Federal Court  Cour fédérale

Date: 20170111

Docket: T-2044-15

Citation: 2017 FC 23

Ottawa, Ontario, January 11, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

DE WOLF MARITIME SAFETY B.V.

Plaintiff

and

TRAFFIC-TECH INTERNATIONAL INC.

Defendant (moving party)

ORDER AND REASONS

I. Introduction

[1] These proceedings constitute the second step of the Motion for the preliminary determination of questions of law Traffic-Tech International Inc. [Traffic-Tech] presented under Section 22 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 220(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*].

[2] On August 17, 2016, Prothonotary Morneau, deciding on the first stage as per Rule 220(2) of the *Federal Courts Rules*, granted the Motion, and ordered that the two questions submitted by Traffic-Tech be determined by the Court.

II. Background

[3] In December 2015, the plaintiff, De Wolf Maritime Safety B.V. [De Wolf] introduced an Action against the defendant, Traffic-Tech, and served and filed its initial Statement of Claim *in personam*, which it amended in September 2016.

[4] In brief, De Wolf claims Traffic-Tech failed to carry its cargo under deck; that the loss is the result of Traffic-Tech's failure to safely carry, care for, discharge, store and deliver its cargo in good order and condition. It further claims that Traffic-Tech breached its contract and obligations, was grossly negligent, and important for these proceedings, that Traffic-tech is not entitled to invoke any of the immunities or limitations provided for in the *Hague-Visby Rules*, being Schedule 3 of the *Marine Liability Act*, SC 2001, c 6 [*Marine Liability Act*].

[5] De Wolf asks that Traffic-Tech be condemned jointly and severally to pay to it the sum of €71,706.00 (or the Canadian equivalent of $98,896.92 at the rate of 1.3792 on June 23, 2015) plus interest and costs; and such other relief as the Court might deem appropriate in the circumstances. This amount represents the value of the goods it shipped from Vancouver to Rotterdam, goods that were lost overboard and therefore did not arrive to the port of delivery.

[6] In its Statement of Defence, Traffic-Tech argues it can limit its liability towards De Wolf to an amount not exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, pursuant to the bill of lading and the *Hague-Visby Rules*; that the damages claimed are excessive and remote; and that De Wolf did not take any or adequate steps to mitigate those damages.

III. Facts

[7] As per their Agreed Statement of Facts, the parties agree that at all material time, De Wolf was the owner and consignee of a shipment described as "One piece zodiac and Spare Parts", which was stuffed into a container (TCLU4132019/3269653), itself loaded on board the vessel "Cap Jackson" in Vancouver, Canada, for delivery in Rotterdam, Netherlands.

[8] The container was carried under a bill of lading bearing number 40020710, issued by Traffic-Tech on December 6, 2014. This bill of lading did not declare that the container containing the shipment was to be carried "on deck", while the container was in fact so carried.

[9] The container was lost during the voyage, did not arrive in Rotterdam, and the loss suffered by De Wolf amounts to €71,706.00 or CND $98,896.92 at the exchange rate of 1.3792 calculated on June 23, 2015.

[10] At the hearing, the parties have also confirmed that the nature and value of the goods had not been declared by the shipper before shipment nor inserted in the bill of lading.

IV. Questions of law

[11] The two questions of law before the Court are :

1. Does the undeclared on-deck carriage of the cargo under the Traffic-Tech bill of lading prevent the defendant from relying on the *Hague-Visby Rules*?

2. In the negative, what are the limitations applicable to the contract of carriage pursuant to the *Hague-Visby Rules*?

V. Submissions of the parties

A. *Traffic-Tech (defendant and moving party)*

(1) The damaged goods are "goods" as defined in the *Hague-Visby Rules*

[12] Traffic-Tech first relies on the definition of "goods" contained in Article I(c) of the *Hague-Visby Rules* to argue that they are applicable here. As said definition excludes "cargo which by the contract of carriage is stated as being carried on deck and is so carried", it follows that cargo which is not stated as being carried on deck by the contract of carriage is not excluded.

[13] The parties agree that the bill of lading bore no indication that the shipment would be carried on deck. Hence, Traffic-Tech submits, as the lost shipment was not stated by contract as being carried on deck, it therefore was "goods". Since the shipment was in fact "goods", the claim falls within the scope of the *Hague-Visby Rules*. According to Traffic-Tech, this interpretation allows more flexibility to the carrier whereas De Wolf's position runs against the commercial reality of container shipping, where about 30% of containers are stowed on deck.

(2) The carrier's liability is limited by the provisions contained in the *Hague-Visby Rules*

[14] Satisfied that the *Hague-Visby Rules* apply, Traffic-Tech then turns to its Article IV(5)(a) to argue that neither the carrier nor the ship shall "in any event" become liable for any amount above the limitation provided for in the convention, and to its Article IV *bis*, reproduced in annex, which states the limits shall apply in any action against the carrier, be it found in tort or contract.

[15] Traffic-Tech contends that the only exception to limitation provided for in Article IV(5)(a) of the *Hague-Visby Rules* is the one provided for in Article IV(5)(e) that pertains to damage resulting "from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

[16] In this regard, Traffic-Tech argues that Article IV(5)(e) is not at play in these proceedings since De Wolf's allegation of gross negligence is not supported by allegation or proof that the damage was indeed caused with intent or knowledge on the part of Traffic-Tech that the damage would occur. Furthermore, it argues that in any event, Article IV(5)(e) requires a higher threshold than gross negligence, and that no evidence whatsoever has been put forward in these proceedings as the questions to be addressed by the Court are strictly questions of law. It addresses the allegation of bad faith raised by De Wolf in the same way, submitting that bad faith cannot be presumed and that a simple omission on the bill of lading cannot be inferred as bad faith. In other words, Traffic-Tech contends that the goal of this hearing is to determine questions of law, and not to examine either the intent or a particular state of mind of the parties.

[17] Finally, Traffic-Tech submits that the Canadian courts have not yet tested the question of whether the limitations of the *Hague-Visby Rules* apply to undeclared on-deck carriage. However, it refers to a decision of the England and Wales Court of Appeal whereby this question was addressed in *Daewoo Heavy Industries Ltd et al v Klipriver Shipping Ltd et al,* [2003] EWCA Civ 451 (*The Kapitan Petko Voivoda*) in the context of the old *Hague Rules*, which provision is alleged to be analogous to Article IV(5)(a) of the *Hague-Visby Rules*. This decision is said to be in alignment with the new realities of modern commercial shipping industry, particularly in respect to containerized shipping, for which the risks of on-deck carriage are considerably diminished.

(3) Conclusion

[18] So, Traffic-Tech's answer to the first question is negative, in that the undeclared on-deck carriage of the cargo under the Traffic-Tech bill of lading does not prevent it from relying on the *Hague-Visby Rules.*

[19] In regards to the second question, Traffic-Tech submits that it can avail itself of the limitations of the *Hague-Visby Rules*, that the amount must be calculated pursuant to its Article IV(5)(a), and that the only exception to the "in any event" provision is the one provided for in Article IV(5)(e) which is not at play here. The loss claimed by De Wolf may thus not exceed 666.67 units of account per package or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher.

B. *De Wolf (plaintiff)*

(1) Failure to disclose the on-deck carriage precludes Traffic-Tech from relying on any limitation of liability

[20] In its memorandum, De Wolf addresses question 1 differently than the question determined by the Court. De Wolf particularly questions if the undeclared on-deck carriage of the cargo under the bill of lading prevents the defendant from relying on the carrier's limitations of liability provided for in the *Hague-Visby Rules*. De Wolf stresses the fact that it was never notified that its containerized shipment would be stowed on the deck of the vessel, and was only made aware of this once it was alerted of its loss. It submits that the undeclared deck cargo prevents Traffic-Tech from relying on the limitations of liability provided for in the *Hague-Visby Rules*.

[21] De Wolf exposes the special risks associated with on-deck cargo, the additional measures that must be taken to protect and insure the goods when they are so shipped, and the fact that deck carriage is, as per Article III(2) of the *Hague-Visby Rules*, improper stowage. Hence, De Wolf submits that when the place of stowage is not mentioned on a bill of lading, i.e. a clean bill of lading, it is understood that the goods are to be carried under deck. To carry them on deck without prior declaration is thus improper.

[22] More precisely, De Wolf first submits that the *Hague-Visby Rules* apply, but that the limitation of liability does not. Indeed, De Wolf submits, contrary to Traffic-Tech's position, the latter's failure to disclose the on-deck carriage precludes it from relying on any limitation of

liability. Concluding otherwise would be to reward the carrier for failing to its obligation to declare on-deck stowage, in breach of contract, and contrary to the good faith requirement read into Article 1(c) of the *Hague-Visby Rules.*

[23] De Wolf relies on professor William Tetley's assertion that the carrier cannot avail itself of the limitation if it has omitted to declare the on-deck stowage, particularly so in light of the good faith obligation now read into Canadian common law contract (*Bhasin v Hrynew*, 2014 CSS 71). De Wolf contends that Traffic-Tech should not benefit from the *Hague-Visby Rules* as it acted in bad faith in stowing the goods on deck in breach of the bill of lading. Indeed, according to De Wolf, had Traffic-Tech acted in good faith, it would have indicated the on-deck stowage on the bill of lading and, as such, would not have benefited from the *Hague-Visby Rules*.

[24] Second, De Wolf submits that the words "in any event" of Article IV(5)(a) refer to the events listed under Article IV(2), reproduced in annex. De Wolf hereby relies on professor Tetley's assertion that "those words should be construed to mean that the package limitation applies where the carrier fails to prove its right to total exoneration from liability under any of the exception of art. 4(2)(a) to (q)" (William Tetley, *Marine Cargo Claims*, 4th ed (Cowansville: Les Éditions Yvon Blais, 2008 at 1587).

[25] De Wolf distinguishes the English caselaw relied upon by Traffic-Tech, pointing out that Canadian Courts are not bound by decisions of English Courts, that professor Tetley called the decision "unfortunate and flawed", and that it was rendered under the old *Hague Rules.* De Wolf

contends that the Court cannot rely on the case of *The Kapitan Petko Voivoda* as Article IV(5) of the *Hague-Visby Rules* comprises an exception to the limitation of liability (Article IV(5)(e)) that was not included in the old *Hague Rules*. It also distinguishes the decision *St-Siméon Navigation Inc v A Coutier & Fils Limitée*, [1974] SCR 1176 [*St-Siméon*] where there was a liberty clause, i.e. a liberty to stow on deck clause, and no violation of the contract of carriage, as well as the decision *Timberwest Forest Ltd v Gearbulk Pool Ltd*, 2001 BCSC 882 where the owner of the cargo was aware that his shipment would either be carried on deck or under deck. However, in the case at hand, De Wolf contends that, as there was no liberty clause in the bill of lading, it was not aware that its shipment could be stowed on deck.

[26] Thirdly, De Wolf contends that the stowage of the goods on deck constitutes gross negligence.

(2) Contract of carriage is governed by the common law

[27] As the contract of carriage between the parties is not subject to the limitations of the *Hague-Visby Rules*, De Wolf argues that the case must thus be decided based on the Canadian common law principles, as incorporated within Canadian maritime law, under which there are no limitations of liability.

(3) Conclusion

[28] In conclusion, De Wolf answers question one in the positive, in that the *Hague-Visby Rules* apply. However, the undeclared on-deck carriage of the cargo prevents Traffic-Tech from relying on the limitations of liability provided for in same *Hague Visby Rules*.

[29] On question number 2, De Wolf submits that due to bad faith or gross negligence, or because the words "in any event" of Article IV(5)(a) refer to the events listed under Article IV(2), Traffic-Tech cannot rely on the limitation of liability provided for in the *Hague-Visby Rules* and, as common law applies, it is entitled to the amount of its actual loss without limitation.

VI. Analysis

A. *Does the undeclared on-deck carriage of the cargo under the Traffic-Tech bill of lading prevent the defendant from relying on the Hague-Visby Rules?*

[30] For the reasons exposed hereinafter, the Court sides with Traffic-Tech and answers the first question in the negative. Hence, Traffic-Tech's undeclared on-deck carriage of De Wolf's goods does not prevent it from relying on the *Hague-Visby Rules.*

[31] This question of law is answered by examining the relevant legislative provisions, the definition of "goods" under the *Hague-Visby Rules,* and the Canadian and international caselaw.

(1) Legislative provisions

[32] The *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, better known as the *Hague Rules*, was concluded at Brussels on August 25, 1924. It was amended in 1968 by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* to become the *Hague-Visby Rules*. The *Hague Rules* were incorporated in Canadian law through the *Water Carriage of Goods Act*, SC 1936, c 49. Afterwards, the *Hague-Visby Rules* came into force first through section 7 of the *Carriage of Goods by Water Act*, SC 1993, c 21, and then through section 43 of the *Marine Liability Act*, being inserted in its schedule 3. The *Hague Rules* and the *Hague-Visby Rules* may herein collectively be referred as the Rules except where reference to a specific convention is required.

[33] The *Hague-Visby Rules* have force of law in Canada in respect of contracts for the carriage of goods by water between different states, as well as in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply (*Marine Liability Act*, s 43). They enact the responsibilities, liabilities, rights and immunities of the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of goods covered by a contract of carriage by water (*Hague-Visby Rules*, Article II).

(2) Definition of "goods" in Article 1(c) of the *Hague-Visby Rules*

[34] Goods, wares or merchandise excluded by the definition of goods are not subject to the *Hague-Visby Rules*, while to the contrary goods that are included in the definition will be so subject. Article I(c) of the *Hague-Visby Rules*, like Article I(c) of the *Hague Rules*, defines

"goods" as including "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" (our emphasis).

[35] As per the aforementioned definition, in order for cargo not to be regarded as "goods", it must not only be carried on deck, but also be stated in the contract of carriage as being so carried. The late professor William Tetley confirms that "neither the carrier nor the shipper may benefit from or be subject to the Rules, provided that: a) the bill of lading on its face states that the goods are carried on deck, and b) the cargo is in fact carried on deck" (Tetley at 1569).

[36] Therefore, the *Hague-Visby Rules* will apply to cargo carried under deck while the bill of lading states that the cargo is carried on deck, and vice versa (Julian Cooke et al, *Voyage Charters*, 4th ed (London: Lloyd's Shipping Law Library, 2014) at 1018).

[37] In this case, it is undisputed that the bill of lading did not mention on-deck carriage, and that the goods were carried on deck. As one of the two conditions is not met, the cargo cannot be excluded from the definition of "goods", and it is thus subject to the *Hague-Visby Rules.*

(3) Caselaw

[38] The caselaw confirms this interpretation. In *Grace Plastics Ltd v Bernd Wesch II (The)*, [1971] FC 273 [*Grace Plastics*], the plaintiff purchased two reactors along with certain equipment and arranged with a forwarder to ship them to Canada. The contract between the forwarder and the shipping company detailed that the reactors would be carried on deck and the

rest of the shipment under deck but four parcels were in fact loaded on deck together with the two reactors, with the forwarder's consent. The Court applied the definition of "goods" in Article I of the old *Hague Rules* to decide that the contract of carriage did not contemplate the carriage of the three parcels on deck. Therefore, according to the Court, those three parcel did not fall "within the exception from the definition of "goods" in the Hague Rules even though the forwarder's Hamburg agent did subsequently verbally acquiesce in their being so carried" (*Grace Plastics* at para 14). On the contrary, as the contract of carriage provided for the carriage of the two 70 ton reactors on deck, and as they were so carried, the contract of carriage was not governed by the *Hague Rules* in relation to those two reactors.

[39] In *St-Siméon*, the Court concluded that a provision that "goods stowed on deck shall be deemed to be stated as so stowed, without any specific statement to this effect, is in violation of the Rules" *(St-Siméon* at 1179). Indeed, in *St-Siméon*, the carrier relied on a clause in the bill of lading excluding liability for goods stowed on deck. The clause provided that the goods "may be stowed on or under the deck at the discretion of the carrier; and when they are stowed on deck they shall, by virtue of this provision, be deemed to be declared as so stowed, without any specific statement to this effect on the face of the bill of lading. With respect to goods stowed on deck or stated on the face of the bill of lading to be stowed, the carrier assumes no liability for any loss, damage or delay […]". This provision was deemed contrary to the then *Carriage of Goods by Water Act*, RSC 1952, c 291 and to the Rules, and was therefore null and void. Hence, in order to be excluded from the definition of "goods", cargo must be stated in the contract of carriage as being carried on deck in addition to being so carried.

[40] Similarly, in a situation where, according to the bill of lading, “some” cargo was to be carried on deck, the Rules have been held to apply. This indication did not sufficiently identify which parts of a cargo were carried on deck, and made it impossible for the parties to assess their risks and responsibilities for the future. Indeed, in *Timberwest Forest Ltd v Gearbulk Pool Ltd*, 2001 BCSC 882, it was to be determined whether the lumber shipped was considered as “goods” under the Rules. If the lumber was “goods”, the exclusion clauses would be void. On the bills of lading, the notation “Stowage: 86% OD 14% UD” was included. The Court applied a strict construction of the definition of “goods” in the *Hague-Visby Rules*. The trial judge found that the percentages included on the bills of lading were unreliable with respect to each shipment and that the absence of identification of the specific packages carried on deck and under deck made it impossible to determine the value of the cargo carried on deck. The exclusion clauses included on the bills of lading were held not to be valid or enforceable. This decision was confirmed by the British Columbia Court of Appeal in *Timberwest Forest Ltd v Gearbulk Pool Ltd*, 2003 BCCA 39 [*Timberwest*] at para 46:

> In my view, the conclusions reached by the trial judge reflect a construction of the definition of “goods” that accords with practical affairs and business efficacy, in that certainty is necessary for the parties to commercial transactions to assess their respective risks and determine the appropriate price for their goods and services. It is not a construction that creates a “more extensive restriction [on freedom of contract] than the language used reasonably requires”, to quote McFarlane J.A. in H.B. Contracting Ltd. v. Northland Shipping (1962) Co. Ltd. (1971), 24 D.L.R. (3d) 209 at 215 (B.C.C.A.).

[41] In the cases mentioned above, the exclusion included in the definition of “goods” has been interpreted strictly. The strict application of the two requirements of the Rules (contract of

carriage stating cargo as being carried on deck and cargo de facto carried on deck) benefited the shippers when it rendered void the exclusion clauses at the expense of the carriers.

[42] Although the situation at hand is different in that the bill of lading contained no exclusion of liability clause, the conclusions reached namely in *St-Siméon* and *Timberwest*, as well as in *Grace Plastics*, should nonetheless prevail.

(4) Conclusion

[43] The containerized shipment of De Wolf does constitute "goods" within the meaning of the Rules as, even if it was carried on deck, it was not stated as being so carried on the contract of carriage. The Court thus answers the first question in the negative.

B. *In the negative, what are the limitations applicable to the contract of carriage pursuant to the Hague-Visby Rules?*

[44] Having answered the first question in the negative, the Court turns to the second question. For the reasons exposed hereinafter, the Court finds that the limitation of liability provided for in Article IV(5)(a) of the *Hague-Visby Rules* applies to the situation at hand.

(1) Legislative provisions

[45] Article IV(2) of the *Hague-Visby Rules* provides complete exoneration to the carrier and the ship for loss or damage arising or resulting from the circumstances listed in this article, such as acts of war or of public enemies, among others.

[46] Article IV(5)(a) on the other hand provides a limitation of liability to the carrier and the ship "in any event", while Article IV(5)(e) provides that neither the carrier nor the ship shall be entitled to the benefit of this limitation of liability if "the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

[47] It is worth reproducing Article IV(5)(a):

> Unless the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher (emphasis added).

(2) Doctrine and caselaw

[48] The late professor Tetley considered the unauthorized on-deck carriage to be a breach of contract of such magnitude that it should cause the carrier to lose the benefit of the exoneration or limitation of liabilities provided for in Article IV of the *Hague-Visby Rules*. He considered that when the goods are carried on deck without any indication to that effect, "the carrier may not invoke the limitation in the contract or of the Hague Rules which might benefit him, because there has been a fundamental breach of the contract" (Tetley at 1581). Professor Tetley namely referred to the *St-Siméon* case where the Supreme Court wrote:

> The principle underlying the legislation in question, and the purpose of the Rules annexed thereto, is to prevent shipowners from reducing their liability below the standard contemplated therein. It must be said, therefore, that without the required statement an exclusion of liability for cargo stowed on deck is

> void, as held by Pilcher J. in Svenska Traktor v. Maritime Agencies [[1953] 2 All E.R. 570], and Jackett C.J. in Grace Plastics Ltd. v. The "Bernd Wesch II" [[1971] F.C. 273].

[49] Professor Tetley also referred to American caselaw such as *Searoad Shipping Co v EI DuPont de Nemours*, 361 F2d 833 (5th Cir 1966) [*Searoad*] where the carrier was found liable for a loss that occurred while the goods were stowed on deck despite issuing a clean bill of lading: “There being no legal justification for this on-deck stowage of cargo shipped pursuant to an under-deck clean bill of lading, this stowage amounted to a deviation casting the shipowner for the loss which was directly and causally related to the deck stowage” (*Searoad* at para 16). He also referred to *Encyclopaedia Britannica v Hong Kong Producer*, 422 F2d 7 (2d Cir 1969) where the fact that a container was carried on deck without indication on the bill of lading was considered as a deviation depriving the carrier of the $500 per package limitation of the *Carriage of Goods by Sea Act* of the United States.

[50] The England and Wales Court of Appeal, in *The Kapitan Petko Voivoda*, held a different opinion. It rather concluded that unauthorized on-deck carriage constitutes a breach of contract with no special added characteristics, and considered the applicability of exception and limitation clauses to be a question of construction of the contract. It concluded that unauthorized on-deck carriage does not exclude the operation of the *Hague Rules* nor, more particularly, the limitation of liability provided for in Article IV(5). Moreover, the Court determined that stowing on deck in breach of contract could not be assimilated to deviation from the contractual voyage or storing goods in a warehouse other than that originally agreed, and that the duty of the Court in such a case “is merely to construe the contract which the parties have made” (at para 15). The words “in any event” of Article IV(5)(a) are interpreted as “in every case” (at para 16), leading the court to

decide that even when a carrier carried cargo on deck in breach of a contract governed by the old *Hague Rules*, it could "take advantage of Article IV rule 5 to limit his liability for loss or damage to that cargo" (at para 1).

[51] It is worth noting that *The Kapitan Petko Voivoda* decision was rendered under the old *Hague Rules*. As stated by Simon Baughen in Shipping Law, 3rd ed (London UK: Cavendish Publishing Ltd, 2004) at 143, "[a] potential drawback of the latter decision is that, under the Hague Rules, a carrier will still be entitled to limit in circumstances in which, under the Hague-Visby Rules, it would have lost the right to limit by virtue of Art IV(5)(e)".

[52] This situation was also examined in Canada in *Grace Plastics* where the same interpretation prevailed and where Article IV(5)(a) was applied literally. As discussed above, in that case, four parcels were loaded on deck although they were supposed to be stowed under deck. Some of the parcels were damaged, as the result of a failure to make the ship seaworthy (Article III(1) of the Rules). The Court decided that the plaintiff could "take judgement in respect of each of these items for the amount of actual loss or $500", hereby referring to Article IV(5) of the old *Hague Rules* (*Grace Plastics* at para 48). In reaching its decision, the Court also referred to *Falconbridge Nick Mines Ltd v Chimo Shipping Ltd*, [1969] 2 Ex CR 261 at para 66:

> The situation, then, if the Rules applied to the tractor and generating set until they were lost, appears to me to be this: If the loss resulted from unseaworthiness of the barge caused by want of due diligence on the part of the carrier to make the barge seaworthy, the exceptions from immunity in Article IV, Rule 2, are of no avail to the carrier, but the limitation of liability in Rule 5, where the words "in any event" are used, applies.

[53] If we stick to "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (*Vienna Convention on the Law of Treaties*, Can TS 1980 No 37, art 31(1); see also *J.D. Irving Ltd v Siemens Canada Ltd*, 2016 FC 287 at para 32), hereby constructing the words as the England and Wales Court of Appeal did, it appears clear that the words "in any event" used in Article IV(5)(a) mean "in every case" and encompass the case at bar. This can also be inferred from the French wording "en aucun cas responsable", which can be translated as "in no way responsible". Neither the wording of Article IV(5)(a) nor the context of the article suggest that "in any event" refers to the events listed under Article IV(2). Hence, the only exception to the limitation rule set out in Article IV(5)(a) is the one provided by Article IV(5)(e), discussed further below.

[54] De Wolf submits that bad faith should bar a carrier from the benefits of the *Hague-Visby Rules.* However, there is no evidence before the Court that Traffic-Tech actually acted in bad faith as no evidence is to be tendered in these proceedings. Hence, it is not for this Court to assess whether Traffic-Tech acted in bad faith or not.

[55] Finally, on the issue of fundamental breach, the Supreme Court of Canada made it clear that "the time has come to lay this doctrine to rest" (*Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 62). The Court notes that Professor Tetley associated the unauthorized on-deck stowage to a fundamental breach of contract in its *Marine Cargo Claims* book, published in 2008, hence two years before the aforementioned decision of the Supreme Court of Canada was rendered. Interpreting the words "in any event" as "in every

case" is thus compatible with the exclusion of the doctrine of fundamental breach in Canadian law.

[56] De Wolf argues that Traffic-Tech cannot invoke the benefit of the limitations of liability contained in Article IV(5)(a), hereby relying on Article IV(5)(e) of the *Hague-Visby Rules.* Traffic-Tech submits that this exception is not at play as, while De Wolf alleges that the damage was caused by Traffic-Tech's negligence, "the proceedings contain no allegation or proof of the damage having been caused with the intent or knowledge on the part of the Defendant that the damages would occur" (Defendant's Memorandum of Fact and Law at para 23).

[57] The Court sides with Traffic-Tech as, once again, it is not for the Court to decide if Article IV(5)(e) applies in these proceedings as this would require an assessment of the facts.

(3) Conclusion

[58] Traffic-Tech may invoke the limitation of liability provided for at Article IV(5)(a) of the *Hague-Visby Rules,* despite the unauthorised on-deck carriage. Hence the limitations applicable to the contract of carriage pursuant to the *Hague-Visby Rules* shall not exceed "666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher" pursuant to Article IV(5)(a).

[59] Whether the exception provided at Article IV(5)(e) applies or not is not for this Court to examine or decide.

ORDER

THIS COURT'S ORDER is that:

1. The undeclared on-deck carriage of the cargo under the Traffic-Tech bill of lading does not prevent the defendant from relying on the *Hague-Visby Rules*;

2. The applicable limitations to the contract of carriage are the ones provided for in Article IV(5)(a) of the *Hague-Visby Rules.* The limitation applicable to the bill of lading is 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher, the whole pursuant to Article IV(5)(a) of the *Hague-Visbsy Rules*;

3. Costs are granted in favor of the defendant (moving party).

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Annex

Hague-Visby Rules, art IV(2), IV *bis*, being Schedule 3 of the *Marine Liability Act*, SC 2001, c 6	*Règles de la Haye-Visby*, art IV(2), IV bis, constituant l'annexe 3 de la *Loi sur la responsabilité en matière maritime*, LC 2001, c 6
Article IV	Article IV
Rights and Immunities	Droits et exonérations
[…]	[…]
2 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from	2 Ni le transporteur ni le navire ne seront responsables pour perte ou dommage résultant ou provenant :
(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;	a) des actes, négligence ou défaut du capitaine, marin, pilote ou des préposés du transporteur dans la navigation ou dans l'administration du navire;
(b) fire, unless caused by the actual fault or privity of the carrier;	b) d'un incendie, à moins qu'il ne soit causé par le fait ou la faute du transporteur;
(c) perils, dangers and accidents of the sea or other navigable waters;	c) des périls, dangers ou accidents de la mer ou d'autres eaux navigables;
(d) act of God;	d) d'un « acte de Dieu »;
(e) act of war;	e) de faits de guerre;
(f) act of public enemies;	f) du fait d'ennemis publics
(g) arrest or restraint of princes, rulers or people, or seizure under legal process;	g) d'un arrêt ou contrainte de prince, autorité ou peuple ou d'une saisie judiciaire;
(h) quarantine restrictions;	h) d'une restriction de quarantaine;
(i) act or omission of the shipper or owner of the goods,	i) d'un acte ou d'une omission du chargeur ou propriétaire des

his agent or representative;	marchandises, de son agent ou représentant;
(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;	j) de grèves ou lock-out ou d'arrêts ou entraves apportés au travail, pour quelque cause que ce soit, partiellement ou complètement
(k) riots and civil commotions;	k) d'émeutes ou de troubles civils;
(l) saving or attempting to save life or property at sea;	l) d'un sauvetage ou tentative de sauvetage de vies ou de biens en mer;
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;	m) de la freinte en volume ou en poids ou de toute autre perte ou dommage résultant de vice caché, nature spéciale ou vice propre de la marchandise;
(n) insufficiency of packing;	n) d'une insuffisance d'emballage;
(o) insufficiency or inadequacy of marks;	o) d'une insuffisance ou imperfection de marques;
(p) latent defects not discoverable by due diligence;	p) de vices cachés échappant à une diligence raisonnable;
(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.	q) de toute autre cause ne provenant pas du fait ou de la faute du transporteur ou du fait ou de la faute des agents ou préposés du transporteur, mais le fardeau de la preuve incombera à la personne réclamant le bénéfice de cette exception et il lui appartiendra de montrer que ni la faute personnelle ni le fait du transporteur n'ont contribué à la perte ou au dommage.
Article IV *bis*	Article IV bis

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.

Application des exonérations et limitations

1 Les exonérations et limitations prévues par les présentes règles sont applicables à toute action contre le transporteur en réparation de pertes ou dommages à des marchandises faisant l'objet d'un contrat de transport, que l'action soit fondée sur la responsabilité contractuelle ou sur une responsabilité extracontractuelle.

2 Si une telle action est intentée contre un préposé du transporteur, ce préposé pourra se prévaloir des exonérations et des limitations de responsabilité que le transporteur peut invoquer en vertu des présentes règles.

3 L'ensemble des montants mis à la charge du transporteur et de ses préposés ne dépassera pas dans ce cas la limite prévue par les présentes règles.

4 Toutefois le préposé ne pourra se prévaloir des dispositions du présent article, s'il est prouvé que le dommage résulte d'un acte ou d'une omission de ce préposé qui a eu lieu soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résulterait probablement.