent to defraud is required. *Fraudulently* goes even further and requires proof of *intention to deceive and to benefit himself at the expense of another*, not merely knowledge of fraud. On intentional and knowing faults see *infra* at 234s.

another, it seems that fraud related incidents are usually available to the shipper so that the burden of proof soon shifts to him as in the case of inherent vice¹⁰³⁸. All these scenarios are highly case specific and imply judges subjectivity on the issue¹⁰³⁹.

The stoppage in transit liability exception we find in U.S. and Canadian motor BsOL, U.S. rail BOL, Norfolk Southern intermodal rail tariff but also in both countries ocean carriage case law¹⁰⁴⁰, has the effect of transferring the risk of loss or damage to the party entitled to give stoppage instructions¹⁰⁴¹. This may be the shipper, consignee, shipper's/consignee's creditors or other third parties in right¹⁰⁴². Because 'in transit' is, at times, hard to determine (i.e. in case of imperfect demand of delivery by the consignee) Canadian and U.S. case law has concluded that the test to be used in this respect is in what capacity the goods are held by the person in custody¹⁰⁴³.

D. Ocean Specific Liability Exceptions: The last category of liability exceptions are specific to ocean, not land, carriage and include fire, the catch-all (q) liability exception, saving life at sea, the nautical fault exception and already examined sea perils and latent (vessel) defect, all making part of the Hague (U.S.) and the Visby Rules (Canada).

¹⁰³⁸ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 456 for shipper ultimate proof. *Supra* at 204s for inherent vice.

¹⁰³⁹ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 104, *Canadian Westinghouse Co. v. Canadian Pacific Railway Co* [1925], S. C. R. 579 (S. C. C.).

¹⁰⁴⁰ *Annex No. III, Table No. 5, 6, 7, 8* at cxc-cxciv and (ocean) Thomas J. Schoenbaum, 'Bills of lading' *Admiralty & Mar. Law* § 10-11 (2001) WESTLAW (Tp-all) and William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 987 and note 203. This exception was intended to alleviate carrier from increased liability following prolonged physical detention of the cargo due to stoppage in transit.

¹⁰⁴¹ John S. McNeil, *Motor Carrier Cargo Claims* 3d. (Toronto: Carswell, 1997) at 78s.

¹⁰⁴² *Ibid.* For this reason we make this exception appear close to the shipper fault liability exception.

¹⁰⁴³ *Ibid.* Both countries case law indicates that the person entitled to stop goods in transit can do so until receipt of good by the consignee, representative or transferee. U.S.: William H. Danne, "Right to withhold or Stop Delivery" (2002) 45 Fla. Jur. 2d Sales and Exchanges of Goods § 204 (WESTLAW-Tp-all). Canada: *Bombardier Inc. v. Canadian Pacific Ltd.*(1991), 7 O. R. (3d) 559 (Ont. C. A.).

Under the Hague, Visby, COGSA and MLA, the ocean carrier is exonerated in case of ‘fire unless caused by the actual fault or privity of the carrier’¹⁰⁴⁴. Authors suggest that the fire exception should be treated separately from other exceptions¹⁰⁴⁵ since the U.S. has an ancient (1851) ‘Fire Statute’¹⁰⁴⁶ enacted before the Hague Rules and intended to protect shipowners against fire on board, a common catastrophe of the times, absent carrier ‘design or neglect’¹⁰⁴⁷. COGSA Sec. 1308 specifically protects the Fire Statute from implied repeal¹⁰⁴⁸ but does not provide any further guidance on the interrelationship between the COGSA fire defense and the Fire Statute. This was left to courts to resolve upon shipper invoking the (Fire Statute and/or COGSA) fire defense¹⁰⁴⁹. As we are going to confirm, U.S. courts are divided on the issue of which act takes priority over the other.

¹⁰⁴⁴ Art. IV(2)(b) of the Hague, Visby Rules and MLA (Schedule III), COGSA Sec. 1304(2)(b). *Annex No. II, Tables No. 2, 3, 4 and Annex No. III, Table No. 5* at cxc. Fire is the peril most dreaded by all mariners, and most difficult to combat in a fully laden ship. Herbert R. Baer, (3rd ed.) *Admiralty Law of the Supreme Court* (Charlottesville, Virginia: Michie Company, 1979) at 491. Today, it is affirmed that since the Lloyds of London began writing ocean marine coverage over 300 years ago, incendiary fires have increased dramatically in the latter part of the twentieth century. Gary S. Mogel, “Arson Defense to Coverage Under Property Insurance” *Am. Jur.* (1995) online: WESTLAW (Newsletters).

¹⁰⁴⁵ Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 161.

¹⁰⁴⁶ The statute is really called ‘*Limitation of Shipowners Liability Act*’ (1851) 46 U. S. Code 182 (1997) R. S. 4282 [hereinafter *Fire Statute*] and contains a liability exception known as the Fire Statute, exonerating carrier in case of fire loss. Patricia Wong, “Intercircuit Conflict with Respect to the Burden of Proof Standard under the Fire Statute and the Fire Exemption Clause of COGSA” (1994) 20 J. Legis. 91 at 91. U.S. courts have held the Fire Statute constitutional since it is within the powers of Congress to determine U.S. maritime law. *Consumers Import Co. v. Zosenjo*, 320 U. S. 249 (U. S. N. Y. 1943) as reported by Herbert R. Baer, (3rd ed.) *Admiralty Law of the Supreme Court* (Charlottesville, Virginia: Michie Company, 1979) at 492.

¹⁰⁴⁷ The *raison d’être* of the Fire Statute was the *New Jersey Steam Nav. Co. v. Merchant’s Bank of Boston*, 47 U. S. (6 How.) 344 (U. S. S. C. 1848) case that held carrier liable for damage to the goods due to personnel negligence in causing the fire on board and unsafe construction of the vessel. As reported by Herbert R. Baer, (3rd ed.) *Admiralty Law of the Supreme Court* (Charlottesville, Virginia: Michie Company, 1979) at 490. The Fire Statute was pattered after its English counterpart but since it did not resolve the ongoing tensions between shippers and carriers, Congress passed the Harter Act in 1893 followed later by COGSA to apply to ocean carriage. Patricia Wong, “Intercircuit Conflict with Respect to the Burden of Proof Standard under the Fire Statute and the Fire Exemption Clause of COGSA” (1994) 20 J. Legis. 91 at 91-92. The COGSA fire exception and its Fire Statute counterpart are very similarly phrased. Michael Sturley, “An Overview of the Considerations Involved in Handling the Cargo case” (1997) 21 Tul. Mar. L. J. 263 at 309. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 428.

¹⁰⁴⁸ COGSA Sec. 1308 specifically sets forth that ‘the provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions . . . of . . . 46 U.S.C. sections 175, 181 to 183, and 183b to 188,’ the Fire Statute being section 182. *Annex No. II, Table No. 4* at clxiii.

¹⁰⁴⁹ Joseph P. Tabrisky, “COGSA and the Fire Statute” (1997) 28 J. Mar. L. & Com. 359 at 363. In case of damage to goods from shipboard fire, the defendant must determine which, if not both, fire defenses he will assert. Eugene J. O’Connor, Shannon O’Reilly, “The Fire Defenses under U.S. law” (2002) 33 J. Mar. L. & Com. 111 at 115.

COGSA, MLA and the Fire Statute require a visible flame or light and not mere heat for 'fire' to exist¹⁰⁵⁰. Moreover, all three statutes prescribe the same standard of carrier care, due diligence, in case of fire¹⁰⁵¹. The similarity of retained criteria and COGSA incorporation of the Fire Statute in its provisions is probably the reason why U.S. courts frequently base their holdings on both COGSA and the Fire Statute with respect to the fire exception. This, however, may frequently create problems since there are notable differences between the two acts¹⁰⁵².

In effect, it may be that under COGSA, MLA (Schedule III) and the Fire Statute the shipper has to make its *prima facie* case of loss or damage before the burden of proof shifts to the carrier to prove the cause of the loss (how the fire

¹⁰⁵⁰ U.S.: Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo case" (1997) 21 Tul. Mar. L. J. 263 at 309, Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal) at 118 citing U.S. case law. Canada: *David McNair & Co. Ltd. v. The Santa Malta* (1967), 2 Ll. Rep. 391 (Ex. C. C.), (not transport case) *Brothers v. Atlantic Insurance Co.* [1998], N. J. No. 8 (Nfld. S. C.) opposing *Duncanson v. Continental Insurance Co. (N. S. C. A.)* [1990], N. S. J. No. 118 (N. S. S. C. A. D.).

¹⁰⁵¹ This translates into 'what the owner knows or is charged with finding out', about the occurrence causing the fire or measures taken to extinguish it. U.S.: *In re Damodar Bulk Carriers Ltd.*, 903 F. 2d 675 (9th Cir. 1990), *In re Ta Chi Navigation (Panama) Corp.*, 677 F. 2d 225 (2d Cir. 1982), *Asbestos Corp. Ltd.*, AMC 1683 (2nd Cir. 1973) and *Banana Servs. Inc. v. M/V Tasman Star*, 68 F. 3d 418 (11th Cir. 1995) holding that the Fire Statute and COGSA negligence criteria are identical. See also Grant Gilmore, Charles L. Black, Patricia Wong, "Intercircuit Conflict with Respect to the Burden of Proof Standard under the Fire Statute and the Fire Exemption Clause of COGSA" (1994) 20 J. Legis. 91 at 92. Canada: *Maxine Footwear Co. v. Canadian Government Merchant Marine L.* [1957], S. C. R. 801 (C. S. C.), *Hunter & Co. v. Owners Schr. "Morning Star"* (1817-28) as reported by *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding L* [1991], N. J. No. 257 (Nfld. S. C. T. D.). Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Éditions Thémis, 1986) at 204.

¹⁰⁵² Some of the less important differences between COGSA and the Fire Statute as reported by William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 425: Difference (1) COGSA-Fire Statute: U.S. Fire Statute only applies to shipowners, carriers and demise (not other) charterers, not agents, master or crew. U.K. Fire Statute applies to carrier and all charterers. COGSA is applicable to the shipowner, (contracting, actual) carriers and charterers (demise charterers or issuing charterers or charterers who have accepted some or all of the liabilities of the Hague or the Visby Rules). Because of the ambiguity in the hierarchy of U.S. COGSA and the Fire Statute, we do not know with certainty which act will cover persons not envisaged by the other. *Ibid* at 234s. Difference (2) COGSA-Fire Statute: The Fire Statute only applies to goods that are on board the vessel whereas COGSA applies from 'tackle to tackle'. Henry N. Longley, *Common Carriage of Cargo* (San Francisco: Matthew Bender, 1967) at 170, Thomas J. Schoenbaum, *Excepted Perils* 3rd ed. (U.S.: West Group, 2003) at par. 10-27. Difference (3) COGSA-Fire Statute: COGSA applies to all ships, not merely American ships. Difference (4) COGSA-Fire Statute: Under COGSA and 2001 MLA (Schedule III) article 3(2), once fire has started carrier, master, crew and servants must act 'properly and carefully' to protect cargo whereas carrier personal negligence will only hold him liable under the Fire Statute. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 426.

started and that it caused the loss)¹⁰⁵³. However, an inter-circuit conflict exists in the U.S. on whether the carrier must prove vessel seaworthiness before invoking the fire exception under COGSA and the Fire Statute. The U.S. Court of Appeals for the Ninth Circuit required proof of vessel seaworthiness as a precondition to carrier invoking the fire exemption¹⁰⁵⁴. Recently, however, the Ninth Circuit has held that the ocean carrier only has to prove that he "personally" exercised due diligence to make the vessel seaworthy with respect to the fire before and at the beginning of the journey, making seaworthiness a delegable duty¹⁰⁵⁵. With this decision, the Ninth Circuit has been said to approximate COGSA to the Fire Statute¹⁰⁵⁶. In effect, under the Fire Statute there is no *overriding, non-delegable* duty of seaworthiness so that only *shipper proof of carrier personal vessel unseaworthiness* before or at the beginning of the journey, causing the fire, will render him liable¹⁰⁵⁷. U.S. Court of Appeals for the Second, Fifth, and Eleventh Circuits align themselves with Fire Statute provisions on this point and do not make proof of vessel seaworthiness a

¹⁰⁵³ U.S.: Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo case" (1997) 21 Tul. Mar. L. J. 263 at 309 and Henry N. Longley, *Common Carriage of Cargo* (San Francisco: Matthew Bender, 1967) at 165. For the same proof in *Canada: Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (S. C. C.). Proof has to be made by preponderance of evidence. Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal) at 119. Fire need not directly ignite cargo to be cause of damage. U.S.: *Westinghouse Electric Co. v. M/V Leslie Lykes*, 734 F. 2d 199 (5th Cir. 1984), *Banana Services Inc. v. M/V Tasman Star*, 68 F. 3d 418 (11th Cir. 1995). On the contrary, in *Canada, Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (S. C. C.) and *Dominion Glass Co. v. Anglo Indian (The)* [1944], S. C. R. 409 (S. C. C.) have required fire to be the direct cause of the loss.

¹⁰⁵⁴ *Sunkist Growers Inc. v. Adelaide Shipping Lines*, 603 F. 2d 1327 (9th Cir. 1979) on the basis of COGSA and the Fire Statute. In rendering its decision, the court cited Canadian case *Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (C. S. C.) concluding in the same sense. This argument was said to be wrong since Canada does not have a Fire Statute resulting in *Sunkist* being incomplete and unsound. In the more recent COGSA case *Re Damodar Bulk Carriers Ltd.* (1990) 903 F. 2d 675 (9th Cir.) *Sunkist* is mentioned.

¹⁰⁵⁵ *Nissan Fire & Marine Ins. Co. Ltd. v. M/V Hyundai Explorer*, 93 F. 3d 641 (C. A. 1996). rejecting the *Complaint of Damodar Bulk Carriers*, 903 F. 2d 675 (9th Cir. 1990) holding. Joseph P. Tabrisky, "COGSA and Fire Statute" (1996) 28 J. Mar. L. & Com. 359 at 365. 'Personal' refers to persons occupying a managerial position within the corporate structure, either the ocean carrier or corporate or managing officers. William Tetley, *Tetley's Law and other Nonsense Chapter 17 Sec. 8(4) (Update of Marine Cargo Claims)* (2002) online: Tetley's Law/McGill Homepage <<http://tetley.law.mcgill.ca/ch26.htm>> (last modified: continuously). Eugene J. O'Connor, Shannon O'Reilly, (2002) "The Fire Defenses under U.S. law" 33 J. Mar. L. & Com. 111 at 125. On seaworthiness being a non-delegable duty see *supra* at 185.

¹⁰⁵⁶ Joseph P. Tabrisky, "COGSA and Fire Statute" (1996) 28 J. Mar. L. & Com. 359 at 366-367.

¹⁰⁵⁷ William Tetley, *Tetley's Law and other Nonsense Chapter 17 Sec. 8(4) (Update of Marine Cargo Claims)* (2002) online: Tetley's Law/McGill Homepage <<http://tetley.law.mcgill.ca/ch26.htm>> (last modified: continuously) and *Westibghouse v. Leslie Lykes*, 734 F. 2d 199 (5th Cir. 1984) cited by *In re South Coast Boat Rentals, Inc.* 1999 WL 615180 (E. D. La. 1999).

condition precedent to carrier invoking the fire exception under the Fire Statute or the COGSA¹⁰⁵⁸.

The inter-circuit conflict may be attributed to Fire Statute provisions opposing COGSA, and COGSA's vagueness on the interrelationship of the two acts. It has been argued, in this respect, that the Fire Statute undermines international uniformity the Hague Rules intended to promote, inviting the Supreme Court to intervene to end the conflict¹⁰⁵⁹. In effect, Canadian and other national courts are not divided on the issue of vessel seaworthiness and make it an overriding, non-delegable duty, condition precedent to carrier invoking any liability exception, including fire¹⁰⁶⁰.

Under all mentioned acts, once carrier proves, when applicable, seaworthiness and establishes the cause of the loss (fire), the burden of proof shifts again to the shipper to establish carrier *personal* fault in the commencement of the fire. This is a heavy burden of proof since it is the shipper who must prove carrier personal fault, the 'largeness of authority' of this exception embracing only carrier or its managing representatives in case of corporate ownership¹⁰⁶¹. The only

¹⁰⁵⁸ *Re Ta Chi Navigation (Panama) Corp.*, 677 F. 2d 225 (2d Cir. 1982), *Westinghouse Elec. Co. v. M/V Leslie Lykes*, 734 F. 2d 199 (5th Cir. 1984) under the Fire Statute and COGSA, *Banana Servs. Inc. v. M/V Tasman Star*, 68 F. 3d 418 (11th Cir. 1995) for the COGSA/Fire Statute fire defense. As reported by Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo case" (1997) 21 Tul. Mar. L. J. 263 at 309-310.

¹⁰⁵⁹ Michael Sturley as reported by Patricia Wong, "Intercircuit Conflict with Respect to the Burden of Proof Standard under the Fire Statute and the Fire Exemption Clause of COGSA" (1994) 20 J. Legis. 91 at 93.

¹⁰⁶⁰ *Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (C. S. C.), *Dominion Glass Co. v. Anglo Indian (The)* [1944], S. C. R. 409 (S.C.C) on the comparison with the U.S. fire exception. *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* (1974), S. C. R. 933 (S. C. C.) and Michel Pourcelet, *Le Transport Maritime sous Connaissance (droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal, 1972) at 119-120. See also Québec Civil Code art. 2063 (water transport).

¹⁰⁶¹ U.S.: Eugene J. O' Connor, Shannon O'Reilly, "The Fire Defenses under U.S. law" (2002) 33 J. Mar. L. & Com. 111 at 118. Herbert R. Baer, (3rd ed.) *Admiralty Law of the Supreme Court* (Charlottesville, Virginia: Michie Company, 1979) at 491 for the Fire Statute and COGSA, mentioning the early decision *Walker v. Transportation Co.*, 70 U. S. (3 Wall. 1865) 150. See also Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at note 320 for U.S. cases on the issue. The following carrier representatives have been held to satisfy statutory criteria: managing director, general agent, general manager, operations manager, general superintendent, marine superintendent, superintending engineer, assistant superintending engineer, port captain, port engineer, general foreman of a barge owner. The fault of the master or minor shore employees is excluded. Canada: In *Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (S. C. C.) the court held that fire must be

exception would be MLA (Schedule III) and COGSA vessel unseaworthiness (before and at the beginning of the voyage) causing the fire, where the carrier is always liable for the fault of its agents¹⁰⁶². Under the Fire Statute, however, there is not a non-delegable duty of seaworthiness and vessel unseaworthiness causing the fire will only hold carrier liable when it is attributed to him personally¹⁰⁶³.

Overall, the source of problems for the ocean fire liability exception is the preponderance given to the Fire Statute over COGSA by certain U.S. courts. This results in overpowering COGSA duty of seaworthiness before and at the beginning of the journey and duty to care for the cargo once fire has started, multiplying, in this manner, applicable legal principles. Authors argue that there is no reason to maintain the Fire Statute since its *raison d'être*, namely, carrier protection, is not present today, the Hague Rules having reached a new balance of liabilities and rights between carriers and shippers¹⁰⁶⁴.

Land BsOL and intermodal rail tariffs in the U.S. and Canada do not contain a fire liability exception except for the U.S. BNSF intermodal rail tariff (Item 62. 3) that enumerates 'fire' among carrier exoneration causes¹⁰⁶⁵. Moreover, the 'fire' exception has occasionally been found in older Canadian and U.S. land BsOL¹⁰⁶⁶. For the rest, 'fire' will not exonerate the land carrier except if another liability exception i.e. shipper fault, inherent vice, act of God, causes the fire or the damage¹⁰⁶⁷. Or, when land carriers in multimodal transport incorporate ocean carrier

personal to the carrier or its directing mind (the life and soul of the company, the very ego and center of the personality of the corporation).

¹⁰⁶² *Supra* at 185s.

¹⁰⁶³ *Westibghouse v. Leslie Lykes* (1984) 734 F. 2d 199 (5th Cir.).

¹⁰⁶⁴ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 428.

¹⁰⁶⁵ *Ibid* at 411 on the inexistence of this exception in land transport. *Annex No. III, Tables No. 5, 6, 7, 8* at cxc-cxciv and *Annex No. I, Table No. 6* at lxx for the BNSF rail tariff. See also Québec case *Richard v. Centre de Camions Chrysler Montréal Ltée* (1978), J. E. 78-185 (S. C. Qué.) where tort law principles decided motor carrier liability in case of fire.

¹⁰⁶⁶ U.S.: (rail) *Missouri Pac. R. Co. v. Porter*, 273 U. S. 341 (U. S. S. C. 1927) even though no reference was made to carrier actual 'fault or privity'. Canada: (rail) *Lake Erie and Detroit River Railway Co. v. Sales & Halliday* (1896), 26 S. C. R. 663 (S. C. C.) where it was not clear or significant whether the fire exception concerned railway as a carrier or as a warehouseman. Nor did the case refer to carrier 'actual fault or privity'.

¹⁰⁶⁷ Canada: 'act of God'- 'fire' see (rail) *McMorrin v. Canadian Pacific Railway Co.* (1901) O. J. No. 104 (Ont. H. C. J.). U.S.: *Shipper fault* in not notifying carrier of the nature of the goods and subsequent *fire*

liability provisions to their segment of transportation. Absence of a land 'fire' exception is probably due to the fact that the need to protect ocean carriers from such an occurrence is not as evident in land transport.

Hague, Visby, MLA (Schedule III) and COGSA exempt the ocean carrier in case of 'saving or attempting to save life or property at sea' ('salvage defense')¹⁰⁶⁸. Authors argue that this liability exception is similar to the 'perils of the sea' ocean exoneration cause that also concerns maritime perils¹⁰⁶⁹. Public policy in favour of assisting those in distress at sea is so strong that this liability defence has never been controversial¹⁰⁷⁰. In practice, the salvage defence has not retained much judicial attention¹⁰⁷¹ to permit a more detailed analysis of its components. Although authors may suggest that carrier or servants negligence during salvage operations is

resulting thereof, (rail) *Crump v. Thompson* (1949) 171 F. 2d 442 (8th Cir.) and (motor) *B. C. Truck Lines Inc. v. Pilot Freight Carriers, Inc.*, 225 F. Supp. 1 (N. D. Ga. 1963).

¹⁰⁶⁸ Art. IV(2)(1) of the Hague, Visby Rules and MLA (Schedule III), COGSA Sec. 1304(2)(1), *Annex No. III, Table No. 5* at cxc and *Annex No. II, Tables No. 2, 3, 4*. This defense is proof that salvage operations can be part of a contract of carriage: U.S.: Marva Jo Wyatt, « Contract Terms in Multimodal Contracts : COGSA Comes Ashore » (1991) 16 Tul. Mar. L. J. 177 at 200. Canada: *Bombardier Inc. v. Canadian Pacific Ltd.* (1991), 7 O. R. (3d) 559 (Ont. C. A.). Salvage principles are so well settled that are sometimes said to be the *jus gentium* or the international law of the sea. In both Canada and the U.S., as internationally, the salvor may establish a claim for a salvage award if he establishes: (1) marine peril (property or lives saved must be on water, not on land) which does not need to be imminent or absolute but has to be present (réel) or reasonably apprehended; (2) services voluntarily rendered (not under official or legal duty or salvor saving his own ship); (3) success of the salvage operations, in whole or in part. Canada: André Braen, *Le Droit Maritime au Québec* (Montréal: Wilson & Lafleur Ltée, 1992) at 236-239. U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 532s and Andrew Anderson, "Salvage and Recreational Vessels: Modern Concepts and Misconceptions (1993) 6 U. S. F. Mar. L. J. 203 at 208-210.

The salvage concept, however, must be distinguished from the salvage defence. Salvage awards, granted to the salvor for his meritorious services, presuppose successful salvage services whereas the Hague and the Visby Rules exonerate carrier even in case of attempts to save life or property at sea. Canada: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 209. U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 560. First, in the legal sense of the term, the salvage award is an amount of money given to the salvor as indemnity for the property and life saved whereas the salvage defense simply exonerates him from liability for damage to property on the salving ship as a result of salvage operations.

¹⁰⁶⁹ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 446 and Marva Jo Wyatt, « Contract Terms in Multimodal Contracts : COGSA Comes Ashore » (1991) 16 Tul. Mar. L. J. 177 at 200.

¹⁰⁷⁰ U.S.: Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 313, Marva Jo Wyatt, « Contract Terms in Multimodal Contracts : COGSA Comes Ashore » (1991) 16 Tul. Mar. L. J. 177 at 201. Canada: André Braen, *Le Droit Maritime au Québec* (Montréal: Wilson & Lafleur Ltée, 1992) at 233-234 and *Ontario v. Mar-Dive Corp.* [1996], O. J. No. 4471 (Ont. Ct. GD).

¹⁰⁷¹ U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 560. Canada: cases only mention this exception as part of the Visby Rules without further comment made on it.

irrelevant to this exception¹⁰⁷² this is incompatible with absence of negligence being part of herein mentioned carrier liability exceptions and also of claims of salvage awards in both the U.S. and Canada¹⁰⁷³.

Due diligence is also a key concept with respect to Hague, Visby Rules art. IV(4) and respective domestic laws providing for carrier exoneration in case of ‘reasonable deviations’¹⁰⁷⁴ in general, or specifically destined to save life or property at sea¹⁰⁷⁵. The doctrine of ‘unreasonable deviation’ is narrowly construed to include mainly cases of geographical deviation¹⁰⁷⁶ punishing carrier for an intentional or

¹⁰⁷² Robert Force, « A Comparison of the Hague, Hague-Visby and the Hamburg Rules : Much Ado about? » 70 Tul. L. Rev. 2051 at 2068. This is a theoretical argument the author bases on the comparison of the Hamburg Rules art. 5(6) reference to ‘reasonable’ measures during salvaging operations, with the Hague and the Visby Rules provisions that do not use the term ‘reasonable’. This, according to the author, implies that due diligence needs not be exercised by the carrier in case of the Hague and the Visby Rules. See also *infra* note 1373.

¹⁰⁷³ U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 553-555. Thomas Segalla, “Insurer” 12 *Couch on Ins.* § 183:148 (2000) WESTLAW (Tp-all) and Laura Hunter Dietz, “Salvage Operations: Imputation of Liability to Others” 68 *Am. Jur. 2d Salvage* § 35 (2000) WESTLAW (Newsletters). Canada: André Braen, *Le Droit Maritime au Québec* (Montréal: Wilson & Lafleur Ltée, 1992) at 238. *Manchester Liners Ltd. v. Scotia Trader (The)* [1971], F. C. 14 (F. C. C.).

¹⁰⁷⁴ Art. IV(4) of the Hague, Visby Rules and 2001 MLA (Schedule III) reflects the ‘doctrine of unreasonable deviation’ which is firmly entrenched in maritime law: «Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”. *Annex No. II, Tables No. 2, 3* at cxlvi and cliv. U.S. COGSA Sec. 1304(4) adds that “provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, prima facie, be regarded as unreasonable”. *Annex No. II, Table No. 4* at clviii. This additional COGSA provision refers to specific factual patterns that create a *prima facie* case (rebuttable presumption) of unreasonable deviation. In this way, lucrative oriented deviations on the part of the carrier are presumed unreasonable. Michel Pourcelet, *Transport Maritime Sous Connaissance* (Montréal: Les Presses de l’Université de Montréal, 1972) at 81. See *Dow Chemical Pacific Ltd. v. Rascator Maritime S.A.*, 782 F. 2d 329 (2d Cir. 1986) on deviation for unloading cargo.

¹⁰⁷⁵ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Éditions Thémis, 1986) at 209. We should note that the doctrine of ‘unreasonable deviation’ does not exist in civil law countries and this provision does not make part of the 1966 French law implementing Visby Rules provisions in France. René Rodière, *Traité Général de Droit Maritime* (Tome II) (Paris : Éditions Dalloz, 1968) at 407. In the province of Québec, however, art. 2072 of the Code Civil on water transport refers to this Visby Rules exception. No Québec cases were found on this exception.

¹⁰⁷⁶ Michel Pourcelet, *Transport Maritime Sous Connaissance* (Montréal: Les Presses de l’Université de Montréal, 1972) at 81. U.S.: *SPM Corp. v. M/V Ming Moon*, 965 F. 2d 1297 (3rd Cir. 1992), *SNC S.L.B. v. M/V Newark Bay*, 111 F. 3d 243 (2nd Cir. 1997). Although in the beginning U.S. courts had extended the doctrine to some non-geographic deviations (i.e. quasi-deviations), they have, in more recent years, cut back on quasi-deviations so that geographic deviation and unauthorized deck carriage (quasi-deviation) are now the only deviations subject to the doctrine. *Mitsui Marine Fire and Ins. Co. Ltd. v. Direct Container Line Inc.*, 119 F. Supp. 2d 412 (S. D. N. Y. 2000), Michael Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 653-654. Canada : William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 99 and *Z.I. Pompey Industrie v. Ecu-Line N.V.* [1999], F. C. J. No. 1584 (F. C. C.) citing Pr. Tetley. Unauthorized deck carriage (a U.S. quasi-deviation) is named ‘departure from the contract of carriage’ in Canada and classifies as an unreasonable deviation.

voluntary and unjustifiable (unreasonable) deviation, which has "so changed the essence of the agreement as to effect its abrogation"¹⁰⁷⁷. Reference to 'reasonable' (deviation) alludes to exercise of 'due diligence' in deviating (in the perspective of salvage), an element subject to an *in concreto* examination¹⁰⁷⁸.

In U.S. and Canadian land transport the concept of deviation from the scheduled itinerary or from the terms of the contract of carriage exists, even though it is not connected to saving life or property on land or to a carrier liability defence¹⁰⁷⁹. Further, there is no land 'salvage defence' since there is no similar public policy that would reward a truck driver stopping to assist a stranded motorist¹⁰⁸⁰. This, along with the implicit duty to properly care for the cargo would seem to prohibit an interruption in the carriage¹⁰⁸¹. In 1988, U.S. Congress attempted

Consumers Glass Co. Ltd. et al. v. Farrell Lines Inc. et al. (1985), 53 O. R. (2d) 230 (Ont. C. J.). We found no U.S. or Canadian cases on deviation and the 'salvage defense'.

¹⁰⁷⁷ U.S.: *Sedco Inc. v. S.S. Strathewe*, 800 F. 2d 27 (2nd Cir. 1986), *Jones v. The Flying Clipper*, 116 F. Supp. 386 (D. C. N. Y. 1953) as reported by *SPM Corp. v. M/V Ming Moon*, 965 F.2d 1297 (3rd Cir. 1992). 'Unreasonable' or 'unjustifiable' means 'substantially increasing the exposure of cargo to foreseeable dangers that would have been avoided had no deviation occurred'. *SNC S.L.B. v. M/V Newark Bay*, 1996 WL 82384 (S. D. N. Y. 1996) and *General Elec. Co. Intern. Sales Div. v. S.S. Nancy Lykes*, 706 F. 2d 80 (2nd Cir. 1983), *Manuel International v. Rascator Maritime*, A. M. C. 523 (S. D. N. Y. 1985) (deviation for carrier own benefit is unreasonable). Canada: *Z.I. Pompey Industrie v. Ecu-Line N.V.* [1999], F. C. J. No. 1584 (F. C. C.) on deviation for carrier own benefit, *Toronto Elevators Ltd. v. Colonial Steamships Ltd.* [1950], Ex. C. R. 371 (Ex. Ct.), *Canastrand Industries Ltd. v. Lara S (The) (T.D.)* [1993], 2 F. C. 553 (F. C. C.) and *Beloit Canada Ltée/Ltd. v. Neptune Orient Lines Ltd.* [1988], F. C. J. No. 310 (F. C. C.). See also *infra* at 236 and 249.

¹⁰⁷⁸ U.S.: Robert Force, «A Comparison of the Hague, Hague-Visby and the Hamburg Rules : Much Ado about?» 70 Tul. L. Rev. 2051 at 2069. In case of a 'liberty clause' (*supra* note 960) courts will declare the clause null and void if the carrier did not act reasonably in deviating. *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F. 2d 874 (3rd Cir. 1992), *General Elec. Co. Intern. Sales Div. v. S.S. Nancy Lykes*, 706 F. 2d 80 (2nd Cir. 1982). Canadian *Drew Brown Ltd. v. Orient Trader (The)* [1974], S. C. R. 1286 (S. C. C.) just comments on U.S. law.

If we take a closer look at this Hague and Visby Rules provision we note that 'any deviation to save life or property at sea ... or any reasonable deviation' will benefit carrier. This does not mean that the deviation to save life or property at sea should not be reasonable, on the contrary, it constitutes an example of a reasonable deviation, not a case apart. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 738.

¹⁰⁷⁹ Canada: Although routing is rarely specified in inland contracts, its presence is a necessity in international shipments in order to give effect to pre-arranged commitments on the part of the shipper taking place at the border. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Ontario: Carswell, 1997) at 76. *Compagnie des Chemins de Fer Nationaux du Canada v. Norsk Pacific Steamship Co.* [1990], 3 C. F. 114 (F. C. C.), *F. T. James Co. v. Dominion Express Co.* (1907), 13 O. L. R. 211 (Ont. Div. Ct.), *England v. Heimbecker* (1997), 78 D. L. R. (3d) 117 (Sask. Dist. Ct.) on geographical and non-geographical deviation. U.S.: *Hartford Fire Ins. Co. v. M/V 'OOCL BRAVERY'*, 79 F. Supp. 2d 316 (S. D. N. Y. 1999), *Nippon Fire & Marine Ins. Co. Ltd. v. Skyway Freight Systems Inc.*, 67 F. Supp. 2d 293 (S. D. N. Y. 1999), the latter referring to the 'material deviation' doctrine.

¹⁰⁸⁰ Marva Jo Wyatt, « Contract Terms in Multimodal Contracts : COGSA Comes Ashore » (1991) 16 Tul. Mar. L. J. 177 at 201.

¹⁰⁸¹ *Ibid* at note 159 with reference to multimodal cases where ocean rules were extended to land carriers.

extension of COGSA benefits to land carriers by including the new 'saving or attempting to save life' ("at sea" being conspicuously absent). Authors argued that there is no reason to imply into a contract of carriage the intent to recognize a duty to an unlimited number of third parties¹⁰⁸². Thus, COGSA salvage defence remains, today, specific to the ocean carriage.

Art. 4(2)(q) of the Hague, Visby Rules, MLA (Schedule III), and COGSA Section 1304(2)(q) contains a catch-all no fault exception drafted in common law style, exonerating carrier from liability for any cause not provided in the litany of exceptions, absent negligence on his part and on the part of his agents and servants¹⁰⁸³. In this way, causes of damages other than those provided in said sets of rules, i.e. pilferage, theft, collision, rust, sweat, bursting of pipes, breakdown of machinery etc., may exonerate carrier if they meet the requisite conditions¹⁰⁸⁴.

The nature of this exception is very interesting to examine. We have seen that the Hague and the Visby Rules presume carrier liability and exonerate him only in case of proof of enumerated occurrences (presumption of liability). Certain of them constitute force majeure events in civil law jurisdictions while others do not¹⁰⁸⁵. We will regroup both these categories of force majeure and non force majeure liability

¹⁰⁸² Marva Jo Wyatt, « Contract Terms in Multimodal Contracts : COGSA Comes Ashore » (1991) 16 Tul. Mar. L. J. 177 at 201. Carrier duties must be narrowly construed.

¹⁰⁸³ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Éditions Thémis, 1986) at 210. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 167. The exception reads: 'Any other cause arising without the actual fault and privity of the carrier or (and for COGSA) without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage'. *Annex No. II, Tables No. 2, 3, 4 and Annex No. III, Table No. 5* at cxc. The underlined 'or' term really means 'and', so that COGSA is really in conformity with MLA (Schedule III) and international conventions. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 515. See also Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 137 (note 269).

¹⁰⁸⁴ U.S.: Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 167. These causes of loss cannot fall under the catch-all 'acts of God' or 'perils of the sea' liability exceptions since they are not natural causes of damage. (theft) *The Remington Rand v. U.S.A.*, 98 F. Supp. 334 (S. D. N. Y. 1951), (collision) *M. Golodetz Export Corp. v. Lake Anja* (1985) 751 F.2d 1103 (2nd Cir.). (hold condensation) Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 129. Canada: (carriage on deck) *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) mentioning *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.). Both cases apply the *q* exception after having decided that the 'perils of the sea' exception is inapplicable.

exceptions under the principle of presumption of liability requiring carrier to prove the cause of the loss¹⁰⁸⁶. The *q* exception seems to be so much more generous to the ocean carrier by establishing a presumption of fault principle exonerating him beyond the scope of specific exoneration causes without need to prove a specific cause of loss¹⁰⁸⁷. In reality, however, the ocean carrier needs to prove the cause of the loss under the (q) exception because this is the way one can determine whether carrier or his servant's negligence contributed to it¹⁰⁸⁸.

The convergence of the principles of presumption of fault and presumption of liability the (q) exception seems to operate by requiring proof of the cause of the loss, is put into question by civil law systems that strongly reject this exception, replacing it by the 'roughly similar' force majeure concept¹⁰⁸⁹. However, this difference between common and civil law jurisdictions seems to be of little practical importance since ocean carriers rarely have recourse to the (q) exception because of its heavy burden of proof that we will examine as follows. Ocean carriers prefer to invoke other exoneration causes such as insufficiency of packing, shipper fault or perils of the sea to be exonerated for the very same facts¹⁰⁹⁰. Thus, the field

¹⁰⁸⁵ *Supra* at 201s.

¹⁰⁸⁶ See *infra* note 1323 and accompanying text on our perception of the presumption of liability concept.

¹⁰⁸⁷ *Infra* at Part II, Chapter II, Section II, Par. 1 for the presumption of fault and presumption of liability principles.

¹⁰⁸⁸ Need for such carrier proof does not stem, therefore, from the presumption of liability or negligence principles but from the (q) exception wording 'contributed to the loss...'. Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal: Les Presses de l'Université de Montréal, 1972) at 135-136 and William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 517. U.S.: *Quaker Oat Co. v. M/V Torvanger*, 734 F. 2d 238 (5th Cir. 1984). In case carrier or agents merely contribute to the loss, the carrier will be held liable for the whole damage unless he can establish what proportion of the damage results from a cause for which he is not responsible. *The Vallescura*, 293 U. S. 296 (U. S. S. C. 1934), *American Home Assoc. v. American President Lines*, 44 F. 3d 774 (9th Cir. 1995) and *American Marine Corp. v. Barge American Gulf III*, 100 F. Supp.2d 393 (E. D. La. 2000). Canada: *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.) and *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) mentioning the *Bayliss* case on this issue.

¹⁰⁸⁹ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 524. René Rodière describes this ocean carrier liability exception as 'the legal monster that torments civil law minds'. Québec Civil Code art. 2072 (water transport) and the 1966 French law implementing the Hague and the Visby Rules at the domestic level, have respectively substituted the concepts of force majeure or 'facts constituting an event non imputable to the carrier' for the (q) exception. See also *infra* at 288s.

¹⁰⁹⁰ Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal: Les Presses de l'Université de Montréal, 1972) at 135. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 168. *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.). *Fondation Co. Of Canada Ltd. v. Ship 'Fort George'* (1978), 20 N. R. 251 (F. C. C.) as reported by Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Éditions Thémis, 1986) at 210.

occupied by the *q exception* is really limited to cases of theft and actions of third parties¹⁰⁹¹.

Under this exception, once shipper establishes its *prima facie* case, carrier needs to prove vessel seaworthiness¹⁰⁹², the cause of the loss and absence of his or servants negligence contributing to the loss¹⁰⁹³. Even though this order of proof does not seemingly differ from judicial requirements for Hague and Visby Rules (a)-(q) and land carrier exceptions, the fact that the (q) exception explicitly refers to carrier burden of proof means that this is not merely a burden of going forward with the evidence, but a real burden of persuasion¹⁰⁹⁴. Consequently, the burden of proof does not return to the shipper once carrier proves vessel seaworthiness with respect to the loss or damage, the cause of the loss or damage and absence of his and his servants negligence contributing to the loss or damage but, rather, judgement hinges upon the adequacy of carrier proof¹⁰⁹⁵. As with all the other exceptions, the degree of care is that of ‘due diligence’ on the part of the carrier and its servants¹⁰⁹⁶. The

¹⁰⁹¹ Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 135.

¹⁰⁹² U.S.: *Tubacex, Inc. v. M/V Risan*, 45 F. 3d 951 (5th Cir. 1995). Canada: *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) affirmed by the Supreme Court in *St-Siméon Navigation Inc. v. A. Couturier & Fils Ltée* (1974), S. C. R. 1176 (S. C. C.).

¹⁰⁹³ Canada: *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.) and *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) mentioning *Bayliss* on this point. U.S.: *EAC Timberlane v. Pisces Ltd.* (1984) 745 F. 2d 715 (1st Cir.). *A/S Dampskibsselskabet Torm v. U.S.* 64 F. Supp. 2d 298 (S. D. N. Y. 1999).

‘Servants’ includes independent contractors and all parties to whom the carrier has delegated any of its responsibility to care for the cargo as long as he retains control over loading and discharge (condition precedent). William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 519. *Agrico Chemical v. Atlantic Forest*, 459 F. Supp. 638 (E. D. La. 1978) and *Metalimport of Romania v. S. S. Italia*, 426 F. Supp. 770 (S. D. N. Y. 1976), *Tapco Nigeria, Ltd. v. M/V WESTWIND*, 702 F. 2d 1252 (C. A. La. 1983).

¹⁰⁹⁴ *Quaker Oats Co. v. M/V Torvanger*, 734 F. 2d 238 (5th Cir. 1984). *U.S. v. Ocean Bulk Ships, Inc.*, 248 F. 3d 331 (5th Cir. 2001) and *Lekas & Drivas Inc. v. Goulandris*, 306 F. 2d 426 (2nd Cir. 1962).

¹⁰⁹⁵ *Ibid.* In citing *EAC Timberlane v. Pisces Ltd.*, 580 F. Supp. 99 (D. Pto Ric. 1983), Pr. Tetley opines that once the burden of production and of persuasion is satisfied by the carrier, shippers have to meet, with at least equal proof carrier or servant causative or contributory negligence. As a result, the burden of proof under the (q) exception returns to the shipper following this author’s view. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 520. The two views are not necessarily contradictory. We believe that, in practice, the burden of proof will eventually shift to the shipper once carrier satisfies his proof under the (q) exception, simply courts will attribute greater burden to carrier proof.

¹⁰⁹⁶ U.S.: Leslie Tomasello Weitz, «The Nautical Fault Debate» (1998) 22 Tul. Mar. L. J. 581 at 583. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 519 mentioning *Sankyo Seiki v. Korean Leader*, 556 F. Supp. 337 (S. D. N. Y. 1982) and *Metalimport v. S.S. Italia*, 426 F. Supp. 770 (S. D. N. Y. 1976). *Quaker Oat Co. v. M/V Torvanger*, 734 F. 2d 238 (5th Cir. 1984). Canada: *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.) and *A. Couturier*

heavier burden of proof of the (q) exception was intended to remedy a specific harm, namely, the abuse of non-statutory exception clauses in bills of lading¹⁰⁹⁷.

Courts insist that the *q exception* should be viewed as part of the Hague and the Visby Rules and not as conflicting them. In this way, agents nautical fault exonerating carrier does not contradict the *q exception* that will take effect when the nautical fault or other enumerated exception are inapplicable¹⁰⁹⁸. Moreover, contractually agreed upon occurrences that exonerate carrier on the basis of the *q exception* principle of presumption of fault contravene the Hague and Visby Rules art. III(8) that prohibits contractual limitation of carrier liability rendering, therefore, ineffective such clauses¹⁰⁹⁹.

In land transport, there is no exception similar to the ocean transport (q) exception. Land perils being less frequent or intense than ocean risks, the need justifying a land (q) exception was seemingly not present. As a result, land carrier will be held liable even though neither him nor his agents have committed any fault so long as a specifically enumerated land carrier exoneration cause is not present.

To this we should add that land carriers will generally be held liable for the damage caused by their agents and servants, something that is not always the case with ocean carriers (nautical fault).

Nautical fault: Hague, Visby Rules, MLA (Schedule III) art. IV(2)(a) and COGSA Sec. 1304(2)(a) exonerate carrier in case of ‘act, neglect, or default of the

& *Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) mentioning *Bayliss* in deciding that foreseeable weather carrier and crew could guard against, did not justify presence of a sea peril or of the (q) exception.

¹⁰⁹⁷ James H. Hohenstein, «The Allocation of the Burden of Proof in Marine Fire Damage Cases» (1983) Un. of Chicago L. Rev. 1146 at 1158.

¹⁰⁹⁸ U.S.: *Matter of Intercontinental Properties Management, S.A.* (1979) 604 F. 2d 254 (4th Cir.), *Quaker Oats Co. v. M/V Torvanger*, 734 F. 2d 238 (5th Cir. 1984) Canada: *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) the court mentioned *Canadian National Steamships v. Bayliss (The Lady Drake)* (1937), S. C. R. 261 (S. C. C.). This is the meaning of the (q) exception ‘any other cause of loss’.

¹⁰⁹⁹ U.S.: *Anvil Knitwear Inc. v. Crowley American Transport Inc.* 2001 WL 856607 (S. D. N. Y. 2001). Canada: *St-Siméon Navigation Inc. v. A. Couturier & Fils Ltée* (1974), S. C. R. 1176 (S. C. C.) affirming *A. Couturier & Fils Ltée v. St. Simeon Navigation Inc.* [1970], Ex. C. R. 1012 (Ex. C. R.) in deciding that parties cannot contractually limit carrier liability beyond what is statutorily provided on the basis of the *q exception*.

master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship' when this constitutes the proximate cause of damage¹¹⁰⁰. This is known as the 'nautical fault' ocean carrier liability exception that came into being in the 19th century as a contractual BOL clause¹¹⁰¹, was intended to reconcile carrier and shipper interests¹¹⁰² and has given rise, overtime, to great doctrinal controversy. Despite this fact, the nautical fault defense rarely succeeds in court, particularly in recent years, not only because of the difficulty of proof it entails, but also because courts do not seem overly fond of excusing carrier for the negligence of its own employees¹¹⁰³.

The problem that has particularly vexed courts when considering this exception is the distinction between servants error in navigation or error in the management of the vessel ('faute nautique' ou 'faute dans l'administration du navire') exonerating carrier, and servants error in the management of the cargo or commercial default (faute commerciale ou faute dans l'administration de la cargaison) holding him liable¹¹⁰⁴. This distinction, based on the nature of servant's faults, is not contained in international conventions and courts have difficulty to

¹¹⁰⁰ On the proximate cause of damage see U.S.: *Insurance Co. of North America v. S.S. Flying Trader*, 306 F. Supp. 221 (D. C. N. Y. 1969) and Canada: *Maxine Footwear Co. v. Canadian Government Merchant Marine L* [1957], S. C. R. 801 (S. C. C.).

¹¹⁰¹ *Annex No. III, Table No. 5* at cxc and *Annex No. II, Tables No. 2, 3, 4*. At the end of the nineteenth century, navigational technology did not permit carriers to communicate with their ships at sea so that the nautical fault exception was deemed a necessary carrier protective measure. Eun Sup Lee, Seon Ok Kim, "Carriers Liability for Commercial Default or default in the Navigation and management of the Vessel" (2000) 27 *Transp. L. J.* 205 at 212. William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 397. This contractual exception was not permitted by American courts before the 1893 *Harter Act*. In Canada, contractual 'negligence clauses' exempting carrier for masters and servants negligence were successfully used before adoption of the Hague Rules. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 201, *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.* [1950], S. C. R. 356 (S. C. C.). *Glengoil Steamship Co. v. Pilkington* (1897), 28 S. C. R. 146 (S. C. C.) held that 'negligence clauses' are not contrary to public policy.

¹¹⁰² Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 96.

¹¹⁰³ Michael Sturley, "An Overview in the Considerations Involved in Handling the Cargo Case" (1997) 21 *Tul. Mar. L. J.* 263 at 308. Although the nautical fault defense rarely succeeds before the courts, it constitutes a valuable carrier defense in collision cases.

¹¹⁰⁴ William Tetley, *Marine Cargo Claims* (Montréal : International Shipping Publications, 1988) at 398s and René Rodière, Emmanuel du Pontavice, *Droit Maritime* 12th ed. (Paris: Dalloz, 1997) at 345-346. Hereinafter, we will refer to 'nautical fault' to designate the first category of servants errors exonerating carriers and to 'commercial fault' when dealing with servants errors with respect to the cargo.

delineate its components since, in the majority of instances, the same act may be viewed upon as covering both types of errors¹¹⁰⁵.

Both a nautical and a commercial fault involve damage to cargo without which neither can exist¹¹⁰⁶. However, a nautical fault refers to an act or omission towards the safety or well being of the vessel and, therefore, the safety of the venture. When attributed to carrier servants, this fault exonerates the carrier. It comprises errors in the navigation and errors in the management of the vessel¹¹⁰⁷. The former error constitutes a violation of practical and technical rules of navigation dictated by custom or regulation and taking place at sea or before the beginning of the voyage: choice of the route or *man oeuvre* that lead to the sinking of the vessel, error in reading luminous signs, excessive speed, defective functioning of sirens or signalization lights in foggy weather¹¹⁰⁸. The latter error refers to any operation, equipment or man oeuvre affecting directly and principally the well functioning of the vessel itself (i.e. maintenance, reparations) and only incidentally and indirectly affecting cargo¹¹⁰⁹.

On the other hand, a commercial fault concerns an act or omission with respect to the cargo and will not exonerate carrier since Hague and Visby Rules art. III(2) holds carrier liable for his or his servants acts and omissions with respect to

¹¹⁰⁵ This is because errors in the management of the vessel generally result in damaging the cargo. Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 97, 98 and 101-102 and Michael Sturley, "An Overview in the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 307.

¹¹⁰⁶ René Rodière, «Faute Nautique et Faute Commerciale devant la Jurisprudence Française» (1961) 13 D. M. F. 451 at 453.

¹¹⁰⁷ *Ibid.* Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 96.

¹¹⁰⁸ Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal : Les Presses de l'Université de Montréal, 1972) at 96, 97-98 and 100 based on U.S. case law and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal : Editions Thémis, 1986) at 201 for Canada.

¹¹⁰⁹ *Ibid.* at 98-99 and at 104 on the basis of U.S. and Canadian case law respectively, *ibid.* at 201 for Canada. Canadian case *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.* [1950], S. C. R. 356 (S. C. C.), later mentioned by *Seaway Distributors Ltd v. Newfoundland Container Lines* (1982) N. S. J. No. 135 (N. S. C. C.) held that an error in the navigation concerns the navigation or moving of the vessel whereas the management of the vessel goes beyond these and concerns the vessel itself. Citing U.S. decisions, *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* [1969], 2 Ex. C. R. 261 (Ex. C. R.) held that removal of the hatches for the sake of ventilation might be an error in the management of the ship but has nothing to do with its navigation.

the cargo¹¹¹⁰. Sailing in bad weather, forcing the ship through the storm, navigating in ice without proper equipment¹¹¹¹ or failing to use the apparatus of the ship for the protection of the cargo¹¹¹², are examples of errors in the administration of the cargo.

In case of doubt as to the nature of servant's error, the 'primary intent' test differentiates errors in the administration of the vessel exonerating carrier from errors in the management of the cargo holding him liable. This test inquires into what was the intent of servants in proceeding to the harm-causing act, whether it was to stabilize the vessel (nautical fault) or to care for the cargo (commercial fault)¹¹¹³. This leaves courts a great margin of consideration in drawing the line between nautical and commercial faults¹¹¹⁴. What is certain is that parties cannot

¹¹¹⁰ On Hague, Visby Rules and 2001 MLA (Schedule III) art. III(2) and corresponding COGSA Sec. 1303(2).

¹¹¹¹ These incidents can be grouped in the category of 'maintaining course through a storm'. U.S.: *Hershey Chocolate Corp. v. S.S. Mars*, 172 F. Supp. 321 (E. D. Pa. 1959). Canada: *C.N.R. v. E & S Barbour Ltd* (1963), S. C. R. 323 (S. C. C.) as reported by William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 402. Entering a strike-bound port is like entering an ice-bound port or sailing in bad weather so that this will hold carrier liable. *Crelisten Fruit Co. v. Mormacsaga* (1969), 2 Ex. C. R. 215 (Ex. Ct).

¹¹¹² Eun Sup Lee, Seon Ok Kim, "Carriers Liability for Commercial Default or default in the Navigation and Management of the Vessel" (2000) 27 *Transp. L. J.* 205 at 218. See also Canadian case *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.* [1950], S. C. R. 356 (S. C. C.).

¹¹¹³ U.S.: Eun Sup Lee, Seon Ok Kim, "Carriers Liability for Commercial Default or default in the Navigation and management of the Vessel" (2000) 27 *Transp. L. J.* 205 at 214. Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal: Les Presses de l'Université de Montréal, 1972) at 97-98 and 99. Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 157-158 and 159 and Herbert R. Baer, *Admiralty Law of the Supreme Court* 3rd ed. (Charlottesville, VA: The Michie Company, 1979) at 508-509. The 'primary intent' test is a judicial test that preexisted COGSA, taking effect under the Harter Act. *The Germanic* (1905) 196 U.S. 589 (S. C. C.) and *Knott v. Botany Worsted Mills* (1900), 179 U. S. 69 (S. C. C.). Canada: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Editions Thémis, 1986) at 201, *Kalamazoo Paper Co. v. C.P.R.* (1950), R. C. S. 356 (S. C. C.) citing the U.S. *Germanic* case and *The Sylvia*, 171 U. S. 462 (U. S. N. Y. 1898) in concluding that damage affecting cargo may constitute a nautical fault where the primary concern of master's acts was to stabilize the ship and, as a result, the cargo was incidentally damaged. *Leval & Co. Inc. v. Colonial Steamships Ltd.* [1961], S. C. R. 221 (S. C. C.).

¹¹¹⁴ A ballasting (operation destined to stabilize vessel) error, the most common nautical fault example, has also been held to constitute a commercial fault when it occurs during discharge operations. Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal: Les Presses de l'Université de Montréal, 1972) at 97-98. Inversely, authors have argued that improper stowage taking place during an intermediate port of the voyage and affecting the stability of the vessel may constitute a nautical fault. When same occurs before and at the beginning of the voyage, it will not exonerate carrier because of article III(2). René Rodière, "Faute Nautique et Faute Commerciale devant la Jurisprudence Française" (1961) 13 *Droit Marit. Fr.* 451 at 454. Others, however, opine that improper stowage always constitutes a commercial fault even when intervening before and at the beginning of the journey. Michel Pourcelet, *Le Transport Maritime sous Connaissance* (Montréal: Les Presses de l'Université de Montréal, 1972) at 103 and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Editions Thémis, 1986) at 202 and 203 and 204 (note 396). *Knott v. Botany Worsted Mills* (1900), 179 U. S. 69 (S. C. C.) and *Carling O'Keefe Breweries of Canada Ltd. v. CN Marine Inc.* [1990], 1 F. C. 483 (F. C. A.).

contractually provide what constitutes an error in the administration of the cargo or a nautical fault in the BOL since such a clause will be considered null and void under art. III(8) of the Hague and the Visby Rules¹¹¹⁵.

The nature of servants acts as basis of the distinction between nautical and commercial faults is not the only element that conditions carrier liability. The gravity of servants acts is also determinative in this regard. In effect, servants and agents nautical faults exonerating carrier denote servant's absence of due diligence in the navigation and management of the vessel¹¹¹⁶. However, where navigational negligence is so extreme as to raise a presumption of incompetence of crew and, therefore, of vessel unseaworthiness before or at the beginning of the voyage, carrier is presumed liable and may only rebut this presumption by demonstrating that it exercised due diligence in selecting or training a competent crew¹¹¹⁷. This does not mean that a nautical fault should be confounded with vessel unseaworthiness. The former may take place during the journey and not only before or at the beginning of it as unseaworthiness does¹¹¹⁸. In this case where the nautical fault and unseaworthiness take place before and at the beginning of the journey, the carrier will be exonerated if he shows that a member of the crew was sufficiently negligent to justify the nautical fault defense but not so negligent as to have made the vessel unseaworthy before and at the beginning of the voyage¹¹¹⁹.

¹¹¹⁵ Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 159.

¹¹¹⁶ U.S.: Herbert R. Baer, *Admiralty Law of the Supreme Court* 3rd ed. (Charlottesville, VA: The Michie Company, 1979) at 511-512, Michael Sturley, "An Overview in the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 307, *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F. 2d 1321 (5th Cir. 1987) and *Van Muching [sic] & Co., Inc. v. M/V Star Mindanao*, 630 F. Supp. 433 (E. D. Pa. 1985). Canada: *National Wholesale Clothing Ltd. v. Coast Ferries Ltd.* [1975], F. C. J. No. 507 (F. C. C.) and *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.* [1950], S. C. R. 356 (S. C. C.).

¹¹¹⁷ U.S.: *Potomac Transport Inc. v. Ogden Marine Inc.*, 909 F. 2d 42 (2nd Cir. 1990). Canada: *Keystone Transports Ltd. v. Dominion Steel & Coal Corp.* [1942], S. C. R. 495 (S. C. C.) citing an English case on the issue. *N.M. Paterson & Sons Ltd. v. Robin Hood Flour Mills, Ltd.* [1968], 1 Ex. C. R. 175 (Ex. Ct). On this point see also the Lefebvre Guy, *L'Obligation de Navigabilité et le Transport des Marchandises sous Connaissance* (LL. M. Thesis, University of Montréal, 1986) at 21-23 [published in (1990) 31 Les Cahiers de Droit 81] and *supra* note 922 and accompanying text.

¹¹¹⁸ The vessel can be seaworthy before and at the beginning of the voyage but during the voyage improper ballasting may constitute a nautical fault exonerating carrier. *American Mail Line Ltd. v. United States*, 377 F. Supp. 657 (W. D. Wash. 1974).

¹¹¹⁹ I.e. the fact that a vessel sails with the doors open leading to wetting the cargo constitutes unseaworthiness. However, when a vessel sails with the doors open on purpose to light the hold, this is not

A nautical fault is always due to carrier servants, not to the carrier himself. The master, mariner and pilot are specifically provided by the Hague and the Visby Rules nautical fault exception as being carrier servants¹¹²⁰. Case law seems to add that officers, engineers, and other carrier employees will exonerate him in case of nautical fault¹¹²¹. Common and civil law agency principles apply to determine who qualifies as an agent and servant of the carrier¹¹²² with emphasis put on carrier control over the servant or agent to determine the agency relationship¹¹²³. Although it is not always clear where the line is drawn between an officer who acts as the carrier and an employee who acts as a servant, an assistant marine superintendent is considered to be an employee¹¹²⁴.

unseaworthiness but a nautical fault because the doors had not been closed once the vessel had sailed. As reported by Grant Gilmore, Charles L. Black, *The Law of Admiralty* (New York: The Foundation Press Inc., 1975) at 160 and Michael Sturley, "An Overview in the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 308. U.S.: *Usinas Siderurgicas de Minas Geras Sa-Usiminias v. Scindia Steam Nav. Co. Ltd.*, 118 F. 3d 328 (5th Cir. 1997) and *American Mail Line Ltd. v. United States*, 377 F. Supp. 657 (W. D. Wash. 1974). Canadian: *Maxine Footwear Co. v. CDN Government Merchant Marine Ltd.* (1957), S. C. R. 801 (S. C. C.) where carrier was held liable because of vessel unseaworthiness despite presence of a nautical fault. See also *C.N.R. v. E&S. Barbour Ltd* (1963), S. C. R. 323 (S. C. C.) and *N.M. Paterson & Sons Ltd. v. Robin Hood Flour Mills Ltd* [1968], 1 Ex. C. R. 175 (Ex. Ct.).

¹¹²⁰ Art. IV(2)(a) of the Hague, Visby Rules, 2001 MLA (Schedule III) and COGSA Sec. 1304(2)(a). See also U.S.: *Insurance Co. of North America v. S.S. Flying Trader*, 306 F. Supp. 221 (S. D. N. Y. 1969) and *Complaint of Grace Line Inc.*, AMC 1253 (S. D. N. Y. 1974) and Canadian: *Eisenerz G.m.b.H. v. Federal Commerce and Navigation Co. Ltd. (The Oak Hill)* (1974), 1974 S. C. R. 1225 (S. C. C.) for pilot's error in navigation.

¹¹²¹ *Miami Structural Iron Corp. v. Cie Nationale Belge De T.M.*, 224 F. 2d 566 (5th Cir. 1955) explained that the pilot, master, mariners, engineers or other persons in the service of the ship or for whose act the shipowner is liable, are envisaged by this exception. Although no Canadian case law or doctrine was found on the issue, English case law, source of inspiration for Canadian courts, seems to conclude in the same way. *Foscolo, Mango and Company, Limited and Others v. Stag Line Limited* [1931], 2 K. B. 48 (C. A.).

¹¹²² U.S.: Jody L. Mikasen, "Shipping (Officers and Pilots)" 70 *Am. Jur. 2d Shipping* § 264 (1987) WESTLAW (Tp-all) and Canadian *National Wholesale Clothing Ltd. v. Coast Ferries Ltd.* [1975], F. C. J. No. 507 (F. C. C.). for reference made to agency laws.

¹¹²³ Three are the common and civil law principles for an agency relationship to exist: an agency contract, carrier control over the agent and assent to perform respective duties. Art. 2130 of the Québec Civil Code, U.S. and Canadian common law principles. Carrier control over the agent is the most important element of this relationship because it justifies carrier liability for agents acts. Agent's nautical tasks are not delegable to independent contractors so that when stevedores commit a nautical fault, carrier will not be exonerated. U.S.: *Universe Tankships Inc v. Pyrate Tank Cleaners Inc.*, 152 F. Supp. 903 (S. D. N. Y. 1957). Canada *Sears Ltd. v. Murmansk Shipping Co. (C.A.F.)* [1988], A. C. F. No 529 (F. C. A.).

¹¹²⁴ U.S.: *Leval & Co. v. Colonial Steamships Ltd.*, (1960), Ex. C. R. 172 (Ex. Ct. C.) a Canadian court case decided on the basis of U.S. case law and Canadian *C.N.R. v. E & S. Barbour Ltd* (1963) S. C. R. 323 (S. C. C.) (English case law referred therein).

In land transport as well as in certain international conventions governing ocean and air carriage, there is no nautical fault carrier defense¹¹²⁵. The carrier is, therefore, liable for servants and agents negligent acts. The presence of ocean carrier nautical fault defense is said to be a great difference between sea, air and land transportation and a major obstacle in achieving a uniform multimodal carrier liability regime¹¹²⁶. Courts attribute the different statutory provisions to the fact that navigational errors at sea are not analogous to trucker's inability to follow a specified route on a highway¹¹²⁷.

Lack of uniformity of ocean and land carrier liability provisions is one of the reasons supporters of the abolition of the nautical fault exemption advance in advocating its elimination. They also argue that survival of the nautical fault exception protects the worst performers, increases shipper costs in insuring their goods, is incompatible with carrier duty to care for the cargo and is not supported by technological advances¹¹²⁸. Proponents of the nautical fault exemption argue that this carrier exemption operates as a protective shield for the carrier in case of grave occurrences (i.e. collisions) so that its abolition would increase litigation without having an effect on masters and officers conduct and, in any case, this defense is not very frequently invoked in litigation¹¹²⁹. They specifically state that the nautical fault liability exception works to spread loss among cargo underwriters, with little effect on the world's cargo premiums¹¹³⁰. From the opposition between carrier and

¹¹²⁵ The nautical fault exemption has also been abolished by the Hamburg Rules, Multimodal Convention as well as the 1929 Warsaw Convention on international air transport. For the Hamburg Rules and the Multimodal Convention see *supra* at 51.

¹¹²⁶ Leslie Tomasello Weitz, «The Nautical Fault Debate» (1998) 22 Tul. Mar. L. J. 581 at 591.

¹¹²⁷ *Vistar S.A. v. M/V Sea Land Express*, 792 F. 2d 469 (5th Cir. 1986) holding that contractual extension of ocean rules to the land segment of multimodal carriage does not apply to the nautical fault defense except if there exists clear intent of the parties to apply this exception to land transport. On this last point see *U.S.: Vistar S.A. v. M/V Sea Land Express*, 792 F. 2d 469 (5th Cir. 1986). *Canada: Glengoil Steamship Co. v. Pilkington* (1897), 28 S. C. R. 146 (S. C. C.) where the BOL extended to the railway company the 'error in judgment of the pilot, master, mariners or other servants of the ship owners' liability exemption. See also *Union Steamship Co. of British Columbia v. Drysdale* (1902), 32 S. C. R. 379 (S. C. C.).

¹¹²⁸ Leslie Tomasello Weitz, «The Nautical Fault Debate» (1998) 22 Tul. Mar. L. J. 587.

¹¹²⁹ *Ibid* at 587-588. Masters have interest to act diligently since the opposite would adversely affect their records and could lead to criminal liability. *Ibid*.

¹¹³⁰ Samuel Robert Mandelbaum, «International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay» (1995) 5 J. Transnat'l. L & Pol'y 1 at 28.

shipper arguments we can conclude that the impact of elimination of the nautical fault liability exception on carrier liability is difficult to quantify¹¹³¹.

Because of the strong opposition between carrier and shipper interests, Pr. Mandelbaum suggests that, rather than maintain a complete exception, a *qualified nautical fault* defense would be equitable to both sides of the debate. Under the suggested concept, the ship owner would have the burden of proof of lack of control or lack of knowledge of captain or crew acts (faults) in the operation or management of the vessel due, i.e., to concealment, in order to be exonerated¹¹³². Otherwise, he would be liable for damage to or loss of the goods in case of nautical fault. In considering multimodal carrier uniform liability rules such intermediate solutions between abolition or maintenance of the nautical fault exception need to be taken into account.

¹¹³¹ *Ibid.*

¹¹³² *Ibid* at 38.

Section II: Limitation of Multimodal Carrier Liability in the U.S. and Canada

In moving international shipments the shipper wishes to minimize his freight costs and maximize the chance of full recovery in the event of damage. A carrier, on the other hand, desires to maximize shipper freight costs and minimize his exposure to liability¹¹³³. Depending on the country and mode, however, the flexibility in delineating carrier liability limitation varies and is fixed by statute, treaty or convention¹¹³⁴. We will herein examine limitation of motor **Par. 1** rail **Par. 2** and ocean **Par. 3** carrier liability.

Paragraph 1. Limitation of Motor Carrier Liability: We will first examine motor carrier limitation of liability in the U.S. **(A)** and Canada **(B)** before presenting loss of motor carrier limitation benefit in both countries **(C)**.

A. U.S. Motor Carrier Limitation of Liability: Carmack Amendment 49 U.S.C. § 14706(C)(1)(A) provides that U.S. motor carriers are liable for the ‘actual loss or injury’ of transported goods except if parties explicitly agree to limit, though not contractually exclude, carrier liability for negligence¹¹³⁵. ‘Actual loss or injury’ is ordinarily measured by the reduction in market value *at destination* or by replacement or repair costs occasioned by the harm¹¹³⁶. Courts are divided on whether freight charges make part of goods ‘actual’ value and are, therefore, recoverable whereas incidental damages to the contract of transport are always recoverable¹¹³⁷. Although delay seems to be outside the scope of Carmack Amendment ‘actual loss or injury’, U.S. case law renders motor carrier liable for unreasonable delay in delivering goods unless otherwise agreed by the parties¹¹³⁸. Finally, consequential damages reasonably contemplated by the parties in case of loss, damage or delay will also be compensated¹¹³⁹.

¹¹³³ Nancy A. Sharp, “What is a COGSA Package” (1993) *Pace. Int’l. L. Rev.* 115 at 134.

¹¹³⁴ Saul Sorkin, «Limited Liability in Multimodal Transport» (1989) 13 *Tul. Mar. L. J.* 285 at 296.

¹¹³⁵ If a lower value is declared, agreed upon or determined by tariff, this will apply unless otherwise contractually provided. Sec. 5(a) of American Freightways BOL in *Annex No. I, Table 4 (bis)* at lii, *Annex No. III, Table No. 9* at cxcv and Sec. 1(B)(3) of the American Freightways tariff *Annex No. I, Table No. 4* at l. Contractual exclusion of motor carrier liability is prohibited. *Supra* at 178.

¹¹³⁶ 49 U.S.C.A. § 14706. *Camar Corp. v. Preston Trucking Co. Inc.*, 221 F. 3d 271 (1st Cir. 2000). *Annex No. III, Table No. 9* at cxcv.

¹¹³⁷ *Annex No. III, Table No. 9* at cxcv. For a good analysis of freight charges see *Contempo Metal Furniture Co. of California East Texas Motor Freight Lines Inc.*, 661 F. 2d 761 (9th Cir. 1981) and for incidental damages see *American Telegraph & Telephone Inc. v. Con-Way Southern Exp. Inc.*, 1996 WL 24763 (N. D. Cal. 1996).

¹¹³⁸ White & Summers, “Uniform Commercial: Carriage Of Goods Covered By Bills Of Lading, Rights of Shipper Against Carrier” *WS-UCC-TOC* (1995) online: WESTLAW (Tp-all) and *Richter v. North American Van Lines Inc.*, 110 F. Supp. 2d 406 (D. Md. 2000).

¹¹³⁹ U.S.: H. N. Cunningham, «Transborder-Road Transportation» (1992) 23 *St. Mary's L. J.* 801 at 813 on the foreseeability test of consequential damages (natural and probable consequence of damage to goods including

Possibility of contractual limitation of liability has permitted U.S. motor carriers to lower their liability sometimes to levels equal or lower to the prescribed by regulation Canadian liability amounts¹¹⁴⁰. This, however, does not occur often and virtually all U.S. motor carriers today limit their liability to 25\$USD ‘per pound’, ‘per piece’ lost or damaged or 100.000\$USD ‘per shipment’ whichever is lower (contractual uniformity)¹¹⁴¹. “Per shipment” means “per container” because motor carrier tariffs for containers are determined on a “per container” basis¹¹⁴². The ‘per piece’ gimmick finds its origins in air transport and applies carrier weight limitation to the weight of the property lost or damaged instead of the weight of the entire shipment¹¹⁴³. Same liability limitations apply to U.S. motor container transport¹¹⁴⁴. Volume shipments as well as certain commodities (i.e. transport of paintings, electronics), however, may be subject to specific limitations¹¹⁴⁵. Apart from specific standardized liability limits, confidential contracting of motor carrier liability limitations is possible and actually practiced by U.S. motor carriers¹¹⁴⁶.

intentional infliction of emotional distress). *Gordon v. United Van Lines Inc.*, 130 F. 3d 282 (7th Cir. 1997), *Rosenthal v. United Van Lines*, F. Supp. 2d 2001 WL 1561550 (N. D. Ga. 2001). On contractual provisions on delay see *Co-operative Shippers Inc. v. Atchison Topeka and Santa Fe Ry.Co.*, 613 F. Supp. 788 (N. D. Ill. 1985).

¹¹⁴⁰ See *supra* at 123s.

¹¹⁴¹ William J. Augello, *Logistics Issues Your Providers Usually do not Talk About* (1999) online : Supply Chain & Logistics Journal <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000). This limitation does not normally appear on motor carrier BsOL but it is generally applicable on the basis of carrier tariffs. See i.e. American Freightways *Rules Tariff 125-J*, Item 420 (1)(B)(3) online: American Freightways Homepage <http://www.af.com/tariff_arfw_125g.asp> (last visited : Jan. 31, 2002). *Annex No. I, Table No. 4* at 1 and *Annex No. III, Table No. 9* at excv.

¹¹⁴² On the basis of U.S. Carmack Amendment case law, the “per shipment” limit is determined by applicable tariffs or special written agreement, as we will see this being the case for rail carriage. *Bio-Lab Inc. v. Pony Exp. Courier Corp.*, 911 F. 2d 1580 (11th Cir. 1990), *Esprit De Corp v. Victory Express*, 225 F. 3d 662 (9th Cir. 2000), *Insurance Co. of North America v. NNR Aircargo Service (USA) Inc.*, 201 F. 3d 1111 (9th Cir. 2000). Shippers have to be aware, however, that there are companies like American Freightways that apply a 100.000\$USD limitation ‘per incident’ which quite differs from the ‘per shipment’ limitation and is applicable to the entire shipment. American Freightways *Rules Tariff 125-J*, Item 420 (1)(B)(3). *Annex No. I, Table No. 4* at 1.

¹¹⁴³ In 1977, the Civil Aeronautics Board ordered airlines to increase their unreasonably low liability limit of 0.50\$USD per piece to the Warsaw Convention level (9.07\$USD per pound). International airlines applied the 9.07\$USD limitation only to the weight of the pieces that were lost or damaged and not to the weight of the entire shipment. Motor carriers adopted the same rule on partial losses which substantially reduced claimants recoveries without any reduction on freight rates. William J. Augello, “The Evolution of Liability Limitations” *Log. Mgmt* (2001) online: WESTLAW (Newsletters). *Small Businessman's Guide to Shipping via Trucklines* (2000) online: Transport Law Homepage <<http://www.transportlaw.com/tcpc/smallbusinessman.htm>> (last visited: Dec. 2001).

¹¹⁴⁴ This seems to be the practice of American Freightways. Interview of the author with customer service of American Freightways, (Dec. 21, 2001 and Jan. 29, 2002).

¹¹⁴⁵ This seems to be the practice of American Freightways. Volume shipments, such as 20 feet container and/or 16.000 pounds or more of shipment, are subject to the specific limitation of 1\$USD per pound following American Freightways rules. Interview of the author with American Freightways Intermodal personnel (Jan. 31, 2002). This is not a confidential contract, it is a standard contract sent to interested shippers. William Augello, “Avoid the Liability-Limitation Trap” *Log. Mgmt* (2001) online: WESTLAW (Newsletters).

¹¹⁴⁶ *Supra* at 119.

B. Canadian Motor Carrier Limitation of Liability: Canadian CUBOL clause 10 limits motor carrier liability to 4.41\$CAD ‘per kilo’ or 2.00\$CAD ‘per pound’ computed on the total weight of the shipment¹¹⁴⁷. This has been interpreted to mean ‘weight of lost items with respect to the weight of the whole shipment’ (as in the U.S.)¹¹⁴⁸. Said limitation, much lower than its 25\$USD counterpart but higher than the 1\$USD high-volume container limit, is also applicable to international container trade¹¹⁴⁹. BOL Clause 9, (Valuation of shipper loss including shipper declaration of value or agreed upon amounts), provides that shipper loss represents the difference between goods market value *at the time of shipment* and their market value at the time of the breach¹¹⁵⁰. The same clause also provides that shipper can recover freight and ‘other charges’, meaning incidental payments to the transport contract¹¹⁵¹. Although delay seems to be outside the scope of CUBOL clause 10 ‘any loss or damage’, CUBOL clause 6 retains motor carrier liability for unreasonable delay in delivering goods unless otherwise agreed upon by the parties¹¹⁵². Consequential damages reasonably contemplated by the parties will also be compensated¹¹⁵³.

¹¹⁴⁷ CUBOL Clause 10 reads: ‘The amount of any loss or damage computed under paragraph (a) or (h) of Clause 9 shall not exceed 4.41\$CAD per kilogram computed on the total weight of the shipment unless a higher value is declared on the face of the bill of lading by the consignor’. The 2.00\$CAD amount is in Imperial measure and the figure is entirely due to legislative policy decision. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 117. *Annex No. I, Table No. 5* at lv-lxv and *Annex No. III, Table No. 9* at cxcv.

¹¹⁴⁸ *Trafi-Tech Inc. v. Transport All Type/Division de Jerry Cohen Forwarders Ltd.* (1999), J. Q. no. 2571 (Que. C.). *Supra* at 142-143. The case insists on interpretation of BOL Clause 10 and concludes that the holding is conform to the civil code and the laws of Québec. Such conclusion probably puts an end to the doctrinal discussion on whether the limitation amount is based on the total weight of the shipment or the weight of the lost or damaged property to which the case referred. Proponents of the former view suggest that this is the literal interpretation of the BOL that reflects legislative intent that carrier maximum liability is the same whether the loss is total or partial. Proponents of the latter view argue that BOL language refers to the total loss of the shipment so that a partial loss has to be computed differently. The reason for the dispute is that if the carrier knows that its liability is the same in case of total or partial loss of the cargo, when partial loss occurs he may ensure a total disappearance of the freight, knowing that his liability will remain same. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 121-123. For the U. S. see *supra* at 230.

¹¹⁴⁹ This seems to be the practice of mentioned transport companies. Interview of the author with two Canadian motor carrier companies personnel (Liaison Can / US Courier Inc. and Manitoulin) (Dec. 17, 2001 and Jan. 31, 2002).

¹¹⁵⁰ John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 168 referring to *David McNair & Co. Ltd. v. Trade Wind* [1954], Ex. C. R. 450 (Ex. C. C.) cited more recently by *Redpath Industries Ltd. v. The "Cisco"* (1993), 110 D. L. R. (4th) 583 (F. C. A.). *Annex No. I, Table No. 5* at lv-lxv and *Annex No. III, Table No. 9* at cxcv.

¹¹⁵¹ This may also include custom duties paid by the carrier even though these appear separately from ‘other charges’ in rail BsOL and motor case law. *Bank of Montréal v. Overland Freight Lines Ltd.* [1989], B. C. J. No. 572 (B. C. S. C.) and John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 174.

¹¹⁵² CUBOL clause 6 provides: “no carrier is bound to transport the goods by any particular vehicle or in time for any particular market or otherwise than within due dispatch, unless by agreement specifically endorsed on the bill of lading and signed by the parties thereto”. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 73. *Annex No. I, Table No. 5* at lv-lxv.

¹¹⁵³ *Cathcart Inspection Services Ltd. v. Purolator Courier Ltd.* (1982), 39 O. R. (2d) 656 (Ont. C. A.). On the foreseeability test (direct and natural consequences of the breach which may include mental distress) *Canada v.*

Even though Québec courts exclude contractual limitation of motor carrier liability, Canadian common law courts have held that lower than statutory (tariff) limitations will be taken into account by courts¹¹⁵⁴. What is theoretically possible, however, does not seem to be used in practice by Canadian motor carriers involved in intermodal transport of goods or otherwise¹¹⁵⁵. This is probably because uniformity of, lower than U.S., Canadian motor carrier liability amounts is achieved by means of an interprovincial agreement not present in the U.S. where contractual uniformity, easier to deviate, reigns. U.S. carrier use of liability limitation amounts as low as 1\$U.S. does not seem to have created a threat to Canadian motor carrier industry although this should not be excluded in the future.

U.S. motor carriers have attempted to convince Congress to adopt a lower liability limitation similar to the one used by Canadian truckers but U.S. shippers disagree and the dispute is essentially one between carriers and shippers¹¹⁵⁶. Shippers and the U.S. DOT insist on Carmack Amendment provisions rejecting Canadian limitation as too low, only covering 50 to 70 percent of the value of goods being transported by truck¹¹⁵⁷. An agreement on motor carrier liability limitations is fundamental since it affects how quickly NAFTA becomes a reality¹¹⁵⁸. Difference in motor carrier liability limits in the two countries and U.S. motor carrier more frequent use of contractual limitation of carrier liability than their Canadian counterparts are the two major obstacles in achieving motor carrier uniformity in the U.S. and Canada.

Hochelaga Shipping & Towing Co. [1940], S. C. R. 153 (S. C. C.) and John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 120 and at 178, 185 and 75.

¹¹⁵⁴ *Bank of Montréal v. Overland Freight Lines Ltd.* [1989], B. C. J. No. 572 (B. C. S. C.). See also John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 167-168. *Supra* at 138s.

¹¹⁵⁵ This seems to be the practice of herein mentioned transport companies. Québec: Interview of the author with Liaison Can/U.S. Courrier Inc. personnel located in Montréal (Jan. 31 and May 22, 2002) and container shipment expert of Big Freight Inc. located in Manitoba (Feb. 1, 2002) for common law provinces. This also excludes the possibility of confidential contracting. *Ibid. Supra* at 143-144.

¹¹⁵⁶ *The Transportation Consumer Protection Council Inc.* (1999) online: Transport Law Homepage <<http://www.transportlaw.com/tcpc/td.htm>> (last visited: July 30, 1999) on carrier proposal to adopt Canadian limits on limitation of liability. Rip Watson, "Liability Meeting Held Key to NAFTA Market Access for Trucks" *J. Com.* (1995) online: WESTLAW (Newsletters).

¹¹⁵⁷ Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 *Am. J. Comp. L.* 403 at 411. William J. Augello, *Logistics Issues Your Providers Usually do not Talk About* (1999) online: Supply Chain & Logistics Journal <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000).

¹¹⁵⁸ Rip Watson, "Liability Meeting Held Key to NAFTA Market Access for Trucks" *J. Com.* (1995) online: WESTLAW (Newsletters). On a recent initiative in this regard see *infra* at 300.

C. Loss of U.S. and Canadian Motor Carrier Limitation Benefit: Through case law study we learn that, unlike liability exceptions, U.S. and Canadian statutory or contractual limitations will survive carrier and servants negligence¹¹⁵⁹.

Where carrier non-performance amounts to fundamental breach in Canadian common law provinces (or rupture de contrats in Québec), liability limitation provisions will be of no avail to him¹¹⁶⁰. Fundamental breach and its Québec counterpart refer to carrier non-performance of an agreement that goes to the root of the contract¹¹⁶¹. Fundamental breach also requires intent to renounce or repudiate the contract¹¹⁶². In this respect, intentional or willful misconduct, the latter referring to carrier knowledge that damage might occur from its actions¹¹⁶³, will lead to loss of carrier limitation benefit¹¹⁶⁴.

¹¹⁵⁹ William J. Augello, *Logistics Issues Your Providers Usually do not Talk About* (1999) online: Supply Chain & Logistics Journal Homepage <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000) for the U.S and Canada. Canada: CUBOL Clause 9 refers to limitation of liability amount no matter carrier negligence and John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 117. U.S.: *Praxair Inc. v. Mayflower Transit Inc.*, 919 F. Supp. 650 (S. D. N. Y. 1996).

¹¹⁶⁰ *Annex No. III, Table No. 9* at cxvii. Common law provinces: *Bill Le Boeuf Jewellers of Barrie v. B.D.C. Ltd.* [1982], O. J. No. 1626 (Ont. C. A.) and John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 126s. G.H.L. Fridman, *The Law of Contract in Canada* (Canada: Carswell, 1994) at 565. On the Québec equivalent of fundamental breach see William Tetley, *Marine Cargo Claims* 3rd ed. (Montréal: International Shipping Publications, 1988) at 99 although the literal translation of fundamental breach is 'violation (inexécution) fondamentale'. Rupture de contrats actions may be based on resolution, rescission (both referring to the performance of the contract with the latter applying to successive contracts) or nullity (vice in contract formation) of contracts. Resolution actions approach the closest the fundamental breach concept. *Ibid* at 101, 99 and *O'Connor v. Omega Engineering Inc.* (1999) [2000], R. J. Q. 243 (Qué. S. C.), *Assoc. des Manoeuvres Interprovinciaux v. Assoc. des Employés du Syndicat du Québec* [1998], A. Q. no 1103 (Qué. S. C.). The rupture de contrats concept is broader than that of fundamental breach that only refers to contract performance, not its formation.

Servant's fundamental breach engages carrier liability on the basis of agency laws. *Sti-Tech Business Systems Ltd. v. Purolator Courrier Ltd.* (1996), A. J. N. 1157 (Alta. Pr. Ct. CD), *P. A. B. v. Curry* (1997), B. C. J. No. 692 (B. C. C. A.). These will not retain our attention.

¹¹⁶¹ G. H. L. Fridman, *The Law of Contract in Canada* (Canada: Carswell, 1994) at 565. Non-performance should not be confounded with negligent performance, the latter not occasioning carrier loss of his limitative benefits. *Monta Arbre Farms v. Inter-Traffic (1983) Ltd.* (1988), 10 A. S.C. W. S. (3d) 244 (Ont. H. C.), *Saint John Shipbuilding Ltd. v. Snyders (C.A.N.-B.)* [1989], A. N.-B. no 814 (C. A. N. B.). Jean Louis Baudouin, Pierre Gabriel Jobin, *Les Obligations* 5th ed. (Cowansville, Québec: Les Éditions Yvon Blais, 1998) at 586 stating that a 'faute légère' in not performing a contract is not enough to justify a resolution action.

¹¹⁶² *Kwick Clean v. Ledingham* (1999), B. C. J. No.1897 (B. C. S. C.) also citing *Tomenson v. Saunders WhiteHead Ltd.* (1987), 43 D. L. R. (4th) 346 (B. C. C. A.). Civil law resolution concept does not require intentional misconduct to exist making this concept more shipper protective than the fundamental breach concept.

¹¹⁶³ *Grand Truck Railway Co. of Canada v. Fitzgerald* (1881), 5 S. C. R. 204 (S. C. C.) and *A. L. Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.* (1959), S. C. R. 271 (S. C. C.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 130. We should note, however, that the distinction between intentional and willful misfeasance is not clear in Canada and courts often refer to willful misconduct with respect to an intentional tort. Moreover, although cases usually mention intentional or willful acts, they imply more than mere acts.

¹¹⁶⁴ *Meditek Laboratory Services Ltd. v. Purolator Courrier Ltd.* (1995), 125 D. L. R. (4th) 738 (Man. C. A.), *Premier Lumber Co. v. G. T. P. Rwy Co.* (1923), S. C. R. 84 (S. C. C.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 130. From Québec case law definitions of 'faute intentionnelle' we have concluded that it is not clear whether there must be an intent to act or, instead, an intention to cause damage. *Supra* note 530. U.S. courts define intentional fault as more than an intent to act if not an intent to cause harm. *Infra* note 1176 and accompanying text.

It is only in Québec that gross negligence ('faute lourde') will also lead to same result¹¹⁶⁵. Assimilation of *faute lourde* to *dol* may be considered a delicate issue in the province of Québec¹¹⁶⁶ but some courts seem to decide, still, that such assimilation is valid¹¹⁶⁷.

In all cases, the breach may be a geographical or other deviation from contractual terms¹¹⁶⁸ that lead to loss of carrier limitation benefit¹¹⁶⁹. However, if the breach in question is in the contemplation of the contracting parties at the time of contracting, maximum liability will survive the breach¹¹⁷⁰. Parties sophistication, experience, knowledge in commercial dealing will be considered in determining the true construction of the contract¹¹⁷¹. In case of ambiguity, courts apply the *contra preferentem* rule

¹¹⁶⁵ *Annex No. III, Table No. 9* at excvi. Québec: Art. 1474 of the Québec Civil Code holds beneficiary of contractual exclusions liable in case of intentional fault or 'faute lourde'. (motor) *Bagatelle Canada Inc. v. Jerry Cohen Forwarders Ltd.* (1988), 10 A. C. W. S. (3d) 94 (Qué. C. A.), *Pigeon v. Purolator Courrier ltée C. Q. Abitibi* (1994), J.E. 95-316 (Q. C.), *Pafco, Compagnie d'Assurances ltée v. Federal Express Canada ltée* (1997), J. E. 97-886 (Q. C.) and *Blondeau c. Excellent Van Lines Inc.* (1998), B. E. 98BE-551 (Qué. S. C.) citing Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 85 and 70. This is not so in the rest of Canada and the U.S that limit carrier liability in case of gross negligence. Canada (common law provinces): John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 130. U.S. *Praxair Inc. v. Mayflower Transit Inc.* (1996) 919 F. Supp. 650 (S. D. N. Y.) and *White v. United Van Lines Inc.*, 758 F. Supp. 1240 (N. D. Ill. 1991).

¹¹⁶⁶ Jean Pineau, Serge Gaudet, *Théorie des Obligations* 4th ed. (Montréal: Éditions Thémis, 2001) at 799 on the basis of art. 1474 of the 1994 Québec Civil Code which does not assimilate 'faute lourde' to 'dol' as art. 1074 and 1075 of the C. C. B. C. did, but defines 'faute lourde' as gross recklessness, gross carelessness or gross negligence. *Supra* note 543.

¹¹⁶⁷ *Chubb Insurance Co. of Canada v. Kingsway Transports Ltd.* [1997], A. Q. no 375 (Qué. C. A.), *Riquet v. Royal Aviation Inc. (f.a.s. Royal)* [2000], J. Q. no 1297 (Ct. Qué. CD).

¹¹⁶⁸ Cases reported by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 76-77, Québec non transport case *Breuvages Cott Ltée v. Breuvico Inc.* (1990), J. E. 90-1054 (Qué. S. C.). Mr. McNeil argues that although it is tempting to conclude that deviation constitutes a fundamental breach case, there is a substantial difference between the two doctrines, the former concerns carrier performance of the contract of carriage whereas the latter refers more to the effects of carrier non-performance. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 78.

¹¹⁶⁹ Fundamental breach doctrine developed as a device applicable to contract exclusion clauses impeding the defaulting party to rely on them. M.H. Ogilvie, "Fundamental Breach Excluded but not Extinguished: *Hunter Engineering v. Syncruse Canada*" (1991) 17 Can. Bus. L. J. 75 at 86 for sea and land transport contracts. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 101. Today, fundamental breach also allows parties to end a contract as rupture de contrats does. *Nowlan v. Midland Transport (c.o.b. Polar Bear Transport)* [1996], N. B. J. No. 88 (C. A. N. B.) and *Hines v. Johnson* [1986], B. C. J. No. 2043 (B. C. S. C.). Civil law resolution actions (most closely resembling fundamental breach), on the other hand, will either abrogate the contract or ask for its specific performance in which case contractual provisions and limitations should be respected except in case of intentional, willful misconduct or gross negligence. William Tetley, *Marine Cargo Claims* 3rd ed. (Montréal: International Shipping Publications, 1988) at 104.

¹¹⁷⁰ John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 126. (motor) *Bill Le Boeuf Jewellers of Barrie v. B. D. C. Ltd* [1982], O. J. No. 1626 (Ont. C. A.), *Peter Cortesis Jeweller Ltd v. Purolator Courrier Ltd* (1981), 35 O. R. (26) 39 (Ont. Co. Ct). 1994 Québec Civil Code art. 1425 provides that it is parties intention that should be taken into account in interpreting a contract.

¹¹⁷¹ *Hunter Engineering Co. v. Syncrude Canada Ltd* (1989), 57 D. L. R. (4th) 321 (S. C. C.) (authority case in Canada on fundamental breach, also applicable to transport cases) held that if a contract is unconscionable, exemption clauses in it will not be given effect. Unconscionability implies consideration of equitable elements, mainly equality of bargaining power, sophistication and parties experience. John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 126s, (air transport) *Holt Renfrew & Co. v. Burlington Northern Air Freight (Canada) Ltd.* (1990), O. J. No. 1579 (Ont. C. A.). Art. 1426 of the Québec Civil Code also refers to taking into account all the circumstances in which the contract took place.

according to which the contract is construed adversely to its author so that carrier protective provisions will not be available to him¹¹⁷².

The U.S. equivalent of fundamental breach, the admiralty unreasonable deviation doctrine¹¹⁷³, has not been transposed to Carmack (land) transport cases. Courts content that this is a doctrine of purely admiralty origin with no application in the context of air and land transport¹¹⁷⁴. However, it has been consistently held that when land and ocean carriers intentionally and unjustifiably deviate from specified route (geographical deviation) they are liable as insurers of cargo and cannot invoke contractual limitative clauses¹¹⁷⁵. U.S. courts seem to refer equally to intentional and voluntary (willful) deviations in this regard¹¹⁷⁶. Failure of contractual or statutory limitative provisions because of fraud is justified by public policy reasons¹¹⁷⁷.

¹¹⁷² See cases referred to by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 128. The *contra preferentem* is a rule of contractual construction also applicable to transport contracts specifically. See William Tetley, *Marine Cargo Claims* 3rd ed. (Montréal: International Shipping Publications, 1988) at 861-862 (ocean transport). On this rule, see also 1994 Québec Civil Code art. 1432.

¹¹⁷³ For the concept of unreasonable deviation see *supra* at 217s. Unreasonable deviation concerns carrier non-performance (going to the essence of the contract) rather than carrier negligent performance. *Praxair Inc. v. Mayflower Transit Inc.*, 919 F. Supp. 650 (S. D. N. Y. 1996).

U.S. law is familiar with the concept of fundamental breach that it defines in the same way as Canada, meaning that it concerns an intentional or willful breach that goes to the essence of the contract and is not contemplated by the parties. Unreasonable deviation is but one kind of fundamental breach. The concept of fundamental breach was added to the unreasonable deviation line of cases by the ocean case *Berisford Metals Corp. v. S/S SALVADOR*, 779 F. 2d 841 (2nd Cir. 1985). Stanley L. Gibson, "The Evolution of Unreasonable Deviation under U.S. COGSA" (1991) 3 U. S. F. Mar. L. J. 197 at 224 and Chester D. Hooper, "Carriage of Goods and Charter Parties" (1999) 73 Tul. L. Rev. 1697 at 1719. Jo Desha Lucas, "Admiralty and Maritime Law" (1987) 62 Tul. L. Rev. 1491 at 1503 and Harry M. Flechtner, "Remedies under the New International Convention: the Perspective from Art. 2 of the U. C. C." (1988) 8 J. L. & Com. 53 at 76.

¹¹⁷⁴ *Conoco Inc. v. Andrews Van Lines Inc.*, 526 F. Supp. 720 (D. C. Okl. 1981) for motor transport. For the explanatory reasons see railway case *Minneapolis Society of Fine Arts v. Railway Express Agency Inc.*, 213 F. Supp. 129 (D. Minn. 1963) referred to in *Conoco*.

¹¹⁷⁵ *Annex No. III, Table No. 9* at cxvii. *Lichten v. Eastern Airlines Inc.*, 189 F.2d 939 (2d Cir. 1951), "Carriers: Rights, Duties and Liabilities" (2000) 11 Tex. Jur. 3d Carriers § 310 at §377 (WESTLAW-Tp-all) referring to cases that denied carrier the benefit of the liability defenses and of the limitation benefit. For all modes, carrier servant's unreasonable deviation engages carrier liability on the basis of agency laws. "Deviation from Route, Schedule or Mode of Travel" 9 *Couch on Ins. par.135:23* (3rd ed.) (1997) online: WESTLAW (Tp-all). On agency laws see *supra* note 1123.

¹¹⁷⁶ *Opp v. Wheaton Van Lines Inc.*, 56 F. Supp. 2d 1027 (N. D. Ill. 1999), *Hughes v. United Van Lines Inc.*, 829 F. 2d 1407 (7th Cir. 1987) and case law cited by *Duerrmeyer v. Alamo Moving and Storage One Corp.*, 49 F.Supp. 2d 934 (W. D. Tex. 1999) also referring to conversion and fraud. *A.T. Clayton & Co. Inc. v. Missouri-Kansas-Texas R. Co.*, 901 F. 2d 833 (10th Cir. 1990) (frequently cited ever since) stating that willful misconduct will deny carrier its limitation benefit and Jeanne Kaiser: "Moving Violations: An Examination of the Broad Preemptive effect of the Carmack Amendment" (1998) W. NewEngl. L. Rev. 289s on this point. See *infra* at 251 on the willful misconduct translating into a voluntary fault.

U.S. and English case law on willful misconduct refers to carrier *intention* to cause damage or *consciousness* that damage will probably result. The U.S. concept of intentional fault denotes something more than malicious intent to act, if not intent to cause damage. *Supra* note 532 and accompanying text.

¹¹⁷⁷ U.S.: *Bates v. Southgate*, 308 Mass. 170 (S. C. Mass. 1941).

In the more recent and consistently cited ever since *Praxair Inc. v. Mayflower Transit Inc.* holding, U.S. court denied land carrier BOL liability limitations in motor or rail traffic because of carrier failure to abide by shipper specialized safety measures for which an additional charge was paid¹¹⁷⁸. By allowing principally geographical deviations to deny carrier the limitation benefit, U.S. law is more carrier protective than Canadian fundamental breach doctrine that embraces a larger scope of deviations¹¹⁷⁹. As in the case of Canadian fundamental breach, however, U.S. unreasonable deviation should not be within parties contemplation.

In summary, in both Canada and the U.S. we need a breach that goes to the essence of the contract and is not contemplated by the parties in order to deny carrier beneficial limitative provisions [fundamental breach (Canada), rupture de contrats (Québec) and unreasonable deviation (U.S.)]. Breaches that produce this effect relate to contract performance and are combined with or, in certain cases, exist independently from gravity of carrier or servant's fault (intentional, willful misconduct, gross negligence). The nature of breach differs in Canada, Québec and the U.S. since geographical deviations will principally lead to loss of the limitation benefit in the U.S. whereas Canada (including Québec) adopts a more shipper protective position in awarding the said effect to both geographical and other deviations. Moreover, Québec courts very strict carrier stance in depriving grossly negligent carrier its limitation benefit is attenuated by the more *pro* carrier Canadian and U.S. case law reference to intentional or willful misconduct (deviations) with respect to fundamental breach or unreasonable deviations. In all mentioned cases judges are left with a great margin of appreciation.

Paragraph 2. Limitation of Rail Carrier Liability: Canadian and U.S. rail statutory and, thus, BOL provisions permit parties to contractually limit carrier liability¹¹⁸⁰. In this way, railways in both countries have elaborated specific tariffs to govern international intermodal traffic. Even though we cannot examine liability terms

¹¹⁷⁸ 919 F. Supp. 650 (S. D. N. Y. 1996) later cited by *Nippon Fire & Marine Ins. Co. Ltd. v. Skyway Freight Systems Inc.*, 45 F. Supp. 2d 288 (S. D. N. Y. 1999) and *The Limited Inc. v. PDQ Transit Inc.*, 160 F. Supp. 2d 842 (S. D. Ohio 2001) that refused to extent *Praxair's* effect to other deviations. *Seetapun v. Illinois-California Express Inc.*, 518 P. 2d 885 (S. C. Okl. 1973), (frequently cited ever since), held that carrier deviation from agreed upon packing, stowing or transporting of goods also denies carrier the limitation benefit. *Annex No. III, Table No. 9* at cxvii.

¹¹⁷⁹ This is an important difference according to William Augello. William J. Augello, *Logistics Issues Your Providers Usually do not Talk About* (1999) online: Supply Chain & Logistics Journal <<http://www.infochain.org/quarterly/Nov99/Augello.html>> (last modified: April 25, 2000). *Annex No. III, Table No. 9* at cxvii.

and conditions applicable to all Canadian and U.S. rail companies, we will take the representative examples of Canadian National Railways (CN) and Burlington Northern Santa Fe Railways (BNSF)¹¹⁸¹. Both company's tariffs provide that when tariffs are inapplicable BsOL provisions will take effect so that study of both BOL and tariff provisions on rail carrier liability limitation is imposed¹¹⁸².

We will first examine Canadian and U.S. rail carrier limitation of liability (A) and then analyze loss of Canadian and U.S. rail carrier limitation benefit provisions (B).

A. *Canadian and U.S. Rail Carrier Limitation of Liability*: Canadian and U.S. rail statutory and, therefore, BsOL provisions hold rail carriers liable for actual physical damage to the goods [based on their market value *at shipment* (Canada) or *at destination* (U.S.)] and for incidental transportation charges¹¹⁸³. U.S. case law and Canadian BsOL and case law also hold carrier liable for unreasonable delay and contemplated consequential damages unless otherwise agreed upon by the parties¹¹⁸⁴.

¹¹⁸⁰ On the effect of deregulation on contractual limitation of carrier liability see *supra* at 124 and 137-138.

¹¹⁸¹ *Annex No. I, Tables No. 6, 7* at lxvi and at lxxxix. Accessorily, references will be made to other railway companies such as Norfolk Southern Railways (NS) and Canadian Pacific (CP) as well. *Annex No. I, Tables No. 6(bis), 8* at lxxvi and at xcii respectively. CN and CP lines cover all Canadian territory. BNSF and NS cover all U.S. territory. *Annex No. III, Table No. I* at clxxx-clxxxi.

¹¹⁸² *Supra* notes 856 and 903 and accompanying text.

¹¹⁸³ *Canada*: Sec. 4 of the *Railway Traffic Liability Regulations* applying the *National Transportation Act* and reproduced in the CN and CP BsOL refers to 'any loss damage or delay' measured *at the time of the shipment* by the difference between the market value of the goods at the time of shipment and their market value at the time of the breach. *David McNair & Co. Ltd. v. Trade Wind* [1954], Ex. C. R. 450 (Ex. C. C.) recently stated by (ocean) *Redpath Industries Ltd. v. The "Cisco"* (1993), 110 D. L. R. (4th) 583 (F. C. A.). This means that if there is an increase in value in transit, the increase will not be recovered. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 84. Under CN and CP BsOL 'Valuation' clause, the lesser value of either the value represented by the shipper, agreed upon by carrier and shipper or determined by tariff will be taken into account to determine shipper loss at the time of shipment. The same provision stipulates that shipper indemnity will include freight, 'other charges' and custom duties. *Annex No. I, Table No. 9* at cxi and at civ-cv. 'Other charges' means direct and incidental to ordinary transport contract charges such as taking goods from railway storage house and other shipping costs. *North-West Line Elevators Association v. Canadian Pacific Ra.* [1959], S. C. R. 239 (S. C. C.), *Sparling v. D.H. Howden and Co.* [1970], S. C. R. 883 (S. C. C.). *U.S.*: Carmack Amendment 49 U. S. C. A. §§ 11706(a) and U. S. case law 'actual loss or injury' is based on the difference between the market value of goods in the condition in which they should have arrived *at destination* (common law rule) and their market value in the condition they did arrive. *Contempo Metal Furniture Co. of Calif. v. East Texas Motor Freight Lines*, 661 F. 2d 761 (9th Cir. 1981). U.S. Rail BOL Sec. 2(a) provides that if there exists a lower declared, agreed upon or tariff determined value, this will apply to determine shipper loss. *Annex No. I, Table No. 9* at ci. Even though not explicitly provided by the BOL or the Carmack Amendment, case law compensates carrier for incidental charges to the transport contract. *Moffitt v. Bekins Moving and Storage*, 818 F. Supp. 178 (N. D. Tex. 1993) referring to *Intech Inc. v. Consolidated Freightways Inc.*, 836 F. 2d 672 (1st Cir. 1987). U.S. courts, however, are divided on the question whether freight recovery under Carmack amounts to 'actual loss'. *Contempo Metal Furniture Co. of Calif. v. East Texas Motor Freight Lines*, 661 F. 2d 761 (9th Cir. 1981) referring to specific cases on this inter-circuit conflict. For comparison of valuations with motor carriage see *Annex No. III, Tables No. 9 and 10* at cxv-cxcvii.

¹¹⁸⁴ *Unreasonable delay*: *U.S.*: *Tube City Inc. v. Boston & Maine Corp.*, 170 F. Supp. 2d 35 (D. Me. 2001) and *American Synthetic Rubber Corp. v. Louisville & N. R. Co.*, 422 F. 2d 462 (6th Cir. 1970). *Canada*: CN and CP BsOL (look under 'liability of the carrier') and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien*

Although CN and BNSF intermodal tariffs refer to compensation of actual physical loss or damage, they explicitly exclude carrier compensation for consequential damages¹¹⁸⁵. Moreover, liability limitation amounts exist and differ on each side of the border. For the CN, a distinction is made between damage to the container itself or the contents thereof: damage, loss or delay sustained *to any container* is limited to the lesser amount of: 3.000\$CAD for a container under 40 feet, 5.000\$CAD for a container over 40 feet or the depreciated reproduction value of the container based on specific calculations included in the tariff¹¹⁸⁶. Damage, loss or delay sustained *to the contents* of a container shall be limited to the lesser amount of either: i) value of the contents at place and time of loading (*at shipment*) including freight charges if paid and customs if paid or payable and not refunded or refundable, ii) 10.000\$CAD for a container under 40 feet, 20.000\$CAD for a container over 40 feet or iii) ocean carrier liability under the ocean BOL the last specifically considering intermodal transport¹¹⁸⁷.

NS and BNSF limit their liability only for the contents of the shipment to the lesser value of the destination value of the cargo (*at destination*) or 250.000\$USD ‘per shipment’ (per container)¹¹⁸⁸. For damage sustained to the containers themselves, BNSF makes the distinction between rail controlled and private containers. Damage to the former type of containers is not a shipper concern but is, rather, determined by the UIIA

(Montréal: Les Éditions Thémis, 1986) at 82. *Consequential damages: Canada: CP RailMcCain Produce* [1981], 2 S. C. R. 219 (S. C. C.)(frequently cited thereafter), *Vandenbrink Farm Equipment Inc. v. Double-D Transport Inc.* [1999], O. J. No. 2302 (Ont. S. C. J.). U.S.: *Pillbury Co. v. Illinois Cent. Gulf R.R. C.A.8*, 687 F. 2d 241 (8th Cir. 1982), *Turner's Farms Inc. v. Main Cent.R.Co. D. C. Me.*, 486 F. Supp. 694 (D. C. Me. 1980) and *American Synthetic Rubber Corp. v. Louisville & N. R. Co.*, 422 F. 2d 462 (6th Cir. 1970). *Annex No. I, Table No. 9* at civ and at cvii.

¹¹⁸⁵ CN Tariff 7589-AN Item 300 par. 1 and 3(a) (also providing for delay), BNSF Rules and Policies Guide Item 62 and NS Circular #2 Sec. 8.3.3(e) *Annex No. I Tables No. 6-8* at xc (CN), lxix (BNSF) and lxxx (NS), and *Annex No. III, Table No. 10* at cxvii. Where specific reference is not made i.e. to compensation of customs and incidental damages, U.S. and Canadian rail case law and BsOL will apply and compensate shippers for their loss. *Supra* note 1184.

¹¹⁸⁶ CN Tariff 7589-AN Item 300 par. 2. Similar provision with, however, different depreciation scales is contained in CP Tariff 7690 Item 00080 (A)(1). *Annex No. I, Tables No. 7-8* at xc and xcvi respectively and *Annex No. III, Table No. 10* at cxvii. Even though not explicitly provided, compensation most likely applies to shipper provided containers.

¹¹⁸⁷ CN Tariff 7589-AN Item 300 par. 3. Similar provision is contained in CP Tariff 7690 Item 00080 (A)(1). *Annex No. I, Tables No. 7-8* at xci and xcvi respectively and *Annex No. III, Table No. 10* at cxvii.

¹¹⁸⁸ BNSF Rules and Policies Guide Item 62 and NS Circular #2 Sec. 8.3.3 adopting similar phrasing. *Annex No. I, Tables No. 6, 6(bis)* at lxix and at lxxx. The ‘per shipment’ term actually means ‘per container’. Interview of the author with BNSF and NS customer service (Feb. 7, 2002). Also, interview of the author with a BNSF Freight Claims personnel (Feb. 5, 2002) also indicating that BNSF Intermodal Rules & Policies Guide definition (Definitions: *in fine* of tariff) of the term shipment means ‘per container’ and that it could not have been otherwise since rates are set per container. *Annex No. I, Table No. 6* at lxxv. The BNSF intermodal tariff is the only tariff that explicitly provides for compensation for unlocated damage (defining it as the damage where the cause cannot be determined, undetermined damage) but provides that it will not reimburse it if it is the liability of another carrier and, for the rest, it will cover it only for commodities indicated (Item 63). *Annex No. I, Table No. 6* at lxx.

agreement to which BNSF is member¹¹⁸⁹. The latter type of containers are containers provided by shippers, damage to which will be compensated by the railway merely on the basis of container depreciated value, although different depreciation scales are adopted by different Canadian and U.S. railway companies¹¹⁹⁰.

If the shipper declares cargo's value the declaration will operate as a restriction on the quantum of damages (limitation of liability) cross-modally and cross-country if the amount declared is less than the market value of the cargo¹¹⁹¹. Usually, shippers choose to declare a lesser value for the transported goods or leave blank the space for declaration on the BOL in order to pay lesser freight or save the insurance premium for the additional value of the goods¹¹⁹². In case of value declaration the shipper understandingly and freely makes a business decision involving the risk of receiving compensation limited to the declared value of the goods in case of loss or damage¹¹⁹³.

From a comparative point of view, U.S. and Canadian rail tariffs may vary as to applicable limitation amounts. They seem, however, to uniformly apply at the domestic level despite their contractual nature (contractual uniformity). This approximates U.S. and Canadian rail tariff provisions to U.S. (contractual) and Canadian (statutory) uniformly applicable, at the domestic level, motor carrier limitations¹¹⁹⁴. As we are going to see later, this is also true for both countries ocean limitations determined by international conventions.

¹¹⁸⁹ BNSF Rules and Policies Guide Item 65 and *Annex No. 1, Table No. 6* at lxxii. Also interview of the author with a BNSF Freight Claims Manager (Feb. 5, 2002). The Uniform Intermodal Interchange Agreement (UIIA) is a standard industry contract between Intermodal truckers/drayage companies and water and rail carriers (Equipment Providers). The UIIA was developed as a means of achieving a degree of uniformity in the interchange process. *About UIIA* (2003) online: UIIA Homepage <<http://www.uiia.org/u-about.html>> (last visited: June 13, 2003).

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ Land, cross-country: John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 182 and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 84-85 (land transport). Ocean cross-country: See also 2001 MLA 4(5)(a) and COGSA Sec. 1304(5) and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 214 and at note 429 (ocean transport).

¹¹⁹² James A Calderwood, "Container Liability" *Transp. & Distr.* (2001) online: WESTLAW (Newsletters). Michael F. Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 324 for ocean transport.

¹¹⁹³ Canada: (motor) *Hi-Tech Business System Ltd. v. Purolator Courier Ltd.* (1996), 194 A. R. 247 (Prov. Ct.) and Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 84-85 and 214. U.S.: (rail) *Union Pac. R. Co. v. Burke*, 41 S. Ct 823 (U. S. S. C. 1921), (rail) *Yamazen U.S.A. Inc. v. Chicago and Northwestern Transp. Co.*, 790 F. 2d 621 (7th Cir. 1986), (motor) *Novelty Textile Mills Inc. v. C.T. Eastern Inc.*, 743 F. Supp. 212 (S. D. N. Y. 1990).

¹¹⁹⁴ *Supra* at Part II, Chapter I, Section II, Par. 1(A)(B). As in the case of U.S. motor transport of goods where contractual limitation of liability is rather the principle than the exception and unlike Canadian motor carriers that do not easily have recourse to such practices, U.S. and Canadian rail contracts are dependent on contractual definition of carrier liability. This amounts to an informal harmonization *supra* at 20s.

Confidential contracting, very widely used today in rail transport, is another variable that disturbs the seemingly calm waters of domestic uniformity of land (motor-rail) liability limitations through application of agreed upon provisions and/or amounts¹¹⁹⁵. Although their content is not made public, people having access to their provisions inform us that liability terms and amounts and not just rates are actually negotiated within the frame of these contracts¹¹⁹⁶.

B. Loss of Canadian and U.S. Rail Carrier Limitation Benefit: Like railway statutes and BsOL, rail tariffs do not contain provisions on loss of carrier limitation benefit and case law in both countries is left to deal with the issue. As in the case of motor carriage and unlike liability exceptions, U.S. and Canadian contractual limitations will survive carrier and servants negligence unless otherwise agreed by the parties¹¹⁹⁷. This includes gross negligence with the exception of the province of Québec where ‘faute lourde’ or equivalent fault will deprive carrier of the limitation benefit¹¹⁹⁸. For the rest, Canadian fundamental breach¹¹⁹⁹ and U.S. unreasonable deviation¹²⁰⁰ denying rail carriers the limitation benefit follow motor carriage laws.

¹¹⁹⁵ On motor confidential contracting see *supra* at 231 and 119.

¹¹⁹⁶ This seems to be the practice of mentioned transport companies. Canada: Interview of the author with CN Freight Claims Department (Dec. 18, 2001). CN personnel referred to a Québec Paper Company that agreed, in its confidential contract with CN, not to bring any claims against the railway in case of damage (0\$CAD liability). It also referred to a confidential contract further limiting rail carrier liability for the transport of ocean containers despite the fact that these are already subject to railway tariff liability limitations. Finally, it stated that even liability terms of standardized forms of confidential contracts are sometimes negotiated between the parties. It all depends on the volume of the shipment and the specific needs of each shipper. A CP Confidential Contract Negotiator confirmed the same information being more reserved when referring to specific examples. He stated, however, that if a shipper is disposed to provide more than a 1000 containers, (for a 1000 containers only a ‘quote’ confidential rate without negotiation of carrier liability will be provided), all aspects of contracts, including liability, can be negotiated confidentially. Interview of the author with a CP negotiator of confidential contracts, (Jan. 8, 2002). In the U.S., Union Pacific (UP) Damages Prevention and Freight Claims Manager also affirmed that liability and rates can be negotiated within the frame of confidential contracts taking place for great volumes of shipments. Interview of the author with a UP Freight Claims Manager (Jan. 9, 2002).

¹¹⁹⁷ Canada: *Sutherland v. Grand Truck Railway Company* (1909), 18 O. L. R. 139 (Ont. C. A.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 117. U.S.: Saul Sorkin, “Changing Concepts of Liability” (1982) 17 Forum 710 at 711-712.

¹¹⁹⁸ Canada: *Fitzgerald v. G.T.R.*(1881), 5 S. C. R. 204 (S. C. C.) as reported by John S. McNeil, *Motor Carrier Cargo Claims* 3rd ed. (Toronto: Carswell, 1997) at 130-131, on the exclusion of gross negligence. For Québec see Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 85, 70 and 52. U.S.: “Limitation of Liability” (2000) 14 Am. Jur. 2d Carriers § 572 (WESTLAW-Newsletters) on carrier gross negligence not voiding limitation limits (i.e. released value). The text referred to the *Quasar Co. a Div. of Matsushita Elec. Corp. of America v. Atchison Topeka and Santa Fe Ry. Co.*, 632 F. Supp. 1106 (N. D. Ill. 1986).

¹¹⁹⁹ On the distinction between fundamental breach (non-performance that goes to the essence of the contract) and negligent performance see *B.G. Linton Construction Ltd. v. Canadian National Railway* [1975], 2 S. C. R. 678 (S. C. C.) as reported by *Bombardier Inc. v. Canadian Pacific Ltd.* (1991), 7 O. R. (3d) 559 (Ont. C. A.). The *Linton* holding was later mentioned by the *Hunter Engineering* authority case on fundamental breach, applicable to motor carriers. Also *supra* at 234s. Québec province case law on ‘rupture de contrats’ remains same in rail as in motor transport. *Ibid. Annex No. III, Table No. 9* at cxvii.

Paragraph 3. Limitation of Ocean Carrier Liability: Commenting on ocean carrier liability limitations is particularly important not only because ocean carriage is, in practice, the most significant segment of multimodal transport, but also because land carriers will often ‘import’ ocean limitations in their BsOL¹²⁰¹. U.S. ocean carriers are subject to the Hague Rules through the 1936 COGSA whereas their Canadian counterparts follow the Visby Rules through their national statute, the 2001 Marine Liability Act (MLA)¹²⁰². In this way, uniform liability limitation amounts apply at the domestic level.

We will first focus on Canadian and U.S. ocean carrier limitation of liability rules (A) before examining U.S. and Canadian ocean carrier loss of the limitation benefit provisions (B).

A. Canadian and U.S. Ocean Carrier Limitation of Liability: Both the Hague and the Visby Rules hold ocean carrier liable for shipper actual losses or damage to the goods¹²⁰³. Actual losses or damages constitute the difference between the market value (Hague) or the ‘exchange value’¹²⁰⁴ (Visby Rules art. 4(5)(b)) of the goods *at destination* in intact and non-intact condition, plus freight (the latter element encountered only in the U.S.), customs and other elements that refer to actual loss¹²⁰⁵. Although recovery for

¹²⁰⁰ On the distinction between deviation and negligent performance see *Quasar Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 632 F. Supp. 1106 (N. D. Ill. 1986). For geographical deviation and inability of carrier to invoke contractual liability limitation see “Carriers: Rights, Duties and Liabilities” (2000) 11 Tex. Jur. 3d Carriers § 377 (WESTLAW–Tp-all) referring to railway cases. On the extension of geographical deviations to other deviations from shipper instructions in rail transport see *Praxair* holding as applicable to rail. *Supra* at 237. Fraud, intentional misconduct and conversion may deprive carrier of the benefit of limitative conditions.

¹²⁰¹ Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 559. See also *supra* note 14.

¹²⁰² For these acts see *supra* notes 45 and 47 respectively. Ocean tariffs and BsOL incorporate Hague and Visby Rules provisions. *Supra* note 856 at 174.

¹²⁰³ Art. 4(5) of the Hague and the Visby Rules and respective domestic provisions refer to carrier liability for ‘any loss or damage’. If the actual losses are inferior from the statutory or other limitations, actual losses amount cannot be overcome (art. 4(5) of the Hague Rules and Sec. 1304 (5) par. 2 of COGSA). Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 145. William Tetley, “Limitation, Non-Limitation and Disclaimer Clauses” (1986) 11 Mar. Law. 203 at 213.

¹²⁰⁴ Although the concepts of ‘market value’ and ‘exchange value’ should not be equated, they approximate each other since it is said that the most secure way to obtain sound ‘market value’ is to obtain prices at established commodity markets, that is commodity ‘exchange prices’. George F. Chandler, « Damages to Cargo : The Measure of Damages to Cargo » (1997) 72 Tul. L. Rev. 539 at 541. Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 145 on the Hague Rules that remain silent on the issue and applicable, in practice, value.

¹²⁰⁵ U.S.: Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 145. Canada: Visby Rules art. 4(5)(b) refers to the calculation of the actual loss first on the basis of the goods exchange price, in the absence of which the market price will be taken into account and absent this, value of goods in the same kind and quality will be retained. *Union Carbide Corp. v. Fednav Ltd.* [1997], F. C. J. No. 655 (F. C. C.). Canada has not followed U.S. case law with

delay and foreseeable consequential damages is not explicitly provided by the Hague or the Visby Rules¹²⁰⁶, Canadian and the majority of U.S. courts have sanctioned it, subjecting private agreements on the matter to art. III(8)¹²⁰⁷.

COGSA maximum limitation is 500\$USD ‘per package or customary freight unit’ unless higher value has been declared by shipper¹²⁰⁸. This limitation is considered today largely outdated¹²⁰⁹. 2001 MLA applies the higher Visby Rules limitation of ‘666.67 SDR per package or unit or 2 SDR¹²¹⁰ per kilo of gross weight of goods lost¹²¹¹, whichever is higher’. Both U.S. and Canadian statutory limitations can be contractually increased but not limited, as is the case with motor carrier limitation of liability in Québec¹²¹². Contrary to U.S. and Canadian land transport where confidential contracts

respect to freight and will not, therefore, permit set-off of carrier claim for freight because of shipper’s claim. *Mediterranean Shipping Co. S.A. Geneva v. Sipco Inc.* (2001), F. C. J. No. 1460 (F. C. C.), William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 900 and 907. In all cases, parties can contract recovery or not of freight charges. *Ibid* at 896. *Annex No. II, Table No. 3* at clv on the Visby Rules and *Annex No. III, Table No. 11* at cxviii for the Hague and the Visby Rules.

¹²⁰⁶ William Tetley, “Limitation, Non-Limitation and Disclaimer Clauses” (1986) 11 Mar. Law. 203 at 225 on the basis of Hague and Visby Rules art. 4(5). Author notes that although art. 4(5)(b) is ambiguous on this point, text’s interpretation that delay and other damages are excluded is probably the most plausible one. *Ibid* at note 133.

¹²⁰⁷ U.S.: *Ibid* at 334s. *Anyangwe v. Nedlloyd Lines*, 909 F. Supp. 315 (D. Md. 1995) citing cases reflecting the majority and minority view. (majority view) *Mitsui Marine Fire and Ins. Co. Ltd. v. Direct Container Line Inc.*, 119 F. Supp. 2d 412 (S. D. N. Y. 2000), (minority view) *Narcissus Shipping Corp. v. Armada Reefers Ltd.*, 950 F. Supp. 1129 (M. D. Fla. 1990). *Hoogwegt U.S. Inc. v. Schenker Intern. Inc.*, 121 F. Supp. 2d 1228 (N. D. Ill. 2000). for consequential damages. Canada: Max Ganado & Hugh M. Kindred, *Marine Cargo Delays* (London: Lloyds of London Press Ltd, 1990) at 20-22 for Hague and Visby Rules provision and Canadian position on the issue. The book also refers to *St. Lawrence Construction Limited (Plaintiff) v. Federal Com* [1985], 1 F. C. 767 (F. C. A.) (frequently cited).

Both the Hamburg Rules (art. 5(1) and (2)) and the Multimodal Convention (art. 16(1)(2)) retain carrier liability for unreasonable delay.

¹²⁰⁸ COGSA 46 U. S. C. par. 1304(5) and Hague Rules 4(5). *Annex No. II, Tables No. 2, 4* at cxlvi and at clxii respectively. Hague Rules provision merely refers to a ‘unit’ limitation (and not to a ‘customary freight unit’): ‘100 pounds sterling per package or unit or the equivalent of that sum in other currency...’, which corresponds to 500\$USD or 500\$CAD. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 890. In 1926, England ‘went off the gold standard’ and defined the limitation in English pounds, (applicable under certain conditions), that only some countries followed, leading to lack of uniformity. *Ibid* at note 76 and André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at note 480. On declaration of value for all modes see *supra* at 240.

¹²⁰⁹ This is because the size of the average package has risen, the value of the dollar has fallen and shippers virtually never take advantage of their right to declare value or contractually increase carrier liability. Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 324.

¹²¹⁰ (art. 4(5)(a)) of 2001 MLA and the Visby Rules. *Annex No. II, Tables No. 3* at cliv. Use of the Special Drawing Rights (SDR) and its adaptability to economic realities put an end to Hague Rules ‘problematic’ limitation. For the S.D.R. see *supra* note 247.

¹²¹¹ The Visby Rules did not only raise the Hague Rules limitation amount but also added a limitation based on weight softening the Hague Rules unidimensional package limit. Benjamin W. Yancey, “The Carriage of Goods: Hague, COGSA, Visby and Hamburg” (1983) 57 Tul. L. Rev. 1238 at 1248. Although in U.S. and Canadian motor carriage there is a doctrinal dispute on whether the weight limitation is reported to the weight of the whole shipment or of the damaged articles (*supra* note 1148), the Visby Rules leave no doubt in deciding that it is latter that will be taken into account. *Annex No. I, Table No. 5* at lvi, *Annex II, Table No. 3* at cliv and *Annex No. III, Table No. 9* at cxcv.

¹²¹² 46 U.S.C. par. 1304(8) of COGSA and art. 3(8) of the Visby Rules, Hague Rules and 2001 MLA for the explicit prohibition of contractual limitation of carrier liability. Shipper declaration of value does not frequently take place.

liability limitations are subject to negotiation, ocean carriage confidential contracts do not vary on carrier liability terms and adopt, therefore, statutory limitations¹²¹³. What is negotiable in ocean confidential contracts are rates and rates only¹²¹⁴.

Even though it is not clear how case law defines ‘package’¹²¹⁵, there are general standards most courts in both countries seem to apply¹²¹⁶. A controlling, albeit not conclusive, factor mostly relied upon by courts in defining the ‘package’ term is parties intent, when latter does not violate statutory language¹²¹⁷. Having announced the ground rule, certain nuances have to be made.

To simplify a complicated legal reality, U.S. doctrine distinguishes between damages or losses to containerized and non-containerized cargo. Canadian case law seems to follow the same general reasoning frequently referring to U.S. cases. We will, hereby, follow the U.S. classification in order to better comprehend how the intention element functions in both countries prevailing legal regime.

For non-containerized cargo that is fully boxed or crated, each box or crate will generally constitute a package regardless of the size and weight of the cargo¹²¹⁸. Conversely, cargo that is shipped without any packaging whatsoever, is generally treated as "not shipped in packages"¹²¹⁹. Parties agreement to the contrary cannot supplant COGSA provisions and will, therefore, not influence courts¹²²⁰.

Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 347 and 349, see also *supra* note 1192. *Annex No. III, Table No. 11* at cxviii.

¹²¹³ This seems to be the practice of mentioned transport companies. Canada: Interview of the author with a Canadian Maritime International shipment expert, (Dec. 18, 2001) commenting on international ocean shipments. U.S.: interview of the author with pricing personnel of Sanco Inc./Imorex Shipping (Dec. 18, 2001), a freight forwarding company whose personnel noted that most ocean carriers in the U.S. follow COGSA terms and conditions of carriage.

¹²¹⁴ *Ibid. Supra* at 241 for land carrier confidential contracts.

¹²¹⁵ For instance, it was decided in the U.S. that a large tractor transported surrounded by large protective trunks was not a package whereas a yacht transported on a vessel was considered to be a package. As reported by Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 143.

¹²¹⁶ Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 324-325 for the U.S.. We will refer to Canadian cases as follows.

¹²¹⁷ Nancy A. Sharp, “What is a COGSA Package” (1993) *Pace Int’l. L. Rev.* 115 at 131 for the U.S.. We will refer to Canadian cases as follows.

¹²¹⁸ U.S.: cases reported by Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 325 and Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par.1 at par.12. Canada: André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at 276 and *Trenton Works Lavalin Inc. v. Panalpina Inc.* (1993), N. S. J. No.455 (N. S. S. C.), *Falconbridge Nickel Mines Ltd. et al v. Chimo Shipping Limited et al* [1974], S. C. R. 933 (S. C. C.) that noted that, generally, a ‘package’ requires packaging.

¹²¹⁹ U.S.: Thus, bulk shipments, a free-standing locomotive, an uncrated generator unit and a loose tractor/ are not deemed packages. Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case”

When considering cargo in the twilight zone, meaning prepared for shipment but not fully boxed, crated or enclosed, U.S. courts are split. Some of them follow the ‘facilitation of handling’ test according to which when the packaging preparation is made for the purpose of facilitating the handling of cargo, partially packaged cargo is deemed a package¹²²¹. Others, reject the ‘facilitation of handling’ test as based on an unpersuasive reasoning¹²²² insisting, as Canadian courts generally do, on parties intent as evidenced by BOL description of the goods and limited only by minimum statutory requirements in determining the presence or not of a package¹²²³.

Parties intent as evidenced by the BOL is also the criterion taken into account by U.S. (exceptions exist) and Canadian courts in deciding ocean carrier ‘package’ limitation with respect to containerized cargo¹²²⁴. To determine parties intent for containerized cargo courts base their holdings on the totality of circumstances of the case, primarily parties BOL description of the goods, but also shipper sophistication, previous

(1997) 21 Tul. Mar. L. J. 263 at 325-326. Authority to the contrary exists. *Supra* note 1215. Cases reported by Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par.1 at 18. Canada: André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at 276 with specific reference made to bulk and not packed shipments.

¹²²⁰ U.S.: *Middle East Agency Inc. v. The John B. Waterman*, 1949 86 F. Supp. 487 (D. C. N. Y. 1949) very frequently cited thereafter. The court held that an uncrated tractor should not be regarded as if it were described as crated, and the use of the printed word “package” on bill of lading should not be construed as a stipulation that the tractors were packages under the statute. Cited by Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par.1 at par.16. Canada: Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien, Américain et Anglais)* (Montréal: Les Presses de l’Université de Montréal, 1972) at 140 mentioning the container case *Anticosti* with respect to bulk cargo (wine, grain, wheat) that parties cannot describe as packaged when it is really not.

¹²²¹ Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 326s and for a clearer analysis and case law see Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par. 1 at par.13-14.

¹²²² *Ibid.*

¹²²³ U.S.: cases reported by Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 327-328. It was held, for instance, that parties were bound by their declaration on the BOL ‘1 Skid of Machinery’. The author notes that in the case of ‘imported’ limitations, (land segments of multimodal transport applying ocean carrier rules), parties description of the goods will be given greater weight since COGSA does not apply as a matter of law. *Ibid* and Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par.1 at 18. Other examples: if the BOL says that the cargo loaded ‘is not shipped in packages’ or if the BOL describes cargo as a ‘loose printing machine’ the (customary freight) unit limitation will apply. *Morris Graphics Inc. v. Transfreight Lines Inc.*, 1990 WL 96765 (S. D. N. Y. 1990) and *Norwich Union Fire Ins. Soc. Ltd. v. Lyjtes Bros. S.S. Co. Inc.*, 741 F. Supp. 1051 (S. D. N. Y. 1990). Canada: *International Factory Sales v. The Alexandr Serafimovich* (1976), 1 F. C. 35 (F. C. C.).

¹²²⁴ U.S.: *Mitsui & Co. v. American Export Lines*, 636 F. 2d 807 (2nd Cir. 1981). This test is gaining favor in the U.S., both the 11th and the 4th Circuit having adopted it in the desire to fashion a uniform body of law. As reported by Michael F. Sturley, “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L. J. 263 at 330-331 and Nancy A. Sharp, “What is a COGSA Package” (1993) *Pace Int’l. L. Rev.* 127 at 131, William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 642 and 881s. Canada: André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at 276 specifically mentioning that if the BOL states 25 articles, each article is a package. In the absence of such precision the container will be deemed a package. *Ibid.* 2001 MLA and Visby Rules art. 4(5)(c) provides that where a container pallet or similar article is used to transport packages that are enumerated by shipper on the BOL as contained in the unit of transport, the individual packages will be considered as ‘packages’ under respective rules.

dealings with the carrier, freight rates...¹²²⁵. This gives judges a great margin of interpretation, which may occasionally lead to conflicting conclusions¹²²⁶. Despite variations in its implementation, however, case law criterion of parties intent in determining what constitutes a ‘package’ seems to be the same in the U.S. and Canada.

Reference to ‘package or unit’ in both the Hague and the Visby Rules was intended to cover packaged goods (‘per package’) and non-packaged merchandise (‘per unit’) respectively¹²²⁷. As with the ‘package’ limitation, there is considerable case law controversy as to what constitutes a ‘unit’, whether it is an unpacked object (shipping unit) i.e. a vehicle, tractor, yacht, bulk cargo, or a freight unit¹²²⁸.

Believing that the Hague Rules' "unit" meant a "customary freight unit," U.S. Congress hoped to clarify the law in adopting the COGSA ‘per customary freight unit’ limitation¹²²⁹. This is a COGSA specific (not Hague or Visby Rules) limitation, based on the way carriers collect money (freight units) and not on the weight or physical

¹²²⁵ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 883. Canada: (multimodal) *Bombardier Inc. v. Canadian Pacific Ltd* (1991), O. J. No. 2035 (Ont. C. A.), *Consumers Distributing Co. v. Dart Containerline Co.* (1979), F. C. J. No. 1113 (F.C.A.), *Havercate v. Toronto Harbour Commissioners et al.* (1986), O. J. No.676 (Ont. H. C. J.), *Québec Liquor Corp. v. Dart Europe* (1980), 1979 AMC 2382 (F. C. C.) (ocean) *International Factory Sales v. The Alexandr.Serafimovich* (1976), 1 F. C. 35 (F. C. C.), *N.S. Tractors & Equipment Ltd. v. Tarros Gage* (1986), F. C. J. No. 127 (F. C. C.), *Carling O’Keef Breweries v. C.N. Marine* (1987), 2 C. F. 107 (F. C. C.), *The ‘Tinderfell’* [1973], C. F. 1003 (F. C. C.). *Fraser Valley Milk Producers Cooperative Assn. v. Kaslo Cold* [1994], B. C. J. No. 1928 (B. C. S. C.) on the basis of both American and Canadian cases. U.S.: Nancy A. Sharp, “What is a COGSA Package” (1993) Pace Int’l. L. Rev. 127 at 131 and William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 880-881. Joseph E. Edwards, “What Constitutes Package or Customary Freight Unit within COGSA” (2000) 27 A. L. R. par. 1 at par. 10-11. *Mitsui & Co. v. American Export Lines*, 636 F. 2d 807 (2nd Cir. 1981), *Sperry Rand Co. v. Norddeutscher Lloyd*, 1973 A. M. C. 1392 (N. D. N. Y. 1973), *Binladen BSB Landscaping v. M.V. Nedlloyd Rotterdam*, 759 F. 2d 1006 (N. Y. C. A. 1985), *Norwich Union Fire Ins. Soc. Ltd. v. Lyjes Bros. S.S. Co. Inc.*, 741 F. Supp. 1051 (S. D. N. Y. 1990).

¹²²⁶ Canada: (intermodal) *Consumers Distributing Co. v. Dart Containerline Co.* (1979), F. C. J. No. 1113 (F. C. A.). Here, each carton within the container appeared under description of the goods and the court distinguished this from U.S. cases where descriptions such as ‘1 container said to contain machinery’ and absence of shipper indication of cartons contained in container were insufficient to qualify machinery as package. However, in U.S. *Inter-American Foods Inc. v. Coordinated Caribbean Transport Inc.*, 313 F. Supp. 1331 (S. D. Fla. 1970) the court held that individual cartons indicated on carrier receipt were ‘packages’ even though the BOL contained a clause “1 trailer load ‘said to contain’ shrimp product”. *St. Paul Fire & Marine Ins. Co. v. Sea-Land Service Inc.*, 735 F. Supp. 129 (S. D. N. Y. 1990).

¹²²⁷ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 212, *Sept-Iles Express Inc. v. Clément Tremblay* (1964), Ex. C. R. 213 (E. C. C.).

¹²²⁸ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 884. André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at 276.

¹²²⁹ Sec. 1304 par. 5. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 884 (note) 41. *Annex No. II, Table No. 4* at clxii.

characteristics of the cargo¹²³⁰. Parties intent and, in case of doubt, custom, will determine the freight unit taken into account¹²³¹.

On the other hand, the Canadian Supreme Court has held that the Hague and Visby Rules "unit" refers to a 'unit of goods' that is legally distinct from the U.S. COGSA "customary freight unit" which refers to a unit of freight¹²³². In this way, Canadian decisions align themselves with English case law in deciding that goods, which cannot be packaged because of their nature or dimensions, constitute shipping units (i.e. bulk cargo)¹²³³. As in the U.S., parties intent will determine the type of retained 'shipping unit' in the absence of which all non-packaged goods will constitute a unit of goods¹²³⁴. This may produce unjust results since unpackaged goods of great value may be limited to 500\$USD limitation. But as it was stated in *Anticosti*, later reproduced in *Falconbridge*, 'the rule does not seem to permit qualification'¹²³⁵.

The last draft of U.S. COGSA 1998 adopts the Visby Rules limitation without reference to the 'customary freight unit' or the 'unit' limitation measures¹²³⁶. The Multimodal Convention and the Hamburg Rules raise multimodal transport operator and

¹²³⁰ A customary freight unit is defined as 'the unit of quantity, weight or measurement of cargo customarily used as the basis for the calculation of the freight rate to be charged'. This may be weight tons, measure tons or a lump sum. Thus, if pieces of structural steel weighing more than 100 pounds each are transported on a 64 cents per 100 pounds freight, the customary freight unit is not the piece of steel but the 100 pounds upon which the freight was calculated. If the freight is charged on the basis of measure tons (i.e. freight of 43,319 pound tractor measured on the basis of 40 cubic foot units), the measure ton (40 cubic foot) will be the customary freight unit. If the freight charge is a lump sum (a single price per item shipped), the single item being shipped will be the customary freight unit but, in this case, the same limitation would result if the shipped item were determined to be a package. As reported by Michael F. Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 333-334 and note 457 and Nancy A. Sharp, "What is a COGSA Package" (1993) Pace Int'l. L. Rev. 115 at note 23 and accompanying text. *Annex No. III, Table No. 11* at cxviii.

¹²³¹ Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal, 1972) at 142. Joseph E. Edwards, "What Constitutes Package or Customary Freight Unit within COGSA" (2000) 27 A. L. R. par.1 at 26-28 and par. 28-33. Michael F. Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul. Mar. L. J. 263 at 334-336. *Allied Chem. Intern. Corp. v. Compania de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2nd Cir. 1985), also reported by Nancy A. Sharp, "What is a COGSA Package" (1993) Pace Int'l. L. Rev. 115 at 124-125 and 131.

¹²³² *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.* (1974), S. C. R. 933 (S. C. C.) (authority case) which held that a car constitutes a 'unit', not a 'package' reproduced by *Atlantic Consolidated Foods Ltd. v. The Ship Dorothy* (1979), 1 FC 283 (F. C. C.). Michel Pourcelet, *Le Transport Maritime sous Connaissance (Droit Canadien Américain et Anglais)* (Montréal: Les Presses de l'Université de Montréal, 1972) at 142.

¹²³³ *Ibid.* *The Ermua v. Coutinho, Caro & Co. Canada Ltd.* [1982] 1 F. C. 252 (F. C. C.) and William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 885.

¹²³⁴ *Trenton Works Lavalin Inc. v. Panalpina Inc.* (1993), N. S. J. No.455 (N. S. S. C.) that held that since the parties had indicated the weight of the railcar on the BOL, the railcar is considered a 'unit' under the BOL. In the very interesting Canadian (ocean) case *Power Construction Ltd. v. Canadian National Railway Co.* (Nf [1984], N. J. No. 67 (Nfld. C. A.)) the court held that as evidenced by BOL description the crane (single item shipped) was a 'unit' under the Hague Rules applicable to the rail segment of transport even if a BOL had not been issued.

¹²³⁵ *Anticosti Shipping Company v. Viateur St.-Amand* [1959], S. C. R. 372 (S. C. C.), *Falconbridge Nickel Mines Ltd. et al v. Chimo Shipping Limited et al* [1974], S. C. R. 933 (S. C. C.).

¹²³⁶ Sec. 9(h)(1). For draft COGSA 1998 see *supra* at 169s and *Annex No. II, Table No. 4(bis)* at clxxiv.

ocean ‘per package or unit’ limitation amounts but do not refer to a customary freight unit limitation¹²³⁷. Pr. Tetley argues, however, that the limitation measure ‘customary freight unit’ should be the one adopted because it is the most appropriate limitation for bulk cargo¹²³⁸.

Even though the above-mentioned principles are not always uncontested, parties intent seems to be a key element in determining what constitutes a package or a unit. This gives way to subjective judicial interpretations and calls for shippers alertness as to the indications made on the BOL and knowledge of basic legal principles in this respect¹²³⁹. On the other hand, parties intent is an element easily adaptable to technological advances so that invention of ‘new’ packages, as was the case of containers some decades ago, will not render the test obsolete.

In total, all modes allow contractual limitation of carrier liability except for Canada/U.S ocean carriers and Québec motor carriers¹²⁴⁰. U.S. motor, and U.S. and Canadian rail carriers actually give effect to this contractual definition of carrier liability that seems to uniformly apply at the domestic level within each mode (contractual uniformity). Multimodal carriage at the domestic or international level, however, is subject today to liability limitations that vary in their amounts and measures cross-modally and cross-country. We pass from one motor carrier weight limitation amount, through another ‘per package/unit’ Hague and ‘per package/unit’ or ‘kilo’ Visby limitation, to end up to still other ‘per container’ rail limit, exception made of rail and confidential contracts where, depending on the shipper and volume of merchandise, everything may be negotiated (except for ocean carriers). All these limits are intended to compensate shipper actual loss, including unreasonable delay, consequential damages (except for rail container movements) and freight, (except for freight in Canadian ocean carriage), calculated on the basis of goods market value at destination (except Canadian motor and rail ‘at shipment’) unless another value has been declared by the shipper.

¹²³⁷ Hamburg Rules art. 6(1)(a) and Multimodal Convention art. 18(1). Samuel Robert Mandelbaum, “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage or Delay: A U.S. Approach to COGSA, Hague Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnat’l. L. & Pol’y 1 at 19.

¹²³⁸ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 885.

¹²³⁹ I.e. if the shipper indicates on the BOL: ‘a locomotive 10 tons’ it will result in a different limitation than the indication ‘a locomotive 10.000 kilos’ since in the second case the kilo and not the ton will be retained for the application of the maximum limitation. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 212.

¹²⁴⁰ See a table representation of all that follows and more in *Annex No. III, Tables No. 9, 10, 11* at cxcv-cxcic.

B. Loss of Canadian and U.S. Ocean Carrier Limitation Benefit: COGSA and MLA statutory limitations will survive carrier or servant's negligence unless otherwise agreed upon by parties¹²⁴¹. There is misconduct, however, that will lead to loss of ocean carrier limitation benefit although the required degree of misconduct differs for the Hague and the Visby Rules.

Under Hague Rules and COGSA art. 4(5) 'neither the carrier nor the ship shall *in any event* be or become liable...in an amount exceeding...'. Despite the expression 'in any event', the majority of U.S. courts conclude that unreasonable deviation or quasi deviation will deprive carrier of the COGSA limitation benefit¹²⁴². We have seen that the unreasonable deviation and quasi-deviation concepts are the counterpart of Canadian fundamental breach, are limited in scope to geographical deviation and carriage on deck and must, in all cases, be intentional or voluntary and unjustifiable to result to loss of carrier limitation benefit¹²⁴³.

In considering presence of unreasonable deviation in ocean carriage, judges are given considerable leeway¹²⁴⁴. There is at least one court decision¹²⁴⁴ that has concluded that gross negligence and not intent is necessary to constitute an unreasonable deviation even though *innocent, erroneous* deviations or those made out of necessity do not generally produce such effect¹²⁴⁵. Most of the time, however, intentional (i.e. fraudulent)¹²⁴⁶ or willful misconduct will be needed for unreasonable deviation to exist. Moreover, even

¹²⁴¹ André Braën, *Le Droit Maritime au Québec* (Montréal : Wilson & Lafleur Ltée, 1992) at 275 commenting on the Visby Rules. Same reasoning is applicable to the Hague Rules.

¹²⁴² William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 111 and Michael F. Sturley, «Proposed Amendments to the Carriage of Goods by Sea Act» (1996) 18 Hous. J. Int'l. L. 609 at 653-654. When 1936 COGSA was enacted, there was a disagreement as to whether the 'unreasonable deviation' doctrine survived COGSA's enactment. The majority of courts followed pre-COGSA case law and continued to hold that an unreasonable deviation nullifies the contract of carriage, including package limitation protection. The Seventh Circuit and a few other courts reached the opposite conclusion and held that the drafters intended the package limitation to apply to all situations, including those in which a carrier unreasonably deviates. J. Hoke Peacock III, "Deviation and the Package Limitation in the Hague Rules and the COGSA" (1990) 68 Tex. L. Rev. 977 at 987. *Iligan Integrated Steel Mills Inc. v. S. S. John Weyerhaeuser*, 507 F. 2d 68 (N. Y. C. A. 1974), David M. Blachman, "Punitive Damages under the COGSA: a Bulkhead is Breached" (1986) 62 Wash. L. Rev. 523 at 528.

¹²⁴³ *Supra* at 217s and 236.

¹²⁴⁴ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 114.

¹²⁴⁵ *Ibid.* at 114 and 112. Herbert R. Baer, *Admiralty Law of the Supreme Court* 3rd ed. (Charlottesville, Virginia: The Michie Company, 1979) at 513.

¹²⁴⁶ *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha* ("Olivier II"), 47 F. 2d 878 (2d Cir. 1928), a pre-COGSA case on fraud still valid law today. *Berisford Metals Corp. v. S.S. Salvador*, 779 F. 2d 841 (2d Cir. 1985) reaffirmed *Olivier II* and introduced the term 'fundamental breach' to U.S. unreasonable deviation. *Supra* note 1173. The 'intent' to deviate can be adduced in many ways by courts: i.e. deviation 'for nefarious reasons', 'absence of excuse for the deviation' and the burden of proof of absence of intent is on the carrier. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 112.

though deviation may lead to abrogation of the contract of carriage, most courts have limited its effect to simple loss of carrier limitation benefit¹²⁴⁷.

Visby Rules and MLA art. 4(5)(e), applicable to Canada, specifically target carrier loss of the limitation benefit¹²⁴⁸ in providing that ‘an act or omission of the carrier done with intent to cause damage¹²⁴⁹, or recklessly and with knowledge that damage would probably result’ will produce such effect. The burden of proof of carrier acts and *mens rea* is on the claimant. The draftsmen of the Visby Rules copied this article from Warsaw Convention art. 22 as amended by the 1955 Hague Protocol¹²⁵⁰. Unlike amended Warsaw Convention art. 22, however, Visby Rules art. 4(5)(e) requires a personal ocean carrier

¹²⁴⁷ William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 110, 118-119. Today, courts will very frequently deprive carrier of the benefit of express statutory or contractual exclusions or limitations of liability, less frequently hold that the express contract is entirely or wholly displaced or abrogated and sometimes conclude that the carrier is deprived of the benefit of only those provisions which are affected by the deviation complained of, or which relate to its substantive liability. “Displacement of Provisions of Contracts of Carriage” (2001) 17 N. Y. Jur. 2d Carriers § 195 (WESTLAW-Tp-all). See also J. Hoke Peacock III, “Deviation and the Package Limitation in the Hague Rules and the COGSA” (1990) 68 Tex. L. Rev. 977 at 987. U.S. courts majority view brings the unreasonable deviation doctrine closer to Canadian land common law fundamental breach that produces the same effect. *Supra* note 1169. *Annex No. III, Table No. 9 and 11* at cxcvi and cxcix.

¹²⁴⁸ Merely carrier limitation benefit and not other benefits such as carrier liability defenses are concerned by this provision. Abraham Mocatta, Michael J. Mustill, Stewart C. Boyd, *Scrutton on Charterparties and Bills of Lading* 19th ed. (London: Sweet & Maxwell, 1984) at 456 (note 36, 37, 40) to which the Canadian case *Ontario Bus Industries Inc. v. The Federal Camulet* (1992), 1 F. C. 245 (F. C. C.), commenting on the Visby Rules, referred. *Z.I. Pompey Industrie v. Ecu-Line N.V.* (1999), 1999 F. C. J. No. 1584 (F. C. J.) referring to Pr. Tetley statements on this point.

¹²⁴⁹ Note here the intent to cause damage and not the intent to act. According to Pr. Tetley art. 4(5)(e) ‘intent to cause damage’ goes too far since persons who act fraudulently rarely intent to cause damage and seek, rather, to benefit themselves. William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 122-123.

In a uniformity perspective, international maritime carriage in Québec follows common law principles. *ITO-International Terminal Operators Ltd. v. Miida Electronics Inc.* (1986), 1 R. C. S. 752 (S. C. C.). *Supra* note 913. As a result, a grossly negligent ocean carrier will not be deprived of its liability limitation benefit as is the case with Québec land carriers. *Fitzgerald v. G.T.R.* (1881), 5 S. C. R. 204 (S. C. C.) (very frequently cited). See also André Braën, *Le Droit Maritime au Québec* (Montréal: Wilson & Lafleur Ltée, 1992) at 115 and 132. Maritime law in Canada is uniform and does not belong to any province.

¹²⁵⁰ *Convention for the Unification of Certain Rules relating to International Transportation by Air*, 12 October 1929, 261 U.N.T.S. 423 (hereinafter Warsaw Convention) (also *supra* note 528) and *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, Sept. 28, 1955, ICAO DOC 7632 (hereinafter Hague Protocol).

The *Montréal Protocol No. 4* signed in Montréal on Sept. 25, 1975 and entering into force on Nov. 25, 1999 in Canada and on March 4, 1999 in the U.S. amended the Warsaw convention. For the Warsaw Convention signatories see *Documents* (2000) online: Dial Space Homepage <<http://dspace.dial.pipex.com/bobtoldmetodoit/ds/documents.htm>> (last visited: Feb 1, 2002) and for the Montréal Protocol No. 4 see 1975 *Montréal Protocol No. 4* (1999) online: International Civil Organization Aviation <<http://www.icao.int/icao/en/leb/mp4.htm>> (last visited: March 13, 2001). See also U.S., U.S. Department of State, *U.S. Aviation Policy: The Montréal Convention and the Hague Protocol* (2003) online: U.S. Department of State Homepage <<http://www.state.gov/e/eb/rls/rm/2003/21869.htm>> (last modified: June 17, 2003). We should note, in this respect, that the Montréal Protocol No. 4 art. 25 maintains amended Warsaw Convention article 22(5) only for the transport of persons and baggage but not for air cargo for which carrier does not lose its limitation benefit. The Montréal Protocol No. 4 is not to be confounded with the *Montréal Liability Convention* signed in Montréal on May 28, 1999, 24 *Annals of Air & Space L.* 25, a convention intended to replace the Warsaw Convention and not yet in force. Up to June 2003, only 29 out of 30 countries required to sign it before its entry into force have done so. *Convention for the Unification of Certain Rules for International Carriage by Air* (2003) online: International Civil Aviation Organization Homepage <www.icao.int/icao/en/leb/ml99.htm> (last modified: June 11, 2003).

fault to deprive him of its limitation benefit so that master or other agent fault cannot operate loss of ocean carrier limitation benefit¹²⁵¹. Since Canadian case law on this Visby Rules provision is really scarce, we will often make recourse to Canadian air cases when commenting on ocean carrier loss of the limitation benefit.

Air transport cases provide guidance when commenting on the expression ‘recklessly and with knowledge that damage would probably result’¹²⁵². Domestic courts have described this type of carrier conduct as ‘willful misconduct’, ‘faute inexcusable’, ‘faute lourde’ or ‘gross negligence’¹²⁵³. U.S. and Canadian common law case law have adopted the denomination ‘willful misconduct’ for this Visby Rules provision while Québec and French courts reason on the ‘faute intentionnelle’ and ‘faute inexcusable’ concepts respectively to describe the common law concept¹²⁵⁴. In both countries, willful misconduct denotes both intent to cause harm (French/Québec ‘faute intentionnelle’) or *belief that the consequences of the act are substantially certain*¹²⁵⁵, the latter expression reflecting the inexcusable fault concept in France. In this sense, inexcusable fault and willful misconduct are located in between the concepts of intentional fault and gross negligence and describe a voluntary fault, this means to say, an act or omission committed with conscience of the implied danger and damages that might occur¹²⁵⁶.

A controversy seems to exist in Canadian air case law as to whether intent and recklessness should be appreciated objectively, as is the case in France, or subjectively,

¹²⁵¹ Warsaw Convention article 22 as amended by the Hague Protocol states: «The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with the knowledge that damage would probably result; provided that, in a case of such act or omission of a servant or agent, it is also proved he was acting within the scope of his employment».

¹²⁵² On the basis of Canadian air cases, Visby Rules art. 4(5)(e) ‘reckless’ term indicates a decision to run a risk acting indifferently of its presence and must be combined with knowledge that damage would probably result. *Johnson Estate v. Pischke* (1989), S. J. No. 58 (Sask. Q. B.) that granted carrier his limitation benefit since, although reckless, he was also naïve about the consequences of his acts and that it is unconceivable he would have proceeded had he realized a crash was probable. The same case teaches us that ‘probable’ implies something more than ‘possible’, it is a common word and implies that something is likely to happen. *Ibid.*

¹²⁵³ As reported by *Harry Richer Furs Inc. v. Swissair* (1988), 2 F. C. 117 (F. C. C.) that cited English case law for willful misconduct and gross negligence, French case law for ‘faute inexcusable’ and Swiss cases for ‘faute lourde’.

¹²⁵⁴ Bin Cheng, “Willful Misconduct from Warsaw to Hague and from Brussels to Paris” (1977) *Annals of Air & Space L.* 55 at 64 (Anglo-Saxon) and 94 (France). For Québec see *supra* note 537 and *supra* at 108-109. However, the term ‘faute inexcusable’ is used in air carriage in Québec to describe this type of misconduct. Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 320. Not to confuse terms and concepts herein used, we will employ the term ‘faute inexcusable’ (inexcusable fault) to describe presence of *dolus eventualis*.

¹²⁵⁵ *Supra* at 107s and note 532 for U.S. and English cases and doctrine on willful misconduct and its civil law counterpart. We should add, in this regard, the illuminating case *Pelletti v. Membrilla*, 234 Cal. App 2d 606 (2nd Distr. Cal. 1965).

¹²⁵⁶ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 319 and 320. For French ‘faute inexcusable’ and ‘willful misconduct’ notions see *supra* at 108-109.

as is the case of U.S. majority view case law¹²⁵⁷. The objective standard test is more predictable since it reasons on the conduct of a ‘prudent’ carrier, contrary to the subjective standard test that takes into account the *mens rea* of the specific carrier¹²⁵⁸. Pr. Bin Cheng prefers the objective test since this would defeat the spirit of the Warsaw Convention and judges would be ‘flying in the face of justice in search of absolute equity in individual cases’¹²⁵⁹. Pr. Jean Pineau, on the other hand, argues that cases should be viewed *in concreto* not *in abstracto*, since this seems to be the intent of drafters of the air convention based on preparatory negotiations¹²⁶⁰.

Visby Rules art. 4(5)(e) may approximate Canadian fundamental breach doctrine *mens rea* requirements (intentional or willful misconduct), still, it must be distinguished from the latter doctrine which also concentrates on the seriousness of carrier breach. U.S. unreasonable deviation, on the other hand, may refer to intentional or willful acts but its principle reference to geographical deviation makes it more restrictive in scope than the Visby Rules provision. Another aspect that one should also consider with respect to the loss of the limitation benefit cross-modally and cross-country is the U.S. ‘fair opportunity’ doctrine and the Canadian ‘sufficient notice’ test that we have examined in our transport deregulation part¹²⁶¹.

Despite divergences, all mentioned theories and provisions seem to limit their effect, in theory or in practice, to the loss of carrier limitation benefit. According to Pr. Tetley, Visby Rules art. 4(5)(e) reference to carrier loss of the limitation benefit does not prevent loss of carrier liability defenses and other protective provisions in case of

¹²⁵⁷ Canada: Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 321-322. *Harry Richer Furs Inc. v. Swissair* (1988), 2 F. C. 117 (F. C. C.), *Prudential Assurance Co. v. Canada (C.A.)* (1993), 2 F. C. 293 (F. C. A.) that decided that the result would be the same whatever the standard adopted. *Swiss Bank Corp. v. Air Canada* (1988), 1 F. C. 71 (F. C. A.) commenting on the French shipper protective objective standard. For the U.S. subjective test see Bin Cheng, “Willful Misconduct from Warsaw to Hague and from Brussels to Paris” (1977) *Annals of Air & Space L.* 55 at 66-67, Keith Jacobson, «A Global Perspective on Airline Tort Liability” 13 *DePaul Bus. L. J.* 273 at 281.

¹²⁵⁸ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 321-322.

¹²⁵⁹ Bin Cheng, “Willful Misconduct, From Warsaw to the Hague and From Brussels to Paris” (1977) 2 *Annals of Air & Space L.* 55 at 99. The author argues that the objective standard test is particularly appropriate in the case of international uniform law based on treaties, change in which cannot and should not be made unilaterally by any of the participating states or courts. *Ibid.*

¹²⁶⁰ Jean Pineau, *Le Contrat de Transport Terrestre, Maritime, Aérien* (Montréal: Les Éditions Thémis, 1986) at 322. The only Canadian case commenting more in detail on this Visby Rules point is *Ontario Bus Industries Inc. v. Federal Camulet* (1992), 1 F. C. 245 (F. C. C.).

¹²⁶¹ *Supra* at Part I, Chapter II, Sec. 1, Par. 1 (C) and Sec. II, Par. 2.

fundamental breach or deviation¹²⁶². Scrutton agrees with Pr. Tetley but notes that if carrier servants engage in deviation or fundamental breach, these doctrines will not operate carrier loss of the limitation benefit under the Visby Rules because of the ocean carrier personal fault requirement¹²⁶³.

U.S. Draft COGSA '98 proposes an interesting solution in approaching Visby Rules art. 4(5)(e) and the unreasonable deviation doctrine. In Sec. 9(h)(3)(D)) it reproduces Visby Rules art. 4(5)(e) but also operates loss of carrier limitation benefit in case of 'unreasonable deviation committed intentionally or recklessly and with knowledge that damage will probably result'¹²⁶⁴. This provision advances an interesting uniformity proposal in combining unreasonable deviation doctrine with Visby Rules loss of carrier limitation benefit provisions¹²⁶⁵.

Conclusion

Overall, all Canadian and U.S. land and ocean carriers are generally subject to either contractual or statutory liability limitations uniformly applicable within each mode at the domestic level, although amounts and measures greatly vary cross-modally and cross-country. This is where harmonization efforts should intervene to advance a harmonized limitation amount and measure that will ensure stability in international intermodal shipping.

¹²⁶² *Canadian Pacific Forest Products Ltd.-Tahsis Pacific Region* [1999] 4 F. C. 320 (F. C. A.) and William Tetley, *Marine Cargo Claims* (Montréal: International Shipping Publications, 1988) at 123. The author argues that art. 4(5)(e) is a specific fundamental breach/deviation provision that can co-exist with the general theories in the U.S. and Canada. *Ibid* at 111 and 121. Note, in this respect, that Visby Rules art. 4(5)(a) continues to use the expression 'in any event', possibly implying that preexisting doctrines are not abolished. *Ibid* at 122. We have seen, however, that unreasonable deviation and fundamental breach limit, in practice, their effect to loss of carrier limitation benefit. *Supra* notes 1169 and 1247.

¹²⁶³ Abraham Mocatta, Michael J. Mustill, Stewart C. Boyd, *Scrutton on Charterparties and Bills of Lading* 19th ed. (London: Sweet & Maxwell, 1984) at 456 to which the Canadian case *Ontario Bus Industries Inc. v. Federal Camulet* (1992), 1 F. C. 245 (F. C. C.) refers.

¹²⁶⁴ (Sec. 9(h)(3)(D)) of the Draft COGSA '98 provides: Paragraph (1) (limitation amounts) does not apply if it is proven that the loss or damage resulted from: (i) an act or omission of the carrier, within the privity or knowledge of the carrier, done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result; or (ii) an unreasonable deviation if the carrier knew, or should have known, that the deviation would result in such loss or damage.

¹²⁶⁵ *Supra* at 252 on the difference between Visby Rules art. 4(5)(e) and the unreasonable deviation doctrine. Authors opine that draft COGSA 1998 limitations and loss of the limitation benefit provisions will save considerable claims expense since the cargo interests will no longer be able to defeat damage limitation with technical arguments such as the claims that there was no 'fair opportunity' to declare value on the BOL. Michael McDaniel, *Proposed Changes to U.S. COGSA* (1998) online: Countryman & McDaniel Homepage <http://www.cargolaw.com/presentations_cogsa98.html> (last visited: June 13, 2003). For the U.S. specific 'fair opportunity' doctrine see *supra* at Part I, Chapter II, Sec. 1, Par. 1 (C) and Sec. II, Par. 2 (ocean and land transport).

Loss of statutory or contractual liability benefit provisions are not always uniformly applicable within each mode at the domestic level. It may be that U.S. unreasonable deviation operates loss of ocean and land carrier limitation benefit. However, U.S. jurisdiction split on the 'fair opportunity' doctrine, the Canadian common law fundamental breach doctrine and its Québec land carrier *rupture de contrats* counterpart add to the complexity of rules governing loss of carrier limitation benefit. Because of the diversity of applicable concepts, harmonization efforts are needed with respect to loss of intermodal carrier liability provisions.

Conceptual variations and divergent applications of mentioned limits and provisions need to be approximated to form a harmonized whole. Suggestions to this direction are made in our following chapter.

Chapter II: Suggestions on Uniformity of Multimodal Carrier Liability in the U.S. and Canada

When observing multimodal legal reality in the U.S. and Canada one cannot but be left in great astonishment as to the complexity of presently applicable rules burdening carriers and shippers and incapacity of the interests involved to elaborate a uniform regime to govern multimodal carrier liability.

We are here to contribute by our writing to elaborating uniform multimodal liability rules. What we offer is suggestions towards uniformity, in other words, we do not advance a multimodal carrier liability regime but simply make uniformity proposals on certain liability issues¹²⁶⁶. Our suggestions are based on existing legal realities in the U.S. and Canada and take into account different proposals advanced, so far, by doctrine. Even though the scope of our study is geographically limited, most of our suggestions and reasoning can be transposed to the international level.

Our proposals will be developed in three sections: the first will concentrate on general suggestions on multimodal carrier liability (**Section I**) and then will follow suggestions on the basis (**Section II**) and the limitation (**Section III**) of multimodal carrier liability

Section I: General Suggestions on Uniformity of Multimodal Carrier Liability in Canada and the U.S.

So far, all topics of our diverse multimodal carrier liability analysis are demonstrative of the legal complexities prevailing in the sector. Diverse liability regimes, unclear or/and opposing case law applications, highly technical concepts in the two countries need to be dealt with in an effort to achieve uniformity. In making our uniformity suggestions on multimodal carrier liability we will be based on approximation of existing legal principles¹²⁶⁷. This is because our suggestions primarily seek pragmatic solutions, in the absence of which parties (carriers, shippers and insurers) consent will be

¹²⁶⁶ We believe that elaboration of an intermodal liability regime should be the result of a concerted effort. *Supra* at 11. We should also note that suggestions herein made are based on the topics already examined and could be reformulated if new elements come into play. On the flexibility of our proposals see also *infra* at 260.

¹²⁶⁷ *Supra* at 15s.

withheld. In making our suggestions, we also seek to fairly balance shipper and carrier interests and clarity, to the degree possible, of applicable provisions¹²⁶⁸. These objectives will be materialized as our analysis develops.

We will herein concentrate on our suggestion for a gradual, pragmatic uniformity **Par. 1**, before presenting our general multimodal carrier liability suggestions **Par. 2**.

Paragraph 1. Gradual, pragmatic uniformity: Whatever the geographical scope of proposed uniformity, whether bilateral, multilateral or international, we believe that gradual, not radical, changes from currently applicable liability provisions should be made towards this end. This is the lesson drawn from the study of the 1980 Multimodal Convention and, more particularly, carrier and their insurer inability to predict the effects of the newly established regime, leading to their opposing its adoption. This is also the conclusion drawn from our deregulation study and highly diverse multimodal carrier liability rules present in the U.S. and Canada¹²⁶⁹. Pr. Jan Ramberg has stated, in this regard, that any uniformity initiative should, as far as liability for loss of or damage to the goods is concerned, rest on the present ‘liability level’ in order to enhance worldwide ratification¹²⁷⁰.

The main difficulty in establishing international multimodal transport rules seems to stem from the fact that necessary political focus on multimodalism is lacking in both Canada and the U.S.. In effect, private maritime or land transport laws are rarely the ‘top priority’ of national lawmakers, particularly where issues of social and economic policy are present, so that national politicians frequently succumb to the dictates of short-term political expediency, leaving real law-making for later times¹²⁷¹. Furthermore, conflicting interests of carriers, shippers, insurers and a presently profitable multimodal transport sector are blocking uniformity undertakings so that it would probably take a ‘hand of

¹²⁶⁸ *Supra* at 12-13, 26, 31s for a more detailed analysis.

¹²⁶⁹ *Supra* at Part I, Chapter I, Section I, Par. 1 for the 1980 Multimodal Convention, Part I, Chapter II for the deregulation and Part II Chapter I for the U.S./Canada comparative liability study.

¹²⁷⁰ Jan Ramberg, *The Future of International Unification of Transport Law* (1998) online: Forwarder Law Homepage <<http://www.forwarderlaw.com/feature/ramberg2.html>> (last visited: March 6, 2001). Also, Pr. Tetley notes that the world is not yet ready for a monolithic international law. It cannot give up its diversity of social purpose and manner of doing things, which actually makes it richer the same way Canada is richer because of its two cultures. William Tetley, “Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions” (2000) Tul. Mar. L. J. 775 at 823.

¹²⁷¹ William Tetley, “Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions” (2000) Tul. Mar. L. J. 775 at 810.

steel' and transportation sensitive politicians to lobby Congress in this direction. Lack of political and industry consensus stresses the importance of gradual changes, whose proximity to ground practice makes more likely their adoption by all interests involved. Moreover, economic advantages of establishing uniform intermodal liability suggestions cannot but bolster a political decision to undertake a uniformity effort¹²⁷².

Our gradual, pragmatic uniformity consists in proposing: an ocean v. land carrier liability pattern (A), a contractual definition of land carrier liability (B) and a contractual document of voluntary adoption (C).

A. Ocean v. land carrier liability pattern: Our gradual changes suggestion becomes reality through elaboration of an ocean v. land (rail/road carriage) network system of intermodal carrier liability representing for us the minimum uniformity solution that best combines commitment to the present legal reality, respect of modal and cultural diversities and likelihood of its adoption by interested parties while keeping a uniformity perspective¹²⁷³. Ocean carriage needs to be distinguished from land transport because of the nature of the liquid element which exposes the ocean carrier to greater risk of liability¹²⁷⁴. This generally results in a more expansive list of liability limitations, comparatively lower monetary limitations and reluctance of maritime carriers to accept liability for delay¹²⁷⁵. Land carrier liability rules are brought under the same roof following our suggestions. The ocean v. land carrier liability pattern we propose does not exclude adoption of common liability provisions to land and ocean carriers.

Under the proposed pattern, localized (evident) damage will be subject to land or ocean rules, depending on the segment of the intermodal journey the damage occurs. This is, for us, an obvious, fair, clear-cut solution that matches the obviousness and clarity of a localized damage. Recovery for non-localized (concealed) damage may depend on the

¹²⁷² On the economic advantages of a uniformity initiative see *supra* at 33s. and *infra* at Part II, Chapter II, Section III (A).

¹²⁷³ International laws in any form must recognize diversities in substance or they will fail. William Tetley, "Uniformity of International Private Maritime Law" (2000) Tul. Mar. L. J. 775 at 823. Respondents, (industry representatives, experts, governmental, non-governmental, inter-governmental organizations), to an UNCTAD questionnaire are divided with regard to the type of liability system to be adopted for the multimodal carriage. Just under half of all respondents express their support for a uniform liability system and, among the remainder of respondents, broadly equal numbers express support for a network liability system or for a modified liability system. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Genève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 97. *Annex No. III, Table No. 12* at cc.

¹²⁷⁴ Jan Ramberg, *The FIATA Model Rules on Freight Forwarding Services* (2000) online: Forwarderlaw Homepage <<http://www.forwarderlaw.com/feature/ramberg3.html>> (last visited: Dec. 3, 2001).

presence of an ocean segment in the journey. If an ocean segment exists in the multimodal journey, ocean rules will apply with respect to the concealed damage. Otherwise, land provisions will take effect¹²⁷⁶. In other words, what we propose is an ocean v. land liability pattern that will apply differently in case of localized or concealed damage¹²⁷⁷. In the first case, it is the *situs* of the damage that determines the applicable liability rules while, in the second case, we create a simulation of the *situs* of the damage to determine applicable liability rules.

One could argue that the modesty in the degree of uniformity sought by the ocean v. land liability pattern does not make it worthy of attention¹²⁷⁸. A more integrated regime should be sought for multimodal carrier liability. However, we should first note that our suggestions are clearly situated on the path towards uniformity since they try to bring together land carrier liability rules and examine, for the rest, common grounds between ocean and land liability provisions. As such, they differ from current fragmented multimodal reality. Second, our suggestions may lack audacity in the degree of uniformity they seek, but “those who do intentionally or negligently ignore the past [failure of the audacious 1980 Multimodal Convention] they are condemned to repeat it” (George Santayana 1863-1952).

In this regard, considerable differences seem to exist between our suggestions and the 1980 Multimodal Convention or the FIATA BOL (FBL) uniform liability provisions¹²⁷⁹. While the latter documents differ between them in other ways, they resemble in that they propose one intermodal liability limitation amount for localized and non-localized damage but this amount differs depending on the presence or not of an

¹²⁷⁵ *Ibid.* Neither the Hague nor the Visby Rules explicitly provide for delay.

¹²⁷⁶ Our suggestion is inspired by FBL and 1980 Multimodal Convention liability provisions. *Supra* at 55-56 and at 65. Depending on applicable ocean and land carrier limitation amounts as well as where damage occurs most frequently during the intermodal journey, whether on land or at sea, proposed suggestions may be said to privilege ocean carriers (who usually benefit from lower limitation amounts compared to other modes), or shippers. These are considerations to take into account in defining ocean and land carriers limitation amounts within a multimodal context, not only limited to North America (where land multimodal carriage may be used more frequently) but also worldwide. *Annex. No. III, Table No. 12* at cc.

¹²⁷⁷ See concurring opinion of Jonathan Rodriguez-Atkatz, “Apportionment of Risk in Vessel and Marine Terminal Contracts” (1989) 64 Tul. L. Rev. 497 at 508 who argues that to avoid inconsistencies between the law governing land and ocean carriers, the multimodal BOL must be drafted so that it prospectively segregates claims into categories based upon whether the *situs* of the damage is known or unknown.

¹²⁷⁸ See *supra* at 66-68 for an analogous reasoning with respect to the FBL. See also concurring opinion of De Wit Ralph, *Carrier Liability and Documentation in Multimodal Transport* (D. Jur. Thesis, Law Faculty of the Vrije Universiteit at Brussels, 1993) [published by Informa Law and is part of the Lloyd’s Shipping Law Library] at 875.

¹²⁷⁹ For these documents see *supra* at Part I, Chapter I, Section I, Par. 1 and Par. 2 respectively.

ocean segment in the multimodal journey¹²⁸⁰. This is an intermodal ocean-land v. a land carrier limitation amount for localized and concealed damage. Our approach is different. We maintain different limitation amounts for ocean and land carriers in case of localized (evident) damage and apply different liability limitations for non-localized (concealed) damage depending on whether the intermodal journey comprises or not an ocean segment (1980 Multimodal Convention, FBL approach)¹²⁸¹. As such, our proposal is more modest than that of the 1980 Multimodal Convention and the FBL.

Our suggested approach further distances itself from the FBL provisions. In effect, the FBL gives priority to mandatory applicable domestic legislation¹²⁸². Since most countries provide for compensation of localized damage on the basis of unimodal liability rules, the FBL really reflects one of the most modest uniformity approaches of a multimodal carrier liability regime, giving priority to national, fragmented unimodal rules. We intent our suggestions to supplant domestic laws and practices upon which they are based¹²⁸³. This is an element we encounter in the 1980 Multimodal Convention whose provisions were designed to override national laws (art. 19).

The question may be raised whether we go too far in advancing overriding multimodal carrier liability suggestions instead of adopting the more complacent FBL approach. We prefer not to follow this approach! Contrary to the 1980 Multimodal Convention and the FBL document, the limited geographical scope of our study permits an in depth analysis of domestic unimodal rules and practices so that their harmonization may successfully replace formerly applicable rules advancing, at the same time, uniformity.

¹²⁸⁰ *Supra* at 55 and at 65 on this point.

¹²⁸¹ Our suggestion on localized damage differs from the FBL and the 1980 *Multimodal Convention* corresponding provisions. Under both these documents uniform liability provisions, different limitations apply depending on whether the journey contains an ocean segment and irrespective of where the damage occurs. We make the distinction between an ocean and a land segment in localized damage and we apply the rules pertinent to each segment depending on where the damage occurs. For non-localized damage we follow similar to said documents principles. See also *supra* note 1276 and accompanying text. The overall modesty of our approach is explained by the need to adopt viable liability rules. A more integrated approach could be envisaged at a later stage.

¹²⁸² *Supra* at 64.

¹²⁸³ Some nuances have to be made on this point. The FBL is a document of voluntary application whose provisions give priority to national legislation. Our document is of voluntary adoption but, when adhered to, it overrides unimodal liability rules and gives the possibility to parties to contractually modify land carrier liability. This is because such seems to be the case with U.S. and Canadian land carriers.

To make sure that more integrated proposals are well represented in our study, different degrees of uniformity will be suggested as possible solutions to consider apart from our ocean v. land multimodal carrier liability suggestions, which constitute the most modest approach towards uniformity. This does not mean to say that our document will contain alternatives or options to the suggested ocean v. land liability pattern¹²⁸⁴. Under our suggestions, the latter will represent the minimum degree of uniformity herein retained. However, if drafters and negotiators want to reach higher degrees of uniformity instead of our minimum level of uniformity, they could consider one of the more integrated choices present in our study. As Pr. Tetley suggests, adoption of international law requires flexibility and objective thinking¹²⁸⁵.

B. Contractual Definition of Multimodal Carrier Liability?: Shipping has seen the rise and fall of the principle of freedom of contract. Starting from carrier contractual abuses in the 1800s, it went through subsequent restrictions of this principle to end up, today, gradually expanding its use through transport deregulation and the use of confidential contracting¹²⁸⁶.

Despite this fact, ocean carrier liability in Canada and the U.S. may not be contractually limited today (formalism). On the contrary, U.S. and Canadian land carrier liability is largely subject to contractualism permitting carriers and shippers to agree on its liability terms (except for Canadian motor carrier contractual limitation of carrier liability).

Reasoning exclusively on the basis of formalism and governmental intervention when formulating our uniformity suggestions on multimodal carrier liability would be trying to turn stream's flow backwards. We do not rejoice in such a perspective not only because of current deregulated reality but, also because deregulated liability limits have achieved, in practice, a certain degree of contractual uniformity¹²⁸⁷. For instance, inherent

¹²⁸⁴ In drafting national or international laws, alternatives or options are to be avoided because they make the entire process of adoption of these laws difficult and time-consuming. William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions" (2000) Tul. Mar. L. J. 775 at 813.

¹²⁸⁵ *Ibid.*

¹²⁸⁶ Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) L. M. C. L. Q. 178 at 178s, 186 and 191.

¹²⁸⁷ *Ibid* and *supra* note 1194. This reflects informal harmonization. Exception should be made of confidential contracts. For these see *infra* at 262s. Contractual uniformity of carrier liability is a flexible concept that enhances uniformity, not only because of the stabilization of contractual practices it gives way to, over time, but also because it supports expansion of trade and spread of private businesses, the latter influencing development of harmonized

to deregulation carrier abuses such as U.S. motor carrier inadvertence clauses are quite limited in practice following deregulation.

It may be that, on an economic analysis basis, possibility to depart from standardized contract terms under deregulation is costly¹²⁸⁸. However, considering the contractual uniformity of liability terms carriers and shippers have generally reached in practice, uniformity is generally preserved and departure from established contractual terms will be envisaged only on the condition that it is profitable enough to overcome the costs it will incur¹²⁸⁹. For all these reasons, we propose that an ocean (formalist) v. land (contractualist) multimodal carrier liability pattern, the former prohibiting contractual limitation of carrier liability while the latter sanctioning it, be retained.

Suggesting that land carriers can contractually limit their liability in Canada and the U.S. contravenes currently applicable Canadian motor carrier practices/laws. In effect, even though statutory and case law language permit contractual limitation of motor carrier liability, Canadian carriers do not make recourse to it whereas Québec courts do not allow such limitation¹²⁹⁰. It is not only that Canadian motor carriers do not make use of contractual limitations, it is also that they do not need to do it. In effect, Canadian motor carriers currently maintain the very low uniform limitation amount of 4.41\$CAD per kilo or 2\$CAD per pound, much lower than its generally applicable U.S. counterpart, the 25\$USD per pound. Maintaining the lowest liability limitation, Canadian motor carriers do not fear competition in this field to be tempted to further limit their liability. However, we have also seen that U.S. motor carriers may apply limitations as low as 1\$USD per pound for big volume shipments¹²⁹¹. Even if this limit does not seem to currently threaten Canadian motor carriers through competition, the day may come

laws at the domestic level. Stephen Zamora, "NAFTA and the Harmonization of Domestic Legal Systems: the Side Effects of Free Trade" (1995) *Ariz. J. Int'l & Comp. L.* 401 at 421.

Pr. Jan Ramberg adds that sharp competition promotes decent behavior which, coupled with the presence of a judicial safety net, reduces in importance the need for shipper protection from carrier abuses or prevention of damages through regulation. Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) *L. M. C. L. Q.* 178 at 191. For a more complete analysis of this argument see *infra* at 301-302 on the loss of limitation of liability benefit.

¹²⁸⁸ Paul B. Stephan, "The Futility of Unification and Harmonization of International Commercial Law (1999) 39 *Va. J. Int'l. L.* 743 at 783 stating that the benefits derived from standardization of contractual terms might be so great as to make departures costly even in those cases where a modification might produce some welfare gains.

¹²⁸⁹ Ronald J. Gilson, David M. Schizer, "Understanding Capital Structure: a Tax Explanation for Convertible Preferred Stock" (2003) 116 *Harv. L. Rev.* 874 at 881.

¹²⁹⁰ *Supra* at Part I, Chapter II, Section I, Par. 2(B)(b). For our suggestion in this regard see *Annex No. III, Table No. I/2* at cc.

¹²⁹¹ This is the example of American Freightways, *supra* note 1145 and accompanying text.

when this will occur depending on how often these extremely low liability limitations will be used. That day, Canadian motor case law may choose to use statutory and judicial permissive provisions/terms to sanction contractual limitation of liability.

It is certain that a deregulated environment requires shipper alertness to avoid eventual carrier abuses but in a market economy, as is the one introduced in carriage contracts, consumers of goods or services have to be alert and be informed of their rights and choices. On the other hand, it is not as if deregulation denies shippers any type of protection. Follow the deregulation trend also means that shipper sophistication and parties intent will be seriously considered before giving effect to contractual liability terms and conditions (passage from the regulatory to the judicial 'safety net'). Reliance on shipper sophistication and parties' intent may increase insecurity in the outcome of case law decisions. However, since contractual clauses limiting liability are, as transportation laws and regulations, strictly interpreted in Canada and the U.S., the effect of the agreement and the latitude of the judge's subjectivity are constrained¹²⁹². Moreover, our codification of U.S. and Canadian case law conclusions on shipper sophistication and equal bargaining power helps to clarify applicable principles in this respect¹²⁹³. Further codification of case law, a principle adopted by our analysis, also constitutes a useful tool for carriers and shippers in predicting case law conclusions.

Following our suggestions, U.S. and Canadian ocean carriers are always prohibited to contract below applicable international convention limitations. This is because of Hague and Visby Rules provisions, which form the basis of our suggestions for ocean carriers. One, however, should not exclude evolution of ocean carriage to permit contractual limitation of liability even if this may take considerable time to occur. In effect, transport deregulation has often led to contractual liability limitation, mostly in case of land confidential contracts. Even though ocean carriage confidential contracts do not currently practice carrier liability limitations¹²⁹⁴, competition could eventually lead to such result. In effect, the Hague and the Visby Rules can become default rules since

¹²⁹² For the U.S. : Blake D. Morant, «Contracts Limiting Liability» (1995) 69 Tul. L. Rev. 715 at 744. For Canada: *Reed Decorative Products Ltd. v. Manchester Liners* (1984) 1984 F. C. J. No. 618 (F. C. J.).

¹²⁹³ *Supra* notes 714, 685, 641, 812 and accompanying text.

¹²⁹⁴ *Supra* at Part II, Chapter I, Section II, Par. 3(A).

parties to a confidential contract can opt out of their provisions with a swipe of the pen¹²⁹⁵.

Expanded use of such confidential contracts could lead to renegotiation of international conventions to permit contractual limitation of ocean carrier liability. If this were to occur, contractual limitation of multimodal carrier liability would become the principle in all modes of transport and the only thing that would, then, be the subject of uniformity efforts would be ocean and land carrier liability amounts and measures.

Extrapolating into the future is a highly stimulating and fulfilling task. Still, the uniformity we advocate is based on existing realities. The way things stand at present, we believe it is necessary to maintain the prevailing distinction between ocean carriers ban on contractual limitation and land carriers permission to contractually limit their liability (ocean v. land liability pattern)¹²⁹⁶.

C. Contractual document of voluntary adoption: The question herein raised is what type of document will embrace our suggestions. International transport law, especially international ocean carriage, has been traditionally harmonized through conventions¹²⁹⁷. International conventions, however, are not the only harmonization vehicle: standard form contracts, uniform codes, standard clauses, insurance policies all assist in securing harmonization of law¹²⁹⁸.

In the case of multimodal transport, failure to elaborate an international convention to govern carrier liability has led to harmonization initiatives by means of standardized contractual documents¹²⁹⁹. Today, doctrine¹³⁰⁰ leans towards adoption of

¹²⁹⁵ *Supra* at 158-159. *The Latest on Cargo Liability Reform* (2001) online: BP & M Homepage <<http://www.bpmlaw.com/transportation/publications/legallookout1.101.htm>> (last visited: Nov. 17, 2001).

¹²⁹⁶ The FBL does not even address the issue of contractual limitation or not of carrier liability. *Supra* at 65-66.

¹²⁹⁷ Hannu Honka, «Harmonization of Contract Law Through International Trade: A Nordic Perspective» (1996) 11 Tul. Euro. Civ. L. For. 111 at 128 and 131. For instance, international ocean carriage is governed today by the Hague, Hague-Visby and Hamburg Rules. International ocean and air carriage, however, have been de-harmonized due to amendments or new conventions as well as divergent national interpretations of each convention's terms. *Ibid.*

¹²⁹⁸ William Tetley, «Uniformity of International Private Maritime Law» (2000) Tul. Mar. L. J. 775 at 787.

¹²⁹⁹ *Supra* at Part I, Chapter I, Section I, Par. 2.

¹³⁰⁰ Hannu Honka, «Harmonization of Contract Law Through International Trade: A Nordic Perspective» (1996) 11 Tul. Euro. Civ. L. For. 111 at 151, 152, 154. For CIFFA position see Tony Young, *Position Statement on Multimodal Liability* (2001) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 9, 2001). Jack G. Knebel, Denise Savoie Blocker, «United States Statutory Regulation of Multimodalism» (1989) 64 Tul. L. Rev. 543 at 565s. H. Hillenbrand, «Proper Drafting of the Intermodal Contract as a Solution to Liability Differences between Transportation Modes» (presentation to Pac, Rim Mar. L. Conf., Jan. 6, 1989) as reported in Richard W. Palmer, Frank P. DeGiulio, «Terminal Operations and Multimodal Carriage» (1989) 64 Tul. L. Rev. 281 at note 440 and

standardized contractual documents ('properly drafted intermodal through bills...or connecting carrier agreements') prescribing uniform multimodal liability standards. This seems also to be the opinion of practitioners¹³⁰¹.

Such a choice is also justified from an economic point of view. In effect, standardized contracts reduce the costs of drawing up contracts. If a transport company is making similar agreements with millions of customers a year, it is a lot cheaper to draft a single contract with options to cover likely variations among what customers want than to redraft the contract for each transaction¹³⁰². The benefits of standardized contracts are time and money savings¹³⁰³.

We side with this opinion. Our choice to adopt a modest uniformity approach does not only translate into maintaining an ocean v. land liability pattern but also into advancing a contractual document of voluntary application that will either be sanctioned by national governments or by parties private practice¹³⁰⁴. In the latter case, uncertainty remains with documents of voluntary application since there is no guarantee that carriers and shippers will adopt them¹³⁰⁵. However, wide adoption of our voluntary document should not be hard to get due to the fact that its suggested contractual provisions are

accompanying text. Stephen G. Wood, «Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues» (1998) 46 Am. J. Comp. L. 403 at 415. Jan Ramberg, *Unification of the Law of International Freight Forwarding* (2001) online: UNIDROIT Homepage <<http://www.unidroit.org/english/publications/review/articles/1998-1.htm>> (last modified: Jan. 10, 2001). Jan Ramberg, *The Future of International Unification of Transport Law* (1998) online: Forwarder Law Homepage <<http://www.forwarderlaw.com/feature/ramberg2.html>> (last modified: Jan. 10, 2001).

¹³⁰¹ Paul S. Edelman, "Second Circuit Handles Bill of Lading for Sea, Land Transportation" (2000) 3 N. Y. Law. J. 1 (WESTLAW-Newsletters). U.S., D.O.T., *Towards Improved Intermodal Freight Transport in Europe and the United States* (1998) online: U.S. DOT Homepage <http://www.ops.fhwa.dot.gov/freight/institut/inter/eu_us2.pdf> (last visited: July 11, 2001).

However, 58% of respondents (industry representatives, experts, governmental, non – governmental, inter – governmental organizations) to an UNCTAD questionnaire expressed the view that any multimodal instrument should be in the form of a convention which applies on a mandatory basis and provides mandatory liability rules (that cannot be contracted out by parties). UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève UNCTAD/SDTE/TLB/2003/1, 2003) at par. 79.

¹³⁰² For this assertion and further analysis see David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 157. See also *supra* at 261.

¹³⁰³ Anne Brafford, "Arbitration Clauses in Consumer Contracts of Adhesion" (1996) 21 Iowa J. Comp. L. 331 at 381.

¹³⁰⁴ The Hague Rules were intended to be voluntarily incorporated by carriers into their BsOL but the rules were given wide effect either in the form of legislative ratification or by voluntary adoption. Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 405. *Annex No. III, Table No. 12* at cc for our suggestions.

¹³⁰⁵ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 393.

based on currently applicable realities without distancing themselves greatly from them, in the same manner the FIATA BOL provides¹³⁰⁶.

When we compare our general suggestions on multimodal carrier liability uniformity to the UNIDROIT principles, we find common ground¹³⁰⁷. Both our suggestions and the UNIDROIT principles are of voluntary application (UNIDROIT preamble par. 2). Both adopt the principle of freedom of contract combined with a mandatory set of rules (UNIDROIT Chap.1, art. 1.1 and 1.5). Both intend to conciliate principles of civil and common law tradition by adopting solutions common to existing legal systems (and modes, in our case) increasing, at the same time, clarity and predictability of applicable rules¹³⁰⁸.

However, there are aspects of the two sets of adopted rules that differ. The UNIDROIT principles are general uniform principles applicable to the formation, validity, execution, damages and resolution of contracts at the international level. Carrier liability rules are *ad hoc* rules and cannot, therefore, look to general international contract law principles for uniformity suggestions except, perhaps, in a complementary way¹³⁰⁹. Moreover, because of their extended geographical scope, the UNIDROIT principles cannot consider in depth all country laws or attribute to each one of them the same influence¹³¹⁰. Our analysis geographical scope is more limited so that respective laws and legal systems are considered in greater detail, attributing to each greater importance. Finally, the UNIDROIT principles seem to follow the example of the FIATA BOL in

¹³⁰⁶ This is the 'opt in' method of adoption of a voluntary document which takes effect where parties to the contract choose to apply voluntary document's provisions. This is also the method of adoption of the FBL document, see *supra* at 62.

¹³⁰⁷ The objective of the UNIDROIT (Institut International pour l' Unification de Droit-International Institute for the Unification of Private Law) principles is to establish a balanced set of rules governing the general principles of contracting designed for use throughout the world, irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied. Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?* (1996) online: <<http://www.cisg.law.pace.edu/cisg/biblio/bonell96.html>> (last visited: Jan. 15, 2000).

¹³⁰⁸ Common requirements to existing legal systems could be considered to constitute a sort of modern 'ius commune'. Michael Joachim Bonell, "The UNIDROIT Principals of International Commercial Contracts" (1995) Tul. L. Rev. 1121 at 1143-1144. Franco Ferrari, "Defining the Sphere of the 1994 'UNIDROIT Principles of International Commercial Contracts'" (1995) Tul. L. Rev. 1225 at 1232. Anne Marie Traham, «UNIDROIT Principles» (Montréal: Hotel Intercontinental, CDACI 2001) (unpublished).

¹³⁰⁹ For instance, Chapter I, art. 1.7 reference of the UNIDROIT principles to 'good faith and fair dealing in international trade'. These complementary aspects of the UNIDROIT principles to our proposals will not retain herein our attention.

¹³¹⁰ Michael Joachim Bonell, "The UNIDROIT Principals of International Commercial Contracts" (1995) Tul. L. Rev. 1121 at 1129.

providing that they do not limit the application of imperative domestic or international laws on the issue (UNIDROIT Chap.1, art. 1.4 FBL clause 6.B)¹³¹¹. Our suggestions may be of voluntary application but, when adopted by the parties to the transport contract, they override existing (unimodal) applicable rules moving, at the same time, towards uniformity of multimodal carrier liability. Because of the specificity of transport liability rules, the limited geographical scope of our study permitting a more in depth analysis of carrier liability and the effect of our suggestions on domestic laws, we will not herein reason on the basis of the UNIDROIT principles.

Gradual changes towards uniformity presuppose frequent review of the voluntary contractual document adopted, in order to adapt it to economic, legal and political realities. Scheduling for systematic (i.e. every three or four years) review of the adopted proposals at the bilateral level would condition continuing successful implementation of proposed suggestions¹³¹².

Equally important to its systematic review, is foreseeability of commercial contract provisions. When a dispute arises, the parties must be able to trust the contract. This is why it is necessary to comment on the content of the contractual voluntary document adopted.

Paragraph 2. General liability provisions: We have already affirmed that the way to achieve uniformity consists in retaining what is common throughout modes and countries, approximate divergent liability rules (i.e. encounter the ‘middle ground’ solution) and, in case such approximation seems impossible, invite parties to negotiate a commonly agreed upon solution¹³¹³.

¹³¹¹ *Ibid* at 1135. The author asserts that it is very controversial which type of mandatory rules will take priority in each given case. See also Franco Ferrari, “Defining the Sphere of the 1994 ‘UNIDROIT Principles of International Commercial Contracts’” (1995) Tul. L. Rev. 1225 at 1237. Anne Marie Traham, «UNIDROIT Principles» (Montréal: Hotel Intercontinental, CDACI 2001) (unpublished).

¹³¹² Bringing up to date international documents is a challenging task because if the revision procedure is not easy and flexible, proposed amendments to the document will not be adopted. On the examination of different revision procedures see William Tetley, “Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions” (2000) Tul. Mar. L. J. 775 at 817s.

¹³¹³ *Supra* at 20-21 for our harmonization approach. 39% of respondents, (industry representatives, experts, governmental, non-governmental, inter-governmental organizations), to an UNCTAD questionnaire considered a new international instrument to govern multimodal transport to be most appropriate against 26% opting for a revision of the 1980 Multimodal Convention and 13% expressing support for an extension of the ocean or land liability regime to land and ocean segments of the transportation respectively. UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Génève:

Taking a look at cross-modal and cross-country liability limitation provisions we observe that land and ocean carriers in both countries share common liability exceptions and are subject to limited liability that may be either contractual or statutory. We will, therefore, exonerate all carriers in the presence of common liability exceptions and limit multimodal carrier liability to an amount that should be translated into SDR to serve as a hedge against monetary inflation¹³¹⁴. Moreover, shipper *prima facie* case and carrier proof of absence of negligence (reasonableness standard) with respect to carrier exoneration causes are common case law conclusions that will be herein retained¹³¹⁵. Further, current statutory law and cases hold all carriers liable for the actual value of the physical loss, damage and delay to the extent of a prescribed liability limitation amount¹³¹⁶. Finally, we will not permit contractual exclusion of carrier liability as no modal or country case law seems to permit such an eventuality. We cannot but retain these common statutory or case law conclusions.

In ocean transport, proof of vessel seaworthiness before and at the commencement of the journey will constitute the condition precedent to ocean carrier invoking liability exceptions, since this is a common Hague and Visby Rules provision based on carrier due diligence and which does not vest such great importance in land transport (ocean v. land pattern)¹³¹⁷. We will also retain an ocean v. land liability pattern with respect to carrier care for the cargo and the higher degree of care (‘properly and carefully’) encountered in ocean carriage when compared with land transport (due diligence)¹³¹⁸.

UNCTAD/SDTE/TLB/2003/1, 2003) at par. 32. We should remind the reader that we are attentive of our use of the ‘middle ground’ solution method so as not to remote ourselves from present liability rules. *Supra* note 102.

¹³¹⁴ *Annex No. III, Table No. 12* at cc for a graphical representation of our (general liability) suggestions. On the possibility to limit multimodal carrier liability see comments of Boris Kozolchyk, “On the State of Commercial Law at the State of the 20th Century” (1991) *Az. J. Int’l. & Comp. L.* 1 at 11 and 19.

SDR is an international measure of value whose basket of currencies best reflects present international economic reality coupled with a constant update of its value. Tony Young, *CIFFA Submission To Transport Canada: the OECD’s Maritime Transport Committee Workshop in Paris* (Jan. 25-26, 2001) online: CIFFA Homepage <http://www.ciffa.com/downloads/submission/CIFFA_Submission.pdf> (last visited: Feb.20, 2001). Jan Ramberg, “The Development towards Control of Maritime Contracts by Mandatory Law” (1993) *Ll. Mar. & Com. L. Q.* 178 at 190. See also *supra* note 247.

¹³¹⁵ For these see multiple pages *supra* at 175-221.

¹³¹⁶ For delay see also opinion of Jan Ramberg, “The Law of Carriage of Goods, Attempts at Harmonization” (1974) 9 *E. T. L.* 1 at 40. Suggestions will not be made on consequential damages provisions, measure of goods value ‘at shipment’ or ‘at destination’ and payment of ocean freight charges to the shipper (for a schematic representation of said modal provisions see *Annex No. III, Tables No. 9-11* at cxcv-cc) (modes of calculation of actual loss). Cross – modal legislation on these matters differs and development in detail of said concepts is needed before making suggestions in this respect, something that exceeds the purposes of the present study.

¹³¹⁷ We refer to Hague and Visby Rules art. 3(1). *Supra* at 185s. This, despite U.S. Fire Statute provisions which undermine efforts towards international uniformity. *Supra* at 213s.

¹³¹⁸ *Supra* at 187-198.

Section II: Suggestions on the Basis of Multimodal Carrier Liability in the U.S. and Canada

Carrier -as an insurer of cargo- initial liability exceptions were enlarged by adoption of additional exoneration causes included in the BOL and exempting him from the presumption of liability principle. Recently, cargo interests and developing (non-seafaring) countries begun an effort to revise and simplify the Hague and the Visby Rules by adopting liability based on the principle of presumption of fault¹³¹⁹. This is not only the case of the 1978 Hamburg Rules and the 1980 Multimodal Convention¹³²⁰. The presently applicable Hague and Visby Rules (q) liability exception is also based on the same principle, distancing itself from carrier strict liability even as enlarged by BsOL list of liability exceptions¹³²¹.

The analysis that will follow will focus on the choice between the presumption of fault or presumption of liability principles **Par. 1** suggested liability exceptions **Par. 2** and the concept of force majeure within our suggestions **Par. 3**.

Paragraph 1: Presumption of Fault or Presumption of Liability? The difference between the presumption of liability and presumption of fault/negligence principles resides in the proof to be brought by the carrier¹³²². The latter only requires proof of absence of fault made by the carrier while the former requires proof of specific carrier exoneration causes occurring without negligence¹³²³. In other words, simple proof

¹³¹⁹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 419.

¹³²⁰ Although different patterns of the presumption of fault principle are advanced by said documents, we remain always within the sphere of the presumption of fault principle. Part I, Chapter I, Section I, Par. 1(B) (1980 Multimodal Convention) on the general relation between the two sets of rules.

¹³²¹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 410-411.

¹³²² We use the terms 'fault' and 'negligence' interchangeably because of their conceptual proximity. *Supra* note 863.

¹³²³ Jean Louis Baudouin, Pierre Gabriel Jobin, *Les Obligations* 5th ed. (Cowansville, Québec : Les Editions Yvon Blais, 1998) at 702-703. The presumption of fault principle can present a real advantage for the carrier in the case of concealed damage. For the benefit of our suggestions, the principle of presumption of carrier liability, a civil law concept, is conceived as the one accompanied by enumerated exoneration causes that need to be proven by the carrier but need not be external to him. Even though civil law force majeure concept, the corollary of civil law presumption of liability principle, requires carrier to prove external causes of loss and such is the requirement for several carrier liability exceptions in civil law jurisdictions, this is not perceived as such by common law systems. However, both civil and common law jurisdictions refer to a list of specific exoneration causes with respect to the carrier liability as an insurer of the cargo (presumption of liability). This is why we will refer to a list of specific exoneration causes to oppose our principle of presumption of liability to the principle of presumption of fault. On the force majeure concept being the corollary of the civil law presumption of liability principle see *ibid* at 34-35 and

of absence of negligence will not suffice, absent proof of the cause of the loss, to exonerate carrier under the principle of presumption of liability¹³²⁴. This means that the latter principle is not as carrier protective as the principle of presumption of negligence.

Still, ambiguity seems to exist as to the carrier protective character of the presumption of fault principle. In effect, when a carrier invokes a specific cause of loss under the latter principle, it is not always clear whether carrier can be exonerated by simple proof of this cause of loss -as under the presumption of liability principle- or whether he has to prove also absence of negligence in general, -without regard to the cause of the loss- before the burden of proof shifts to the shipper¹³²⁵. In the latter case, the principle of presumption of fault is more burdensome on the carrier than the principle of presumption of liability.

There are authors who have argued that the two principles approximate each other but this opinion has been rejected by modern doctrine that insists on their difference of modes of proof¹³²⁶. We agree with authors that these two concepts are *de faux amis* so that their approximation, or simply opting for one system in favor of the other would be desirable¹³²⁷.

CN tariff 7589-AN and BNSF Railway Intermodal Rules & Policies Guide (Item 62) applicable to international intermodal rail container transport and currently in use by Canadian and U.S. rail carriers sanction the principle of liability for negligence¹³²⁸. Under this principle, carrier fault is not presumed as in the case of the 1978 Hamburg Rules, the 1980 Multimodal Convention or the Hague and the Visby Rules (q) exception but needs

see reported cases by Maurice Tancelin, Daniel Gardner, *Jurisprudence Commentée sur les Obligations* 7me ed. (Montréal: Wilson & Lafleur Ltée, 1999) at 584 (note 2).

¹³²⁴ Interview of the author with Pr. Yves Tassel, Professor of Shipping law at the University of Nantes in France (Feb 22, 2002) e-mail: ytassel@hotmail.com. This remark becomes particularly important in case of concealed damage where, not knowing where the damage occurs, it is often difficult for the carrier to prove the cause of the loss.

¹³²⁵ *Supra* at 52.

¹³²⁶ On the comparison of the civil law force majeure concept, (main exoneration cause of the presumption of liability principle) and the principle of the presumption of fault see Jean Louis Baudouin, Pierre Gabriel Jobin, *Les Obligations* 5th ed. (Cowansville, Québec : Les Éditions Yvon Blais, 1998) at 702-703. In the same sense, see also Jean Pineau, Danielle Burman, Serge Gaudet, *Théorie des Obligations* 3rd ed. (Montréal: Éditions Thémis, 1996) at 680-681. See also Hugh M. Kindered, Mary R. Brooks «Multimodal Transport Rules» (Netherlands : Kluwer Law International, 1997) at 2.

¹³²⁷ On this second suggestion see Michael Beaupré, “La Traduction Juridique” (1987) 28 *Les Cahiers De Droit* 735 at 742-743.

¹³²⁸ *Supra* at 182. CP (00075-00080. A. 1), NS (Sec. 8.3.3.d) and BNSF (Item 62).

to be proven by the shipper. The principle of liability for negligence is, therefore, even more carrier protective than the principle of presumption of fault may be since, in the latter case, carrier's fault is presumed and not proven by shipper.

We should note, in this respect, that contrary to the CN, the BNSF, NS and CP rail tariffs will also exonerate rail carriers in case of a specific list of carrier liability exceptions, narrow duplications of the principle of liability for negligence maintained by the tariff¹³²⁹. Deletion of the presumption of liability liability defenses from paper through adoption of the principle of liability for negligence or the principle of presumption of fault, therefore, does not really mean their elimination in practice¹³³⁰. It simply means that carrier can invoke formerly applicable liability exceptions as specific examples of absence of negligence.

Our suggestion consists in marrying the principle of presumption of fault with the currently applicable principle of presumption of liability ('middle ground' solution). As a result, the principle of presumption of fault will form the basis of carrier liability and will be accompanied by a list of carrier liability exceptions, specific illustrations of the principle, requiring proof of the harm-causing event by the carrier. The list of exceptions will be based on currently applicable cross-modal and cross-country exoneration causes we will propose as follows. This will be *a non-exhaustive list of liability defenses*, meaning that additional liability exceptions could be added to the list based on evolution of case law, parties' contractual practices and the facts of each case. However, the additional, as well as the already present, liability exceptions will require proof of *a specific cause* of damage as well as absence of carrier and servant's negligence *with respect to it*. So, the carrier will not be exonerated by simple proof of absence of negligence, as is the case of the presumption of fault principle. On the other hand, the presumed liable carrier needs to prove absence of negligence only with respect to the cause of the damage (and not in general) before the burden of proof shifts to the shipper.

¹³²⁹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 420 and 411. Robert Hellawell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 360. Robert Force, "A Comparison of the Hague, Hague-Visby and Hamburg Rules: Much Ado About?" (1996) 70 Tul. L. Rev. 2051 at 2066. *Supra* at 182.

¹³³⁰ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 420 and 411.

To take more specific examples, insufficient ventilation or overrun engines may cause damage to the transported goods¹³³¹. However, they do not constitute Hague, Visby or land BOL carrier liability exceptions since they cannot fall under the ‘act of God’ or ‘perils of the sea’ exoneration causes. As such, they do not exculpate carrier under the principle of presumption of liability of mentioned rules. Under the principle of presumption of fault, the fact that carrier and its agents have taken all reasonable measures carriers and agents normally take to protect transported goods may exonerate carrier even in the absence of identified cause of damage since, under this principle, it is not necessary to identify the cause of damage. Proof of absence of fault suffices. Under our suggestion, carrier may be exonerated in case of insufficient ventilation or overrun engines contrary to the presumption of liability and in conformity with the presumption of fault principles. However, in order for this to occur, carrier and agents absence of negligence *in connection with said causes of damage* and, as a result, the cause of the damage, have to be proven by the carrier as under the presumption of liability principle and contrary to the presumption of fault principle.

Thus, the proposed basis of carrier liability enlarges the scope of carrier exoneration causes under the principle of presumption of liability but retains latter principle’s burden of proof rules. Our suggestion resembles ocean carrier (q) exception that requires proof of carrier and servants absence of negligence but also proof of a specific cause of loss¹³³². We actually take the principle of presumption of negligence the (q) exception advances and make it the basis of multimodal carrier liability. However, while the (q) exception takes effect when other liability exceptions (i.e. nautical fault) do not, our presumption of fault principle conditions carrier liability in all cases and uses specific carrier liability exceptions as its specific illustrations. Another significant difference between our principle of presumption of fault and the (q) exception is that the latter puts on the carrier a burden of persuasion, which is very onerous, and which has rendered obsolete said exception in practice¹³³³. Our suggestion consists in obliging carrier to simply come forward with proposed evidence and not to bear a burden of

¹³³¹ For these examples see C.W.H. Goldie, “Effect of the Hamburg Rules on Ship Owners Liability Insurance” (1993) 24 J. Mar. L. Com. 91 at 115-116. The author uses these and other examples in commenting on Hamburg Rules principle of presumption of fault. *Annex No. III, Table No. 12* at cc for this suggestion.

¹³³² *Supra* at 219s.

¹³³³ *Supra* at 221.

persuasion as this is done with the ocean (q) exception. The reason behind our suggestion is not to render obsolete adopted principle as is currently the case of the (q) exception while put, at the same time, the *onus probandi* of additional exoneration causes on the party generally considered more apt to prove circumstances of damage: the carrier¹³³⁴.

Some authors assert that innovations concerning the shifting of the burden of proof and apportionment of damages are alterations that affect the presence or not of liability¹³³⁵. Authors also argue that greater carrier burden of proof may encourage settlement procedures undertaken on carrier initiative decreasing, in this way, litigation costs¹³³⁶. They further state that carriers faced with greater burden of proof might take greater precaution with respect to the transported goods. This consideration, however, may be undercut by the economic interest the carrier already has in the prevention of damage to the transported goods¹³³⁷. Still, whatever the effects of economy and competition on carrier liability, we are going to affirm our belief that it is law, rather than economics, that should define, in pragmatic terms, legal concepts and carrier liability¹³³⁸. This is why we will herein use burden of proof rules as a risk allocation mechanism.

One could argue that since specific carrier liability exceptions are much clearer than the principle of presumption of fault, we should not choose the latter to form the basis of multimodal carrier liability. In effect, adoption of the principle of presumption of fault may be laudatory but it exposes carriers and shippers to considerable uncertainty by not referring to specific exoneration causes¹³³⁹. Uncertainty increases litigation and is to be contrasted to currently higher degree of clarity and certainty maintained by ocean or land carrier 'litany' of liability exceptions¹³⁴⁰.

¹³³⁴ This is extremely important in multimodal transport where cargo is usually stuffed in sealed containers that are passed amongst many services providers so that the task of discovering the source of concealed damage may be very difficult, burdening the party to which proof of the cause of the loss is attributed by law. Hugh M. Kindred, Mary R. Brooks «Multimodal Transport Rules» (Netherlands : Kluwer Law International, 1997) at 3.

¹³³⁵ Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory and Public Policy* (United States: Yale University Press, 1946) at 49. The author states that alterations in the burden of proof may permit parties to recover damages from persons who have not actually caused the loss. *Ibid.* Others, however, suggest that the effects of a particular burden allocation on carrier liability and commerce in general are uncertain and speculative.

¹³³⁶ James H. Holenstein, "The Allocation of the Burden of Proof in Marine Fire Damage Cases" (1983) 50 U. of Chicago L. Rev. 1146 at 1168.

¹³³⁷ *Ibid* at 1167. *Infra* at 301s.

¹³³⁸ On this point see *infra* at 301-303.

¹³³⁹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 420 on carriers.

¹³⁴⁰ Only years of case law on liability based on fault will provide increased certainty. *Ibid.*

This is a valid argument that fails, however, to take into account the constant rising in importance of the principle of liability for negligence sanctioned by U.S./Canadian domestic rail tariffs¹³⁴¹. It also overlooks the adaptability of this and the presumption of fault principles to different factual scenarios that the principle of presumption of liability, being limited to a specific list of carrier exoneration causes, tends to ignore¹³⁴². Finally, it is not as if we set aside the principle of presumption of liability since we maintain a list of specific carrier exoneration causes that could be extended only by proof of specific causes of damage indicating absence of carrier negligence. A list of exculpatory causes does alleviate the vagueness of the presumption of fault principle herein adopted, enhancing clarity under our suggestions.

Let us now examine the principles of presumption of fault, liability for fault (negligence) and presumption of liability under the ‘Law and Economics’ doctrine. What we are looking for, in this regard, is a liability principle that provides for the *maximum degree of carrier care* in exchange for an *economically justified cost* (cost-effectiveness)¹³⁴³.

According to economic analysis principles, carrier optimum standard of care is achieved when for a final spend of 1\$ the carrier or shipper is expected to save 1\$¹³⁴⁴. Under the presumption of liability principle the optimal standard of care is more easily achieved when compared with the principle of liability for fault. In effect, under the

¹³⁴¹ *Supra* at Part II, Chapter I, Section I, Par. 1(B). Even from this point of view the adopted presumption of fault principle constitutes a ‘middle ground’ solution between the currently applicable presumption of liability and liability for negligence principles.

¹³⁴² We agree, in the regard, with Mr. Tantin who has affirmed, although for different reasons, that the principle of presumption of fault is best suited for container transport Gérard Tantin, “Les Documents de Transports Combiné” (1980) 15 Eur. Transp. L. 367 at 380. The ocean carrier (q) exception may apply the principle of presumption of fault but its limited practical use does permit to effectively consider it in this regard. 53% (51% of Governments and 54% of others providing a response) of the respondents, (industry representatives, experts, governmental, non – governmental, inter – governmental organizations), to an UNCTAD questionnaire supported a fault-based system of liability and 47% supported a system of strict liability (principle of presumption of liability). UNCTAD, UNCTAD Secretariat, *Multimodal Transport: The Feasibility of an International Legal Instrument* (Genève: UNCTAD/SDTE/TLB/2003/1, 2003) at par. 64.

¹³⁴³ Reasoning by analogy to insurance and ‘Law and Economics’ as reported by Saul Sorokin, “Changing Concepts of Liability” (1982) 17 FORUM 710 at 717. See also *infra* at Part II, Chapter II, Section III, Par. 3.

¹³⁴⁴ Robert Hellowell, “The Allocation of Risk Between Cargo Owner and Carrier” (1979) 27 Am. J. Comp. L. 357 at 364. This is the very essence of the Pareto optimality defining efficiency in ‘Law and Economics’. The Pareto optimality simply means that all benefits are allocated, nothing is wasted. Michael J. Meurer, “Fair Division” (1999) 47 Buffalo L. Rev. 937 at 960. In other words, the cost of investment has to equal its benefit for the optimal degree of care or other measures (i.e. national wealth) to be attained. George Priest, “Lawyers Liability and Law Reform: Effects on Economic Growth and Trade Competitiveness” (1993) 71 Denv. U. L. Rev. 115 at 136-137. For the Pareto principle see *supra* note 162.

former principle liability is more clear cut -thus, more cost-effectively put to practice- so that carrier can predict with reasonable certainty that for every 1\$ spent, there will be 1\$ of damages saved. Under the latter principle, as under the principle of liability for negligence, fault is not always easy to (dis)prove¹³⁴⁵. In trying to delineate the borderlines of the concept of fault, additional great litigation costs are incurred. As a result, the optimal standard of care is not always easy to achieve with the liability for fault principle.

This, may also provide a reason why the 'middle ground' solution between the principles of presumption of liability and liability for negligence -both these principles being well represented in both land and ocean transport- is the herein adopted principle of presumption of fault. Here, for every dollar spent the carrier is expected to save one dollar principally because his liability is presumed and, therefore, is more clear-cut than under the principle of liability for negligence where liability needs to be proven by the shipper. However, under the adopted principle of presumption of negligence the carrier can be exonerated by proving absence of negligence with respect to a non-exhaustive list of liability exceptions so that the equality of the one-dollar saved equals one dollar spent principle may not always be respected. Even though the presumption of fault principle does not provide the optimal standard of care, it certainly offers, in economic terms as well as in terms of its suitability to intermodal carriage, a satisfactory first approach towards uniformity of multimodal carrier liability.

It should also be noted that adoption of the principle of presumption of fault as the 'middle ground' solution equals adoption of a satisfactory degree of carrier care for the cargo. Among the principles of presumption of liability, presumption of fault and liability for negligence, it is the former that provides for the maximum degree of carrier care for the cargo. In effect, we have seen that the former principle presumes carrier liable unless he proves specific enumerated liability exceptions whereas the latter expects shipper to prove carrier negligence, something that may not always be achieved. The presumption of fault principle presumes carrier liable but the latter can exonerate himself by proving absence of fault on his part. As such, this principle is situated between the presumption of liability and liability for negligence concepts with respect to the degree of carrier care.

¹³⁴⁵ Robert Hellowell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am. J. Comp. L. 357 at 364. for the whole reasoning stated herein.

This holds carrier to a higher standard of care than the principle of liability for negligence where burden of proof and, therefore, risk of no proof, of carrier negligence lies with the shipper. It holds the carrier to a lesser degree of care than the principle of presumption of liability since, in the latter case, the carrier cannot disprove its absence of negligence except on the basis of specified exoneration causes.

Other ‘Law and Economics’ authors reasoning leads to the same conclusion. Recognizing that the presumption of liability principle operates a better incentive for careful behavior, they propose a two-part system of liability¹³⁴⁶. According to this system, the responsible party (in our case the carrier) will be held strictly liable (presumption of liability) for the full cost of the damage, and the victim (shipper for us) will receive little or no payment for the occurred damage. The difference in the price actually paid by the responsible party and the price received by the victim, which might be called fine, cannot be paid to either the carrier or the shipper. Such a system provides the optimal deterrence of trouble from both the carrier and the shipper (risk-averse parties) because of the price ultimately paid by each.

Recognizing that transaction and legal costs of the proposed two part system would be prohibitively high, said authors go further in suggesting that the best compromise between legal costs and deterrence problems would be a negligence standard for the responsible party, in our case the principle of presumed negligence, and a contributory negligence standard for the presumed victim¹³⁴⁷. This would deter careless behavior by both parties in the contract or torts action and would minimize legal costs. Though far from being perfect, this may be the best that actual legal institutions can do, or, at least, an improvement of the status quo¹³⁴⁸.

Paragraph 2: Liability Exceptions: The question then is posed: under our suggestion of presumed carrier fault coupled with a list of carrier liability exceptions, of what exceptions will this list consist?

¹³⁴⁶ The following is taken out of H.E. Frech III, “State-Dependent Utility and the Tort System as Insurance: Strict Liability v. Negligence” (1994) 14 Int’l. Rev. L. & Econ. 261 at 268.

¹³⁴⁷ *Ibid* at 269. See, however, authors’ opinion stating that contributory negligence in other fields of law (manufacturer-consumer liability) does not achieve the optimal manufacturer standard of care. Avery Wiener Katz, *Foundations of the Economic Approach to Law* (New York: Oxford University, 1998) at 203 for more details.

¹³⁴⁸ H.E. Frech III, “State-Dependent Utility and the Tort System as Insurance: Strict Liability v. Negligence” (1994) 14 Int’l. Rev. L. & Econ. 261 at 269.

Implicit to a number of currently applicable ocean specific carrier liability exceptions (i.e. nautical fault, saving lives and property at sea) is the assumption that ocean transport is essentially risky in nature¹³⁴⁹. Even if today the ocean adventure is less hazardous and more routine than formerly, ship owners are reluctant to give up their privileged exceptions that have acquired, over time, a sacred aura¹³⁵⁰. Lack of competition by other modes and disorganized cargo interests permitted them to prevail in their positions¹³⁵¹.

Recognizing the special position ocean carriage has traditionally occupied, we will attribute to it additional carrier liability exoneration causes (A) apart from the common, to land and ocean carriers, liability exceptions (B). In this way, an ocean v. land multimodal carrier liability pattern is created with ocean specific liability exceptions and other exceptions that will benefit land and ocean carriers alike. Our approach is the one followed by the FIATA BOL even though we do not adopt *verbatim* the liability exceptions therein contained¹³⁵². It is also respectful of modal diversities, a becoming trait of the harmonization concept we have adopted in the present study.

All herein adopted liability exceptions are based on motor, rail and ocean BsOL provisions and intermodal rail tariffs¹³⁵³. Specific to rail intermodal tariffs liability defenses (i.e. theft of containers absent carrier negligence) we encounter in no other mode of transport, will be treated as isolated exceptions not part of the explicit list of exoneration causes herein adopted. Their future inclusion in the adopted list should not, however, be excluded. It all depends on how frequently they are used by contracting parties and under what conditions courts will give them effect.

It is certain that courts enjoy a large margin of discretion in deciding presence of liability defenses, not only because of the principle of presumption of fault but also

¹³⁴⁹ Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am. J. Comp. L. 391 at 409. Ocean specific perils, unwillingness to concentrate the risk of catastrophic losses on carriers and the economic power of the ship-owners explain the reason of specific ocean carrier liability exceptions in the Hague and the Visby Rules. *Ibid* at 419.

¹³⁵⁰ *Ibid* at 419.

¹³⁵¹ *Ibid*.

¹³⁵² *Supra* at Part I, Chapter I, Section I, Par. 2. See *Annex No. III, Table No. 12* at cc for our suggestions and *Annex No. 1, Table No. 2* at xviii for the FBL.

¹³⁵³ We have seen that rail BsOL liability exceptions supplement the tariff's principle of liability for negligence. *Supra* at 174, 182 and *Annex No. III, Tables No. 5-9* at cxc-cxciv.

because of the relativity of the components conditioning their presence. This is why close monitoring and codification of case law holdings and contractual practices is important to increase predictability of carrier's conduct and court's decisions. Since parties can contractually modify land carrier liability terms under our suggestions, identification of contractual trends through codification of case law and practices is necessary to enhance and support uniformity efforts¹³⁵⁴.

A. Ocean specific liability exceptions: We suggest that perils of the sea, fire, saving or attempting to save life or property at sea be the ocean specific carrier liability exceptions in our contractual document. We, therefore, put aside the currently applicable nautical fault liability exception while we have already commented on the adjustments made to the (q) exception presumption of fault principle after its adoption as the basis of multimodal carrier liability under our suggestions¹³⁵⁵. At the very limit, we would allow presence of a *qualified nautical fault defense* considering carrier and shipper unwillingness to find a compromise in this regard.

It is certain that elimination of the nautical fault exception does not favor carriers or their insurers, mostly in case of major damaging occurrences at sea, the ones mostly feared by liability insurers. It is also certain that the nautical fault liability defense is present in the Hague and in the Visby Rules as well as in the FIATA BOL (Clause 7.1). If we advocate abolition of this exoneration cause in ocean transport it is because the need for uniformity with other modal conventions, technological advances and the relatively low number of cases where this liability exemption is invoked or is successful, do not favor maintaining it¹³⁵⁶.

We are conscious of the fact that mentioned arguments have not, so far, convinced carriers, shippers and their insurers, mainly because of the unpredictability of nautical fault defense abolition effects¹³⁵⁷. Knowing how polarized shipper and carrier interests

¹³⁵⁴ On the contractual nature of liability suggestions see *supra* at Part II, Chapter II, Section I, Par. 1(B).

¹³⁵⁵ *Annex No. III, Table No. 12* at cc for a table of our suggestions. It is not by negligence or intention that we do not refer to the Hague and the Visby Rules (q) exception. We have already made of the principle of presumption of fault the (q) exception advances, the general principle of multimodal carrier liability under our suggestions so as not to require specific reference to it under this part. *Supra* at 271-272 for the (q) exception.

¹³⁵⁶ *Supra* at 228-229. See also the conforming opinion of Chris Gillespie (FIATA President), *FIATA Position Paper* (2000) online: Forwarder Law Homepage <<http://www.forwarderlaw.com/feature/cmigill.htm>> (last visited: Sep. 4, 2000).

¹³⁵⁷ *Supra* at 228-230.

are and realizing that parties may refuse to eliminate the nautical fault exception, Pr. Mandelbaum suggestion on institution of a *qualified nautical fault defense* seems to offer a valid ‘middle-ground’ solution on the way towards uniformity. According to his suggestion, the ocean carrier will not be exculpated for masters or servants nautical fault except if he can prove lack of personal control or knowledge of captain or crew’s acts in the operation or the management of the vessel¹³⁵⁸. In other words, we eliminate ocean carrier nautical fault defense except if ocean carrier can prove that he had no personal knowledge or control of master’s or servants acts amounting to a nautical fault. In the latter case, the nautical fault exception as described in the present study would take effect¹³⁵⁹.

We believe this suggestion operates a fair balance between carrier and shipper interests since it does not eliminate the nautical fault exception while it places the burden of proof on the party mostly apt to assume it. At the same time, it partially satisfies insurance interests concerns on abolition of the nautical fault exception while clearly heading towards uniformity of multimodal liability by gradually making ocean carriers count less on this exception.

It is very probable that liability insurers will oppose the qualified nautical fault defense proposal as disturbing the convenience of currently well-settled reality. Moreover, the qualified nautical fault defense will probably lead to long litigation proceedings to determine the conditions that give way to its application, increasing, therefore, incurred costs. In effect, it is not only that subjectivity exists on whether or not we are in the presence of a nautical fault, our suggestion also implies determination of carrier personal knowledge of servant’s nautical fault¹³⁶⁰. In the relatively few cases where the nautical fault defense will appear, ocean carriers will make ardent efforts to prove absence of knowledge and control of servants acts in order to be exonerated. For these reasons, we would urge carriers and their insurers to seriously consider elimination of this exception, a more radical but clear-cut solution heading towards uniformity.

¹³⁵⁸ *Supra* at 229.

¹³⁵⁹ *Ibid.* Annex No. III, Table No. 12 at cc for our suggestions.

¹³⁶⁰ *Supra* at 229.

'Perils of the sea' is an ocean specific carrier liability exception that we maintain as such under our suggestions because of the common elements composing this concept under Canadian and U.S. legislation and case law¹³⁶¹. We have noted, however, that to constitute a sea peril, U.S. case law adopts the position that a sea peril be of extraordinary nature, unforeseeable and irresistible while Canadian case law does not insist on the 'extraordinary' nature of the incident. The rest of Anglo-Saxon jurisdictions do not require presence of an extraordinary peril and do not even insist on peril foreseeability to exonerate carrier¹³⁶². Between the two extremes of U.S. and Anglo-Saxon case law, Canadian cases maintain a median, 'middle-ground' solution balancing shipper and carrier interests in not requiring sea peril's extraordinary nature but insisting, on the other hand, on its unforeseeability and irresistibility to exonerate carrier. Other European maritime nations adopt similar approaches whose main trait is insistence on sea perils foreseeability element without regard to the incident's extraordinary nature¹³⁶³. For the sake of international, not just bilateral, uniformity it is desirable that U.S. case law takes the direction of its Canadian counterpart on this issue.

Another Hague and Visby Rules common liability exception adopted as such under our suggestions is ocean carrier exoneration in case of on-board 'fire, unless caused by the actual fault or privity of the carrier', a cause of damage mostly dreaded by ocean carriers and most difficult for them to combat¹³⁶⁴. U.S. and Canadian fire liability exception has not given rise to uniform cross-country case law holdings since COGSA sanctioned U.S. Fire Statute favors ocean carriers in not requiring proof of vessel seaworthiness before they invoke the benefit of this exception or proof of care for cargo

¹³⁶¹ *Supra* at 197s. for this exception and its absence in land transport. See *Annex No. III, Table No. 12* at cc for our suggestions.

¹³⁶² *Supra* at 198-199 and 104s.

¹³⁶³ The Greek Code of Private Maritime Law holds carrier liable for any damage to the cargo "unless the loss or damage is due to events which could not be avoided, even by exercise of the care of a prudent carrier". This is particularly significant because it reflects the approach of a major maritime country that has traditionally fostered shipping trade. Under the plain meaning of the statute, it appears that a foreseeable storm would not exonerate carrier. For French courts, a sea peril must present the characteristics of force majeure, namely, be external, unforeseeable (characteristic less influent today before French courts) and insurmountable. *Supra* at 105-106. Belgian courts seem to adopt similar a approach. Harry Apostolakopoulos, *Navigating in Perilous Water : Examining the 'Peril of the Sea' Exception to Carrier's Liability under COGSA for Cargo Loss Resulting from Severe Weather Conditions* (1999) online: South Texas Law College Review Homepage <http://www.stcl.edu/lawrev/Articles/Peril_of_the_Sea/peril_of_the_sea.html> (last modified: Jan. 25, 2000). Because domestic case law evolution on the composing elements of the 'sea peril' concept is quite interesting, it should be closely monitored through codification of case law for uniformity purposes.

¹³⁶⁴ *Supra* at 211s. *Annex No. III, Table 12* at cc for a schematic representation of our suggestions.

once fire has started¹³⁶⁵. The subsequent division of U.S. courts on the issue is to be contrasted to Canadian uniform holdings abiding by Visby Rules prerequisites (vessel seaworthiness, absence of negligence) to exonerate carrier for fire¹³⁶⁶.

U.S. Fire Statute, therefore, disturbs uniformity the Hague and the Visby Rules were meant to promote. Moreover, carrier protection, the *raison d'être* of the U.S. Fire Statute, was attained through enactment of the Hague Rules exonerating carrier in case of fire¹³⁶⁷. We would, therefore, join certain authors' in concluding that U.S. case law should conform itself to its Canadian counterpart, which also seems to be what the majority of jurisdictions apply on the issue¹³⁶⁸. For the rest, both countries case law holdings on what constitutes a 'fire' are very similar and should, therefore, be retained (i.e. what constitutes 'fire', carrier 'actual fault')¹³⁶⁹.

We have also seen that land BsOL do not contain a 'fire' exception except for some intermodal rail carrier tariffs (BNSF Intermodal Rules Guide (Item 62.3)) or in case of contractual extension of ocean carrier liability exceptions to land carriers¹³⁷⁰. We believe that, with time, U.S. and Canadian land carriers may increase contractual use of the fire exception in multimodal transport, following the example of BNSF railways. The frequency of its use and its sanction by courts could justify, at some point in time, classification of the ocean specific fire exception as a common ocean/land liability exception. The thereby instituted land fire exception may refer to shipper burden of proof of carrier actual fault with respect to the fire, as it is currently done under the Hague and the Visby Rules. Historically, however, fire in land transport has not constituted as a dreadful incident for carriers as fire set on board a vessel, so as to justify presence of said carrier protective burden of proof¹³⁷¹. As a result, if, at some point in time, fire is adopted as a land carrier liability exception, proof of carrier actual fault brought by the shipper

¹³⁶⁵ *Supra* at 212s.

¹³⁶⁶ *Supra* at 214.

¹³⁶⁷ *Supra* notes 1047 and 1044.

¹³⁶⁸ *Sunkist Growers Inc. v. Adelaide Shipping Lines Ltd.*, 603 F.2d 1327 (9th Cir. 1979) on the need to achieve uniformity with foreign jurisdictions. However, the Ninth Circuit has recently changed direction contributing to the already existing complexity with respect to the fire exception. *Supra* at 213. See also Sandra A. Larkin, "The Allocation of the Burden of Proof under the Fire Statute and the Fire Exemption Clause of the Carriage of Goods by Sea Act" (1996) 20 Tul. Mar. L. J. 403 at 417.

¹³⁶⁹ *Supra* at 212s. U.S. and Canadian courts, however, need to converge their holdings on whether the fire needs to be the direct or not cause of the loss. *Supra* note 1053.

¹³⁷⁰ *Supra* at 215-216.

¹³⁷¹ *Ibid.*

may not be needed. The variation in the land and ocean fire exception would be justified by the historical evolution of the exception in land and ocean transport and would be compatible with our harmonization concept that respects modal diversities.

Finally, we suggest that ocean carrier ‘saving or attempting to save life or property at sea’ liability exception is phrased ‘*reasonable measures* of saving or attempting to save life or property at sea’¹³⁷². We add the expression ‘reasonable measures’ so as to leave no doubt as to the degree of care exerted by carrier in order to benefit from this exception. ‘Reasonable measures’ is a Hamburg Rules (art. 5(1)) and a Multimodal Convention (art. 16(1)) explicit statutory provision¹³⁷³.

In this respect, we also adopt Hague and Visby Rules ocean carrier exculpation ‘any deviation in saving or attempting to save life or property at sea or any reasonable deviation’¹³⁷⁴. COGSA Sec. 1304(4) adds that deviations to unload passengers or cargo are presumed unreasonable, a rebuttable presumption intended to avoid lucrative deviations¹³⁷⁵. Intending to clarify currently applicable law, we would suggest inclusion of the additional provision in the ocean liability exception retained by our proposals. For the rest, no equivalent public policy to save life or property at sea exists in land transport, making this exception an ocean specific one¹³⁷⁶.

B. Common land-ocean liability exceptions: We maintain, with some variations, the following liability exceptions to govern ocean and land carrier liability: ‘acts of war, public enemies, riots, civil commotions or insurrections’, ‘authority of law, seizure under legal processes’, ‘strikes, locks-out, stoppage of labor’, ‘acts of God’ and ‘shipper fault, cargo, *vehicle* latent defect and stoppage in transit’. In this way, all liability exceptions present in ocean, land BsOL and intermodal rail tariffs will be covered by our suggestions¹³⁷⁷.

¹³⁷² *Supra* at 216s. *Annex No. III, Table No. 12* at cc for our suggestions.

¹³⁷³ *Supra* at 217. Also, under Warsaw Convention art. 20, air carrier was presumed liable unless “all necessary measures” are taken to avoid damage. Case law interpreted this as “all reasonable measures” as is the case of the Hamburg Rules and the Multimodal Convention. 1999 Montréal Convention intended to replace the Warsaw Convention (*supra* note 1250) does not refer to the expression ‘all necessary measure’ except for delay claims.

¹³⁷⁴ *Supra* at 217s and at note 1078 on deviation and its reasonableness requirement when saving or attempting to save life or property at sea.

¹³⁷⁵ *Supra* note 1074.

¹³⁷⁶ *Supra* at 218s.

¹³⁷⁷ *Annex No. III, Table No. 5-8* at exc-cxciv for the modal liability exceptions in Canada and the U.S. and *Annex No. III, Table 12* at cc for a schematic representation of our suggestions.

Let's start with the liability exceptions that have given rise to sporadic case law and, for the rest, do not seem to engender any controversy cross-modally and cross-country. Because of their similarity and sporadic use by courts, we would regroup 'acts of war', 'public enemies', 'riots', 'civil commotions or insurrection', commonly found in contracts and case law practice cross-modally and cross-country, under one liability exception entitled 'acts of war, public enemies, riots, civil commotions or insurrections'¹³⁷⁸. Even though rail intermodal tariffs use much more descriptive terms to indicate different forms of such events, (acts of civil or military authority, rebellions, invasion, hostilities),¹³⁷⁹ we believe that the terms herein chosen are generic terms, representative of events described in the rail tariffs. All these terms conjure up either images of (civil or international) war or public uprising against the government and frequently overlap¹³⁸⁰. Although case law may be sparse on this exception and a lot of issues need to be specified, there are certain things that seem to be excluded from its scope such as the fact that political protests of independent truckers are excluded from the public enemies exception¹³⁸¹.

Another category of third-party liability exceptions that we will herein retain is the 'authority of law or seizure under legal processes' liability exception, an expression that seems to effectively enclose in substance different exoneration events contained in BsOL and tariffs¹³⁸². They all presuppose damage done to the cargo or ship due to an act of governmental authorities or ordinary civil administration of justice and include, in all cases, quarantine measures¹³⁸³. Rail tariffs, usually more descriptive in their terms than ocean or land BsOL also refer to 'confiscation', 'customs', 'civil or military authority'

¹³⁷⁸ We do not use the terms Kings (common law) or Queens (Canadian motor BOL) enemies along with 'public enemies' because we believe that the term 'public enemies' is more adapted to the present organization of society. Chosen term intends to cover spherically, without redundancies the conceptual and geographic scope of this exception. *Supra* note 940 and accompanying text. See also *Annex No. III, Tables No. 5-8* at cxc-cxciv and *Annex No. III, Table 12* at cc for a schematic representation of our suggestions.

¹³⁷⁹ *Supra* at 191s. and *Annex No. III, Tables No. 6-8* at xcii-cxciv.

¹³⁸⁰ *Ibid.*

¹³⁸¹ *Supra* at 193.

¹³⁸² *Annex No. III, Table No. 5-8* at cxc-cxciv and *Annex No. III, Table 12* at cc for our suggestions. I.e. we do not use ocean 'restraint of princes' liability exception because we consider it part of the 'authority of law' exoneration cause and because it uses archaic language taken from old insurance companies. *Supra* note 937 and accompanying text. Seizure under legal processes may not be frequently encountered on land but it is not excluded from land carriage applications. *Supra* at 191.

¹³⁸³ *Supra* at 190.

which we consider to be specific examples of the ‘authority of law’ liability exception¹³⁸⁴.

‘Strikes, locks-out or stoppage of labor’ is the last third party exoneration cause of damage we encounter cross-modally and cross-country and which we retain under our suggestions¹³⁸⁵. Stoppage of labor seems to regroup ‘strike’ and strike related concepts on the basis of Canadian and U.S. case law¹³⁸⁶. In all cases, ‘strikes’ in the U.S. and Canada require a concerted employee’s action against the employer in the presence of a labor dispute or concerted employees’ action against the government¹³⁸⁷. The term ‘strikes’ seems to include ‘picketing’ by definition¹³⁸⁸. The ocean and Canadian rail term ‘locks-out’ indicating employer’s refusal to give work to his employees in order for them to accept certain working conditions, is not widely used in U.S. land transport case law that does not, however, reject it¹³⁸⁹. Our desire to retain whatever seems to be common to all modes in both countries while maintaining the scope BOL drafters intended to give each of these exceptions, makes us retain ‘strikes, locks-out or stoppage of labor’ to exonerate carrier.

In the absence of case law definition of the term ‘labor disturbances’ we find in the CP and BNSF intermodal tariffs, it is doubtful whether its use by rail intermodal tariffs is intended to describe or enlarge the ‘strike’ concept¹³⁹⁰. Canadian and U.S. case law has indicated that when there is no legal definition of a term, it will be used by courts for descriptive purposes only¹³⁹¹. Since the content of this liability term is not clearly defined to determine whether cross-modal and cross-country case law sanctions it, we cannot presently include it in suggested list of liability exceptions. Close monitoring and codification of case law could change our conclusion at a later time.

¹³⁸⁴ *Supra* note 937 and *Annex No. III, Tables No. 5-8* at cxc-cxciv.

¹³⁸⁵ *Supra* at 193s. *Annex No. III, Table No. 5-8* at cxc-cxciv, *Annex No. III, Table 12* at cci for our suggestions.

¹³⁸⁶ *Supra* at 193.

¹³⁸⁷ *Supra* at 193-194. Innocent carriers are also targeted by strikes. *Supra* note 957 and accompanying text.

¹³⁸⁸ *Supra* note 193-194.

¹³⁸⁹ *Supra* note 955.

¹³⁹⁰ The term is used in CP Intermodal Container Tariff 7690-E under ‘Liability of Carrier’ (*Annex No. I, Table No. 8* at xcv) and BNSF Intermodal Rules & Policies Guide Item 62.1.a. *Annex No. III, Table No. 7-8* at cxcii-cxciv. No legal definition of this term was found in case law. On the contrary, the term ‘picketing’ is legally defined in U.S. and Canadian case law. *Supra* note 955.

¹³⁹¹ *Canada: Re Tilco Plastics Ltd. v. Skurjat et al. Attorney-General* [1966], 2 O. R. 547 (Ont. H. C. J.) that concluded in this way with respect to the terms ‘parading’ (not given a legal definition) and ‘picketing’ (legally defined). *U.S.: Hamling v. U.S.*, 418 U.S. 87 (U. S. Cal. 1974).

One further observation needs to be made with regard to our ‘strikes locks-out or stoppage of labor’ exception. U.S. COGSA explicitly conditions presence of the ‘strikes’ exception on absence of carrier negligence, an element already built into all carrier exoneration causes in ocean and land transport¹³⁹². We find U.S. COGSA additional reminder of this element superfluous, since it is not intended to clarify an unsettled case law question. Consequently, ‘strikes, locks-out or stoppage of labor’ will not be accompanied by any such additional provision under our suggestions.

‘Shipper fault, cargo, vehicle latent defect and stoppage in transit’: While names may vary cross-modally and cross-country with respect to cargo inherent vice (‘inherent’ or ‘goods defect or nature’, ‘natural shrinkage’), cargo latent defect is the name we will retain to indicate cargo hidden weaknesses, including natural shrinkage¹³⁹³. We have seen that cross-modal and cross-country case law on transported goods latent defect (often phrased inherent vice) is very similar, with cross-references made between U.S. and Canadian court decisions: similar definitions, same burden of proof ultimately burdening shipper, clean BOL insufficiency to establish *prima facie* case, absence of carrier and servants negligence¹³⁹⁴.

In intermodal transport, defect of shipper provided containers exonerates carrier either on the basis of explicit intermodal rail tariff provisions or on the basis of cross-modal and cross-country case law¹³⁹⁵. A container defect is also described as a ‘vehicle defect’ in certain intermodal rail tariffs¹³⁹⁶. Our retention of a ‘vehicle defect’ as a multimodal carrier liability exception, however, does not only refer to containers as vehicles but also to vessels and land vehicles such as rail vehicles and trucks. In this sense, the adopted exception operates extension of the Hague and Visby Rules latent (vessel) defect exoneration cause to land transport¹³⁹⁷. In effect, our ‘vehicle defect’ liability defense indicating rail vehicle and truck latent defects, does not presently make

¹³⁹² *Supra* at 194. *Annex No. III, Table No. 12* at cc for our suggestions.

¹³⁹³ *Annex No. III, Table No. 12* at cci. *Supra* at 204-205 for natural shrinkage being a form of cargo latent defect. We choose the name ‘cargo latent defect’ to oppose it to suggested ‘vehicle latent defect’ we herein retain. Note that the denomination retained somewhat differs from the ones used by Canadian and U.S. case law. *Supra* note 1008.

¹³⁹⁴ *Supra* at 204-205.

¹³⁹⁵ *Supra* at 205-206.

¹³⁹⁶ BNSF Intermodal Rules & Policies Guide (Item 65) and *in fine* of the tariff under ‘Definitions of terms’ *Annex No. I, Table No. 6* at lxxv.

¹³⁹⁷ We are talking here about *in transit roadworthiness* and *seaworthiness*. *Supra* at 206-207 for the latter.

part of U.S. and Canadian land BsOL, tariff liability exceptions or common and civil law carrier liability defenses¹³⁹⁸.

One cannot argue, however, that a land ‘vehicle defect’ carrier liability exception is deprived of a case law bearing. Common and civil law cases on land transport of passengers do not hold carrier (or debtor in general) liable for latent vehicle defects not discoverable through exercise of due diligence¹³⁹⁹. Moreover, in property cases, the owner or occupier of a dwelling who cannot discover its latent defects by exercise of reasonable care will not be held liable for injuries sustained to invitees, licensees, brief, business or social visitors as a result of property’s latent defects¹⁴⁰⁰. In other words, U.S. and Canadian common law jurisdictions as well as Québec case law will exonerate the operator of an instrumentality containing an inherent defect which cannot be discovered by operator’s exercise of due diligence. We believe it’s only fair to reason by way of analogy in land carriage of goods and excuse land carriers for latent vehicle defects not discoverable by reasonable care. For this reason, we suggest that latent vehicle (vessel, truck, rail vehicle) defects constitute a common land/ocean carrier liability exception in multimodal transport.

Shipper fault is another liability exception we encounter cross-modally and cross-country and which can put on countless different masks. Intermodal rail tariffs will disclaim carrier liability if containers do not meet weight, height or other specification requirements without always referring to an express ‘shipper fault’ liability exception¹⁴⁰¹. Despite its different manifestations, U.S. and Canadian case law seems to maintain very

¹³⁹⁸ A ‘vehicle defect’ cannot qualify as an ‘act of God’ (or French ‘force majeure’ translation) or ‘inherent vice’ incident under U.S. and Canadian land BsOL or common law provisions. Also art. 2049 of the Québec Civil Code on carrier exoneration causes only refers to force majeure, goods inherent vice and natural shrinkage. *Supra* note 1024. Québec non transport case law commenting on latent vehicle defect and the force majeure concept treats the two notions separately as pertaining to two different worlds. *Groupe Commerce (Le) Compagnie d’Assurances v. Duchesne* [1993], R. R. A. 375 (S. C. Q.). This exception should not be confounded with our analysis on roadworthiness as developed under Part II, Chapter I, Sec. 1, Par. 1(C), *supra* at 185-186.

¹³⁹⁹ More specifically, case law makes reference to ‘reasonable degree of human skill and foresight’ and ‘ordinary skill and care’ in undertaking the effort to detect the defect. *Curtis v. Rochester & Syracuse Railroad Co.*, 18 N.Y. 534 (N.Y.C.A. 1959) (frequently cited thereafter) and *Canadian Pacific Railway Co. v. Chalifoux* (1888), 22 S. C. R. 721 (S. C. C.) (frequently cited thereafter).

¹⁴⁰⁰ U.S.: *Riley v. Champion Intern. Corp.*, 973 F. Supp. 634 (E. D. Tex. 1997) and “Premise Liability” 59 *Tex. Jur. 3d* at § 24 (1999) online: WESTLAW (Tp-all). Canada: *Hawkins v. Botyanski* [1987], O. J. No. 1419 (Ont. D. C.), *Kennedy et al. v. Hanes et al.* [1940], O.R. 461 (Ont. C. A.). Québec: *Huot v. Montréal (Ville)* [1999], J.Q. no 2989 (Que.S.C.) referring to other cases and *Rubis v. Gray Rocks Inn Ltd.* (1982), 1 R. C. S. 452 (S.C.C.) on appeal from the Québec Court of Appeals.

¹⁴⁰¹ *Supra* note 1026 and accompanying text.

similar principles on what constitutes a shipper fault, the weight and type of proof needed to condition its presence¹⁴⁰². We cannot but retain these common elements.

The only notable difference between the U.S. and Canada on this point is carrier right to invoke shipper fault vis-à-vis third parties when shipper has acted *fraudulently and knowingly* (U.S. ocean), just *fraudulently* (Canadian-U.S. land transport) or *knowingly* (Canadian ocean, art. 4.5(h)), Hague (4(5) *in fine*) and Visby Rules (5(h)) in misstating nature or value of the goods¹⁴⁰³. This aspect of shipper fault does not seem to constitute a major contentious topic in practice so that analyzing said concepts of shipper fraud or knowledge would exceed the length of the present study without substantially advancing uniformity. Evolution of case law on this point should be closely monitored for harmonization purposes.

The extended scope of the shipper fault liability exception is not as far reaching as that of the stoppage in transit. This carrier liability defense transfers risk of loss to the shipper or other party entitled to stop the goods in transit. Ocean conventions and statutes may not always explicitly provide for this liability exception but case law sanctions this carrier exoneration cause¹⁴⁰⁴. We cannot, therefore, but classify it as a common land/ocean carrier liability exception following case law principles U.S. and Canada follow on the issue¹⁴⁰⁵.

‘Acts of God’ is the only liability exception we encounter cross-modally and cross-country without the slightest variation in wording. We herein adopt it as such. Reputed to be a ‘catch-all’ liability exception, both U.S. and Canadian cases require it to constitute a natural cause of damage, unforeseeable, irresistible and distinguished from sea perils¹⁴⁰⁶. We cannot but retain these common elements.

BNSF intermodal rail tariff refers to specific ‘acts of God’ events such as floods, earthquakes, high winds...¹⁴⁰⁷. One could suggest, in this respect, that dressing a list of events that may constitute ‘acts of God’ could be helpful in identifying ‘acts of God’

¹⁴⁰² *Supra* at 208-210. Fort his exception see also *Annex No. III, Table No. 12* at cci.

¹⁴⁰³ *Supra* at 209.

¹⁴⁰⁴ *Supra* at 210.

¹⁴⁰⁵ *Annex No. III Table No. 12* at cci.

¹⁴⁰⁶ *Supra* at 195s. These elements give way to a discussion on the concepts of force majeure and absence of negligence that we will take up on as follows. *Annex No. III, Table No. 12* at cci for our suggestions.

incidents. We do not agree with such reasoning because of the simple fact that there are myriads of events that can qualify as ‘acts of God’. It is preferable, in this regard, to clearly discern the components of an ‘act of God’ event and then apply the retained criteria to different factual situations. Such an approach is more flexible and practical than any ‘acts of God’ event list.

Paragraph 3: The Concept of Force Majeure: We have seen that, while certain ocean and land carrier liability exceptions constitute force majeure events in the province of Québec, all cross-modal and cross-country carrier liability exceptions require proof of absence of negligence in order for them to take effect¹⁴⁰⁸.

Both force majeure and absence of negligence concepts need proof of unforeseeability and irresistibility of the harm-causing event exculpating carrier¹⁴⁰⁹. In general terms, absence of negligence is a much broader concept than that of force majeure since it does not necessarily require proof of the cause of loss as force majeure does¹⁴¹⁰. However, this argument is not valid when reasoning in terms of specific land/ocean carrier liability exceptions where proof of the cause of loss needs to be made by the carrier in all cases¹⁴¹¹.

This is not to say that the concepts of force majeure and absence of negligence are synonymous when referring to specific liability exceptions. We have seen that although authors argue that force majeure external cause of damage element is not particularly important, there are a number of carrier liability exceptions that do not qualify as force majeure causes because they are not external causes of damage¹⁴¹². Despite this fact, we find that further convergence of absence of negligence and force majeure concepts is not required for the purposes of our study. In effect, what shippers and carriers are interested in, is less how many liability exceptions qualify or not as force majeure, and more what are the minimum general requirements for a non listed cause of damage to enter the

¹⁴⁰⁷ *Annex No. I, Tables No. 6 at lxix and Annex No. III, Table No. 8 at exciv.*

¹⁴⁰⁸ *Supra* at 201-202 for force majeure liability exceptions. For proof of absence negligence with respect to individual liability exceptions see *supra* at 195s.

¹⁴⁰⁹ *Supra* at 202.

¹⁴¹⁰ For the required proof for the absence of negligence concept see *supra* at Part II, Chapter II, Section II, Par.1 and *supra* note 1323.

¹⁴¹¹ *Ibid.*

¹⁴¹² *Supra* at 201-204. We refer to shipper fault, inherent vice etc.

already existing list of exceptions¹⁴¹³. These requirements are that carriers need always prove the cause of the loss, unforeseeability and irresistibility of the harm-causing event to be exonerated from liability. If Québec courts require, in addition, proof of cause's external element as they currently do for certain ocean and land carrier liability exceptions, this is what herein suggested case law codification will reveal.

This discussion brings us to the force majeure concept as a separate Canadian rail (French version of the CN BOL), Québec motor (Règlement sur le camionage) and civil law ocean (art. 2049 of the Québec Civil Code) exoneration cause substituting for the 'acts of God' and other land and ocean liability exceptions including the Hague and Visby Rules (q) exception¹⁴¹⁴. On the one hand, translation of the 'acts of God' liability exception into 'force majeure' is misplaced since force majeure is a broader concept than that of 'acts of God', not being restricted to natural causes of loss¹⁴¹⁵. For this reason, Québec rail/motor BsOL and Québec Civil Code art. 2049 (ocean carriage) 'force majeure' liability exception needs to be replaced by the 'act of God' liability exception or other exceptions literally translating English version terms. On the other hand, exonerating carrier for absence of fault ((q) exception) and for force majeure (art. 2049 of Québec Civil Code) is hardly the same thing since we have seen that the latter concept is more restrictive than the former¹⁴¹⁶. Québec Civil Code provision can probably be explained by the fact that civil law is not familiar with the absence of negligence exoneration cause in this context, which it automatically replaces by the 'force majeure' concept¹⁴¹⁷. To avoid multiplication of carrier liability regimes and confusion of concepts, a more faithful replica of Visby Rules liability exceptions should be maintained by the Québec Civil Code ocean carrier provisions.

Finally, contractual force majeure clauses found in the U.S. and Canadian common law provinces enumerate specific exculpating events while civil law force majeure concept contains a non-exhaustive list of occurrences, except when referring to

¹⁴¹³ This is the personal opinion of the author.

¹⁴¹⁴ *Supra* at 200-201. *Annex No. 1, Tables 5 and 9* at lxiii and cv. We remind, however, the reader that in the province of Québec common law applies to the international ocean carriage of goods.

¹⁴¹⁵ See also *supra* at 201s. for the concept of force majeure.

¹⁴¹⁶ *Supra* at 287 and 220.

¹⁴¹⁷ We should note that this Québec Civil Code article is a new article of the 1994 Québec Civil Code that was intended to conform ocean carrier liability laws of the province with international documents.

specific statutory or contractual carrier force majeure liability exceptions. Force majeure clauses and civil law force majeure concept or liability exceptions are not easily comparable. Force majeure clauses really refer to specific absence of negligence (unforeseeability, irresistibility) events intended to protect carrier against abnormal risks of carriage, which may, or may not be external to him¹⁴¹⁸. Civil law force majeure concept or liability exceptions, however, refer to unforeseeable and irresistible causes of damage that must be, in all cases, external to the carrier. Moreover, force majeure clauses may retain inherent vice as a carrier exoneration cause whereas the civil law force majeure concept or liability exceptions exclude it from their scope¹⁴¹⁹. Finally, force majeure clauses can be contractually defined or modified to a large extent, contrary to the civil law force majeure concept¹⁴²⁰. Identity of denomination, therefore, does not necessarily imply identity of concepts. Shippers and carriers should be aware of this fact.

This is not just a theoretical analysis. Although not frequently encountered in transport, appearance of force majeure clauses under our suggested principle of presumption of negligence should not be excluded¹⁴²¹. In effect, in trying to delineate multimodal carrier liability under the principle of presumption of fault we herein retain, parties can agree to include force majeure clauses in their BsOL to give parties some guidance on events exonerating carrier. Because of the civil and common law force majeure conceptual difference, civil and common law courts will be left to decide whether incidents under such clauses will be given effect or not¹⁴²². Codification of case law principles that will complement our mentioned analysis reveals, therefore, important.

Moreover, the question of how far parties can go in utilizing force majeure clauses or contractually limiting carrier liability under suggested presumption of fault principle is raised. Our suggestions retain a list of carrier liability exceptions accompanying the adopted principle of presumption of fault. Because of this, parties will probably be less inclined to make use of force majeure clauses and, perhaps, other contractual limitation

¹⁴¹⁸ *Supra* at 202-203.

¹⁴¹⁹ *Supra* at 203. On the contrary, U.S. courts have generally not been willing to excuse financially burdensome performance as an unforeseeable condition beyond the control of the performing party. This, however, could be the case of the civil law force majeure clause. Marc F. Conley, "A Reassessment of *Tara Petroleum Corp. v. Hughey*, a Case of Temporary Convenience" (1985) 20 Tulsa L. J. 519 at note 153.

¹⁴²⁰ *Supra* at 203-204.

¹⁴²¹ *Supra* at Part II, Chapter II, Section II, Par.1.

¹⁴²² *Supra* at 219-220 on analogous case law conclusion under the (q) exception.

clauses. Still, the question of how far one can push the presumption of negligence principle by insertion of force majeure or other limitative clauses remains, since parties may decide to complement the non-exhaustive list of liability exceptions by such clauses. Determining the threshold not to be crossed in such a case depends on the specific force majeure or contractual exoneration clauses¹⁴²³. This is a question of fact left to the courts to decide, always keeping in mind that the adopted principle of presumption of fault tends to be inclusive rather than exclusive of carrier liability defenses and that we have excluded contractual exemption of carrier liability for negligence. Codification of civil and common law case law decisions on this point is of crucial importance.

Overall, suggested ocean v. land basis of multimodal carrier liability respects modal (additional ocean liability exceptions) and cultural (maintenance of civil law force majeure concept) diversities. It also tries to maintain a fair balance between shipper and carrier interests. On the one hand, it favors carriers by maintaining the principle of presumption of fault and instituting exceptions such as the latent vehicle defect. On the other hand, it protects shippers by suggesting abolition of the nautical fault liability exception and adopting shipper-protective burden of proof mechanisms under the adopted principle of presumption of fault¹⁴²⁴.

Section III: Suggestions on Limitation of Multimodal Carrier Liability in the U.S. and Canada

Since forces shaping multimodal transport are so perplex and intertwined, different liability limitation suggestions will be examined, choice among which will depend on the degree of uniformity negotiators intent to reach. We will develop as follows our suggestions on: **Par. 1** uniformity of liability amounts and measures, **Par. 2** loss of the limitation benefit, to later focus on the economic analysis of our suggestions **Par. 3**.

¹⁴²³ It is the courts which will decide to what extent contractual force majeure clauses will be permitted in ocean carriage where contractual limitation of carrier liability is excluded under our suggestions. The latter concept and the adopted principle of presumption of fault should not be viewed as contradictory since both can co-exist, the exclusion of the contractual limitation of carrier liability can apply 'subject to' the adopted presumption of fault principle.

¹⁴²⁴ *Supra* at Part II, Chapter II, Section II, Par. 1 for the presumption of fault principle and at 278 for the nautical fault.

Paragraph 1: Uniformity of Liability Amounts and Measures: What we need to find out in the present part of our study is whether divergent liability amounts and measures (per pound, per container, per package) can be approximated so that one, if possible, liability limitation amount and measure apply to multimodal carriage. After presenting the panorama of unimodal liability amounts and measures we will proceed to approximation of cross-country unimodal limitation measures **(A)**, before concentrating on approximation of cross-country unimodal limitation amounts **(B)**.

Let's start by observing the different applicable liability limitations. In ocean transport, U.S. (COGSA) maintains Hague Rules 500\$USD (also 500\$CAD) 'per package or per customary freight unit' (latter being U.S. specific) whereas Canada (2001 MLA (Schedule III)) applies Visby Rules 666.67 SDR (1332.76\$CAD or 835.74\$USD) 'per package or unit' or 2 SDR (2.50\$USD or 3.99\$CAD) 'per kilo'¹⁴²⁵. Both sets of rules ban contractual limitation of liability. U.S. and Canadian land carriers are held liable for all damages sustained to the extent of the goods value unless otherwise agreed by parties, with the exception of Canadian motor carrier 4.41\$CAD (or 2.77\$USD) 'per kilo' or 2\$CAD (or 1.25\$USD) 'per pound' statutory amounts not subject to contractual limitation¹⁴²⁶. In this way, U.S. intermodal rail tariffs presented herein habitually limit liability to 250.000\$USD 'per shipment' and Canadian intermodal rail tariffs habitually maintain a 10.000\$CAD (6.289\$USD) 'per, (under 40 ft), container' or 20.000\$CAD (12.578\$USD) 'per, (over 40 ft), container' unless otherwise agreed upon by parties. The same principle applies to U.S. motor carriers who habitually limit their liability to 25\$USD 'per pound, per piece or 100.000\$USD per shipment' unless otherwise agreed upon by parties. With the exception of Canadian motor carriers, therefore, all other U.S. and Canadian land carriers do contractually limit their liability.

A. Approximation of cross-country unimodal limitation measures: We will presently focus on cross-country unimodal uniformity of ocean, rail and motor limitation

¹⁴²⁵ Value of the SDR see *supra* note 247. This is a summary of previously mentioned limitations *supra* at Part I, Chapter I, Section I, Par. 1 that can also be found in *Annex No. III, Table No. 9, 10, 11* at cxcv-cc.

¹⁴²⁶ For the conversion of U.S. to Canadian dollars and vice versa, when this conversion is necessary, we are based on respective values as of August 1, 2002: 1\$CAD = 0.628\$USD and 1\$US = 1.59045\$CAD. On August 22, 2003 values have somewhat, but not radically changed to change our calculations. 1\$CAD = 0.712\$USD, 1\$U.S. = 1.404\$CAD, *Universal Currency Converter* (2003) online: XE. COM Homepage <<http://www.xe.com/ucc/convert.cgi>> (last modified: continuously).

measures before intending their cross-country intermodal uniformity.

Although U.S. and Canadian rail intermodal limitation amounts greatly vary, they both maintain a ‘per container’ limitation measure in case of damage sustained to the contents of the container¹⁴²⁷. Since we retain common elements present cross-country for each mode, we adopt the ‘per container’ limitation measure for the rail segment of the multimodal journey. For damage sustained to the containers themselves the common denominator of Canadian and U.S. intermodal rail carriage is ‘container depreciated value’ although depreciated value scales vary from one company to the other in the U.S. and Canada¹⁴²⁸. As in the case of the ‘per container’ rail limitation measure for damage to the contents of a container, we cannot but adopt container depreciation value to determine compensation for damage to the containers themselves since both these limitation measures are common to intermodal rail transport cross-country.

Even though uniform ocean liability measures and amounts apply within each country’s ocean transport, the only thing U.S. and Canadian ocean statutes have in common is the ‘per package’ limitation measure. What we have in common we retain adopting, therefore, the ‘per package’ measure for ocean carriage¹⁴²⁹. For the rest, liability measures differ. The U.S. COGSA specific ‘customary freight unit’ is rejected by Canadian courts, which adopt the Visby ‘per unit’ and ‘per kilo’ limitation, the latter not being present neither in the U.S. COSGA nor in the Hague Rules.

It may be that the U.S. ‘per customary freight unit’ measure is the only limitation measure adapted to bulk shipments as Pr. Tetley argues¹⁴³⁰. However, we disagree with replacing the ‘per unit’ limitation measure of the Hague and the Visby Rules by the ‘per customary freight unit’ COGSA limitation measure, mainly because no other country or international ocean convention seem to have adopted latter limitation. Moreover, draft COGSA ’98 adopting Visby Rules limitations only refers to a ‘per package’ liability

¹⁴²⁷ U.S. intermodal rail tariffs refer to a ‘per shipment’ limitation measure which is actually a ‘per container’ limitation. *Supra* at 238s.

¹⁴²⁸ *Supra* at 239-240. *Annex No. III, Table No. 12* at cci for a schematic representation of our suggestions.

¹⁴²⁹ *Annex No. III, Table No. 12* at cci.

¹⁴³⁰ *Supra* note 1238.

measure without even mentioning the ‘per unit’ or ‘per customary freight unit’ measure (Sec. 9(h)(1))¹⁴³¹.

Nor can we entirely agree, however, with Canadian case law position completely rejecting the ‘per customary freight unit’ limitation. On the contrary, we trust our general case law conclusion for both Canada and the U.S. that for container, as for non-container shipments, parties intention should determine what ‘per unit’ means unless this frustrates explicit statutory language i.e. what physically constitutes a package. ‘Per customary freight’ unit limitation does not explicitly make part of the Hague or the Visby Rules and if parties choose to make recourse to it they should be welcomed to do so notwithstanding statutory domestic provisions or case law interpretations excluding or including this limitation measure in/from statutes. As a result, if parties decide to use the freight unit limitation, their intent should be honored, not rejected as in Canadian case law¹⁴³². However, we do not go as far as advocate inclusion of this limitation measure in domestic statutes (i.e. COGSA) because no international convention or other domestic laws explicitly provide for it. Parties intention should prime in such a case. This is why we suggest that the ‘per unit’ limitation measure (Hague, Visby Rules, MLA) appears among our suggestions, leaving its interpretation to parties intent. Case law or statutes cannot substitute for parties intent for something that does not explicitly make part of international conventions. Transport laws are to be strictly interpreted¹⁴³³. It is only if no parties intent exists that courts could supplement rules provisions with their own interpretations.

Even though our suggestion distances itself from currently applicable U.S. and Canadian case law conclusions on the issue and leaves interpretation of parties intent in the hands of courts, parties intent is a common U.S. and Canadian case law criterion interpreting the ‘per package/unit’ limitation that could conciliate the two jurisdictions opposing views on the ‘per customary freight unit’ measure. Parties intent test has also been tried before the courts and case law guidelines in this respect exist providing

¹⁴³¹ For all comments concerning the ‘per customary freight unit’ limitation see *supra* at 247-248.

¹⁴³² *Supra* at 247. See also *Annex No. III, Table No. 12* at cci for our suggestions.

¹⁴³³ U.S.: Robert T. Stephen, “Transportation of Students/Non-Students” Opinion of the Attorney General (1979) Kan. Atty. Gen. Op. No. 79-229 online: WESTLAW (All-feds). Canada: (multimodal) *Reed Decorative Products Ltd. v. Manchester Liners Ltd.* [1984], F. C. J. No. 618 (F. C. T. D.).

guidance to parties¹⁴³⁴. Finally, this criterion is flexible, easily adaptable to technological advances.

Having adopted the ‘per package/unit’ measure and rejected explicit reference to the ‘per customary freight unit’ to govern ocean carriage, we need to comment on the Visby Rules kilo limitation measure. The kilo limitation is a weight limitation that does not make part of the Hague Rules but was intended to relax the harsh Visby Rules ‘package’ standard and is, otherwise, very popular with U.S. and Canadian motor carriers.

In effect, Canadian and U.S. motor carrier limitations adopt a weight measure of damages with a high U.S. limitation of 25\$USD (37.76\$CAD) ‘per pound, per piece’ or 100.000\$USD ‘per shipment’ and a much lower Canadian limitation of 4.41\$CAD (or 2.77\$USD) ‘per kilo’ or 2\$CAD (1.25\$USD) ‘per pound’ that U.S. motor carriers envy and would love to have in their BsOL. As in the case of rail carriers, “per shipment” means “per container” because motor carrier tariffs for containers are determined on a “per container” basis¹⁴³⁵. Weight limitation measures (‘per pound’, ‘per kilo’) being common to both U.S. and Canadian motor carriers, we adopt them to form the basis of motor carrier liability limitations cross-country. Even though doctrinal discussion may exist as to whether ‘per pound’ refers to the weight of the item lost or the weight of the whole shipment, U.S. and Canadian case law seems to reason on the basis of the former and this is the solution we herein adopt¹⁴³⁶. This is the very essence of the U.S. ‘per piece’ limitation measure destined to put an end to the said doctrinal discussion¹⁴³⁷. Because this is a common U.S. and Canadian case law conclusion, reference to the ‘per piece’ gimmick under our suggestions will be unnecessary.

Visby Rules, U.S. and Canadian motor carrier weight limitation measure is also gaining in importance in the U.S. that is debating adoption of the Visby Rules. Moreover, U.S. and Canadian rail carriers are familiar with this limitation since they may, and frequently do, incorporate Visby Rules limitations to govern the rail segment of the intermodal journey. Consequently, weight limitation measures should be seriously

¹⁴³⁴ *Supra* at 244s.

¹⁴³⁵ *Supra* at 231.

¹⁴³⁶ On the doctrinal discussion see *supra* note 1148 and accompanying text.

considered in a uniform multimodal carrier liability setting. We, therefore, retain them as one of our multimodal limitation measure suggestions¹⁴³⁸.

We also adopt the U.S. and Canadian rail ‘per container’ (damage to goods) and container depreciated value (damage to containers) limitation measures to apply to land (rail-motor) carriers cross-country because we find these limitation measures to be mostly appropriate for the intermodal transport of goods, mainly involving transport of containers¹⁴³⁹. We do not apply the ‘per container’ limitation measure to ocean carriers since U.S. and Canadian ocean ‘per package’ limitation already contains the ‘per container’ limit through parties intent test.

Previously noted suggestions actually consist in putting under the same roof currently applicable U.S. and Canadian rail and motor carrier liability measures (‘per container’ or ‘per kilo/pound’) and maintain Visby limitation measures (‘per package (containing the ‘per container’)/unit’ or ‘per kilo/pound’) for ocean carriers. In this way, an ocean v. land carrier liability measures pattern is created¹⁴⁴⁰.

Even though suggested ocean and land limitation measures share many common elements, we also suggest that ocean limitation measures herein adopted substitute for land limitation measures whenever parties contractually agree to extent ocean carrier limitations to land transport. In effect, ocean carriers are already familiar with the complexities of the “per package”/“unit” limitations currently applicable to them. If parties agree to import its intricacies to land transport, as rail carriers may do, that’s what they should get. Otherwise, the simple, clear-cut ‘per container’/‘per weight’ limitation should apply to land carriers and existing Visby limitations to ocean carriers.

One cannot but wonder why we should maintain or permit extension of ocean carrier “per package or per unit” limitation measures to land carriers, when such limitations easily create uncertainties as to the presence and amount of recovery (intent

¹⁴³⁷ *Supra* note 1143.

¹⁴³⁸ *Annex No. III, Table No. 12* at cci for our suggestions.

¹⁴³⁹ *Ibid.*

¹⁴⁴⁰ Note, however, common ‘per container’ and ‘per weight (kilo/pound) limitation measures cross-modally and cross-country. *Ibid.* Choosing between the land ‘per weight’ or ‘per container’ limit and the ocean ‘per package’ or ‘unit’ limitation measures would involve consideration of the shipper protective ‘the higher of’ or carrier beneficial ‘the lesser of’ mentioned measures. Tony Young, *Position Statement on Multimodal Liability* (2001) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 9, 2001).

test). Why not do away with them even within the frame of currently applicable ocean carrier rules and be left with the more clear-cut weight and, perhaps, container limitation(s) (measures)?¹⁴⁴¹

Our answer coincides with the main philosophy of our thesis. We are not here to undo applicable limitations but to build on them. Moreover, by eliminating ocean ‘per package or per unit’ limitation measures we are left with one sided weight limitations which may be too onerous for ocean carriers or too low for shippers, depending on the shipment. As far as extension of the ‘per package/unit’ limitation to land carriers is concerned, it is not as if land carriers are completely foreign to its intricacies. Rail and motor carriers can, and frequently do, contractually agree with shippers to apply ocean carrier liability terms to their segment of the multimodal journey. Moreover, certain U.S. motor carriers such as American Freightways have added in their tariffs (tariff 125-J for American Freightways) a limitation equal to the lesser of 25\$USD ‘per pound per package’¹⁴⁴². Although there are available sources used to define the term ‘package’, they do not clearly indicate whether the term designates a container or the contents of the container, exactly in the same way as with ocean carrier ‘per package/unit’ limitation measure¹⁴⁴³. There is, therefore, a number of important reasons why we do not consider elimination and do not exclude extension of the ocean ‘per package’ limitation measure.

A more integrated limitation measure proposal approximating ocean and land carrier limits could also be envisaged. The lower or higher of either a ‘per package/unit’, ‘per container’ or ‘per weight’ limitation could be adopted by land and ocean carriers alike. This uniformity suggestion puts together currently applicable cross-modal and cross-country applicable limitation measures. Adoption of a “per container” limitation in

¹⁴⁴¹ Elimination of the package limit and maintenance of clear cut weight limitation is also some authors position. *Ibid.* and Tony Young, *CIFFA Submission To Transport Canada: the OECD's Maritime Transport Committee Workshop in Paris* (Jan. 25-26, 2001) online: CIFFA Homepage <http://www.ciffa.com/downloads/submission/CIFFA_Submission.pdf> (last visited: Feb. 20, 2001).

¹⁴⁴² Rules Tariff 125-J (Item 420(1)(2)) *Carrier Liability Coverage* (2001) online: American Freightways Homepage <http://www.af.com/tariff125/carrier_liability_coverage.htm> (last visited: Aug. 7, 2001). *Annex No. 1, Table No. 4* at l. U.S. motor limitation measures are normally defined as ‘per pound, per piece or per shipment’. American Freightways retains a limitation ‘per pound per package or per incident’. The package limitation also applies in case of excess liability coverage contracted by shippers of American Freightways.

¹⁴⁴³ This seems to be the current practice. Interview of the author with American Freightways Freight Claims Personnel member (Feb. 7, 2002) who read to us the package limitation definition of the National Motor Freight Classification (NMFC) where BsOL are published and one of the sources the company uses for guidance in defining terms. Unfortunately, this document is not available to us. The person noted that this definition can be interpreted to mean both the container itself or the contents of the container. *Ibid.*

ocean carriage would end ocean case law controversy of whether a container constitutes a package or not. In effect, the fact that a separate ‘per container’ limitation would be adopted would mean that the ‘per package’ measure does not refer to containers as it may currently be interpreted to mean so. Adoption of the ‘per package’/‘unit’ limitation in land carriage where the ‘per container’ limit already applies would produce same effect. For the rest, parties intention would determine what constitutes a ‘package’ or ‘unit’, notwithstanding freight unit limitations, as long as it does not contravene explicit statutory language¹⁴⁴⁴. Case law codification determining parties intent on applicable measures could enhance clarity in their determination.

Suggestions of uniform limitation measures become a dead letter when not accompanied by suggestions of uniform limitation amounts.

B. Approximation of cross-country unimodal limitation amounts: Let’s now move to limitation amounts and see if and how harmonization can work its way around here. Ocean carrier limitations differ in the U.S. and Canada, the former applying the 500\$USD (also 500\$CAD) ‘per package or unit’ Hague Rules limitation while the latter maintaining the 666.67SDR (835.74\$USD or 1332.76\$CAD) ‘per package or unit’ or 2 SDR (2.50\$USD or 3.99\$CAD) ‘per kilo’ Visby Rules limitation¹⁴⁴⁵. Rail carrier limitation amounts greatly differ in the U.S. and Canada. From the exceedingly high U.S. 250.000\$USD ‘per container’ for the contents of each container we go down to 20.000\$CAD (12.578\$U.S.) or 10.000\$CAD (6.289\$USD) ‘per container’ for Canadian railways, depending on the size of the container, unless otherwise agreed by the parties¹⁴⁴⁶. Amounts and depreciation value scales also differ between the U.S. and Canada in case of damage to the containers themselves¹⁴⁴⁷. Finally, motor carrier limitation amounts greatly vary, with U.S. motor carriers applying a 25\$USD ‘per pound, per piece’ or 100.000\$USD ‘per shipment’ whereas their Canadian counterparts maintain 4.41\$CAD (or 2.77\$USD) ‘per kilo’ or 2\$CAD (or 1.25\$USD) ‘per pound’. By

¹⁴⁴⁴ This proposal is considered unlikely to occur for the time being because, as Tony Young suggests, ship owner interests are absolutely intransigent to any extension of their liability scope beyond the ship's rails, while governments are unlikely to modify their inland liability laws with a "per package" limitation. Tony Young, *CIFFA Commentary on the CMI Singapore Conference on Issues of Transport Law* (2001) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_singapore.html> (last visited: Nov. 9, 2001).

¹⁴⁴⁵ *Supra* note 247 and accompanying text for the SDR limitation measure.

¹⁴⁴⁶ *Supra* note 1426 for the conversion rate between the Canadian and U.S. dollars.

¹⁴⁴⁷ *Supra* at 239-240.

contractual agreement ocean carrier limitations may be ‘imported’ to motor or rail carriage in case of multimodal transport. The contrary, however, the extension of land carrier limitations to the ocean carriage would only be possible if such limitations increase ocean carrier liability since both the Hague and the Visby Rules prohibit its contractual limitation.

In harmonizing divergent liability limitation amounts we do not aspire at proposing one limitation amount to apply to all multimodal carriers. We will, rather, compare presently applicable cross-modal and cross-country limitations to make some useful suggestions towards uniformity.

Because rail and motor carriers can contractually ‘import’ ocean carrier limitations to their segment of multimodal carriage, authors have suggested that the easiest path towards multimodal uniformity would be to extend ocean carrier limitations to land carriers, a practice to which mainly rail carriers have usually recourse¹⁴⁴⁸. Such a solution would really do away with all anxieties as to what limitation measures or amounts would apply or whether contractual limitation of multimodal carrier liability would be possible. In all cases, ocean carrier rules would take effect.

On the other hand, however, subjectivity of judge’s decisions of what constitutes a ‘package’ or ‘unit’ and low ocean carrier limitation amounts would be imported to land carriage. Land shipper and carrier interests would have to consent to such an extension. Their consent might be hard to get since U.S. motor shipper protective limitations would be ceded with difficulty to adopt lower and different ocean ones. For the rest, governments seem to oppose such a perspective¹⁴⁴⁹. Although such an evolution towards uniformity should not be excluded¹⁴⁵⁰, obstacles on adoption of ocean carrier liability amounts by land carriers will not be that easy to overcome.

Let’s now examine another way towards multimodal uniformity. Since Canadian

¹⁴⁴⁸ Opinion countered by Tony Young, *CIFFA Submission To Transport Canada: the OECD’s Maritime Transport Committee Workshop in Paris* (Jan. 25-26, 2001) online: CIFFA Homepage <http://www.ciffa.com/downloads/submission/CIFFA_Submission.pdf> (last visited: Feb. 20, 2001).

¹⁴⁴⁹ *Ibid.*

¹⁴⁵⁰ See *supra* at 58s for the negotiations on the CMI draft document and similar proposals on extending ocean carrier liability to land carriers. This is also the opinion of Jonathan Rodriguez-Atkatz, “Apportionment of Risk in Vessel and Marine Terminal Contracts” (1989) 64 Tul. L. Rev. 497 at 512.

motor carrier 4.41\$CAD (or 2.77\$USD) ‘per kilo’ or 2\$CAD (or 1.25\$USD) ‘per pound’ limitation approximates Visby Rules weight limitation of 2SDR = 3.99\$CAD or 2.50\$USD ‘per kilo’, uniformity between these two does not seem hard to negotiate. This, however, only indicates a partial uniformity on a ‘per kilo’ or ‘per pound’ (per weight) basis between the Visby Rules and Canadian motor carrier limitations. In effect, Visby Rules and Canadian motor carrier weight limitations differ from all other currently applicable land and ocean carrier limitation amounts¹⁴⁵¹.

The great divergence in applicable land and ocean carrier limitation amounts and the considerable shipper and carrier resistance to work on uniformity in this regard do not permit us to go further with our harmonization efforts. We cannot but urge interests involved to negotiate mutually beneficial limitation amounts to shape at least the most modest approach of multimodal uniformity [ocean (Visby) v. land pattern (per container, per weight)].

To demonstrate how difficult it is to harmonize liability limitation amounts cross-country even when reasoning within one mode, we will briefly examine the failed initiative of the North American Committee on Surface Transportation to create a Uniform Transborder Motorfreight Through Bill of Lading (UTMTBL) to govern motor carrier liability throughout the U.S., Canada and Mexico. The working group of this committee proposed three possible levels of liability: CMR and FBL 8.33SDR ‘per kilo’, (23\$USD ‘per pound’ or 16.65\$CAD ‘per kilo’), or 2.00\$CAD ‘per pound’ or 1 S.D.R. (1.25\$USD and 1.99\$CAD), or leave the level of liability to the discretion of the parties¹⁴⁵². If we pay closer attention to these limitation amounts, we observe that CMR 8.33SDR approximates currently applicable U.S. motor carrier 25\$USD ‘per pound’ limitation amount whereas proposed 2.00\$CAD ‘per pound’ is the Canadian limitation for motor carriers. The third proposal consisting in contractually defining motor carrier liability under the UTMTBL, leans towards U.S. principles of definition of motor carrier liability¹⁴⁵³. Country, carrier and shipper delegates did not agree on uniform amounts proposed. Canadian delegation proposed limitation amounts that would differ according

¹⁴⁵¹ See *supra* at 297 for the summary presentation of all applicable unimodal limitations in rail, ocean and motor carriage. *Annex No. III, Table No. 9, 10, 11* at cxcv-cxcviii for a table representation of same.

¹⁴⁵² Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tucson, Arizona: National Law Center for Interamerican Free Trade, 1996) at 93-96.

¹⁴⁵³ *Supra* at 178.

to the country of origin whereas U.S. shippers, benefiting from the highest liability limitation, contended that current rules should apply¹⁴⁵⁴. This demonstrates, once more, that the dispute in adopting North American motor carrier limits is one between carriers and shippers and their unwillingness to negotiate uniform liability amounts and measures.

Despite this fact, efforts undertaken to elaborate a Uniform Transborder Motorfreight Through Bill of Lading have not been made in vain. In effect, a new uniform BOL respecting currently applicable domestic laws of motor carriage at the NAFTA level is now near completion and will be available to carrier and shippers early in 2004. The document does not advance a unified motor carrier liability regime at the regional level, it is rather a uniform document that is intended to clarify applicable rules for trans-border motor shipments¹⁴⁵⁵.

Let's now summarize our conclusions on limitation of multimodal carrier liability. Although more integrated schemes may be envisaged, the most recommended approach towards uniformity of U.S. and Canadian multimodal carrier liability would be, in our opinion, to bring together land carrier limits and measures of liability and, for the rest, maintain separate ocean transport rules (ocean v. land carrier pattern). Even though we arrived at shaping such a pattern for liability limitation measures, we could not reach same solution for liability limitation amounts.

Paragraph 2: Loss of the Limitation Benefit. Even though there is doctrinal discussion on loss of various carrier liability benefits in case of serious breach and/or gravity of carrier fault, loss of carrier liability limitation benefit will essentially retain our attention since this is U.S./Canadian case law and statutory provisions main focus¹⁴⁵⁶. In this part of our study we will first focus on the necessity of a loss of limitation benefit provision under our suggestions **(A)** before presenting our ocean v. land loss of carrier limitation benefit suggestion **(B)**.

¹⁴⁵⁴ Dr. Boris Kozolchyk, Gary T. Doyle, Lic. Martin Gerardo Olea Amaya, *Transportation Law and Practice in North America* (Tucson, Arizona: National Law Center for Interamerican Free Trade, 1996) at 93-96.

¹⁴⁵⁵ The advantage the new BOL provides is the use of a single document at the regional level. This document will also be available in electronic form. Interview of the author with François Rouette, transportation law attorney in Québec-City and Montréal, Flynn Rivard & Associates (July 4, 2003) tel: (514) 288-7156 and (418) 692-3751. Mr. Rouette informs us that further information on this document is not yet available to the public.

¹⁴⁵⁶ On this discussion see *supra* note 1247 and accompanying text.

A. Loss of the Limitation Benefit: Necessary?: Before intending to harmonize presently applicable doctrines and laws on loss of carrier limitation benefit, we will have to ask ourselves whether or not we even need such doctrines and laws. Of course we do, one could say! Both countries have such doctrines and laws and you base your suggestions on existing applicable rules so that reasoning in another manner contravenes the very foundations of your analysis. This is correct, we are committed to harmonizing presently applicable rules. We would like, however, to extrapolate, once more, into the future to take a taste of what ocean carrier loss of the limitation benefit might be one day, based on our present knowledge.

Presently in force 1999 Montréal Protocol No. 4 amending the 1929 Warsaw Convention as amended by the 1955 Hague Protocol governing air transport of cargo, persons and luggage, eliminated Warsaw/Hague Protocol loss of air cargo carrier liability limitation benefit provision that the Visby Rules practically copied¹⁴⁵⁷. This means that air cargo carrier intentional or voluntary (inexcusable) fault no longer operates loss of its limitation benefit. Since this Warsaw provision was intended to exclude consideration of all former doctrines denying carrier the limitation benefit, elimination of the Warsaw loss of limitation benefit provision for air cargo carrier, results in elimination of every possible doctrine that produces this effect. 1999 Montréal Protocol No. 4 air cargo limitation amounts become, therefore, unbreakable in an effort to reduce insurance and settlement costs¹⁴⁵⁸. This inevitably makes one wonder if ocean carriers will, one day, share the same fate as air carriers presently do under the 1999 Montréal Protocol No. 4. Considering that the Visby Rules essentially copied the Warsaw Convention, next step for ocean carriers could be absence of loss of their limitation benefit, a very protective air, as ocean, carrier provision.

We believe that intentional or voluntary (inexcusable) carrier faults are not just any types of faults from which carriers should be excused. Cross-modal and cross-country laws and courts punish such carrier behavior in order to dissuade carrier similar

¹⁴⁵⁷ On these protocols and conventions see *supra* note 1250 and accompanying text.

¹⁴⁵⁸ This was Montréal Protocol No. 4 drafters intention in increasing carrier liability amounts and eliminating Warsaw Convention air cargo carrier loss of limitation benefit provision. Warren L. Dean, "Aviation Liability Regimes in the New Millennium: Beyond the Wild Blue Yonder Air Carrier Liability for International Air Cargo Shipments in the 21st Century" (2001) 28 *Transp. L. J.* 239 at 247.

actions¹⁴⁵⁹. Permitting limitation of ocean carrier liability in case of such behavior really means encouraging him to neglect cargo since, even in the worst case, he can limit his liability¹⁴⁶⁰.

This is not to say that laissez-faire policies and transport deregulation do not have a preventive effect on cargo damages. We agree with Pr. Ramberg that accentuated carrier competition following transport deregulation is a more realistic motive than fear of liability for carriers to be attentive of the cargo¹⁴⁶¹. Nonetheless, and although we have already affirmed that we are not here to impede uniform definition of carrier liability through deregulation and competition among carriers, we do not accept these trends to substitute for legal rules governing multimodal transport¹⁴⁶². We believe that law should set the basic uniform carrier liability rules that competition could support or complement and upon which insurance companies should base their allocation of risks. In this sense, punishment of intentional or willful faults is very much a legal concern, also supported by deregulatory carrier practices. No doubt should be left that law does punish carriers for such types of behavior.

After this rough landing on the return trip from what ocean carrier loss of limitation benefit could be in the future, let us concentrate on existing cross-modal realities in the U.S. and Canada.

B. Ocean v. Land Loss of Carrier Limitation Benefit: Unreasonable deviation, mainly restricted to geographical deviation will only deny ocean and land carriers their

¹⁴⁵⁹ Laws and court decisions deter carrier unreasonable conduct. Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health. L. Rev. No. 3, 2-8 (QUICKAW-JOUR).

¹⁴⁶⁰ We should note, in this regard, that if, at some point in time, a regime similar to the 1999 Montréal Protocol No. 4 (air transport) governs ocean carriage, land and ocean regimes would be really polarized since ocean carrier limitation benefit would be unbreakable while, for the rest, land carriers would be subject to existing loss of limitation benefit doctrines. This adds to the reasons why the 1999 Montréal Protocol No. 4 should not be considered as an alternative for ocean carriage. See also *supra* note 54.

¹⁴⁶¹ Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 Eur. Transp. L. 1 at 39 and Jan Ramberg, "Freedom of Contract in Maritime Law" (1993) L. M. C. L. Q. 178 at 191. Mr. David Peck is much more explicit on this point. He argues that losses due to carrier fault are not profitable for carriers because they reduce profitability on the shipments. They are also not profitable for liability insurers because they increase liability insurance costs. They are, finally, not profitable for cargo insurers because their major controllable expense is cargo damages. The author goes even further suggesting that carrier liability is one of transaction costs and that we should not worry about regulating it because competition effectively allocates liability. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier, or is It?" (1998) Transp. L. J. 73 at 94, 98 and 101.

¹⁴⁶² It is law that should organize the marketplace by correcting distortions and not the other way round. By correcting distortions, law organizes a more efficient market. Boris Kozolchik, "On the State of Commercial Law at the End of the 20th Century" (1991) Ariz. J. Int'l & Comp. L. 1 at 1.

liability limitation benefit in the U.S.. This is very much a carrier protective provision. In Canada, a distinction is made between land transport and the Visby Rules. The Visby Rules insist on carrier *mens rea*, namely, presence of intentional or willful misconduct (inexcusable fault in Québec) to deprive him of its limitation benefit. In Canadian land transport fundamental breach, an intentional or willful breach going to the root of the contract, will disallow carrier the limitation benefit in common law provinces whereas in Québec, *rupture de contrats*, (also including gross negligence as type of carrier misconduct), will produce same result¹⁴⁶³.

The larger scope of envisaged breaches makes Canadian land carrier loss of limitation benefit doctrines more shipper protective than U.S. unreasonable deviation, which is mainly restricted to geographical deviations. We have already affirmed that the *rupture de contrats* doctrine is broader and, therefore, more shipper protective than that of fundamental breach¹⁴⁶⁴. We can conclude, therefore, that, overall, U.S. loss of limitation benefit doctrines and concepts are carrier protective whereas their Canadian land carrier counterparts are more shipper protective with Québec maintaining the most shipper protective provisions compared with the rest of Canada and the U.S.¹⁴⁶⁵.

If the U.S. adopts the Visby Rules, as it is currently considering doing under draft COGSA 1998 or otherwise, Canada and the U.S. would apply identical provisions to ocean carriage, operating loss of carrier limitation benefit only in case of its intentional or willful misconduct¹⁴⁶⁶. U.S. Hague Rules unreasonable deviation doctrine would, therefore, be eliminated and uniformity with Canadian ocean transport would be achieved through adoption of identical rules¹⁴⁶⁷. To leave no doubt as to the scope of these concepts, intentional fault would imply, under our suggestions, presence of intention to act in an inappropriate manner and not intention to cause damage¹⁴⁶⁸. Willful fault would

¹⁴⁶³ *Supra* at Part II, Chapter I, Section II, Par. 1(C), Par. 2(B), Par. 3(B). *Annex No. III, Table No. 9, 11* at cxvii and cxviii.

¹⁴⁶⁴ *Supra* note 1160.

¹⁴⁶⁵ Compare provisions in *Annex No. III, Tables No. 9, 11* at cxvii and cxviii.

¹⁴⁶⁶ See *Annex No. III, Table No. 12* at cci for our suggestion. Similar to the Visby Rules provision is contained in art. 8(1) of the 1978 Hamburg Rules, art. 21(1) of the 1980 Multimodal Convention, COTIF/CIM art. 44, FBL clause 8.9 and CMR art. 29 which refers to 'willful misconduct or default equivalent to willful misconduct'. On different interpretations of European courts in this regard, see *supra* at 106s.

¹⁴⁶⁷ The Visby Rules supplanted formerly applicable Canadian fundamental breach as far as the loss of ocean carrier limitation benefit is concerned. *Supra* at 252-253.

¹⁴⁶⁸ Although it is not clear whether Canadian (including Québec) and U.S. case law define 'intentional fault' in the same manner, an 'intent to act' seems to constitute the common requirement of all these countries definitions (*supra*

underline a voluntary (inexcusable) fault, which means to say, knowledge that damage would probably result.

In land transport, however, loss of carrier limitation benefit would still range from carrier protective U.S. unreasonable deviation to more shipper protective Canadian fundamental breach and most shipper protective Québec rupture de contrats doctrines. Between the two extremes of carrier protective U.S. unreasonable deviation and shipper protective Québec rupture de contrats, lies Canadian common law fundamental breach concept (middle ground solution). Not being fair to favor either carrier or shipper interests by opting for one of the two extremes, we suggest that land case law in both countries be directed towards Canadian common law fundamental breach to condition loss of land carrier limitation benefit.

Our proposal results in an ocean (Visby) v. land (fundamental breach) carrier loss of limitation benefit pattern. Visby Rules concentrate on carrier *mens rea* (state of mind: intentional or willful misconduct) while fundamental breach also requires shippers to prove a breach that goes to the root of the contract¹⁴⁶⁹. The more shipper protective Visby Rules provision could be explained by the fact that higher and more diversified ocean risks make less predictable ocean carrier reaction to a given set of circumstances requiring, therefore, a more favorable burden of proof given to the ocean, than the land, shipper.

Adopting our middle ground solution involves U.S. courts abandoning the unreasonable deviation doctrine in favor of Canadian fundamental breach. It also involves Québec case law abandonment of the shipper protective concept of carrier gross negligence. This opposes our harmonization approach which is respectful of modal and cultural diversities, as well as authors concurring opinion that imposing one legal system or tradition on others should be avoided to impede marginalization of these systems and traditions¹⁴⁷⁰.

notes 530, 1164, 1176). Our suggestion differs, in this way, from Visby Rules requirement of an intent to cause damage, a requirement that goes too far according to Pr. Tetley. *Supra* note 1249.

¹⁴⁶⁹ On fundamental breach and Visby Rules requirements see *supra* at 252.

¹⁴⁷⁰ *Supra* note 106 and accompanying text and William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions" (2000) Tul. Mar. L. J. 775 at 823.

However, it is not as if U.S. case law is not familiar with the common law concept of fundamental breach that it only chose to restrict to the unreasonable deviation doctrine¹⁴⁷¹. As far as Québec is concerned, it is true that one could argue that our suggestion(s) tend to marginalize Québec laws and case law principles. Gross negligence, rupture de contrats and the ban on contractual limitation of motor carrier liability have been done away with by our suggestions.

Québec carriers and shippers should not feel isolated by our proposals. It is true that we sacrificed the ban on contractual limitation of motor carrier liability and the concept of gross negligence and rupture de contrats on the altar of uniformity but we preserved civil law force majeure concept that qualifies certain carrier liability exceptions. Moreover, it is to be doubted whether contracting parties in Québec will make use of the contractual limitation of motor carrier liability under our suggestions since Canada applies the lowest motor carrier limitation amounts and, for the rest, Canadian motor carriers do not make use, in practice, of such limitations. Finally, denying land carriers their limitation benefit on the basis of Québec gross negligence when under no other U.S. or Canadian jurisdiction occurs the same, would really go too far in considering this concept in a U.S./Canadian uniformity perspective¹⁴⁷². For the rest, rupture de contrats is not eliminated but simply limited in scope to conform to fundamental breach standards under our suggestions¹⁴⁷³. Harmonization involves some change in the applicable pattern and we believe that our suggestions are the closest we can get to existing land carrier legislation in the U.S. and Canada in trying to achieve uniformity.

We have also noted that there is a question of whether a subjective or objective standards test should be adopted in appreciating presence of carrier intentional or willful faults. The objective standards test is based on the conduct of a prudent carrier in general and not of the carrier in question. It is more uniformity suited since it maintains a

¹⁴⁷¹ *Supra* note 1173.

¹⁴⁷² It may be that European civil law jurisdictions reason on gross negligence with respect to COTIF/CIM and CMR loss of land carrier limitation benefit provisions. We have seen, however, that there is a tendency in France to restrict the scope of 'faute lourde' (gross negligence) in favor of the faute inexcusable (willful misconduct). *Supra* at 111. More detailed analysis of European jurisdictions cases would be interesting, in this regard, to see what is case law direction on this issue. Such a comparison exceeds the geographical scope of our study.

¹⁴⁷³ Rupture de contrats is a broader concept than fundamental breach but they share common elements see *supra* note 1160.

predictable standard of conduct. The subjective standards test is less predictable and more inclined to achieve absolute equity and justice on the basis of individual cases¹⁴⁷⁴. One cannot but side, in heart, with the latter test despite its complexity and subjectivity. However, since uniformity and predictability of multimodal carrier liability rules are the primary goals of the present study, we will opt for the objective standards test to condition presence of carrier intentional or willful fault.

One could then wonder why we do not adopt U.S. draft COGSA '98 uniformity approach consisting in building into adopted Visby Rules provision the concept of unreasonable deviation or, following our proposal, the fundamental breach notion¹⁴⁷⁵. Authors have noted that COGSA '98 provision marries applicable U.S. doctrine of unreasonable deviation with Visby Rules provision. The new provision seems to render clearer applicable criteria to the loss of ocean and multimodal carrier limitation benefit under domestic law¹⁴⁷⁶.

If an analogous suggestion was made for our proposed ocean (Visby) v. land (fundamental breach) multimodal carrier pattern in Canada and the U.S., multimodal carrier would be denied its limitation benefit in case of Visby Rules intentional or willful misconduct *or in case of carrier fundamental breach when the carrier knows or should have known that from his actions damage would probably result*. Such a provision would not alter the fundamental breach concept for the simple reason that intentional and willful misconduct make already integral part of the fundamental breach concept. On the contrary, the new provision would render clearer the applicable doctrines to carrier loss of the limitation benefit. At the same time, suggested provision automatically demonstrates common ground between the fundamental breach doctrine and said Visby Rules provision and comparison of the two could lead to a more integrated loss of limitation benefit rule under our suggestions. Draft COGSA 1998 loss of limitation benefit provision could, therefore, provide a useful element to consider in pursuing a more integrated loss of limitation benefit liability provision under our suggestions.

¹⁴⁷⁴ *Supra* at 251-252 for further analysis and critics of the two tests.

¹⁴⁷⁵ (Sec. 9(h)(3)(D)) of the draft COGSA '98 adopts Visby Rules provision but also operates loss of carrier liability limitation in case of carrier unreasonable deviation made with intent to cause damage or recklessly and with knowledge that damage will probably result. See also *supra* at 253.

¹⁴⁷⁶ For draft COGSA 1998 application to intermodal carriers see *supra* at 169s.

Suggestions towards uniformity of multimodal carrier loss of the limitation benefit would be incomplete if we did not comment on the U.S. ‘fair opportunity’ doctrine¹⁴⁷⁷. We have seen that if a U.S. carrier fails to notify shipper of applicable limitations and give him fair opportunity to declare goods value, he will be denied its statutory or contractual liability limitation benefit. While all U.S. courts agree on the presence of the ‘fair opportunity’ doctrine, they are divided in ‘actual’ and ‘constructive’ notice jurisdictions as to the presence of ‘express’ notice given to all shippers (‘actual notice’) or notice based on shipper sophistication (‘constructive notice’)¹⁴⁷⁸. In recent years, U.S. ocean and land case law seem to lean towards the constructive notice test which approximates Canadian ‘sufficient notice’ test applicable on the issue, both taking into account shipper sophistication.

We have already suggested that U.S. courts should end up homogeneously applying the ‘constructive notice’ test for uniformity purposes either through Supreme Court guidance or through its extensive judicial adoption (informal uniformity)¹⁴⁷⁹. Considering that ‘the fair opportunity’ doctrine and ‘sufficient notice’ tests are judicial constructions, we align ourselves with authors opinion in recommending that appropriate language in the BOL should exist to indicate the application and the content of the applicable (converged) ‘constructive’ or ‘sufficient’ notice tests¹⁴⁸⁰.

Conclusion

Summarizing our suggestions so far, we conclude that different degrees of uniformity of multimodal carrier liability can be attained, with an ocean v. land carrier liability pattern being the closest possible to present reality constituting, therefore, the

¹⁴⁷⁷ Pr. Tetley argues that U.S. ‘unreasonable deviation’ and ‘fair opportunity’ doctrine do distance themselves from foreign jurisdiction criteria operating loss of carrier limitation benefit under the Hague and the Visby Rules. The author adds that this is a mere nuance of the many that exist in many national interpretations of the rules and which do not create fundamental divergence in the carriage by sea law of the countries in question. William Tetley, «The Proposed New U.S. Senate COGSA : the Disintegration of Uniform International Carriage of Goods by Sea Law » (Oct. 1999) 1999 J. Mar. L & Com. 595 at 620. Our geographically restricted, more punctual and detailed analysis of multimodal carrier liability permits to insist on what authors consider a mere nuance in ocean carrier liability regime.

¹⁴⁷⁸ *Supra* at 127s.

¹⁴⁷⁹ *Supra* at 163. Authors agree with what seems to be the case law in the U.S. and Canada on the issue of contractual definition of carrier liability, namely, that parity of bargaining power should be the primary focus in the judicial enforceability of contracts. Blake D. Morant, «Contracts Limiting Liability» (1995) 69 Tul. L. Rev. 715 at 758.

¹⁴⁸⁰ Jonathan Rodriguez-Atkatz, “Apportionment of Risk in Vessel and Marine Terminal Contracts” (1989) 64 Tul. L. Rev. 497 at 511.

most modest uniformity approach one can make. This uniformity approach is adopted for our multimodal carrier liability exceptions, liability limitations and loss of carrier limitation benefit, signaling respect of modal diversities. This, and all alternative solutions of proposed uniformity are based on harmonization efforts of presently applicable liability provisions. Where we found absolute carrier and shipper resistance to negotiate a uniformity suggestion, we urged parties to negotiate and agree on commonly acceptable solutions. Within suggested ocean v. land multimodal carrier liability pattern we adopted contractual limitation of land carrier liability and combined it with ocean carrier regulatory safety net prohibiting such a possibility.

Paragraph 3. Economic Analysis of Suggestions: One cannot formulate uniform multimodal carrier liability suggestions without considering their costs or which party in the transport contract, whether it is the carrier or the shipper –or, rather, their insurers-, is suited to assume more efficiently a change in the current liability pattern. We will, therefore, examine the allocation of risks and costs of our suggestions (A) but also ponder over other suggestions made by economists intended to improve intermodal liability (B).

A. Allocation of Risks, Costs and our Suggestions: The questions relevant to uniformity initiatives and insurance are how expensive insurance becomes and how the allocation of insurance costs between carriers and shippers is defined on the basis of undertaken uniformity initiatives¹⁴⁸¹. Proper answer to these questions conditions adoption of uniformity suggestions by insurance companies. What we need to achieve, in this regard, is an economically justified insurance cost in exchange for an adequate degree of care undertaken by the carrier¹⁴⁸² and predictability as to the allocation of risks so that the item on the grocery shelf is not padded with unnecessary legal expenses¹⁴⁸³.

One, however, could argue: why should we even bother about the cost of

¹⁴⁸¹ Stephen Zamora, “Carrier Liability for Damage or Loss to Cargo in International Transport” (1975) 23 Am. J. Comp. L. 391 at 393. The author notes that insurance costs are included in the price of the goods. For further details on ‘Law & Economics’ see *supra* at 33.

¹⁴⁸² Saul Sorokin, “Changing Concepts of Liability” (1982) 17 FORUM 710 at 717.

¹⁴⁸³ M.E. de Orchis, “Maritime Insurance and the Multimodal Muddle” (1982) 17 Eur. Transp. L. 691 at 706. As Pr. Ramberg notes, what really matters is not where the risk of a certain insurable contingency is placed but, rather, a clear distribution of risks so that one can determine as accurately as possible where the risk lies. Jan Ramberg, “The Law of Carriage of Goods, Attempts at Harmonization” (1974) 9 Eur. Transp. L. 1 at 38. Opinion shared by De Wit Ralph, *Carrier Liability and Documentation in Multimodal Transport* (D. Jur. Thesis, Law Faculty of the Vrije Universiteit at Brussels, 1993) [published by Informa Law and is part of the Lloyd’s Shipping Law Library] at 875.

insurance and allocation of risks since, whatever the cost of insurance may be it will simply be passed on from carriers to shippers or vice versa? We have seen that redefining carrier liability does not necessarily reflect an exact same change in cargo and liability insurance premiums. Definition of insurance premiums is not an exact science¹⁴⁸⁴. Absorption of eventual carrier liability increases by liability insurers and the inexact science of defining cargo insurance premiums can create imbalances in the overall picture of seemingly exact repercussion mechanisms giving way to fear of change¹⁴⁸⁵. To the fear to adopt uniform multimodal rules operating uncertain allocation of risks changes among insurers, we should add insurance companies successful adaptation to existing complicated multimodal reality, which does not really create a strong motive for change.

This is why we have expressed the opinion that if there will ever be a chance to convince insurance companies to transform the somewhat controlled multimodal legal jungle into a freely accessible, smoothly running, well structured, safe multimodal territory for carriers and shippers to venture, this will be done by making gradual, close to the ground but firm and well defined uniformity proposals. Such solutions would not exceedingly change present insurance costs or allocation of risks between carriers and shippers so that insurers would have to think twice before rejecting uniformity initiatives that intent to sort out the tangled web of multimodal legal liability.

‘Law and Economics’ also provides a valid motive for our reasoning. In effect, there are some ‘Law and Economics’ authors who argue that more risks should be born by the party to the contract who is more able to mitigate damages caused by the harm-causing event (superior risk bearer test)¹⁴⁸⁶. This is an economics minded theory that answers law and economics cost-effectiveness preoccupations. Transposing this logic to the world of intermodalism, we wonder which one of the liability or cargo insurers is more capable of mitigating losses or damages to the transported goods.

‘Law and Economics’ suggests that the person who can predict and prevent the damage or loss on the one hand, or the one who can more cost-effectively bear the

¹⁴⁸⁴ *Supra* at 82s.

¹⁴⁸⁵ *Ibid.*

¹⁴⁸⁶ John Eloffson, “The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests” (1996) 30 *Columbia J. of L. and Soc. Probl.* 1 at 11-12.

damage to or loss of the goods (risk bearer) on the other hand, should carry greater liability (superior risk bearer test)¹⁴⁸⁷. We will herein comment on both tests.

It is generally thought that a builder who builds many houses each year is in a better position to spread losses (risk bearer) than the individual buyer¹⁴⁸⁸. Transposing this line of reasoning to the carrier/shipper relationship, it can be argued that it is probably the carrier who is the best *risk bearer* since he can spread the risk of damage or loss to the many shippers he contracts with, in the same way the builder does when contracting with many buyers¹⁴⁸⁹. However, most of the time, all damages affecting goods in transit are settled between cargo and liability insurers who are both capable of spreading losses to their insureds and are, hence, both good risk bearers¹⁴⁹⁰. As a result, advanced argument justifying greater liability to be born by the carrier does not appear to be that solid at first sight.

It is also thought that liability insurers operate more cost-effectively and, therefore, more easily absorbing losses than cargo insurers¹⁴⁹¹. This puts liability insurers in a better position (better risk-bearers) to assume a higher degree of liability. Others, however, assert that liability insurance is more expensive than cargo insurance¹⁴⁹² so that, overall, it is hard to conclude whether it is the carrier or the cargo insurers who are the best risk bearers and can, therefore, assume a higher degree of liability¹⁴⁹³. Inability to

¹⁴⁸⁷ David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 161.

¹⁴⁸⁸ *Ibid* at 162. See also the argument that the ability to better mitigate damages depends on the availability of information (the insurer has of its client's business) and the uncertainty of this test. John Eloffson, "The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests" (1996) 30 Columbia J. of L. and Soc. Probl. 1 at 11-13.

¹⁴⁸⁹ Authors argue that if we are to minimize transaction costs and, therefore, final price of the goods, losses should be allocated to the party who can most cheaply avoid them. David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Transp. L. J.* 73 at 98. Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 *J. Mar. L. & Com.* 119 at 129-130.

¹⁴⁹⁰ In risk allocation we begin with the assumption that when a party is risk-averse and the other is risk-neutral the risk-neutral party is the best risk bearer and the parties should allocate the risk to him. Between the insured and the insurance company, the latter is risk-neutral because its very business is the spreading of risk. Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 *Univ. of Chicago L. Rev.* 1337 at 1355-1357.

¹⁴⁹¹ *Supra* at 82.

¹⁴⁹² Robert Hellowell, "The Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 *Am. J. Comp. L.* 357 at 367. Opponents of carrier strict liability argue that cargo insurance is less costly than liability insurance. The problem is that for all these arguments there is no statistical support. Stephen Zamora, "NAFTA and the Harmonization of Domestic Legal Systems: the Side Effects of Free Trade" (1995) *Ariz. J. Int'l & Comp. L.* 401 at 394.

¹⁴⁹³ The party who can most cheaply avoid losses cannot easily be determined because of the multiplicity of liability regimes in multimodal transport and different characteristics of shipments. Michael F. Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of

determine which party to the transport contract is a better risk bearer justifies, once more, our view of making gradual steps towards uniformity in allocating risks under our uniform intermodal liability suggestions.

What about the second ‘law and economics’ test on prediction and prevention of risks? It is generally argued that the party with control over some part of the production process is in a better position both to prevent and to predict losses¹⁴⁹⁴. This person may be the builder as in the above-mentioned example but, depending on the specific fact pattern, it may also be another person. To better illustrate our conclusion, suppose that a professional photographer spends six months taking photographs in the Himalayas for a big magazine at a cost of a hundred thousand dollars. When he gets home he gives the film for development to the local supermarket that loses it. At first sight, liability lays with the supermarket that loses the entrusted good, the film. One can, however, validly argue that it is the photographer who is in the better position to prevent the loss and should, therefore, be held liable. In effect, knowing the value of the film, the photographer could have avoided the damage by taking the film to a specialist film lab and making sure that the proprietor realizes what they are¹⁴⁹⁵. As a result, the person who is in the best position to prevent the loss is the photographer¹⁴⁹⁶.

In the transport contract, one could assert that it is generally the carrier who has better control of the goods in transit and is, therefore, in a better position to prevent their damage or loss. In effect, it is the carrier who is the guardian of the transported goods, is aware of their nature and knows the measures to be taken in this respect considering the perils to be confronted at sea. The situation is quite similar to that of the supermarket that holds and loses photographers film. However, we have seen that photographer may be considered liable too, since he is aware of the value of the film and can reasonably predict potential damage to it but does not take all the necessary precautions to avoid it. In the same way, there are cases where shipper (for instance under the ‘shipper fault’

Empirical Evidence” (1993) 24 J. Mar. L. & Com. 119 at 130-131. David S. Peck, “Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?” (1998) Transp. L. J. 73 at 98.

¹⁴⁹⁴ David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 162. When risk prevention measures are known, as is the case of our example, their adoption depends on whether they are cost-effective, this means to say, whether the cost of their adoption is lower than the reduction of risk they operate. Ejan Mackaay, *L'Analyse Économique du Droit* (Montréal, Québec: Éditions Thémis, 2000) at 173.

¹⁴⁹⁵ David D. Friedman, *Law's Order* (Princeton, U.S.A.: Princeton University Press, 2000) at 161-162.

¹⁴⁹⁶ *Ibid* at 162.

liability exception) or other parties may be considered liable for not taking all needed precautions to insure goods safety whenever such precautions are reasonably foreseeable by him/them. Consequently, one cannot draw a general conclusion on what party, whether it is the carrier or the shipper, is better situated to predict and prevent damage. The answer to this question depends on a case-by-case analysis.

We conclude that, overall, one cannot draw general conclusions as to what party to the transport contract is the best risk bearer or most apt to predict and prevent damages. As a result, there cannot be a generalized answer as to which party can more easily assume a greater degree of liability when reasoning on economic terms so as to justify an eventual increase or decrease in the degree of liability. Hence, we cannot talk about a most cost-effective allocation of risks in the transport contract. This is one more reason why, once more, we prefer to keep ourselves the closest possible to the present legal reality when allocating risks between the carrier and the shipper (pragmatism).

Even if we have affirmed that one can only theorize on the consequences of uniform multimodal rules on cargo and liability insurance, we will attempt to describe how our uniformity suggestions operate gradual changes in the present level of insurance costs and allocation of risks pattern (pragmatism) while keeping a fair balance between the carrier and shipper interests (fairness)¹⁴⁹⁷.

Adding new 'per container', 'per pound' or 'per package/unit' liability measures where they did not exist before would probably increase carrier liability and premiums due to the additional limitation amounts and measures present. Providing for abolition of the nautical fault defense and compensation of concealed damage would probably produce same effect. On the other hand, adoption of the principle of presumption of fault and extension of the latent defect defense to land carriers would probably lessen carrier liability. The fact that our suggestions are based on an ocean v. land liability pattern and its voluntary application by carriers and shippers should moderate the importance of an eventual carrier liability increase or decrease because of their modest approach towards uniformity.

¹⁴⁹⁷ Lacking empirical data on the following we can only reason on a hypothetical basis as precisely as possible. On the lack of empirical data in general see *supra* note 400.

Insurance costs for carriers and shippers would probably rise in a deregulated (contractual) but harmonized legal liability environment due to the uncertainties as to the effects of our suggestions. For the rest, insecurities relating to appreciation of parties sophistication to determine shipper notice of carrier limitations, parties intention in defining 'package/unit', reasonableness standard in appreciating carrier absence of negligence and carrier *mens rea* to determine loss of the limitation benefit, would remain same.

Above-mentioned liability suggestions intervene in specific (*ad hoc*) areas and frequently advance only part of the desired solution (i.e. suggestion on limitation measures without defining specific liability amounts). This certainly leaves many liability areas uncovered by our suggestions, something that constitutes a first safety feature impeding great alterations in the presently applicable allocation of risks pattern.

Proposed measures also emanate from ground unimodal or/and multimodal practice being further elaborated to adapt to the multimodal carriage and operate the necessary convergence between the modes in order to achieve the desired uniformity. This is the case of the presumption of fault principle or the extension of the latent defect defense to land carriers. Being defined on the basis of the present multimodal practice said measures do not distance themselves greatly from ground rules (pragmatism).

In granting both carriers and shippers, respectfully, beneficial provisions we are not aiming at precisely balancing out shipper and carrier granted advantages¹⁴⁹⁸. From the study of cargo and liability insurance mechanisms we have concluded that allocation of risks between carriers and shippers is not an exact science. Still, fairness has to be maintained to the maximum degree possible to encourage adoption of proposed measures. This is why we avoided granting one-sided benefits so as not to, greatly or unjustifiably, benefit one group of interests over the other.

If insurance costs and allocation of risks seem to not radically change under our suggestions, what about overall costs of our adopted approach towards uniformity (network system of liability, constant codification and harmonization of laws and

¹⁴⁹⁸ Apart from the above-mentioned suggestions see also *supra* at Part II, Chapter II, Section II, Par. 1 on the presumption of fault suggestion balancing out carrier and shipper interests.

legislation)? Because of the gradual, continuing, expansive and protracted approach adopted to achieve uniformity, the whole harmonization procedure risks to be fastidious and costly¹⁴⁹⁹. Authors seem to agree in asserting that an intermodal liability regime premised on the *UNCTAD/ICC Rules* (such as the *FIATA BOL* and several suggestions of ours) provides no substantial difference in total costs when compared to the present legal reality¹⁵⁰⁰. So why change and suggest uniformity?

Same authors also argue that harmonization of domestic and modal laws, the initiative we are undertaking in the present study, reduces uncertainty, transportation and litigation costs¹⁵⁰¹. Further, we have seen that improvements (this also includes improvements to liability principles governing intermodalism) to multimodal transportation produce disproportionately higher gains to the measure of such improvements¹⁵⁰². Finally, we should note that certain intermodal liability suggestions we advance (i.e. adoption of a contractual multimodal document instead of elaboration of a convention, abolition of the nautical fault defense, conservation of the list of carrier liability exceptions to better define the presumption of fault principle) tend to alleviate the costly nature of the overall proposals either in their negotiation or in their implementation stage. Because of our effort to decrease the cost of our suggestions and the final objective increase of benefits harmonization entails, we believe that the end product -the uniform multimodal carrier liability regime to which we herein make a modest contribution- will worth the costs undertaken if not in the short, at least in the long run.

B. Other suggestions: It has been argued that the solution to multimodal transport complexities does not lie ‘in a new multimodal regime but in a new insurance

¹⁴⁹⁹ See *supra* at 39. This seems to be the cost of choosing pragmatism and fairness.

¹⁵⁰⁰ European Commission, *The Economic Impact of Carrier Liability on Intermodal Freight Transport* (2001) online: Europa Homepage <http://europa.eu.int/comm/transport/library/final_report.pdf> (last visited: Jan. 10, 2001) at 37-38.

¹⁵⁰¹ *Ibid* at 38-39. However, interviews with carriers, shippers, forwarders and insurers have indicated that the reduction in administrative costs (litigation, arbitration) resulting from harmonization would not be great. *Ibid*.

¹⁵⁰² *Supra* at 34-35. See also *supra* note 482 and accompanying text for an economic analysis of costs due to the absence of a harmonized liability regime made at the European level. We should also note that herein suggested codification of case law on multimodal carrier liability will not only benefit multimodal carriage. It will also benefit advancement of the law in general since codification, clarification of notions used in many legal fields such as, for instance, shipper sophistication, are extensively used outside the transport field.

regime'¹⁵⁰³. In this way, some people opine that if all risk of damage or loss were placed on one party, either the carrier or the shipper, dual or overlapping insurance would be eliminated as well as would be necessity for cargo or liability insurance (depending on the adopted solution) and subrogation actions between insurers, reputed to be so very costly¹⁵⁰⁴.

Abolishing carrier liability insurance and, therefore, carrier liability as a whole has never received serious support mainly because of the fact that the carrier would have no incentive to take adequate measures to protect cargo¹⁵⁰⁵. Some authors have argued that it is liability insurance that should be abolished and not a person's liability since insurance lessens the incentive of exercise of care of liable person and/or victim by assuming the burden of loss in the event of damage or injury¹⁵⁰⁶. Although both these views may have a certain merit they should not be viewed as absolute. Carrier, as any insured person, has an incentive to take care of his cargo irrespective of the presence of liability or liability insurance since damages due to his lack of care will cause him loss of business and interruption of otherwise smoothly running transport operations resulting in further expenses¹⁵⁰⁷. It is, thus, competition that creates the incentive for carriers to care for cargo not necessarily or exclusively the presence of liability or liability insurance¹⁵⁰⁸. In any case, we view both the suggestions of abolishing liability and/or liability insurance as largely distancing themselves from current reality (pragmatism) to be given serious consideration.

If we want to avoid the traditional twins (cargo and liability insurance) we can opt for elimination of cargo insurance through increase of carrier liability. Same argument of

¹⁵⁰³ Tony Young, *Position Statement on Multimodal Liability* (1999) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 30, 2001).

¹⁵⁰⁴ "Chequered History of a Legal System Bedevilled by Political Confrontation" (2000) *L.I. List Int'l. Sp. Rep.* 19 (WESTLAW-Newsletters) on cargo insurance becoming obsolete if carrier liability were to be extended. For the opposite view see Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 *Eur. Transp. L.* 1 at 39-40. *Supra* at 78 for overlapping or dual insurance.

¹⁵⁰⁵ David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Transp. L. J.* 73 at 100. On this proposal being a utopian idea see Jan Ramberg, "The Law of Carriage of Goods, Attempts at Harmonization" (1974) 9 *Eur. Transp. L.* 1 at 41. M. R. Th. Sarassin, "La Signification de l'Assurance sur Facultés en Cohésion avec le Postulat d'une Répartition Équilibrée du Risque de Transport entre le Propriétaire des Marchandises et le Transporteur" (1973) 8 *Eur. Transp. L.* 350 at 356-357. Every time such a proposal would be made, negotiators would discard it as utopian thinking it would lead carrier to lack of care for the cargo.

¹⁵⁰⁶ Jeffrey A. Greenblatt, "Insurance and Subrogation: When the Pie is not Big Enough Who Eats Last?" (1997) 64 *Univ. of Chicago L. Rev.* 1337 at 1357-1358. See also *supra* at 301-302.

¹⁵⁰⁷ *Ibid* for an analogous reasoning made on the basis of personal injury insurance.

remoteness of this solution from present reality could be made in this regard. Moreover, in such a case, cargo insurance may be reduced but will not be eliminated. In effect, shipper will still use cargo insurers because payment is prompt, the cargo owner can deal with a single insurer who may also provide coverage before and after liability insurance is effective¹⁵⁰⁹. Such a regime may, thus, present a gain for individual shippers but not for shippers as a class¹⁵¹⁰. Finally, a raise in carrier liability falls, in the end, back upon the shippers of cargo.

Another solution that approximates the proposal on abolition of liability insurance is the institution of a no fault insurance system to compensate for damages to goods in multimodal transport¹⁵¹¹. Here, the elimination of liability insurance does not stem from elimination of carrier liability, as in our previous hypothesis, but from elimination of fault as the basis of carrier liability. This is not a no-liability insurance, it is a no-fault insurance replacing currently existing tort (fault-based) compensation of damages¹⁵¹². In effect, no-fault insurance permits carriers and shippers to be compensated by their insurance companies in the event of damage without respect to carrier or shipper fault, willful misconduct, gross negligence or presumption of liability, which no longer constitute the basis of compensation¹⁵¹³. Depending on the type of instituted no-fault insurance system, tort actions may be eliminated or preserved to a certain extent but the principle of this system is automatic compensation for sustained damages without regard

¹⁵⁰⁸ See also *supra* at 301-302 for carrier economic motive to avoid damages.

¹⁵⁰⁹ David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Tul L. J.* 73 at 100. The author also suggests that, under such a regime, dual insurance would be reduced but not eliminated. M. R. Th. Sarassin, "La Signification de l'Assurance sur Facultés en Cohésion avec le Postulat d'une Répartition Équilibrée du Risque de Transport entre le Propriétaire des Marchandises et le Transporteur" (1973) 8 *Eur. Transp. L.* 350 at 355 and 357. See also opinion of Sender-Augello made with respect to the 1978 *Hamburg Rules* as reported by Alan Schoedel, "Obstacles Seen to Convening New Cargo Liability Conference" *J. Com.* (1987) online: LEXIS (Newsletters) and Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 *ILSA J. Int'l & Comp. L.* 153 at 169. Saul Sorokin, "Changing Concepts of Liability" (1982) 17 *FORUM* 710 at 718.

¹⁵¹⁰ Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods" (1996) 23 *Transp. L. J.* 471 at 489. *Supra* at Part I, Chapter I, Section I, Par. 3. C. for insurance mechanisms. It is probably for this reason that Pr. Tassel has noted in one of his articles on maritime law: "Tant que les entreprises d'assurances perdureront le mal sera limité mais qu'elles viennent à être mises en péril le remède aura été pire que le mal ». Yves Tassel, "La Spécificité du Droit Maritime" (1997) *Annuaire de Droit Maritime et Océanique* 143.

¹⁵¹¹ As reported by Tony Young, *Position Statement on Multimodal Liability* (2001) online: CIFFA Homepage <http://www.ciffa.com/currentissues_transportlaw_multimodal.html> (last visited: Nov. 9, 2001). This is also the position of David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Transp. L. J.* 73 at 104.

¹⁵¹² Lewis N. Klar, "Tort and No-Fault" (1997) 5 *Health L. Rev.* No. 3, 2-8 at par. 3-4 (QUICKLAW-JOUR).

¹⁵¹³ David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) *Transp. L. J.* 73 at 104. *No Fault Insurance* (2002) online: 4Insurance Homepage <<http://www.4insurance.com/auto/nofault.asp>> (last visited: Feb. 22, 2002).

to any person's fault¹⁵¹⁴. When carrier and shipper insurance is no longer based on fault, cargo and liability insurance tend to converge so that, in the end, liability allocation is irrelevant because the parties bargain over who pays the insurance premium¹⁵¹⁵.

Mr. David Peck suggests, in this respect, that a no-fault insurance scheme in carriage of goods can be based on parties free contractual allocation of liability amongst themselves attributing X per cent of the damage or loss to the carrier with the shipper retaining the rest of liability¹⁵¹⁶. He further argues that competition rather than law would force carriers to be more attentive of the cargo and that legislation could help them be more effective by requiring them to disclose all shipping accidents so that shippers can evaluate the precautions carriers take with respect to the cargo¹⁵¹⁷. The author finally maintains that system's benefits would outweigh its costs and complexities (i.e. multiplicity of individual contracts) since, after trial and error, standard practice would allocate carrier the percentage of its liability in most cases¹⁵¹⁸ as is currently the case with U.S./Canadian rail and U.S. motor carrier liability amounts (contractual uniformity).

Applying our mainstream line of thinking to this hypothesis, the present suggestion should be rejected as too remote from ground practice, which is based on cargo and carrier liability (fault) insurance and contractual definition of it. However, because Mr. Peck's arguments seem rather convincing and because no-fault insurance systems are currently in place in other areas in the U.S. and Canada, more convincing answers should be given to counter author's arguments.

Proponents of the no-fault insurance system argue that it permits reduction of insurance costs, efficiency, timeliness and fairness of compensation, elements to be

¹⁵¹⁴ Whatever the type of no-fault insurance adopted, (pure no-fault, limited no-fault), insurers always maintain fault based criminal actions and premium penalties against the carrier. Craig Brown, *No-Fault Automobile Insurance in Canada* (Ontario: Carswell, 1988) at 1. In pure no-fault jurisdictions, as is the province of Québec for automobile accidents, the victim is compensated for any injury but denies recourse to any tort actions. *Ibid.* and Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR). In limited no-fault jurisdictions the tort system remains in place for outcomes not included as automatically compensable. Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

¹⁵¹⁵ David S. Peck, "Economic Analysis of the Allocation of Liability for Cargo Damage: the Case for the Carrier or is It?" (1998) Transp. L. J. 73 at 105.

¹⁵¹⁶ *Ibid* at 104. The author adds that the carrier would provide a sliding rate schedule dependent upon the percentage of liability which it agreed to accept. The shipper would compare the list of rates with the cost of cargo insurance and choose the cheapest combination of freight and insurance. *Ibid.*

¹⁵¹⁷ *Ibid* at 104 and at 96-97.

¹⁵¹⁸ *Ibid* at 105.

opposed to the costly, adversarial, unfair and frequently arbitrary fault-based system¹⁵¹⁹. They note, more specifically, that no-fault insurance favors speedy settlement of claims without need for lawyers, courts, delays, judges and juries since it is the insurance company that automatically pays for damages¹⁵²⁰. This results in reduction of insurance premiums because less cases end up in court (cost-effectiveness, litigation argument)¹⁵²¹. No-fault insurance also provides compensation in all cases without regard to fault not excluding, at the same time, certain tort (fault-based) actions ('peaceful coexistence' with litigation)¹⁵²². Moreover, the system is more fair than current fault-based tort actions because the latter only punish parties at fault and, in certain cases, arbitrary decisions may withhold or limit compensation to some claimants while overpay others (fairness argument)¹⁵²³. Finally, because of its flaws and the presence of liability insurance companies, fault-based system loses its deterrent effect and cannot create disincentives with respect to undesirable conduct (deterrence argument)¹⁵²⁴.

Opponents of no-fault insurance argue that this system is not without fault and its considerable disadvantages make it non-appealing. Litigation costs, presumably avoided under no-fault insurance, are not really done away with since the time and effort insurers once spent defending litigation claims are now spent defending lawsuits brought by their own insureds for failure to pay no-fault benefits or/and determining whether thresholds, conditioning compensation, have been crossed¹⁵²⁵. Studies have also shown that under

¹⁵¹⁹ Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

¹⁵²⁰ *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002). *No Fault Insurance* (2002) online: 4Insurance Homepage <<http://www.4insurance.com/auto/nofault.asp>> (last visited: Feb. 22, 2002).

¹⁵²¹ *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002).

¹⁵²² *Ibid.* See also Craig Brown, *No-Fault Automobile Insurance in Canada* (Ontario: Carswell, 1988) at 2 and *supra* note 1514.

¹⁵²³ Robert Astroff, "Show Me the Money" (1996) 5 Health L. Rev. No. 3, 9-17 (QUICKLAW-JOUR).

¹⁵²⁴ *Ibid.*

¹⁵²⁵ *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002). Under a system of thresholds, the threshold is passed once a person exceeds a certain dollar amount in damages (monetary threshold) or meets defined criteria (verbal threshold i.e. severity of injury). Having a low monetary threshold is a bad idea and no-fault systems with such thresholds will just increase premiums without having much of an efficiency effect on the system. Some thresholds, however, are extremely severe requiring serious damage to goods. *A Message from the Coalition against No-Fault* (2001) online: BC Coalition of People with Disabilities Homepage <<http://www.bccpd.bc.ca/commalert/nofault.html>> (last visited: June 1, 2001), Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 21-26 (QUICKLAW-JOUR) and Paul Eisenberg, *Wharton Study Explores no-Fault Insurance* (2000) online: Business Journal Homepage <<http://www.bizjournals.com/philadelphia/stories/2000/04/10/focus3.html>> (last visited: April 7, 2000).

the Québec pure no-fault automobile insurance scheme there has been reported no significant difference in insurance costs when compared to other fault-based provinces (cost-effectiveness, litigation argument)¹⁵²⁶. A major Ontario study, the Osborne Report of Inquiry into Motor Vehicle Accident Compensation in Ontario, indicated that under the Ontario system of tort, a move to no-fault would only result in 5% reduction in expenses¹⁵²⁷. Further, experience with no-fault, especially in New Zealand, and its very high costs have led to a significant ‘reform’ of the scheme¹⁵²⁸. Authors conclude that how much would actually be saved by moving to a no-fault system is highly speculative. Moreover, studies have shown that the threat of tort liability does deter unreasonable conduct and further proof to this effect is provided by the fact that tort judgments can result in high liability insurance premiums (deterrence argument)¹⁵²⁹. What’s more, in the area of automobile insurance, it seems that no-fault insurance has increased accidents because it has promoted drivers carelessness¹⁵³⁰.

Finally, and most importantly, it may be that a fault-based system is unfair because it always punishes persons at fault whereas no-fault insurance compensates not withstanding a person’s fault without, however, excluding latter¹⁵³¹. However, it is also true that the fault-based system provides for full compensation of damages whereas no-fault insurance does not since it is financially prohibitive to cover all possible losses¹⁵³². Compensation thresholds established by no-fault insurers may be arbitrarily set, in the

¹⁵²⁶ Release report of the Canadian Bar Association as reported by Lewis N. Klar, ‘Tort and No-Fault’ (1997) 5 Health L. Rev. No. 3, 2-8 at par. 24 (QUICKLAW-JOUR). Four Canadian provinces have no-fault schemes in the automobile accident area with Québec and Manitoba disposing of a pure no-fault insurance system in the area of automobile accidents. *Ibid* at note 1. No U.S. state has adopted a pure no-fault insurance scheme. *History of the No-Fault Concept* (1999) online: Consumer Watchdog Homepage <<http://www.consumerwatchdog.org/insurance/fs/fs000160.php3>> (last visited: March 3, 2000).

¹⁵²⁷ Lewis N. Klar, ‘Tort and No-Fault’ (1997) 5 Health L. Rev. No. 3, 2-8 at par. 21 (QUICKLAW-JOUR).

¹⁵²⁸ *Ibid* at par. 25s. A letter to the *Herald* newspaper stating that the no-fault accident compensation scheme may have appeared attractive enough to New Zealanders at first, but it did prove to be an abysmal failure in the end, seems to sum up the prevailing opinion on the issue. Roger Kerr, *New Zealand’s ACC Scheme: Time for a Decent Burial* (1996) online: <www.nzbr.org.nz/documents/speeches/speeches-96-97/acc-hvcc.doc.htm> (last visited: June 15, 1997).

¹⁵²⁹ Lewis N. Klar, ‘Tort and No-Fault’ (1997) 5 Health L. Rev. No. 3, 2-8 at par. 17.

¹⁵³⁰ David Cummins, Mary Weiss, Richard Phillips, *The Incentive Effects of No-Fault Automobile Insurance* (1999) online: <<http://fic.wharton.upenn.edu/fic/papers/99/9938.pdf>> (last visited: Aug. 16, 1999). An empirical study of automobile accident fatality rates in all U.S. over the period of 1982-1994 revealed that no-fault insurance is significantly associated with higher fatal accident rates than the tort system. *Ibid* under ‘Discussion’.

¹⁵³¹ It all depends on the type of no-fault insurance scheme adopted. *Supra* note 1514.

¹⁵³² This is so, even assuming that there may be some financial savings to the system by moving away from tort to no-fault. Lewis N. Klar, ‘Tort and No-Fault’ (1997) 5 Health L. Rev. No. 3, 2-8 at par. 13 (QUICKLAW-JOUR). *A Failed Experiment: Analysis and Evaluation of No-Fault Laws* (1999) online: Consumer Watchdog Homepage <<http://www.consumerwatchdog.org/insurance/fs/fs000218.php3>> (last visited: March, 30 2000).

same way there can be arbitrary court decisions under the fault-based system¹⁵³³. The latter, however, constitute the exception rather than the rule since, in most cases, the issue of fault is very straightforward and the conduct of the defendant clearly blameworthy on any reasonable standard (fairness argument)¹⁵³⁴. The same cannot be asserted for no-fault insurance thresholds since there are no-fault jurisdictions that may maintain very severe thresholds (permanent injury, disability) in order to compensate victims¹⁵³⁵. These may be some of the reasons why no-fault insurance systems, tried in many parts of the world, have been extremely unpopular or repealed since they have resulted in increased premium costs and reduced benefits¹⁵³⁶.

Because defects exist in both fault-based and no-fault based insurance systems, we believe that the choice between the one or the other lies in a more extended reasoning of this latter 'fairness' argument¹⁵³⁷. By punishing wrongful conduct and promoting reasonable behavior the fault-based system promotes values such as fairness¹⁵³⁸. It is inevitable, therefore, that the legal community would prefer such a system. Yes, but one could argue that, in practice, fault cannot always be attributed as this is very frequently the case of concealed damage in multimodal carriage. What is the system that one could apply in such a case? Can it be a fault based system?

¹⁵³³ *A Message from the Coalition against No-Fault* (2001) online: BC Coalition of People with Disabilities Homepage <<http://www.bccpd.bc.ca/commlert/nofault.html>> (last visited: June 1, 2001). The slogan for this Coalition is Threshold = No-Fault = No-Choice = No-Fairness. See also *No Fault Insurance, The Basics* (2002) online: Insurance. Com Homepage online: <http://www.insurance.com/insurance_options/auto/auto_basics_no_fault_ins.asp> (last visited: April 4, 2002).

¹⁵³⁴ Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 15 (QUICKLAW-JOUR).

¹⁵³⁵ In the U.S., for instance, Kansas no-fault automobile insurance has set such serious injuries as permanent disfigurement, bone fractures, permanent injury or permanent loss of a bodily function as threshold conditions in order to compensate victims. *You Were Injured in an Automobile Accident* (2002) online: My Counsel Homepage <<http://www.mycounsel.com/content/personalinjury/hurt/auto/>> (last visited: Mar. 2, 2002).

¹⁵³⁶ *No Fault* (2001) online: Pushol & Mitchell Lawyers Homepage <<http://www.pushormitchell.com/articles/nofault.html>> (last visited: March 20, 2001). *Choice No-Fault and other Recent Proposals* (2000) online: Consumer Watchdog Homepage <<http://www.consumerwatchdog.org/insurance/fs/fs000285.pbp3>> (last visited: March 3, 2002). *History of the No-Fault Concept* (1999) online: Consumer Watchdog Homepage <<http://www.consumerwatchdog.org/insurance/fs/fs000160.php3>> (last visited: March 3, 2000).

¹⁵³⁷ See also concurring opinion of Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health. L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

¹⁵³⁸ Other values promoted: common sense of rights, a common sense of duties, a demand for fair hearing, an aversion to inconsistency, a passion for equality of treatment, an abhorrence of illegality and a commitment to legality. H. J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Pres, 1974) at 26 as reported by *ibid.*

We have suggested that in case of concealed damage we simulate the *situs* of damage to attribute liability¹⁵³⁹. Even in case of non-localized damage, therefore, we attribute liability, we do not determine compensation based on thresholds, as no-fault insurance does. We remain, thus, within the sphere of the fault-based system.

It is true that the costs of doing things fairly are not trivial¹⁵⁴⁰. Based on the previous analysis, however, it is not certain that a no-fault insurance system will provide the desirable result. What's more, what is to be expected under the no-fault insurance system? To have powerful and affluent claimants capable of buying more insurance coverage overpower smaller and powerless ones?¹⁵⁴¹ This is not our answer with respect to no-fault insurance or with respect to multimodal carrier liability. We cling to our belief that justice, fairness should serve realistic uniformity solutions adopted that are not to be exchanged for pure economic measures¹⁵⁴². Eventual flaws in the thereby established system –fault-based system and multimodal carrier liability regime in the present case-leave margin to correction. Correction of some legal flaws of the presently applicable multimodal carrier liability regime is exactly the initiative undertaken in the present study with uniformity suggestions made to this regard.

¹⁵³⁹ *Supra* at 258. One could argue that no-fault insurance would be perfectly suited for covering damages due to concealed damage since, not knowing where the damage has occurred, the fairness argument fails in the absence of elements identifying the liable party. So, instead of presuming ocean or land carrier liability in case of concealed damage, as it is currently the case, no fault liability insurance should take effect. This is a very interesting idea that should be further examined within the uniformity context. Its remoteness from applicable legal reality (pragmatism) and the fact that the fairness argument is not totally eliminated in the sense that more powerful parties would be mostly favoured under a no-fault insurance system for concealed damage, makes the idea less appealing under the proposed suggestions. However, the proposal is quite interesting and deserves further examination.

¹⁵⁴⁰ H.W. Arthurs, "A Review of Advocacy and Dispute Resolution in the Ontario Automobile Insurance System" (1993) a report prepared by the Ontario Minister responsible for Automobile Insurance Review 1 at 11, as reported by Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

¹⁵⁴¹ In *Peixeiro v. Haberman* [1997], 3 S. C. R. 549 (S. C. C.) the court noted that full compensation, justice, accident deterrence, safety and education goals of tort are not the aims of no fault-insurance. As reported by Lewis N. Klar, 'Tort and No-Fault' (1997) 5 Health L. Rev. No. 3, 2-8 at par. 22 (QUICKLAW-JOUR).

¹⁵⁴² *Supra* at 11s and at 302.

Conclusion

In a world where trade is booming, uniformity of multimodal carrier liability rules is desirable and actually sought at the international level. Absence of such rules in the U.S., Canada and worldwide has led to application of fragmented unimodal liability rules, with contractualism rising in importance in the U.S. and Canada as a result of transport deregulation.

Considering failure to elaborate international or national uniform mandatory multimodal liability rules and absence of fervent political support for adoption of a single uniform multimodal carrier liability regime at the national, international or industry level, gradual, modest changes towards uniformity are more likely to be adopted by industry participants and governments. In the present study, we followed the trend currently prevailing at the international level by adopting a contractual document of voluntary application. Following our suggestions, the document prescribes an ocean (mandatory/formalist) v. land (contractual) carrier liability pattern as the minimum level of uniformity of multimodal carrier liability in the U.S. and Canada. All our therein contained multimodal carrier liability suggestions on uniformity are based on a detailed cross-modal (motor-rail-ocean) and cross-country (U.S.-Canada) case law study and harmonization efforts, directed by the need to serve pragmatism and fairness.

By opting for the well settled-in deregulation prescribed *contractualism* to govern land carrier liability and the presently applicable mandatory liability rules to govern ocean carriage, we served pragmatism. This corresponds to the presently applicable reality in the U.S. and Canada. Undertaken *harmonization* of presently applicable cross-modal and cross-country liability defenses, amounts and measures also served the suggested ocean v. land carrier liability suggestions and, therefore, pragmatism.

It is true that being the guardian of the principle of freedom of contract and laissez-faire policies deregulation favors the stronger party in the transport contract. Because favoring the stronger party in the transport contract overpowers the weaker party -most likely the shipper- it could be argued that fairness, the second great guideline of our reasoning is not respected by our suggestions.

However, this is not a solid argument since our suggestions did not neglect to keep a fair balance between carrier and shipper interests while always remaining within the sphere of pragmatism. Considering the need to promote justice within what certain may regard as unjust suggestions based on the principle of freedom of contract, we tried to overcome the principle's pernicious effects by inserting strong doses of justice. In this way, we maintained that judicial consideration of parties sophistication and equal bargaining power, notions whose case law components we tried to clarify, is necessary in giving effect to contractually defined conditions of carriage (judicial safety net). We also refuted current reality of insurance companies substituting for the (lack of) legal and more fair uniform liability rules. In making our suggestions we provided for shipper compensation for goods concealed damage, so frequently occurring in multimodal transport and so carefully neglected, so far, in domestic, international unimodal or multimodal liability laws. For the rest, we specifically tried not to give one sided benefits to carriers (or shippers) in phrasing each one of our carrier liability exceptions, basis of carrier liability principles (presumption of liability, presumption of fault), limitation of liability and loss of carrier limitation benefit.

Pragmatic uniformity and fairness in the relation between the carrier and the shipper are just empty words if the suggestions made do not advance clear solutions. Even though adopted deregulation trend and its corollary, freedom of contracting, do not advance clarity of the applicable rule, we tried to decompose case law elements on examined liability issues to create guidelines for future litigation (shipper sophistication, package/unit, fair opportunity doctrine, presumption of fault and liability principles). Moreover, in depth analysis and clearer classification of the list of exonerations causes accompanying the principle of presumption of fault, cross-modal and cross-country contractualism and formalism, liability limitation measures and loss of the limitation benefit are also provisions that intended to shed light on some of the 'obscure' aspects of multimodal liability rules. Because clarity of instituted liability provisions is dependent on a follow-up of case law conclusions, case law *codification* and shipper alertness need to accompany our instituted suggestions.

In citing John Singer Sargent statement 'every time I paint a portrait I lose a friend', Pr. Tetley did not comment on how little the painter may not have mastered his

art. He, rather, noted how uniformity suggestions require courage and the willingness to become unpopular to at least some persons or people in rendering them public¹⁵⁴³. This is a danger lurking behind suggestions made in the present study. The ones may reject them as unjust to the shipper or the carrier, the others may do same because of the modesty of the measures adopted. Arguing on the former view, we reiterate our commitment to making realistic suggestions, fairly balancing all interests concerned. Arguing on the latter view, we insist that our proposals are clearly directed towards uniformity, something that we do not encounter in the present segmental multimodal reality. We conscientiously keep away from too audacious uniformity suggestions that have proven fruitless in the past. History teaches us, once more, that 'it is better to be safe than sorry'!

¹⁵⁴³ William Tetley, "Uniformity of International Private Maritime Law-The Pros, Cons and Alternatives to International Conventions" (2000) *Tul. Mar. L. J.* 775 at 824.

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V. Interviews

ATA Regulation Expert

American Freightways (intermodal) personnel

American Trucking Association

BNSF Freight Claims personnel

Big Freight Inc. Container Expert

CIFFA Regulatory Division and personnel

Canadian Maritime International personnel and shipment expert

Canadian Transportation Agency Personnel (tariff responsible, regulation experts)

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CN Rates, Freight Claims personnel and customer service

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Department of Federal Motor Carriers (Canada)

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European Energy and Transport Directorate,
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UP (Union Pacific, U.S.) Damages Prevention and Freight Claims personnel

University of Denver, Intermodal Transportation Institute personnel