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Dockets: T-2184-18
T-2185-18

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Ottawa, Ontario, June 7, 2022

PRESENT: The Honourable Madam Justice Rochester

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

Docket: T-2184-18

BETWEEN:

ARC-EN-CIEL PRODUCE INC., A BODY POLITIC AND CORPORATE LOCATED AT 122 THE WEST MALL, TORONTO, ONTARIO, CANADA M9C 1B9

Plaintiff

and

THE SHIP "BF LETICIA" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "BF LETICIA" AND BF LETICIA FOROOHARI SCHIFFS, A BODY POLITIC AND CORPORATE CARE OF PETER DOEHLE SCHIFFAHRTS-KG, ELBCHAUSSEE 370, 22609, HAMBURG, GERMANY, C/O MONTSHIP INC., 360 ST. JACQUES STREET, SUITE 100, MONTREAL, QUEBEC H2Y 1R2 AND GREAT WHITE FLEET, A BODY POLITIC AND CORPORATE OF THE UNITED STATES, C/O MONTSHIP INC., 360 ST. JACQUES STREET, SUITE 100, MONTREAL, QUEBEC H2Y 1R2

Defendants

Docket: T-2185-18

AND BETWEEN:

ARC-EN-CIEL PRODUCE INC., A BODY POLITIC AND CORPORATE LOCATED AT 122 THE WEST MALL, TORONTO, ONTARIO, CANADA M9C 1B9

Plaintiff

and

THE SHIP "MSC BELLE" AND THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "MSC BELLE" AND BELLE INC., A BODY POLITIC AND CORPORATE CARE OF MSC MEDITERRANEAN SHIPPING CO. SA, CHEMIN RIEU, 12-14, 1208 GENEVA, SWITZERLAND, C/O MONTSHIP INC., 360 ST. JACQUES STREET, SUITE 100, MONTREAL, QUEBEC H2Y 1R2 AND GREAT WHITE FLEET, A BODY POLITIC AND CORPORATE OF THE UNITED STATES, C/O MONTSHIP INC., 360 ST. JACQUES STREET, SUITE 100, MONTREAL, QUEBEC H2Y 1R2

Defendants

JUDGMENT AND REASONS

TABLE OF CONTENTS:

I. Introduction

> The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indomitable sea. Since time immemorial, the postulate which has inspired all the approaches to the problem has implied the establishment of a uniform law.
>
> L'histoire du droit maritime porte l'empreinte d'une recherché constant de stabilité et de sécurité dans les rapports entre les hommes qui confient leur personne et leurs biens à la mer capricieuse et indomptable. Depuis des temps immémoriaux, le postulat qui a inspiré toutes les approches du problème, implique l'établissement d'un droit uniforme.
>
> Lilar et Bosch, *Le Comité Maritime International 1897-1972.*

[1] Save for the use of the term "men" rather than persons, this statement holds true today. The parties in this action are seeking certainty as to the legal regime applicable to the contractual arrangements for the carriage of the goods at issue.

[2] This matter concerns several containerized shipments of fresh produce transported from Costa Rica to Etobicoke, Canada. The Plaintiff, Arc-En-Ciel Produce Inc. [the Cargo Claimant] alleges that the cargo arrived at its destination in a damaged and deteriorated state. The Cargo Claimant commenced two actions in this Court, naming as Defendants, Great White Fleet, the vessels that carried the cargo, and their respective owners. The Defendant, Great White Fleet [the Carrier], is a defendant in both actions.

[3] The Carrier and the Cargo Claimant have a business relationship spanning several years. The nature of the contractual relationship between them, as it pertains to the shipments in question, is at issue in the present motions.

[4] The Carrier brought a motion in each of the actions seeking a stay, pursuant to subsection 50(1) of the *Federal Courts Act*, RSC 1985, c F-7, on the basis of a forum selection clause in favour of the United States District Court, Southern District of New York. The Carrier's position is that the parties should be held to their bargain and, consequently, this Court should exercise its discretion to grant a stay. The Carrier submits that the Cargo Claimant has failed to show a "strong cause" as to why the forum selection clause should not be enforced. The Carrier relies on *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [*ZI Pompey*], in which the Supreme Court of Canada endorsed the "strong cause" test as set out in *Cargo Owners v "Eleftheria" (The)*, [1969] 1 Lloyd's Rep. 237 at 242 (Adm Div) [*The Eleftheria*].

[5] The Cargo Claimant asks this Court to decline to enforce the forum selection clause on two grounds. First, the Cargo Claimant submits that the contracts at issue fall within the scope of section 46 of the *Marine Liability Act*, SC 2001, c 6 [the Act]. Section 46 of the Act permits a claimant to institute proceedings in Canada despite a foreign jurisdiction clause, provided certain requirements are met. Second, and in the alternative, the Cargo Claimant submits that it has demonstrated that a "strong cause" exists to set aside the forum selection clause.

[6] The two issues in the present motion are therefore (i) whether section 46 of the *Marine Liability Act* applies to the contracts at issue; and (ii) if not, whether there is a "strong cause" to refuse to enforce the forum selection clause.

[7] In order to rule on the first issue, it is necessary to consider the nature of the contractual arrangements between the Carrier and the Cargo Claimant. I will state from the outset that this is

not an easy task. The applicable provisions of the Act, including the international convention known as the *Hague-Visby Rules* appended thereto, are rooted in provisions that were negotiated in 1893. Those 1893 provisions were in turn based on pre-existing mercantile and maritime trade practices. These maritime trade practices had existed and evolved over the course of approximately six centuries prior to 1893. They have continued to evolve over the course of the 20th and 21st centuries, while much of the statutory language at issue, conceived in the 19th century, remains the same.

[8] This Court thus finds itself faced with a choice between, on the one hand, a strict interpretation of the Act based on the meaning of language used and the documents in existence in the 19th century, and on the other hand, an expansive interpretation taking into account the modern realities of the international carriage of goods and the objective of protecting Canadian consumers. A consideration of the origins of the documentation and the legislative texts at issue is therefore, among other things, appropriate and necessary to the determination of the present motions. I wish to note that I have been assisted in this task by the able submissions of counsel, both practitioners of the maritime bar, whose efforts on behalf of their respective clients were thorough, considered, and clear.

II. Facts

[9] Before turning to the origins of the type of documents at issue and the history of the language contained in Canada's carriage of goods by water regime, I shall briefly set out the facts, and following that, the procedural history of this case.

[10] The Carrier and the Cargo Claimant have filed affidavits in support of their motion materials. The Carrier relies upon the affidavit of Luis Rodriguez Contreras, Transportation Claims Analyst, who handles claims for the Carrier, including the claims that are the subject of this action. Mr. Contreras describes in detail the business relationship between the parties and the process followed, along with the documentation used, with respect to cargo transported by the Carrier under the terms of its arrangements with the Cargo Claimant. The relevant documentation to which Mr. Contreras refers is appended to his affidavit.

[11] The Cargo Claimant relies upon the affidavit of Sam Hak, President of the Claimant, who also sets out the relationship between the parties, addresses the shipments at issue, and attaches the relevant documentation to his affidavit.

[12] The Carrier and the Cargo Claimant have had a business relationship since 2012. The Cargo Claimant is a Canadian company that specializes in the importation and distribution of fresh produce to local merchants. The Carrier specializes in dry and refrigerated containerized cargo services between Central and North America. The Carrier is an affiliate of Chiquita Fresh North America LLC and has its principal place of business in Florida.

[13] Over the course of the business relationship, the Carrier provided the Cargo Claimant with door-to-door transportation services for produce from Central America to Toronto or Etobicoke, Ontario using refrigerated containers. As of June 2019, the Carrier had transported approximately 185 containers of produce for the Cargo Claimant. With respect to shipments originating from Costa Rica, the Carrier and the Cargo Claimant had entered into a series of what

are termed service contracts. The most recent service contract, entitled Confidential Service Contract [Service Contract], was entered into in June 2017, and remained in effect through June 30, 2018. It was in effect at the time of the shipments at issue.

[14] The Service Contract provided for discounted rates, as compared to the Carrier's published tariff, provided the minimum cargo commitment was reached. The Service Contract contained a clause incorporating the "Carrier's bill of lading" and providing that said, "bill of lading will determine the terms and conditions of the shipment".

[15] The Carrier's standard form bill of lading is a one-page form with printed text on both sides. The vast majority of the clauses containing the terms and conditions are printed on the reverse side of the one-page form. The clauses include a jurisdiction clause, also known as a forum selection clause, providing for the exclusive jurisdiction of the United States District Court, Southern District of New York. They further include a "clause paramount" which provides that the carriage shall be governed by the United States Carriage of Goods by Sea Act, 1936 [US COGSA], and an applicable law clause specifying the application of United States federal law, or where there is no governing federal law, the laws of the State of New York.

[16] The Cargo Claimant states that at no time was it provided with a copy of the terms and conditions of the Carrier's standard form bill of lading. In response, the Carrier states that it was available and referenced in all the contractual documentation between the parties.

[17] The Carrier filed evidence of the *modus operandi* between the parties for door-to-door shipments. This method of operating also formed the subject of submissions during the hearing. The Cargo Claimant has not contradicted the parties' *modus operandi* and it is common ground that the shipments at issue were door-to-door shipments.

[18] In order to initiate a shipment in Costa Rica, a company called Arcsam de Costa Rica [the Shipper], which the Carrier believes to be an affiliate of the Cargo Claimant, contacts the Carrier's representative in Costa Rica with a booking request. The booking request confirms, among other things, the type of produce, quantities, place of pick up and requested date for the delivery of one or more empty containers. The Carrier then arranges for a local trucking company to deliver the required number of containers to be stuffed and sealed by the Shipper. Once stuffed and sealed, the containers are then transported by truck to the vessel's port of loading, Puerto Limon, in Costa Rica.

[19] The containers are shipped as "shipper load, stow and count", meaning it is the Shipper who provides the information to the Carrier about the contents of the container. The Shipper provides the Carrier with, among other things, the seal numbers of the containers, the description and quantity of the goods therein, and the required temperature setting for the refrigeration unit. This information is then entered into the Carrier's database.

[20] Once the containers arrive in Puerto Limon, they are stored until such time as they are loaded onto a vessel for a short-sea transit to Guatamala, following which they are discharged and then loaded onto a vessel bound for Wilmington, United States.

[21] Once the containers are loaded, the Carrier sends an email to the Cargo Claimant with (i) a notice of arrival and (ii) a copy of what shall be referred to as a shipping document [Shipping Document] for each container. The Carrier refers to the Shipping Document as an "unsigned non-negotiable Express Release Bill of Lading". The Cargo Claimant refers to the Shipping Document as a "non-negotiable International Bill of Lading". The nature and characterization of the Shipping Document and the consequences that flow from that characterization are central to the present motion.

[22] For the cargo at issue, six (6) Shipping Documents were issued, copies of which are in the record. A copy of one of the Shipping Documents is appended to these reasons as Appendix A. I shall discuss the contents of the Shipping Documents, along with the Service Contract, in greater detail in the analysis section of these reasons. For the moment, it is sufficient to say that the Shipping Documents bear the printed name of the Carrier on the top left and the printed heading "INTERNATIONAL BILL OF LADING" on the top right. Each Shipping Document contains a reference to the Service Contract number. The Shipping Documents indicate a door-to-door transport, the name of the vessel, the container number and contents, an "express release" notation, and are unsigned. The Cargo Claimant is identified as both the consignee and the notify party. The places of receipt are indicated as inland in Costa Rica (Ujarras and Chachagua), the port of loading is Puerto Limon, Costa Rica, the port of discharge is Puerto Barrios, Guatemala, and the place of delivery is Etobicoke, Ontario. Once issued, the Cargo Claimant receives copies of the Shipping Documents, but the Cargo Claimant does not receive any originals.

[23] To continue with the *modus operandi*, once the vessel arrives in Wilmington, United States, the containers are discharged and the Carrier obtains authorization from customs to move the cargo. The Carrier then engages a road carrier to collect the containers at the Port of Wilmington and deliver them to the final destination of Etobicoke, Ontario. Upon delivery of the containers to the Cargo Claimant, the truck driver requests that a representative of the Cargo Claimant sign a copy of a trucking bill of lading. A copy of the trucking bill of lading, also known as a road carrier's bill of lading, is not in the record.

[24] It is common ground that in order to obtain delivery of the cargo, the Cargo Claimant was not required to tender or present a copy of the Shipping Document.

[25] The carriage of the cargo at issue was booked between December 8, 2017 and January 15, 2018. The Shipping Documents pertaining to each of the containers were issued between December 15, 2017 and January 28, 2018. The shipments arrived in Etobicoke between January 4 and February 26, 2018. The Cargo Claimant claims that when it unsealed the containers, it discovered that the cargoes exhibited various forms of damage.

[26] The Cargo Claimant notified the Carrier of the loss and submitted claims to the Carrier. As to the claims process with the Carrier, the Cargo Claimant dealt with Montship Inc., the Carrier's agent, based in Montréal, Canada.

[27] On December 21, 2018, the Cargo Claimant commenced the present actions. The Carrier filed the present motions on June 7, 2019. As will be discussed below, the procedural path of the motions has been a lengthy one.

III. Procedural History

[28] The motions were initially heard by my colleague Justice Elizabeth Heneghan. In a judgment dated January 29, 2020, Justice Heneghan found that it was premature to determine the nature of the contractual arrangements between the parties, and in particular whether the contractual arrangements in question constituted a "contract for the carriage of goods by water" within the scope of section 46 of the Act (*Arc-En-Ciel Produce Inc v MSC Belle (Ship)*, 2020 FC 23 [*Arc-En-Ciel* 2020]). Nevertheless, Justice Heneghan found sufficient grounds to decline to grant the requested stay.

[29] The Carrier appealed. In *Great White Fleet v Arc-En-Ciel Produce Inc*, 2021 FCA 70 [*Arc-En-Ciel* 2021], the Federal Court of Appeal allowed the Carrier's appeal, finding that the question of whether the contractual arrangements between the parties falls within the scope of section 46 of the Act should generally be settled before trial. The Federal Court of Appeal noted that leaving this question to the trial judge defeats one of the purposes of section 46 of the Act, namely bringing certainty to the question of jurisdiction. Consequently, the Federal Court of Appeal held that the proper recourse was to remit the matter to a different judge of the Federal Court for determination of the applicability of section 46 of the Act.

[30] The Federal Court of Appeal also confirmed that if section 46 of the Act is found to apply then the test to determine whether a stay should be granted is the *forum non conveniens* test. If section 46 is found not to apply, then the appropriate test for determining whether a stay should be granted is the strong cause test as set out in *The Eleftheria*. I note that the Carrier abandoned its *forum non conveniens* arguments at the hearing before Justice Heneghan. This was also the case when the matter was pleaded before me. Accordingly, if I find that section 46 of the Act applies, then the Carrier's motions shall be dismissed and the matter shall proceed in Canada. If I find that section 46 of the Act does not apply, then the Cargo Claimant bears the burden of demonstrating a strong cause to refuse to enforce the forum selection clause.

[31] If the nature of the contractual arrangement is one that attracts the application of section 46 of the Act, a claimant is permitted to institute a claim in Canada provided one or more of the connecting factors listed in section 46 of the Act exist. The listed factors connecting a claim to Canada include, but are not limited to, that the actual port of loading or discharge is in Canada, that the intended port of loading or discharge in the contract is in Canada, and where the defendant has a place of business, branch or agency in Canada. The complete text of section 46 is appended to these reasons (see Appendix B). The Federal Court of Appeal instructed that the question of whether the Carrier had an agent in Canada had been decided by Justice Heneghan, thereby satisfying the requirement in paragraph 46(1)(b) of the Act. If I find that section 46 of the Act applies to the contractual arrangements at issue, then I do not need to reanalyze whether a connecting factor exists.

IV. Issues

[32] The issues for determination are as follows:

A. What is the nature of the contractual arrangements between the Carrier and the Cargo Claimant, as evidenced by the Service Contract and the Shipping Documents?

B. Do the contractual arrangements attract the application of section 46 of the Act with the result that the Cargo Claimant may continue its proceedings in Canada despite the forum selection clause?

C. If section 46 of the Act does not apply, should the forum selection clause be nevertheless be set aside on the basis of the strong cause test as set out in *The Eleftheria* and adopted by the Supreme Court of Canada in *ZI Pompey*?

[33] As alluded to in the introduction to these reasons, the determination of issues A and B above require a detailed consideration of the history and evolution of certain contractual arrangements used in the context of carriage of goods by sea, along with an examination of the history, meaning and context of certain provisions of Canada's carriage of goods by water regime as contained in Part 5 and Schedule 3 the Act. The contractual arrangements at issue are rooted in centuries-old maritime trade practices; however, the arrangements also reflect the modern conveniences of multi-modal door-to-door transport. Certain language contained in the Act that is relevant to the matter at hand dates to a time before containers, containerships and radio transmitters were even invented. To put it succinctly, I am, in part, applying centuries' old terms and statutory language to modern facts.

V. Analysis

[34] At the beginning of each section of my analysis below, I introduce the topic and state why the particular topic is relevant to the determination of the Carrier's motions.

A. *Bills of Lading*

[35] The Cargo Claimant pleads that the Shipping Document is a bill of lading. The Carrier pleads that it is not a "bill of lading" in the sense that it attracts the application of sections 43 and 46 of the Act, despite the language on the heading of the document. Whether or not the Shipping Document is a bill of lading is ultimately important because that will impact how the Shipping Document is treated under the Act. The Act, however, does not provide a definition of a bill of lading (*Wells Fargo Equipment Finance Company v Barge "MLT-3"*, 2012 FC 738 at para 73 [*Wells Fargo*]). Consequently, we must first turn to the common law, and thereafter to the international convention governing the carriage of goods by sea known as the *Hague-Visby Rules*, in order to ascertain the meaning of this term.

[36] Unfortunately, "[l]ike an elephant, a bill of lading is generally easier to recognize than to define" (Richard Aikens et al, *Bills of Lading*, 2nd ed (Informa Law 2016) at 19 [Aikens, *Bills of Lading*]). Nevertheless, to begin with the basics, a bill of lading is a document that is widely used in the carriage of goods by sea. It tends to be employed in the liner trade and on chartered ships in certain trades (Edgar Gold et al, *Canadian Maritime Law*, 2nd ed (Irwin 2016) at 564 [*Canadian Maritime Law*]). It is important to note from the outset that there are various types of documents used in the carriage of goods by sea that are loosely referred to as bills of lading. While the documents may have similar characteristics, certain documents perform different legal

and commercial functions (see Sir Treitel, *Carver on Bills of Lading*, 4th ed (Sweet & Maxwell 2017) at 1-002 – 1-011 [*Carver*]). For the purposes of the present section, it is important to define the features and functions of what are referred to as "order" or "negotiable" bills of lading (*Canadian Maritime Law* at 564-565). For the moment, I shall simply refer to them as a bill of lading.

[37] Justice Sean Harrington has described a bill of lading as "a venerable document with centuries of use in the transportation of goods" (*H Paulin & Co Ltd v A Plus Freight Forwarder Co Ltd*, 2009 FC 727 at para 27 [*H Paulin*]). It is generally accepted that a bill of lading fulfills three key functions: (a) to act as a receipt for the goods received by the carrier; (b) to evidence the terms of the contract of carriage; and (c) to act as a "document of title" (*Canadian Maritime Law* at 565; *Canadian General Electric Company Limited et al v Les Armateurs du St-Laurent Inc et al (The Maurice Desgagnes)*, [1977] 1 FC 215 at para 14 [*The Maurice Desgagnes*]; *Cami Automotive, Inc v Westwood Shipping Lines Inc*, 2009 FC 664 at para 13 [*Cami Automotive*]; *H Paulin* at para 27). In its argument, the Carrier has relied on these three functions, which it refers to as "three essential characteristics". The Carrier pleads that the Shipping Document does not fulfill the three functions, and thus, is not a bill of lading. The Cargo Claimant does not dispute that bills of lading can have three functions or characteristics, but as shall be discussed further below, pleads that it is the term bill of lading as used on the Shipping Document that is, among other things, determinative.

[38] While there is no universally accepted definition of a bill of lading, a document that has all three characteristics will almost certainly be one, while a document that does not will rarely

be one (Aikens, *Bills of Lading*, at 19). I now turn to the three functions or characteristics of a bill of lading, noting, however, that such a review cannot be isolated from the historical context in which the functions of a bill of lading developed (Aikens, *Bills of Lading* at 19).

(1) First Function – Receipt

[39] The first function is that of a receipt. The earliest bills of lading were devised in the 14th century. By that time, the trade between ports in the Mediterranean had grown significantly, and the trade practices had evolved such that certain merchants sent their goods to correspondents at the ports of destination rather than travelling with the goods as they had previously done (Aikens, *Bills of Lading* at 1.1). Thus, the earliest bills of lading were merely receipts issued to merchants once their goods had been received by the carrier (*Canadian Maritime Law* at 565).

(2) Second Function – Evidence of the Contract of Carriage

[40] By the 16th and 17th centuries, bills of lading began to include terms of the contract, thus performing a contractual function (Aikens, *Bills of Lading*, at 1.12 – 1.25). As to this second function, it is not to say that the bill of lading <u>*is*</u> the contract of carriage. It is well settled that the bill of lading is not, in and of itself, the contract between the shipper and the carrier. Rather it is considered to be the "best evidence" of the terms of that contract (*The Maurice Desgagnes* at para 19; *The Ardennes* [1951] 1 KB 55; *Canadian Maritime Law* at 567). One of the reasons for this is that the bill of lading will generally only be issued after the goods have been received and shipped, but the agreement to ship the goods will have been reached before that (*Canadian Maritime Law* at 567*).* Hence the common law evolved to accommodate the commercial practice (*ibid*).

(3) Third Function – Document of Title

[41] The third function, acting as a "document of title", has its origins in transferability and the need to demonstrate entitlement to the delivery of the goods. In the 16th century, we see changes in the form of the bills of lading, likely caused by changes in trading practice (Aikens at 1-8 – 1.11). Shipments were dispatched before the shipper knew to whom the goods were destined, consequently the bill of lading needed to evidence entitlement to the goods (Aikens *ibid*). The bill of lading therefore gave the holder of the bill a right against the carrier to call for delivery, and in turn it indicated to the carrier to whom the goods should be delivered (Aikens, *ibid*). In this sense, the bill of lading is a transferable key to the floating warehouse (*The Delfini* [1990] 1 Lloyd's Rep. 347 at 359 [*Delfini*]). It must be produced to the carrier by the person claiming delivery of the goods.

[42] As of the 1782 case *Lickbarrow v Mason*, the courts have recognized what may be loosely termed as the modern version of the bill of lading (Aikens, *Bills of Lading* at 1.28; *Canadian Maritime Law* at 565). In *Lickbarrow v Mason*, a merchant jury decided that by the custom of merchants, a shipped, negotiable, and transferable bill of lading may transfer the property in the goods through the endorsement and delivery, or the transmission, of the bill of lading ((1794) 5 TR at 683, 685-686). Since *Lickbarrow v Mason*, the common law has accepted the commercial practice of transferring or trading the bill of lading as if it represented the goods while the goods are in transit (*Canadian Maritime Law* at 570; *The Rafaela S* [2005] UKHL 11, [2005] 1 Lloyd's Rep. 347 (HL) at para 59 [*The Rafaela S*]). It has been noted, at the time, that while the courts spoke of transfer, it was clear that the transfer of a bill of lading raised a

presumption of an intention to transfer property, but that the presumption was rebuttable (Aikens, *Bills of Lading*, at 1.33).

[43] The function of a bill of lading as "document of title" can therefore be broken down into two elements: (i) the bill of lading's transfer is a transfer of constructive possession entitling the holder to receive the goods from the carrier (the key to the floating warehouse); and (ii) while strictly speaking it does not transfer property in the goods which it represents (it is not a negotiable instrument akin to a bill of exchange or a cheque), it is capable of being part of the mechanism by which property is passed (*Delfini* at 359; *Canadian Maritime Law* at 570; William Tetley, *Marine Cargo Claims*, 4th ed, (Thompson) at 533 [Tetley]).

[44] The concept that the bill of lading is a "document of title", based on *Lickbarrow v Manson*, has been described, in its traditional sense, as meaning a document "relating to goods the transfer of which operates as a transfer of the constructive possession in the goods, and may, if so intended operate as a transfer of them" (*Carver* at 6-002). Sir Guentel Treitel in *Carver on Bills of Lading* notes that "at common law there is no other class of documents which is recognized as a document of title in this sense" (*Carver* at 6-002).

[45] For those unfamiliar with bills of lading, the expression "document of title" could be inadvertently understood to mean a document that necessarily transfers ownership, i.e. title, in the goods when it is transferred from one holder to another. As explained above, this is not the case, and thus it is better understood as a document entitling the holder to receive the goods at the end of the voyage. Professor William Tetley's explanation in this regard is helpful:

> The term "document of title" as applied to a bill of lading generally refers *not* to "title" in the sense of *ownership* of the goods carried under the bill, but, more precisely, to the right to *possession* of them. "Title" thus has to do primarily with the right of the consignee or last endorsee of the bill to demand delivery of the goods from the carrier or its agent at the port of discharge. In this sense, the bill of lading, although traditionally termed "a document of title", is better understood as being a document of *transfer.* It is important to make this distinction.
>
> (Tetley at 533; see also *The Rafaela S.*)

[46] The bill of lading can thus be described as a document entitling possession of the goods described therein rather than necessarily identifying the legal owner or the person with the right of property in the goods. By transferring or negotiating the bill of lading, the right to possession is transferred.

(4) The Form of a Bill of Lading

[47] The foregoing briefly defines the three key functions of a bill of lading under common law. As to its form, in practice, a bill of lading tends to follow a fairly standardized two-page format with the details of the shipper, the cargo, the date, the name of the ship, and the ports of loading and discharge on the front (also known as the face), and the carrier's standard printed terms on the back (*Canadian Maritime Law* at 565). Bills of lading have traditionally been issued in sets of at least three original copies, which, as described by Professor Gold, have generally been dealt with as follows:

> One is given to the shipper (for transmittal to the consignee), one is kept by the shipping company for its records, and one is carried on board attached to the manifest of the ship. The latter is required for customs purposes for entry of the ship at the port of discharge, as well as to match the original bill presented by the consignee or endorsee in exchange for the delivery of the goods. The practice of issuing sets of bills of lading reflects the vagaries and inefficiencies of communications in times past; the principle

> remains that once one copy had been validly presented to the carrier, the rest stand void.
>
> (*Canadian Maritime Law* at 566.)

[48] In the introduction to this section, I referred to bills of lading as being "order" or "negotiable" bills of lading. This refers to the transferability of the bills of lading. An order bill of lading is made out to "order", "order or assigns" or a named consignee and to his "order and assigns", or similar words of transferability (*Carver* at 1-011 – 1-012). Where the bill of lading is to a named consignee or his "order", the practice to transfer it is to simply for the consignee to endorse the bill of lading with the name of the transferee under its signature and provide the transferee with possession of the bill (*Canadian Maritime Law* at 570).

[49] As will be discussed further below, certain types of bills of lading and shipping documentation have evolved alongside commercial practices with the result that these newer documents (i) are not referred to as order bills of lading, (ii) are no longer transferable or negotiable, and (iii) in certain cases, but not all, they no longer need to be presented in order to obtain delivery. This is relevant to the matter at hand, as the presence of the statement "not negotiable unless consigned to order" and the question of presentation at delivery relate to the characterization of the Shipping Document. For the purposes of the present section and section V.B (The *Hague-Visby Rules* – Introduction and Context) of these reasons below, references to a bill of lading shall mean an order or a negotiable bill. Before turning to the more recent forms of shipping documents, we first turn to the international convention, applicable in Canada, that governs carriage of goods by sea under bills of lading.

B. The *Hague-Visby Rules* – Introduction and Context

[50] A discussion of the *Hague-Visby Rules* provides context that assists in the determination of this matter. The *Hague-Visby Rules* are appended to the Act and incorporated into it by reference. It has been pled by the Carrier that the definition of a contract of carriage as contained in the *Hague-Visby Rules* does not include the Shipping Document, with the result that neither section 43 nor section 46 of the Act apply. The Cargo Claimant disagrees, and invites this Court to consider the imbalance in bargaining power between carriers and cargo interests that led to the development of international regimes, such as the *Hague Visby Rules*, and ultimately to section 46 of the Act. The Cargo Claimant relies on the reasons authored by Justice Gauthier in *The Federal Ems*, where Federal Court of Appeal considered the liner trade and the imbalance of power that the international regimes sought to address (*Canada Moon Shipping Co Ltd v Companhia Siderurgica Paulista-Cosipa (The Federal Ems)* 2012 FCA 284 [*The Federal Ems*]).

[51] Like Justice Gauthier before me, I consider that, as part of the legal context of the provisions that will be interpreted, it is worth considering how the *Hague-Visby Rules* came to be, what they covered, and the mischief they sought to address (*The Federal Ems* at para 45; see also *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep 57 at 67 [*The Muncaster Castle*]).

[52] By the 17th century, in most European nations and new world colonies, ocean carriers were held strictly liable for the goods they carried. In the centuries that followed, carriers were effectively treated as insurers of the cargo they carried (*Canadian Maritime Law* at 596; *The Federal Ems* at para 46; *Riley v Horne* (1828) 130 ER 1044 at 1045). By the same token, under

common law, a carrier is entitled to contractually limit its liability. Prior to the 19th century, attempts by carriers to escape liability through contractual exemptions were restricted by adverse reactions from cargo interests. In the 19th century, however, advances in shipping and increases in world trade resulted in an increase in the relative bargaining power of carriers. As a result, extensive exculpatory clauses were inserted into bills of lading, resulting in little or no liability on the part of the carriers (*Canadian Maritime Law* at 596; *The Federal Ems* at para 46; *Rafaela S* at para 8). Divergences in the law began to appear where previously it had been fairly uniform. The courts in England were willing to enforce such exculpatory clauses on the basis of freedom of contract, while courts in the United States began to invalidate the clauses on the basis of public policy.

[53] It soon became clear that certainty and uniformity were desirable for all involved. In 1882, the International Law Association attempted to reach an agreement on a model bill of lading that would regulate the rights and duties as between the carriers and the cargo interests, but was ultimately unsuccessful. Not long thereafter, a number of states "adopted what might be considered the first consumer protection legislation regulating the rights and obligations of ocean carriers under bills of lading, albeit in the commercial world" (*The Federal Ems* at para 47). In 1893, the United States enacted the *Harter Act*, creating what was considered at the time to be a balanced regime between carriers and cargo interests. Shortly thereafter, New Zealand (in 1903), Australia (in 1904), Fiji (in 1906), Canada (in 1910), and Morocco (in 1919) all adopted legislation modelled after the *Harter Act*. Furthermore, many other nations were contemplating introducing similar legislation, notably Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain and Sweden (Comité Maritime International, *The Travaux*

Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules (1997) CMI Headquarters at 23-24).

[54] As noted by Professor Gold and quoted by Justice Gauthier, it had become "clear that a proliferation of national legislation imposing different rules on merchant ships, which, by the nature of their business, call in many different countries, would cause legal confusion and inhibit trade." (*Canadian Maritime Law* at 596; *The Federal Ems* at para 48). This proliferation of national legislation was brought to an end by work of the International Law Association and the newly founded Comité Maritime International [CMI]. The CMI, a non-governmental international organization founded in 1897, brought together experts in maritime law from around the world to contribute towards the unification of maritime law. After meetings and diplomatic conferences held in Brussels over the course of several years, a compromise was struck between the rights, duties and obligations of the parties to contracts of carriage of goods as evidenced by bills of lading. The resulting *Hague Rules* of 1924, which entered into force in 1931, was a success and was widely ratified and adopted throughout the world (*The Federal Ems* at para 49). So much so, that it has even been argued that the *Hague Rules* has acquired the status of international customary shipping law – *lex maritima* (Maris Lejnieks, "Diverging solutions in the harmonisation of carriage of goods by sea: which approach to choose?" (2003) Uniform Law Review at 304).

[55] As explained by Viscount Simonds in *The Muncaster Castle*, the aim of the *Hague Rules* "was broadly to standardise within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum for the responsibilities and liabilities to be undertaken by the latter. To guide them the framers of the rules had amongst other precedents the American Harter Act of 1893, the Australian Sea Carriage of Goods Act, 1904, the Canadian Water Carriage of Goods Act, 1910, and, though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading." (*The Muncaster Castle* at 67).

[56] In 1936, Canada incorporated the *Hague Rules* into its domestic legislation entitled the *Carriage of Goods by Water Act*, thereby replacing the *Water-Carriage of Goods Act* (1910).

[57] As a result of advancements and changes in the shipping industry, including the advent of containers, certain updates were made to the *Hague Rules* in 1968 by way of a protocol. The resulting *Hague-Visby Rules* came into force in 1977. They were incorporated into Canadian law by way of the 1993 *Carriage of Goods by Water Act*.

[58] In parallel, it was recognized that the *Hague-Visby Rules* were in need of modernization. The United Nations Commission on International Trade Law (UNCITRAL) undertook the work of creating a new convention dealing with carriage of goods by sea, resulting in the *Hamburg Rules* of 1978 (*The Federal Ems* at para 49). The *Hamburg Rules* raised the limits of liability and narrowed the number of exceptions from which the carrier may benefit. Unlike the *Hague-Visby*

Rules, they included provisions dealing with arbitration and jurisdiction clauses. The *Hamburg Rules* were also meant to apply to new types of shipping documents used by carriers that had characteristics that differed from those of the traditional bills of lading (*The Federal Ems* at para 51).

[59] As noted by both Professor Gold and the Federal Court of Appeal, the *Hamburg Rules* have not been widely adopted (*The Federal Ems* at para 51; *Canadian Maritime Law* at 597). Few, if any, of those states who ratified the *Hamburg Rules* are considered significant maritime trading nations (*Canadian Maritime Law* at 597). A further convention, *The Rotterdam Rules* of 2009, was the latest effort at modernization but it has not entered into force. As a result, most nations operate under *Hague* or *Hague-Visby Rules* regimes. In practice, while the variety of shipping documentation used in the liner trade has increased in recent years, the law governing the carriage of goods by common carriers has remained substantially the same since 1924, and in many respects even earlier (*Canadian Maritime Law* at 564). Professor Gold has stated that "[u]ndoubtedly a new internationally uniform regime that meets the needs of carriers and cargo owners operating modern, containerized traffic by streamlined electronic processes is required." (*Canadian Maritime Law* at 564).

[60] Given that there has not been a widely adopted carriage of goods by sea convention since the *Hague* and *Hague-Visby Rules*, and that many countries did not embrace the *Hamburg Rules*, an appreciable number of nations have taken steps to modernize certain aspects of their carriage regimes through domestic legislation, while nevertheless retaining many aspects of the *Hague* and *Hague-Visby Rules*. Such nations include the United Kingdom, Australia, New Zealand,

South Africa, Singapore, Denmark, Sweden, Norway, Finland, Germany, the Republic of Korea and the People's Republic of China (*Cami Automotive* at para 46; Tetley at 2304, 2420, 2446, 2533, 2555, 2581, 2597).

[61] Canada's carriage of goods by water regime remains a *Hague-Visby Rules* based regime. In 2001, Part 5 of the *Act* replaced the 1993 *Carriage of Goods by Water* Act. Save for section 46 of the Act, Canada's carriage regime has remained the same. As of the date of this judgment, no legislation updating the *Hague-Visby Rules* based regime has been passed in Canada.

[62] It is helpful to keep the foregoing history and context in mind. The Cargo Claimant pleads that the Shipping Document was issued by a common carrier in the context of the liner trade on the basis of standard carrier terms that were not negotiable. The Cargo Claimant submits that it is in need of protection and should be afforded it in line with the aims of Canada's carriage of goods by water regime as applied in the context of modern carriage. The Carrier disagrees and submits that the material provisions of the Act simply do not cover the Shipping Document, because Canada's carriage of goods by water regime is a *Hague-Visby Rules* based regime. If the *Hamburg Rules* or the *Rotterdam Rules* had been enacted in Canada, this would not be an issue, but they are not. Consequently, we must turn to the definition of a contract of carriage contained in the *Hague-Visby Rules.*

C. *Is the Shipping Document a Contract of Carriage Covered by a Bill of Lading or Any Similar Document of Title Under the* Hague-Visby Rules*?*

[63] Section 46 of the Act applies to "a contract for the carriage of goods by water". This expression is not defined in the Act. The Carrier pleads that the same expression is also used in

section 43 of the Act, where it provides that the "*Hague-Visby Rules* have the force of law in Canada in respect of contracts for the carriage of goods by water". In other words, if a contract is a "contract for the carriage of goods by water", then, pursuant to section 43, and provided the other conditions are met, the *Hague-Visby Rules* apply to that contract. The Carrier submits that a "contract for the carriage of goods by water", be it in section 43 or section 46 of the Act must have the same meaning. If, pursuant to section 43, a contract for the carriage of goods by water is the type of contract to which the *Hague-Visby Rules* apply by force of law, then section 46 can only apply to those same types of contracts.

[64] The Carrier relies on *Cami Automotive*, where Justice Edmond P. Blanchard found that to determine the meaning of the phrase a "contract for the carriage of goods by water" in the context of section 43 of the Act, one must turn to the definition of "contract of carriage" as contained in Article 1(b) of the *Hague-Visby Rules*, appended to the Act. Article 1(b) defines a contract of carriage as a contract "covered by a bill of lading or any similar document of title…".

[65] The Carrier's position is that neither the Service Contract nor the Shipping Documents are contracts "covered by a bill of lading or similar document of title" as per the *Hague-Visby Rules*. Consequently, they are not the type of contract that attracts the application of the *Hague-Visby Rules* by force of law pursuant to section 43 of the Act, and thus do not attract the application of section 46 of the Act. Simply put, the phrase cannot mean one thing in section 43 and another in section 46 of the Act.

[66] The Cargo Claimant pleads that (i) the Shipping Document is a bill of lading, as it clearly says so on the face of the document, and (ii) the phrase contained in section 46 of the Act, whose policy it is to protect Canadian importers and exporters, should be given a wider scope than the same phrase found in section 43 of the Act or the definition contained in Article 1(b) of the *Hague-Visby Rules.*

[67] Prior to considering the scope of section 46 of the Act, I shall first consider whether the Shipping Document and/or the Service Contract constitute a contract of carriage as defined by Article 1(b) of the of the *Hague-Visby Rules*, such that it is the type of contract that attracts the application of the *Hague-Visby Rules* by force of law.

[68] For the purposes of the application of the *Hague-Visby Rules,* Article 1(b) defines a contract of carriage to which they apply as follows:

…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.	[…] contrat de transport constaté par un connaissement ou par tout document similaire formant titre pour le transport des marchandises par eau, il s'applique également au connaissement ou document similaire émis en vertu d'une charte-partie à partir du moment où ce titre régit les rapports du transporteur et du porteur du connaissement;
[Emphasis added.]	[Soulignement ajouté.]

[69] For the purposes of the matter at hand, the material phrase is “a bill of lading or any similar document of title”. Bear in mind that the interpretation of this phrase has been informed by the trade practices and the common law functions of a bill of lading as described in section V.A (*Bills of Lading*) of these reasons, namely (a) a receipt for the goods; (b) evidence of the contract of carriage; and (c) a “document of title”.

[70] It is common ground between the parties that the Shipping Document was used as an acknowledgement of receipt for the cargo. Moreover, it is clear from the record that the Shipping Document evidences the terms of carriage as between the Cargo Claimant and the Carrier. The material issue, as plead by the Carrier, is whether the Shipping Document is a “document of title”. The Carrier submits that it is not.

[71] The Shipping Document names the Cargo Claimant as consignee, meaning, the Cargo Claimant is identified on the Shipping Document as the party to whom the cargo is to be delivered. There is no language contained on the face of the Shipping Document that indicates that it is transferable, as would have been the case had it been made out to the named consignee (the Cargo Claimant) and its “order or assigns” or similar words of transferability (*Carver* at 1-011 – 1-112). The upper right-hand corner of the Shipping Document contains the printed words “NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER”. Not only is there no language permitting transferability in the Shipping Document, there is language negating transferability (*Carver* at 1-011; *Cami Automotive* at para 15).

[72] The fact that a bill of lading is not transferable does not necessarily mean that it is excluded from Article 1(b) of the *Hague-Visby Rules* on the basis that it is not a "document of title". A "straight bill of lading" is one that is consigned to a named consignee and cannot be transferred. The lack of transferability is often made clear by the bill being stamped, or containing the phrase, "non-negotiable". Historically, non-negotiable bills of lading have not been viewed as a document of title in the common law sense, due to their lack of transferability (*Carver* at 6-016).

[73] In *The Rafaela S*, the House of Lords considered the question of whether a straight bill of lading was "a bill of lading or any similar document of title" for the purpose of Article 1(b) of the *Hague-Visby Rules*. The House of Lords concluded that a straight bill of lading was a document of title for the purposes of the *Hague-Visby Rules* on the basis that, *inter alia*, it had to be presented in order to obtain delivery of the cargo (at para 20). It was found that production of the straight bill of lading to the carrier was a prerequisite to delivery given the express terms it contained, but also that production of a straight bill of lading is a necessary precondition to delivery even in the absence of an express provision requiring it (at para 20 per Lord Bingham). The straight bill of lading in the *Rafaela S* indicated on its face that a set of three (3) original bills of lading was issued and it contained an attestation clause: "IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or deliver order" (at para 32). Placing aside the last sentence of the attestation clause, Lord Steyn found as follows:

> In any event, the issue of a set of three bills of lading, with the provision "one of which being accomplished, the others to stand

> void" necessarily implies that delivery will only be made against presentation of the bill of lading. In my view the decision of the Court of Appeal of Singapore in *Voss v APL Co Pte Ltd* [2002] 2 Lloyds LR 707 at 722 that presentation of a straight bill of lading is a requirement for the delivery of the cargo is right.

[74] Lord Steyn distinguished straight bills of lading from waybills noting authority that waybills are not required to be produced in order to obtain delivery and that "straight bills of lading are invariably issued in sets of three and waybills are not" (*Rafaela S* at para 46). Note that waybills are defined and addressed in detail in section V.D of these reasons, further below.

[75] In *Voss v APL Co Pte Ltd* [2002] 2 Lloyds LR 707, referenced by Lords Steyn, Bingham and Rodger in the *Rafaela S*, the Court of Appeal of Singapore considered a non-negotiable straight bill of lading issued by a carrier in a set of three originals and containing the language "Upon surrender to the Carrier of any one negotiable bill of lading, properly endorsed, all others shall stand void" (at para 4). The Court of Appeal found that presentation of the straight bill of lading was required in order to obtain delivery of the goods. If the parties had wished to avoid the requirement of presentation, they would not have issued a bill of lading with three originals (at para 49). The Court of Appeal contrasted a waybill with a straight bill of lading noting that a waybill is retained by the shipper and all the consignee need show to take delivery is proof of his identity (para 53). While a waybill is a receipt, it is unlike a straight bill of lading in that it is not a document of title (at para 53).

[76] This Court, relying on the *Rafaela S*, has recognized that both negotiable bills of lading and non-negotiable bills of lading (straight bills of lading) are "documents of title" and as such must be presented at the port of discharge to obtain delivery of the goods (*Cami Automotive* at

para 16). In *Cami Automotive*, Justice Blanchard found that a shipping document was not a "document of title" because, among other things, it did not have to be produced at the port of discharge and only one copy was issued by the carrier, rather than in triplicate as is usually the case for bills of lading (at paras 28, 30). Consequently, the Court found the document to be a waybill rather than a straight bill of lading.

[77] Justice Harrington in *Timberwest Forest Corp v Pacific Link Ocean Services Corporation*, 2008 FC 801 [*Timberwest*] described a bill of lading as follows, noting the fundamental importance of delivering the cargo to the holder of the bill:

> [13] Although the bill of lading is a venerable document, it is not defined in either the Hague-Visby Rules or in our Bills of Lading Act. Article I of the Rules provides that they only apply to "...contracts of carriage covered by a bill of lading or similar document of title." Depending on its terms, a bill of lading may, or may not, be a negotiable instrument. A fundamental aspect of a contract of carriage covered by a bill of lading is that the carrier, or its agents, delivers the cargo to the holder of the bill…
>
> [Emphasis added.]

[78] In the present matter, the Carrier highlights that only one copy of the Shipping Document was issued and that the copy did not have to be presented by the Cargo Claimant in order to obtain delivery of the cargo.

[79] I find that the fact that the Shipping Document was not required to be surrendered to the Carrier or its agent in order to obtain delivery of the cargo substantially weighs against the Shipping Document being considered a straight bill of lading or other document of title under the *Hague-Visby Rules*. It is clear from the record that the parties did not intend that the Shipping Document be presented in order to obtain the cargo. Moreover, it was the practice of the parties

for such shipments, the *modus operandi*, that presentation was not required. For the particular cargo at issue, the Cargo Claimant was not required to present or tender a copy of the Shipping Document in order to obtain delivery. The Shipping Document contains the notation "express release", which is in fact what took place.

[80] Alongside the practice of the parties, I also find that the terms contained in the Shipping Document speak against its production as a prerequisite to delivery. The Shipping Document contains a printed attestation clause "IN WITNESS WHEREOF, the Carrier has signed ____ original Bills of Lading, all of the tenor and date, and if one is accomplished the others shall be void. Dated_____ Signature_____". Unlike in the *Rafaela S*, it was the practice in this case that no originals were issued and only one copy was issued for each cargo. In the copies of the Shipping Documents that were issued by the Carrier for the cargos, the attestation clause is left blank indicating no original bills were ever issued nor was the Shipping Document signed. No original bill was thus tendered for delivery that would render the other originals void. That no original bills, let alone a set of three, were issued weighs against the Shipping Document being a document of title as covered by the *Hague-Visby Rules.*

[81] The date and signature lines contained in the Shipping Document, right below the attestation clause quoted above, were also left blank. The Carrier, relying upon *The Maurice Desgagnes,* pleads that the fact that the Shipping Document is unsigned is decisive. In *The Maurice Desgagnes,* the Court sought to determine whether a document issued in relation to the carriage of cargo was a bill of lading such that it attracted the application of the *Hague Rules* as annexed to the *Carriage of Goods by Water Act* (the predecessor to the Act). As noted

previously, Article 1(b) of the *Hague-Visby Rules* remains the same. Justice Dube noted that the document was unsigned and conducted an extensive review of numerous authorities in order to determine whether a signature was an essential element of a bill of lading. Justice Dube cited *British Shipping Laws*, both the first and second editions, as setting out the essential facts in a bill of lading that include (at paras 17-18):

> *The number of signed negotiable copies*. The bill of lading must state how many negotiable copies have been *signed*. Two or three copies are most usual, but sometimes there are more or even only one, according to the requirements of the shipper rather than of the shipping company…
>
> A bill of lading is a document which is *signed by the shipowner* or his agent…

[82] Following his review of the authorities, Justice Dube concluded that he was "of the view therefore that the unsigned document referred to in this application is not a bill of lading within the meaning of the Carriage of Goods by Water Act" (at para 32). Justice Dube also considered negotiability to be of "the utmost importance" in determining whether a document is a bill of lading under the predecessor to the Act (at para 25). It was these two factors, the lack of signature and the non-negotiability of the document, that led to Justice Dube's finding that the *Hague Rules* did not apply (at para 25). As to the non-negotiability of the document, I respectfully disagree with Justice Dube. In light of more recent authorities, it is clear that a bill of lading that attracts the application of the *Hague-Visby Rules* can be either negotiable or non-negotiable (*Rafaela S, Timberwest, Cami Automotive,* and *H Paulin* (at para 28)). I note that Justice Dube's decision was overturned on appeal (*Canadian General Electric Co v Armateurs du St-Laurent* [1977] 2 FC 503 (CA)), although on grounds that do not detract from his analysis on bills of lading. This analysis has since been cited by this Court (*Cami Automotive* at para 13).

[83] With respect to the signature or lack thereof, I find this to be, in the words of Justice Dube, “an important evidentiary element” (*The Maurice Desgagnes* at para 16). In the matter at hand, the Shipping Document contains no signature, whether written or electronic. Moreover, it is clear from the record that they were never intended to be signed. The lack of signature by the Carrier or its agent was not an oversight, rather it was part of the *modus operandi*. While I would not go so far as to say that the lack of signature is determinative of the matter at hand, it certainly weighs against the Shipping Document being considered a bill of lading or other document of title under the *Hague-Visby Rules.*

[84] I pause here to underscore the importance of whether the Shipping Document was intended to be signed. As noted above, the second function of the bill of lading is to evidence the terms of the contract of carriage. The bill of lading is not in itself the contract of carriage (*Saint John Shipbuilding & Dry Dock Co v Kingsland Maritime Corp*, (1981) 126 DLR (3d) 332 (FCA) at para 17) [*Saint John Shipbuilding*] , although it has often been described as the “best evidence” of the contract (Tetley at 524) As stated by Lord Goddard and relied on by this Court, “a bill of lading it not in itself the contract between the shipowner and the shipper of the goods, thought [*sic*] it is said to be excellent evidence of its terms. The contract has come into existence before the bill of lading is signed; the latter is signed by one party only, and handed by him to the shipper usually after the goods have been put on board.” (*The Ardennes* [1951] 1 KB 55 at 59; see also *H Paulin* at para 27; *The Maurice Desgagnes* at para 19; *Saint John Shipbuilding* at para 15).

[85] A contract of carriage therefore comes into existence before a bill of lading is even issued or signed. The contract ultimately may be comprised of a variety of documents and exchanges, including the arrangements for shipment, the tariffs of the carrier, a booking note, a mate's receipt, the exchanges with the carrier and/or its agents, and the bill of lading, if issued (or waybill or other document issued or intended to be issued by the carrier or its agent, if no bill of lading is used). Consequently, when facing a claim, it is no defence to say that no bill of lading was ever in fact signed, if it had been the intention of the parties for one or more bills to be issued and signed. These comments hold equally true with respect to the intention of the parties as to whether a document so issued had to be tendered in order to obtain delivery. It would be no defence to a claim in misdelivery if the parties had intended that delivery be made against the presentation of a bill of lading. In the matter at hand, the *modus operandi* evidences a clear intention, and practice, on the part of the parties that the Shipping Documents remain unsigned, are stamped non-negotiable, and are not tendered in order to obtain delivery.

[86] The Cargo Claimant acknowledges that the Shipping Documents were unsigned and did not need to be presented in order to obtain delivery of the cargo, however, it pleads that the Shipping Document clearly states on its face "INTERNATIONAL BILL OF LADING" and accordingly that the Carrier should be bound by the legal meaning of this term. In short, the Carrier is a sophisticated carrier, who chose to use the term "bill of lading" in the context of a standard form document that it prepared. The Cargo Claimant submits that, when interpreting a contract between the parties, one must presume that the Carrier intended the legal consequences of the words the Carrier used (Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed (2020) at 120; *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at para 56 [*Eli Lilly*]).

[87] On the contrary, the Carrier submits that *Eli Lilly* in fact supports its position because one must equally assume that the parties intended the legal consequences of the other terms contained in the Shipping Document. The Carrier pleads that while the Shipping Document does have "bill of lading" on its face, its other terms support an interpretation that the document is not a "bill of lading or similar document of title" under the *Hague-Visby Rules,* including: the stipulation that it is not negotiable unless consigned to order (not transferable), the fact that it is unsigned, that no originals are issued, that it is stamped non-negotiable, that the attestation clause remains blank, the reference to the Service Contract, and has the notation "express release".

[88] The difficulty, legally speaking, is that there is a measure of ambiguity in the Shipping Document's terms. Practically speaking, this derives from the use of what is termed a hybrid or dual purpose form (*Carver* at 06-21). A hybrid form of carriage document is one that, according to the way in which the blanks are filled in and how it is stamped, can be used either as an order bill of lading, a straight bill of lading, or neither (*Carver* at 06-21). Often, such hybrid forms are used either as order bills or straight bills (*Rafaela S* at para 6; *Carver* at 06-21), but I do not find such forms to be restricted to those two types of carriage documents. The use of hybrid forms has been said to be an unfortunate development that invites errors and spawns litigation. Lord Justice Rix of the Court of Appeal in *The Rafaela S* [2003] EWCA Civ 556, affirmed by the House of Lords, criticized the use of hybrid forms:

> 146 It seems to me that the use of these hybrid forms of bill of lading is an unfortunate development and has spawned litigation in recent years in an area which for the previous century or so has not caused any real difficulty. Carriers should not use bill of lading forms if what they want to invite shippers to do is to enter into sea waybill type contracts. It may be true that ultimately it is up to shippers to ensure that the boxes in these hybrid forms are filled up in the way that best suits themselves; but in practice I suspect that

> serendipity often prevails. In any event, these forms invite error and litigation, which is best avoided by a simple rule.

[89] The Carrier noted during the hearing that the situation would have been clearer if the Carrier had the practice of using separate forms for waybills and bills of lading. This was, however, simply not their practice. The Carrier used the same base, or hybrid, form for multiple type of commercial arrangements. The Carrier submits that the use of the hybrid form does not make the Shipping Documents at issue a "bill of lading or similar document of title" because, by virtue of how they are filled in (i.e., express release, non-negotiable, unsigned, not requiring presentation), they lack the essential characteristics of a bill of lading or similar document of title under the *Hague-Visby Rules.* As noted above, the Cargo Claimant disagrees.

[90] As in the *Rafaela S*, the use of a hybrid form in the present matter has spawned a dispute over the nature of the Shipping Document. It is true that the commercial arrangements between participants in the transportation and logistics chain do not always fit into neat, tidy and easily identifiable legal categories. In such cases, as here, it is the task of the Court to determine the true nature and legal effect of the contractual arrangements between the parties. When considering a mercantile document, issued in the ordinary course of trade, a court will often be slow to reject the description which the document bears, particularly where such a document has been issued by the party seeking to reject the description (*Rafaela S* at para 5). This is the essence of the Cargo Claimant's argument: that the Carrier should be held to the term it chose, "bill of lading", and should not now be entitled to distance itself from that term.

[91] The Cargo Claimant relies on the judgment of Justice Harrington in *H Paulin* for the proposition that the Carrier ought to be bound by the term "bill of lading" and that it cannot escape the wording of its own document. I find that the circumstances in *H Paulin* differ from those in the present matter. In *H Paulin*, the transport document had been stamped "freight prepaid". Justice Harrington found that the "freight prepaid" notation was not a representation as between the carrier and the shipper, but it was vis-à-vis others who rely on the document. As such, the carrier who represented by virtue of the stamp that freight had been paid was bound by that representation, and could not claim freight from the ultimate receiver of the cargo (*H Paulin* at paras 1-2, 63).

[92] I do not find that the header on the hybrid form ("INTERNATIONAL BILL OF LADING – NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER") is a representation in the same manner as "freight prepaid" was in *H Paulin.* Rather, the header on the hybrid form is one of numerous factors that one must consider when determining the true nature of the Shipping Document. I agree that the Court should be slow to reject a description given to a document by the Carrier, but the header on the form cannot be wholly divorced from manner in which the form is filled in, the options that are selected or left blank, the stamps that are applied to the form, and the practice of the parties. I therefore do not find the term "bill of lading" in the Shipping Document to be determinative. While the use of the term is a factor that does weigh in favour of the Shipping Document being considered a bill of lading under the *Hague-Visby Rules*, it does not, in my view, outweigh the other factors discussed in detail above.

[93] Ultimately, Sir Richard Aikens notes that the definition of a bill of lading depends on the relevant context, and furthermore, "…the question of whether a document satisfies the relevant definition depends on the substance of the document and not its form. A document describing itself as a bill of lading will not be one unless it has the necessary attributes. Conversely, a document may be a bill of lading without those words appearing in it" (Aikens, *Bills of Lading* at 2.8).

[94] To summarize, the Shipping Document is non-negotiable, both by virtue of the printed term ("NOT NEGOTIABLE UNLESS CONSIDERED TO ORDER") and the large "NON-NEGOTIABLE" stamp on the face of the document. The form used was a hybrid form that is titled "INTERNATIONAL BILL OF LADING – NOT NEGOTIABLE UNLESS CONSIGNED TO ORDER", and contains numerous references to the "bill of lading". The Cargo Claimant is the consignee and the notify party. No originals were issued, nor was it signed, and the attestation clause was left blank. The Shipping Document contains the notation "express release", and the Cargo Claimant was not required to present it in order to obtain delivery. It was the practice between the parties that such documents were left unsigned, with no originals issued, and did not have to be surrendered to the Carrier or its agent for delivery. Save for the printed references to the bill of lading on the form, I find that the remainder of the factors are either neutral or support the Carrier's position. In particular, the fact that the Shipping Document was unsigned, with no originals issued, and presentation was not required to obtain delivery of the Cargo, weighs heavily against the Shipping Document being a contract of carriage, i.e., a bill of lading or other document of title, under the *Hague-Visby Rules.*

[95] The foregoing indicates therefore that the Shipping Document is not a bill of lading or other document of title under the *Hague-Visby Rules.* The Carrier pleads that, instead, the Shipping Document is a waybill. I will therefore consider the characteristics of waybills, before concluding on the true nature and effect of the Shipping Document.

D. *Is the Shipping Document akin to a Waybill?*

[96] As noted previously, as mercantile custom and practice have evolved, so has the documentation used by those involved with the carriage of goods by sea. Conventional negotiable bills of lading have numerous advantages and have developed to facilitate international trade. As addressed previously in section V.A (*Bills of Lading*) of these reasons, above, their function as a document of title permitted the right to possession of the cargo to be transferred and formed part of the mechanism by which property in the cargo passed. A negotiable bill of lading is a useful document for merchants and bankers who wish to buy, sell or borrow against cargo while in transit (*Canadian Maritime Law* at 571).

[97] Negotiable and straight bills of lading, however, come with challenges. As they must be presented in order to obtain delivery of the cargo, delays in documentation may well result delays in delivery. A bill of lading will be issued by a carrier once the cargo is loaded onboard. If a shipper is lucky, an original bill of lading will be ready for pick-up the day after the vessel sails, however, it is common place for it to take several days (Susan Beecher, “Can the Electronic Bill of Lading Go Paperless?” (2006) 40 Int’l Law at 633 [Beecher]). Modern container vessels operate so quickly that they often arrive at the port of discharge before the bills of lading have been processed through the shipping and banking systems (Nicholas Gaskell et al,

Bills of Lading: Law and Contract (Informa Law, 2000) at 20 [Gaskell]). If a consignee is unable to promptly receive their cargo at the port of discharge due to documentation delays, they are then exposed to financial penalties such as demurrage charges (Beecher at 634).

[98] In addition to potential delays and the costs associated thereto, simply obtaining a conventional bill of lading has a cost to it. Carriers charge fees in order to issue such bills of lading. The risk and the cost of the features of a bill of lading are not always necessary. In many instances, the identity of the consignee is known from the outset and the cargo is not being sold or financed while in transit. Take for example, where one company in a group ships cargo overseas to another company in the same group or where there is an in-house transfer within a multinational corporation (Gaskell at 20).

[99] Carriers responded to the problems caused by bills of lading by developing simpler documents known as waybills or sea waybills (Gaskell at 20; *Canadian Maritime Law* at 571). The introduction of computers and technical advancements in the later part of the twentieth century also facilitated the development of waybills (*Cami Automotive* at para 14). Although waybills share certain characteristics with traditional bills of lading, they differ in a number of respects (*The Federal Ems* at para 51). A waybill, when issued, is made out to a named consignee to whom the cargo is to be delivered. It is effectively a non-negotiable receipt which contains contractual terms (Gaskell at 20). A waybill therefore performs two of the three functions of a bill of lading, in that it acts as a receipt for the goods and as evidence of the contract of carriage (Gaskell at 20; *Canadian Maritime Law* at 571; *Cami Automotive* at para 17).

[100] A waybill is not a document of title, and thus, it does not have to be presented to the carrier in order to receive delivery of the cargo (*Canadian Maritime Law* at 571-572; *Cami Automotive* at para 17; Aikens, *Bills of Lading* at 22; *Rafaela S* at para 46). It is simply documentary evidence of the consignee's right to receive the cargo from the carrier (*Canadian Maritime Law* at 572). To receive delivery, a recipient simply provides the carrier with the information required to show that the recipient is the consignee named in the waybill (i*bid*). This is the principal advantage of using a waybill. Cargo interests are not exposed to the inconvenience and cost of having to wait for the bill of lading to arrive with the consignee before the cargo can be delivered by the carrier (Aikens, *Bills of Lading* at 22). Unless presentation is required (and possibility negotiability as well), there are good commercial reasons why parties avail themselves of convenient and less costly waybills.

[101] Given that waybills are not considered to be bills of lading or similar documents of title, the *Hague-Visby Rules* do not apply to them by force of law (*Cami Automotive* at paras 44-45; Aikens Bills of Lading at 22; David Colford, "The Federal Courts and Admiralty Law" in *The Federal Court of Appeal and the Federal Court 50 Years of* History, (Irwin Law 2021) at 493). As detailed in Section V.C of these reasons, in order for the *Hague-Visby Rules* to be compulsory, there must be a contract of carriage as defined in Article 1(b) of the *Hague-Visby Rules* meaning one covered by a bill of lading or similar document of title. As such, when a waybill is used, the parties are free of the imposition of the rights and obligations contained in the *Hague-Visby Rules*. This is distinguished from the *Hamburg Rules* and the *Rotterdam Rules*, which do apply to such documents. That is not to say, however, that the *Hague-Visby Rules* are not relevant when considering a waybill, because in practice, the *Hague* or *Hague-Visby Rules*

are frequently incorporated by reference into contracts evidenced by waybills. In the matter at hand, the Shipping Document provides for US COGSA to apply, a *Hague Rules* based regime.

[102] With respect to non-negotiable documents, the *Hague-Visby Rules* apply by force of law to straight bills of lading, addressed in Section V.C of these reasons, but not to waybills. The legal characterization of a transport document as either a waybill or a straight bill of lading is not always easy (*Canadian Maritime Law* at 572; Carver at 17). Carver highlights the distinctions between the two being: the label on the document, whether the document contains clauses found in bills of lading that would be meaningless in the case of a waybill, and whether it is issued in triplicate rather than one original document (Carver at 17-18). *Canadian Maritime Law* instructs that the distinction appears to depend on the intention of the maker as can be collected from the document, and may turn on the presence or absence of an attestation clause that asserts the requirement that the document be presented in exchange for delivery (at 572).

[103] This Court has found that the distinction between a waybill and a straight bill of lading lies with the manner in which the document is entitled, that bills of lading are issued in triplicate while a single copy is issued for waybills, whether presentation is required for delivery of the cargo, and the intention of the parties (*Cami Automotive* at paras 30-35). The House of Lords has highlighted the differences between the terms, the number of documents issued, and stated that a waybill is never a document of title and no “trader, insurer or banker would assimilate the two” (*Rafaela S* at para 46).

[104] In the matter at hand, although the Shipping Document is entitled “INTERNATIONAL BILL OF LADING”, I find it was used and treated as a waybill would be. While the Carrier used a hybrid form as the basis for the Shipping Document, the manner in which it was filled in and the portions that were left blank, speak to the document being akin to a waybill. The line indicating the number of originals issued was left blank, as was the remainder of the attestation clause.

[105] While certain printed terms on the Shipping Document did refer to a bill of lading, the document was stamped non-negotiable and “express release”. It is well established that printed terms are subordinate to stamped terms (*Cami Automotive* at para 25). Moreover, the cargo at issue was in fact released on an express basis. The practice of the Carrier releasing the cargo without presentation of the Shipping Document means that the parties treated it as a waybill.

[106] The Carrier submits that it was also the intention of the parties that the Shipping Documents be treated as waybills. I agree. The evidence contained in the affidavit of Mr. Contreras spoke to the use of the express release format at the request of, and for the convenience of, the Cargo Claimant. Such formats are used by the Carrier, according to Mr. Contreras, for the convenience of their customers when presentation is not required to obtain delivery of the goods. Mr. Contreras contrasts this with the situation where the Carrier issues ordinary bills of lading, which they typically issue in sets of three originals, cause them to be signed by the Carrier’s authorized agent, remitted to the shipper, and would insist on the presentation of an original at delivery in order to surrender custody of the goods to the original bill of lading holder. Mr. Contreras’ evidence on this issue was uncontradicted.

[107] All this aligns with what is common place in the industry: the practice of dispensing with the requirement of presentation, along with the cost and potential inconvenience associated with bills of lading, through the use of waybills when the nature of the shipments do not require bills of lading.

[108] As noted previously, the parties have had a business relationship since 2012. As of June 2019, the Carrier had transported approximately 185 cargos of produce for the Cargo Claimant. The evidence in the record indicates that the parties intended to use an efficient and expedited process, and did so.

[109] I therefore find that the true nature and effect of the Shipping Document is akin to a waybill. It is a receipt for the cargo carried and evidence of the terms of the contract of carriage, however, it is not a document of title. Consequently, the contract of carriage at issue is not evidenced by a bill of lading or similar document of title as per Article 1(b) of the *Hague Visby Rules* and is not the type of contract that would attract the application of the *Hague-Visby Rules* by force of law.

[110] Before moving on to consider the scope of sections 43 and 46 of the Act, I shall first briefly consider the Service Contract, including whether it constitutes a contract of carriage as defined by Article 1(b) of the *Hague-Visby Rules*.

E. *The Service Contract*

[111] The contractual relationship between the parties is evidenced not only by the Shipping Documents pertaining to the cargo at issue, but also the Service Contract. As described in Section II (Facts) of these reasons, over the course of their business relationship, the parties have entered into a series of service contracts. The Service Contract at issue is the third such contract. It provides for discounted rates, as compared to the Carrier's published tariff, provided the minimum cargo commitment is reached. The Service Contract also contains a clause incorporating the terms of the "Carrier's bill of lading" into the Service Contracts and providing that said "bill of lading will determine the terms and conditions of the shipment." In the event of conflict between the provisions of the Service Contract and the terms of the bill of lading, those of the bill of lading prevail. While the Service Contract contains numerous references to United States' legislation and the US Federal Maritime Commission, it is the standard form terms of the Carrier's bill of lading that contains the governing law clause and the jurisdiction clause (United States District Court, Southern District of New York).

[112] In the United States, service contracts arose as a consequence of the deregulation of the shipping industry. Previously, all the shipping lines' tariffs were publicly available, filed with the Federal Maritime Commission, and no special treatment by the carrier was permitted. Following the reforms in 1984 and 1998, shippers and shipping lines became able to negotiate preferential and confidential rates based on a volume of cargo over a specified time (Proshanto K. Mukherjee et al, "A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective" (2009) 40 Journal of Maritime Law & Commerce 579 at 586-588 [Mukherjee]). Subsection 3(19) of the *Shipping Act* of 1984 defined a service contract, by reference to a volume commitment over a fixed period, as follows:

> a written contract, other than a bill of lading or receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the individual ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as, assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.
>
> (Mukherjee at 583; Title 46 *Code of Federal Regulations*, Part 530.3(q) (Service Contracts).)

[113] The Service Contract falls within the above definition. The Cargo Claimant highlights that the trade relationship between the parties as found in the Service Contract, i.e., the preferential rates, is distinct from the liability regime applicable to the carriage of the cargo. In this respect, the Cargo Claimant submits that it is the Shipping Documents that are the best evidence of the contracts of carriage at issue.

[114] The Carrier relies on the terms of Service Contract, including the terms incorporated by reference, alongside the terms contained in the Shipping Documents. The Carrier notes that the definition of a service contract in the *Code of Federal Regulations*, quoted above, states that it is a written contract "other than a bill of lading or receipt". The Carrier submits that the Service Contract does not attract the application of the *Hague-Visby Rules* nor does it constitute a contract for the carriage of goods by water under either section 43 or section 46 of the Act.

[115] Having considered the Service Contract, I do not find that it is the type of contract that attracts the application of *Hague-Visby Rules* by force of law. While it does govern the commercial relationship between the parties, it cannot be considered to be a bill of lading or

similar document of title for any particular shipment. It stands apart from the Shipping Documents, issued for each shipment, which I have determined are akin to waybills. I agree with the Cargo Claimant that, in the present case, the best evidence of the contracts of carriage are the Shipping Documents, albeit the applicable terms of the Service Contract are certainly not to be discounted. Indeed, the Shipping Documents all include a reference to the contract number of the Service Contract between the parties. I find that documents akin to waybills were issued by the Carrier for the shipments at issue, the rates for which were governed by the Service Contract.

F. *Conclusion – Characterization of the Shipping Documents and the Service Contract under the* Hague-Visby Rules *and section 43 of the* Act

[116] The Cargo Claimant argues that the Shipping Document is a bill of lading, as it is named as such on its face and thus the Carrier should be bound to the meaning of this term. The Carrier submits that the Shipping Document is more in the nature of a waybill and neither the Shipping Documents nor the Service Contract fulfill the characteristics and functions of a bill of lading.

[117] As discussed earlier in these reasons, bills of lading fulfill three key functions: (a) to act as a receipt for the goods received by the carrier; (b) to evidence the terms of the contract of carriage; and (c) to act as a "document of title" (*Canadian Maritime Law* at 565; *The Maurice Desgagnes* at para 14; *Cami Automotive* at para 13; *H Paulin* at para 27). In addition to the three key functions, the review of the authorities conducted in section V.C of these reasons demonstrates that bills of lading have a number of other characteristics. As per section V.D of these reasons, while waybills share two of the functions of bills of lading, they are not documents of title and do not require presentation in order to obtain delivery.

[118] The Shipping Document does contain numerous references to a bill of lading, including the header “INTERNATIONAL BILL OF LADING”. Nevertheless, the form that was used was a hybrid form, and ultimately the Shipping Document has the characteristics of a waybill and was used as such. The Shipping Document is not a contract of carriage “covered by a bill of lading or any similar document of title” such that it is the type of document that attracts the *Hague-Visby Rules* by force of law. As determined in section V.E (*The Service Contract*) of these reasons, neither is the Service Contract.

[119] Section 43 of the Act provides that the *Hague-Visby Rules* have the force of law in Canada with respect to “contracts for the carriage of goods by water.” Given that the Shipping Document is not a contract of carriage under the *Hague-Visby Rules*, it is not a “contract for the carriage of goods by water” under section 43 of the Act (*Cami Automotive* at paras 43-45).

G. *Does Section 46 of the Act Apply to the Shipping Documents?*

[120] Having found that the nature and effect of the Shipping Document is akin to a waybill that is not covered by the *Hague-Visby Rules* and section 43 of the Act, the issue that now arises is whether a waybill is a “contract for the carriage of goods by water” under section 46 of the Act. As mentioned, the Carrier submits that because the Shipping Document is not a “contract for the carriage of goods by water” under section 43 of the Act, it does not attract the application of section 46 of the Act, which equally applies to a “contract for the carriage of goods by water”. The Cargo Claimant pleads that while the same phrase is used in both sections of the Act, the scope of section 46 is much broader than section 43 given the purpose of the section, and thus the Shipping Document is covered by section 46 of the Act.

[121] If the Shipping Documents are found to be a “contract for the carriage of goods by water” under section 46 of the Act, then the Carrier’s motion would be denied and the claim heard in Canada. If not, then the Cargo Claimant must demonstrate a strong cause as per the test in *The Eleftheria* for the Court to decline to enforce the forum selection clause providing for disputes to be heard in the United States District Court, Southern District Court of New York.

[122] Section 46 of the Act permits a claimant to institute proceedings in Canada, despite a foreign forum selection clause in a contract of carriage, provided certain conditions are met. As mentioned previously in these reasons, my colleague Justice Heneghan determined that the Defendants have an agent in Canada, and thus the Cargo Claimant has satisfied this condition.

[123] The focus of the Cargo Claimant’s argument is on the purpose of section 46 of the Act, which it submits is to protect Canadian shippers and receivers. The Cargo Claimant relies on *OT Africa Line Ltd v Magic Sportswear Corp*, 2006 FCA 284 [*Magic Sportswear*] in which the Federal Court of Appeal highlighted the history of the section and its aim of protecting Canadian importers and exporters by permitting them to pursue their claims in Canada rather than in foreign jurisdictions.

[124] The Cargo Claimant submits that the present claim, brought by a small Canadian importer faced with the Carrier’s foreign jurisdiction clause, is exactly the type of situation that section 46 of the Act seeks to address.

[125] The Carrier pleads that the Shipping Document is not a "contract for the carriage of goods by water" under section 43 of the Act, and thus does not fall under section 46 of the Act because the same phrase is presumed to have the same meaning. The Carrier relies on the *Mercury XII*, in which the Federal Court of Appeal rejected the argument that the phrase sections 43 and 46 of the Act should be interpreted differently on the basis that the sections to serve different purposes (*Mercury XII (Ship) v. MLT-3 (Belle Copper No. 3)* 2013 FCA 96 at paras 32-36 [*Mercury XII*]). The Carrier submits that the Federal Court of Appeal has pronounced on this question, that the phrase has the same meaning, and thus this Court is bound to follow the decision in *Mercury XII*. The Carrier further relies on *Sullivan on the Construction of Statutes* for the proposition that the same language within a statute in close proximity is strongly presumed to have the same meaning (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ontario: LexisNexis Canada Inc, 2008) at 214-16 [Sullivan]; *Mercury XII* at para 33).

[126] The Cargo Claimant disagrees and pleads that in both the *Mercury XII* and the *Federal Ems*, the issue before the Federal Court of Appeal was with whether charterparties were "contract[s] for the carriage of goods by water" under section 43 and section 46, respectively. The Cargo Claimant submits that not only is this Court not bound by the *Mercury XII* because it was a charterparty case, but the facts at hand dictate that the policy goal of section 46 should bear greater weight than the use of the same language in sections 43 and 46. This case involves cargo shipped as part of the liner trade, where, unlike in the context of charterparties, there exists an imbalance of bargaining power (*The Federal Ems* at para 61). The Cargo Claimant also relies on *Sullivan on the Construction of Statutes*, highlighting that the purpose must be taken into

account, and one must do so regardless of whether the legislation is ambiguous or not (Sullivan, 6th ed at para 2.2).

[127] The Carrier denies that an imbalance of power exists or that the Cargo Claimant is in need of protection. The Carrier submits that the Cargo Claimant is a sophisticated commercial entity and that the evidence establishes that the parties repeatedly entered into service contracts covering large volumes of cargo with preferential rates. The Carrier pleads that the parties have had a business relationship since 2012 and should be held to their bargains.

[128] I agree with the Cargo Claimant as to the purpose of section 46 of the Act. Section 46 was primarily enacted in order to protect Canadian exporters and importers from having to bear the expense, which may be prohibitive, of litigating claims against carriers in foreign jurisdictions (*Magic Sportswear* at paras 56-58). During parliamentary proceedings, particular concern was expressed that small and medium-sized Canadian shippers and consignees did not have much bargaining power and would thus be at the mercy of carriers who tend to insert exclusive jurisdiction clauses into their documentation (*Magic Sportswear* at paras 57-58). Section 46 has been described as being designed to redress a perceived power imbalance between carrier and shippers, by favouring the shippers (*Magic Sportswear* at para 65).

[129] This purpose of seeking to redress a perceived power imbalance was also one of the driving factors behind the development of the various international regimes dealt with in detail in section V.B (The *Hague-Visby Rules* – Introduction and Context) of these reasons (see also *The Federal Ems* at paras 45-57, 61). As noted previously, the late 19th and early 20th century

legislation that seeded the *Hague* and *Hague-Visby Rules* may be considered, "the first consumer protection legislation regulating the rights and obligation of ocean carriers under bills of lading." (*The Federal Ems* at para 47). Along with seeking to provide certainty and uniformity, the *Hague* and *Hague-Visby Rules* sought to address the mischief of extensive exculpatory clauses in bills of lading issued by carriers (*The Federal Ems* at paras 46-47, 61; *Canadian Maritime Law* at 596). As discussed in detail in section V.C of these reasons, the *Hague-Visby Rules* have force of law in Canada in respect of contracts for the carriage of goods by water by virtue of section 43 of the Act.

[130] Sections 43 and 46 are contained in Part 5 of the Act entitled Liability for the Carriage of Goods by Water. The purpose of the provisions, as well as the legal context in which they were adopted, speak to an effort to address a power imbalance between carriers operating in the liner trade and the shippers and consignees whose cargo is carried. Given the alignment between the aims of sections 43 and 46, I do not consider that the meaning of the language in section 46 can be divorced from the meaning of the language in section 43. The context and general purpose of Part 5 of the *Act* is to deal with the rights and obligations of carriers in the liner trade by implementing the *Hague-Visby Rules* and providing for the possible implementation of the *Hamburg Rules* (*The Federal Ems* at paras 71-80). The general purpose of Part 5 aligns with the specific mischief that section 46 was meant to cure, namely boilerplate jurisdiction clauses dictated by carriers to the detriment of Canadian importers and exporters (*The Federal Ems* at para 80). It cannot be said, in my view, that the purposes of sections 43 and 46 differ such that a different interpretation of the term "contract for the carriage of goods by water" is warranted.

[131] A conclusion that the term "contract for the carriage of goods by water" has the same meaning in sections 43 and 46 is further supported by the Federal Court of Appeal's findings in the *Mercury XII*. While, as the Cargo Claimant pleads, the *Mercury XII* did deal with whether the term as found in sections 43 and 46 should be interpreted consistently in excluding charterparties, I nevertheless find the reasoning to be applicable to the matter at hand. The Federal Court of Appeal highlighted that the presumption that language has the same meaning is particularly difficult to rebut when the words appear relatively close together in a statute and noted that the legal nature of the term "contract for the carriage of goods by water" tends to strengthen this presumption (*Mercury XII* at para 33; see also *Sullivan* 5th ed at 214-215). The term "contract for the carriage of goods by water" in section 43 does not include waybills (*Cami Automotive* at paras 44-45). The same term as used in section 46 should be given the same meaning, and thus also not include waybills.

[132] Such an interpretation is further supported by the scheme of Part 5, in that section 46 is meant to operate alongside the *Hague-Visby Rules* regime in section 43 and Schedule III. As noted previously, the *Hamburg Rules* contains provisions dealing with jurisdiction and arbitration clauses (*The Federal Ems* at paras 51, 64), but the *Hague-Visby Rules* do not. Consequently, a number of nations who had not implemented the *Hamburg Rules*, including Canada, Australia, New Zealand, South Africa, Denmark, Finland, Norway and Sweden, enacted domestic legislation to address the use of foreign jurisdiction clauses (*Magic Sportswear* at para 64; *The Federal Ems* at para 65). Section 46 of the Act refers to "a contract for the carriage of goods by water to which the Hamburg Rules do not apply…" Accordingly, an interpretation of

the language of section 46 that has the same meaning as the language in section 43, and operates in conjunction with the *Hague-Visby Rules,* is preferable.

[133] The Cargo Claimant pleads that if the Shipping Documents do not fall within the ambit of section 46, this would have far-reaching and devastating consequences for Canadian shippers and consignees, along with the carriage of goods regime in Canada. The Cargo Claimant submits that those who contract on a door-to-door basis would be denied the protection of section 46 and be forced to abdicate their right to pursue a claim in Canada. The Cargo Claimant further submits that the growing use of non-negotiable documents in multi-modal transport is very real and to restrict the application of section 46 to bills of lading or similar documents of title would frustrate the purpose of section 46 of the Act.

[134] As noted in sections I and IV of these reasons, Canada's carriage of goods regime, a *Hague-Visby Rules* based regime, is rooted in centuries' old concepts and terms. In effect, the Cargo Claimant is seeking to have this Court adopt an expansive interpretation of section 46, of the Act so as to include the Shipping Documents, which I have found to be akin to waybills. The regime in Part 5 of the Act must, in my view, be read harmoniously. The *Hague-Visby Rules* and section 43 do not apply to waybills by force of law (*Cami Automotive* at paras 44-45; *Canadian Maritime Law* at 607; Aikens at 2.16). As noted previously, the more modern international conventions, the *Hamburg Rules* and the *Rotterdam Rules*, do cover waybills and other similar non-negotiable documents.

[135] Given that the *Hague-Visby Rules'* limited application in terms of transport documentation by comparison to more modern international conventions, a number of nations have passed legislation extending their carriage regimes to cover waybills and other non-negotiable documents (*Cami Automotive* at para 46; Tetley at 2304). Examples include Australia, United Kingdom, New Zealand, Denmark, Norway, Sweden, Finland, South Africa and Singapore. As noted by Justice Blanchard in *Cami Automotive*, no such legislation has been enacted in Canada (para 46).

[136] The Cargo Claimant's concern that the regime does not apply to it by force of law because of the nature of the documentation holds true for both sections 43 and 46. Both sections had as their purposes to protect shippers and consignees, and neither apply by force of law because the Shipping Documents are not bills of lading or similar documents of title, and therefore are not contracts for the carriage of goods by water under the Act. Canada differs from a number of nations who have extended their carriage regimes, including provisions analogous to section 46, to apply to waybills. By way of example, Australia's equivalent to section 46 of the Act, section 11 of *Carriage of Goods by Sea Act 1991*, applies to "sea-carriage documents" which by definition includes not only bills of lading, but waybills, consignment notes and other non-negotiable instruments (Tetley at 2419-2422).

[137] I agree with the Cargo Claimant in that the widespread use of non-negotiable carriage documents may well result in claimants, such as the Cargo Claimant, not being able to avail themselves of rights of action in Canada pursuant to section 46 of the Act. It is not for this Court, however, to broaden the scope of Canada's carriage of goods regime, contained in Part 5 of the

Act, so as to include waybills and other similar non-negotiable documents. The Carrier pleads that a future Parliament may choose to extend the scope, but has not done so yet. I agree with the Carrier that the question of whether Canada's carriage of goods regime, and particularly section 46, should be extended to apply to waybills is one for Parliament.

[138] As noted above, the Cargo Claimant submitted that every Canadian shipper or consignee that contracts on a door-to-door basis would be abdicating their rights to pursue a claim in Canada. While cargo shipped door-to-door frequently moves on a waybill basis, that is not to say this is always the case. The terms intermodal bills of lading, multimodal bills of lading, and combined transport bills, refer to bills covering at least two modes of transport (Gaskell at 15; *Canadian Maritime Law* at 573-574). The term through bills of lading, which are bills that cover both marine and inland portions of the carriage, are referred to in the *Federal Courts Act*, at paragraph 22(2)(f), in respect of the Court's jurisdiction. The Carrier pleads that there was nothing preventing the Cargo Claimant from requesting through or multimodal bills of lading had the Cargo Claimant wished to contract on that basis. The Carrier highlights that original sets of combined transport bills are used in the industry and covered by the UCP 500, being the instrument used in documentary credit transactions (Uniform Customs and Practices for Documentary Credits (UCP) issued by the International Chamber of Commerce at Article 26; see Gaskell at 15).

[139] While I agree with the Cargo Claimant that the scope of section 46 of the Act impacts Canadian shippers and consignees of cargo shipped door-to-door, documentation options exist should such shippers and consignees wish to ensure that a "contract for the carriage of goods by

water" pursuant to section 46 of the Act is in place. Contrary to the submissions of the Cargo Claimant, I do not find that the interests of justice warrant an expansive interpretation of section 46 to include waybills and consequently the Shipping Document. The Cargo Claimant is not wrong that the current carriage of goods regime is, in a number of respects, out of step with the modern realities of the liner trade and door-to-door transport, but that does not empower me to take a step that Parliament has not chosen to take.

[140] Having found that the contractual arrangements between the parties, namely the Shipping Documents and the Service Contract, do not attract the application of section 46 of the Act, I now turn to the question of whether the forum selection clause in favour of the United States District Court, Southern District of New York, should nevertheless be set aside on the basis of the strong test.

H. *Is There a Strong Cause Not to Enforce the Forum Selection Clause in Favour of the United States District Court, Southern District of New York?*

[141] Section 46 of the Act is not applicable to the matter at hand. The appropriate test, therefore, on a motion for a stay pursuant to subsection 50(1) of the *Federal Courts Act*, is the "strong cause" test as set out in *The Eleftheria* and adopted by the Supreme Court of Canada in *ZI Pompey* (*Arc-En-Ciel* 2021 at para 20). Being satisfied that the Shipping Documents and the Service Contract bind the parties, I must grant the stay unless the Cargo Claimant "can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause." (*ZI Pompey* at para 39).

[142] The strong cause test imposes the burden on the party contesting a forum selection clause to satisfy the Court that there is a good reason it should not be bound by the clause (*ZI Pompey* at para 20). The Supreme Court has instructed that it "is essential that courts give full weight to the desirability of holding contracting parties to their agreements" (*ibid* at para 20). The Supreme Court has further stated that forum selection clauses serve a valuable purpose and "are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law" (*Douez v Facebook, Inc*, 2017 SCC 33 at para 24 [*Douez*]; *ZI Pompey* at para 20).

[143] In *The Eleftheria*, Justice Brandon set out the strong cause test as follows:

> (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts. (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would (i) be deprived of security for that claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.
>
> (*The Eleftheria*; *ZI Pompey* at 19.)

[144] The Supreme Court has noted that there is some flexibility in the list of factors above and that the list is not a closed list (*Douez* at para 30). When exercising its discretion under section 50 of the *Federal Courts Act*, the Court should take into account all of the circumstances of a particular case (*ZI Pompey* at para 39; *Douez* at para 30). The Cargo Claimant pleads, relying on *Douez*, that public policy considerations must enter into consideration, along with such elements as the convenience of the parties, fairness and the interests of justice. The Carrier disagrees and submits that in *Douez* the Supreme Court confirmed (i) the strong cause factors have been interpreted and applied restrictively in a commercial context, and (ii) public policy considerations come into play in the consumer context, not the commercial context. I shall first address the factors listed in *The Eleftheria* that were raised by the parties and then turn to the public policy issue raised by the Cargo Claimant.

[145] The first factor to be considered is where the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the Federal Court and the foreign court. The Cargo Claimant submits that the evidence is primarily located in Canada, including: (i) evidence of loss and damage to the cargo because the containers were unsealed in, and the cargo subsequently surveyed in, Canada; (ii) the Cargo Claimant's witnesses are located in Canada because it operates in Canada; and (iii) the Carrier's Canadian agent who has assisted in the processing of the present claims. The Carrier responds that there are a number of jurisdictions involved, notably: (i) Costa Rica where the containers were stuffed and sealed; (ii) Costa Rica where the vessels were loaded; (iii) evidence from the vessels as to their seaworthiness at the beginning of the voyages; (iii) Guatemala where the cargos were transhipped; (iv) United States, where the cargos were discharged and then carried

by road; (v) United States, where the Carrier has its principal place of business; and (vi) Canada for the reasons stated previously.

[146] While I accept that evidence on issues of fact is located in Canada, it is not exclusively the case. I further accept that the Cargo Claimant will wish to call witnesses who are based in Canada, which may well cause inconvenience and expense if they were to testify in the United States. The Court of Appeal has established, however, that "mere questions of convenience in the marshalling of evidence are not enough to overcome a contractual undertaking to submit a dispute to arbitration or to a foreign court." (*Ultramar Canada v Lineas Asmar SA*, [1989] FCJ No 242 (FCA) at para 1 [*Ultramar*]; see also *Sea Pearl (Ship) v Seven Seas Dry Cargo Shipping Corporation*, [1983] 2 FC 161 (FCA) [*The Sea Pearl*]). Justice Brandon in *The Eleftheria* found that the inconvenience and expense of having to take witnesses from England to Greece could not be regarded, in any way, as overwhelming or insuperable (at 245). This Court has determined that the fact that the language of the Israeli courts is Hebrew and that several witnesses would have to travel to Israel from Canada did not constitute sufficiently strong reasons to not enforce a jurisdiction clause in a bill of lading (*Transcontinental Sales Inc v Zim Container Service* [1997] 131 FTR 156 [*Transcontinental Sales*]).

[147] In addition, as to the location of witnesses, I note that this may be less of an issue in the age of virtual appearances as it has been in the past. Recently, this Court, in the context of a motion for a stay in an action for loss of cargo, found that geographic distance was less of a factor given new technologies and the use of virtual platforms for court proceedings (*Brinks Global Services Ltd et al v Binex Line Corp et al*, 2022 FC 571 at paras 79-83 [*Brinks*]). My

colleague Prothonotary Kevin R. Aalto stated that “we all now live and work in this new digital age…[and] the parties are but a click away from accessing the Court.” (*Brinks* at paras 80, 83). Prothonotary Aalto also quoted with approval Justice Morgan of the Ontario Superior Court who noted that “a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web… Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger.” (*Brinks* at para 82, citing *Kore Meals LLC v Freshii Development LLC*, 2021 ONSC 2896 at paras 31-32).

[148] The Cargo Claimant relies on *Bomar Navigation Ltee v Hansa Bay* [1975] FC 231 for the proposition that the location of witnesses and evidence in Canada is sufficient grounds to refuse to grant a motion for stay. I prefer the slightly more recent authorities, including those of the Court of Appeal, discussed above (*Transcontinental Sales; The Sea Pearl; Ultramar; The Eleftheria*). In addition, given the increased use of virtual platforms in the recent years, it would be challenging to suggest that the expense and inconvenience of having witnesses located in Canada is substantially greater than the similar situations previously addressed by this Court prior to the existence of such platforms.

[149] The Cargo Claimant pleads that the expense of litigation would be much higher in the United States than it would be in Canada. The Carrier responds that no evidence was presented to this effect. I agree that no evidence was presented as to the increased cost. I also note that this Court has found arguments as to the litigation expense or inability to recover costs in a foreign jurisdiction not to be persuasive in the context of declining to grant a stay under the strong cause test (*Trans-Continental Textile Recycling Ltd v Erato (The)*, [1996] 1 FC 404 at para 30; *Anraj*

Fish Products Industries Ltd v Hyundai Merchant Marine Co Ltd, (2000) 190 FTR 259 (FCA) [*Anraj*]). The Cargo Claimant pleads that in *Hitachi Maxco Ltd v Dolphin Logistics Company Ltd*, 2010 FC 853 [*Hitachi*], Justice Harrington dismissed a motion for a stay of proceedings despite the fact that there was a meagre evidentiary record. I do not find that *Hitachi* salvages the Cargo Claimant's position, as I find it to be distinguishable from the matter at hand in that it was decided on the basis of *forum non conveniens* (at para 43).

[150] I turn now to the applicable law. In *The Eleftheria*, Justice Brandon, when considering whether an action in England should be stayed in favour of a Greek court, found "of substantial importance the circumstances that Greek law governs, and is, in respects which may be material, different from English law" (at 246). Justice Brandon found that it is more satisfactory for the law of a foreign country to be decided by the court of that country (at 246; *Anraj* at para 8(2)). He further noted that there is a significant difference on appeal in that a question of foreign law decided by a foreign court is appealable as a question of law, while a question of foreign law decided by an English court on the basis of expert evidence is treated as a question of fact for the purposes of appeal, which therefore limits the scope of an appeal (at 246).

[151] In the matter at hand, the evidence is that the law governing the parties' contractual relationship is the United States *Carriage of Goods by Sea Act*, 1936, the federal law of the United States, and where there is no governing federal law, then the laws of the State of New York. The Court can, and does, decide questions of foreign law on the basis of expert evidence from foreign lawyers. Nevertheless, I find that the fact the United States' law applies to the matter at hand weighs in favour of granting the stay. Moreover, there is no evidence that there

are any serious defects in the procedure of the United States District Court that could warrant consideration in the context of the requested stay (*Anraj* at para 8(2)).

[152] I now consider the connections of the parties to the two forums. The evidence is that the Cargo Claimant is a Canadian company, organized under the laws of Ontario, that imports fresh produce into Canada and distributes it to the local market. The Carrier is a company organized under the law of Bermuda, with its principal place of business in the United States, that provides dry and refrigerated containerized cargo services between Central and North America. The Cargo Claimant is connected to Canada and the Carrier has connections to the United States. This factor, in my view, does not demonstrate a strong reason to displace the forum selection clause.

[153] The next factor is whether a defendant genuinely desires a trial in the foreign country or whether they are only seeking a procedural advantage. The Federal Court of Appeal has noted, citing Justice Brandon in *The El Amria*, that this consideration arose out of a factual situation where the main motive of a defendant in applying for a stay was shown by the evidence to have been to avoid giving security for the plaintiff's claim in England, rather than actually litigating in the foreign forum (*Anraj* at para 8(4), *Arata Potato Co. v. Egyptian Navigation Co. (The El Amria)* [1981] 2 Lloyd's Rep 119 (Eng. C.A.) at 127). There is no evidence on the record to support a conclusion that the Carrier's motive is only to seek a procedural advantage.

[154] The final factor listed in *The Eleftheria* is whether the plaintiff would be prejudiced by having to litigate in the foreign court because they would (i) be deprived of security for that

claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial. The sole applicable point for this factor is the issue of the time bar. The terms of the Shipping Documents contain a one-year time bar from the date upon which the cargos were delivered.

[155] When this motion was first heard in 2019, counsel for the Carrier provided an undertaking to refrain from raising the time-bar. In her judgment, Justice Heneghan, stated that the position of the Carrier "while admirable, will not be binding upon a foreign Court, so it is of limited benefit at this time" (*Arc-en-Ciel* 2020 at para 50). On appeal, the Court of Appeal stated that "the reasons do not explain why the prejudice associated with the limitation period was not addressed by GWF's undertaking to not pursue that defence, other than to say that the undertaking would not be binding on the American court. While I share the Federal Court's concern about the enforceability in an American court of an oral undertaking given in the course of argument, the reasons, alone, amount to conjecture and do not, again, reflect that the legal obligation to establish prejudice rested with the plaintiff" (*Arc-En-Ciel* 2021 at para 16). The Cargo Claimant relies upon the comments by Justice Heneghan and the Court of Appeal, and raises concerns about the legitimacy of the Carrier's waiver of the time-bar by its counsel and the value of the waiver before a foreign court. The Cargo Claimant also submits that the Carrier did not waive the time-bar through an affidavit nor has the Carrier adduced evidence to speak to the effect such a waiver would have under foreign law. In response, the Carrier submits that its undertaking via counsel is a standard practice before this Court and that the Cargo Claimant has failed to show prejudice on its part.

[156] I agree with Justice Heneghan and the Court of Appeal that an oral undertaking made to this Court may well not be enforceable in a foreign court. While one would hope that in the interests of comity, a District Court of the United States would enforce an undertaking made by counsel in written and oral submissions, there is no such guarantee; in any event, that would be a question for the District Court of the United States to determine. This does not mean, however, that the undertaking provided by counsel on behalf of the Carrier to this Court is of no moment. Such an undertaking, given by counsel on behalf of their client, may be relied upon and taken into account when rendering an order.

[157] One-year time bars are common in such cases given that the *Hague* and *Hague-Visby Rules* contain one-year time bars, as do the contracts that incorporate those rules (Tetley at 1623 and ff). Where, in an admiralty action, a time-bar has been an issue in the context of a motion for stay, there are numerous instances where this Court has made the stay conditional on an undertaking or waiver of the time-bar (*Anraj*; *Nissho Iwai Corp v Paragon Grand Carriers Corp*, [1987] 11 FTR 134, 5 ACWS (3d) 389; *Ocean Star Container Line AG v Iberfreight SA*, [1989] 104 NR 164, 16 ACWS (3d) 4; *Transcontinental Sales*; *Can-am Produce & Trading Ltd v "Senator" (The)*, [1996] FCJ No 550, 112 FTR 255; *Burrard-Yarrows Corp v "Hoegh Merchant" (The)*, [1982] 1 FC 248 upheld in [1983] 1 FC 495 [*The Hoegh Merchant*]). In a number of cases, the stay has been conditional upon the defendants' undertaking or waiver in writing to be filed within sixty (60) days of the date of the order (*Anraj*; *Transcontinental Sales; Ocean Star Container Line*).

[158] I see no reason why such a conditional order in the present matter would not address the argument raised by the Cargo Claimant that the time-bar would cause prejudice. The present action would be stayed, not dismissed, and the Cargo Claimant would have recourse to this Court should the Carrier raise the time-bar in the foreign proceedings. Indeed, I can assure the Cargo Claimant that this Court would take a dim view of a party's failure to comply with such an undertaking and costs remain available as a mechanism to compensate for such non-compliance. Accordingly, I find that the issue of the time-bar does not constitute a strong reason to decline to enforce the forum selection clause.

[159] Finally, as noted above, the Cargo Claimant also raises as a circumstance in the present case the issue of public policy and relies on *Douez*. In response, the Carrier submits that the Supreme Court's finding in *Douez* that public policy considerations play a role in the strong cause test was made within a consumer context, not a commercial one.

[160] The foundation of the Cargo Claimant's argument is the policy and legislative purpose underlying the enactment of section 46 of the Act, discussed above in section V.G of these reasons. The Cargo Claimant submits that the protection of small and medium-sized Canadian importers and exporters should raise sufficient public policy concerns to warrant this Court setting aside the forum selection clause.

[161] In *Douez*, the Supreme Court noted that "the strong cause factors have been interpreted and applied restrictively in the commercial context" and that in a commercial setting, forum selection clauses are generally enforced and to be encouraged (*Douez* at para 31). The Supreme

Court specifically referred to *ZI Pompey*, where the Supreme Court enforced a forum selection clause in a bill of lading, noting that the parties in that case were corporations with significant experience in international maritime commerce (at para 32). The Supreme Court stated, however, that commercial and consumer relationships are very different, and as such, the consumer context may provide strong reasons to not enforce a forum selection clause (at para 33). The Supreme Court highlighted that in a commercial context, forum selection clauses support certainty, security, stability and foreseeability, while in a consumer context, the unequal bargaining power, the rights the consumer relinquishes, and the fact that millions of ordinary people would not foresee or expect the implications of the terms or be deemed to have undertaken a sophisticated analysis of foreign legal systems prior to opening an online account (*Douez* at paras 31, 33). The Supreme Court found that "different concerns animate the consumer context than those that this Court considered in *Pompey*, where a sophisticated commercial transaction was at issue," and consequently, modified the strong cause factors in the consumer context to account for "public policy considerations relating to the gross inequality of bargaining power between the parties and the nature of the rights at stake" (at paras 35, 38). Nevertheless, the Supreme Court emphasized that the burden remains on the party wishing to avoid the clause to establish a strong cause (at para 38).

[162] I am not persuaded that the relationship between the parties in the present case falls properly within the consumer context addressed in *Douez*. In *Douez*, the online contract of adhesion was between an individual consumer and a large multi-billion dollar corporation (at paras 53 and 54). The decisive factors in *Douez* were that the claim involved "a consumer contract of adhesion and a statutory cause of action implicating the quasi-constitutional privacy

rights of British Columbians" (at para 50). The present contractual relationship differs markedly from the consumer relationship at issue in *Douez*. The evidence is that since in the inception of the relationship between the Cargo Claimant and the Carrier in 2012, they have entered into three different service contracts, including the Service Contract, with preferential rates as compared to the tariff rates. As of June 2019, the Carrier had transported approximately 185 containers of produce for the Cargo Claimant, more than half of which were transported under the service contracts. The Cargo Claimant is not a newcomer to maritime commerce and, as of the hearing, the parties have continued to work together for close to a decade.

[163] As noted previously, the Cargo Claimant was, however, subject to the Carrier's standard form terms, including the forum selection clause contained within the standard terms and conditions on the back of the Shipping Documents. These standard form terms do not, in my view, render the present matter analogous to *Douez.* Rather, this matter remains a commercial matter, not a consumer one. I find that cases such as *ZI Pompey*, *The Eleftheria*, *Transcontinental Sales*, *Anraj* and *The Hoegh Merchant*, which address forum selection clauses in contracts of carriage by sea, are properly applicable.

[164] In addition, even if the public policy of protecting small and medium-sized Canadian importers and exporters were to be a consideration, I do not find that it warrants setting aside the forum selection clause in this case. Section 46 of the Act was primarily enacted to protect Canadian importers and exporters from having to bear the expense of litigating claims against carriers in foreign jurisdictions (see section V.G of these reasons above). I have determined, above, that the Shipping Documents fall outside the scope of section 46 of the Act. Were I to

decline to enforce the forum selection clause based on a policy of protecting the Cargo Claimant from having to litigate in the United States against the Carrier, I would simply be doing indirectly what I cannot do directly.

[165] The starting point under the strong cause test is that parties should be held to their bargain (*ZI Pompey* at para 21). In all but exceptional circumstances, the Court is to give effect to the parties' agreement (*ibid*). Taking into account all the circumstances of the present case, I am of the view that the Cargo Claimant has not met its burden of showing sufficiently strong reasons to conclude that it would not be reasonable or just to enforce the forum selection clause (*Anraj* at para 9).

VI. Conclusion

[166] I have concluded that contractual arrangements between the Carrier and the Cargo Claimant, namely the Shipping Documents and the Service Contract, fall outside the scope of section 46 of the Act. I find the Shipping Documents are akin to waybills, namely non-negotiable receipts that are not documents of title. The Service Contract, akin to a volume contract in the United States, is not a bill of lading or similar document of title. Accordingly, neither the Shipping Documents nor the Service Contract are "contract(s) for the carriage of goods by water" pursuant to section 46 of the Act.

[167] Given that I have concluded that section 46 of the Act is not applicable, in order to have this matter heard in Canada, the Cargo Claimant bore the burden of demonstrating a strong cause as to why the forum selection clause should not be enforced (*Arc-En-Ciel* 2021 at para 20). I find

that the Cargo Claimant has not met its burden. Consequently, the Carrier's motions for a stay of the proceedings, pursuant to subsection 50(1) of the *Federal Courts Act*, by reason of the forum selection clause in favour of the United States District Court, Southern District of New York, are granted.

[168] The Carrier, through its counsel, has provided an undertaking to waive the contractual time-bar. In granting a stay, this Court may impose such conditions as it considers just. Consequently, the stay is granted conditional upon such a waiver being provided in writing and filed in the Court record within sixty (60) days of the date of these reasons.

JUDGMENT in T-2184-18 and T-2185-18

THIS COURT'S JUDGMENT is that:

1. The motions for stays of the proceedings are granted, conditional upon the Defendant, Great White Fleet, providing an undertaking in writing to waive any applicable time-bar and/or defence based thereon, to be served and filed into the Court record within sixty (60) days of the date of this judgment.

2. Costs are awarded to the Defendant, Great White Fleet.

3. The parties are encouraged to resolve the issue of costs. If the parties are unable to do so, then brief submissions not exceeding three (3) pages may be made along with a draft bill of costs, to be served and filed within thirty (30) days of the date of this judgment.

4. This judgment shall be placed on files T-2185-18 and T-2184-18.

"Vanessa Rochester"
Judge

APPENDIX A

GREAT WHITE FLEET LINER SERVICES LTD.

INTERNATIONAL BILL OF LADING

NOT NEGOTIABLE UNLESS CONSIGNED "TO ORDER"

SHIPPER (COMPLETE NAME AND ADDRESS)
ARCSAM DE COSTA RICA S.A.
TELEFAX (506) 2481-0851
TICAPRODUCE@HOTMAIL.COM
SAN RAMON, CHACHAGUA, EBAIS
800 MTS OESTE

BOOKING NO. 3033164A
BILL OF LADING NO. GWFT3033164A

FORWARDER / SHIPPER REFERENCE NO.
B-KABELMA
02/2240

CONSIGNEE (COMPLETE NAME AND ADDRESS)
ARC-EN-CIEL PRODUCE INC.
122 THE WEST MALL
ETOBICOKE , TORONTO, ONTARIO
CANADA M9C 1B9

FORWARDING AGENT/F M C NO.
*MOBILE SAM: (647) 400-3855

POINT AND COUNTRY OF ORIGIN
CHACHAGUA, CR

NOTIFY PARTY (COMPLETE NAME AND ADDRESS)
SAME AS CNEE
ATTN: MRS DEBBIE BOSCO & SAM HAK
PHONE: (416)236-4949/TIFAX: (416)
236-4915 MOBILE DEBBIE: (647)228-
8237*

EXPORT INSTRUCTIONS
EXPRESS RELEASE

INITIAL CARRIAGE BY (MODE)

PLACE OF RECEIPT*
CHACHAGUA, CR

SERVICE CONTRACT NUMBER
SC20173855

VESSEL / VOYAGE
MSC BELLE LE750A

PORT OF LOADING
PUERTO LIMON, CR

LOADING PIER/TERMINAL

PORT OF DISCHARGE
PUERTO BARRIOS, GT

PLACE OF DELIVERY*
ETOBICOKE, ONT.

TYPE OF MOVE (IF MIXED, USE DESCRIPTION OF GOODS BLOCK)
DOOR/DOOR

CARRIER'S RECEIPT — PARTICULARS FURNISHED BY SHIPPER - CARRIER NOT RESPONSIBLE

MARKS / CONTAINER NOS	NO. OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASURE
TEMU9449765 40HR SN# CBA2475158 SC20173855 NO.RYAN 76396703	1	732 BOXES OF CASSAVA 16 KGS 540 BOXES OF EDDOES 16 KGS 1272 BOXES TOTAL 1X40'HR CNTR SLAC: ***TEMP: +48 DEG. FAHR***	22132KG 48793LB	
		SHIPPER LOAD, STOW AND COUNT "CARRIER SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR DELAY HOWSOEVER ARISING OR RESULTING FROM ANY ACTS, INCLUDING BUT NOT LIMITED TO HIJACKINGS, OF THIEVES, PIRATES, OR ASSAILING THIEVES OCCURING AT ANY STAGE OF TRANSPORTATION. MERCHANTS ATTENTION IS ALSO DRAWN TO THE TERMS AND CONDITIONS OF THIS BILL OF LADING IN RESPECT TO LIABILITIES AND LIMITATIONS ARISING DURING INTERMODAL CARRIAGE"		
	1	TOTALS	22132KG 48793LB	

DECLARED VALUE $

(SEE CLAUSE 19 ON THE REVERSE SIDE OF THIS BILL OF LADING)

TEMPERATURE SET POINT
+48 F VENTS: 10% OPEN

FREIGHT

INTERMODAL	IM	.00 C
VESSEL BUNKER FUE	VF	.00 C
FOREIGN INTERMODA	FI	.00 C
US SECURITY CHARG	SE	.00 C
INLAND FUEL RECOV	IF	.00 C
LOW SULFUR FUEL S	LF	.00 C
COSTA RICA SECURI	CS	.00 C
WHARFAGE CHARGE	WF	.00 C

CONTINUED ON PAGE 2

RECEIVED from the Merchant, in apparent good order and condition (unless otherwise noted), the number of packages or customary freight units set forth under the Carrier's Receipt above, to be transported hereunder to the Place of Delivery named herein (or, if not so named, to the Port of Discharge named hereto) to the Consignee, holder of this Bill of Lading, or on-carrier. Such transport is subject to the terms and conditions on both sides of this Bill of Lading and to the terms and conditions of all other documents issued by the Carrier in connection with such transport (including, if applicable, the Carrier's Tariff), and the Merchant in accepting this Bill of Lading agrees to be bound by all such terms and conditions.
The Shipper's Memorandum is not a term of this Bill of Lading but contains particulars furnished by the shipper solely for its use (including the description, weight and measurement of the goods said by the Shipper to be contained in the shipment), and the Carrier has no knowledge of and makes no representation as to the accuracy of any particulars in The Shipper's Memorandum

IN WITNESS WHEREOF, the Carrier has signed _____ original Bills of Lading, all of the tenor and date, and if one is accomplished the others shall be void.

DATED _____ SIGNATURE: _____

On Behalf of Carrier GREAT WHITE FLEET LINER SERVICES LTD.
Directly, or Through the Following Agent:

NAME OF AGENT (IF ANY): _____

*Applicable only where the place of receipt or delivery differs from the port of loading or discharge, respectively.

GREAT WHITE FLEET LINER SERVICES LTD.

INTERNATIONAL BILL OF LADING

NOT NEGOTIABLE UNLESS CONSIGNED "TO ORDER"

SHIPPER (COMPLETE NAME AND ADDRESS)
ARCSAM DE COSTA RICA S.A.
TELEFAX (506) 2481-0851
TICAPRODUCE@HOTMAIL.COM
SAN RAMON, CHACHAGUA, EBAIS
800 MTS ORSTE

BOOKING NO. 3033164A
BILL OF LADING NO. GWFT3033164A

FORWARDER / SHIPPER REFERENCE NO.
B-KABELMA
02/2240

CONSIGNEE (COMPLETE NAME AND ADDRESS)
ARC-EN-CIEL PRODUCE INC.
122 THE WEST MALL
ETOBICOKE , TORONTO, ONTARIO
CANADA M9C 1B9

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ATTN: MRS DEBBIE BOSCO & SAM HAK
PHONE:(416)236-4949/TIFAX:(416)
236-4915 MOBILE DEBBIE: (647)228-
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PLACE OF RECEIPT*
CHACHAGUA, CR

SERVICE CONTRACT NUMBER
SC20173855

VESSEL / VOYAGE
MSC BELLE LE750A

PORT OF LOADING
PUERTO LIMON, CR

LOADING PIER/TERMINAL

PORT OF DISCHARGE
PUERTO BARRIOS, GT

PLACE OF DELIVERY*
ETOBICOKE, ONT.

TYPE OF MOVE (IF MIXED, USE DESCRIPTION OF GOODS BLOCK)
DOOR/DOOR

CARRIER'S RECEIPT

PARTICULARS FURNISHED BY SHIPPER - CARRIER NOT RESPONSIBLE

MARKS / CONTAINER NOS.	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASURE

EXPRESS RELEASE

PAID wire JMV 9/18 20180142365

DECLARED VALUE $

(SEE CLAUSE 1b OF REVERSE SIDE OF BILL OF LADING)

TEMPERATURE SET POINT
+48 F VENTS: 10% OPEN

FREIGHT

CONTINUATION - PAGE 2
TICA SURCHARGE TS .00 C
TOTAL PREPAID USD
TOTAL COLLECT USD .00

RECEIVED from the Merchant, in apparent good order and condition (unless otherwise noted), the number of packages or customary freight units set forth under the Carrier's Receipt above, to be transported hereunder to the Place of Delivery named herein (or, if not so named, to the Port of Discharge named herein) to the Consignee, holder of this Bill of Lading, or on-carrier. Such transport is subject to the terms and conditions on both sides of this Bill of Lading and to the terms and conditions of all other documents issued by the Carrier in connection with such transport (including, if applicable, the Carrier's tariff), and the Merchant in accepting this Bill of Lading agrees to be bound by all such terms and conditions.
The Shipper's Memorandum is not a term of this Bill of Lading but contains particulars furnished by the shipper solely for its use (including the description, weight and measurement of the goods sold by the Shipper to be contained in the shipment), and the Carrier has no knowledge of and makes no representation as to the accuracy of any particulars in The Shipper's Memorandum

IN WITNESS WHEREOF, the Carrier has signed ____ original Bills of Lading, all of the tenor and date, and if one is accomplished the others shall be void.

DATED _____ SIGNATURE: _____

On Behalf of Carrier GREAT WHITE FLEET LINER SERVICES LTD.
Directly, or Through the Following Agent:

NAME OF AGENT (IF ANY): _____

15 DEC 17 MONTREAL, QC

*Applicable only where the place of receipt or delivery differs from the port of loading or discharge, respectively.

21

APPENDIX B

Institution of Proceedings in Canada

Claims not subject to Hamburg Rules

46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where

(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;

(b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or

(c) the contract was made in Canada.

Procédure intentée au Canada

Créances non assujetties aux règles de Hambourg

46 (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :

a) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;

b) l'autre partie a au Canada sa résidence, un établissement, une succursale ou une agence;

c) le contrat a été conclu au Canada.

Agreement to designate

(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceeding.

Accord

(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2184-18
STYLE OF CAUSE:	ARC-EN-CIEL PRODUCE INC. v THE SHIP "BF LETICIA" ET AL
AND DOCKET:	T-2185-18
STYLE OF CAUSE:	ARC-EN-CIEL PRODUCE INC. v THE SHIP "MSC BELLE" ET AL
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 29, 2021
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	JUNE 7, 2022

APPEARANCES:

Matthew Hamerman	FOR THE PLAINTIFF
Katherine Shaughnessy-Chapman	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

De Man Pillet Montréal, Quebec	FOR THE PLAINTIFF
Brisset Bishop s.e.n.c. Montréal, Quebec	FOR THE DEFENDANTS