THE BURDEN AND ORDER OF PROOF IN MARINE CARGO CLAIMS

© Prof. William Tetley*

INDEX

Introduction …….3

I. The Classic Distinction between Burden of Proof vs. Order of Proof…….3

II. Four Basic Principles of Burden of Proof……..4

1) First principle of proof - A carrier is *prima facie* liable for all loss or damage to cargo received in good order and out-turned short or in bad order ……....4

a) A rebuttable presumption of liability……..4

b) Must the carrier prove an excepted peril to rebut the presumption?.....9

c) Must the carrier both prove an excepted peril and disprove its own negligence to rebut the presumption?.....10

d) The *Vallescura* Rule and the first principle of proof……11

e) The first principle of proof is a rule of public order/ public policy……..……...…12

f) The first principle of proof and the "last carrier" presumption…….13

2) Second principle of proof - The parties must prove all the facts available to them……..15

a) Parties must prove facts available to them……15

b) Proof beyond the clean bill of lading……..17

c) Clean bill attests only to apparent good order at loading……18

d) Qualifications as to order and condition of goods at loading……..21

e) Proof of goods outturned short or damaged…….23

f) Timely notice of loss or damage and the claimant's *prima facie* case…….23

3) Third principle of proof – Onus of proof means making proof to a reasonable degree…….....24

4) Fourth principle of proof – concealment, modification or destruction of key evidence…...……..25

a) Concealment, modification or destruction of key evidence…….25

---

* Professor of Law, McGill University, Distinguished Visiting Professor of Maritime and Commercial Law, Tulane University School of Law, and counsel to Langlois Gaudreau O'Connor of Montreal. The author is indebted to Robert C. Wilkins, B.A., B.C.L., for his assistance in the preparation and correction of the text. The financial support of the Wainwright Foundation for initial research is gratefully acknowledged.

b) Failure to call key witnesses…….27
c) Failure to conduct proper investigations……28
d) Specious testimony……29
e) Inadequate documentary evidence……..30

III. The Order of Proof in a Marine Cargo Claim and its Defence……31

1) What the claimant must prove…….31
2) What the carrier must prove……32
3) The various arguments then available to the claimant……..32
4) Other arguments, proofs and related matters then available to both parties……33

IV. Two views of the Order of Proof in Marine Cargo Claims - Noël J. vs. Thurlow……33

V. The Balance of the Hague and Hague/Visby Rules – The "Juggling" of Three "Balls"……..35

VI. France - The Order of Proof…….35

1) The former Law of April 2, 1936……..35
2) The Law of June 18, 1966……..36
a) Introduction……36
b) The claimant must prove his claim……...36
c) The cause of the loss……...36
d) Due diligence……...37
e) The exculpatory exceptions……...38
f) The counterproof of claimant……39
g) Mixed causation……..39
h) Notice of loss……40
3) The value of the Law of June 18, 1966……..41

VII. Hamburg Rules—The Order of Proof……..41

VIII. The Order of Proof in Court vs. the Order of Proof under the Rules……...42

IX. The Adversarial System vs. the Investigative System (or the Accusatorial vs. the Inquisitorial)…….43

X. The Managerial System……..43

XI. Conclusion……...45
Annex I Case Management and Dispute Resolution Services……...46
Annex II Pre-Trial Settlement Discussions and Pre-Trial Conferences……....51
Annex III Pre-Trial Service of Experts' Affidavits……....54

THE BURDEN AND ORDER OF PROOF IN MARINE CARGO CLAIMS

© Prof. William Tetley*

I. Introduction

This article on burden and order of proof has changed in a number of respects from the corresponding chapter in the three previous editions of *Marine Cargo Claims*. Firstly, it puts more emphasis on the order of proof, on the one hand enunciated by Noël J. in *N.M. Paterson & Sons Ltd.* v. *Robin Hood Flour Mills, Ltd.* (*The Farrandoc*),[1], and, on the other hand, the order of proof of Thurlow J. in the same Canadian appeal case. Various decisions throughout the world upholding either position are noted. Secondly, although siding with Thurlow J. (who, I am proud to say, cited me), I appreciate that the practical and effective answer is that the order of proof is a balancing of three responsibilities: 1) proving and disproving due diligence to make the ship seaworthy; 2) proving and disproving one of the exculpatory exceptions; and 3) proving and disproving care of the cargo. In effect, the parties (claimant and carrier) must make proof of the facts available to them in respect of the three responsibilities.

Thirdly, I have also noted that the court practices in an investigative court (as in France) change the order of proof considerably.

Fourthly, case management, pre-trial settlement conferences, dispute resolution services, mini-trials, mediation and obligatory mediation, in some common law countries, are leading the courts towards a more investigative system of litigation. The result is that the Canadian Admiralty Court at least has a managerial system, which affects the order of proof and probably the burden of proof as well.

I. The Classic Distinction between Burden of Proof and Order of Proof

Law traditionally distinguished between "burden of proof" and "order of proof". Burden of proof determined which party to a suit had the responsibility for adducing evidence of one particular issue of fact (often referred to as the "evidentiary burden"). Order of proof, on the other hand, related to the sequence in which the facts or allegations had to be proven by one party or the other to the suit during the trial. This traditional distinction between burden of proof and order of proof was understood and applied in marine cargo claims as in other types of litigation.

---

* Professor of Law, McGill University, Distinguished Visiting Professor of Maritime and Commercial Law, Tulane University School of Law, and counsel to Langlois Gaudreau O'Connor of Montreal. The author is indebted to Robert C. Wilkins, B.A., B.C.L., for his assistance in the preparation and correction of the text. The financial support of the Wainwright Foundation for initial research is gratefully acknowledged.

[1] [1968] 1 Ex. C.R. 175 at p. 188.

The text, *Marine Cargo Claims*, since its first edition (sent to the publisher in 1964), has discussed the burden and the order of proof in this classic sense. The order of the chapters (after the seven first preliminary chapters) has been in the order in which the proof must be made, as I see it. See the discussions surrounding footnotes 127 to 148, *infra*.

II. Four Basic Principles of Burden of Proof

Four general principles of proof run as unbroken threads through Hague and Hague/Visby Rules jurisprudence.[2] The first three principles are not always apparent but nevertheless are present in every cargo claim where the claimant has properly made his claim and the carrier has properly defended himself. The fourth principle is not as common but is noteworthy.

1) First principle of proof - A carrier is *prima facie* liable for all loss or damage to cargo received in good order and out-turned short or in bad order

a) A rebuttable presumption of liability

It is the first principle of proof of a marine cargo claim that *the carrier is prima facie liable for all loss or damage to cargo received in good order and out-turned short or in bad order*.

The carrier having received the goods in good order under a clean bill of lading and having received bad order receipts on delivery is *prima facie* liable for the loss or damage, which is presumed to have occurred while the goods were in its custody[3]. This

---

[2] All three of these principles, as formulated in the third edition of this book, were endorsed and applied by Blais J. of the Federal Court of Canada in *Voest-Alpine Stahl Linz GmbH* v. *Federal Pacific Ltd.* (1999) 174 F.T.R. 69 at p. 74, [2000] ETL 497 at p. 502 (Fed. C. Can.) and again in *Mediterranean Shipping Co. S.A. Geneva* v. *Sipco Inc.* [2002] 3 F.C. 125 at p. 150, (2001) 211 F.T.R. 248 at p. 262 (Fed. C. Can.). The first principle of proof was expressly approved by the Federal Court of Canada in *Francosteel Corp.* v. *Fednav Ltd.* (1990) 37 F.T.R. 184 at pp. 193-194, 1991 AMC 1078 at pp. 1080-1081 (Fed. C. Can.), in *Canastrand Industries Ltd.* v. *The Lara S* [1993] 2 F.C. 553 at p. 573, (1993) 60 F.T.R. 1 at p. 14-15, upheld without discussion of this point, (1994) 176 N.R. 31 (Fed. C.A.), in *General Motors Corp.* v. *Cast* (*1983*) *Ltd.* (1994) 74 F.T.R. 81 at p. 92 (Fed. C. Can.); in *Wirth Ltd.* v. *Belcan N.V.* (1996) 112 F.T.R. 81 at pp. 95-96 (Fed. C. Can.) and in *American Risk Management Inc.* v. *APL Co. Pte. Ltd.* (*The Eagle Strength*) (2002) 224 F.T.R. 249 at p. 254, [2003] ETL 338 at p. 344 (Fed. C. Can.). The first two principles of proof were also invoked by the defendant in *Canusa Systems Ltd.* v. *The Canmar Ambassador* (1998) 146 F.T.R. 314 at p. 316 (Fed. C. Can.). The second principle was invoked by the defendant in *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1987) 8 F.T.R. 191 at p. 197, 1987 AMC 1474 at p. 1479 (Fed. C. Can.).

[3] *N.M. Paterson & Sons Ltd.* v. *Robin Hood Flour Mills, Ltd.v.* (*The Farrandoc*) [1968] 1 Ex. C.R. 175 at p. 188, [1967] 2 Lloyd's Rep. 276 at p. 284 (Ex. Ct. of Can.); *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 159 (Fed. C. Can.); *S.S. Sabine Howaldt* (*J. Gerber & Co.* v. *S.S. Sabine Howaldt*), 310 F. Supp. 343 at p. 350, 1970 AMC 441 at p. 450, [1970] 1 Lloyd's Rep. 185 at p. 190 (S.D. N.Y. 1969) reversed on other grounds, 437 F. 2d 580, 1971 AMC 539, [1971] 2 Lloyd's Rep. 78 (2 Cir. 1971); *Vana Trading Co.* V. *S.S. Mette Skou* 556 F.2d 100 at p. 104, 1977 AMC 702 at p. 707 (2 Cir. 1977), cert. denied, 434 U.S. 892, 1978 AMC 1898 (1977); *M.W. Zack Metal Co.* v. *S.S. Birmingham City*, 311 F. 2d 334 at p. 337, 1963 AMC 737 at pp. 741-42 (2 Cir. 1962), cert. denied 375 U.S. 816, 1963 AMC 2698

presumption reflects art. 3(4) of the Hague and Hague/Visby Rules, which provides that: "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b) and (c)."

Prima facie (at first sight) means that the proof is rebuttable[4] so that the carrier has the burden of making proof sufficient to overturn claimant's *prima facie* case. The carrier discharges this burden by showing that the loss or damage was caused by one of the excepted perils contemplated by art. 4(2)(a) to (q). The point has been reiterated frequently in decisions from the United States,[5] Canada,[6] the United Kingdom and other Commonwealth jurisdictions.[7] This onus on the carrier has been held to flow from "…the common law principle that he who seeks to rely upon an exception in his contract must bring himself within it."[8]

The first principle of proof was already well established before the Hague Rules were adopted. It was voiced powerfully by Lord Esher, M.R. in *The Glendarroch*,[9] a decision which continues to be cited frequently:

"It would be enough for the cargo owner to prove the contract and non-

---

(1963); *Del Monte* v. *Grigorios Civ.*, 1980 AMC 120 (S.D. N.Y. 1979); *Fruitex Corp.* v. *Eurofreighter*, 1980 AMC 2710 (S.D. N.Y. 1980); *Hojgaard & Schultz* v. *Transamer. S.S.*, 590 F. Supp. 916 at p. 922, 1985 AMC 2129 at p. 2134 (S.D. N.Y. 1984); *U.S.* v. *Central Gulf Lines*, 575 F. Supp. 1430 at p. 1435, 1985 AMC 595 at p. 601 (E.D. La. 1983); affirmed 747 F. 2d 315, 1985 AMC 1982 (5 Cir. 1984); *Sony Magnetic Products Inc.* v. *Merivienti O/Y* 863 F.2d 1537 at p. 1539, 1989 AMC 1259 at p. 1262 (11 Cir. 1989); *Bally, Inc.* v. *M/V Zim America* 22 F.3d 65 at p. 69, 1994 AMC 2762 at p. 2766 (2 Cir. 1994); *Plastique Tags, Inc.* v. *Asia Trans Line, Inc.* 83 F.3d 1367 at p. 1369, 1996 AMC 2304 at p. 2306 (11 Cir. 1996); *Transtlantic Marine Caims Agency, Inc.* v. *M/V OOCL Inspiration*, 137 F. 3d 94 at p. 98, 1998 AMC 1327 at p. 1329 (2 Cir. 1998); *Resources Recovery, Inc.* v. *China Ocean Shipping* (*Group*) *Co.* 1999 AMC 780 at p. 782 (S.D. N.Y. 1998). See the interesting analysis by Hobhouse J. in *The Torenia*, [1983] Lloyd's Rep. 210 at p. 216. See also *The Hellenic Dolphin*, [1978] 2 Lloyd's Rep. 336 at p. 339; *The Theodegmon* [1990] 1 Lloyd's Rep. 52 at pp. 53 and 54.

[4] *Caterpillar Overseas* v. *S.S. Havtroll*, 333 F. Supp. 783, 1972 AMC 241 (S.D. N.Y. 1971). See *The Tolmidis*, [1983] 1 Lloyd's Rep. 530 at p. 534. See also *Hale Container Line, Inc.* v. *Houston Packing Co.*, 137 F. 3d 1455, 1999 AMC 607 (summ.) (11 Cir. 1998).

[5] *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at p. 352, 1981 AMC 1801 at p. 1807 (2 Cir 1981); *Westway Coffee Corp.* v. *M/V Netuno* 675 F.2d 30 at p. 32, 1982 AMC 1640 at p. 1641 (2 Cir. 1982); *Bally, Inc.* v. *M/V Zim America* 22 F.3d 65 at p. 69, 1994 AMC 2762 at p. 2766 (2 Cir. 1994); *Sun Co, Inc.* v. *S.S. Overseas Arctic* 27 F.3d 1104 at p. 1109, 1995 AMC 57 at pp. 62 (5 Cir. 1994); *Transatlantic Marine Claims Agency, Inc.* v. *M/V OOCL Inspiration* 137 F.3d 94 at p. 98, 1998 AMC 1327 at p. 1329 (2 Cir. 1998).

[6] *Trent Rubber Services* (*1978*) *Ltd.* v. *Polarctic* (1987) 12 F.T.R. 140 at pp. 161-162 (Fed. C. Can.); *Kruger Inc.* v. *Baltic Shipping Co.* (1989) 57 D.L.R. (4th) 498 at p. 502 (Fed. C.A.); *Francosteel Corp.* v. *Fednav Limited* (1990) 37 F.T.R. 184 at p. 194, 1991 AMC 1078 at p. 1081 (Fed. C. Can.); *Canastrand Industries Ltd.* v. *The Lara S* [1993] 2 F.C. 553 at p. 574, (1990) 60 F.T.R. 1 at p 15, upheld (1994) 176 N.R. 31 (Fed. C.A.); *Wirth Ltd.* v. *Belcan N.V.* (1996) 112 F.T.R. 81 at p. 97 (Fed. C. Can.); *Voest-Alpine Stahl Linz GmbH* v. *Federal Pacific Ltd.* (1999) 174 F.T.R. 69 at pp. 75 and 79, [2000] ETL 497 at pp. 504 and 508 (Fed. C. Can.).

[7] *The Evgrafov* [1987] 2 Lloyd's Rep. 634 at p. 636; *The Theodegmon* [1990] 1 Lloyd's Rep. 52 at p. 54; *The TNT Express* [1992] 2 Lloyd's Rep. 636 at pp. 642-643 (N.S.W. S.C.).

[8] *The Antigoni* [1991] 1 Lloyd's Rep. 209 at p. 212 (C.A. *per* Staughton L.J.).

[9] [1894] P. 226 at p. 231 (C.A.).

> delivery. From this, a breach of the obligation of proper and careful conduct would be inferred. Once that was established, it would be for the carrier to bring itself within the exceptional immunity. The onus of doing so would lie upon it."

As Viscount Sumner said in *Gosse Millerd, Ltd.* v. *Can. Government Merchant Marine Ltd.*,[10]

> "As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under Art. III, r. 2 of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within Art. IV, r. 2, so as to obtain the relief for which it provides."

Much the same thing was said in *Edouard Materne* v. *S.S. Leerdam*:[11]

> "It is well established that a carrier of goods by sea is *prima facie* liable for damage to cargo received in good condition but which is outturned in a damaged condition at the end of the voyage, unless the carrier can affirmatively show that the immediate cause of the damage is an excepted cause for which the law does not hold him responsible."

When the loss or damage is unexplained, the carrier cannot rebut the *prima facie* case of the claimant merely by proving that he took reasonable care of the goods. He must explain the cause of the loss. The Fifth Circuit has held:[12]

> "To rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than its own negligence. Once the shipper establishes a prima facie case, under 'the policy of the law' the carrier must 'explain what took place or suffer the consequences.' [T]he law casts upon [the carrier] the burden of the loss which it cannot explain or, explaining, bring within the exception case in which he is relieved from liability."

In *Fagundes Sucena* v. *Miss. Shipping Co.*,[13] flour was damaged by salt water and the court record failed "to disclose the cause of the damage to the cargo in question:

---

[10] [1929] A.C. 223 at p. 234, (1928) 32 Ll. L. Rep. 91 at p. 95 (H.L.). See also Wright J. at trial, [1927] 28 Ll. L. Rep. 88 at p. 103, [1927] 2 K.B. 432 at p. 434: "The words 'properly discharge' in Art. III, r. 2, mean I think, deliver from the ship's tackle can excuse himself under Art. IV. Hence the carrier's failure so to deliver must constitute a *prima facie* breach of his obligations, casting on him the onus to excuse that breach."

[11] 143 F. Supp. 367 at p. 369, 1956 AMC 1977 at p. 1980 (S.D. N.Y. 1956). See also The *Saturnia*, 226 F. 2d 147, 1955 AMC 1935 (2 Cir. 1959).

[12] *Quaker Oats Co* v. *M/V Torvanger* 743 F.2d 238 at p. 243, 1984 AMC 2943 at p. 2949 (5 Cir. 1984), cert. denied 469 U.S. 1189, 1985 AMC 2398 (1985), cited with approval in *Associated Metals & Minerals Corp.* v. *M/V Arktis Sky* 978 F.2d 47 at p. 51, 1993 AMC 509 at p. 515 (2 Cir. 1992); *Transatlantic Marine Claims Agency, Ltd.* v. *M/V OOCL Inspiration* 137 F.3d 94 at p. 98, 1998 AMC 1327 at p. 1330 (2 Cir. 1998); *Rothfos Corp.* v. *M/V Nuevo Leon* 123 F. Supp.2d 362 at p. 367, 2000 AMC 2054 at pp. 2058-2059 (S.D. Tex. 2000).

[13] 108 F. Supp. 918 at p. 921, 1953 AMC 148 at p. 153 (E.D. La. 1952). See also *Great American Trading Co.* v. *American President Lines, Ltd.* 641 F. Supp. 396 at p. 401 (N.D. Cal. 1986).

> "The merchandise in question, having been received by respondent in apparent good order and condition and having been delivered by respondent in a damaged condition, a *prima facie* case for the libellant has been made, and respondent has the affirmative burden of proving that the cause of the damage was one for which it has no responsibility under its bill of lading, or under the Carriage of Goods by Sea Act."
>
> "The respondent has failed to carry the burden of proving that the cause of the damage was one for which it has no responsibility under the bill of lading or the Carriage of Goods by Sea Act."

In *Nisso-Iwai* v. *Stolt Lion,*[14] the Second Circuit reversed the trial judge and imposed the rule that once the shipper proves good order at shipment and bad order at discharge there is a *prima facie* case which places the burden of proof on the carrier. The Second Circuit repeated its astonishment in the same case to the same judge who was still reluctant to impose on the carrier the burden of proving absence of fault (when, of course, it could not prove an exculpatory exception).[15]

In Canada, the same view prevails. In *Cargill Grain Co.* v. *N.M. Paterson & Sons,*[16] for example, Wells D.J.A. relied on Wright J. in *Gosse Millerd, Ltd*. v. *Can. Government Merchant Marine Ltd.*[17] and held:

> "… the fact that the goods were damaged raises a *prima facie* case of negligence, which can only be met by showing what actually occurred."

In *Kaufman Ltd.* v. *Cunard Steamship Co. Ltd.*,[18] Smith D.J.A. held:

> "It having been established at least *prima facie* that the furs were 'shipped in good condition internally' the shipowner, in order to escape liability, was obliged to prove either that the damage existed when he accepted the goods for carriage or that he is entitled to the benefit of the exemptions afforded by the Water Carriage of Goods Act, 1936."

France has taken the same position. La *Cour d'Appel de Bordeaux*[19] held that when the cause of damage cannot be determined, the damage is presumed to have taken place during the maritime part of the carriage.

---

[14] 617 F. 2d 907 at p. 912, 1980 AMC 867 at p. 872 (2 Cir. 1980). "Under COGSA, a shipper or consignee may establish a *prima facie* case against the 'carrier', in this case the vessel owner…, by showing that the cargo was delivered in good condition to the carrier but was in damaged condition when discharged." Cited were *Vana Trading Co.* v. *S.S. Mette Skou,* 556 F. 2d 100 at p. 104, 1977 AMC 702 at p. 707-08 (2 Cir. 1977),), cert. denied, 434 U.S. 892, 1978 AMC 1898 (1977); *Travalers Indem. Co.* v. *S.S. Polarland*, 418 F. Supp. 985 at p. 987, 1976 AMC 1878 at pp. 1880-81, affirmed 562 F. 2d 39 (2 Cir. 1977).

[15] *Nisso-Iwai* v. *Stolt Lion*, 719 F. 2d 34 at p. 38, 1984 AMC 2611 at p. 2617 (2 Cir. 1983).

[16] [1966] Ex. C.R. 22 at p. 33, upheld in appeal [1968] 1 Ex. C.R. 199.

[17] [1929] A.C. 223, (1928) 32 Ll. L Rep. 91.

[18] [1965] 2 Lloyd's Rep. 564 at p. 566. See also *Wirth Ltd.* v. *Belcan N.V.* (1996) 112 F.T.R. 81 at p. 97 (Fed. C. Can.), where Nadon J. held: "Since the carrier has not met its burden of proving that the damage to this [steel] rail falls under one of the exceptions provided at Article IV of the Hague/Visby Rules, judgment must be rendered in favour of the plaintiff."

[19] May 7, 1951, DMF 1951, 393.

Le *Tribunal de commerce du Havre* held:[20]

> "*… les manquants ou avaries sont toujours présumés avoir eu lieu au cours du transport maritime, sauf preuve contraire…*"
>
> (Translation)
>
> "… shortage or damage is always presumed to have taken place during the course of the maritime carriage, unless there is contrary proof…"

Seawater damage provides a good example of how the onus is placed on the carrier. In *Konfort S.A.* v. *S.S. Santo Cerro*[21] the surveyor tested and found salt on both the torn paper wrappings and the steel wire cargo. The carrier was expected to contradict this proof and being unable to do so was held responsible. In *Wessels* v. *Asturias*[22], the Second Circuit held:

> "Proof of the presence of seawater… raises a presumption of unseaworthiness which the carrier must rebut."

In *George E. Pickett*,[23] cargo was received under a clean bill of lading and discharged dripping wet. It was held that the carrier was responsible for the unexplained damage despite the fact that the vessel was new, was on its second voyage, the shipment was stowed in the driest and safest place on board and the hold showed no wetness on inspection after discharge.

In *Ralston Purina Co.* v. *U.S.A.*,[24] it was held:

> "When the cause of damage by seawater to an ocean shipment is unexplained, the rule has always been that the damage must be presumed to have been caused by unseaworthiness of the vessel on account of failure of the carrier to exercise due diligence to make the vessel seaworthy."

In *Transatlantic Marine Claims Agency, Ltd.* v. *M/V OOCL Inspiration*,[25] the Second Circuit held that a cargo owner may establish a *prima facie* case of liability on the part of the carrier in one of two ways. The first way is for the claimant to adduce "direct evidence" of the cargo's condition on delivery to the carrier (e.g. by putting in evidence the clean bill of lading) and its damaged condition at outturn. The second way is by showing that the characteristics of the damage support the conclusion that the harm occurred while the goods were in the carrier's custody.[26] In this case, the latter method

---

[20] September 5, 1952, DMF 1953, 145 at p. 146. See also *Cour d'Appel de Tunis*, February 9, 1953, DMF 1953, 433.

[21] 190 F. Supp. 1 at p. 7, 1960 AMC 1838 at p. 1847 (S.D. N.Y. 1960).

[22] 126 F. 2d 999 at p. 1001, 1942 AMC 360 at p. 362 (2 Cir. 1942). See also *The Masashima Maru* (*Stelwyre Ltd. v. Kawasaki Kisen*) [1974] 2 Lloyd's Rep. 394 at p. 397: "This seawater damage raises a presumption of negligence that the carrier has not rebutted."

[23] 77 F. Supp. 988, 1948 AMC 148 at p. 153 (E.D. La. 1952).

[24] 1952 AMC 1496 at pp. 1498-99 (E.D. La. 1952). See also *North Star Cement* v. *Labelle*, 1976 AMC 944 (Fed. C. Can); *BHP Trading Asia Ltd.* v. *Oceaname Shipping Ltd.* (1996) 67 FCR 211 at p. 229 (Fed. C. Aust.).

[25] 137 F.3d 94, 1998 AMC 1327 (2 Cir. 1998).

[26] *Ibid*. F.3d at p. 98, AMC at pp. 1330-1331. See also *Vana Trading* v. *S.S. Mette Skou* 556 F.2d 100 at p. 105 note 8, 1977 AMC 702 at p. 708 note 8 (2 Cir. 1977), cert. denied, 434 U.S. 892, 1978 AMC 1898

was used, and the Court decided: [27]

> "... the court below quite correctly found that the nature of the damage—seawater wetting—was of the sort that inexorably justified the conclusion that the injury occurred at sea."[28]

It can be concluded from the foregoing decisions that a clean bill of lading and bad order receipts do create a *prima facie* case against a carrier, and that the carrier can only rebut that case by adducing evidence that the loss or damage resulted from one or more of the specific exculpatory exceptions enumerated at art. 4(2)(a) to (q).

b) Must the carrier prove an excepted peril to rebut the presumption?

Unfortunately, Australia appears to be out of step with other major maritime countries in its understanding of this first principle of proof. In *Great China Metal Industries Co. Ltd.* v. *Malaysian International Shipping Corporation Berhad (The Bunga Seroja)*, certain justices of the High Court of Australia expressed a rather different view of the carrier's burden of proof in a cargo claim. McHugh J, in particular, held that:[29]

> "The delivery of goods in a damaged state is evidence of a breach of art. III and imposes an evidentiary burden on the carrier to show that no breach of art. III has occurred. But unlike the common law, failure to deliver the goods in the state received does not cast a legal onus on the carrier to prove that the state of, or non-delivery of the goods, was not due to the carrier's fault.
>
> "Once Mr. Justice Carruthers [the trial judge] found that there was no breach of the carrier's obligations in this case, the immunities conferred by art. IV, r. 2 became irrelevant."

Gaudron, Gummow and Hayne, JJ. also doubted that the principles of the "common law", established in decisions such as *The Glendarroch,*[30] could be used as an aid to interpreting the Hague Rules, which they saw as a "self-contained code".[31]

Under this theory, the carrier, in rebutting the presumption of fault resulting from the loading of the cargo in good order and its subsequent outturn in bad order need not

---

(1977); *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at p. 355, 1981 AMC 1801 at p. 1813 (2 Cir. 1981); *Perugina Chocolates & Confections, Inc.* v. *S/S Ro Ro Genova* 649 F. Supp. 1235 at p. 1241, 1987 AMC 801 at p. 810 (S.D. N.Y. 1986); *Rit-Chem Co.* v. *S/S Valiant* 743 F. Supp. 232 at p. 236, 1990 AMC 2953 at p. 2956 (S.D. N.Y. 1990); *Hyosung* (*America*), *Inc. v. M/V Tadorne II* 1998 AMC 858 at p. 860 (E.D. La. 1997) (although no bill of lading was issued in this case); *Rothfos Corp. v. M/V Nuevo Leon* 123 F. Supp. 2d 362 at p. 367, 2000 AMC 2054 at pp. 2057-2058 (S.D. Tex. 2000).

[27] *Ibid*. F.3d 94 at p. 99, 1998 AMC at p. 1331.

[28] But see also *American Home Assurance Co.* v. *Zim Jamaica* 296 F. Supp.2d 494 at p. 502, 2004 AMC 393 at p. 402 (S.D. N.Y. 2003), where the fact that the wetting of the cargo was by fresh water, rather than seawater as in *Transatlantic*, raised a genuine issue of material fact as to whether the damage occurred during the carrier's custody of the cargo, resulting in the decision that the claimant had not made out a *prima facie* case of carrier liability.

[29] (1998) 158 A.L.R. 1 at p. 27, [1999] 1 Lloyd's Rep. 512 at p. 529, 1999 AMC 427 at p. 463.

[30] [1894] P. 226 (C.A).

[31] *The Bunga Seroja, supra*, A.L.R. 1 at p. 7, Lloyd's Rep. at p. 516, AMC at pp. 433-434.

prove that one of the specific immunities of art. 4 caused the loss. Rather, the *prima facie* case of the cargo claimant may be rebutted simply upon proof by the carrier that it exercised due diligence to make the ship seaworthy before and at the start of the voyage and that it was not negligent in caring for the cargo during the trip.[32] Accordingly, the carrier's evidentiary burden would be satisfied by general evidence showing its diligence and care in maintaining the ship and its cargo-handling systems.[33]

The practical effect of this position is that in cases where the cause of the loss is unidentified or uncertain, the carrier, on proof of general diligence and care, may escape liability, without showing exactly how the cargo came to harm.[34] This is very different from the law in other Hague and Hague/Visby Rules jurisdictions, where the carrier must prove which specific exception applies.[35]

Fortunately, however, other justices in *The Bunga Seroja* do not appear to have subscribed to this novel understanding of the onus and order of proof. In particular, Callinan J. restated his adherence to the more traditional notion.[36]

c) Must the carrier both prove an excepted peril and disprove its own negligence to rebut the presumption?

Some older U.K. decisions have held that the carrier, in order to rebut the presumption of liability resulting from the arrival in damaged condition of goods shipped undamaged, must prove not only that the loss or damage was caused by one of the excepted perils listed at art. 4(2), but also that the harm did not result from any negligence on the carrier's part.[37]

---

[32] This holding resembles the conclusion reached in *The Vermont* 47 F. Supp. 877 at p. 880, 1942 AMC 1407 at p. 1410 (E.D. N.Y. 1942), where the Court found that under sect. 4(2)(q) of U.S. COGSA 1936, "... the carrier does not have to show the cause of the damage, but has the alternative burden of showing freedom from negligence." This position is not in accord with other authorities and finds no support in the one decision cited by the Court (*The City of Baroda* (1926) 25 Ll. L. Rep. 437), where the defendant in fact identified two possible causes of the loss, neither of which would have rendered it liable as carrier.

[33] See Martin Davies' critical commentary on *The Bunga Seroja*, [1999] LMCLQ 408 at pp. 409-410, focusing on this point.

[34] In England, by comparison, it has been held that where the cause of pre-loading unseaworthiness is unidentified, the carrier is likely to have difficulty proving that he exercised due diligence, as required by art. 4(1), if he is unable to establish what specific latent defect not discoverable by due diligence, within the meaning of art. 4(2)(p), caused the unseaworthiness. See *The Antigoni* [1991] 1 Lloyd's Rep. 209 at pp. 212-213 and 215 (C.A.).

[35] See *Quaker Oats Co.* v. *M/V Torvanger* 743 F.2d 238 at p. 243, 1984 AMC 2943 at p. 2949 (5 Cir. 1984), cert. denied 469 U.S. 1189, 1985 AMC 2398 (1985), and other decisions on this point, cited in section II(1)(a), *supra*.

[36] *Ibid*., A.L.R. at p. 63, Lloyd's Rep. at p. 551, AMC at pp. 513- 514, indicating his view that the carrier should be entitled to immunity where he has acted as expressly required by the Rules, is not guilty of negligence, and "*events at sea can be shown to have caused the loss*" (emphasis added). Callinan J., *ibid*., also approves the "form and order of pleading referred to by Lord Esher in *The Glendarroch*." Kirby J. also gave at least qualified support to the traditional position. See *ibid*., A.L.R. at p. 48, [19991] 1 Lloyd's Rep. 512 at p. 540, 1999 AMC 427 at p. 491: "Thus, *the legal burden is on it [the carrier] to prove that the loss or damage arose or resulted from the specified ground of immunity pleaded*. Similarly, it is for it to establish that the hazard described in the evidence partakes of the character necessary to attract the terms of Art. IV r. 2 as that paragraph has been construed. So much is clear as a matter of law." (emphasis added).

[37] *F.C. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Company, Ltd.* (1927) 27 Ll. L. Rep. 395 at p. 396 (H.L.) (but the holding was *obiter dictum*, because the carrier had failed to prove any of the

Most more recent English decisions[38] and authors,[39] however, uphold the view that, in general, the carrier may rebut the claimant's *prima facie* case simply by proving that the loss was caused by an excepted peril. At that point, the onus switches to the cargo claimant to prove that the true cause of the loss was the carrier's negligence.[40] That is also my position.

Nevertheless certain Hague and Hague/Visby Rules exceptions, expressly or implicitly, also require the carrier to negative its own negligence in proving the exception itself. For example, art. 4(2)(q) expressly imposes on the carrier the burden of proving that the loss or damage occurred without its actual fault or privity and without any fault or neglect on the part of its servants or agents.[41]

The carrier, however, must truly prove the existence of one or more of the exceptions and their causative role in respect of the loss or damage. Conjectures and speculation do not take the place of hard evidence. The Federal Court of Canada has held: "Mere speculation will not overcome the prima facie evidence of a clean bill of lading."[42]

d) The *Vallescura* Rule and the first principle of proof

In some cases, even if the carrier succeeds in proving the applicability of one of the art. 4(2) exceptions, it may succeed only partially in rebutting the *prima facie* presumption of liability resulting from the cargo claimant's proof of good condition at loading and damage at discharge. This will notably be the case where part of the loss or damage was caused by an excepted peril and another portion of the loss or damage was caused by the carrier's breach of the contract of carriage (e.g. by negligence in the care of the cargo contrary to art. 3(2) of the Hague and Hague/Visby Rules).

---

exceptions); *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* [1927] 2 K.B. 432 at pp. 435-437, (1927) 28 Ll. L. Rep. 88 at pp. 102-104 (per Wright J.); *Borthwick & Sons, Ltd.* v. *New Zealand Shipping Company, Ltd.* (1934) 49 Ll. L. Rep. 19 at pp. 23 and 24; *Phillips* v. *Clan Line* (1943) 76 Ll. L. Rep 58 at p. 61; *Svenska Tractor Aktiebolaget* v. *Maritime Agencies* (*Southampton*), *Ltd.* [1953] 2 Q.B. 295 at p. 303, [1953] 2 Lloyd's Rep. 123 at p. 133; *Albacora S.R.L.* v. *Westcott & Laurence Lines, Ltd.* [1965] 2 Lloyd's Rep. 37 at pp. 47-48 (Sc. Ct. of Sess.).

[38] See, for example, *Albacora S.R.L.* v. *Westcott & Laurence Line, Ltd.* [1966] 2 Lloyd's Rep. 53 at p. 61 (H.L. *per* Lord Pearce) and at p. 64 (*per* Lord Pearson); *The Flowergate* [1967] 1 Lloyd's Rep. 1 at p. 8.

[39] Scrutton, 20 Ed., 1996 at p. 446, note 28. The editors nevertheless doubt: "…if the case has yet been fully argued in a case where it was material to the decision.". See also Wilson, 2 Ed., 1993 at p. 192; Carver, 13 Ed., 1982, vol. 1, paras. 511-513 at pp. 360-363.

[40] See, *inter alia*, Greer L.J.'s clear enunciation of the point in *Silver* v. *Ocean S.S. Co.* [1930] 1 K.B. 416 at p. 435, (1929) 35 LL. L. Rep. 49 at p. 56 (C.A.).

[41] See *The Lady Drake* (*Canadian National Steamships* v. *Bayliss*) 1935 AMC 427 at pp. 433-434 (Que. Supr. Ct.), upheld 1936 AMC AMC 998 (Que. C.A.), upheld [1937] S.C.R. 261, [1937] 1 D.L.R. 545, 1937 AMC 290 (Supr. Ct. of Can.): "The distinction between subsections (a) to (p), and subsection (q), of Rule 2, Article IV, seems to be that in the former group of exceptions where the cause of the damage is shown to fall within one of these exceptions, the onus of proof is shifted from the shoulders of the shipowner to those of the goods owner, whereas when the alleged cause of damage arises under subsection (q), the burden of proof does not shift, but remains where it was – upon the shipowner."

[42] *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1987) 8 F.T.R. 191 at p. 197, 1987 AMC 1474 at p. 1479 (Fed. C. Can.), upheld (1988) 86 N.R. 39 (Fed. C.A.). See also *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 160 (Fed. C. Can.).

The *Vallescura* Rule[43] completes the first principle of proof in such cases. The Rule imposes liability for **the whole** of the loss or damage on the carrier, unless the carrier proves the portion of the harm which is attributable to the excepted peril.[44] The Rule is equitable, because the carrier has much readier access to the evidence needed to prove the part of the loss attributable to the excepted peril than does the cargo claimant. The *Vallescura* Rule, although directed at rebutting the presumption flowing from the first principle of proof, is therefore justified by reference to the second principle of proof (see *infra*).

The *Vallescura* Rule does not operate, however, where one of the contributory causes of the loss or damage is the failure of the carrier to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage, as required by art. 3(1) of Hague and Hague/Visby, because such a failure breaches a duty which is an "overriding obligation" of the carrier.[45] Such a breach rightly precludes the carrier in default from benefitting from any of the defences of art. 4(2).[46]

e) The first principle of proof is a rule of public order/public policy

In *Encyclopedia Britannica Inc.* v. *S.S. Hong Kong Producer*,[47] the bill of lading relieved the carrier of liability unless the shipper proved the carrier's negligence or lack of due diligence. The Second Circuit decided that the clause illegally relieved or lessened the carrier's liability, contrary to sect. 3(8) of U.S. COGSA[48] (identical to art. 3(8) of the Hague Rules), and consequently was invalid. The Court held:[49]

---

[43] *Schnell* v. *The Vallescura* 293 U.S. 296 at p. 306, 1934 AMC 1573 at pp. 1577-1578 (1934), the U.S. Supreme Court decision which gave birth to the "*Vallescura* Rule". For a more recent application of the Rule, see *Thyssen, Inc.* v. *S.S. Eurounity*, 1994 AMC 393 at p. 399 (S.D. N.Y. 1993), aff'd 21 F.3d 533, 1994 AMC 1638 (2 Cir. 1994). See also *Sun Co., Inc.* v. *S.S. Overseas Arctic* 27 F.3d 1104 at p. 1109, 1995 AMC 57 at p. 62 (5 Cir. 1994).

[44] The Vallescura Rule is also applicable, although not under that specific name, in the United Kingdom and Canada. See also *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* [1929] A.C. 223 at p. 241, (1928) 32 LL. L. Rep. 91 at p. 98 (H.L.); *The Evgrafov* [1987] 2 Lloyd's Rep. 634 at p. 636; *Carver's Carriage by Sea*, 13 Ed., vol. 1, 1982 at p. 154, cited with approval in *Kruger Inc.* v. *Baltic Shipping Co.* [1988] 1 F.C. 262 at p. 268, (1987) 11 F.T.R. 80 at p. 91 (Fed. C. Can.), upheld without discussion (1989) 57 D.L.R. (4th) 498 (Fed. C.A.); Scrutton, 20 Ed., 1996, at pp. 218 and 446. In Australia, however, it has been held that where cargo damage is caused concurrently by a peril of the seas and another cause for which the carrier is liable (e.g. improper stowage), the peril exception is not admitted. Generally, however, in such cases, the carrier's negligence has been held to be the "dominant" or "decisive" cause of the loss or damage. See, for example, *Shipping Corp. of India Ltd.* v. *Gamlen Chemical Co.* (*Australasia*) *Pty Ltd.* (1980) 147 C.L.R. 142 at pp. 156 and 163 and 164, (1980) 32 A.L.R. 609 at pp. 615 and 622 (High C. of Aust.).

[45] *Maxine Footwear Co., Ltd.* v. *Can. Government Merchant Marine* [1959] A.C. 589 at pp. 602-603, [1959] 2 Lloyd's Rep. 105 at p. 113 (P.C.); *N.M. Paterson & Sons Ltd.* v. *Robin Hood Flour Mills, Ltd.* (*The Farrandoc*) [1968] 1 Ex. C.R. 175 at p. 183 (Ex. Ct. of Can.); *The Good Friend* [1984] 2 Lloyd's Rep. 586 at pp. 588 and 593; *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad* (*The Bunga Seroja*) (1998) 158 A.L.R. 1 at p. 24, [1999] 1 Lloyd's Rep. 512 at p. 526, 1999 AMC 427 at p. 458 (High C. of Aust.).

[46] See discussion of this point in Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap. 15: "Due Diligence to Make the Vessel Seaworthy".

[47] 1969 AMC 1741, [1969] 2 Lloyd's Rep. 536 (2 Cir. 1969).

[48] 46 U.S.C. Appx. 1301 *et seq.*

[49] 1969 AMC 1741 at pp. 1753-1754, [1969] 2 Lloyd's Rep. 536 at p. 543 (2 Cir. 1969).

> "Clause 13 states that the carrier will not be liable for any damage unless the shipper proves negligence or lack of due diligence on the carrier's part. This effects a shift in the burden of proof from the carrier, as provided by COGSA, to the shipper. COGSA had effected a change from the pre-Harter [Act] situation when the burden of proof was on the shipper, by shifting it to the carrier. The burden of proof which COGSA has placed on the carrier is a major weapon in the shipper's arsenal. It is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier's hands. Clause 13's attempted transfer of burden of proof to the shipper creates such a lessening of the carrier's liability as to be impermissible under Sect. 1303(8)."

One may therefore conclude that the first principle of proof in cargo claims is a rule of public order/public policy, from which the parties to the carriage of goods by sea contract are not free to derogate.

f) The first principle of proof and the "last carrier" presumption

Today's multimodal transportation (i.e. the carriage of goods partly by sea and partly by road, rail and/or air) has given rise to a special adaptation of the first principle of proof. In multimodal carriage, the goods are successively in the hands of different carriers, as they journey from their point of origin to their point of destination. Each of the successive carriers in the chain is, in effect, a bailee of the goods during the time when the goods are in its custody. If the goods finally arrive at their destination short or damaged, the cargo claimant may be unable to ascertain exactly when or where the harm was sustained. In consequence, he may be uncertain which of the successive carriers in to hold liable for the harm.

To resolve this difficulty, courts have developed a slight variation of the first principle of proof, creating a rebuttable presumption of liability of the last carrier in the chain. Maczko J. of the British Columbia Supreme Court phrased it as follows:[50]

> "In my view, the governing principle should be that where there is a successive chain of bailees and the owner of the goods has proven delivery of the goods to the first bailee in good order and the receipt of those goods in bad order at the end of the chain of successive carriers, there is a

[50] *Voest-Alpine Canada Corp.* v. *Pan Ocean Shipping Co.* (*The Sammi Crystal*) (1991) 55 B.C.L.R. (2d) 357 at p. 362 (B.C. S.C.), upheld (1993) 79 B.C.L.R. (2d) 379 (B.C. C.A.). Maczko J. supported this first Canadian decision on the presumed liability of the last carrier by reference to international conventions and national laws on carriage of goods by road and air, but in particular by reference to American maritime decisions establishing the presumption, notably *Robert Badenhop Corp.* v. *N.V. Koninklijke* 1960 AMC 2114 (S.D. N.Y. 1960); *Julius Klugman's Sons, Inc.* v. *Oceanic Steam Navigation Co.* 42 F.2d 461, 1930 AMC 1445 (S.D. N.Y. 1930); and *Empire Aluminum Corp.* v. *S.S. Korendijk* 391 F.Supp. 402 (S.D. Ga. 1973). See also *Madow Co.* v. *S.S. Liberty Exporter* 569 F.2d 1183 at pp. 1185-1186, 1978 AMC 425 at pp. 428-429 (2 Cir. 1978); *Tranasatlantic Marine Claims Agency, Inc.* v. *M/V. OOCL Inspiration* 137 F3d 94 at p.100, note 7, 1998 AMC 1327 at p. 1332 note 7 (2 Cir. 1998).

> presumption that the loss occurred during the time the last custodian had control of the goods."

The clean bill of lading serves to establish the claimant's *prima facie* case against the last carrier. The presumption is, however, rebuttable, as Maczko J. decided:[51]

> "…where there is a successive chain of carriers and the goods were initially delivered for shipment in good order and condition but have arrived in a damaged condition, the last bailee in the chain has the burden of proof to show that it did not damage the goods and that it received the goods in a damaged condition, or that the damage, although while in its custody, occurred without negligence on its part."

The order of proof of a cargo claim where the last carrier presumption is invoked requires all parties to keep careful records of the condition of the goods at the various stages of their voyage. In the words of Maczko J.: [52]

> "The key to this kind of case is documentation. The bills of lading and waybills are absolutely vital. The plaintiff need only prove that the cargo was delivered to the first carrier in good condition and that it was received in damaged condition. The plaintiff then has a right to rely on the presumption that the last carrier is responsible for all damage except that which is noted on the bills of lading along the chain of carriers. To be able to rely on the presumption, the plaintiff must carefully document the amount of damage, the type of damage and must prove that the correct cargo is being documented. Once this has been done, responsibility falls to the last carrier to prove that the goods were not damaged while in its possession or that if the goods were damaged while in its possession that it was not negligent. It is then for the last carrier to shift the responsibility for damage to other carriers, if indeed other carriers are responsible. The reason for this presumption is that it is impossible for the plaintiff to prove where and how the damage occurred along the chain of carriers. The presumption is important and should be strictly applied. In view of the presumptions, it is vital that each carrier carefully document all damage as it receives the goods. Failure to do so will, prima facie, impose on it liability for damage that is noted by a subsequent carrier. It may be that this system will cause expense and inconvenience. However, in my view the law has developed in this way for very good reason."

Courts consider all the evidence of the handling of the cargo at each stage of the voyage in determining whether or not the last carrier has rebutted the presumption.[53]

---

[51] *Ibid*. at pp. 366-367.
[52] *Ibid*. at p. 367, cited with approval in (1993) 79 B.C.L.R. (2d) 379 at p. 382 (B.C. C.A.).
[53] See, for example, *Canadian Forest Products Ltd.* v. *B.C. Rail Ltd.* 2003 AMC 1125 at pp. 1139-1141 (B.C. S.C.), where the last carrier (the ocean carrier) and the second-to-last carrier (a marine terminal where the goods were stored prior to loading) successfully rebutted the presumption of liability for wood splinter

2) Second principle of proof – The parties must prove all the facts available to them

a) Parties must prove facts available to them

It is the second principle of proof of a marine cargo claim that *the parties are in general required to make proof of whatever facts are available to them.*

The carrier has the principal burden of proof, because from reception to delivery the cargo is in its hands or in the hands of its servants and agents. The master and crew, being the carrier's servants, can be found and brought to the trial by the carrier, if need be, to explain what happened, whereas the shipper or consignee has little opportunity of knowing what took place at sea or from tackle to tackle.

The shipper does not know how the goods were manufactured or produced, however he knows how they were packed. The consignee also controls the examination of the goods when they are damaged after discharge. In consequence, the cargo claimant (shipper or consignee, as the case may be) has the burden of proving condition at the time of loading[54] and at discharge.[55]

In *Vallescura*,[56] it was held:

> "In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed to his undertaking, such as his immunity from liability for act of God or the public enemy… It applies equally with respect to other exceptions for which the law permits him to

---

contamination of a pulp cargo, but where a rail carrier which had transported the pulp previously failed to rebut the presumption.

[54] *Commodity Service Corp.* v. *Hamburg-Amer. Line* 354 F. 2d 234 at p. 234, 1966 AMC 65 at p. 65 (2 Cir. 1965): "The shipper, since it has superior access to the information as to the condition of goods when delivered to the carrier, has the burden of proving good condition at the time of delivery." See also *Hecht, Levis & Kahn, Inc.* v. *S.S. President Buchanan*, 236 F. 2d 627 at p. 631, 1956 AMC 1970 at p. 1976 (2 Cir. 1956).

[55] *U.S.A.* v. *Lykes Bros S.S. Co. Inc.*, 511 F. 2d 218 at p. 223, 1975 AMC 2244 at p. 2250 (5 Cir. 1975): "A shipper complaining of cargo damage must prove delivery in good order and condition, and out-turn by the vessel in damaged condition to make out a *prima facie* case." See also *Kurt Orban Co.* v. *S.S. Federal St Laurent*, 1975 AMC 55 (S.D. N.Y. 1974); *Acwoo Int'l Steel Corp.* v. *Toko Kaiun Kaish, Ltd.*, 840 F. 2d 1284 (6 Cir. 1988); *Great American Trading Co.* v. *American President Lines, Ltd.* 641 F. Supp. 396 at p. 400 (N.D. Cal. 1986): "Prior to the time that the goods are delivered to the carrier, the shipper has exclusive knowledge as to the condition of the goods and the manner in which they are transported to the carrier. Once the goods are in the carrier's possession, though, the carrier has exclusive knowledge as to what happens to them. Because it is reasonable to require the party with exclusive knowledge and control over the goods to explain what happens to them, the burden of proof is upon that party."; *Bally, Inc.* v. *M/V Zim America* 22 F.3d 65 at p. 69, 1994 AMC 2762 at p. 2766 (2 Cir. 1994); *Resources Recovery, Inc.* v. *China Ocean Shipping* (*Group*) *Co.* 1999 AMC 780 at p. 782 (S.D. N.Y. 1998).

[56] *Schnell & Co.* v. *S.S. Vallescura* 293 U.S. 296 at pp. 303-4, 1934 AMC 1573 at p. 1576 (1934). The Vallescura is a Harter Act, pre-COGSA claim, but the decision's burden of proof references have been cited so often that it is appropriate to cite it on this point which is the same under the Hague and Hague/Visby Rules.

> stipulate… The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes on him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability." (emphasis added).

In *American Tobacco Co.* v. *Goulandris*,[57] the Second Circuit applied this principle of proof to the shipper:

> "If the damage in fact resulted from the condition of the tobacco when shipped, the shipper must bear the loss. It seems reasonable to place the burden of proof on the shipper once damage is shown to have been of internal origin for he is clearly the one who has access to the information on this question."

In *Encyclopedia Britannica, Inc.* v. *S.S. Hong Kong Producer*,[58] the Second Circuit declared yet more forcefully: "It is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier's hands."

In C*aemint Food, Inc.* v. *Lloyd Brasileiro*, the Second Circuit reiterated the point:[59]

> "It is fair to impose on the plaintiff the burden of showing the condition of packaged goods on delivery because the shipper has superior access to information as to the condition of the goods when delivered to the carrier, just as the carrier has superior access to information as to what happened thereafter."

The following of proper procedures of cargo handling which have been employed on previous shipments of similar merchandise may assist the shipper in proving that the goods were in good condition on delivery to the carrier.[60]

---

[57] 281 F. 2d 179 at p. 182, 1962 AMC 2655 at p. 2659 (2 Cir. 1960).

[58] 1969 AMC 1741 at p. 1754, [1969] 2 Lloyd's Rep. 536 at p. 543 (2 Cir. 1969).

[59] 647 F.2d 347 at p. 354, 1981 AMC 1801 at p. 1812 (2 Cir. 1981), citing *Commodity Service Corp.* v. *Hamburg-Amer. Line* 354 F.2d 234, 1966 AMC 65 (2 Cir. 1965); *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind* 371 F.2d 537 at p. 539, 1967 AMC 277 at pp. 279-281 (2 Cir. 1967); *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F. Supp. 438 at p. 447, 1949 AMC 49 at pp. 60-61 (S.D N.Y. 1948), modified on other grounds, 194 F.2d 449, 1951 AMC 1933 (2 Cir. 1951), cert. denied, 343 U.S. 978 (1952). *Caemint Food* was cited with approval on this point in *Perugina Chocolates & Confections, Inc.* v. *S/S Ro Ro Genova* 649 F. Supp. 1235 at p. 1240, 1987 AMC 801 at p. 809 (S.D. N.Y. 1986); *Rit-Chem Co., Inc.* v. *S/S Valiant* 743 F.Supp. 232 at p. 236, 1990 AMC 2953 at p. 2956 (S.D. N.Y. 1990); *Associated Metals & Minerals Corp.* v. *M/V Olympic Mentor* 1997 AMC 1140 at p. 1147 (S.D. N.Y. 1995); *Transatlantic Marine Claims Agency, Inc.* v. *M/V OOCL Inspiration* 137 F.3d 94 at p. 98 note 5, 1998 AMC 1327 at p. 1329 note 5 (2 Cir. 1998), and *Hyosung* (*America*), *Inc.* v. *M/V Tadorne II* 1998 AMC 858 at p. 860 (E.D. La. 1997).

[60] See, for example, *Insurance Co. of N. America* v. *M/V Frio Brazil* 729 F. Supp. 826, 1990 AMC 2505

b) Proof beyond the clean bill of lading

The courts themselves usually look beyond the clean bill of lading and the bad order receipt. For example, in *A.-G. of Ceylon* v. *Scindia Steam Navigation Co.*,[61] the Privy Council noted that the clean bills of lading were *prima facie* proof, but instead of stopping there, considered all the evidence at loading and discharging - the boat notes, the notations made when cargo entered customs, the tally upon delivery - in fact, all the available evidence.[62]

In *Manhattan Fruit* v. *Royal Netherlands*,[63] the shipper was called upon to prove more than the clean bill of lading, i.e. to also "show the good condition of the plums and that they were fit for the voyage upon their delivery to the carrier."

In *Konfort* v. *S.S. Santo Cerro*,[64] the Court suggested evidence be obtained beyond the clean bill of lading, but did not insist:

> "During the trial I suggested that libellant get somebody from the plant to testify to the condition of the coils of wire before they were wrapped, how they were wrapped, and where they were kept before they were put in the steel box car. Libellant's counsel stated that he thought he was not going to be able to get the evidence of the condition of the coils inside the wrappers at the time of shipment and that he would rely on the fact that he had a clean bill of lading and the fact that the external condition of the wrappers admittedly changed while the shipment was in respondent's custody; and that they were wet and their contents were rusty when dischaged at Havanna."

In *Associated Metals & Minerals Corp.* v. *M/V Olympic Mentor*,[65] a similar case of sweat damage to steel coils, the plaintiff established its *prima facie* case by combining the clean bill of lading with additional evidence, including surveys, photographs, testimony about the cargo's packaging and evidence concerning the inadequacy of the ship's natural ventilation system and its lack of fans, devices to prevent sweating and equipment to measure the temperature and relative humidity in the holds.

In *Fox and Associates, Inc.* v. *M/V Hanjin Yokohama*,[66] documents filed by a

---

(M.D. Fla. 1990), where the cargo claimant proved the good condition of a shipment of frozen orange juice concentrate when delivered to the carrier by showing that it had been handled using similar procedures to those employed without problems on previous, similar shipments.

[61] [1962] A.C. 60, [1961] 2 Lloyd's Rep. 173 (P.C.). See also *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 159 (Fed. C. Can.), where, in addition to the clean bill of lading, both parties placed in evidence dock receipts attesting to the condition of the goods at discharge.

[62] See also *Transatlantic Marine Claims Agency, Inc.* v. *S.S. Zyrardow* 898 F.2d 137, 1990 AMC 2193 (2 Cir. 1990), where, in a case of deterioration to bananas, testimony of experts as to the mode of packing and transporting the cargo to the ship, combined with the clean bill of lading and a random inspection at loading by the shipper, convinced the court that the bananas had been in good condition at loading.

[63] 175 F. Supp. 771 at p. 775, 1959 AMC 1200 at p. 1203 (S.D. N.Y. 1958).

[64] 190 F. Supp. 1 at p. 7, 1960 AMC 1838 at p. 1847 (S.D. N.Y. 1960).

[65] 1997 AMC 1140 at p. 1148.

[66] 977 F. Supp. 1022 at p. 1029, 1998 AMC 1090 at p. 1098 (C.D. Ca. 1997).

government agency in the country of shipment, showing details of the shipment as evidenced by an export permit, corroborated the evidence from the bill of lading as to the quantity of goods delivered to the carrier for loading, and were admitted as evidence additional to the bill of lading to establish the claimant's *prima facie* case.[67]

In *Voest-Alpine Stahl Linz GmbH.* v. *Federal Pacific Ltd.*,[68] the Federal Court of Canada did not rely on the clean bill of lading alone, but also invoked evidence obtained from several survey reports filed in the record to support its conclusion that the steel cargo in question had sustained damage during the ocean carrier's period of responsibility.

An irregular bill of lading may also require to be supplemented, if not replaced, by other evidence. In a 1990 decision of the *Hof van Beroep te Antwerpen*,[69] for example, a so-called bill of lading "*apuré*", drawn up a considerable time after the discharge of the goods, was held insufficient evidence that the shortage complained of existed at discharge, where no valid protest had been issued against the carrier in good time. In *Nova Steel Ltd.* v. *The Kapitonas Gudin*,[70] where the cargo claimant could not establish a *prima facie* case of carrier liability for damage to a steel cargo by a clean bill of lading, it was nevertheless able to adduce "overwhelming" evidence that the steel had been damaged by sea water while in the carrier's custody.

The Supreme Court of Israel, in *Zim Israel Navigation Ltd.* v. *The Israeli Phoenix Assurance Company Ltd.* (*The Zim-Marseilles*),[71] relied upon evidence in addition to the bill of lading (the testimony of one of the shipper's production managers who had seen the container before it was sealed, as well as the supplier's invoice and the shipper's packaging list) to establish the contents of the container at loading and to overcome the effect of a "said to contain" notation on the bill of lading. Also relied upon was the fact that an additional container with identical contents, intended for the same importer, had not been the object of any claim.

Proof beyond the clean bill of lading can at times assist the carrier, rather than the cargo claimant. The *Cour de Cassation*,[72] for example, decided that although the carrier had issued a clean bill to the shipper, the shipper could not sue for the cargo loss or damage because the master, before issuing the bill, had also sent the shipper a letter of protest concerning the packing, condition and stowage of the cargo.

c) Clean bill of lading attests only to apparent good order at loading

A clean bill of lading only gives rise to a presumption of the apparent good order and condition of the goods at the time of their delivery to the carrier, in so far as that

---

[67] See also *The Irini M* [1988] 1 Lloyd's Rep. 253, a case of short delivery of a cargo of oil, decided on the basis of the ship's ullages and shore measurements at loading and discharge, rather than on the basis of the quantity shown on the bill of lading.
[68] (1999) 174 F.T.R. 69, [2000] ETL 497 (Fed. C. Can.).
[69] [1993] ETL 880.
[70] (2002) 216 F.T.R. 1 at pp. 22-23 (Fed. C. Can.).
[71] [1999] ETL 535 at p. 541.
[72] *Cour de Cassation*, May 25, 1993, [1994] ETL 31.

order and condition can be ascertained by an external examination.[73] In consequence, where the goods are packed in such a way that their order and condition is not apparent from an external examination, the burden of proof on the cargo claimant is more demanding. As the Fifth Circuit held in *Fabre S.A.* v. *Mondial United Corp.*:[74]

> "Where because of the perishable or instrinsic nature of the commodity, the internal condition is not adequately revealed by external appearances, cargo may have a considerable burden of going further to prove actual condition."

More recently, Hugessen J.A. of the Federal Court of Appeal of Canada echoed the same idea: "…where damage is caused by an unapparent condition, such as moisture, a clean bill in those terms ["apparent good order and condition"] may not be enough to support the shipper's claim."[75]

In today's shipping, where the goods are frequently packed in a container stuffed and sealed by the shipper or its freight forwarder, and the container is delivered to the carrier sealed, the carrier generally has no opportunity to make a thorough examination of its contents and is therefore left to rely on the description of the goods in the bill of lading. If loss or damage is ascertained at discharge, the bill of lading cannot always be relied upon to prove that the harm occurred while the goods were in the carrier's custody. In such cases, the bill does not necessarily suffice to make the claimant's *prima facie*

---

[73] See, for example, *The Niel Maersk* 91 F.2d 932 at p. 933, 1937 AMC 975 at p. 978 (2 Cir. 1937), cert. denied 302 U.S. 753, 1937 AMC 1646 (1937); *U.S.A.* v. *Lykes Bros. S.S. Co., Inc.* 511 F.2d 218 at p. 223, 1975 AMC 2244 at p. 2250 (5 Cir. 1975); *Vana Trading Co.* v. *S.S. Mette Skou* 536 F.2d 100 at p. 103 and note 4, 1977 AMC 702 at p. 705 (2 Cir. 1977), cert. denied, 434 U.S. 892, 1978 AMC 1898 (1977); *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at pp. 353-354 note 5, 1981AMC 1801 at p. 1810 note 5 (2 Cir. 1981) and authorities cited there; *Greenburg* v. *Puerto Rico Maritime Shipping Authority* 835 F.2d 932 at p. 934, 1989 AMC 699 at p. 702 (1 Cir.1987); *Transatlantic Marine Claims Agency, Ltd.* v. *M/V OOCL Inspiration* 137 F.3d 94 at p. 97, note 3, 1998 AMC 1327 at p. 1328 (2 Cir. 1998). See also *The TNT Express* [1992] 2 Lloyd's Rep. 636 at pp. 641-642 (N.S.W. S.C.); *Bally, Inc.* v. *M/V Zim America* 22 F3d 65 at p. 69, 1994 AMC2762 at p. 2766 (2 Cir. 1994); *Plastique Tags, Inc.* v. *Asia Trans Line, Inc.* 83 F.3d 1367 at p. 1370, 1996 AMC 2304 at p. 2307 (11 Cir. 1996); *Cigna Ins. Co. of Puerto* Rico v. *M/V Skanderborg* 897 F. Supp. 659 at p 661, 1996 AMC 600 at p. 602 (D. P.R. 1995);*Wirth Ltd.* v. *Belcan N.V.* (1996) 112 F.T.R. 81 at p. 96 (Fed. C. Can.); *Daewoo International* (*America*) *Corp.* v. *Sea-Land Orient Ltd.* 196 F.3d 481 at p. 485, 2000 AMC 197 at p. 200 (3 Cir. 1999). See also David Yates, *Contracts for the Carriage of Goods by Land, Sea and Air*, Lloyd's, London, 1993 at p. 1-411 and authorities cited there.

[74] 316 F.2d 163 at p. 170, 1963 AMC 946 at p. 951 (5 Cir. 1963). See also *J. Howard Smith, Inc. v. S.S. Maranon* 501 F.2d 1275 at p. 1278, 1974 AMC 1553 at p. 1554 (2 Cir. 1974), cert. denied 420 U.S. 975, 1975 AMC 2158 (1975); *Midwest Nut and Seed Co. v. S.S. Great Republic* 1979 AMC 379 at p. 384 (S.D. N.Y. 1978); *Perugina Chocolates & Confections, Inc. v. S/S Ro Ro Genova* 649 F. Supp. 1235 at p. 1240, 1987 AMC 801 at p. 809 (S.D. N.Y. 1986); *Associated Metals & Minerals Corp.* v. *M/V Olympic Mentor* 1997 AMC 1140 at p. 1146 (S.D. N.Y. 1995); *Steel Coils, Inc.* v. *M/V Lake Marion* 331 F.3d 422 at p. 429, 2003 AMC 1408 at p. 1415, [2003] ETL 601 at p. 610 (5 Cir. 2003), cert. denied *sub nom. Bay Ocean Management, Inc.* v. *Steel Coils, Inc.* 124 S. Ct. 400, 157 L. Ed.2d 280 (2003). In Canada, see *Francosteel Corp.* v. *Fednav Ltd.* (1990) 37 F.T.R. 184 at p. 194, 1991 AMC 1078 at p. 1082 (Fed. C. Can.).

[75] *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1988) 86 N.R. 39 at p. 40 (Fed. C.A.). See also *American Home Assurance Co.* v. *Zim Jamaica* 296 F. Supp.2d 494, 2004 AMC 393 (S.D. N.Y. 2003), where a clean bill of lading did not establish *prima facie* evidence of carrier liability for the wetting of a containerized cargo, and where the additional evidence adduced by the plaintiff was cast in doubt by the carrier.

proof of the carrier's liability for the loss or damage sustained. Other credible evidence may then be needed to establish the presumption of liability[76] (e.g. testimony of eyewitnesses to the loading and/or discharge, inspection reports, or proof that, by its very nature, the damage probably occurred during the carrier's period of responsibility).[77]

In *Bally, Inc.* v. *M/V Zim America*,[78] for example, where a clean bill of lading showed the weight of a shipment of shoes and leather goods packed in sealed containers, the bill, although affording *prima facie* evidence of the weight of the merchandise at loading,[79] did not suffice to prove the number of cartons loaded in the containers, because that aspect of the shipment was not visible on the bill or from an external examination of the containers. Consequently, when some cartons were missing at outturn, evidence in addition to the clean bill establishing the weight of the cargo at outturn, was required, in order to permit the cargo claimant to make a *prima facie* case that the cartons concerned had disappeared while the shipment was in the carrier's care.[80]

Similarly, where at outturn it was discovered that the cargo (which was supposed to be videocassette tape holders) was in fact cement blocks, the mere fact that the bill of lading stated the weight of the cargo and contained a "shipper's load and count" and a "said to contain" notation, did not suffice to prove that tape holders, rather than cement blocks, had been loaded into the sealed containers. Faced with this complete substitution of cargo (as opposed to a mere cargo shortage), the consignee's failure to adduce additional evidence of the packing of the container and what its weight would have been had it been stuffed with tape holders instead of cement, precluded it from making *prima*

---

[76] *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at pp. 353-354, 1981 AMC 1801 at p. 1811 (2 Cir. 1981); *Great American Trading Co.* v. *American President Lines, Ltd.* 641 F. Supp. 396 at p.399 (N.D. Cal. 1986); *Greenburg* v. *Puerto Rico Maritime Shipping Authority* 835 F.2d 932 at pp. 934-935, 1989 AMC 699 at p.702 (1 Cir. 1987); *Arkwright Mutual Insurance Co.* v. *M/V Oriental Fortune* 745 F. Supp. 920 at p. 923, 1991 AMC 2237 at p. 2240 (S.D. N.Y. 1990); *Rit-Chem Co.* v. *S/S Valiant* 743 F. Supp., 232 at p. 236, 1990 AMC 2953 at p. 2955 (S.D. N.Y. 1990); *New York Marine* v. *S/S Ming Prosperity* 920 F. Supp. 416 at p. 422, 1996 AMC 1161 at p. 1169 (S.D. N.Y. 1996); *Transatlantic Marine Claims Agency, Inc.* v. *M/V Ibn Zuhr* 1994 AMC 2087 at p. 2089 (S.D. Ga. 1994). See also *Wirth Ltd.* v. *Belcan N.V.* (1996) 112 F.T.R. 81 at p. 97 (Fed. C. Can.).

[77] *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind* 371 F.2d 537 at p. 539, 1967 AMC 277 at p. 280 (2 Cir. 1967)*; Greenberg v. Puerto Rico Maritime Shipping Authority* 835 F.2d 932 at p. 935, 1989 AMC 699 at p. 703 (1 Cir. 1987); *Francosteel Corp. v. Fednav Ltd.* (1990) 37 F.T.R. 184 at p. 196, 1991 AMC 1078 at p. 1084 (Fed. C. Can.).

[78] 22 F.3d 65 at p. 69, 1994 AMC 2762 at p. 2769 (2 Cir. 1994). See also *Plastique Tags, Inc.* v. *Asia Trans Line, Inc.* 83 F.3d 1367at p. 1370, 1996 AMC 2304 at p. 2307 (11 Cir. 1996); *Intercargo Insurance Co.* v. *L.C. Shipping, Inc.* 1998 AMC 2561 at p. 2564 (Cal. App. Dep't Supr. C. 1998).

[79] In many cases, however, the mere fact that the bill of lading mentions the weight of the shipment **will** suffice to establish the claimant's *prima facie* case. See, for example, *Leather's Best Inernational Inc.* v. *M/V Lloyd Sergipe* 760 F. Supp. 301 at pp. 308-309, 1991 AMC 1930 at p. 1937 (S.D. N.Y. 1991); *Hartford Fire Ins. Co.* v. *M/V Savannah* 756 F.Supp. 825 at p. 827, 1991 AMC 1923 at p. 1925 (S.D. N.Y. 1991); *Continental Distributing Co., Inc.* v. *M/V Sea-Land Commitment* 1992 AMC 1743, 1994 AMC 82 (S.D. N.Y. 1992); *Fox and Associates, Inc.* v. *M/V Hanjin Yokohama* 977 F. Supp. 1022 at p. 1028, 1998 AMC 1090 at p. 1096 (C.D. Ca. 1997).

[80] For a similar case, see *Junior Gallery Ltd*. v. *Neptune Orient Lines Ltd*. 1999 AMC 565 at p. 573 (S.D. N.Y. 1998), holding that the additional evidence of shortage at "outturn" must show the shortage on delivery to the consignee or agent, rather than when the container is inventoried at its final destination.

facie proof of delivery of the goods to the carrier in "good condition".[81]

In *Associated Metals & Minerals Corp.* v. *M/V Olympic Mentor*,[82] the Court held that one way of proving delivery to the carrier in good condition is to show that the damaged apparent on the packaging at outturn would have affected the appearance of the package at loading had it existed at that time. Another way is to show that "the cargo was packaged and transported to the load port in such a manner and under such conditions that should have prevented damage from occurring en route."[83]

d) Qualifications as to order and condition of goods at loading

The carrier is the party to whom the apparent condition of the goods on their reception from the shipper or his agent is best known. Bills of lading covering shipments in sealed containers stuffed by shippers or their agents are often qualified by the carrier, using expressions such as "weight, number and quantity unknown". Phillips, L.J. held in *The River Gurara*:[84]

> "Where the bill of lading is so qualified it does not even constitute prima facie evidence that the goods detailed by the shipper have been shipped. In such circumstances, the onus is on a claimant to prove by extrinsic evidence the shipment of any goods which he claims have been lost or damaged. The shipowner similarly has to rely on extrinsic evidence – probably the same evidence—to demonstrate the number of packages upon the basis of which his limitation of liability falls to be computed."

Much the same effect is achieved by the use on bills of lading of expressions such as "said to contain" or "shipper's weight, load and count", wording expressly authorized in the United States by the *Pomerene Act* 1916/1994.[85] These words suffice to switch to the claimant the burden of proving that the cargo mentioned on the bill of lading was in fact loaded.[86] Nor is the carrier bound to show on its bill of lading any information as to marks, number, quantity or weight which it has reasonable grounds to suspect to be

---

[81] *Daewoo International* (*America*) *Corp.* v. *Sea-Land Orient Ltd.* 196 F.3d 481 at p. 485, 2000 AMC 197 at pp. 200-201 (3 Cir. 1999). See also *Classic Fashions, Inc.* v. *Navieras N.P.R., Inc.* 68 F. Supp.2d 1312 at p. 1314 (S.D. Fla. 1999) (insufficient evidence of total number of cartons packed in container at shipment).

[82] 1997 AMC 1140 (S.D. N.Y. 1995).

[83] *Ibid*. at pp. 1146-1147 (S.D. N.Y. 1995).

[84] [1998] 1 Lloyd's Rep. 225 at p. 234 (C.A.). See also *Attorney-General of Ceylon* v. *Scindia Steam Navigation Co.* [1962] A.C. 60 at p. 73, [1961] 2 Lloyd's Rep. 173 at p. 180 (P.C.); *The Atlas* [1996] 1 Lloyd's Rep. 642 at pp. 646-647; *The Mata K* [1998] 2 Lloyd's Rep. 614 at p. 619. But see also *Cour de Cassation*, February 13, 1996, DMF 1997, 802, note Y. Tassel, where a similar rubber-stamped clause was held ineffective to protect the carrier under art. 36 of Decree No. 66-1078 of December 31, 1966, because the carrier could have weighed the container.

[85] 49 U.S.C. 80113(b), (c) and (d).

[86] *Dublin Co. v. Ryder Truck Lines, Inc*. 417 F.2d 777 at p. 778 (5 Cir. 1969)*; Mitsui & Co.* v. *M/V Eastern Treasure Barge M/V 6769*, 466 F. Supp. 391 at p. 395, 1979 AMC 2508 at pp. 2509-2512 (E.D. La. 1979); *Fluor Engineers & Constructors, Inc. v. Southern Pacific Transportation Co.* 753 F.2d 444 at p. 453 n. 13 (5 Cir. 1985), rehearing denied, 760 F.2d 269 (1985).

inaccurate or which it has no reasonable means of checking.[87]

Of course, even if the bill of lading contains "limiting language", such as "shipper's weight, load and count", it may nevertheless constitute *prima facie* proof of any of those terms which the carrier could have verified (e.g. by weighing the container) but did not in fact verify.[88]

A bill of lading which has been "claused" unreasonably or dishonestly by a master, however, has rendered the carrier liable for violating the duty of issuing a proper bill. In *The David Agmashenebeli*, Colman, J. held:[89]

> "I therefore conclude that, although the master was entitled to clause the mate's receipt to refer to the fact that a small proportion of the cargo [of urea] was discoloured, he was not entitled to use the words which conveyed the meaning that the whole or a substantial part of the cargo was thus affected. Nor was he entitled to clause the mate's receipts or bills of lading to suggest that the presence of a miniscule quantity of contaminants rendered the cargo otherwise than in good order and condition. The defendants therefore failed to issue to the shippers a bill of lading which contained a statement as to the apparent good order and condition of the urea which a reasonably observant master could properly have made. The defendants were thereby in breach of their contractual duty arising under art. III, r. 3 of the Hague-Visby Rules."

It has also been held that in the case of cargoes of a particular kind, certain notations as to apparent damage do not affect the status of the bill as a "clean bill". For example, hot rolled steel coils are sometimes shipped under bills of lading containing notations such as "atmospheric rust", "rust stained", "partly rust stained", "wet before shipment" or "rust on ends". Such notations have been found to refer to "fresh water rust" caused by the storage of the hot rolled steel coils in the open air prior to their loading onto the ship. Because rust of this type does not damage the coils or affect their value, bills of lading bearing such notations have been held to be "clean bills" despite such notations, and therefore to avail as *prima facie* evidence by the shipper of the apparent good order and condition of the steel at loading.[90]

---

[87] Hague and Hague/Visby Rules, art. 3(3) *in fine*; U.S. COGSA 1936, 46 U.S.C. Appx. 1303 (3)(c) *in fine*. See also *Leather's Best International Inc.* v. *M/V Lloyd Sergipe* 760 F. Supp. 301 at p. 309, 1991 AMC 1929 at p. 1938 (S.D. N.Y. 1991). For a similar Australian decision, see *The Esmeralda I* [1988] 1 Lloyd's 206 at pp. 209-210 (N.S.W. S.C.).

[88] *Westway Coffee Corp.* v. *M/V Netuno* 675 F.2d 30 at p. 32, 1982 AMC 1640 at pp. 1642-1643 (2 Cir. 1982); *Plastique Tags, Inc.* v. *Asia Trans Line, Inc.* 83 F.3d 1367 at p.1370, 1996 AMC 2304 at p. 2307 (11 Cir. 1996); *Fox and Associates, Inc.* v. *M/V Hanjin Yokohama* 977 F.Supp. 1022 at p. 1028, 1998 AMC 1090 at p. 1097 (C.D. Ca. 1997).

[89] [2003] 1 Lloyd's Rep. 92 at p. 115.

[90] *Steel Coils, Inc.* v. *M/V Lake Marion* 331 F.2d 422 at pp. 426-428, 2003 AMC 1408 at p. 1412-1415, [2003] ETL 601 at pp. 606-609 (5 Cir. 2003), cert. denied *sub nom. Bay Ocean Management, Inc.* v. *Steel Coils, Inc.* 124 S. Ct. 400, 157 L. Ed.2d 280 (2003). See also *Thyssen, Inc.* v. *S/S Eurounity* 21 F.3d 533 at pp. 536-538, 1994 AMC 1638 at pp. 1640-1644 (2 Cir. 1994); *Nova Steel Ltd.* v. *Lithuanian Shipping Co.* (2002) 216 F.T.R. 1 at p. 9 (Fed. C. Can.); *Moac* v. *Lilac Marine Corp.* 296 F. Supp.2d 91 at p. 101, 2004

e) Proof of goods outturned short or damaged

To complete its *prima facie* proof, the cargo claimant must show that the goods were discharged short or damaged. Once again, credible evidence is necessary, and the burden of proof falls on the claimant to adduce it,[91] because the claimant is the party to whom that evidence is usually most readily available.

f) Timely notice of loss or damage and the claimant's *prima facie* case

The Hague and Hague/Visby Rules, at art. 3(6), require that notice of loss or damage and its general nature be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery under the contract of carriage. If the loss or damage is non-apparent, the notice must be given within three days of such removal. The failure of the cargo claimant to give such notice on time constitutes *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.[92]

Accordingly, it has been held that giving timely notice of loss within the deadlines set by art. 3(6) is part of the cargo claimant's burden in establishing its *prima facie* case of the carrier's liability, so that failure to give the notice on time gives rise to a rebuttable presumption that the goods were discharged in the condition specified on the bill of lading.[93] This presumption too is a logical consequence of recognizing that the facts as to the condition of the cargo on discharge are best known to the consignee. Rebuttal of the presumption is possible on presentation by the claimant of "...sufficient evidence that the cargo was damaged or short prior to delivery."[94]

AMC 670 at p. 681 (D. P.R. 2003).

[91] *Crisis Transportation Co.* v. *M/V Erlangen Express* 794 F.2d 185 at p. 187, 1987 AMC 1905 at pp. 1907-1908 (5 Cir. 1986); *Pacific Employers Insurance Co.* v. *M/V Gloria* 767 F.2d 229 at p. 239 (5 Cir. 1985); *Westinghouse Electric Corp.* v. *M/V Leslie Lykes* 734 F.2d 199 at p. 206, 1985 AMC 247 at pp. 255-256 (5 Cir. 1984). See also *Hof van Beroep te Antwerpen*, September 16, 1996, (*The Swede Maria*), [1997] ETL 108 (no probative force where document concerning shortages issued by port authority and dated after the event, especially where document referred to wrong date of vessel's arrival and where cargo interests failed to request an unloading report). See also *Tribunal de Commerce de Nanterre*, November 8, 2000, Revue Scapel 2002, 70.

[92] For France, see art. 57 of Decree No. 66-1078 of December 31, 1966. See also *Cour de Cassation*, March 12, 1996, [1996] ETL 507.

[93] *Socony Mobil Oil Co., Inc.* v. *Texas Coastal & International, Inc.* 559 F.2d 1008 at p. 1012, 1977 AMC 2598 at p. 2602 (5 Cir. 1977); *Associated Metals and Minerals Corp.* v. *M/V Rupert de Larrinaga* 581 F.2d 100 at p. 109, 1979 AMC 483 at p. 484 (5 Cir. 1978); *Goya Foods, Inc.* v. *S.S. Italica* 561 F. Supp. 1077 at p. 1083 n. 4, 1987 AMC 817 (summ.) (S.D. Tex. 1983); *Pacific Employers Insurance Co.* v. *M/V Gloria* 767 F.2d 229 at p. 238 (5 Cir. 1985); *Sumitomo Corp. of America.* Cv. *M/V Sie Kim* 632 F. Supp. 824 at p. 834, 1987 AMC 160 at p. 169 (S.D. N.Y. 1985); *Crisis Transportation Co.* v. *M/V Erlangen Express* 794 F.2d 185 at p. 187, 1987 AMC 1905 at p. 1908 (5 Cir. 1986*); Leather's Best International Inc. v. M/V Lloyd Sergipe* 760 F. Supp. 301 at p. 309, 1991 AMC 1929 at p. 1939 (S.D. N.Y. 1991); *Bally, Inc.* v. *M/V Zim America* 22 F.3d 65 at p. 71, 1994 AMC 2762 at p. 2770 (2 Cir. 1994.); *Intercargo Insurance Co.* v. *L.C. Shipping, Inc.* 1998 AMC 2651 at pp. 2653-2654 (Cal. App. Dep't. Super. Ct. 1998); *Rothfos Corp.* v. *M/V Nuevo Leon* 123 F. Supp.2d 362 at p. 367, 2000 AMC 2054 at p. 2058 (S.D. Tex. 2000).

[94] *Nissho-Iwai* v. *M/T Stolt Lion* 617 F.2d 907 at p. 912 note 4, 1980 AMC 867 at p. 873 note 4 (2 Cir.

3) Third principle of proof – onus of proof means making proof to a reasonable degree

It is the third principle of proof of a marine cargo claim that *the onus of proof does not mean providing all the circumstances to the point of absurdity, but means making proof to a reasonable degree*.

Burden of proof means making reasonable proof in the circumstances; even the rebutting of *prima facie* proof need not be done by anything more than a preponderance of evidence.

In *Cargo Carriers Inc.* v. *Brown S.S. Co.*,[95] it was held that,

> "The rule of law is well established that when it appears the cargo was in good condition when loaded, the responsibility rests upon the ship owner to establish by a fair preponderance of the evidence that any damage was caused by another… The fact that over 200,000 of this cargo of 277,000 bushels was found to be in good condition is some evidence that the entire cargo was in good condition when loaded."

In *Dominion Tankers Ltd.* v. *Shell Petroleum Co. (John A. McDougald)*,[96] gasoline was lost from a vessel and the carrier argued that this was due to a stranding which damaged the hull. The claimant declared that the gasoline had been pumped over the side to lighten the ship. It was held on appeal that the carrier's explanation of the loss was reasonable and consistent with the occurrence of the stranding and the severe damage done to the ship. Maclean J. cited *The City of Baroda*[97] to the effect that,

> "… the onus on a person relying on an exception relieving him from liability did not go so far as to make him prove all the circumstances

---

1980); *Pacific Employers Ins. Co.* v. *M/V Gloria* 767 F.2d 229 at p. 238 (5 Cir. 1985); *Bally, Inc.* v. *M/V Zim America* 22 F3d. 65 at p. 71, 1994 AMC 2762 at p. 2770 (2 Cir. 1994); *Transatlantic Marine Claims Agency, Inc.* v. *M/V OOCL Inspiration* 137 F.3d 94 at p. 98, 1998 AMC 1327 at p. 1330 (2 Cir. 1998); *Rothfos Corp.* v. *M/V Nueovo Leon* 123 F. Supp. 2d 362 at p. 367, 2000 AMC 2054 at p. 2058 (S.D. Tex. 2000).

[95] 95 F. Supp. 288 at p. 292, 1950 AMC 2046 at p. 2053 (W.D. N.Y. 1950). See also *International Produce, Inc.* v. *Frances Salman*, 1975 AMC 1521 at p. 1538, [1975] 2 Lloyd's Rep. 355 at p. 365 (S.D. N.Y. 1975). ("The burden must be satisfied by a 'preponderance of evidence'."); *Vana Trading Co., Inc.* v. *S.S. Mette Skou* 415 F. Supp. 884 at p. 887, 1976 AMC 1521 at pp. 1523-1525 (S.D. N.Y. 1976), rev'd on other grounds, 556 F.2d 100, 1977 AMC 702 (2 Cir. 1977), cert. denied, 434 U.S. 892, 1978 AMC 1898 (1977); *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at p. 354, 1981 AMC 1801 at p. 1812 (2 Cir. 1981) ("a preponderance of the credible evidence"); *Perugina Chocolates & Confections, Inc.* v. *S/S Ro Ro Genova* 649 F. Supp. 1235 at pp. 1240-1241, 1987 AMC 801 at p. 810 (S.D. N.Y. 1986). See also *The Apostolis* [1999] 2 Lloyd's Rep. 292 at p. 299, (shipowner counterclaiming for fire damage to ship required to prove, on "balance of probability", that fire caused by discarded cigarette of stevedore hired by shipper). See also *The Apostolis* (*No. 2*) [2000] 2 Lloyd's Rep. 337 at pp. 345-346 (C.A.), upholding the trial judge on this specific point.

[96] [1939] Ex. C.R. 192 at p. 203, [1939] AMC 541 at p. 551. This dictum was cited and relied upon by the Supreme Court of Canada in *Western Can. S.S. Co.* v. *Can. Commercial Corp.*, [1960] S.C.R. 632 at p. 641.

[97] (1926) 42 T.L.R. 717.

which would explain an obscure situation."

In *States Marine Corp.* v. *Producers*,[98] the Ninth Circuit held that the carrier has only an "ordinary burden of proof" i.e. on the preponderance of evidence, and need not show "clear and convincing" proof.

In *U.S.A.* v. *Lykes Bros. S.S. Co. Inc.*,[99] it was shown that flour which had been delivered to the ship was partially infested. Thus the clean bill of lading was rebutted. Nevertheless the Fifth Circuit noted that the failure of the shipper's *prima facie* case did not warrant dismissing plaintiff's claim in view of negligence on the part of the carrier. Instead the case was sent back to the trial to determine what care should have been exercised by the carrier and what damage was due to its fault.

In *Perugina Chocolates & Confections, Inc.* v. *S/S Ro Ro Genova*,[100] however, where there was evidence of pre-loading damage to containers of chocolates, because the claimant failed to prove by a preponderance of evidence that the melting of the chocolates was more likely to have occurred while they were in the custody of the carrier than before they were loaded, its claim was dismissed. It was also held that because the claimant had failed to establish its *prima facie* case, and even if there was evidence of improper stowage, the carrier did not have to prove the exception of inherent vice of the goods. Nor did it have to reach the problem of possible concurrent causation.[101]

4) Fourth principle of proof – concealment, modification or destruction of key evidence

a) Concealment, modification or destruction of key evidence

The fourth principle of proof does not arise as often as the three other principles. It is that *once a party conceals, modifies or destroys evidence, other evidence of that party is suspect*.

The fourth principle appears from time to time in reported cases and arises from a practice by claimants and defendants which inevitably irritates the courts. This practice is the concealment, modification or destruction of evidence by one or other of the parties. The court normally views other proof by that party with suspicion, once such conduct has been discovered. This applies to erasures in logs;[102] to the failure by carriers to produce rough cargo receipts, rough logs, engine room logs, refrigeration space records, cargo

---

[98] 310 F. 2d 206, 1963 AMC 246 (9 Cir. 1962).
[99] 511 F. 2d 218, 1975 AMC 224 (5 Cir. 1975).
[100] 649 F. Supp. 1235 at p. 1241, 1987 AMC 801 at p. 811 (S.D. N.Y. 1986).
[101] *Ibid*., F. Supp. at p. 1241, 1987 at p. 811, citing *Caemint Food, Inc.* v. *Lloyd Brasileiro* 647 F.2d 347 at p. 356, 1981 AMC 1801 at pp. 1814-1815 (2 Cir. 1981); *American Tobacco Co.* v. *Goulandris* 281 F.2d 179 at pp. 181-182, 1962 AMC 2655 at pp. 2659-2660 (2 Cir. 1960); *American Tobacco Co.* v. *The Katingo Hadjipatera* 81 F. Supp. 438 at pp. 446-447, 1949 AMC 49 at pp. 59-61 (S.D. N.Y. 1948), modified on other grounds, 194 F.2d 449, 1951 AMC 1933 (2 Cir. 1951), cert. denied, 343 U.S. 978 (1952).
[102] *Old Colony Ins. Co.* v. *S.S. Southern Star*, 280 F. Supp. 189 at p. 191, 1967 AMC 1641 at p. 1644. "The alteration of the log book entries for October 4th are matters to which the Court attaches considerable importance."

plans, mate's tally books, etc.; and the failure by cargo interests to produce packing descriptions, production records, quality control tests, preocean transport tallies, survey reports at discharge, etc.

In *International Produce, Inc.* v. *Frances Salman*,[103] the Court stated:

> "It is important to note that the rough log of the Frances Salmawas never produced, so that entries in the smooth log as to weather conditions, some of which indicate possible afterthought, cannot be accepted with much confidence."

In *The Theodegmon* Phillips J. held:[104]

> "In the course of investigations aboard the *Theodegmon*, photographs were taken from what was said to be the engine bell book in use at the time of the grounding….This record is puzzling for a number of reasons. The book that was photographed vanished soon after the photographs were taken, but does not appear to have been a bell book that had been in continuous use in the engine room up to the time of the grounding."

This fact, together with many others, cast doubt on the testimony of the witnesses for the defendant shipowner. Similarly, in *Olbert Metal Sales Ltd.*v. *Cerescorp. Inc.*,[105] the fact that a cargo claimant had destroyed documents showing when the goods were damaged, was one factor which caused to Court to deny its motion for discontinuance of suit, because it appeared that the motion may have been motivated by the claimant's desire to avoid discovery of documents, which motion, if granted, would have prejudiced the defendant.

On the other hand, in *Complaint of Grace Line, Inc.*,[106] the court refused to draw an inference against Grace Line because the portion of the course recorder tape which referred to the period of the accident had been ripped out and other documents, including the deck log, were missing or stolen. Similarly, in *Caemint Food, Inc.* v. *Lloyd Brasileiro*,[107] although the carrier had destroyed charts showing the temperature and humidity in the ship's holds more than one year after the cargo damage occurred, no unfavourable inference of improper ventilation of the holds was drawn, because the parties agreed that the defendant *routinely* destroyed such reports after one year. It has also been held that: "... an adverse inference from the non-production of evidence may not be used to satisfy [the claimant's] burden of proof until the burden of production has been shifted. [to the carrier]."[108]

---

[103] 1975 AMC 1521 at p. 1540, [1975] 2 Lloyd's Rep. 355 at p. 365 (S.D. N.Y. 1975). See *also Tupman Thurlow Co.* v. *S.S. Castillo*, 490 F. 2d 302 at p. 308, 1974 AMC 51 at p. 59 (2 Cir. 1974) where the failure to produce the *Kuehltagebuch* (daily cooler book) was noted. The non-production of material evidence which is in the control of a party raises an inference that the evidence is unfavourable to that party." See also *The Arabic*, 34 F. 2d 559 a p. 561, 1929 AMC 1364 at p. 1367 (S.D. N.Y. 1929) re: the failure to produce the rough log and the record of wireless communication.

[104] [1990] 1 Lloyd's Rep. 52 at p. 72.

[105] (1996) 126 F.T.R. 161 at p. 166 (Fed. C. Can.).

[106] 1974 AMC 1253 (S.D. N.Y. 1973).

[107] 647 F.2d 347 at p. 356, 1981 AMC 1801 at p. 1814 (2 Cir. 1981).

[108] 898 F.2d 137, 1990 AMC 2193 at p. 2196 (2 Cir. 1990).

The unexplained absence of relevant reports can likewise be damaging. In *The Toledo*,[109] for example, the fact that the crew had never completed any "damage certificates" concerning damage sustained by the frames and brackets supporting the shell plating in the ship's holds, combined with the shipowner's failure to produce an "indent book" in which it claimed that such damage had previously been recorded, were noted by the court. The missing documentation helped support the ultimate decision that the shipowner had not satisfied its burden of proving due diligence to make the vessel seaworthy.

Similarly, in *Kanematsu GmbH* v. *Acadia Shipbrokers Limited*,[110] the Federal Court of Canada held that because the bill of lading was not produced and its absence was not satisfactorily accounted for, the defendants, having "parted with possession of the cargo at their own risk and to the prejudice of [the plaintiff]", were liable for delivering the goods without surrender of the bill of lading.

b) Failure to call key witnesses

The failure by either party to call key witnesses is also suspect. Thus, in *U.S.A.* v. *Central Gulf S.S. Corp.*,[111] it was held:

> "The court finds that defendant's failure to call as witnesses their employees having knowledge of the nature and scope of the defendant's inspections and efforts to protect the flour, and their failure to explain the absence of these witnesses, raises the presumption that the testimony of the employees if called as witnesses, would have been adverse to the interests of the defendants."

More recently, the Leggatt L.J. held:[112]

"It cannot be too strongly emphasized that when the determination of an

---

[109] [1995] 1 Lloyd's Rep. 40 at p. 51. See also *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719 at p. 722, referring to the refusal of the shipowner's representatives to give the claimants' expert access to the plans of the vessel following a fire aboard, and the failure of the owners and ship managers to provide timely disclosure of relevant documents. There was also evidence of an attempt by the defendants to "interfere with evidence before the vessel was inspected".

[110] 1999 AMC 1533 at p. 1538 (Fed. C. Can.). See also *Canadian Pacific Forest Products v. Belship* (*Far East*) *Shipping* (1996) 111 F.T.R. 11 at pp. 25-26 (Fed. C. Can.), where the absence of notations in the ship's log concerning the tightening of lashings on a deck cargo of lumber during Force 7 winds, suggested improper care by the master.

[111] 321 F. Supp. 945 at p. 953, 1971 AMC 14 at p. 25 (E.D. La. 1970). See also *J. Gerber & Co.* v. *S.S. Sabine Howaldt* 437 F. 2d 580 at p. 593, 1971 AMC 539 at p. 556 (2 Cir. 1971): "The defendant is entitled to the inference that [plaintiffs' surveyor] found the hatches and their covers in good condition… because the plaintiffs did not call on [plaintiffs' surveyor] to testify and gave no adequate reason for not producing him." See also *Hellenic Lines Ltd.* v. *Life Ins. Corp. of India* 526 F. 2d 830, 1975 AMC 2457 (2 Cir. 1975).

[112] *The Apolstolis* [1997] 2 Lloyd's Rep. 241 at p. 249 (C.A.). See also *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719 at p. 722, where the failure of the defendant carrier to call various important witnesses was noted.

> issue depends upon whether witnesses… are telling the truth about a particular event, it is not sensible to expect a Judge to be able to decide it satisfactorily without the benefit of seeing the witnesses."

In *Dow Chemicals Co.* v. *S.S. Giovanella d'Amico,*[113] cargo owners had the burden of proving good order and condition of a cargo of styrene monomer upon delivery ot the ship, but the original chemical analysis reports were destroyed and the chemist was not produced as a witness. It was held:

> "However, it is well settled that the intentional destruction of a document or object relevant to the proof of an issue on trial can give rise to a strong inference that its production would have been unfavourable to the spoliator. Richarson on Evidence, s. 91 at p. 64 (9th ed. Prince 1964)." Moreover, where a witness is under the control of a party and could testify, if called, to material facts, the failure to call that witness can give rise to the strongest inference against that party which the opposing evidence permits. This is particularly true where the testimony would be important and where it can be inferred that the witness would ordinarily tend to be favourable to that party."

In *Canastrand Industries Ltd.* v. *The Lara S,*[114] the carrier's failure to call a surveyor retained by it and another surveyor who had conducted a joint survey of the damages, led to the drawing of an "adverse inference" against the carrier.

In *The Patraikos 2,*[115] the Singapore High Court drew an unfavourable inference from the failure of the defendant shipowner to call an able-bodied seaman to testify to the events surrounding a grounding of the ship caused by the incompetence of the vessel's second mate.

c) Failure to conduct proper investigations

The defendant's failure to prove that all proper investigations were carried out can also prove fatal to its efforts to discharge its burden of proof, particularly where the cause of the loss or damage is not clearly established. In *The Fjord Wind*, for example, where the ship's crankpin bearings failed for unidentified reasons, and prior failures of the same kind had not been fully investigated, Moore-Bick J. held:[116]

> "It is for the owners to show that they themselves and those for whom they were responsible exercised due diligence to make the ship seaworthy, or

---

[113] 297 F. Supp. 699 at p. 701, 1970 AMC 379 at p. 381 (S.D. N.Y. 1969). See *also Nissho-Iwai Co*. v. *Star Bulk Shipping* 503 F. 2d 596 at p. 598, 1975 AMC 671 at p. 675 (9 Cir. 1974), where the failure of plaintiff to produce its cargo checkers as witnesses was noted but it was held that the fact should have been raised at trial.

[114] [1993] 2 F.C. 553 at p. 577, (1993) 60 F.T.R. 1 at p. 17 (Fed. C. Can.), upheld without discussion of the point, (1994) 176 N.R. 31 (Fed. C.A.). See also *Nova Steel Ltd.* v. *Lithuanian Shipping Co.* (2002) 216 F.T.R. 1 at p. 24 (Fed. C. Can.), where a negative inference was drawn from the failure to call as a witness the second mate with respect to certain entries he had made in the ship's deck log.

[115] [2002] 4 S.L.R. 232 (Singapore High C.), upheld by Singapore C.A. in October 2002.

[116] [1999] 1 Lloyd's Rep. 307 at p. 323, upheld [2000] 2 Lloyd's Rep. 191 (C.A.)

> that any failure to do so, if there was one, did not cause or contribute to the casualty. Since the cause of the casualty remains unknown, the owners can only discharge that burden by showing that they and M.A.N. [the ship's engine builder] between them did not overlook any lines of enquiry which competent experts would reasonably be expected to have pursued, but in the absence of evidence as to what investigations were in fact carried out and why, I cannot be satisfied that this is so. In these circumstances the owners are unable to discharge the burden of showing that they exercised due diligence to make the ship seaworthy."

The Court of Appeal expressly approved this holding, in dismissing the appeal of the defendants.[117]

Similarly, the claimant's failure to examine cargo for protracted periods of time after its discharge may preclude the claimant from proving, on a balance of probabilities, that the cargo was outturned in a damaged condition.[118]

Adverse consequences may also result for a party who fails to participate in investigating a claim. The Court of Antwerp, for example, allowed a survey report prepared by only one party to be invoked against the other party (a terminal operator) who had not reacted to invitations to attend the survey (performed at the terminal) and to examine the damage.[119]

d) Specious testimony

Of course, contradictory, incredible or evasive testimony by witnesses can also lead courts to conclude that the party producing them has not discharged its burden of proof. In *The Theodegmon*,[120] for example, the deliberate efforts by witnesses for the defendant shipowner to conceal the engine breakdown and their lack of frankness about previous problems with the ship's steering gear, coupled with the absence of proper maintenance records, led to the conclusion that the shipowner had not carried its onus of proving that the failure of the steering gear had not resulted from a lack of due diligence on its part. In *Canastrand Industries Ltd.* v. *The Lara S*, a witness called by the carrier to prove insufficiency of packing by the shipper was found not to be credible; in addition, proof of previous shipments improperly packaged did not prove that the shipment in question suffered from the same defect.[121]

---

[117] [2000] 2 Lloyd's Rep. 191 at pp. 203 and 205-206 (C.A.).

[118] See, for example, *Francosteel Corp.* v. *Fednav Ltd.* (1990) 37 F.T.R. 184 at p. 195, 1991 AMC 1078 at p. 1083 (Fed. C. Can.) (cargo not examined until four weeks after discharge); *Acwoo International Steel Corp.* v. *M/V Hosei Maru* 1989 AMC 2894 at pp. 2906-2907 (E.D. Mich. 1989) (cargo not examined until several months after discharge).

[119] *Hof van Beroep te Antwerpen*, November 30, 1998, [1999] ETL 346.

[120] [1990] 1 Lloyd's Rep. 52 at p. 77.

[121] [1993] 2 F.C. 553 at p. 576, (1993) 60 F.T.R. 1 at p. 16 (Fed. C. Can.), upheld without discussion of the point, (1994) 176 N.R. 31 (Fed. C.A.). See also *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719, where the "inconsistent and inaccurate" statements of many "unsatisfactory" witnesses for the defendant carrier in a ship fire case was commented on repeatedly by Cresswell, J. throughout his decision.

Even testimony proferred in **good** faith, but which is impugned as being erroneous on counterproof, may scuttle a party's effort to discharge its evidentiary burden. In *Francosteel Corp.* v. *Fednav Ltd.*,[122] for example, the plaintiff's surveyor reported and testified as to the "hygroscopic" nature of a cargo of ferro manganese (i.e. its innate propensity to retain moisture). Once that testimony was impugned as technically incorrect by a metallurgist called by the defendant, the Court decided that the surveyor's thesis had been proven incorrect and it was accordingly discounted as evidence that the ferro manganese had caused condensation and sweat damage to a cargo of steel coils stowed alongside it. The rejection of the surveyor's evidence in turn helped defeat the plaintiff's case that the steel had been sweat damaged while in the carrier's custody.

e) Inadequate documentary evidence

The plaintiff may also be unable to discharge its burden of proof if its documentary evidence is inconclusive, contradictory or confused. In *Voest-Alpine Canada Corp.* v. *Pan Ocean Shipping Co.*,[123] for example, the claimant, owing to incomplete, contradictory and confused documentary evidence, was unable to show that most of the damaged steel pipes for which it was seeking compensation had in fact been included in the same shipment of pipes mentioned in the statement of claim. The trial judge dismissed the claim, declaring: "There has been so much confusion in the documentation and reports that I cannot conclude that they relate to the same batch of pipe. I must conclude, therefore, that the plaintiff has not proven its case."

Similarly, in a French decision, where the report of cargo damage, drawn up after a storm at sea, portrayed the loss as due to an "Act of God", but the ship's log reported that the lost cargo had been jettisoned intentionally to correct the vessel's list, the carrier's peril of the sea defence was dismissed.[124]

Another example may be found in *The Fjord Wind*.[125] In that case, the shipowner failed to join the engine builder in the proceedings or to adduce sufficient documentary evidence of precisely what investigations the builder, as an independent contractor retained by the owner, had made of failures in the vessel's crankpin bearings. These omissions supported a finding of lack of due diligence.

---

[122] (1990) 37 F.T.R. 184 at p. 192, 1991 AMC 1078 at p. 1085 (Fed. C. Can.). See also *Nova Steel Ltd.* v. *Lithuanian Shipping Co.* (2002) 216 F.T.R. 1 at p. 26 (Fed. C. Can.), dismissing exaggerated statements by an expert witness about the damaged steel coils having been "saturated with water" at loading and incorrect statements about the coils having been discharged at destination in rain.

[123] (1991) 55 B.C.L.R. (2d) 357 at p. 367 (B.C. S.C.), upheld (1993) 79 B.C.L.R. (2d) 379 (B.C. C.A.).

[124] *Cour d'Appel de Rennes*, July 1, 1992, Bulletin des Transports 1993, 329, commentary by P. Bonassies, DMF 1994, no. 65 at p. 164.

[125] [2000] 2 Lloyd's Rep. 191 at pp. 204 and 206 (C.A.). See also *The Assunzione* [1956] 2 Lloyd's Rep. 468 at p. 487, where the shipowner could not establish its due diligence to make the vessel seaworthy before and at the commencement of the voyage, where it produced no evidence of classification society surveys or repairs to the ship in the years immediately preceding the failure of the vessel's steering gear during severe, but not exceptional, weather.

III. The Order of Proof in a Marine Cargo Claim and its Defence

The Rules do not set out an order of proof in a marine cargo claim and its defence. Yet there is a surprising similarity in the order of proof demanded by the courts of the nations which have adopted the Hague and Hague/Visby Rules.[126]

The order in which proof must be presented in making and defending a cargo claim is the order in which the chapters of *Marine Cargo Claims* have been presented. Generally:

The claimant must first prove his loss.

The carrier must then prove a) the cause of the loss, b) that due diligence to make the vessel seaworthy in respect of the loss was taken and c) that he is not responsible by virtue of at least one of the exculpatory exceptions of the Rules.

Then, various arguments are available to the claimant.

Finally, there is a middle ground where both parties may make various additional proofs.

1) What the claimant must prove:[127]

Initially, it is the claimant who has the burden of proof, and to make his case he must prove all six of the following facts:

a) That the claimant is the owner of the goods and/or is the person entitled to make the claim.[128]

b) The contract or the tort (delict).[129]

c) That the person claimed against is the responsible person.[130]

d) That the loss or damage took place in the carrier's hands. This is usually done by proving the condition of the goods when received by the carrier and the condition at discharge.[131]

---

[126] One American judge, clearly referring to the order (rather than burden) of proof, has stated that "The burden of proof under COGSA shifts more frequently than the wind on a stormy sea." See *Banana Services, Inc.* v. *M/V Fleetwave* 911 F.2d 519 at p. 521, 1991 AMC 439 at p. 442 (11 Cir. 1990).

[127] Preliminary questions such as which law applies are discussed in Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chaps. One to Seven. This order of proof for the claimant was approved by the Federal Court of Canada in *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1987) 8 F.T.R. 191 at p. 195, 1987 AMC 1474 at pp. 1475-1476 (Fed. C. Can.), upheld without discussion of the point (1988) 86 N.R. 39 (Fed. C.A.); *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 159 (Fed. C. Can.); *Voest-Alpine Stahl Linz GmbH* v. *Federal Pacific Ltd.* (1999) 174 F.T.R. 69 at pp. 75-75, [2000] ETL 497 at p. 503 (Fed. C. Can.); in *Nova Steel Ltd.* v. *Lithuanian Shipping Co.* (2002) 216 F.T.R. 1 at pp. 8-9 (Fed. C. Can.); and in *Mediterranean Shipping Co. S.A. Geneva* v. *Sipco Inc.* [2002] 3 F.C. 125 at pp. 150-152, (2001) 211 F.T.R. 248 at pp. 262-264 (Fed. C. Can.).

[128] See Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap. 8, "Who May Claim or Sue".

[129] See *ibid*., Chap. 9, "Proving the Contract or the Tort".

[130] See *ibid*., Chap. 10, "Whom to Sue".

[131] See *ibid*., Chap. 11, "Loss While in the Charge of the Carrier".

e) The physical extent of the damage or the loss.[132]

f) The actual monetary value of the loss or damage.[133]

2) What the carrier must prove

The carrier must then prove one of the following:

a) The cause of the loss.[134]

b) Due diligence to make the vessel seaworthy at the beginning of the voyage, in respect of the loss.[135]

c) One of the following exculpatory clauses :

i) Error in navigation and management of the ship.[136]

ii) Fire.[137]

iii) Perils of the Sea and similar exceptions, being Acts of God; Acts of War; Acts of Public Enemies; Restraint of Princes; Quarantine; Strikes; Riots; Saving Life.[138]

iv) Act or omission of the shipper.[139]

v) Inherent vice.[140]

vi) Insufficiency of packing.[141]

vii) Latent defects.[142]

viii. Any other cause.[143]

3) The various arguments then available to the claimant:

a) Negligence at loading.[144]

b) Negligence in stowage.[145]

c) Lack of the cargo.[146]

d) Negligence at discharge.[147]

---

[132] See *ibid*., Chap. 12, "Loss or Damage to Cargo".
[133] See *ibid*., Chap. 13, "Measure of Damages".
[134] See *ibid*., Chap. 14, "The Cause of the Loss or Damage".
[135] See *ibid*., Chap. 15, "Due Diligence to Make the Vessel Seaworthy".
[136] See *ibid*., Chap. 16, "Error in Navigation or Management".
[137] See *ibid*., Chap. 17, "Fire".
[138] See *ibid*., Chap. 18, "Peril of the Sea and Similar Exceptions".
[139] See *ibid*., Chap. 19, "Acts and Fault of the Shipper".
[140] See *ibid*., Chap. 20, "Inherent Vice and Hidden Defect".
[141] See *ibid*., Chap. 21, "Insufficiency of Packing".
[142] See *ibid*., Chap. 22, "Latent Defects".
[143] See *ibid*., Chap. 23, "Art. 4(2)(q) – Any Other Cause Without Fault".
[144] See *ibid*., Chap. 24, "Load Properly and Carefully".
[145] See *ibid*., Chap. 25, "Stow Properly and Carefully".
[146] See *ibid*., Chap. 26, "Properly Carry, Keep and Care for Cargo."
[147] See *ibid*., Chap. 27, "Discharge Properly and Carefully".

4) Other arguments, proofs and related matters then available to both parties.[148]

IV. Two views of the order of proof in marine cargo claims – Noël J. vs. Thurlow J.

In *N.M. Paterson & Sons Ltd.* v. *Robin Hood Flour Mills, Ltd.* (*The Farrandoc*),[149] Noël J. suggests the following as the proper order of proof in a cargo case:[150]

1) The cargo claimant proves his loss or damage in the hands of the carrier.
2) The carrier must prove the cause of the loss.
3) The carrier must prove one of the exculpatory exceptions of art. 4(2)(a) to (q) of the Hague or Hague/Visby Rules.
4) Then the cargo claimant must prove unseaworthiness and the carrier, presumably, must then prove due diligence to make the vessel seaworthy before and at the beginning of the voyage.[151]

My order of proof[152] differs partly from that of Noël J. and is as follows:

---

[148] See *ibid*., Chaps. 28 to 45.
[149] [1968] 1 Ex. C.R. 175 at p. 188.
[150] *Ibid*. at pp. 188-189.
[151] In *The Bunga Seroja* (1998) 158 A.L.R. 1 at p. 25, [1999] 1 Lloyd's Rep. 512 at p. 527, 1999 AMC 427 at pp. 459, McHugh J. of the High Court of Australia held: "If unseaworthiness is relied on, the cargo owner must prove that the loss or damage resulted from that unseaworthiness. Once that is proved the burden is on the carrier to prove that it exercised due diligence to make the ship seaworthy." This is also the approach also taken in *Hiram Walker & Sons, Ltd.* v. *Dover Navigation Co., Ltd.* (1950) 83 Ll. L. Rep. 84 at p. 89; *Minister of Food* v. *Reardon Smith Line* [1951] 2 Lloyd's Rep. 265 at p. 272; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336 at pp. 339 and 340; *The Good Friend* [1984] 2 Lloyd's Rep. 586 at p. 588; *The Theodegmon* [1990] 1 Lloyd's Rep. 52 at p. 54; *The Fiona* [1993] 1 Lloyd's Rep. 257 at p. 288, upheld without discussion of this point, [1994] 2 Lloyd's Rep. 506 (C.A.); *The Toledo* 1995] 1 Lloyd's Rep. 40 at p. 50; *The Apostolis* [1997] 2 Lloyd's Rep. 241 at pp. 244 and 257 (C.A.); *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719 at p. 735. See also Scrutton, 20 Ed., 1996 at p. 442. For Canada, see also *A.R. Kitson Trucking Ltd.* v. *Rivtow Straits Ltd.* (1975) 55 D.L.R. (3d) 462 at p. 466, [1975] 4 W.W.R. 1 at p. 6 (B.C. S.C.); and *Kruger Inc.* v. *Baltic Shipping Co.* (1989) 57 D.L.R. (4th) 493 at p. 502 (Fed. C.A.).
[152] See *Paterson Steamships, Ltd. v. Canadian Co-operative Wheat Producers* [1934] A.C. 538 at p. 545, (1934) 49 Ll. L. Rep. 421 at p. 427 (P.C.), a case involving the Canadian forerunner to the Hague Rules, where Lord Wright adopted the statement by Lord Sumner in *F.C. Bradley & Sons, Ltd.* v. *Federal Steam Navigation Co. Ltd.* (1927) 27 Ll. L. Rep. 395 at p. 396 (H.L.), a case involving the Australian forerunner to the Rules, that: "in strict law, on proof being given of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowner to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country." See also Hobhouse J. in *The Torenia* [1983] 2 Lloyd's Rep. 210 at p. 218: "If... in all cases where a structural defect in the ship has contributed to the loss, the carrier has in effect to prove that he had exercised due diligence to make the ship seaworthy, I find nothing surprising about that conclusion. Indeed, it suggests that common sense and the law are proceeding in step."

1) The cargo claimant proves his loss and damage in the hands of the carrier.

2) The carrier must prove the cause of the loss.

3) The carrier must prove due diligence to make the ship seaworthy before and at the beginning of the voyage in respect of the loss

4) The carrier must prove one of the exculpatory exceptions of art. 4(2)(a) to (q) of the Hague or Hague/Visby Rules.

5) The cargo claimant then attempts to prove lack of care of cargo or attempts to disprove the above evidence of the carrier, including lack of seaworthiness and lack of due diligence.

6) Both parties then have various arguments available to them.

It is noteworthy that Thurlow J., in *The Farrandoc*,[153] disagrees with Noël J. and would seem to follow my order of proof, because he cites Lord Somervell in *Maxine Footwear Co.*[154] as to art. 3(1) being an overriding obligation.[155] Other decisions have also applied this same order of proof.[156]

I believe Thurlow J. is right for the following three reasons:

a) the carrier's obligation to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage (under art. 3(1) of the Hague and Hague/Visby Rules) is an "overriding obligation", as was held by Lord Somervell in *Maxine Footwear Co.*;[157]
b) the due diligence provision of art. 3(1) of the Hague and Hague/Visby Rules, unlike art. 3(2) of those Rules obliging the carrier to care properly and carefully for the cargo, is not subject to the exculpatory exceptions enumerated at art. 4(2)(a) to (q); and
c) in marine cargo claims, proof of the cause of the cargo loss or damage is more readily available to the carrier than to the cargo claimant and should therefore be made by the carrier, according to the second basic principle of proof outlined above.[158]

Gibson J.'s observation in the Court of Appeal illustrates the dilemma of order of proof facing counsel: "Firstly, that in relation to every issue in respect to which the plaintiff and the defendant had the burden to adduce evidence, each respectively did so in

---

[153] [1968] 1 Ex. C.R. 175 at p. 183.
[154] [1959] A.C. 589 at pp. 602-603. [1959] 2 Lloyd's Rep. 105 at p. 113 (P.C.).
[155] [1968] 1 Ex. C.R. 175 at p. 183.
[156] For other decisions applying my preferred order of proof, see *Produits Alimentaires Grandma Ltée* v. *Zim Israel Navigation Co.* (1987) 8 F.T.R. 191 at p. 195, 1987 AMC 1474 at p. 1476 (Fed. C. Can.), upheld without discussion of the point, (1988) 86 N.R. 39 (Fed. C.A.); *Canfor Ltd.* v. *The Federal Saguenay* (1990) 32 F.T.R. 158 at p. 160 (Fed. C. Can.); *Canastrand Industries Ltd.* v. *The Lara S* [1993] 2 F.C. 553 at p. 575, (1993) 60 F.T.R. 1 at p. 16 (Fed. C. Can. *per* Reed J.), upheld without discussion of the point, (1994) 176 N.R. 31 (Fed. C.A.). The same carrier's order of proof, rephrased very slightly for cases of sweat damage to steel shipments, was also approved in *Francosteel Corp.* v. *Fednav Ltd.* (1990) 37 F.T.R. 184 at p. 193, 1991 AMC 1078 at p. 1080 (Fed. C. Can.).
[157] *Ibid*.
[158] See section II(2), *supra*, and authorities cited there.

a most unsatisfactory manner, making the most flimsy proof." (*N.M. Paterson & Sons Ltd.* v. *Robin Hood Flour Mills, Ltd.* (*The Farrandoc*) [1968] 1 Ex. C.R. 175 at p.198).

V. The Balance of the Hague and Hague/Visby Rules – The "Juggling" of Three "Balls"

From the outset, one crucially important concept must be borne in mind in studying the order and burden of proof under the Hague and Hague/Visby Rules. The Hague Rules, from their inception in 1924, sought to strike a delicate balance among three interrelated principles: a) the carrier's obligation to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage (art. 3(1)); b) the carrier's obligation to care properly and carefully for the cargo (art. 3(2)); and c) the carrier's exculpatory exceptions under art. 4(2)(a) to (q). Allocating liability for marine cargo claims under the Rules depends, in many cases, on the court's analysis of the interplay between these three notions. It requires a skill resembling that of a juggler juggling three balls at a circus. It is vitally important that the equilibrium which the drafters of the Rules sought to enshrine as between these three "balls" be remembered; otherwise the assignment of responsibility in particular cases may depart from the judicial solutions which the drafters were striving to ensure. A change in the definition of any of these elements,[159] in the evaluation of their role in causing the loss or damage,[160] the burden of proof which must be discharged in respect of any of them, or in the order in which that proof is made, threatens to distort the balance, and thus spoil the "juggling". It is against this background that the burden and order of proof in the litigation and arbitration of marine cargo claims are examined in this article.

VI. France--The Order of Proof

1) The former Law of April 2, 1936

The former domestic Law of April 2, 1936[161] did not permit the carrier to exonerate himself by proving that he had exercised due diligence. The carrier did benefit from exceptions similar to those listed in art. 4(2) of the Hague Rules, but he was responsible for lack of seaworthiness. Proving due diligence, therefore, was not a

---

[159] See, for example, Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap. 18: "Peril of the Sea and Similar Exceptions", *infra*, describing the distortion in the balance of the Rules invited by the decision of the High Court of Australia in *Great China Metal Industries Co. Ltd.* v. *Malaysian International Shipping Corporation Berhad* (*The Bunga Seroja*) (1998) 158 A.L.R. 1, [1999] 1 Lloyd's Rep. 512, 1999 AMC 427, determining, contrary to the weight of authority in other countries, that a storm may constitute a "peril of the seas" exculpating the carrier under art. 4(2)(c) of the Rules even where it is both "expectable" and expected" at the time and place where it occurs.

[160] See, for example, Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap. 26: "Properly Carry, Keep and Care for Cargo", *infra*, demonstrating how courts, in deciding the true cause of the cargo loss or damage, are careful to differentiate between improper care of the cargo and peril of the seas, and as between improper care of the cargo and lack of due diligence to make the ship seaworthy.

[161] *Journal officiel* of April 11, 1936. See Rodière, *Traité Général, Afrrètements & Transports*, t. 2, para. 592.

prerequisite to raising an exception.

2) The Law of June 18, 1966

a) Introduction

The domestic Law of June 18, 1966,[162] which replaced the Law of April 2, 1936, was intended to bring the domestic law of France into line with the Hague Rules. A due diligence provision was added at art. 21, but there are certain differences in the presentation of the law. It is drafted in "civil law style",[163] with the result that distinctions have been made between the domestic law, on one hand, and the Hague and Hague/Visby Rules,[164] as applied to international carriage, on the other.

b) The claimant must prove his claim

Supplementing the Law of June 18, 1966, Decree No. 66-1078 of December 31, 1966[165] calls upon the claimant to prove his claim at art. 56 which reads:

(Translation)

> "The plaintiff must establish the existence and the extent of the damages for which he claims relief."

c) The cause of the loss

The burden of proving the cause of the loss is imposed on the carrier by art. 27 of the Law of June 18, 1966, under which the carrier is rebuttably presumed responsible unless it can positively establish that the loss resulted, in whole or in part, from one of the exceptions listed at art. 27(a) to (i).[166] As in other jurisdictions, the presumption of liability results from the carrier's issuance of a clean bill of lading.[167] If the cause is unknown, the carrier is responsible.[168] French courts apply the same onus of proof rule in

---

[162] Law No. 66-420 of June 18, 1966. This Law was amended by Law. No. 79-1103 of December 21, 1979 and by Law No. 86-1292 of December 23, 1986, to more closely reflect the Visby amendments.

[163] Vialard, 1997, para. 481, note. 1.

[164] The Hague Rules were ratified by the Law of April 9, 1936 and promulgated by the Decree of March 25, 1937. The Rules were amended by Decree No. 77-809 of July 8, 1977 to comply with the Visby Rules. The Amending Protocol of December 21, 1979 in respect of Special Drawing Rights (S.D.R.) was ratified by Law No. 86-798 of July 3, 1986, which substituted 666.67 S.D.R. for the 10,000 p.g.f. per package and 2 S.D.R. for the 3 p.g.f. per kilo.

[165] This Decree was adopted as the normal, regulatory supplement to the law of June 18, 1966. As to what the cargo claimant must show, see *Cour d'Appel de Bordeaux*, January 19, 1972, DMF 1972, 349.

[166] *Cour d'Appel de Paris*, January 16, 1985, DMF 1986, 297; *Cour de Cassation*, October 27, 1998, (*The Bo Johnson*) DMF 1999, 608 note P. Pestel-Debord. See also Rodière & du Pontavice, 12 Ed., 1997, para. 364; Vialard, 1997, para. 480; Rèmond-Gouilloud, 2 Ed., 1993, para. 579.

[167] See *Cour d'Appel de Rennes*, September 27, 1995, *The Euro-Trident*, DMF 1997, 49 at p. 51: "*Considérant* ***qu'en l'absence de réserves à l'embarquement****, le transporteur est présumé responsable des dommages survenus pendant que la marchandise se trouve placée sous sa garde...*" (translation: "Considering that *in the absence of clausing at loading*, the carrier is presumed responsible for damages occurring while the goods are under its custody…" (emphasis added).

[168] The text of the Law at art. 27 speaks for itself. See *Cour d'Appel de Bordeaux*, November 20, 1972, DMF 1973, 287; *Cour d'Appel d'Aix*, May 16, 1975, DMF 1976, 288; *Tribunal de commerce de Paris*, October 24, 1975, DMF 1976, 550; *Cour d'Appel de Paris*, November 27, 1996, Bulletin des Transports 1997, 68. See also Rodière & du Pontavice, 1997 at para. 364. Under the Law of April 2, 1936 as well, the

Hague and Hague/Visby Rules cases.[169]

The presumption under art. 27 (like art. 4 of the Hague and Hague/Visby Rules but with perhaps more clarity) is a presumption of liability, not merely of fault. For this reason the carrier does not enjoy the benefit of the doubt.[170]

d) Due diligence

The Law of June 18, 1966 contains a due diligence provision at art. 21 in terms similar to art. 3(1) of the Hague Rules. Under that Law, however, compliance with the obligation to exercise due diligence, as set out in art. 21, is only specifically required to be proved by the carrier when it is attempting to show that the loss was caused by unseaworthiness,[171] i.e. art. 27(a). Proof of the exercise of due diligence is not legally required when the carrier seeks to rely on the other exceptions in art. 27.[172] In other words, proof of compliance with art. 21 is not a condition precedent to reliance on the other art. 27 exceptions.[173]

---

carrier was responsible when the cause was unknown: see *Cour de Cassation*, December 4, 1962, DMF 1963, 145; see also *Cour de Cassation*, February 26, 1963, DMF 1963, 334.

[169] *Cour de Cassation*, March 5, 1996 (*The Diego and The Aquitania*) DMF 1996, 507 and on remand, *Cour d'Appel de Rouen*, December 8, 1998, DMF 2000, 126, note R. Achard; *Tribunal de commerce de Marseille*, January 14, 1997 (*The Zim Yokohama*) Revue Scapel 1997, 27, commentary by P. Bonassies, DMF Hors série no. 2, 1998, no. 109 at p. 71; *Cour de Cassation*, July 10, 2001 (*The Lloyd Pacifico*), DMF 2002, 247, observations P.-Y. Nicolas; *Cour d'Appel d'Aix*, April 1, 2003, Revue Scapel 2003, 59.

[170] Rodière, *Traité Général, Affrètements et Transports*, t. 2, paras. 613 and 617. See *Cour d'Appel de Paris*, October 16, 1985, DMF 1986, 309. See also *Cour de Cassation*, May 23, 1989 (*The Cap-Taillat*) DMF 1992, 350 (where no fault proven, carrier held liable).

[171] *Tribunal de commerce de Marseille*, February 22, 1972, DMF 1972, 731; *Cour d'Appel de Paris*, December 12, 1972, DMF 1973, 292. See also Rodière & du Pontavice, 12, Ed., 1997, para. 365; Rèmond-Gouilloud, 2 Ed., 1993, para. 579.

[172] Rodière, *Traité Général. Affrètements et Transports*, para. 619; *Cour de Cassation*, April 2, 1974, Bulletin des Transports 1974, 369. Similarly, in respect of international carriage governed by the Hague/Visby Rules, French courts have held that the carrier is not required to prove that he exercised due diligence to make the ship seaworthy *before* proving that the cause of the loss fell within the exceptions in art. 4(2); *Cour de Cassation*, April 2, 1972, DMF 1974, 458, [1975] ETL 486. The Belgian courts have also held that view: *Court of Appeal of Brussels*, March 3, 1972, [1972] ETL 992. Yet see the cogent argument of Pierre Bouloy that the carrier must prove that he exercised due diligence before he can raise one of the exceptions in art. 4(2), found in his note appended to *Cour d'Appel de Rouen*, June 30, 1972, DMF 1972, 722 at p. 730. This decision of the *Cour d'Appel de Rouen*, incidentally, was upheld by the *Cour de Cassation*, April 2, 1974, DMF 1974, 458, [1975] ETL 486, which, as mentioned above, specifically held, on the question of the *order* of proof, that the carrier need *not* prove the exercise of due diligence before raising an art. 4(2) exception.

[173] The Law of June 18, 1966 does not contain a provision equivalent to art. 3(2) of the Hague and Hague/Visby Rules. Art. 3(2) specifies that the carrier's duty of care of the cargo is "subject to the provisions of Art. 4…." That art. 3(1) is *not* said to be "subject to the provisions of art. 4" is another argument indicating that the due diligence provision in the Hague/Visby Rules is an overriding obligation. See note by Pierre Bouloy appended to *Cour d'Appel de Rouen*, June 30, 1972, DMF 1972, 722. See Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap. 15: "Due Diligence to Make the Vessel Seaworthy"; *Maxine Footwear Co.* v. *Canadian Government Merchant Marine* [959] A.C. 589 at pp. 602-603, [1959] 2 Lloyd's Rep. 105 at p. 113 (P.C.); *Great China Metal Industries Co. Ltd.* v. *Malaysian International Shipping Corporation Berhad* (*The Bunga Seroja*) (1998) 158 A.L.R. 1 at p. 24, [1999] 1 Lloyd's Rep. 512 at p. 526, 1999 AMC 427 at p. 458 (High C. of Aust.).

e) The exculpatory exceptions

The carrier may therefore exculpate itself from the presumption of liability resulting from the issuance of a clean bill of lading, by proving one of the exceptions of art. 27(a) to (i) (under the internal law) or, where applicable, of art. 4(2)(a) to (q) (of the Hague or Hague/Visby Rules) and its causal connection with the loss or damage.[174] The carrier, however, need not also prove absence of fault on its part.[175] The carrier's proof may be made by any means, including sufficient and concordant "presumptions of fact", but the proof must demonstrate that an excepted peril really existed.[176] In consequence, mere hypotheses do not suffice to rebut the presumption.[177]

The fact that the carrier has issued a clean bill of lading does not preclude the carrier from proving that the loss or damage resulted from an inherent defect of the goods,[178] such a defect not being apparent to the carrier when the bill was issued.

Where goods are packed in a container by the shipper and delivered sealed to the carrier, the carrier is often exonerated for any ensuing damage, because as carrier it had no opportunity to inspect the goods.[179] Nevertheless, it has also been held that the carrier may not simply rely on a clause in the bill of lading systematically exempting it from liability for any and all damage to goods loaded in containers by the shipper, because such a clause would, in effect, reverse the burden of proof, contrary to both the French Law of 1966 and the Hague Rules.[180] The carrier must still show some fault of the shipper in order to rebut the presumption of liability.

French courts generally refuse to give effect to "said to contain" or "shipper's load and count" clauses, because such provisions are considered to be "*clauses de style*" (boilerplate clauses) bereft of any legal efficacy.[181] Most judges take the position that

---

[174] See, for example, *Cour de Cassation*, February 22, 1983 (*The Bordadekoa*), DMF 1983, 660; *Cour d'Appel de Paris*, November 29, 1984 (*The Gauguin*), DMF 1985, 469; *Cour de Cassation*, January 4, 1994 (*The Mercandia*), DMF 1994, 439, notes H. Tassy & Y. Tassel.

[175] *Cour d'Appel d'Aix*, September 13, 1989 (*The Tolga*), DMF 1992, 631, note R. Achard.

[176] *Cour de Cassation*, May 29, 1987 (*The Ismène*), DMF 1988 170 at p. 172, requiring the carrier to: (translation) "... furnish *certain* proof of the existence of a cause of exoneration." (emphasis added).

[177] *Cour d'Appel de Paris*, July 13, 1988, DMF 1989, 515; *Cour d'Appel d'Aix*, July 4, 1986, DMF 1988, 471; *Cour d'Appel de Paris*, October 21, 1994 (*The CMB Exporter*). DMF 1995, 622, commentary by P. Bonassies, DMF 1996, no. 64 at p. 248; *Cour d'Appel d'Aix*, February 17, 1994 (*The Panaghis Vergottis*), DMF 1995, 307, observations P. Bonassies, DMF 1995, 188. See also *Cour d'Appel de Versailles*, March 20, 1995 (*The Soufflot*), DMF 1995, 813 (carrier invoking no cause of exoneration liable for loss).

[178] *Cour de Cassation*, February 16, 1988 (*The Suzanne-Delmas*), DMF 1989, 254, Revue Scapel 1988, 60, Bulletin des Transports 1989, 214; *Cour d'Appel de Rouen*, May 2, 1996 (*The Hoegh Banniere*), DMF 1997, 170 at p. 172, note P.-Y. Nicolas.

[179] *Cour d'Appel de Rouen*, May 23, 1991, Bulletin des Transports 1991, 607, commentary by P. Bonassies, DMF 1992, 157; *Cour d'Appel de Paris*, June 19, 1990, DMF 1991, 376, note R. Achard; but see also *Cour d'Appel de Rouen*, September 8, 1994, DMF 1995, 883, note Y. Tassel, where it was held that intact seals on a container do not guarantee the inviolability of the container, and the carrier was held liable.

[180] See *Cour de Cassation*, April 16, 1991, Bulletin des Transports, 1991, 590, commentary by P. Bonassies, DMF 1992, 158.

[181] See, for example, *Cour d'Appel de Rouen*, September 8, 1994, DMF 1995, 883, note Y. Tassel; *Cour d'Appel de Rouen*, April 14, 1994, DMF 1995, 380; *Cour d'Appel d'Aix*, May 21, 1992, DMF 1993, 307, observations P. Bonassies, DMF 1994, 103; *Cour d'Appel de Rouen*, June 29, 1989 (*The Ever-Giant*), DMF

carriers can virtually always check the contents of containers by being present at loading, either personally or by representatives, or by weighing the containers after receiving them from the shipper. A few decisions, however, have upheld these clauses where the carrier has been unable to exercise these supervisory functions.[182]

f) The counterproof of claimant

Proof by the carrier of an excepted peril and its connection with the loss does not automatically discharge the carrier of liability, however. Rather, such proof shifts the burden back to the cargo claimant to prove negligence by the carrier. The claimant may succeed if he shows, in counterproof, that the loss was caused, in whole or in part, by the fault of the carrier of his *préposés*.[183] For example, the claimant may try to prove that the carrier did not take proper care of the cargo during the voyage.[184]

g) Mixed causation

Where the loss or damage is caused partly by the fault of the carrier and partly by an excepted peril, French courts have begun to distinguish two types of case. The first type includes cases in which the contributory excepted peril is one falling within the "sphere of diligence" (*sphère de diligence*") of the shipper[185] (e.g. fault of the shipper or owner of the goods, insufficiency of packing or of marks, or inherent defect of the goods).[186] The liability for the resulting loss or damage may then be divided proportionally as between the carrier and the cargo claimant, in relation to the relative degrees of causation of the concurrent causes.[187] In such cases, the carrier must prove the

---

1991, 638; *Cour d'Appel de Rouen*, November 17, 1988 (*The Thérèse-Delmas*), DMF 1990, 327, commentary by P. Bonassies, DMF 1991, no. 59 at p. 95; *Cour d'Appel de Paris*, January 9, 1990 (*The Hilaire-Maurel*), DMF 1991, 116. For Belgium, see also *Hof van Beroep te Antwerpen*, January 20, 1988, [1988] ETL 304 (re a "declared by shipper" clause).

[182] See, for example, *Cour d'Appel de Paris*, June 19, 1990, DMF 1991, 376, note R. Achard. The "said to contain" clause has also proven effective in Belgium where the carrier had no opportunity to check the container's contents. See *Rechtbank van Koophandel te Antwerpen*, May 28, 1991, [1992] ETL 249: *Rechtbank van Koophandel te Antwerpen*, September 8, 1987, [1988] ETL 299.

[183] The claimant will not succeed, however, if the fault committed by the carrier or his *préposés* consisted of an error in navigation: art. 27, last para. See also Rodière & du Pontavice, 12, Ed., 1997, para. 364.

[184] Similarly, under the international regime, the cargo claimant, in attempting to overcome one of the carrier's defences based on art. 4(2), has the burden of proving that the loss was caused by the carrier's fault in the performance of his obligations under art. 3(2). See, for example, *Cour d'Appel d'Aix*, October 27, 1987 (*The Knud-Sif*), DMF 1989, 126, commentary by P. Bonassies, DMF 1990, 145. But if the claimant pleads that the loss was caused by the carrier's breach of his obligations under art. 3(1), the burden is on the carrier to prove that he had exercised due diligence.

[185] The theory supporting this distinction was developed by Alain Sériaux in his book, *La faute du transporteur*, 2 Ed., Economica, 1998 at paras. 209 *et seq*.

[186] Hague and Hague/Visby Rules, art. 4(2)(i), (m), (n) and (o). Under France's internal regime, these exceptions are grouped together at art. 27(g) of Law No. 66-420 of June 18, 1966: (translation): "faults of the shipper, notably in the packing, conditioning or marking of the goods".

[187] For examples of this type of mixed causation case, see *Cour d'Appel de Rouen*, December 8, 1998, (*The Diego and The Aquitania*) DMF 2000, 126, note R. Achard (carrier only partially liable for damage to a fruit cargo largely attributable to fault of shipper and inherent defects); *Cour de Cassation*, January 20, 1998 (*The Red-Sea-Elbe*), DMF 1998, 578, note P. Delebecque, commentary P. Bonassies, DMF Hors série

specific excepted peril, attributable to the shipper, which contributed to the harm, and the cargo claimant must prove the extent to which the carrier's fault aggravated the damage caused by the shipper's initial negligence.[188]

The other type of mixed causation case is one in which the contributory excepted peril is one falling **outside** the "sphere of diligence" of the shipper (e.g. peril of the sea, strikes, lockouts, war, restraint of princes, acts of public enemies). In such cases, French courts tend to hold the carrier liable for the **whole** of the loss or damage, provided that the carrier's fault was the proximate cause of the harm (i.e., that "but for" the carrier's fault, the loss or damage would not have occurred).[189] In such cases, the carrier must prove the excepted peril and its causal connection with the loss or damage, and the cargo claimant must prove, not only the fault of the carrier, but also that the fault was *the* cause without which the harm would not have been sustained.[190] Where the claimant makes such proof, the carrier's fault then "overrides" the excepted peril, resulting in the carrier's liability for the *totality* of the loss or damage.[191]

h) Notice of loss

The claimant must give notice of loss ("*des réserves*") in writing on discharge of the cargo, where the loss or damage is apparent, and where it is not apparent, within three days of delivery.[192] The notice of loss must be sufficiently precise as to the nature of the loss or damage.[193] Failure to give the notice is not fatal to the claim, but results in a rebuttable presumption of delivery in good order ("*présomption de livraison conforme*").[194] The right to sue is not lost by failure to give the notice within the

---

no. 3, 1999, no. 104 at p. 75 (carrier held only partially liable for worsening rust damage already affecting cargo when loaded); *Cour de Cassation*, November 26, 1996 (*The World Navigator*), DMF 1997, 798, note R. Achard (carrier relieved in part of liability for sea water damage resulting from defective tank cleaning prior to loading, where shipper's agent, at loading, had negligently certified vessel's fitness to load the cargo); *Cour d'Appel de Versailles*, June 16, 1988, DMF 1989, 465 (shipper held 25% liable for cargo damage because it failed to inspect defective containers supplied by carrier before loading them).

[188] *Ibid*., commentary by P. Delebecque, DMF 1998 at p. 584.

[189] Examples of this type of mixed causation case include *Chambre Arbitrale Maritime de Paris*, Sentence no. 971, October 24, 1997, DMF 1998, 706, commentary by P. Bonassies, DMF Hors série no. 2, 1998, no. 111 at p. 72 (true cause of the loss was found to be carrier's failure to prevent stowaways from boarding the vessel on which they died, thus contaminating the cargo and causing port authorities to order its discharge and reloading; in consequence, carrier's defence of restraint of princes was dismissed). See also *Cour de Cassation*, July 7, 1998 (*The Atlantic Island*), DMF 1998, 826, note P. Bonassies; additional commentary by P. Bonassies, DMF Hors série no. 3, 1999, no. 104 at p. 75 (peril of the sea defence, although established, did not exonerate carrier even partially, because true cause of the loss was carrier's improper deck carriage without shipper's consent or clear wording on the face of the bill of lading authorizing such carriage). See also *Cour d'Appel d'Aix*, October 27, 1987 (*The Knud-Sif*), DMF 1989, 126 (peril defence dismissed where damage would not have happened but for advanced corrosion of ship's shell plating, pre-dating the voyage).

[190] See *The Atlantic Island*, *ibid*., DMF 1998 at p. 830 (report of *conseiller* Rémery).

[191] See commentary by P. Bonassies on *The Atlantic Island*, *supra*, DMF Hors série no. 3, 1999, para. 104 at p. 75.

[192] Hague Rules, art. 3(6); Decree No. 66-1078 of December 31, 1966, art. 57.

[193] *Cour d'Appel de Versailles*, January 17, 2002, DMF 2002, 651; *Cour d'Appel de Paris*, DMF 2002, 27, observations Y. Tassel.

[194] See *Cour d'Appel de Rouen*, December 13, 2001 (*The Nicole*), DMF 2002, 523, observations P. Pestel-

specified deadline, but the failure shifts the onus to the cargo claimant to prove that the cargo was short or damaged on delivery.[195] This onus is a heavy one, but not impossible to discharge.[196]

3) The value of the Law of June 18, 1966

If the Law of June 18, 1966 does not make due diligence an overriding obligation,[197] it does illustrate, by comparison with the wording of the Hague and Hague/Visby Rules, that under these latter, due diligence is an overriding obligation.[198]

The Law of June 18, 1966 is valuable as well, in specifically declaring that the claimant must first prove his claim, that the carrier must then prove the cause of the loss, and that the presumption then falling upon the carrier is one of liability, and not merely of fault.

VII. Hamburg Rules – The Order of Proof

The order of proof under the Hamburg Rules is relatively clear, because the due diligence provision, the care of cargo provision and the exculpatory exceptions (being art. 3(1), art. 3(2) and art. 4(2)(a) to (q) respectively of the Hague/Visby Rules) are all found in art. 5(1) of the Hamburg Rules. Thus the claimant must prove his claim and then the carrier must exculpate himself. This means proving the cause of the loss, because he must show that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequence." The carrier then proves he fell within one of the exceptions.

In the case of fire, the burden of proof is one the claimanat in virtue of art. 5(4)(a) of the Hamburg Rules.

Art. 5(7) of the Hamburg Rules is a codification of the *Vallescura* Rule[199] and is a useful addition.

Debord.

[195] Rodière & du Pontavice, 12 Ed., 1997, paras. 384, 385; Vialard, 1997, para. 478; Rèmond-Gouilloud, 2 Ed., 1993, paras. 567 and 614. See also *Cour de Cassation*, November 12, 1997 (*The Steir*), DMF 1998, 40, note P. Bonassies, Revue Scapel 1998, 22. See also *Cour de Cassation*, January 14, 1997 (*The M.V. Bibi*), DMF 1997, 129, Revue Scapel 1997, 8 (suit dismissed where consignee failed to give notice of loss on time and also failed to adduce other evidence that damage existed on delivery); *Hof van Beroep te Antwerpen*, May 30, 1990 (*The Helene Clipper*), [1991] ETL 673 (where no written statement of loss or damage was given to master following discharge, and bill of lading exempted vessel from liability for post-discharge damage, record of condition of goods drawn up by a state agency out of time after discharge did not prove cargo loss occurred while goods were in carrier's custody).

[196] For cases where the presumption of proper delivery has been rebutted, see *Tribunal de commerce de Dunkerque*, April 25, 1987 (*The Pierre-Vieljeux*). DMF 1989, 535; *Cour de Cassation*, July 21, 1987 (*The Dupleix*), DMF 1989, 126; *Cour d'Appel d'Aix*, May 28, 1991, Revue Scapel 1992, 5; and *Tribunal de commerce de Marseille*, June 21, 1991, Revue Scapel 1991, 108.

[197] Rodière & du Pontavice, 12, Ed., 1997, para. 364.

[198] This is one of the great benefits of comparative law – "to know thyself", or to know one's own law by knowing another law.

[199] *Schnell & Co.* v. *S.S. Vallescura* 293 U.S. 296, 1934 AMC 1573 (1934). See Tetley, *Marine Cargo Claims*, 3 Ed., 1988, Chap 12: "Loss or Damage to Cargo".

VIII. The Order of Proof in Court vs. the Order of Proof under the Rules

The differences between order of proof under the Rules and order of proof in court must be borne in mind in reading this Chapter, which deals mostly with the order and burden of proof under the Hague and Hague/Visby Rules. It is essential to grasp that the order of proof under the Rules is not identical to the order of proof imposed by the rules of practice and procedure of common law courts.

The order of proof under the Rules refers to the sequence in which the cargo claimant and the carrier must prove various facts relating to their respective allegations, *in the light of the structure and provisions of those Rules*. This order of proof, as discussed above,[200] first requires the cargo claimant to advance *prima facie* proof of loss or damage to the goods during the period of responsibility of the carrier. The carrier is then obliged to introduce evidence as to: a) the material cause of the cargo loss or damage, b) the carrier's due diligence to make the ship seaworthy before and at the beginning of the voyage, and c) one or more of the exculpatory exceptions available to carriers as defences under the Rules. Next the cargo claimant tries to show negligence on the part of the carrier in handling and/or caring for the cargo. Thereafter, various arguments are open to each party.

In actually presenting their evidence in a common law court, however, the plaintiff and the defendant must abide by the rules of procedure governing pleading which apply in the court in which the trial is conducted. These court rules determine the order of proof *in the litigation process* (i.e. the manner and sequence in which each party to the lawsuit must adduce evidence in presenting its case). Common law court rules ordinarily require each party to a suit to set forth the *whole* of its case *at once*. First, the plaintiff adduces *all* of its evidence in support of his claim, after which the defendant adduces *all* of its evidence in support of its defence. Then the plaintiff may advance counterproof to contradict the carrier's defence. Neither party may therefore validly delay adducing certain evidence at trial, on the ground that according to the order of proof contemplated by the Hague or Hague/Visby Rules, such and such a fact or allegation is for the other party to prove or need only be proven at a later stage of the proceedings.

In consequence, as a matter of courtroom practice, a cargo claimant usually does not simply adduce evidence to prove his *prima facie* case against the carrier and then sit back, proffering no further evidence (e.g. of the carrier's lack of due diligence and/or negligence) until the carrier has adduced evidence to prove the basic elements of its defence (material cause of the loss, due diligence and exculpatory exception(s)). Rather, the rules of practice usually require the cargo plaintiff, in its proof, to adduce evidence as to *all* the elements of his claim, after which the defendant carrier, in defence, must introduce evidence as to *all* its grounds of defence. Each party usually makes whatever proof it can as to each element of its claim or defence, as the case may be, *as and when required to do so by the applicable court rules*. This conforms with the practice in court

[200] See discussion surrounding footnotes 127 to 148, *supra*.

of each party being obliged to make all the proof available to him. This practice also conforms to the general rule that each party make proof of facts in respect of seaworthiness and care of cargo and one of the exculpatory exceptions (see *supra*).

Confusing the order of proof under the Rules with the procedural order of proof can be a costly mistake. For example, in the case of *The Ralph Misener,* 2003 FC 837; [2003] F.C.J. Q.L. No. 1073, the attorney for the cargo claimant, invoking the order of proof under the Hague/Visby Rules, did not wish to call an expert witness to testify until the carrier had adduced evidence of its due diligence in respect of seaworthiness and the exception of fire. The judge of the Federal Court of Canada, however, on the basis of the governing procedural rules,[201] rightly insisted that cargo introduce its whole case at once, before the carrier adduced its defence evidence. The trial judgment on this point was upheld on appeal by the Federal Court of Appeal.[202]

The position may be different in civilian legal systems, where advocates general or other court-appointed attorneys prepare opinions on the legal issues of the case for the benefit of the presiding magistrates before the trial begins.

IX. The Adversarial System vs. the Investigative System (or Accusatorial vs. Inquisitorial)[203]

The so-called "adversarial" ("accusatorial") procedure is among the hallmarks of the common law as a legal system. In the adversarial system of judicial procedure, the judge plays a relatively passive role, intervening only occasionally in the conduct of the proceedings, and leaving to the lawyers the primary responsibility for adducing evidence, examining and cross-examining witnesses and pleading on the law. Conversely, the "investigative" ("inquisitorial") judicial system, traditionally associated with the civil law countries, assigns to the judge a more active role in the proceedings, particularly as regards the questioning of witnesses.

X. The Managerial System

Today, the historic dichotomy between adversarial and investigative procedure is being altered by the introduction into the procedures of common law courts of case

---

[201] Rule 274(1) of Canada's Federal Court Rules, 1998 (SOR/98-106) now the Federal Courts Rules, SOR/2004-283.

[202] *Elders Grain Co.* v. *The Ralph Misener* 2005 FCA 139, [2005] F.C.J. Q.L. No. 612 (unreported, Fed. C.A., Docket No. A-436-03, April 15, 2005), at paras. 52 to 66, citing on this point, at para. 63, Tetley, "The Burden and Order of Proof in a Marine Cargo Claim", a paper presented at the Federal Court and Federal Court of Appeal Education Seminar: Maritime Law, held in Ottawa, Ontario, November 5, 2004 and available online at: http://upload.mcgill.ca/maritimelaw/burden.pdf.

[203] Professor H. Patrick Glenn of McGill University has properly noted that the names of the contrasting systems should be "adversarial" vs. "investigative", or the more pejorative "accusatorial" vs. "inquisitorial". Glenn also seems to have coined the term "managerial system".

management.[204] Case management entails a more active role for the judge in directing the parties (and their attorneys) in the scheduling and conduct of the proceedings, in the interest of reducing delays and costs and making more efficient use of judicial resources. It is more akin to the investigative tradition of civilian jurisdictions than to the common law adversarial tradition, yet it appears to be "here to stay".

Case management also includes the possible holding of "dispute resolution conferences".[205] Such a conference permits a case management judge or a specially assigned prothonotary to conduct: 1) a mediation, to encourage resolution of the dispute; 2) an "early neutral evaluation of a proceeding" (to evaluate the relative strengths and weaknesses of the parties' positions and render a non-binding opinion on the probable outcome of the proceeding) and 3) a "mini-trial", where counsel for the parties present their "best case", leading to a non-binding opinion by the presiding judge or prothonotary as to the probable outcome of the proceeding.

A further alteration in the traditional adversarial mode of procedure is seen in the introduction of pre-trial settlement conferences into common law court systems. Pre-trial conferences are designed to clarify the issues, promote settlements and expedite the litigation. In the Federal Court of Canada, for example, the pre-trial conference, conducted before a judge or prothonotary,[206] occurs after all examinations for discovery have been completed and settlement discussions have taken place.[207] Participants in the conference must be prepared to address various matters, including, *inter alia*, the possibility of settlement, simplification of the issues, defining the issues requiring expert witnesses, the possibility of obtaining admissions to facilitate the trial, damages claimed, the estimate duration of the trial, suitable trial dates, and any other matter that may promote the timely and just disposition of the action.[208] Significantly, on filing a requisition for a pre-trial conference, a party must file a pre-trial conference memorandum,[209] accompanied by a copy of all documents intended to be used at trial that may be of assistance in settling the action.[210]

A proposed amendment to the Federal Court Rules, 1998 would make the admissibility of evidence of expert witnesses conditional upon the service of affidavits, setting out the proposed evidence, *before* the pre-trial conference is held.[211]

---

[204] See, for example, Canada's Federal Court Rules, 1998, SOR/98-106, at Part 9 ("Case Management and Dispute Resolution Services"), Rules 380-385, reproduced in Annex I, *infra*.
[205] Federal Court Rules, 1998, SOR/98-106, at Rules 386-391.
[206] *Ibid*., at Rules 257-267 ("Pre-Trial"), reproduced in Annex II, *infra*.
[207] *Ibid*., Rule 258(1) and (2).
[208] *Ibid*., Rule 263(a) to (m) lists all the subjects to be addressed at a pre-trial conference.
[209] *Ibid*., Rule 258(3) requires the pre-trial conference memorandum to contain: "(a) a concise statement of the nature of the proceeding; (b) any admissions of the party; (c) the factual and legal contentions of the party; and (d) a statement of the issues to be determined at trial."
[210] *Ibid*., Rule 258(4).
[211] See Annex III attached, being an extra from the Memorandum of the Honourable John D. Richard, Chief Justice of the Federal Court of Appeal to Members of the Profession, dated September 24, 2004, and the related Discussion Paper, prepared by a subcommittee of the Rules Committee of the Federal Court of Appeal and of the Federal Court, entitled "Service of Expert Witnesses' Affidavits Prior to the Pre-Trial Conference".

These procedural innovations in common law courts have at least an indirect effect on the burden and order of proof, inasmuch as they compel the parties to make early and complete disclosure of the evidence on which they rely, even though that disclosure remains confidential.[212] They also assign a more proactive role to judges and prothonotaries than was known under the traditional adversarial system.

A new system of law is thus emerging – not the adversarial vs. the investigative, or the accusatorial vs. the inquisitorial, but the managerial system. It is possible that the investigative system will gradually replace the adversarial system, even in common law countries. The managerial system is bringing this about.

XI. Conclusion

In carriage of goods by sea and, in fact, in the case of any claim in law, one must distinguish between the burden of proving any particular fact and the order of proof of the claim, its defence and counterproof. The order of proof and the burden of proving each fact, is the skeleton upon which any claim in law is made and on which its defence relies.[213]

The four general principles of burden of proof enunciated in this article are also of a general nature. It is hoped that they too will be of value in the prosecution of actions arising under all types of bailment, not merely contracts for the carriage of goods. The four principles can be, and in fact have been, transposed for all contract cases.

The classic distinction between the adversarial (or accusatorial) procedure of common law jurisdictions and the investigative (or inquisitorial) system of civilian countries is breaking down today, as courts, particularly in common law countries, develop a managerial system of procedure. Case management, pre-trial settlement conferences and dispute resolution services are all areas in which the managerial system is gradually emerging, at least in Canada. In the long run, these procedural innovations may make the traditional adversarial system more investigative in character. But the changes are *already* having a considerable impact on the burden and the order of proof in marine cargo claims, particularly because they compel parties to the suit to make full and early disclosure, to one another and to the court, of the facts, arguments and expert evidence which they have available and which they intend to adduce at trial.

---

[212] *Ibid*., Rule 267 provides: "No communication shall be made to a judge or prothonotary presiding at a trial or hearing, or on a motion or reference in an action, with respect to any statement made at a pre-trial conference, except as may be permitted in an order made at the conclusion of the pre-trial conference or as consented to by the parties." By Rule 266, a judge or prothonotary who conducts a pre-trial conference in an action shall not preside at the trial of the action unless all parties consent. Similar rules exist with respect to dispute resolution conferences. See Rules 388 and 391.

[213] For interesting articles on the burden of proof, see C. Ezeoke, "Allocating onus of proof in sea cargo claims: the contest of conflicting principles" [2001] LMCLQ 261; A. M. Paré, Jr., "The Burden of Proof in Cases of Cargo Loss and Damage Where the U.S. Carriage of Goods By Sea Act Has Been Incorporated into a Charter Party" 25 Tul. Mar. L.J. 491 (2001).

Prof. William Tetley, Q.C.
Faculty of Law
McGill University
Montreal, Quebec, Canada
e-mail: william.tetley@mcgill.ca
website: http://www.mcgill.ca/maritimelaw

ANNEX I

CANADA

Federal Court Rules, 1998 (SOR/98-106)

PART 9
CASE MANAGEMENT AND DISPUTE RESOLUTION SERVICES

CASE MANAGEMENT

Status Review

Status review

380. (1) Subject to subsection (3), where

(*a*) in an action,

(i) 180 days have elapsed since the issuance of the statement of claim and pleadings are not closed, or

(ii) 360 days have elapsed since the issuance of the statement of claim and no party has filed a requisition for a pre-trial conference under rule 258, or

(*b*) in an application or appeal, 180 days have elapsed since the issuance of the notice of application or appeal and no requisition for a hearing date has been filed,

the Court shall fix a time and date for a status review.

Review to be in writing

(2) Unless the Court directs otherwise, a status review shall be conducted on the basis of written representations.

Exception

(3) Subsection (1) does not apply to a specially managed proceeding. SOR/98-106, s. 380; err.(F), Vol. 132, No. 12.

Notice of status review

381. The Administrator shall serve a notice of status review, in Form 381, on the parties at least 10 days before the day fixed for the review.

By whom status review conducted

382. (1) A status review shall be conducted by a judge or prothonotary assigned for that purpose.

Powers of Court on status review

(2) At a status review, the Court may

(*a*) require a plaintiff, applicant or appellant to show cause why the proceeding should not be dismissed for delay and, if it is not satisfied that the proceeding should continue, dismiss the proceeding;

(*b*) require a defendant or respondent to show cause why default judgment should not be entered and, if it is not satisfied that the proceeding should continue, grant judgment in favour of the plaintiff, applicant or appellant or order the plaintiff, applicant or appellant to proceed to prove entitlement to the judgment claimed; or

(*c*) if it is satisfied that the proceeding should continue, order that it continue as a specially managed proceeding and make an order under rule 385.

Specially Managed Proceedings

Designated case management judges

383. The Chief Justice may assign

(*a*) one or more judges to act as a case management judge in a proceeding;

(*b*) a prothonotary to act as a case management judge in a proceeding referred to in subsection 50(2); or

(*c*) a prothonotary to assist in the management of a proceeding in the Trial Division other than a proceeding referred to in subsection 50(2).

Motion to request special management

384. A party to a proceeding may at any time bring a motion to have the proceeding managed as a specially managed proceeding.

Class actions

384.1 An action commenced by a member of a class of persons on behalf of the members of that class shall be conducted as a specially managed proceeding. SOR/2002-417, s. 23.

Powers of case management judge

385. (1) A case management judge or a prothonotary assigned under paragraph 383(*c*) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(*a*) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;

(*b*) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;

(*c*) fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and

(*d*) subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.

Order for status review

(2) A case management judge or a prothonotary assigned under paragraph 383(*c*) may, at any time, order that a status review be held in accordance with rule 382.

Order to cease special management

(3) A case management judge or a prothonotary assigned under paragraph 383(*c*) may order that a proceeding, other than a class action, cease to be conducted as a specially managed proceeding, in which case the periods set out in these Rules for taking any subsequent steps will apply. SOR/2002-417, s. 24.

DISPUTE RESOLUTION SERVICES

Order for dispute resolution conference

386. (1) The Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.

Time limit for dispute resolution conference

(2) Unless the Court orders otherwise, a dispute resolution conference shall be completed within 30 days.

Interpretation

387. A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(*c*), who may

(*a*) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;

(*b*) conduct an early neutral evaluation of a proceeding, to evaluate the relative strengths and weaknesses of the positions advanced by the parties and render a non-binding opinion as to the probable outcome of the proceeding; or

(*c*) conduct a mini-trial, presiding over presentation by counsel for the parties of their best case and rendering a non-binding opinion as to the probable outcome of the proceeding.

Confidentiality

388. Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.

Notice of settlement

389. (1) Where a settlement of all or part of a proceeding is reached at a dispute resolution conference,

(*a*) it shall be reduced to writing and signed by the parties or their solicitors; and

(*b*) a notice of settlement in Form 389 shall be filed within 10 days after the settlement is reached.

Report of partial settlement

(2) Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.

Notice of failure to settle

(3) Where no settlement can be reached at a dispute resolution conference, the case management judge shall record that fact on the Court file.

Stay of proceedings

390. On motion, a case management judge or a prothonotary assigned under paragraph 383(*c*) may, by order, stay a proceeding, including a proceeding that has

previously been stayed, for a period of not more than six months, on the ground that the parties have undertaken to refer the subject-matter of the proceeding to an alternative means of dispute resolution, other than a dispute resolution conference referred to in rule 386.

Case management judge not to preside at hearing

391. A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.

ANNEX II

CANADA

Federal Court Rules, 1998 (SOR/98-106)

PRE-TRIAL

Settlement Discussions

Settlement discussions

257. Within 60 days after the close of pleadings, the solicitors for the parties shall discuss the possibility of settling any or all of the issues in the action and of bringing a motion to refer any unsettled issues to a dispute resolution conference.

Pre-trial Conferences

Requisition for pre-trial conference

258. (1) After the close of pleadings, a party who is not in default under these Rules or under an order of the Court and who is ready for trial may serve and file a requisition for a pre-trial conference, accompanied by a pre-trial conference memorandum.

Contents of requisition

(2) A requisition for a pre-trial conference shall be in Form 258 and include a certification by the solicitor of record that

(*a*) all examinations for discovery that the party intends to conduct have been completed; and

(*b*) settlement discussions have taken place in accordance with rule 257.

Contents of pre-trial conference memorandum

(3) A pre-trial conference memorandum shall contain

(*a*) a concise statement of the nature of the proceeding;

(*b*) any admissions of the party;

(*c*) the factual and legal contentions of the party; and

(*d*) a statement of the issues to be determined at trial.

Documents

(4) A pre-trial conference memorandum shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action.

Time and place for pre-trial conference

259. On the filing of a requisition for a pre-trial conference, the Court shall fix a time, not more than 60 days thereafter, and place for the pre-trial conference.

Participation at pre-trial conference

260. Unless the Court directs otherwise, the solicitors of record for the parties and the parties or their authorized representatives shall participate in a pre-trial conference.

Notice of pre-trial conference

261. The Administrator shall serve a notice of pre-trial conference, in Form 261, on the parties at least 30 days before the date fixed for the conference.

Pre-trial conference memoranda

262. Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least seven days before the date fixed for the conference.

Scope of pre-trial conference

263. Participants at a pre-trial conference must be prepared to address

(*a*) the possibility of settlement of any or all of the issues in the action and of referring any unsettled issues to a dispute resolution conference;

(*b*) simplification of the issues in the action;

(*c*) definition of any issues requiring the evidence of expert witnesses;

(*d*) the possibility of obtaining admissions that may facilitate the trial;

(*e*) the issue of liability;

(*f*) the amount of damages, where damages are claimed;

(*g*) the estimated duration of the trial;

(*h*) the advisability of having the Court appoint an assessor;

(*i*) the advisability of a reference;

(*j*) suitable dates for a trial;

(*k*) the necessity for interpreters or simultaneous interpretation at the trial;

(*l*) whether a notice of a constitutional question needs to be served under section 57 of the Act;

(*m*) the content of the trial record; and

(*n*) any other matter that may promote the timely and just disposition of the action. SOR/2002-417, s. 15.

Assignment of trial date

264. A judge or prothonotary who conducts a pre-trial conference shall fix the place of trial and assign a date for trial at the earliest practicable date after the pre-trial conference.

Order

265. At a pre-trial conference,

(*a*) a judge may make any order respecting the conduct of the action; and

(*b*) a prothonotary may make any order respecting the conduct of the action other than an order under a motion referred to in any of paragraphs 50(1)(*a*) to (*i*).

Pre-trial judge not to preside at trial

266. A judge or prothonotary who conducts a pre-trial conference in an action shall not preside at the trial of the action unless all parties consent.

No disclosure to the Court

267. No communication shall be made to a judge or prothonotary presiding at a trial or hearing, or on a motion or reference in an action, with respect to any statement made at a pre-trial conference, except as may be permitted in an order made at the conclusion of the pre-trial conference or as consented to by the parties.

ANNEX III

TO: Members of the Profession
FROM: The Honourable John D. Richard
Chief Justice
DATE: September 24, 2004
RE: Discussion Paper - Service of Expert Witnesses' Affidavits

The Federal Court of Appeal and Federal Court's Rules Committee directed a subcommittee to look into the question of the service of expert witnesses' affidavits.

The subcommittee - composed of the Honorable Eleanor Dawson of the Federal Court and professors W.A. Bogart, Law Faculty, University of Windsor, and Denis Ferland, Law Faculty, Laval University - has prepared a working paper on the question. It is circulated for the purpose of receiving comments on the proposals.

This working paper raises the issue of making the admissibility of the evidence of expert witnesses conditional upon the service of affidavits, setting out the proposed evidence of the experts, before the holding of the pre-trial conference under the *Federal Court Rules, 1998*.

The subcommittee will report to the Rules Committee following receipt of comments and, where appropriate, will recommend measures concerning the issue under discussion.

Please submit your written comments to the Rules Committee Secretary before Friday, October 15, 2004, at the following address:

Éloïse Arbour
Secretary of the Rules Committee

SERVICE OF EXPERT WITNESSES' AFFIDAVITS PRIOR TO THE PRE-TRIAL CONFERENCE

Table of Contents

I. Introduction 56

II. The Existing Provisions Under the Rules 57

III. Relevant Provisions in the Rules of Other Courts 58

A. Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial of that Expert's Report 58

B. Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial – Expert Reports Existing at Pre-Trial Conference to be Available 58

C. Admissibility of Expert Witnesses' Evidence Conditional Upon Service of that Expert Witnesses' Report Before Pre-trial Conference 59

IV. The Case For Change 60

A. Amendments Consistent with Principles of Case Management 60

B. Court's Flexibility Preserved 60

V. Possible Amendments 60

SERVICE OF EXPERT WITNESSES' AFFIDAVITS
PRIOR TO THE PRE-TRIAL CONFERENCE

The Rules Committee of the Federal Court of Appeal and of the Federal Court
September 2004

I. Introduction

The Rules Committee of the Federal Court of Appeal and of the Federal Court (the Committee) is considering specific amendments to the *Federal Court Rules, 1998* (the *Rules*).[1] These amendments would make the admissibility of the evidence of expert witnesses conditional upon the service of affidavits, setting out the proposed evidence of the experts, before the holding of the pre-trial conference under the *Rules*.[2] A subcommittee has been created to examine this issue.

The rationale for this amendment is as follows:

a) The parties should be ready for trial at the pre-trial conference. Such readiness facilitates the setting of earlier trial dates. All expert reports need to be available at the pre-trial conference to ensure that the parties are ready for trial.

b) Full and candid settlement discussion is only possible at the pre-trial conference stage if all expert reports are available.

c) The expense inherent in obtaining expert reports may assist in drawing the attention of litigants to the benefits of settlement at an earlier stage in the process if the reports are required to be available at the pre-trial conference.

d) Judges and prothonotaries are now abridging the time for the exchange of expert reports because of concern at the late dates on which the reports will otherwise be provided.

This paper discusses the present situation under the *Rules*. It also reviews provisions for the admissibility of expert evidence in other courts. Finally, it proposes amendments to the *Rules* to achieve the goals set out in this paper.

---

[1] The *Courts Administration Service Act*, 2002, c.8, came into force on 2 July 2003. There are now two separate courts: the Federal Court of Appeal and the Federal Court. Consequential amendments to the *Federal Court Rules, 1998* were pre-published in the *Canada Gazette*, Part I, 31 July 2004. As a result of the coming into force of the consequential amendments, the Rules will be cited as the *Federal Courts Rules* and the Committee will be referred to as the Federal Courts Rules Committee.

[2] The *Rules*, eg, Rule 279, refer to "an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate…" For the sake of brevity references in this paper to "affidavit" include a "statement…accompanied by a solicitor's certificate.." where appropriate.

II. The Existing Provisions Under the Rules

The main Rule addressing the affidavits of expert witnesses and, consequentially the admissibility of expert evidence, is Rule 279. Rule 281 addresses admissibility of rebuttal evidence of experts.

In Rule 279, the key wording, for the issue raised by this paper, stipulates that: "Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial…unless… (b) an affidavit…has been served on all other parties at least 60 days before the commencement of the trial." Rule 281 stipulates that an affidavit of an expert rebutting the evidence of another expert in an affidavit must be served at least 30 days before the commencement of the trial.

Thus, at present, admissibility of an expert's evidence at trial hinges on serving the affidavit at least 60 days before the commencement of the trial; 30 days in the case of rebuttal evidence of an expert. There is flexibility provided for the Court granting relief from this requirement because of the initial wording of Rule 279: "Unless the Court orders otherwise…". Admissibility of expert evidence is not related to the pre-trial conference.

At the same time Rule 258(4), relating to pre-trial conferences, states: "A pre-trial conference memorandum shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action." This requirement could include affidavits of expert witnesses. The requirement to include affidavits of expert witnesses is buttressed by Rule 263(c): "Participants at a pre-trial conference must be prepared to address…(c) definition of any issues requiring the evidence of expert witnesses…"

Therefore, the Rules relating to affidavits of expert evidence appear to indicate that any affidavits *in existence at the time of the pre-trial conference* should be made available to the Court and to the other parties (R.258(4)) and that these affidavits can be a subject of the pre-trial conference itself (R.263(c)). Sgayias and others, *Federal Court Practice* (2004), p. 623, in an editorial note, state: "While there is no requirement that notices to admit facts or documents be served or expert reports be prepared for the pre-trial conferences, the requisitioning party may wish to consider taking those steps in order to demonstrate readiness for trial." (emphasis added)

In sum, there is no requirement to prepare the affidavits of expert witnesses for the pre-trial conference. Some or all of such affidavits can come into existence after the pre-trial and the evidence of the expert will still be admissible at trial so long as the relevant affidavits have been served on other parties at least 60 days, or 30 days in the case of rebuttal, before the trial's commencement (R.279 (b) and 281).

III. Relevant Provisions in the Rules of Other Courts

There are three overall approaches to admissibility of expert evidence based on service of their reports under the rules of other courts.

A. Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial of that Expert's Report

In this approach there is no requirement to make written statements of experts available at pre-trial conferences. An expert may testify at trial if a copy of that expert's written statement has been served at some stipulated time before the trial.[3]

B. Admissibility of Expert Witnesses' Evidence Conditional Upon Service at Some Stated Time Before Trial – Expert Reports Existing at Pre-Trial Conference to be Available

This approach is similar to that existing under the present Rules: see II, above.

Any affidavits in existence at the time of the pre-trial conference are to be made available to the Court and to the other parties.[4] However, admissibility of expert evidence is conditional upon the affidavit of the expert being served on other parties within a certain time before the commencement of the trial.[5]

In Ontario, case law has confirmed that the applicable Rule (Rule 50.05) applies only to documents in existence at the time of the pre-trial and does not establish that the date of a pre-trial conference is the date which determines what expert evidence may be called at trial.[6]

---

[3] The following Rules reflect this approach: The British Columbia *Supreme Court Rules*, Rule 40A, Alberta *Rules of Court*, Rule 218.1, Nova Scotia, *Civil Procedure Rules*, Rule 31.08, and the *Tax Court of Canada Rules (General Procedure)* Rule 145 (2)(b), the *Tax Court of Canada (Informal Rules)* Rule 7, *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act*, Rule 25(4), *Tax Court of Canada Rules of Procedure respecting the Canada Pension Plan*, Rule 25(4).
As part of the comprehensive revision of the Rules of Alberta it has been recommended, in the context of management of litigation, that expert reports be provided 90 days from the end of discovery with 30 days for a rebuttal report: see Alberta Rules of Court Project, *Management of Litigation*, Consultation Memorandum No. 12.5, March 2003, pp. 38-40.

[4] New Brunswick *Rules of Court*, Rule 50.04(a) and (b) and 50.12(f); Newfoundland *Rules of the Supreme Court*, Rule 39.02(4); Ontario *Rules of Civil Procedure*, 50.05; Prince Edward Island *Rules of Civil Procedure*, Rule 50.05(1).

[5] New Brunswick Rule 52.01; Newfoundland Rule 46.07; Ontario Rule 53.03(1) and (2); Prince Edward Island Rule 53.03(1).

[6] *Kungl* v. *Fallis* (1988), 26 C.P.C. (2d) 102, [1989] O.J. No. 15 (H.C.J.).

C. Admissibility of Expert Witnesses' Evidence Conditional Upon Service of that Expert Witnesses' Report Before Pre-trial Conference

This approach reflects the changes being considered: see I, above.

Manitoba

The *Court of Queen's Bench Rules* of Manitoba do require that all expert reports be served before the pre-trial conference.

Rule 53.03(1) provides: "A party who intends to call an expert witness at trial shall include as part of the party's pre-trial brief a copy of a report, signed by the expert…"

In addition, Rule 50 deals with Pre-Trial Conferences. Rule 50.01(3), addressing pre-trial briefs, states: "When obtaining a date for a pre-trial conference, a party shall deposit with the court a pre-trial brief that… (d) complies with the requirements of subrule 53.03(1)…"

Saskatchewan

Rule 284D of the Saskatchewan *Rules of Practice and Procedure* requires service of an expert witness report not less than 10 days before the pre-trial conference; Rule 284D(3) requires a report of rebuttal evidence of expert witnesses to be served within 15 days of the assignment of a trial date.

Québec

Except with permission of the court, no expert witness may be heard unless his written report has been communicated to all other parties within the time period agreed upon by the parties in their proceeding timetable or, at the very latest, at the time the case is inscribed for proof and hearing in the case of the party inscribing or, in the case of other parties, within 30 days after the inscription (s. 331.4 of the *Code of Civil Procedure*). The expert reports must then be filed within the time period provided in section 331.7 of the Code of Civil Procedure, i.e. no later than 15 days prior to the date set for proof and hearing.

The pre-trial conference can be convened after inscription for proof and hearing and, during this conference, the parties must provide access to the original of the exhibits (including the expert reports, according to section 331.1. *Code of Civil Procedure*) that they have communicated and that they intend to use at the hearing (section 279 *Code of Civil Procedure*).

Ontario Proposal

The present law in Ontario is stated, above: see discussion under approach B.

However, the *Task Force on the Discovery Process in Ontario* (November 2003) has recommended that time for serving expert reports be related to the pre-trial/settlement conference.[7] This recommendation was made in the context of a comprehensive review of the discovery process in Ontario. It is generally consistent with the amendments proposed in this paper.

IV. The Case For Change

A. Amendments Consistent with Principles of Case Management

In the subcommittee's view the case for making the proposed amendments is strong: see I, above, setting out a four point rationale.[8] These amendments appear consistent with the principles of case management. At the same time comments on the proposed amendments are specifically invited.

B. Court's Flexibility Preserved

Flexibility would be preserved, in terms of the Court being able to grant relief from the stipulated requirements, by retaining the existing initial wording of Rule 279: "Unless the Court orders otherwise…".

V. Possible Amendments

The proposed changes are as follows:

1. Amend Rule 258(4) as follows: DELETE, 5th line "in settling the action"; ADD the following words: "…including, but not limited to, all affidavits of experts, or statements in writing signed by the expert and accompanied by a solicitor's certificate, that sets out in full the proposed evidence. [the wording in italics is essentially taken from Rule 279(b)].

   The words "in settling the action" are deleted so as not to limit the use of expert affidavits (or any other documents) at the pre-trial conference. The scope of the pre-trial conference is set out in Rule 263.

Current Rule	**Proposed Amendment**
Documents	**Documents**
258(4) A pre-trial conference memorandum	**258(4)** A pre-trial conference memorandum

[7] *Task Force on the Discovery Process in Ontario* (November 2003), pp. 128-131.

[8] See also the discussion by the *Task Force on the Discovery Process in Ontario*: *ibid*.

shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance in settling the action.	shall be accompanied by a copy of all documents that are intended to be used at trial that may be of assistance, *including, but not limited to, all affidavits of experts, or statements in writing signed by the expert and accompanied by a solicitor's certificate, that set out in full the proposed evidence.*

2. Amend Rule 262 as follows: DELETE, 5th line " seven days" SUBSTITUTE "…20 days".

   This change from seven days to twenty days is to permit some time for the service of the affidavits of expert witnesses in rebuttal by any party seven days before the pretrial conference: see 3 and 5, below.

   These time constraints will be exacting. However, at present, Rule 281 stipulates that rebuttal evidence of an expert is only admissible if an affidavit setting out the rebuttal evidence is served 30 days before trial. Thus, the time periods under the present rules (60 days; 30 days) are also demanding.

Current Rule	**Proposed Amendment**
Pre-Trial Conference Memoranda **262.** Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least seven days before the date fixed for the conference.	**Pre-Trial Conference Memoranda** **262.** Every party, other than the party who filed the requisition for a pre-trial conference, shall serve and file a pre-trial conference memorandum at least *twenty days* before the date fixed for the conference

3. Add Rule 262.1: "Every party shall serve, at least seven days before the date fixed for the pre-trial conference, any affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out any evidence of that expert rebutting the evidence of any other expert in an affidavit or statement served under Rule 258(4) or Rule 262.

Current Rule	**Proposed Amendment**
This Rule does not exist in the current Rules.	**Service** **262.1** *Every party shall serve, at least seven days before the date fixed for the pre-trial conference, any affidavit, or statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out any evidence of that expert rebutting the evidence of any other expert in an affidavit or statement served under Rule 258(4) or Rule 262.*

4. Amend Rule 279(b) as follows: DELETE, 4th line "…has been served…" etc SUBSTITUTE " … *accompanies a pre-trial conference memorandum under Rule 258(4) or under Rule 262.*

Current Rule	Proposed Amendment
Where expert may testify **279.** Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issues unless (a) the issue has been defined by the pleadings or in an order made under rule 265; (b) an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, that sets out in full the proposed evidence, has been served on all other parties at least 60 days before the commencement of the trial; (c) the expert witness is available at the trial for cross-examination.	**Where expert may testify** **279.** Unless the Court orders otherwise, no evidence in chief of an expert witness is admissible at the trial of an action in respect of any issues unless (a) the issue has been defined by the pleadings or in an order made under rule 265; (b) an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, that sets out in full the proposed evidence *accompanies a pre-trial conference memorandum under Rule 258(4) or under Rule 262*; and (c) the expert witness is available at the trial for cross-examination.

5. Amend Rule 281 as follows: DELETE, 9th line "..at least 30 days…" etc. SUBSTITUTE "…under Rule 262.1."
   See explanation in 2, above.

Current Rule	Proposed Amendment
Admissibility of rebuttal evidence **281.** Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the rebuttal evidence has been served on all other parties at least 30 days before the commencement of the trial.	**Admissibility of rebuttal evidence** **281.** Except with leave of the Court, no expert evidence to rebut evidence in an affidavit or statement served under paragraph 279(b) is admissible unless an affidavit, or a statement in writing signed by the expert witness and accompanied by a solicitor's certificate, setting out the rebuttal evidence has been served on all other parties *under Rule 262.1*.