**FUNDAMENTAL BREACH OF CONTRACTS OF AFFREIGHTMENT: A
COMPARATIVE ANALYSIS OF THE UNITED KINGDOM, UNITED STATES
AND CANADIAN JURISPRUDENCE**

By

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ABSTRACT

The ageless doctrine of fundamental breach of contracts of affreightment has received diverse treatments from courts of different countries. Although some academic writers have argued that the doctrine was abolished in the Photo Productions case, this paper has attempted to show that the doctrine is still alive, albeit in several names like unconscionability, unreasonableness, deviation and quasi-deviation in different jurisdictions.

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I. INTRODUCTION

The decision of the House of Lords in the *locus classicus* case of ***Photo Production Ltd. v. Securicor Transport Ltd.***¹ has received an unprecedented acclaim and approval from legal scholars within and outside the United Kingdom.² The gist of their Lordships' decision was "that the doctrine of fundamental breach by virtue of which the termination of a contract brought it, and, with it, any exclusion clause to an end was not good law; that the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract and normally when the parties were bargaining on equal terms they should be free to apportion the risks as they thought fit, making provision for their respective risks according to the terms they choose to agree."³ Without identifying any weakness of the

¹ (1980) A.C. 827; (1980) 2 W.L.R. 383; (1980) 1 All E.R.556; (1980) 1Lloyds Rep. 545; (1980) 124 S.J.147.

² See Collins, St. J. Brian. "Fundamental Breach and Exclusion Clauses" (Northern Ireland) (Winter 1980) 31:4 Northern Ireland Legal Quarterly 356; Seddon, C. Nicholas. "Contract - Exemption or Exclusion Clauses - Fundamental Breach" (Australia) (May 1980) 54:5 Australian Law Journal 289; Palmer, N.E. and Evans, C. Andrew. "Contract - Construction and Function of Exclusion Clauses - Effect of Fundamental Breach" (Dec. 1980) 58 Canadian Bar Review 773; Atkin, John. "Fundamental Breach and the Nature of Exclusion Clauses" (Great Britain) (Case Note) (March 1981) 9:2 Sydney Law Review 434; Coote, Brian. "The Second Rise and Fall of Fundamental Breach" (Australia) (Nov. 1981) 55:11 Australian Law Journal 788; Schmitthoff, M. Clive. "The End of Fundamental Breach" (Great Britain) (Sept. 1983) Journal of Business Law 367; Adams, John. "Fundamental Breach - Positively Last Appearance" (Great Britain) (Nov. 1983) 46:6 Modern Law Review 771; Clarke, Malcolm. "Fundamental Breach is Dead! Long Live ... The Rule Against Absurdity! (Exemption Clause - Construction)" (Great Britain) (April 1984) 43:1 Cambridge Law Journal 32; Ogilvie, M.H. "Contract - Limitation and Exclusion Clauses - Fundamental Breach - Statutory Reasonableness" (Great Britain) (Sept. 1984) 62:3 Canadian Bar Review 389.

³ See *Photo Productions Case*, *supra*, note 1 at 841D, 842E-G, H-843A, E, 848E-G, 849A-B, 850A-851A, 853B-C, E-F. The House of Lords reversed the judgment of the Court of Appeal in *Photo Production Ltd. v. Securicor Transport Ltd.* [1978] 1 W.L.R. 856; [1978] 3 All E.R. 146; [1978] 2 Lloyds Rep. 172; (1978) 122 S.J. 315; (1978) WL 57238, which denied the defendant of the benefit of the exclusion clause in the contract with the plaintiff by applying the doctrine of fundamental breach. Also, the court overruled some earlier cases wherein the doctrine of fundamental breach was applied, namely, *Charterhouse Credit v. Tolly* [1963] 2 Q.B. 683; *Harbutt's "Plasticine" v. Wayne Tank and Pump Co.* [1970] 1 Q.B. 447; and *Waithe's (western) v. Austins (Menswear)* [1976] 1 Lloyds Rep. 14.

fundamental breach doctrine, the courts and legal scholars have continued to express their support for the “demise”⁴ of the ageless doctrine.

This case has wielded radical influences on many common law jurisdictions, setting a new legal order on the judicial approach to limitation and exemption clauses.⁵ The House of Lords however made a salient exception to shipping contracts, recognizing it as “a body of authority *sui generis* with special rules derived from historical and commercial reasons.”⁶ *Prima facie*, this exception implies that the decision of the House of Lords in the *Photo Productions case* should not constitute a binding authority in interpreting limitation and exemption clauses contained in contracts of affreightment. In

⁴ It is highly questionable whether the fundamental breach doctrine can rightly be described as “dead”. The underlying reason for the changed judicial attitude towards fundamental breach is its codification in a number of statutes in some jurisdictions. Even in the *Photo Productions case*, the House of Lords recognized that the ends hitherto met by relying on the fundamental breach doctrine can effectively be achieved by relying on the “unreasonableness test” contained in the Unfair Contract Terms Act, 1977. According to Lord Wilberforce, “The doctrine of fundamental breach, in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate...But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act, 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable” [Note 1 *supra*, at 843]. Interestingly, this fact is appreciated by most legal scholars. See Beatson, J. ed. *Anson’s Law of Contract*, 28th ed. (New York: Oxford University Press) 176 – (“The need for a substantive principle of fundamental breach has largely been obviated by the enactment of the Unfair Contracts Terms Act 1977...”); Hasson, R.A. “The Nine Lives of Fundamental Breach” (Canada) (Feb. 1985) 10:1 Canadian Business Law Journal 80 - (“In short, common law fundamental breach is dead, but statutory fundamental breach using the Unfair Contracts Terms Act is alive and well”); Schmitthoff M. Clive. *supra* note 2 - (“This, of course, is the end of the doctrine of fundamental breach. It has served its purpose. The “reasonableness” test of section 11 of the Unfair Contracts Terms Act 1977 makes it unnecessary to have resort to this artificial and strained device of construction of contractual terms.”); J.M.T. “Final Demise of Fundamental Breach” (Great Britain) (Oct.1983) 99 Law Quarterly Review 492 - (“The reason for the demise of the fundamental breach doctrine is that in many important areas the courts now have statutory powers to override exemption clauses which, having regard to all the circumstances of the case are not ‘fair and reasonable’ [s. 55 of the Sale of Goods Act 1979] or fail to satisfy ‘the requirement of reasonableness’ [s.11 of the Unfair Contract Terms Act 1977]”). Hence, notwithstanding the use or rather “misuse” of the word “demise” to describe the current status of the doctrine of fundamental breach, I make bold to say that the doctrine lives, even in the said jurisdictions in codes and statutes under different names and styles like “reasonableness”, “fair and just”, “rule against ambiguity”; and “unconscionability.”

⁵ For instance, this case influenced the Canadian Supreme Court decision in *Hunter Engineering Co. Inc. v Syncrude Canada Ltd.* (1989) 1 S.C.R. 426; or (1989) D.L.R (4th) 321; and the New Zealand High Court in *The Pembroke* (1995) 2 Lloyds Rep. 290.

⁶ *Photo Productions case supra*, note 1 at 845 per Lord Wilberforce.

other words, the decision did not unsettle the pre-existing legal position as regards fundamental breaches of contracts of affreightment.

This paper examines and compares the attitude of courts of three selected common law jurisdictions, namely, the United Kingdom, Canada⁷ and the United States of America in cases of fundamental breach of contracts of carriage of goods by sea. Besides being common law jurisdictions, the selected countries are renowned key players in the international trade of carriage of goods by sea. To do justice to the topic, the paper is divided into five parts. Part II looks at the historical evolution of the doctrine of fundamental breach in contracts of affreightment; Part III examines the current position of the fundamental breach doctrine in the selected jurisdictions by reviewing decided cases in those jurisdictions; Part IV compares the judicial application of the doctrine in the selected jurisdictions; and finally Part V concludes the discussion raising some issues for reflection.

II. HISTORICAL EVOLUTION OF THE DOCTRINE OF FUNDAMENTAL BREACH IN CONTRACTS OF AFFREIGHTMENT

Fundamental breach has been described as a breach which goes “to the root of the contract”⁸ or as a breach resulting in “performance...totally different from that which the contract contemplates.”⁹ The ancestry of this doctrine dates back to over two hundred years ago in the deviation case of *Ellis v. Turner*¹⁰ followed by *Davies v. Garrett*¹¹. In the later case, the plaintiff delivered to the defendant 114.25 tons of lime for carriage on

⁷ This Paper takes cognizance of the fact that there are civil law provinces in Canada, but the discussions herein are relevant to the common law provinces of Canada only.

⁸ *Suisse Atlantique Societe d'Armement Maritime S.A v. N.V Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 at 399, or (1966) 1 Lloyd's Rep. 529 at 545

⁹ *Ibid.* A.C. at 393, Lloyd's Rep. at 541.

¹⁰ (1800) 5 T.R. 531; 10 E.R. 1529.

¹¹ (1830) 6 Bing 716; 130 E.R. 1456.

the barge safety from the Medway to the Regents Canal. The bill of lading provided that the carrier would be liable “...the act of God, the king’s enemies, fire and all other dangers and accidents of the seas, rivers and navigations excepted....” Without any apparent reason, the master called at two ports in the opposite direction to the normal and direct route to the Regents Canal. Amidst the frolic, the barge suffered twenty-four hours delay and was caught in a storm; the lime being wetted, the barge was destroyed by fire. The court refused to avail the defendant the benefit of the limitation clause contained in the contract as evidenced in the bill of lading, but gave judgment in favour of the plaintiff. The court, per Tindal C.J said:

... we cannot but think that the law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course.¹²

Curiously, a number of academic writers¹³ trace the origin of the heresy to post-war British courts¹⁴ in the nineteen fifties to defeat the effect of the wide exemption clauses found in common form contracts. The misapprehension stems from the fact that the court in *Davies case* did not use the expression “fundamental breach” in its judgment. This expression however gained prominence in the judicial circle in the 1950s, hence the confusion. Specifically, Devlin J., applied the doctrine in *Chandris v. Isbrandtsen-Moller Co. Inc.*,¹⁵ *Alexander v. Railway Executive*,¹⁶ and *Smeaton Hanscomb & Co.*

¹² *Ibid.*, at 1460.

¹³ See Hubbard, Jerry. “Deviations in Contracts of Sea Carriage after the Demise of Fundamental Breach” (1986) 16 Victoria University of Wellington Law Review 147; Niehaus, B. James. “Unconscionability and Fundamental Breach Doctrine in Computer Contracts” (Feb. 1982) 57:3 Notre Dame Lawyer 547 at 551; Coote, Brian. “Second Rise and Fall of Fundamental Breach” (Australia) (Nov. 1981) 55:11 Australian Law Journal 788 at 790.

¹⁴ Ellinghaus, In Defence of Unconscionability, 78 Yale L.J. 757, 797.

¹⁵ [1951] 1 K.B. 240.

¹⁶ [1951] 2 K.B. 882.

*Ltd. V. Sasson I. Setty, Sons & Co.*¹⁷ The first two cases were deviation cases in contracts for carriage and bailment of goods respectively. Devlin J. referred to such breaches as “fundamental”, the exact expression used by the House of Lords in *Hain Steamship Co. Ltd. V. Tate & Lyle Ltd.*¹⁸ The only case of departure was *Smeaton Hanscomb & Co. Ltd. V. Sasson I. Setty, Sons & Co.* involving a sale of goods contract. In Smeaton’s case, the timber sold by description did not comply with specification so that there was a breach of an implied condition under the UK’s Sale of Goods Act 1893.¹⁹ The seller wanted to rely on the defence of statute-bar since the buyer had failed to take action within a contractual fourteen-day time-limit on claims. The court, in rejecting the seller’s contention held that:

It is no doubt a principle of construction that exceptions are to be construed as not being applicable for the protection of those for whose benefit they are inserted if the beneficiary has committed a breach of a fundamental term of the contract, and that a clause requiring a claim to be brought within a specified period is to be regarded as an exception for this purpose...²⁰

Thus, the doctrine of fundamental breach subtly gained entrance into the general contract law. For decades, it prevailed as a substantive principle of contract law denying offending parties of the protection of exclusion and limitation clauses contained in their contracts, until its abolition in 1980 in the *Photo Productions Case*.²¹ Nevertheless, the House of Lords in the *Photo Productions Case* preserved its existence in contracts of

¹⁷ [1953] 1 W.L.R. 1468.

¹⁸ [1936] 2 All E.R. 597.

¹⁹ The relevant section of the Sale of Goods Act 1893 is section 13, which provides that “Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.”

²⁰ *Smeaton Hanscomb & Co. Ltd. V. Sasson I. Setty, Sons & Co. supra*, note 17 at 1470. See also *Atlantic Shipping and Trading Co. Ltd. v. Dreyfus & Co.* [1922] 2 AC 250 at 260.

²¹ It is noteworthy that what was abolished in the *Photo Productions Case* was the “substantive” fundamental breach as it was allowed to exist as a principle of construction in codes and statutes.

carriage of goods by sea. Historically, this doctrine has always found application in maritime contracts in cases of unreasonable geographical deviation,²² quasi-deviation²³ [e.g. Unauthorized deck carriage, delay], unseaworthiness of vessel,²⁴ negligent discharge of cargo,²⁵ and misdelivery of cargo.²⁶

III. THE FUNDAMENTAL BREACH OF CONTRACTS OF AFFREIGHTMENT IN SELECTED JURISDICTIONS

The doctrine of fundamental breach is undoubtedly a common law principle. Three common law jurisdictions have been earmarked for analysis herein with a view to discovering the prevailing judicial attitude towards the doctrine in contracts of carriage of goods by sea in the selected countries namely, the UK, Canada and USA.

The United Kingdom

Besides being a coastal state with great shipping interests, the judgments of the UK courts have persuasive effect on many other common law jurisdictions.²⁷ Notwithstanding the exception made to maritime contracts by the House of Lords in the *Photo Production Case*, the UK courts have taken the position of assimilating maritime

²² *Davies v. Garrett supra*, note 11; S.T.C.V. Golodetz [1989] 1 Lloyds Rep. 277. Historically, deviation cases are considered fundamental breaches of contracts of affreightment, because an unauthorized deviation by the carrier caused cargo owner to lose its insurance protection, hence the carrier was deemed to have become the insurer of the cargo. See William, Tetley. *Marine Cargo Claims* (4th ed.) (2008) 4, online: <<http://www.mcgill.ca/maritimelaw/>>.

²³ *Royal Exchange Shipping Co. v. W.J. Dixon & Co.* (1886) 12 App. Cas. 11; *J. Evans & Sons (Portsmouth) Ltd. v. Andrew Merzario* [1976] 2 Lloyds Rep. 165.

²⁴ *Atlantic Shipping and Trading Co. Ltd. v. Louis Drefus & Co.* (1922) 2 A.C. 250.

²⁵ *Thorley (Joseph) Ltd v. Orchis S.S.Co.* (1907) 1 K.B. 660.

²⁶ *London N.W. Railway v. Neilson* (1922) A.C. 262.

²⁷ For instance, the UK High Court's decision in *The Chanda* [1989] 2 Lloyds Rep. 494 influenced the New Zealand's High Court decision in the similar case of *The Pembroke* [1995] 2 Lloyds Rep.290. Again, the House of Lords decision in the *Photo Productions Case* has found application in almost every common law jurisdiction – see *Hunter Engineering v. Syncrude supra* note 5 (Canada). Note the observation of Ogilvie M.H. *supra* at 408 that “English contract jurisprudence is invariably quickly adopted and assimilated, if in somewhat indigestible chunks, into Canadian contract law.

contracts into the ordinary law of contract as regards the doctrine of fundamental breach. This point is aptly illustrated by *The "Chanda."*²⁸ In this case, the court rejected the plaintiff's contention that fundamental breach of contracts of carriage of goods by sea survived the abolition of the doctrine of fundamental breach in the *Photo Production Case*. The court, per Hirst, J. could not see any reason for treating unauthorized loading of deck cargo²⁹ as a special case. He therefore held: "I would myself favour the view that they should now be assimilated into the ordinary law of contract."³⁰ The implication of this decision is that fundamental breach of contracts of affreightment is now a matter of construction, rather than a substantive rule of law in the UK.

Like every other contract law, the UK courts observe two steps in considering limitation clauses, exemption clauses as well as liberty clauses in contracts of affreightment. First, the said clause would be construed in the light of the circumstances of the case in order to determine whether the specific wrongful act [e.g. geographical deviation] which occurred was one which the parties to the contract may be said to have reasonably contemplated as falling within the scope of the exclusion or limitation of liability provision in their contract. Second, if the exclusion or limitation clause is applicable, the reasonableness test would be applied in determining whether or not the exclusion or limitation clause would be enforceable.³¹

²⁸ [1989] 2 Lloyds Rep. 494. This is a case of unauthorized deck by a carrier which resulted in damage of the cargo (an asphalt drying and mixing plant).

²⁹ It is noteworthy that the court talked about "unauthorized deck carriage" and not the entire contract of carriage of goods by sea. Could other species of maritime claims be treated as special cases? The court did not answer this question.

³⁰ *Ibid.*, at 503. For a contrary position on this issue, see Hubbard, Jerry. *supra*, note 13.

³¹ *The Chanda* [1989] 2 Lloyds Rep. 494; *The Pembroke* [1995] 2 Lloyds Rep.290. For detailed discussion, see Tetley William. *Supra*, note 22 at 10; Ogilvie M.H. *supra*, note 2; Adams, John. *supra*, note 2 at 773.

The application of the so-called construction approach to fundamental breach has resulted in uncertainties and conflicting decisions by the UK courts. In other words, the UK courts have not exhibited stable practice in this area. In *The Chanda* (1989), a UK High Court denied a carrier the protection of exclusion clauses in a case of unauthorized deck carriage holding that the package limitation clause³² was not intended to apply to protect a shipowner when he was in breach of his obligation to stow packages under the deck.³³ Subsequently, in 2003 the UK Court of Appeal overruled this decision holding that the package limitation applied to a case of unauthorized deck stowage. The Court of Appeal reasoned that if the package limitation could excuse a carrier in case of unseaworthiness of vessel as was held in *The Happy Ranger*³⁴ it could protect a carrier who engaged in unauthorised deck carriage.³⁵

Therefore, the UK practice reveals a steady and subtle total assimilation of contracts of carriage of goods by sea into the ordinary law of contract, with the inevitable effect of applying the same tests to exclusion clauses in ordinary contracts to contracts of carriage of goods by sea. The line between maritime contracts and the ordinary contracts has, as a result, become blurred. It is therefore questionable whether contracts of carriage of goods by sea can rightly be described as *sui generis* as suggested by the House of Lords in *Photo Productions*. However, since the House of Lords is yet to lend its voice to

³² This is a statutory limitation of liability contained in Article IV(5) of the Hague Visby Rules. It provides that: "... neither the carrier nor the ship shall in any event be or become liable for any loss or damage in an amount exceeding 666.67 units of account per package or 2 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher."

³³ *Ibid.*, at 505.

³⁴ [2002] 2 Lloyds Rep. 357.

³⁵ The "*Kapitan Petko Voivoda*" [2003] EWCA Civ. 451; [2003] 1 All E.R. (Comm.) 801; [2003] 2 Lloyds Rep. 1; [2003] 1 C.L.C.1092; [2003] WL 1610313. See Lloyds Rep. paragraphs 21, 23, 42, 43, and 45.

this quandary, the last word might not have been heard on the proper status of fundamental breach of contracts of affreightment in the United Kingdom.³⁶

Canada

Like many other common law jurisdictions, the substantive doctrine of fundamental breach prevailed in Canada until lately. The influence of the UK decisions on Canadian courts is glaring in this area of law. A few years after the House of Lords adopted the construction approach to fundamental breach in the *Suisse Atlantique case*³⁷ the Canadian Supreme Court approved the practice in *B.G. Linton Construction Ltd. v. Canadian National Railway Company*,³⁸ stating that “The case of *Suisse Atlantique* is one of the many authorities indicating that although in cases of ambiguity, an exemption clause is to be strictly construed against the party relying on it, it is nevertheless to be given full force and effect if the language in which it is drafted is sufficiently clear to leave no doubt as to its meaning.”³⁹ The Supreme Court’s sympathy for the approach in this case is quite subtle as it did not state in clear terms its adoption of the approach, but its mere approval thereof.

³⁶ This is because, since the House of Lords made the exception in *Photo Productions Case*, as a passing remark (*obiter*), the lower courts might not feel bound to follow it. Hopefully, when a maritime case on this subject gets to the House of Lords, the guiding position of the UK courts will be prescribed.

³⁷ The House of Lords dictum on fundamental breach in the said case was an *obiter dictum* since that was not the matter before the court. No wonder, the Court of Appeal per Lord Denning L.J. (as he then was) refused to follow the case in *Harbutt’s “Plasticine” Ltd. v. Wayne Tank and Pump Co. Ltd* (1970) 1 Q.B 447.

³⁸ (1975) 2 S.C.R. 678. This case involved a contract to deliver a tender via telegram between the appellant and the respondent. Owing to the respondent’s negligence, appellant’s tender arrived one hour after the close of tenders and was rejected. On the action for damages brought by the appellant, the respondent invoked some statutory provisions in the *Railway Act 1970* which relieved it of all liability for delay in transmission. The case was dismissed by the trial court as well as the Supreme Court of Alberta. At the Supreme Court of Canada, the judges were divided – 4 judges allowed the appeal (Laskin C.J, Spence, Dickson and Beetz J.J) on the ground that the delay amounted to fundamental breach depriving the respondent of any exclusionary clause, while the five other judges dismissed the appeal (Martland, Judson, Ritchie, Pigeon, de Grandpre JJ) on the ground that the exclusion clause protected the respondents.

³⁹ *Ibid.*, at 692.

Five years later, in *Beaufort Realities (1964) Inc. v. Chomedey Aluminum Co. Ltd.*⁴⁰ the Canadian apex court followed the House of Lords in *Photo Productions Case* in holding that there is no rule of law preventing the operation of exclusionary clauses in cases of fundamental breach of contract; that the effect of such clauses in cases of fundamental breach depends in each case on the true construction of the contract. However, the lacuna left by the apex court, as rightly observed by Professor Waddams is noteworthy. According to him:

The Supreme Court of Canada says nothing at all about unconscionability. One danger of the decision therefore is that it might be taken to deprive the courts of the only tool they have to deal with unfair exclusionary clauses without offering them a replacement. A more likely effect is that the lower courts will continue much as before.⁴¹

Significantly, in the *locus classicus* case of *Hunter Engineering Co. v. Syncrude Canada Ltd.*,⁴² the Supreme Court of Canada attempted to fill this gap. The case involved a contract for the respondents to supply gearboxes to the appellants for use at their oil sands project. The contract between the parties contained a limitation of liability warranty for only 12 months from the date of start-up of the equipment or 24 months from the date of shipment. Little above a year of installing the gearboxes, a gearbox failure occurred. In an action brought by the appellant, the respondent invoked the provisions of the limitation warranty. The Supreme Court of Canada held that the breach by the respondents was not fundamental because it did not undermine the contractual setting. The Court went further to hold that the inferior performance of the

⁴⁰ (1980) 2 S.C.R. 718.

⁴¹ Waddams, S.M. "Contract Law - Fundamental breach - exemption clauses - unconscionability - *Beaufort Realities (1964) Inc. v. Chomedey Aluminum Co. Ltd.*" [Case Note] (Winter 1981) 15:1 University of British Columbia Law Review 189 at 192.

⁴² (1989) 1 S.C.R.426; 57 D.L.R. (4th) 321, 92 N.R. 1; [1989] 3 W.W.R. 385, 35 B.C.L.R. (2d) 145.

gears did not deprive the appellant of substantially the whole benefit of the contract, and the cost of repairs was only a small part of the total cost. It also stated that, even if the respondents' breach were to be characterized as fundamental, the liability of the respondents would be excluded by the terms of the contractual warranty, since:

...There would be nothing unfair or unreasonable, or unconscionable...in giving effect to the exclusion clause. The contract was between two companies in the commercial market place, both of roughly equal bargaining power and both familiar and experienced with this type of contract. Respondents' reliance on the exclusion clause was not tainted by any sharp or unfair dealing.⁴³

The court used the opportunity to fill the gap left in the *Beaufort Case* by prescribing the Canadian position on fundamental breach as follows:

The rule of law approach to fundamental breach should be discarded and the construction approach to exclusion clauses *already adopted*⁴⁴ by this court should be reaffirmed. The relevant question for the court is whether the parties on a true and natural construction succeeded in excluding liability at the time the contract is made. After considering the provision's true construction, the court must consider whether or not to give it effect in the context of subsequent events such as fundamental breach...Legislative protection exists and other judicial avenues such as unconscionability might apply in appropriate circumstances.⁴⁵

On the strength of this authority, it is clear that the Canadian Courts are expected to apply the reasonableness or unconscionability test in cases of fundamental breach of contract.

⁴³ *Ibid.*, at 463-464.

⁴⁴ Emphasis supplied. It appears the Supreme Court was making reference to the two decisions earlier mentioned in this paper as cases where it adopted the construction approach.

⁴⁵ *Ibid.* The Supreme Court Justices were evenly divided over the exact test to be applied. Dickson C.J.C. and La Forest J., favoured the "unconscionability" test, while Wilson and L'Heureux-Dube JJ. preferred the "unfair or unreasonable" test.

Thus, in *Solway v. Davis Moving & Storage Inc.*⁴⁶, involving the loss of goods contracted to be carried on land, the court found that the plaintiffs' reliance on the expertise and false assurances of the defendant carrier that the goods would be secured had induced them to agree to the limitation clause. In considering whether or not the defendant should be permitted to invoke the limitation of liability clause, the court relied on the decision of the Supreme Court of Canada in *Hunter Engineering Co. v. Syncrude Canada Ltd.* and applied in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*⁴⁷ and said:

this court reviewed the decision in *Hunter Engineering* and noted that, in that case, the Supreme Court of Canada was unanimous in holding that, while limitation of liability provisions, *prima facie*, were enforceable according to their true meaning, a court was empowered in limited circumstances to grant relief against provisions of this nature. The Supreme Court of Canada, however, was evenly divided on the question of the test to be used to determine when or in what circumstances the power to grant relief should be exercised.

The Court finally refused to enforce the limitation of liability clause holding that, to limit the loss of the plaintiffs as contended by the defendant carrier would, in the words of Dickson C.J.C. be "unconscionable", or in the words of Wilson J. be "unfair or unreasonable" and that this is one of those cases where relief should be granted.⁴⁸

More importantly, it is noteworthy that the Canadian maritime decisions on fundamental breach follow the approach enunciated in the ordinary contract law above.⁴⁹ A number of Canadian maritime cases illustrate this fact. In *Coles v. Clarenville Drydock*

⁴⁶ (2002) 62 O.R. (3d) 522; 222 D.L.R. (4th) 251, 166.

⁴⁷ (1997), 34 O.R. (3d) 1 (Ont. C.A.) at 8.

⁴⁸ This appears to be the last word on this case as the leave to appeal against the judgment was refused by the Supreme Court of Canada on May 29 2003.

⁴⁹ See *Bombardier Inc. v. Canadian Pacific Ltd.* (1992) 7 O.R. (3d) 559; 52 O.A.C. 30 where the limitation clause was held applicable because of its clarity, the sophistication of the parties, their awareness and acceptance of the provision included in a tariff imposed by statute.

Ltd.,⁵⁰ the defendant's crane dropped plaintiff's fishing vessel while lifting it into water. The plaintiff had signed a form in which he accepted "full responsibility for any and all damage" resulting from "lift" and purported to exclude defendant's liability. In an action for damages brought against the defendant for damages sustained, the court held that the exemption clauses did not apply to defendant's own negligence in maintenance or operation of its crane; that once defendant commenced lift, plaintiff relinquished all possession and control of vessel and during time of lift, bailment existed. Thus, as bailee, defendant was responsible for any damage to bailed goods caused by negligence in maintaining or operating crane. The court described plaintiff's negligent handling of vessel as fundamental breach of contract which deprived the owner of substantially the whole benefit under the contract including safe lifting of vessel, or that alternatively, it would be unconscionable to enforce the clause in view of parties' unequal bargaining power, failure to provide proper notice of changes in forms, and better position of the defendant to spread risk in such cases.⁵¹

⁵⁰ (1998) 170 Nfld. & P.E.I.R. 17, 522 A.P.R. 17.

⁵¹ In denying defendant the benefit of the exclusion clause, the court held at paragraphs 28 and 30:

"I am satisfied that defendant's negligent dropping of the crane, if it occurred, would be a fundamental breach of the contract. This would have the effect of depriving the plaintiffs of substantially the whole benefit which it was the intention of the parties that they should obtain from the contract, namely, the safe lifting, launching and storage of the Sea Echo. *Hunter Engineering* and *Bow Valley* establish that courts should allow the parties to make their own bargains. They may agree to exclude liability for the negligence of either or both parties. But the four judges who considered the issue in *Hunter Engineering* accepted that, even if the parties have so agreed, the courts may intervene in the case of unconscionability, "addressing directly the protection of the weak from over-reaching by the strong" (Dickson, C.J.C. at p. 341) or because "appropriate" circumstances surrounding the making of a consumer standard-form contract would make it "fair and reasonable" to prevent enforcement of an "unconscionable" exemption clause (Wilson J. at pp. 378 - 382). Fridman, at p. 599, suggests the difference in the two approaches is that Dickson C.J.C. would examine the contract as of the time of its making to determine the effect of an exemption clause, while Wilson J. would examine after the alleged breach. Both Dickson C.J.C. and Wilson J. would consider inequality of bargaining power a sufficient reason to prevent enforcement of an exemption clause...The exemption clauses on a strict construction do not apply to CDL's own negligence in the maintenance or operation of its crane. Even if the clauses, on a proper construction, do purport to exclude defendant's own negligence, they are unenforceable because to do so would not be fair and reasonable but, on the contrary, would be unconscionable, considering – (a) the unequal bargaining power

Similarly, in *Canadian Pacific Forest Products Ltd. v. Belships (Far East) Shipping*,⁵² appellant's cargo was shipped on deck under bill of lading from British Columbia to Belgium and it arrived damaged. Upon appellant's action for damages, the respondent purported to rely on the exclusion clause contained in the bill of lading which exempted the carrier from liability for loss of or damage to deck cargo, howsoever caused. Relying on *Canadian Steamship Lines Ltd. v. The King*,⁵³ the court held that, even though the clause exempts damage resulting from negligence, the respondent was still liable for damage "naturally concomitant with deck stowage including damage by sea water, rain or wind." Hence, the exemption clause did not avail the respondent.⁵⁴

On the contrary, in *Hi-Tech Business Systems Ltd. v. Purolator Courier Ltd.*,⁵⁵ the cargo contracted for shipment was lost in transit. The defendant admitted liability for the loss, but only to the limits contained in the bill of lading. The court dismissed the action, holding that: (a) defendant's liability was restricted to the conditions contained in the bill of lading; (b) the agreement was not unconscionable; (c) the defendant did not act in any way which amounted to tortious conduct, since plaintiff was familiar with the bill

of the parties, (b) the potentially confusing manner in which the forms were changed but signs were not, and (c) the better position of the Centre Operator to spread the risk in these sorts of cases."

⁵² (1999) 4 F.C. 320; A.M.C. 2606.

⁵³ [1952] A.C.192 (PC).

⁵⁴ As rightly observed by Professor William Tetley:

"The court in this case recognized that under *Hunter Engineering* 'the doctrine of fundamental breach does not, by itself preclude the operation of an exclusion clause, but rather that the language of such a clause must be given its natural and true construction' [page 2620]. Nor did the court apply the unconscionability test to the exclusion clause in the Bill of Lading in question. Rather it applied the three test propounded for the construction of such clauses in *Canada Steamship Lines v. The King* (1952) A. C. 192 in deciding the impugned clause did not shield the defendant from liability for negligence."

He then concluded that:

"This position is obviously closer to the Fundamental breach/reasonableness position of Wilson, J. than the pure unconscionability theory of Dickson, C.J. which negates the viability of fundamental breach as a concept." See Tetley, William *supra* note 22 at 9.

⁵⁵ (1996) 194 A.R. 247.

of lading and its conditions; (d) plaintiff's failure to designate a true value for the equipment or arrange for insurance offered by the defendant was a business decision to reduce expenses. Consequently, the plaintiff was responsible for the repercussions of that decision.

Likewise, in *Dryburgh v. Oak Bay Marina (1992) Ltd.*,⁵⁶ plaintiff claimed damages for negligence, breach of contract and breach of duties by the defendants as bailees for reward, following the break up, in heavy weather, of the Marina at Oak Bay near Victoria, British Columbia which resulted in damage to a number of vessels including the plaintiff's Yatch. Prior to that incident, the plaintiff had entered into a standard form moorage contract with the defendant whereby vessels are moored solely at their owner's risk. Under the contract, the defendant was not liable under any circumstances for loss or damage even if caused by the defendant itself, its servants or agents. The plaintiff sought a declaration that no protection was afforded to the defendant by the exculpatory clause in the standard form moorage contract. The court held that the exclusionary provision availed the defendants. It reasoned that while the moorage contract was a contract of adhesion and purported to exclude all liability, even that resulting from negligence, it was nevertheless clearly written, and not one between an all-powerful service provider and an unsophisticated clientele. Moreover the moorage rate made it clear that the defendant was not acting as a port-risk insurer. Therefore the contract was not unconscionable, unfair or unreasonable.

Furthermore, the conclusion that allegations of deviation or fundamental breach are matters arising under the contract that should not be considered in determining

⁵⁶ (2001) 1 F.C. 192.

whether to give effect to a forum selection clause is supported by the construction approach to fundamental breach considered in *Guarantee Company of North America v. Gordon Capital Corporation*.⁵⁷ This case concerned the use of fundamental breach in the context of time limitation provisions. Discussing *Hunter Engineering Co. v. Syncrude Canada Ltd*, the Court stated at paragraph 52 that:

[W]hether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.⁵⁸

The most recent authority in this area appears to be the Ontario Superior Court of Justice decision in *Alcoa Inc. v. CP Ships (UK) Ltd.*⁵⁹ In this case, the Ontario apex court held that notwithstanding the manner in which the cargo was lost, the breach of the contract of carriage by the defendants does not warrant the application of the fundamental breach rule. Relying on the leading case of *Hunter Engineering Co. v. Syncrude Canada Ltd*, the court held that there was nothing unfair, unreasonable, or unconscionable with the limitation provisions. According to the Court:

We are not here dealing with innocent or naïve parties - we are dealing with what would appear to be fairly sophisticated parties and, as aforesaid, we are dealing with an industry where it is known that there frequently

⁵⁷ [1999] 3 S.C.R. 423.

⁵⁸ *Ibid.*, at 448. A sister case involving forum selection clause is *Z.I. Pompey Industrie v. ECU-Line N.V.* (2003) A.M.C. 1280, 303 N.R. 201; (2001) S.C.C. 21, 30 C.P.C. (5th) 1; 224 D.L.R. (4th) 577; (2003) 1 S.C.R. 450; 240 F.T.R. 318. The Supreme Court of Canada did not consider fundamental breach, but only the issue of forum selection. Curiously, Professor Tetley said that in the said case, the court reaffirmed the viability in Canadian maritime law of fundamental breach ... in case of unreasonable deviation – see Tetley, William *supra* note 22 at 10.

⁵⁹ This case was heard on February 9 2006 and decided on October 10 2006 [Unreported].

exists limitations on liability, even where the losses might arise from stupidity or gross negligence.⁶⁰

Clearly, the above survey of the attitude of Canadian Courts to the fundamental breach of contracts of affreightment reveals that: (i) the UK jurisprudence has an overbearing influence on Canadian Courts; (ii) the Canadian Courts do not accord maritime contracts any *sui generis* status; and (iii) aside from the discussion of the ‘unreasonableness’ and ‘unconscionability’ tests in the *Hunter Engineering Case* by the Supreme Court of Canada, the Canadian Courts apply both tests interchangeably without regard to the differences between them.

United States of America

The US Courts use the words “deviation” and “quasi-deviation” for fundamental breach of contracts of affreightment (not just in cases of geographical deviation).⁶¹ Thus, if a ship makes an unreasonable geographical deviation from her route; engages in unauthorized stowage of cargo on deck;⁶² carries goods beyond their intended destination port (overcarriage);⁶³ takes goods to the port of destination, back to the port

⁶⁰ Paragraph 44 of the Judgment. The court distinguished the case from *Solway's case* and approved the concluding words of Patterson C.J in *Hi – Tech Business Systems Ltd v. Purolator Courier Ltd.* *supra* note 55, where the chief judge said:

“...I am not as exorcized over the Defendant's conduct as other courts in the earlier decisions referred to above. It seems to me that there are unavoidable risks in the transportation business; from time to time goods will be delayed, damages, destroyed, lost or stolen - even by the bailee's servants. What is exclusively in possession of the shipper is knowledge of what the package contains and how much it is worth. In my view, it is unreasonable for the carrier to be the insurer of the value of all goods lost or destroyed in shipment when it does not know the amount in advance and does not receive additional consideration for such insurance. ...”

⁶¹ For discussions on the development of the doctrine of deviation in the US, see Lennon, M. Margaret. “Deviation Then and Now – When COSGA’s Per Package Limitation is Lost” (Spring 2002) 76:2 St. John’s Law Review 437.

⁶² *St. Johns N.F. Shipping Corporation v. S.A. Companhia General Commercial* 263 U.S. 119, 44; S.Ct. 30, 68 L.Ed 201. *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer* 422 F. 2d 7 (2d. Cir. 1969).

⁶³ *Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto*, 282 F. 235, 237 (2d Cir. 1922); *Hoskyn & Co. v. Silver Line Ltd.* 63 F. Supp. 452,468 (S.D.N.Y. 1943) (same) *aff’d* 143 F. 2d 462 (2d. Cir. 1944).

of shipment, then sending them back to the destination port;⁶⁴ discharges goods at the wrong port;⁶⁵ engages in the shipment or transshipment of cargo on a different vessel from that named in the bill of lading;⁶⁶ it becomes liable for deviation or quasi-deviation and loses the protection of any exclusion or limitation clause in the contract. Also, in the absence of permission in the contract, a carrier may breach the contract by unreasonably substituting one ship for another in mid-voyage, voiding the limitations against the shipper.⁶⁷

In order to escape the serious consequences of deviation, carriers adopted the practice of drafting wide clauses that permit them to travel by any route so that a deviation from the established route will not constitute breach of contract. Such wide clauses are called *Liberty Clauses*.⁶⁸ The US courts however adopt the practice of nullifying any liberty clause that purports to protect carriers from liability for unreasonable deviation.⁶⁹

The enactment of the Carriage of Goods by Sea Act (COGSA)⁷⁰ in 1936 brought in a new era in United States' maritime law. Hence, two eras exist in the US maritime law, namely, Pre-COGSA era and Post-COGSA era. The notable impact of COGSA which is relevant to this paper is the introduction of the package limitation in its section

⁶⁴ *Calderon v. Atlas Steamship Co.* 64 F. 874, 877-78 (S.D.N.Y. 1894) *aff'd* 69 F. 574 (2d Cir. 1895).

⁶⁵ *Dow Chemical Pac. Ltd. v. Rascator Mar. S.A.* 782 F. 2d 329, 338-39 (2d Cir. 1986).

⁶⁶ *Smith Kirkpatrick & Co. v. Colombian S.S. Co.* 88 F. 2d 392, 394-95 (5th Cir. 1937).

⁶⁷ *See Yang Machine Tool Co. v. Sea-Land Service, Inc.*, 58 F.3d 1350 (9th Cir.1995).

⁶⁸ *See* Hubbard, Jerry. *supra*, note 13 at 151.

⁶⁹ *See* for example *W.R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha*, 7 F. 2d 889, 892 (N.D. Cal. 1925).

⁷⁰ The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C.App. §§ 1300-1315, applies to all international cargo shipments which are carried by sea, to or from the United States. COGSA allows carriers to limit their liability to \$500 per package of cargo in the event of loss or damage to the cargo - 46 U.S.C.App. § 1304(5). An exception to this limitation applies, however, if the carrier commits an unreasonable deviation from the contract of carriage. *See Nemeth v. General S.S. Corp., Ltd.*, 694 F.2d 609, 613 (9th Cir.1982).

4(5). Section 4(5) of COSGA provided that neither the carrier nor the ship will be liable for any loss or damage to goods exceeding \$500 per package, unless the nature and value of the goods have been declared by the shipper and recorded in the bill of lading.

Since the passage of COGSA, however, US courts have split over whether the “unreasonable deviation” rule survived COGSA's enactment.⁷¹ The Second Circuit holds that COGSA was not intended to change the existing law on this point, and that an unreasonable deviation from the contract of carriage of goods by sea deprives the carrier of the benefit of section 4(5)'s liability limitation.⁷² The Seventh Circuit, on the other hand, has concluded that Congress did intend section 4(5) to change the existing law on unreasonable deviation, and that the liability limitation applies regardless of the fact that there has been an unreasonable deviation.⁷³

The Second Circuit's position, that COGSA did not change the existing law on unreasonable deviation, finds support in English law. The English Law Lords had unanimously held that the British Carriage of Goods by Sea Act, which, like COGSA, is based on the Brussels Convention-Hague Rules of 1924⁷⁴ and contains the same provisions as COGSA relating to deviation and carriers' exemptions did not change the existing rule that an unreasonable deviation deprives the carrier of the protection of liability limitations.⁷⁵

⁷¹ For details on the divergent views of the US Courts, see Lennon M. Margaret *supra*, note 61.

⁷² *Du Pont de Nemours International S.A. v. S.S. Mormacvega*, 493 F.2d 97, 100 n. 9 (2nd Cir.1974).

⁷³ *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 313 F.2d 872, 875 (7th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 56, 11 L.Ed.2d 53 (1963).

⁷⁴ The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1925, 120 L.N.T.S. 155.

⁷⁵ *Stag Line, Ltd. v. Foscolo, Mango and Co., Ltd. (The Ixia)*, 1932 A.C. 328.

It appears that the position of the Second Circuit as supported by the English Law Lords is a better one. As rightly observed by the Court in *Nemeth v. General S.S. Corp., Ltd.*,⁷⁶ “The theory behind depriving the carrier of the protection of liability limitations when it unreasonably deviates is that a deviation subjects the cargo to risks the shipper did not anticipate.”⁷⁷ I am in total sympathy with this position. There is nothing in COGSA to indicate that shippers should anticipate the additional risks associated with unreasonable deviations. Indeed, in deciding whether to be bound by the liability limitation in section 4(5) of COGSA or pay for higher liability, a shipper is entitled to assume that his goods will not be subjected to such additional risks. The rationale being that the unreasonable deviation rule is sound, and has not been undermined by the enactment of COGSA.

Furthermore, section 4(4), which immediately precedes section 4(5) of COGSA, seems to assume that the unreasonable deviation rule survives. The subsection provides that “*any reasonable deviation shall not be deemed to be an infringement or breach of this Act...*” As this language is pregnant with the positive meaning that an unreasonable deviation is ‘an infringement and breach of this Act,’ it seems logical, as was held by the

⁷⁶ *Nemeth v. General S.S. Corp., Ltd.* 694 F.2d 609, 1983 AMC 885 (9 Cir. 1982).

⁷⁷ This point is further buttressed by the court in the case of *Jones v. The Flying Clipper*, 116 F.Supp. at 389. when the court said that:

“A shipper has the right to assume that the carrier will not deviate and thereby subject the cargo to other than the known risks inherent in a normal route or under deck stowage.”

The court went further to say at page 390:

“To hold that section 4(5)'s liability limitation is absolute, regardless of the carrier's actions, would permit a carrier to violate the terms of the bill of lading at will, knowing that its liability will be limited to \$500 per package. The carrier would be immunized even from the consequences of a fundamental breach going to the essence of the contract. There is nothing in COGSA or its history to warrant such a result.”

House of Lords in *The Ixia*⁷⁸ that when a departure from the contractual voyage is an unreasonable deviation, the carrier is not entitled to any of the exemptions or limitations provided by COSGA.⁷⁹ In other words, section 4(4) implies that an unreasonable deviation is a breach by the carrier of COGSA, thereby depriving the carrier of COGSA's protection.

An analysis of the Pre-COSGA and Post-COSGA cases will throw more light on the position of the US law on this topic. In the case of *St. Johns N.F. Shipping Corporation v. S.A. Companhia General Commercial*,⁸⁰ the General Commercial Company Limited, doing business as commission merchant and exporting concern in New York, in May, 1918, sold 800 barrels of rosin *cif* to the respondent, a Brazilian Corporation and procured a written freight reservation or agreement from the agents of the schooner St. John N.F. to carry the goods to Rio de Janeiro, 'on or under deck, ship's option,' and 'subject to terms of bills of lading in use by steamer's agents.' The rosin was loaded on board June 11th and clean receipts-without endorsement concerning stowage were given therefor. A day or two later, upon prepayment of freight, the ship issued a clean bill of lading in the usual form making no reference to the prior freight agreement. The goods were placed on deck, and upon encountering a storm, the master jettisoned the rosin in order to relieve her. The loss resulted directly from the on deck stowage; the under deck cargo was safely delivered.

The Respondent cargo owners sued for the value of the goods at destination. It claimed that by issuing the clean bill of lading, the vessel in effect notified the shipper

⁷⁸ *Supra*, note 75.

⁷⁹ For detailed discussion on the issue see 2A *Benedict on Admiralty* § 128, p. 12-32 (7th ed. 1981).

⁸⁰ 263 U.S. 119, 44 S.Ct. 30, 68 L.Ed. 201.

that she had exercised the option specified by the freight agreement and would stow under deck, and that the ship broke her contract as by deviation and thereby lost the benefit of limitation or relieving clauses in the bill. The ship owners maintained that as the freight agreement gave an option as to place of stowage, it was unnecessary for the bill of lading to specify the action taken in respect thereto, and that silence did not amount to a promise to carry under deck. Moreover, that consent to deck stowage sufficiently appeared by the bill of lading read with the freight agreement and therefore there was no departure and no ground for assessing damages.

The court below sustained the position of the respondent and decreed accordingly.⁸¹ Upon appeal to the US Supreme Court, the decision of the lower court was upheld. The apex court held that by stowing the goods on deck the vessel broke her contract; exposed the cargo to greater risk than had been agreed and thereby directly caused the loss. She accordingly became liable as for a deviation and cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit, and must account for the value at destination. Generally, the measure of damages for loss of goods by a carrier when liable for it is their value at the destination to which it undertook to carry them.⁸²

⁸¹ *St. Johns N. F. (C. C. A.)* 280 Fed. 553.

⁸² See *Lawrence v. Minturn*, 17 How. 100, 111, 15 L. Ed. 58; *Mobile & Montgomery Ry. Co. v. Jurey*, 111 U. S. 584, 596, 4 Sup. Ct. 566, 28 L. Ed. 527; *New York, etc., R. R. Co. v. Estill*, 147 U. S. 591, 616, 13 Sup. Ct. 444, 37 L. Ed. 292; *Chicago, etc., Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97, 100, 40 Sup. Ct. 504, 64 L. Ed. 801; *Royal Exchange Shipping Co. v. Dixon*, 12 App. Cas. (1887) 11; *The Sarnia (C. C. A.)* 278 Fed. 459; 3 Hutchinson on Carriers, § 1360; Carver on Carriage of Goods by Sea (6th Ed.) § 287.

Also, in *Jones v. The Flying Clipper*,⁸³ endorsees of bill of lading brought a suit against carrier for damage to 20 packages delivered to respondent for carriage on its vessel and subsequent delivery to libellants. Respondent contended that its liability was limited to \$500 for each of the damaged packages, under limitation of liability provision of COSGA. The District Court, per Weinfeld, J., held that where respondent stowed the shipment on the vessel's deck, although a clean bill of lading was issued thus obligating respondent to stow packages under deck, such unjustifiable deviation by respondent deprived it of benefit of the \$500 per package limitation of liability contained in the COSGA, with respect to cargo damaged by reason of the deviation.

More so, in *The Sarnia*⁸⁴, a ship owner issued a bill of lading which called for shipment under deck, but rather carried the goods on deck, and by reason of their exposed position, the cargoes were damaged. The court held that his breach of the contract deprived him of the benefit of the valuation clause in the bill of lading. In *Nemeth v. General S.S. Corp., Ltd.*,⁸⁵ shipper brought action against ocean carrier, carrier's agent, and vessel, to recover for losses incurred during the transport of his household goods. The United States District Court for the Central District of California, per Andrew Hauk, J., granted partial summary judgment limiting defendants' liability pursuant to the COSGA, and shipper appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) substantial fact issue existed as to whether shipper was given a fair opportunity to opt for a higher liability than that provided for in the limitation of liability sections of the COSGA by paying a correspondingly greater charge, precluding summary

⁸³ 116 F.Supp. 386, 387 (S.D.N.Y.).

⁸⁴ 278 F. 459.

⁸⁵ *Supra*, note 76.

judgment, and (2) an unreasonable deviation from the contract of carriage deprives carrier of the protection afforded by the limitation of liability provisions of the Act. The court concluded that: “It is the law of this Circuit that a carrier may limit its liability under Section 4(5) of COGSA only if the shipper is given a ‘fair opportunity’ to opt for a higher liability by paying a correspondingly greater charge.”⁸⁶

Likewise, in *Yang Machine Tool Company v. Sea-Land Service, Inc.*⁸⁷ Yang Machine Tool Company (“Yang Machine”) contracted with Sea-Land Service, Inc. (“Sea-Land”) to transport two cases of oversized cargo from China to California. The cargo was damaged while being restowed onto a substitute vessel in Japan, and Yang Machine sued for recovery of damages. The District Court found that the restowage of the cargo onto the substitute vessel constituted an “unreasonable deviation,” and the court granted Yang Machine's motion for summary judgment. Sea-Land appealed the judgment and sought to limit its liability to \$500 per package under section 4(5) of COSGA. The appellate court reversed the judgment of the trial court holding that Sea-Land did not commit a deviation from the contract of carriage. The contract provided notice that substitute vessels could be used to transport the cargo for part of the carriage. Sea-Land provided Yang Machine with a fair opportunity to declare a higher value, and Yang Machine failed to do so. Sea-Land's liability was thus limited to \$500 per package.

⁸⁶ See *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 809 (9th Cir.1982); *Pan American World Airways, Inc. v. California Stevedore and Ballast Co.*, 559 F.2d 1173, 1176 (9th Cir.1977). ; *Brown & Root, Inc. v. M.V. Peisander*, 648 F.2d 415 (5th Cir.1981). *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448 (9th Cir.1993); *Institute of London Underwriters v. Sea-Land Service, Inc.*, 881 F.2d 761, 766 (9th Cir.1989).

⁸⁷ 58 F.3d 1350, 1995 A.M.C. 2153, 95 Daily Journal D.A.R. 8678.

In *re M.V. Floreana*,⁸⁸ shippers of goods brought action against carrier and stevedore for damages to goods while being loaded. The District Court, per Hughes, J., held that: (1) substitution of vessels at original port was not deviation from terms of contract of carriage; (2) stevedore's liability was limited by bills of lading; and (3) when bill of lading discloses number of separate packages within container, then number of packages is contents, not container. Substitution of vessels, even an unseaworthy vessel, at original port was not deviation from terms of contract of carriage sufficient to warrant invalidation of limitation of liability in the absence of evidence of lessening in class of vessel.⁸⁹

The above survey reveals that the US courts have exhibited reasonable stability and consistency in determining the effect of exclusion and limitation clauses in cases of fundamental breach of contracts of carriage of goods by sea. Even the enactment of COSGA in 1936 did not unsettle the pre-existing legal regime of deviation and quasi-deviation in contracts of affreightment.

IV. COMPARATIVE ANALYSIS OF THE SELECTED JURISDICTIONS

From the foregoing, it is clear that the attitude of the UK and Canadian courts as regards fundamental breach of maritime contracts is as similar as it is far from being settled. In light of the decided cases from both jurisdictions, some of which have been reviewed herein, the courts of both jurisdictions have exhibited uncertainties in applying the “reasonableness” and/or “unconscionability” tests. In fact, the likely outcome of a case involving the fundamental breach of a contract of affreightment will be a nightmare to legal practitioners in both countries since what is unreasonable or unconscionable

⁸⁸ 65 F.Supp.2d 489, 1999 A.M.C. 2930.

⁸⁹ *Carriage of Goods by Sea Act*, § 4(4), 46 App.U.S.C.A. § 1304(4).

depends on the judge handling each case, as evidenced by conflicting decisions of the courts. Although the UK test, unlike that of Canada is based on legislation,⁹⁰ the decisions of courts in both jurisdictions have been similar. Obviously, the meeting point of both jurisdictions as regards fundamental breach is the adoption of the *constructive* fundamental breach instead of the *substantive* fundamental breach.

However, two differences are noticeable in the application of the doctrine by the UK and Canadian Courts. Firstly, the UK courts generally apply the unconscionability test to non-consumer contracts like insurance contracts and contracts of carriage of goods by sea, and the unreasonableness test under the Unfair Contract Terms Act 1977 on consumer contracts.⁹¹ On the other hand, the Canadian courts apply both the unconscionability and unreasonableness tests to every contract – consumer and non-consumer. This appears to stem from the division amongst the justices of the Supreme Court of Canada in the *Hunter Engineering Case* as to whether the “unconscionability” or the “unfair or unreasonable” test should be the proper test.⁹²

The pertinent question is; “what is the difference between the unconscionability and unreasonableness tests?” Historically, the test of unconscionability was developed to control harsh and oppressive bargains between parties of unequal bargaining powers where the stronger party successfully overreached the weaker party.⁹³ Originally, it seeks to protect heirs, expectants and others in need of protection. It plays no role between

⁹⁰ The Unfair Contract Terms Act 1977. However, there are some provincial legislations in Canada. For example, The Consumer Protection Act (Ontario); The Consumer Product Warranty and Liability Act (New Brunswick); The Business Practices and Consumer Protection Act (British Columbia) e.t.c. Professor Waddams noted that the provisions of these provincial legislations vary substantially from one another and some contain substantial anomalies. See Waddams, S.M. *The Law of Contracts* 5th ed. (Toronto: Canadian Law Books Inc., 2005) 346.

⁹¹ Atkin, John. *supra*, note 2.

⁹² *Supra*, note 45.

⁹³ See *Hunter Engineering v. Syncrude* *supra* note 5 at 381 per Wilson J.

commercial persons who are assumed to be of roughly equal bargaining power.⁹⁴ On the other hand, the test of reasonableness is forward looking considering whether to avail the defendant the benefit of an exemption or limitation clause after breach in the light of the circumstances of the case. It is doubtful if either the UK or Canadian courts consider this difference between reasonableness and unconscionability in applying the tests.

Secondly, the Canadian Courts determine whether a fundamental breach has been committed before asking the reasonableness question to determine its effect on the contract,⁹⁵ while the UK Courts apply the Unfair Contract Terms Act on consumer contracts without mentioning fundamental breach. In cases where the Unfair Contract Terms Act is inapplicable, the UK courts employ the unconscionability test without making reference to the doctrine of fundamental breach. Ultimately, similar decisions are reached by the courts of both jurisdictions. Hence, the difference between the UK and Canadian jurisprudence lies in the procedural approach to issues and not to the substance of the decisions which are handed down in both jurisdictions.

As earlier seen, the attitude of the US courts has been different. Historically, the US is a shipper rather than a carrier nation, hence was intent on preventing the goods from being exposed to greater risks that had been agreed.⁹⁶ Being sympathetic to cargo owners, US courts have been favourably disposed to widening the purview of “deviation cases” to protect shippers. The incidences of fundamental breach of contracts of affreightment in the US are greater than those of the UK and Canada. For instance, where

⁹⁴ Ogilvie M.H. “Reasonable Exemption Clauses in the Supreme Court of Canada and the House of Lords” (1991) 25 University of British Columbia Law Review 199 at 203.

⁹⁵ See *Hunter Engineering v. Syncrude* *supra* note 5; *Coles v. Clarendville Drydock* *supra*, note 50; *Guarantee Company of North America v. Gordon Capital Corporation* *supra*, note 57; *Alcoa Inc. v. CP Ships (UK) Ltd.* *supra*, note 59.

⁹⁶ Tetley, William. *supra* note 22 at 11.

a ship owner fails to offer the cargo owner the opportunity to opt for a higher liability by paying a correspondingly greater charge, the package limitation in section 4(5) COSGA would not avail such ship owner.⁹⁷ Again, once there is on deck stowage, the ship owner loses the benefit of the package limitation or any other limitation or exemption clause contained in the contract.⁹⁸

Notably, the US courts do not go into the analysis of substantive and constructive fundamental breach like their UK and Canadian counterparts. Thus, contracts of carriage of goods by sea enjoy different treatment in US courts. As earlier noted, the UK and Canadian Courts do not recognize the *sui generis* status of fundamental breach of maritime contracts and have continued to assimilate them into the ordinary law of contract. This is not the case in the US where maritime contracts are accorded a *sui generis* status evidenced by the use of special terms like deviation and quasi-deviation.

V. CONCLUDING REFLECTIONS

The doctrine of fundamental breach of contracts of affreightment has undergone transformations over the years in the UK, Canada and USA. These changes are partly attributable to legislative intervention in some jurisdictions and partly to judicial activism in others. The discussions herein reveal that whereas the UK and Canadian practices are virtually the same, the US practice is completely distinct and unique. Since the decisions of UK courts are respected and followed by Canadian Courts, both jurisdictions exhibit

⁹⁷ Nemeth v. General S.S. Corp., Ltd. *supra*, note 76.

⁹⁸ See *St Johns N.F. Shipping Corporation v. S.A. Companhia General Commercial* 263 U.S. 119, 44 S. Ct 30, 68 L.Ed. 201; *Jones v. The Flying Clipper* 116 F. Supp 386 (S.D.N.Y); *Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer* 422 F. 2d 7 (2d. Cir. 1969).

similar uncertainties in applying the reasonableness and unconscionability tests, while the US courts have been consistent in applying its doctrines of deviation and quasi-deviation.

At this juncture, it is pertinent to reflect on the jurisdiction which best reconciles the conflicting interests of the shipper and the carrier. Obviously, the true test of the primacy of any jurisdiction is whether it is an inhibitor or facilitator of commercial transactions. In other words, the extent to which a given jurisdiction promotes commercial interests through an equitable reconciliation of the conflicting interests of the shipper and carrier is crucial to this assessment. The practice which best resolves these issues in a manner that neither party is prejudiced is worthy of emulation.

Preference for a particular jurisdiction depends on the side of the coin one is - for the shipper or the carrier? Whereas the US courts favour shippers more than carriers, the reverse is the case for the UK and Canadian courts. While resisting the urge to take sides with any of the selected jurisdictions, it is noteworthy that the jurisdiction which offers certainty on the likely outcome of a case has an edge over others.