

U.B.C. MARTIME LAW 332  
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CARRIAGE OF GOODS,  
BILLS OF LADING and  
CHARTERPARTIES

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# 1 Introduction

## 1.1 *Nature of Carriage*

Carriage is simply the transportation of goods/cargo from one location to another. It involves loading, stowage, transportation, unloading and delivery.

### 1.1.1 Types of Cargo

- Containerized cargo
- Break-bulk cargo
- Bulk cargo
- Liquid (i.e. oils or petroleum)

### 1.1.2 Types of Ships

Ship types vary with the type and amount of cargo to be carried and with the nature of the voyage to be undertaken.

### 1.1.3 Relationship with contracts for sale of goods

Carriage is frequently the final step in a contract for the sale of goods. The shipper is often the vendor of the cargo. The ultimate consignee is often the buyer of the cargo. Risk and title to the goods will often pass during the course of the contract of carriage. There is a general presumption that title passes when risk passes but this is a rebuttable presumption. The exact point at which risk and title pass depends on the terms of the contract of sale and the intention of the parties.

If the sale is “FOB” (free on board) the seller is obliged to deliver the goods to the ship for carriage to the buyer. Delivery to the buyer occurs when the goods are loaded past the ship's rail. From this point onward the buyer bears the risk of loss or damage to the goods.

If the sale is “CF” (cash and freight) or “CIF” (cash, insurance and freight) the seller is obliged to pay the costs of delivering the cargo to the named place of destination but the risk of loss or damage to the goods again passes to the buyer when the goods are loaded past the ship's rail.

Although it is presumed that title passes with delivery and risk, this is not always the case. If

the sale is “cash against documents”, title passes when the buyer pays for the cargo and receives the bill of lading in exchange. This is usually done using letters of credit and financial institutions as intermediaries. Similarly, if the sale contract contains a title retention clause providing that title remains with the seller until payment is made in full, title will not pass until payment is made.

The determination of who has title has important ramifications since it determines who has a valid cause of action against the carrier for loss or damage. (*Union Carbide Corp. v Fednav Ltd.*, (1997) 131 F.T.R. 241)

## **1.2 Parties**

### **1.2.1 Shipper/Consignor/Vendor**

The shipper/consignor is usually the party that contracts with the carrier for the carriage of the goods. The shipper therefore has right of suit against the carrier. The right of suit can, however, be lost if property of the goods has passed from the shipper to the consignee. (*Union Carbide Corp. v Fednav Ltd.*, (1997) 131 F.T.R. 241)

### **1.2.2 Receiver/Consignee/Buyer**

The consignee has no contractual nexus with the carrier and therefore must rely upon the Bills of Lading Act, s.2 for its right of suit.

“2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.”

### **1.2.3 Owner of the cargo**

The owner of the cargo is usually either the consignor or consignee but it could be someone else. If the owner has no contractual nexus with the carrier its right to sue depends on common law. Case law has recognized the right of the owner to sue for loss of or damage to goods. (The *Aliakmmon* [1986] 2 Lloyd's Rep. 1)

### 1.2.4 Financing companies

International sale transactions are generally financed using letters of credit and financial institutions. These companies may come into possession of negotiable bills of lading but this does not mean that they become entitled to sue the carrier. They hold the bills of lading as security and title to the goods does not pass to them. Without title they cannot rely upon the Bills of Lading Act and the right of suit given by that Act. (*Sewell v Burdick* (1884) 10 App. Cas. 74)

### 1.2.5 Intermediaries (Freight Forwarders, Customs Broker, Stevedores, Warehousemen, Land Carriers)

In almost all carriage cases there are a number of intermediaries involved who are not parties to the contract of carriage. There may be a freight forwarder who acts as agent for the shipper in arranging the carriage. The freight forwarder is generally not liable as a carrier unless it issues its own bill of lading undertaking the carriage. A customs broker may be involved who acts as agent for the consignee in clearing the cargo through customs. Additionally, there can be stevedores, warehousemen and land carriers at either the port of shipment or port of destination. The liability of the stevedores, warehousemen and land carriers depends on the local law applicable to them. (Although they may be covered by exceptions and limitations in the bill of lading if the bill of lading contains a "Himalaya" clause. ( see *Adler v Dickson*, [1954] 2 Lloyd's Rep. 267; *ITO v Miida Electronics*, [1986] 1 S.C.R. 752; *Midland Silicones v Scruttons*, [1962] A.C. 446)

### 1.2.6 Ship Owner

The shipowner is simply the owner of the ship that carried the cargo. The shipowner will often be the "carrier" of the cargo and the person liable for any loss or damage.

### 1.2.7 Charterer

Ships are frequently leased or chartered to other entities. There are essentially three different types of charter arrangement: a bareboat or demise charter, a time charter and a voyage charter.

#### 1.2.7.1 Demise Charters

A bareboat or demise charter is a charter of the vessel in which the charterer takes complete possession and control of the vessel. This is done by the bareboat or demise charterer putting its own master and crew on board the vessel. Where there is a demise charter, the carrier will

usually be the demise charterer.

#### *1.2.7.2 Time Charters*

A time charter is distinguished from a demise charter or bareboat charter by the employment of the master and crew. With a time charter the master and crew remain the employees of the shipowner, although they will be subject to the directions of the time charterer. The time charterer therefore does not take possession of the vessel. The time charterer will not usually be a carrier of the cargo, although it could be if it has expressly undertaken to perform the carriage.

#### *1.2.7.3 Voyage Charters*

A voyage charter is like a time charter in that a voyage charterer does not employ the master and crew and does not take possession of the vessel. The distinction between a time charter and a voyage charter is that a time charter is for a specified period of time whereas a voyage charter is for a particular voyage only.

### **1.2.8 Carrier**

Ascertaining the identity of the “carrier” in a contract for the carriage of goods by sea is sometimes a difficult exercise. The carrier will usually be the shipowner or the demise charterer but it could also be the time or voyage charterer. This issue is considered in more detail below.

## ***2 Common Law Responsibilities and Liabilities***

### ***2.1 Types of carriage***

Common law generally distinguishes between common carrier, private carrier and bailee for reward.

#### **2.1.1 Private Carriage**

Private carriers and bailees for reward enter into *ad hoc* arrangements for carriage and are generally liable only for failure to take reasonable care of goods. The onus of proof, however, is reversed. The onus is on private carrier/bailee to show it took such care.

### **2.1.2 Common Carriage**

At common law, common carriers are those who hold themselves out as carrying goods for everyone on regularly scheduled routes (and are usually obliged by licencing requirements or regulation to do so). Common carriers are strictly liable for loss of or damage to goods. The only defences at common law available to a common carrier are:

- Act of God,
- Queen's Enemies, and
- Inherent vice or defect of the cargo.

## **2.2 Maritime Carriage**

### **2.2.1 Responsibilities and Obligation of the carriers**

The responsibilities and obligations of a carrier of goods by sea established by the common law are:

- to provide a seaworthy ship;
- to care for the cargo;
- to deliver the cargo without delay;
- not to deviate; and
- to share in general average.

#### **2.2.1.1 *To provide a seaworthy ship***

The obligation to provide a seaworthy ship is an absolute undertaking. Whether there has been a breach of the obligation does not depend on whether reasonable care was exercised by the shipowner. If the ship is unseaworthy and the unseaworthiness caused loss or damage, the owner is liable regardless of whether he exercised reasonable care.

The ship must be seaworthy at the beginning of the voyage.

Seaworthiness is relative to the nature of the ship, the particular voyage, and the cargo to be carried.

The undertaking requires that the ship be fit in all respects to carry her cargo safely to her destination having regard to the usual perils to be expected.

A seaworthy ship is one with a staunch hull that is properly manned with a competent crew, properly equipped and properly supplied. The equipment need not be the latest and greatest and not all defects will render a ship unseaworthy. The test is: Would a prudent shipowner have required the defective part be corrected?

Examples of unseaworthiness include:

- insufficient bunkers;
- inefficient crew;
- defective or inadequate equipment;
- improperly cleaned or prepared holds;
- maps and charts not on board or out of date; and/or
- poor stowage that endangers the safety of the ship.

Unseaworthiness must be proved by the person who pleads it.

There is a presumption of unseaworthiness when a ship sinks or leaks shortly after leaving port.

#### *2.2.1.2 To care for the cargo*

The carrier must deliver the cargo without loss or damage. The only exceptions are where the loss or damage is caused by:

- Act of God or Queen's enemies;
- Inherent vice of the cargo;
- Defective or insufficient packaging; and/or
- General average sacrifice.

#### *2.2.1.3 To deliver the cargo without delay*

The carrier must prosecute the voyage and deliver with due despatch.

The carrier is strictly liable for failure to deliver goods on time if a date for delivery has been agreed.

If no date for delivery was agreed, the delivery must be made within a reasonable time. The carrier, in this case, will not be liable for delay caused by events beyond his control.

However, he is required to take reasonable steps to avoid or minimize the delay and will be liable if he fails to do so.

#### *2.2.1.4 Not to deviate*

The carrier is obliged to prosecute the voyage without unreasonable deviation or unreasonable delay. He must use either the agreed route, if one has been agreed, or the usual route.

Deviations to save life or to preserve the ship and cargo are justified. Deviations to save property are not.

#### *2.2.1.5 To share in general average*

A general average situation arises where part of the cargo is jettisoned to save the ship and the balance of the cargo. The saved cargo and the ship are obliged to jointly compensate the owner of the jettisoned cargo.

### **2.2.2 Responsibilities and Obligations of the Shipper**

#### *2.2.2.1 To pay freight*

It is the shipper's obligation to pay the freight agreed upon. The carrier has a lien on the cargo for unpaid freight.

#### *2.2.2.2 Not to ship dangerous goods without warning*

The shipper is responsible for notifying the carrier of any dangerous goods and will be liable for failing to do so.

#### *2.2.2.3 To share in general average*

As with the carrier, the shipper is required pay its portion of any general average charges.

### **2.3 Contractual exceptions and limitations**

Contracts of carriage not subject to the Hague or Hague Visby rules are governed by the common law. The parties are free to include whatever terms in their contract they wish. Generally, contracts of carriage will include terms that exclude the common law obligations of the shipowner/carrier, that exculpate the carrier from liability and/or that limit the liability of the

shipowner/carrier.

Such terms are valid and binding provided adequate notice is given.

Clauses limiting or excluding liability are generally strictly construed against the interest of the drafter, the shipowner/carrier.

Clauses that are unclear or imprecise will not be enforced. (*Elderslie Steamship Company Limited v. Borthwick* [1905] A.C. 93; *Meeker Log & Timber v The "Sea Imp VIII"*, (1994) 1 B.C.L.R. (3d) 320 affd. (1996) 21 B.C.L.R.(3d) 101)

Exculpatory clauses must generally expressly exclude liability for **both** unseaworthiness and negligence. (*Canadian Pacific Forest Products Limited et al. v The "Bel timber" et al.*, (1999), 175 D.L.R. (4th) 449)

## 3 Domestic Carriage

### 3.1 When the Hague-Visby Rules Apply

Marine Liability Act Part V

“43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.

Extended application

(2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, **unless there is no bill of lading and the contract stipulates that those Rules do not apply.**” (emphasis added)

Section 43(2) of MLA makes the Rules *prima facie* applicable to the domestic carriage of goods by sea.

The Rules will, however, not apply if the two conditions specified are met; there must be no bill of lading issued and the contract must specifically state the rules do not apply. If there is a bill of lading the Rules will apply. If there is no bill of lading but the contract fails to include the required statement, the Rules will also apply.

### ***3.2 Liability When the Rules do not Apply***

The responsibilities and liabilities of a carrier for domestic carriage to which the Rules do not apply are governed by the common law rules as set out above. The liability of such a carrier is strict with limited exceptions implied at law but with the freedom to negotiate very broad exceptions and limitations.

#### **3.2.1 The Order and Burden of Proof**

The order and burden of proof in a domestic sea carriage case not governed by the Rules is as follows:

The plaintiff has the initial burden of proving the following matters:

- Right and title to sue (ie. as consignor, consignee or owner of the goods);
- Receipt of the goods by the carrier in good order and condition (This is generally done through the bill of lading which contains an acknowledgement of receipt of the cargo by the carrier in apparent good order and condition.);
- Failure to deliver or delivery by the carrier in a damaged condition; and
- Damages suffered by the plaintiff as a consequence.

The burden then shifts to the carrier to establish a common law defence, a contractual defence or a contractual exclusion or limitation of liability.

## **4 International Carriage**

### ***4.1 Introduction***

International carriage of goods by sea is governed in Canada by Part V of the Marine Liability Act which enacts the Hague-Visby Rules. (Part V also contemplates the possible introduction of the Hamburg Rules but this now appears unlikely to ever happen since the Hamburg Rules have not been well received internationally.) The Rules are a code setting the respective responsibilities and liabilities of cargo interests and the carrier. The Rules have been widely, although not uniformly, adopted internationally. The Rules establish a regime of liability that includes various defences and exceptions from liability as well as limitation of liability. Art. II of the Rules is the provision which makes the Rules applicable to every “contract of carriage” of goods by water.

Article II

## Risks

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

## **4.2 Application**

### **4.2.1 Article X**

The application of the Rules is governed, in part, by Art. X which provides that the Rules apply whenever:

- the bill of lading is issued in a Contracting State, or
- the carriage is from a Contracting State, or
- the contract incorporates the Rules.

“Contracting State” is given an expanded definition by s.43(3) of the Marine Liability Act which expands the definition to include not only states that have signed the convention giving effect to the Rules but also states that have implemented the Rules by national law.

### **4.2.2 Meaning of “Contract of Carriage”**

The application of the Rules to a particular contract of carriage depends not only on Art. X. The application also depends on the definitions given in the Rules. Specifically, the Rules apply to a “contract of carriage” which is a term specifically defined in Art. I.

“(b) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;”

Under the above definition the Rules apply only to contracts of carriage covered by a bill of lading or similar document of title.

#### **4.2.2.1 Bills of Lading**

A bill of lading is a commercial document that has three functions.

- It is evidence of the contract of carriage and usually contains the terms thereof,

- It acknowledges receipt of the cargo by the carrier and usually specifies the apparent condition of the cargo, and
- It is a document of title.

A true bill of lading is made out “To Order” and is transferrable by endorsement. It is negotiated by the vendor/consignor endorsing or signing the back of the bill of lading. In a typical commercial transaction the endorsed bill of lading is then sent by the consignor to an intermediary (often a commercial bank) who then delivers the endorsed bill of lading to the buyer in exchange for payment. The buyer can then obtain delivery of the goods from the carrier by surrendering the endorsed bill of lading to the carrier.

True bills of lading are to be distinguished from so called waybills and seabills. Waybills and seabills are evidence of the contract of carriage and are evidence of receipt of the cargo by the carrier but they are not documents of title. Waybills, seabills and similar receipts are not negotiable documents or documents of title and are not required to be surrendered to obtain possession of the cargo. If a waybill or seabill is required to be surrendered to obtain the cargo it will probably be a “bill of lading or similar document of title”. To distinguish between a bill of lading or similar document of title and a waybill or seabill consider the following factors:

- is it made out “TO ORDER” or to a particular person,
- is it, or does it purport to be, negotiable, and
- is the surrender of the original document required to obtain delivery.

Whenever confronted with an issue as to whether the Rules apply it is always necessary to consider whether the contract of carriage is contained in a true bill of lading. If it is, and the conditions of Art. X are met, the Rules apply. If the document is not a true bill of lading or similar document of title, the Rules will not apply regardless of whether the conditions of Art. X are met. (But see Art. VI. Does this suggest that all contracts of carriage involving ordinary commercial shipments made in the ordinary course of trade are governed by the Rules?)

It is not always necessary that a bill of lading be actually issued for the Rules to apply. It is sufficient if a bill of lading was contemplated and intended to be issued. (*Pyrene Co. v Scindia Navigation Ltd.* [1954] 2 Q.B. 402)

### 4.2.3 Meaning of “Goods”

The definition of goods is also relevant to the application of the Rules.

(c) "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

Live animals are expressly excluded as is some cargo carried on deck.

#### 4.2.3.1 Deck Cargo

Deck cargo is excluded from the Rules provided two conditions are met:

- the bill of lading must state the cargo is carried on deck, and
- the cargo must, in fact, have been carried on deck.

It is necessary that the bill of lading expressly state on its face that the cargo is carried on deck. This is usually done by a stamped or typewritten statement on the face of the bill of lading “STOWED ON DECK AT OWNER'S RISK”. A statement on the reverse of the bill of lading that cargo carried on deck is deemed to be so declared without an actual statement on the face of the bill of lading is not sufficient. (*St. Siméon Navigation Inc. v A. Couturier & Fils Limitee*, [1974] S.C.R. 1176)

Where part of a cargo is carried on deck and part under deck, the statement on the face of the bill of lading must specify, with reasonable precision, which part of the cargo is carried on deck. (*Timberwest v Gearbulk*, 2003 BCCA 39)

Deck carriage is excluded in acknowledgement of the increased risks to such cargo. This is also the reason for the required stipulation in the bill of lading that cargo is carried on deck. With notice the shipper can take out appropriate insurance or pursue other measures to deal with the increased risk. Likewise, the stipulation gives the consignee or buyer notice that the goods have been exposed to increased risk before they take up and pay for the bill of lading.

### 4.2.4 Application to Charterparties

Article V of the Rules is as follows:

The provisions of these Rules shall not be applicable to charter-parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of these Rules. Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

The purpose of this rule is to make it clear that the Rules do not apply to charterparties unless there is a bill of lading issued. If a bill of lading is issued, by virtue of the definition of contract of carriage in Art. I (b), the Rules will apply to the contract contained in that bill of lading.

When dealing with charterparties it is always important to consider what the contract is in relation to the particular claimant.

When a bill of lading is issued under a charterparty and is transferred to a person who is not a party to the charterparty contract (i.e. a consignee), the bill of lading in the hands of the transferee contains the contract of carriage and any dispute between the transferee and the carrier is governed by the Rules. However, if there is a dispute between the charterer and the shipowner, that dispute will be subject to the charterparty and will not be governed by the Rules. A bill of lading in the hands of the charterer is merely a receipt and does not modify the terms of the contract already agreed as contained in the charterparty. (*Rodocanachi v Milburn*, (1886) 18 Q.B.D. 67)

It is not unusual for a bill of lading issued under a charterparty to expressly incorporate the terms and conditions of the charterparty. In this case the terms of the charterparty will only be incorporated and binding on the transferee to the extent that they are not inconsistent with the Rules.

#### **4.2.5 Prohibition Against Contracting Out**

Art. III r.8 of the Rules contains a prohibition against contracting out of the Rules. Because of this clause the Rules are mandatorily applicable to all contracts to which they otherwise apply. (This rule is considered in more detail below.)

#### **4.2.6 Special Contracts**

Art. VI of the Rules provides an interesting and problematic exception to the general rule that the Rules are mandatory. Art. VI is in the following terms:

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or

agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonable to justify a special agreement.

This provision allows for special contracts that are not governed by the Rules. However, its scope is severely limited. Special contracts cannot be made for “ordinary commercial shipment made in the ordinary course of trade”.

This provision is relied upon by Professor Tetley in his leading text, *Marine Cargo Claims*, as indicating a wider application of the Rules than is usually acknowledged. Professor Tetley argues that this provision indicates that the only contracts of carriage intended to be excluded from the Rules are those coming within Art. VI. He says that all other contracts of carriage, including those contained in waybills and seabills are governed by the Rules. This view is not without some justification but it has not been judicially approved.

#### **4.2.7 Before Loading and After Discharge**

The Rules apply mandatorily only during that period of time after the goods pass over the ship's rail and until discharged. This limitation is contained in Art. VII.

##### Article VII

##### Limitations on the Application of the Rules

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

#### **4.2.8 Where the Rules do not Apply**

Claims for loss of or damage to cargo that are exempted from the Rules (live animals, deck cargo properly declared, pre-loading and post-discharge damage) and claims between parties to

a charterparty contract are governed by the common law. This generally means that the liability of the carrier is governed by the terms and conditions of the bill of lading (or charter party) which terms will usually exclude or limit the liability of the carrier. The enforceability of those terms will depend on whether notice is given and on whether the clauses in issue are clear and unambiguous (*Elderslie Steamship Company Limited v. Borthwick* [1905] A.C. 93; *Meeker Log & Timber v The "Sea Imp VIII"*, (1994) 1 B.C.L.R. (3d) 320 affd. (1996) 21 B.C.L.R.(3d) 101) and whether they expressly exclude liability for negligence and unseaworthiness. (*Canadian Pacific Forest Products Limited et al. v The "Bel timber" et al.*, (1999), 175 D.L.R. (4th) 449)

### **4.3 Who is Subject to the Rules**

#### **4.3.1 Who are Proper Plaintiffs**

The Rules do not attempt to define who has rights of suit. Rights of suit are therefore governed by the common law. In general, the parties with possible rights of suit are the shipper, the holder of the bill of lading and the owner of the goods. It has been held that the shipper may sue on behalf of the consignee or owner of the goods (*Dunlop v Lambert*, (1839), 7 E.R. 824). This case law, however, pre-dates the *Bills of Lading Act*. Recently, in *Union Carbide Corp. v. Fednav Ltd.*, (1997) 131 F.T.R. 241 it was held that the rule in *Dunlop v Lambert* had no application where the *Bills of Lading Act* governed. In the same case it was held that the shipper was not a proper plaintiff when risk and title has passed to the consignee.

#### **4.3.2 Who is the Carrier**

The identity of the carrier is a vital issue in a carriage of goods case and one that is not without difficulty. The issue almost always arises in cases of a time chartered ship and the question is whether the carrier is the owner or the time charterer or both.

Although the term "carrier" is defined in the Rules, the definition is not particularly helpful.

- (a) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper

##### **4.3.2.1 Question of Fact**

The issue of who is the carrier is primarily a question of fact. The exercise is to determine who undertook to carry the goods. Generally, where the bill of lading is signed for or on behalf of the Master, it is a shipowner's bill and the carrier is the shipowner (or the demise

charterer if the vessel was under demise charter). (*Patterson Steamship v Alcan*, [1951] S.C.R. 852; *Aris Steamship v The "Evie W"*, [1980] 2 S.C.R. 322) However, in an appropriate case a time charterer can be the carrier if the facts are sufficient to indicate an undertaking on the part of the charterer to carry the cargo. (*Cormorant Bulk Carriers v Canficorp*, (1984) 54 N.R. 66)

#### 4.3.2.2 Identity of Carrier Clauses

Many, if not all, bills of lading on charterer's forms attempt to resolve this issue by including a clause which specifically identifies the carrier as the owner (or demise charterer) of the vessel. (These clauses are commonly called "Identity of Carrier" or "Demise" clauses.) Such clauses have received mixed acceptance by the courts. In *Canadian Klockner Ltd. v The "Mica"*, [1973] 2 Lloyd's L.R. 478, and *Carling O'Keefe v C.N. Marine*, (1987) 7 F.T.R. 178, varied 104 N.R. 166, the courts held the charterers liable as carriers notwithstanding the existence of an Identity of Carrier/Demise clause in the bill of lading. However, in the more recent cases of *Union Carbide Corp. v Fednav Ltd.*, (1997) 131 F.T.R. 241, and *Jian Sheng Co. Ltd. v The "Trans Aspiration"*, [1998] 3 F.C. 418, the charterers were found not to be carriers partly because of the existence of an Identity of Carrier/Demise clause in the bill of lading. The correct view and approach is probably to consider the Identity of Carrier/Demise clause not as determinative of the issue but merely as another factor to be weighed in assessing who has undertaken the carriage.

#### 4.3.2.3 Joint and Several Liability

Professor Tetley in his text argues strongly that in many cases the owner and charterer are both carriers and are jointly and severally liable. This position was accepted in the case of *Canastrand Industries v The "Lara S"*, [1993] 2 F.C. 553 (F.C.T.D.), aff'd (1994) 176 N.R. 31. However, in *Union Carbide Corp. v Fednav Ltd.*, (1997) 131 F.T.R. 241, and later in *Jian Sheng Co. Ltd. v The "Trans Aspiration"*, [1998] 3 F.C. 418, this notion was rejected. These cases hold that there can be only one carrier and that in most cases it will be the shipowner (or demise charterer in the case of a charter by demise).

## 4.4 Responsibilities and Liabilities of the Carriers

The responsibilities and liabilities of the carrier are generally set out in Art. III of the Rules. In

summary, these are:

- to exercise due diligence to make the ship seaworthy;
- to properly and carefully care for, carry and deliver the goods; and
- to issue a bill of lading

#### **4.4.1 Exercise Due Diligence to Make the Ship Seaworthy**

##### *4.4.1.1 Features of Seaworthiness*

Art. III r.1 imposes the obligation on the carrier to provide a seaworthy ship and describes, in part what that entails.

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to
  - (a) make the ship seaworthy;
  - (b) properly man, equip and supply the ship;
  - (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Items (b) and (c) above are really just examples of what is required to make a ship seaworthy. As under the common law, a seaworthy ship is one which is in all respects fit to encounter the ordinary perils of the expected voyage. (see the discussion of unseaworthiness above)

##### *4.4.1.2 Period*

The relevant period for the obligation to exercise due diligence to provide a seaworthy ship is “before and at the beginning of the voyage”. This has been held to mean the period from at least the beginning of loading to the time of sailing. (*Maxine Footwear v Canadian Government Merchant Marine*, [1959] A.C. 589)

##### *4.4.1.3 Due Diligence*

It is most important to note that the obligation to provide a seaworthy ship as imposed by the Rules differs from the common law in that it is not absolute. The obligation under the Rules is to use “due diligence” to make the ship seaworthy. The “due diligence” requirement is similar to the common law duty to use reasonable care and a lack of “due diligence” has been

equated with negligence. (*The Amstelslot*, [1963] 2 Lloyd's Rep. 223)

It has been held that the obligation to exercise due diligence is a personal obligation of the shipowner and cannot be delegated. The shipowner cannot satisfy the requirement simply by hiring competent independent contractors. Such contractors are merely agents of the shipowner and their lack of due diligence is attributed to the shipowner. (*The Muncaster Castle*, [1961] A.C. 807)

#### *4.4.1.4 Overriding Nature of the Obligation*

It has further been held that the obligation is an overriding one. This means that if due diligence has not been exercised and unseaworthiness caused or contributed to the loss the carrier will not be entitled to rely upon any of the other exceptions to liability contained in Article IV r.2. (*Maxine Footwear v Canadian Government Merchant Marine*, [1959] A.C. 589) This interpretation stems, in part, from the fact that the introductory wording of Art. III r.1 does not contain the proviso "Subject to the provisions of Article IV" which is found in Art. III r.2.

#### *4.4.1.5 Burden of Proof*

Art. IV r.1 is also relevant to a discussion of seaworthiness. This rule provides:

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

Pursuant to Art. IV r.1, the initial burden of proving unseaworthiness caused the loss is on the plaintiff. However, once this is shown, the carrier then has the burden of proving it exercised due diligence.

#### **4.4.2 Properly Care for, Carry and Deliver**

Art. III r.2 is as follows:

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

The fact that the duty to care for the cargo is subject to the defences of Art. IV does not mean that a carrier who is negligent in its care of the goods can escape liability by merely establishing an exception under Art. IV. To the contrary, the courts have held that if there has been a breach of Art. III r.2 the carrier is liable even if an excepted peril was also operating. The carrier can only escape liability for that portion of the damages it proves was caused solely by one of the excepted perils. (*Gosse Millerd v Canadian Government*, [1929] A.C. 223; *Farr Inc. v Turlotti Compania Naviera S.A.* [1985] FCJ] No. 602, affd. [1989] FCJ] No. 462; Carver, *On Bills of Lading*, para.9-131; Tetley, *Marine Cargo Claims* (3d ed., p. 365)

As with the obligation to exercise due diligence to provide a seaworthy vessel the obligation to take proper care is personal and non-delegable. If the carrier hires stevedores or surveyors to assist with the loading or stowage, it will be liable for their failure to use proper care. (*Riverstone Meat v Lancashire Shipping* [1961] A.C. 807)

With respect to the obligations of loading, discharging and stowage, it is important to recognize that the carrier is not obligated by the Rules to perform these functions. The case law has recognized that the shipper and carrier can decide between themselves who is to perform these functions. If the cargo is loaded or stowed by the shipper and the loading or stowage is done negligently the carrier is not liable unless it intermeddled. (Scrutton on Charterparties, 12thed., p.431)

#### **4.4.3 Issue a Bill of Lading**

The obligations of the carrier in respect of the issuance of a bill of lading are set out in Art. III r.3 and 4:

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things
  - (a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;
  - (b) either the number of packages or pieces, or the quantity, or weight,

as the case may be, as furnished in writing by the shipper;

(c) the apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c).

However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

The important point to note from the above provisions are:

- the bill of lading need only show the identification marks, number or packages or pieces and the apparent condition of the goods;
- The bill of lading is *prima facie* evidence of receipt of the goods described and their apparent condition (i.e. it is a rebuttable presumption);
- Proof to the contrary will not be permitted where the bill of lading has been negotiated to a third party (The carrier is estopped as against a transferee from denying shipment of the quantity or apparent condition of the cargo.)

#### **4.4.4 Art. III r.8**

Art. III r.8 of the Rules contains a prohibition against contracting out of the Rules. Because of this clause the Rules are mandatorily applicable to all contracts to which they otherwise apply.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

## 4.5 Defences of the Carriers

### 4.5.1 Art. III r.6

Art. II r. 6 sets out both the notice requirements and the prescription period for claims against the carrier.

#### 4.5.1.1 Notice Requirements

The notice requirement is set out in the first two paragraphs of Art. III r. 6:

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection

Pursuant to this provision the claimant must give notice in writing of the loss or damage before removing the goods from the custody of the carrier, if the loss or damage is apparent. If the loss or damage is not apparent, notice must be given within 3 days of delivery.

The consequence of a failure to give notice are not too dire. The lack of notice raises a presumption that the goods were delivered in the same order and condition as described in the bill of lading. This presumption is rebuttable. The presumption can be rebutted by showing (usually by expert evidence) that the damage was of such a nature that it could only have happened while the cargo was in the custody of the carrier.

Finally, note that there is no need to give notice where there has been a joint survey or inspection of the goods.

#### 4.5.1.2 Prescription

The prescription/limitation period for bringing a claim against the carrier is set out in the set out in the third paragraph of Art. III r.6:

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has

arisen.

Pursuant to this provision proceedings against the carrier must be commenced within one year from the date of delivery of the goods. Note that the time runs from the date of delivery and not the date of discharge from the ship. Note also that the time period may be extended by agreement.

#### **4.5.2 Art. IV r.1 - Due Diligence**

Art. IV r.1 provides a defence to the carrier where it has exercised due diligence to provide a seaworthy ship. This defence has been considered above.

#### **4.5.3 Art. IV r.2 – Various Defences**

Art. IV r. 2 contains 17 specific defences (called “excepted perils”) as follows:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
  - (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;
  - (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 lock-outs 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 or 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 and 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.

It is important to note that the carrier has the burden of proving the cause of the loss or damage is one of the excepted perils. This will mean that the carrier must prove how the damage occurred. Additionally, where the damage is caused by two or more causes, one of which is excluded and the other is not, the carrier must distinguish between the damages caused by the excepted peril and the damages caused by the non-excepted peril. If the carrier cannot make this distinction he is probably liable for the whole of the damages. (*Gosse Millerd v Canadian Government*, [1929] A.C. 223; *Farr Inc. v Turlotti Compania Naviera S.A.* [1985] FCJ] No. 602, affd. [1989] FCJ] No. 462; Carver, *On Bills of Lading*, para.9-131; Tetley, *Marine Cargo Claims* (3d ed., p. 365)

It is further important to remember that the carrier cannot rely upon any of the excepted perils if a cause of the damage was failure to exercise due diligence to make the vessel seaworthy.

#### 4.5.3.1 (a) *act, neglect, or default of the master etc.*

This exception applies whenever the cause of the loss or damage is solely due to an act, neglect or default of the master or crew in relation to the navigation or management of the ship. The act must be of the master or crew and not the shipowner. The navigation element of the exception means something to do with the sailing of the ship. (*Canada Shipping Co. v British Shipowners'*, (1889) 23 Q.B.D. 342) The management element is more difficult and arguably goes beyond navigational matters. However, it does not extend to include lack of care in relation to the cargo. (*Kalamazoo Paper v Canadian Pacific*, [1950] S.C.R. 356) Additionally, if it is found that the master or crew were not properly trained or not given proper information then the cause of the loss would be unseaworthiness and the exception would not apply. (*Standard Cline Oil v Clan Line Steamers*, [1924] A.C. 100)

#### 4.5.3.2 (b) *fire, unless caused by the actual fault or privity of the carrier*

The carrier may again only rely upon this exception if he is without personal fault and due diligence was exercised to make the ship seaworthy. The exception covers cargo damaged during fire fighting efforts (*The Diamond*, [1906] P. 282) but does not include heat damage unless flame is also present (*David McNair & Co. v The "Santa Malta"*, [1967] 2 Lloyd's

Rep. 391)

#### 4.5.3.3 (c) *perils, dangers and accidents of the sea or other navigable waters*

A peril of the sea is something related to sea water which was not foreseeable and could not be guarded against as one of the probable incidents of the voyage. (*Goodfellow Lumber v Verreault*, [1971] S.C.R. 522) This peril is usually invoked for damage caused by severe weather, however, the case law establishes that the weather needs to be particularly severe and the foreseeability of the weather is gauged with reference to the particular voyage at the particular time of year. (*Kruger Inc. v Baltic Shipping Co.*, [1988] 1 F.C. 262, affd. 57 D.L.R. (4<sup>th</sup>) 498, where weather in excess of force 10 was held not to be a peril of the sea.)

#### 4.5.3.4 (d) *act of God*

This is the common law exception. An act of God is something that could not have been foreseen or guarded against by any amount of reasonable care. (*Nugent v Smith*, (1876) 1 C.P.D. 423)

#### 4.5.3.5 (e) & (f) *act of war or public enemies*

These exceptions apply when the damage is caused directly by acts of war and terrorism.

#### 4.5.3.6 (g) & (h) *arrest or restraint of princes etc. and quarantine*

These exceptions relate to actions by government authorities and apply to such things as arrest, embargoes or blockades, trading with the enemy legislation, detention of goods, and quarantine. The exception does not apply to ordinary legal proceedings. (See Scrutton on *Chartparties* (12<sup>th</sup>) ed. Art. 110)

#### 4.5.3.7 (i) *act or omission of the shipper or owner of the goods*

This exception applies whenever the damages are caused solely by an act or omission of the shipper or owner of the goods. The exception is most likely to arise where the shipper has stowed the cargo or intermeddled in the stowage. (*Ismail v Polish Ocean Lines*, [1976] Q.B. 893)

#### 4.5.3.8 (j) *strikes or lock-outs etc.*

These exceptions apply whenever damages are caused by labour stoppages that are not the fault of the carrier. However, if the carrier could have avoided the consequences of the labour stoppage and failed to do so it will not be entitled to rely upon the exception.

*(Bulman & Dickson v Fenwick, [1894] 1 Q.B. 179)*

#### 4.5.3.9 (k) *riots and civil commotions*

Again, the carrier can only rely upon these exceptions where it was not at fault and could not have avoided the consequences of the riots or civil commotions.

#### 4.5.3.10 (l) *saving or attempting to save life or property at sea*

This is the common law exemption that permits the carrier to deviate to save life or property at sea.

#### 4.5.3.11 (m) *wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods*

These exceptions relate to loss of or damage to cargo that is caused solely by the nature of the cargo. Wastage in bulk or weight is a natural process that occurs with certain cargoes. Similarly, other cargoes can become damaged by natural processes such as ripening of fruit. The carrier is not liable for the results of such natural processes. However, if the natural process could be expected and guarded against then the carrier will be liable if it fails to do so. For example, the carrier is expected to properly stow and ventilate the goods. (*Albacora v Westcott & Laurence Line, [1966] 2 Lloyd's Rep. 53*)

#### 4.5.3.12 (n) *insufficiency of packing*

The shipper is responsible for packaging the cargo in a manner sufficient to withstand the normal rigours to be expected on the voyage. If damages are caused solely by insufficient packaging, the carrier is not liable. However, if the insufficient packaging was apparent on loading and the bills of lading were not claused accordingly, the carrier will be estopped as against the consignee or holder of the bill of lading from relying upon this exception. (*Silver v Ocean Steamship Co., [1930] 1 K.B. 416*)

#### 4.5.3.13 (o) *insufficiency or inadequacy of marks*

This exception applies where damages are caused by the marks on the goods being so inadequate as to render the goods unidentifiable. It does not apply where the marks are merely inaccurate. (*Sandman & Sons v Tyzack & Branfoot, [1913] A.C. 680*)

#### 4.5.3.14 (p) *latent defects not discoverable by due diligence*

This exception relates to defects in the ship and is closely related to the obligation to

exercise due diligence to make the ship seaworthy. If the defect was discoverable by due diligence, the ship would be unseaworthy. If the defect was not discoverable by due diligence, it would not render the ship unseaworthy and the carrier would be exempt from liability for all damages caused solely by the defect.

#### 4.5.3.15 (q) any other cause arising without the actual fault and privity of the carrier

This is a “catch-all” exception. It is frequently pleaded but rarely with success. In order to come within this exception the carrier must prove that the damages were caused solely by an act or omission to which neither the carrier nor its servants or agents were privy. This exception is most often successfully invoked in cases of theft. (*Leash River Tea Co. v British India SN Co.*, [1967] 2 Q.B. 250)

#### 4.5.4 Art. IV r.4 – Deviation

Art. IV r.4 permits the carrier to deviate to save life or property or for other reasonable purposes and provides that such deviation is not an infringement of the Rules.

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 these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

Whether a deviation is reasonable is a question of fact. The test is whether a prudent person knowing all of the relevant circumstances would have departed from the voyage route. (*Stag Line v Foscolo, Mango*, [1932] A.C. 328)

#### 4.5.5 Art IV r.5(h) – Misstatement

Art. IV r. 5(h) provides that:

Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

Pursuant to this provision a carrier is completely relieved from liability if the nature or value of the goods has been knowingly mis-stated by the shipper. This is the case even if the bill of lading has been transferred and the claim is made by the innocent transferee. The reason for this dire result is that such a mis-statement is tantamount to fraud.

#### **4.5.6 Art. IVbis**

Art. IVbis of the Rules is as follows:

##### Application of Defences and Limits of Liability

1. The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.
3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in these Rules.
4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

The important points to note about this provision are:

- The Rules apply regardless of whether the action is pleaded in contract or tort;
- The defences and limitation available to a carrier are also made available to the servants and agents of the carrier but not subcontractors;
- Regardless of how many entities are sued, the total amount recoverable cannot exceed the limits of liability provided for in the Rules; and
- The servants or agents of the carrier are not entitled to limit their liability if it is proved that the damages resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly with knowledge that damage would probably result.

### ***4.6 Limitation of Liability***

#### **4.6.1 Art. IV r. 5 – Package Limitation**

Art. IV r.5 gives the carrier the right to limit its liability where it is liable for loss of or damage to cargo.

The limitation is expressed in terms of units of account which is defined in r.5(c) as Special Drawing Rights (SDRs) of the International Monetary Fund. SDRs can be converted to Canadian dollar amounts by using regularly published rates of exchange. Currently (November 2004) one SDR is equivalent to Cdn\$0.5546.

The limitation amount is the **higher of** 666.67 SDRs per package or unit or 2 SDRs per kilogram. When converted to Canadian dollars these amounts are approximately Cdn\$1,200.00 per package or Cdn\$3.60 per kilogram.

The shipper can prevent the carrier from limiting its liability by declaring the nature and value of the goods before shipment and inserting the nature and value in the bill of lading. This is rarely done, however, since the shipper would usually be required to pay an increased freight rate if a value was declared.

Problems often arise in determining the number of packages to use in the limitation calculation since individual packages are almost always consolidated for shipment in a container or on a pallet or similar article of transport. The issue is whether the number of individual packages should be used in the calculation or the number of containers. In these cases, r. 5(c) provides that the number of individual packages should be used when the individual packages are enumerated in the bill of lading. For example, if the bill of lading says the cargo is "one container said to contain 500 packages" then the number of packages to use in the limitation calculation would be 500. However, if the individual packages are not enumerated in the bill of lading then the number of containers should be used.

It is important to remember that the limitation amount is the higher of the package limitation and the weight limitation. For example, if the cargo was comprised of two pieces weighing 2000 kg the package limitation would be \$2,400.00 and the weight limitation would be \$7,200.00. In this example the applicable limitation would be \$7,200.00.

The limitation amount cannot exceed the value of the goods at the place and time of discharge. If the actual value of the goods is less than the limitation amount then the plaintiff is entitled to only recover the actual value and not the limitation amount. This flows from r. 5(b).

The carrier loses the right to limit pursuant to r.5(e) if it is proved that the damages resulted from an act or omission of the carrier done with intent to cause damage or recklessly with knowledge that damage would probably result. The burden is on the plaintiff to prove the

carrier is not entitled to limit. The burden is extremely difficult to discharge since it involves proof of intent on the part of the carrier or extreme recklessness done with knowledge that damage would probably result.

#### **4.6.2 Art. VIII – General Limitation**

Art. VIII of the Rules preserves the right of the carrier to limit its liability under any convention or national law. This provision merely preserves the right of the carrier to limit liability under the 1976 Convention for the Limitation of Liability of Maritime Claims as enacted in Part 3 of the *Marine Liability Act*. These limitation amounts depend on the size of the ship but in respect of property damage begin at \$500,000.00 for ships under 300 tons. These provisions are only invoked in case of extreme disaster such as the loss of a ship.

### **4.7 Responsibilities and Liabilities of the Shipper**

#### **4.7.1 Art. III r.5 – Accuracy of Statements**

Art. III r.5 provides as follows:

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Pursuant to this provision the shipper is deemed to guarantee to the carrier the accuracy of the marks, number, quantity and weight of the cargo and is further obliged to indemnify the carrier for any inaccuracy in these particulars. The carrier cannot, however, rely upon the inaccuracies provided by the shipper as a defence to a claim by a transferee of the bill of lading.

#### **4.7.2 Art. IV r.6 – Dangerous Goods**

Art. IV r.6 provides as follows:

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Pursuant to this provision the shipper is liable for damages incurred by the carrier in respect of dangerous goods shipped without the consent of the carrier. If the carrier did consent to the shipment of such goods, the shipper will not be liable for damages incurred by the carrier but, if the goods endanger the ship or cargo, the carrier may discharge or destroy the goods without liability.

#### **4.7.3 Art. IV r.3**

Art. IV r. 3 clarifies that the shipper will not be liable for any damages incurred by the carrier without the act, fault or neglect of the shipper, its agents or servants.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

### **4.8 *The Order and Burden of Proof***

The order and burden of proof in a sea carriage case governed by the Rules is as follows:

The plaintiff has the initial burden of proving the following matters:

- Right and title to sue (ie. as consignor, consignee or owner of the goods);
- The identity of the carrier;
- Receipt of the goods by the carrier in good order and condition (This is generally done through the bill of lading which contains an acknowledgement of receipt of the cargo by the carrier in apparent good order and condition.);
- Failure to deliver or delivery by the carrier in a damaged condition; and
- Damages suffered by the plaintiff as a consequence.

The burden then shifts to the carrier to establish:

- Inadequate notice;
- Expiry of the prescription/limitation period;
- an excepted peril under Art. IV; and

- Limitation of liability

If the carrier establishes an excepted peril under Art. IV r.2 the plaintiff can prevent the carrier from relying upon the exception by proving the cause of the loss was unseaworthiness or failure to take proper care of the cargo.

If unseaworthiness is established as the cause of the loss, the carrier must prove it exercised due diligence.

If the carrier has established the right to limit liability, to avoid limitation the plaintiff must show the damage was caused intentionally or recklessly and with knowledge that damage would probably result.