Vita Food Products Revisited (Which Parts of the Decision Are Good Law Today?)

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Synopsis

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Introduction

Fifty-two years ago the Privy Council rendered its important decision in *Vita Food Products Inc.* v. *Unus Shipping Co. (The Hurry On)*,[1] ruling on various matters and in particular that the intention of the parties overcame the mandatory nature of the *Hague Rules*[2] in a question of choice of law.

Certain findings of the decision were the subject of considerable criticism,[3] whilst other parts have become important authority for the propositions they invoked. Its ghost even arises in recent decisions where one or other of its ques-

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[1][1939] A.C. 277, 1939 AMC 257, [1939] 2 D.L.R. 1, [1939] 1 All E.R. 513, [1939] 1 W.W.R. 433, 63 Ll.L. Rep. 21 (P.C.) [hereinafter *Vita Food Products*].

[2]*International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, signed at Brussels, 25 August 1924 and entered into force 2 June 1931, (1931) 120 L.N.T.S. 155 reproduced in W. Tetley, *Marine Cargo Claims*, 3d ed. (Montreal: Yvon Blais, 1988) at 1121 [hereinafter *Hague Rules* or *Rules*].

The *Hague Rules* are the basic international convention for carriage of goods by sea under bills of lading. Most of the world's shipping nations, including Canada and the United States, have adopted the *Hague Rules*.

The *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* [hereinafter *Visby Rules*], reproduced in Tetley, *ibid.* at 1132, adopted 23 February 1968 in Brussels, are an amendment to the *Hague Rules* so that nations which have adopted the *Visby Rules* are subject to what is known as the *Hague/Visby Rules*. Most shipping nations have adopted the *Visby Rules* with the unfortunate exceptions of Canada and the United States. The *Visby Rules* are (a) the *Visby Protocol* of Brussels, 23 February 1968 to the *Hague Rules* of 1924 and (b) the *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 21 December 1979, reproduced in Tetley, *ibid.* at 1139 [hereinafter *S.D.R. Visby Protocol*], which converted the gold francs of Visby 1968 into Special Drawing Rights.

[3]See discussion *infra*, notes 24 to 38, 54-62, 110-13. See also W. Tetley, Address *(Canadian Bar Association* Annual Meeting, Quebec City, 1960) at 244; refined and reproduced in W. Tetley, *Marine Cargo Claims*, 1st ed. (Toronto: Carswell, 1965) at 273 *et seq.*

tionable or questioned findings is followed, albeit discreetly and without citation.[4]

In consequence, it would seem to be useful at this time to take another look at what was actually decided, especially in order to determine which parts of the decision have not been followed, which parts have been rectified by international convention (the *Hague/Visby Rules*) and which parts are still good law.

The answers to the foregoing questions are particularly important to such nations as the United States and Canada, which have not adopted the *Visby Rules*, and to the United Kingdom, in light of its compliance with the *Rome Convention on the Law Applicable to Contractual Obligations, 1980*.[5] It is noteworthy that when acceding to the *Convention*, the United Kingdom made a reservation with respect to mandatory rules which might be called the "*Vita Food Products* Reservation."[6]

I. The Questions Raised by *Vita Food Products*

The *Vita Food Products* decision is important today and often cited for two carriage of goods questions it raises, as well as for eleven conflict of law questions it considered, either directly or indirectly, and for which in any event it is known and on occasion cited as authority.

A. Carriage of Goods Questions

a) Is a bill of lading issued in a *Hague Rules* jurisdiction valid despite the absence of a paramount clause in that bill of lading? b) Are the *Hague Rules* of mandatory application to a bill of lading which does not contain a paramount clause?

B. Conflict of Law Questions

a) What is the importance of the express intention of the parties in questions of choice of law? b) Must the law chosen by the parties be *bona fide*? c) Must the law chosen by the parties be *legal*? d) Must the law chosen by the parties conform to *public policy*? e) May the parties choose a totally unconnected law? f) May the parties choose a law other than the mandatory law of the place of contracting? g) When the parties choose "English law," may they ignore the mandatory *Hague Rules* of "English law?" h) Will a contract be construed or interpreted by the *lex loci contractus* or by its proper law? i) May the doctrine of

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[4]*The Komninos S*, [1991] 1 Lloyd's Rep. 370 (C.A.). See *infra*, note 105.

[5]80/934/EEC [hereinafter *Rome Convention, 1980*]. Adopted by the E.E.C. at Rome, 19 June 1980 and in force as of 1 April 1991 for Belgium, Denmark, France, Germany, Greece, Italy, Luxemburg and the United Kingdom.

[6]Being a reservation to art. 7(1) of the *Rome Convention, 1980*. See *infra* note 82.

"*renvoi*" be applied when determining the law of the contract? j) Should not a conflict rule bring uniformity and certainty and the avoidance of forum shopping? k) Is there a distinction between public policy/public order (*ordre public*), force of law and mandatory rules?

II. The Various Decisions

A. The Facts

The claim in *Vita Food Products* arose from damage to a shipment of fish carried on a Canadian ship, *The Hurry On*, from Newfoundland to New York, under bills of lading issued in Newfoundland in 1935. The cargo was damaged off the coast of Nova Scotia, Canada, and suit was brought in Nova Scotia where the carriers were domiciled. Newfoundland, which was a Dominion of the British Commonwealth of Nations at the time and not yet a province of Canada, had adopted the *Hague Rules* in 1932, as the Newfoundland *Carriage of Goods by Sea Act*[7] while Canada had not yet adopted the *Rules*.[8] Section 3 of the *Newfoundland Act* contained the normal *Hague Rules* stipulation, requiring an express statement (paramount clause) in each bill of lading:

> 3. Every bill of lading, or similar document of title, issued in this Dominion which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act.

The bills of lading did not contain the required paramount clause, however, old ones having been used in error.[9] Instead, the bills stipulated: "This contract shall be governed by English law."[10]

It is also noteworthy that s. 1 of the *Newfoundland Act* reads as follows:

> 1. Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in this Dominion to any other port whether in or outside this Dominion.

B. The Trial Court

Chisholm C.J., at trial[11] in Nova Scotia, held that the absence of the paramount clause, required by s. 3 of the *Newfoundland Act*, did not invalidate the

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[7]*Statutes of Newfoundland*, 1932, c. 18 [hereinafter *Newfoundland Act*].

[8]Canada did have its own *Water-Carriage of Goods Act*, 1910, c. 61, a precursor of the *Hague Rules*. Canada adopted the *Hague Rules* by the *Water Carriage of Goods Act*, 1936, c. 49.

[9][1939] A.C. 277 at 284, 1939 AMC 257 at 258, [1939] 2 D.L.R. 1 at 3, 63 Ll.L. Rep. 21 at 25.

[10][1939] A.C. 277 at 286, 1939 AMC 257 at 260, [1939] 2 D.L.R. 1 at 4-5, 63 Ll.L. Rep. 21 at 25.

[11][1938] 2 D.L.R. 372 at 382, 1938 AMC 159 at 163.

bills of lading. He added that the *Newfoundland Act* applied because of s. 1 and the rights of the parties must be decided under the *Act*. This judgment of the court of first instance would seem to be correct. Unfortunately, the judgment was appealed.

C. The Appeal Court

On appeal, the Supreme Court of Nova Scotia[12] held that the failure to include the paramount clause made the bills illegal, and the claimant could not plead an illegal contract. Although both parties were *in delicto*, the defendant had the right to plead illegality as a defence.

D. The Privy Council

The Privy Council, in a celebrated judgment rendered by Lord Wright, came to a different decision altogether. It agreed with Chisholm C.J. that the requirement of s. 3, that bills of lading "shall contain" a paramount clause, was directory and not mandatory. The bills of lading were, therefore, not illegal within or outside Newfoundland. The Privy Council then went on to decide that the law which was applicable was not the *Newfoundland Act*, but the law of England, for which the parties had expressly contracted. Lord Wright put it as follows:

> In their Lordships' opinion, the express words of the bill of lading must receive effect, with the result that the contract is governed by English law ... the proper law of the contract "is the law which the parties intended to apply."[13]

In this way the Privy Council disregarded, or at least did not discuss, whether the *Act* itself was mandatory. The mandatory nature of s. 1 of the *Newfoundland Act* (which is a section to be found in all *Hague Rules* acts) was disregarded.

E. Lord Wright and The Torni

Later on in the judgment, when discussing *The Torni*,[14] in which the English Court of Appeal had held that the *Hague Rules* applied no matter what the parties declared, Lord Wright stated: "the decision is contrary to the principles on which they have proceeded in the previous part of this judgment... ."[15] A study of the previous part, however, only indicates that the Court had decided

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[12]*Ibid.*

[13][1939] A.C. 277 at 289-90, 1939 AMC 257 at 263, [1939] 2 D.L.R. 1 at 7-8, 63 Ll.L. Rep. 21 at 27.

[14][1932] P. 78, 43 Ll.L. Rep. 78 (C.A.).

[15][1939] A.C. 277 at 299, 1939 AMC 257 at 271, [1939] 2 D.L.R. 1 at 15, 63 Ll.L. Rep. 21 at 32.

that the bills of lading were not invalid because s. 3 was not mandatory; whether the *Act* was mandatory by virtue of s. 1 was ignored.

F. Lord Wright and Section 1 of the Newfoundland Act

A number of other references to the judgment can illustrate how the Privy Council failed to take into account the significance of s. 1 of the *Newfoundland Act*. At one point, Lord Wright acknowledged that: "[i]n their Lordships' judgment s. 1 is the dominant section"[16] with respect to s. 3. One would likely conclude from this that a determination, by the Privy Council, that s. 3 was only directory could not automatically decide whether s. 1 was also directory. This was also seemingly accepted by the Privy Council: "the mandatory provision of s. 3, which cannot change the effect of s. 1... ."[17] Although the directory nature of s. 3 should have had no effect on the nature of s. 1, the Privy Council failed to consider whether s. 1 was itself directory or imperative. Seemingly then, the nature of s. 3 decided the issue with respect to s. 1.

At another point in the judgment, Lord Wright discussed the situation of a bill of lading which covers a shipment from one Newfoundland port to another port in Newfoundland. He stated that: "[i]n such a case s. 1, by its own force, imports the rules... ."[18] The Privy Council, however, confined the force of law effect in s. 1 to that situation. Section 1 refers to "the carriage of goods... from any port in this Dominion to any other port *whether in or outside this Dominion*" (emphasis added). There was no reason, based upon the wording in s. 1, to impose a restriction on the force of law nature of the *Newfoundland Act*. To do so was, in fact, to misconstrue the plain meaning of s. 1.

Later on, however, even the above acknowledgement of the force of law nature of s. 1 seems to be forgotten. Having determined that s. 3 is merely directory, Lord Wright applied this conclusion to the entire *Newfoundland Act*:

> Sect. 3 is in their Lordships' judgment directory. It is not obligatory, nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the *true construction of the statute...* .[19]

The Privy Council's inconsistent approach to s. 1 was also made manifest when Lord Wright said that Newfoundland law could not supersede the parties'

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[16][1939] A.C. 277 at 289, 1939 AMC 257 at 263, [1939] 2 D.L.R. 1 at 7, 63 Ll.L. Rep. 21 at 27.

[17][1939] A.C. 277 at 289, 1939 AMC 257 at 263, [1939] 2 D.L.R. 1 at 7, 63 Ll.L. Rep. 21 at 27. This citation also illustrates the almost Orwellian use of words by Lord Wright. He acknowledges that s. 3 is "mandatory" but mandatory "directory," not mandatory "imperative."

[18][1939] A.C. 277 at 294, 1939 AMC 257 at 267, [1939] 2 D.L.R. 1 at 11, 63 Ll.L. Rep. 21 at 29.

[19][1939] A.C. 277 at 295, 1939 AMC 257 at 268, [1939] 2 D.L.R. 1 at 12, 63 Ll.L. Rep. 21 at 30 (emphasis added).

express choice of English law.[20] This does not accord with the force of law nature of s. 1, or even the limited force of law accepted at one point by the Privy Council.

III. The Two Maritime Law Questions

A. *Is the Bill of Lading Valid Even Without the Paramount Clause?*

The first finding of the Privy Council in respect to maritime law would seem to be correct — that the absence of a reference to the *Hague Rules* does not invalidate the bill of lading. In other words, the stipulation in s. 3 of the *Newfoundland Act* (equivalent to s. 4 of the present Canadian *Carriage of Goods by Water Act*[21]) that every bill of lading shall contain a clause paramount, is directory and not mandatory. The *Visby Rules* settle the question at article 10, where the *Rules* are specifically declared to be of force of law, so that the need for a paramount clause is eliminated.

B. *Are Not the* Hague Rules *Mandatory?*

Was the Privy Council correct at this point, however, in its second maritime law finding that the *Hague Rules* themselves were not mandatory? It would appear that the Privy Council, upon deciding that s. 3 was directory and not mandatory, was in error when it came to the conclusion that the *Rules* themselves were therefore not mandatory.

There was a strong argument in 1939, when *Vita Food Products* was decided, and it is generally accepted today, that the *Rules* are mandatory. The *Rules* themselves, in my view, make this abundantly clear:

i) The purpose of the *Rules* is to make the law fixed and known to shippers and carriers wherever they are throughout the world. As Scrutton L.J. stated in *The Torni*,[22] the ability to contract out of the *Rules* would "upset the whole applecart ... of the countries who have agreed to it... ." For this reason, s. 1 of the *Newfoundland Act* (like s. 2 of the present Canadian Act)[23] states that:

> [t]he Rules ... shall have effect in relation to and in connection with the carriage of goods by sea... .

Section 1 above, it should be observed, does not refer merely to shipments in which bills of lading contain a clause paramount or even to shipments

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[20][1939] A.C. 277 at 291-92, 1939 AMC 257 at 265, [1939] 2 D.L.R. 1 at 9, 63 Ll.L. Rep. 21 at 28.

[21]R.S.C. 1985, c. C-27, s. 4 [hereinafter *COGWA*]. See also the American *Carriage of Goods by Sea Act*, adopted in 1936, at s. 13, 46 U.S.C., s. 1312 [hereinafter *COGSA*].

[22][1932] P. 78 at 83, 43 Ll. L. Rep. 78 at 81 (C.A.).

[23]*Supra*, note 21.

where a bill of lading is issued. Rather, it covers all "carriage of goods by sea."

ii) Article 5 of the *Hague Rules* states that any bill of lading issued under a charterparty "shall comply with the terms of this Convention." This seems imperative enough, imposing as it does the "terms" of the *Rules* and not merely s. 4, which refers to the paramount clause. Can it not be concluded that all bills of lading not issued under a charterparty are also bound by the terms of the *Rules*?

iii) Article 3(8) of the *Hague Rules* specifically declares:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability ... in the duties and obligations provided in this Article ... shall be null and void.

Thus, it would seem that a clause invoking "English law" is invalid as relieving the carrier of responsibility under the *Rules*.

iv) Article 2 of the *Hague Rules* states also that under "every contract of carriage ... the carrier ... shall be subject to the responsibilities and liabilities ... hereinafter set forth." This, too, seems imperative.

IV. The Response to *Vita Food Products*

A. Criticism by the Authoritics

The inadequacies to be found in *Vita Food Products* have not gone unnoticed, the decision having been subjected to considerable criticism, some of it severe.

i) H.C. Gutteridge[24] and O. Kahn-Freund[25] wrote case comments about *Vita Food Products* soon after the decision was rendered. Both writers expressed the concern that the Privy Council had failed to appreciate the intent behind the *Hague Rules*. As Gutteridge argued, the aim of achieving uniformity of legislation amongst shipping nations could certainly not be attained if contractants were able to avoid by express choice an otherwise applicable law:

> But there is no disguising the fact that it seems, nevertheless, to recognize the possibility of "contracting out" of the provisions of international unified law which as regards the Hague Rules is a matter of very great importance to the mercantile community throughout the world.[26]

Kahn-Freund likewise worried:

> The formidable difficulties which have to be overcome by international "legislation" are clearly demonstrated by this case. The scope given to the choice of law

[24]H.C. Gutteridge, (1939) 55 L.Q.R. 323.
[25]O. Kahn-Freund, (1939) 3 Modern L.R. 61.
[26]*Supra*, note 24 at 326.

> by the parties would seem to make it possible that by selecting a foreign system the operation of the Hague Rules can be excluded.[27]

A third case comment appeared at this time in the Columbia Law Review.[28] Criticism here was sharper, referring to "an unwarranted extension of the 'intent of the parties' doctrine."[29] This comment joined the other two in concurring that the goals behind the *Hague Rules* would be rendered illusory by enabling the parties to choose the governing law:

> In view of the above, the English decision might be termed alarming, giving as it does what might be called a literal interpretation to the intent doctrine, by proclaiming that the parties can freely select the law which will determine not only the construction, but the validity of their contract, and that the English courts will apply it even though the contract might be illegal under the *lex loci contractus*.[30]

ii) The year 1940 witnessed the first criticism of *Vita Food Products* by J.H.C. Morris.[31] Since then, his disagreement with the decision has appeared in other writings.[32] Morris shares the idea that if the *Hague Rules* were meant to receive universal application, then it makes little sense for a court in a country adhering to the *Rules* to allow them to be circumvented. To prevent the *Rules* from becoming worthless, they would have to predominate over the parties' choice of law:

> The fact that the Rules are made applicable to outward shipments should be sufficient to let in the law prevailing at the port of shipment no matter what law may have been selected by the parties.[33]

iii) Joining in the opposition to *Vita Food Products* was W.W. Cook. He realized that the effect of the decision could be to detract seriously from the value of the *Hague Rules*:

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[27]*Supra*, note 25 at 66. Note, however, that Kahn-Freund nevertheless commented that the *Vita Food Products* case was "the greatest contribution to clarity in this field [English private international law] which the courts have made for a long time and it is incidentally of outstanding commercial importance" (*ibid.* at 61). Kahn-Freund also seems to have misunderstood the decision, since, at one point in his commentary, he states: "[t]he Judicial Committee found that s. 3, the so-called paramount section, need not be complied with in order to make the Act applicable. The Hague Rules apply although they are not expressly mentioned" (*ibid.* at 66). In fact, what the Privy Council decided was that s. 3 need not be complied with in order to make the *bills of lading* valid (not in order to make the *Act* applicable). Nor did the judgment decide that the *Hague Rules* applied.

[28]*Anon.* (1940) 40 Col. L.R. 518.

[29]*Ibid.* at 519.

[30]*Ibid.* at 522.

[31]J.H.C. Morris & G.C. Cheshire, "The Proper Law of a Contract in the Conflict of Laws" (1940) 56 L.Q.R. 320.

[32]See J.H.C. Morris, "The Choice of Law Clause in Statutes" (1946) 62 L.Q.R. 170 at 177; *The Conflict of Laws*, 3d ed. (London: Stevens, 1984) at 272; "The Proper Law of a Contract: A Reply" (1950) 3 I.L.Q. 197, responding to F.A. Mann, "The Proper Law of the Contract" (1950) 3 I.L.Q. 60.

[33]*Supra*, note 31 at 328.

> In substance the suggestion is that in such a case it ought to be held "contrary to the public policy" of any forum for the parties to choose a law which would nullify the Hague Rules when those rules have been adopted by the states with which the transaction is factually connected. With this the present writer agrees.[34]

iv) Falconbridge shared the concern of the other writers that a great disservice had been rendered the movement towards uniformity:

> The Privy Council, having held that the bill of lading was not void for illegality either in Newfoundland or in Nova Scotia, might reasonably have held that it was subject to the Carriage of Goods by Sea Act, 1932, notwithstanding the omission of the clause paramount, so as to give the protection of the statutory provisions... , instead of the contractual provisions, but on the contrary the Privy Council held that the defendant had successfully contracted itself out of the statutory provisions and was protected by the contractual provisions. It would seem to be regrettable that the Privy Council has without apparent necessity seriously impaired the efficacy of the effort made in various countries to give effect to an international convention, but presumably, if the partial wrecking of the convention resulting from the reasoning of the Privy Council is regarded as a real grievance by persons engaged in the shipping and carriage of goods by sea, the damage can be repaired by the necessarily slow process of uniform amending legislation.[35]

v) *Carver's Carriage by Sea* is also quite critical when referring to *Vita Food Products*:

> It would be most unsatisfactory if the effect on a contract of municipal legislation adopting the Hague Rules depended on where proceedings happened to be brought.[36]

vi) *Cheshire's Private International Law* is particularly critical as well:

> The significant and surprising implication of this reasoning is that had the Rules imposed liability for negligence, the Privy Council would have disregarded them and in reliance on the exemption clause would have found the shipowners blameless. Another surprising implication of the reasoning is that it condoned the avoidance of the Hague Rules, though these have been carefully designed to bring about uniformity in the maritime law of civilised nations.[37]

vii) *Dicey & Morris on the Conflict of Laws* makes a further contribution to the opinion that the nature of the *Hague Rules* means they should be preferred over a contractual choice of law:

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[34]W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge: Harvard U. Press, 1942) at 426.

[35]J.D. Falconbridge, *Essays on the Conflict of Laws*, 2d ed. (Toronto: Canada Law Book, 1954) at 401. See also J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983) at 475: "In addition, the reasoning of the Privy Council had the effect of condoning the avoidance of the Hague Rules, which had been drafted to achieve uniformity in international maritime law."

[36]R. Colinvaux, ed., *Carver's Carriage by Sea*, vol. I, 13th ed. (London: Stevens and Sons, 1982) at para. 573.

[37]P.M. North, ed., *Cheshire's Private International Law*, 11th ed. (London: Butterworths, 1987) at 453.

> The logic of the conflict of laws was here at variance with the need for the unification of commercial law. Should not a contract designed to frustrate this unification be regarded as contrary to English public policy?[38]

B. Authorities in Support of Vita Food Products

Not all commentators are opposed to the decision. It is submitted, however, that some of the agreement with *Vita Food Products* stems from a failure to appreciate that the *Hague Rules* apply by force of law.

i) Mann's support of *Vita Food Products* was unequivocal. He called the decision "one of the greatest cases in English law decided by one of the strongest judicial committees ever formed."[39] Unfortunately, Mann did not elaborate at all.

ii) Wolff's approval of *Vita Food Products* resulted from an opinion that the *Rules* were not mandatory:

> This decision seems to be correct, because the law of Newfoundland — which would probably have been applied if the parties had not chosen English law — does not apparently contain any compulsory rule incompatible with English law.[40]

Wolff thus failed to understand the real nature of s. 1 of the *Newfoundland Act.*

iii) Malcolm Clarke made the following statement about *Vita Food Products*:

> Once it is accepted that the normal conflicts rules for contracts were relevant to the case, then the decision of the Board was, if not inevitable, certainly justifiable.[41]

It is important to note, however, a previous statement that "the Convention as in force in Newfoundland, was ill-equipped to do battle."[42] Clarke's opinion also seems to depend upon the view that the *Hague Rules* as they existed in Newfoundland were not imperative.

iv) Castel agreed with *Vita Food Products*, as is shown by his use of the judgment to justify the following statement:

> However, if a cargo is shipped from a port of a country other than Canada which has adopted The Hague Rules, the Act [the Canadian *Carriage of Goods by Water Act*] does not apply and the parties may contract out of the rules by selecting as the proper law of the contract a system of law other than that of the port of shipment.[43]

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[38]L. Collins, ed., *Dicey and Morris on the Conflict of Laws*, vol. 2, 11th ed. (London: Stevens and Sons, 1987) at 1284-85.

[39]F.A. Mann, "Uniform Statutes in English Law" (1983) 99 L.Q.R. 376 at 397 n. 98. See also Mann, *supra*, note 32.

[40]M. Wolff, *Private International Law*, 2d ed. (Oxford: Clarendon Press, 1950) at 418.

[41]M. Clarke, *Aspects of the Hague Rules: A Comparative Study in English and French Law* (The Hague: Nijhoff, 1976) at 23.

[42]*Ibid.*

[43]J.-G. Castel, *Canadian Conflict of Laws*, 2d ed. (Toronto: Butterworths, 1986) at 542.

Wolff, Clarke, and Castel share the disciplined tendency of many lawyers (and even many academics) to abide by the decisions of the Privy Council and to set out what the law is (as interpreted by the highest authority — the Privy Council/ House of Lords) rather than how the Court *should have* decided. Nor do Wolff, Clarke and Castel seem to have appreciated the application by force of law of the *Hague Rules*, as provided for in s. 1 of the *Newfoundland Act*. The provisions apply to "the carriage of goods by sea" — there is no qualification.

v) *Scrutton on Charterparties*[44] follows the Privy Council on the mandatory nature of the *Hague Rules*. This position is interesting, if not extraordinary, in light of Scrutton's conversion from an opponent of the *Hague Rules* at their inception to a proponent of them in *The Torni*, when he was a Lord Justice in Appeal and had said that the ability to contract out of the *Rules* would "upset the whole applecart... of the countries who have agreed to it... ."[45]

Scrutton, in his eleventh edition[46] of 1923, opposed the proposed adoption by the U.K. Parliament of the *Hague Rules*, which would impose a standard on merchants who could not contract out of that standard. Scrutton wished the contract of carriage by sea to be subject only to the common law and the free bargaining of the parties. He concluded, in his preface to the eleventh edition:

> Should this work reach another edition, it may be necessary to consider in detail the rules, if any, enacted by Parliament. We sincerely hope, however, that the matter may remain as it now rests, on the bargaining of parties free to contract.[47]

When the *Hague Rules* were adopted in 1924, Scrutton gave up the editing of his own celebrated text. It was only in *The Torni*,[48] nine years later, that he showed that he understood and approved the mandatory nature of the *Hague Rules*.

The editors of the fourteenth edition,[49] the fifteenth edition,[50] the sixteenth edition,[51] the seventeenth edition,[52] and the eighteenth edition,[53] were not true to

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[44]A.A. Mocatta, M.J. Mustill & S.C. Boyd, *Scrutton on Charterparties and Bills of Lading*, 18th ed. (London: Sweet & Maxwell, 1974) at 11 n. 77, 511 n. 3.

[45]*Supra*, text accompanying note 22.

[46]T.E. Scrutton & F.D. McKinnon, *Scrutton on Charterparties and Bills of Lading*, 11th ed. (London: Sweet & Maxwell, 1923) at iii-vi.

[47]*Ibid.* at vii.

[48]*Supra*, note 22.

[49]W.L. McNair & A.A. Mocatta, *Scrutton on Charterparties and Bills of Lading*, 14th ed. (London: Sweet & Maxwell, 1939) at 478-80 n. "k."

[50]W.L. McNair & A.A. Mocatta, *Scrutton on Charterparties and Bills of Lading*, 15th ed. (London: Sweet & Maxwell, 1948) at 449 n. "d."

[51]W.L. McNair & A.A. Mocatta, *Scrutton on Charterparties and Bills of Lading*, 16th ed. (London: Sweet & Maxwell, 1955) at 464 n. "o."

[52]W.L. McNair, A.A. Mocatta & M.J. Mustill, *Scrutton on Charterparties and Bills of Lading*, 17th ed. (London: Sweet & Maxwell, 1964) at 403 n. "q."

[53]A.A. Mocatta, M.J. Mustill & S.C. Boyd, *Scrutton on Charterparties and Bills of Lading*, 18th ed. (London: Sweet & Maxwell, 1974) at 413 n. 44.

their master (in a demonstration of originality) and made the following statement in favour of the *ratio decidendi* of *Vita Food Products*:

> Unless deterred by fear of criminal proceedings, it seems that a shipowner, issuing a bill of lading in this country for delivery of goods in a foreign port, may neglect to insert any such express statement and so avoid the application of the Rules if sued in a foreign port, unless the foreign court, applying the law of Great Britain and Northern Ireland as being the proper law of the contract, should hold that the Rules are thereby incorporated.

The nineteenth (and present) edition of Scrutton drops the question altogether.

C. Response in the Courts

The *Vita Food Products* decision has also encountered judicial opposition, having been ignored, distinguished, circumvented, and even opposed.

i) In *Shackman* v. *Cunard White Star Ltd* an American court ignored *Vita Food Products* completely and held:

> Were this clause [the paramount clause] absent, the above paragraph of the Carriage of Goods by Sea Act would still be a part of the bill of lading.[54]

ii) In *Dominion Glass Co.* v. *The Ship Anglo Indian*,[55] in a shipment from Montreal to Vancouver *via* the Panama Canal, clause 26 of the bill of lading invoked "English Law," clause 24 invoked the *Water-Carriage of Goods Act* of Canada of 1910 (which was not in force) and a stamped clause invoked the Canadian *Water Carriage of Goods Act, 1936*. *Vita Food Products* was referred to, but not followed, by Kerwin J.:

> This being an action in Canada with reference to a bill of lading issued in Canada, the law of Canada must be applied notwithstanding the inclusion in the bill of lading of clause 26.[56]

Rand and Taschereau JJ., dissenting on another matter, nevertheless concurred with Kerwin J. and held:

> It is then urged that by an express stipulation in the bill of lading the contract is to be governed by English law which must be taken to be what is called the proper law of the contract. *Whatever effect might be given to such a stipulation in a court outside of Canada*, within this country we are bound by the provisions of the *Water Carriage of Goods Act of 1936*.[57]

In effect, the Supreme Court of Canada disregarded the *Vita Food Products* decision.

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[54]31 F. Supp. 948 at 950, 1940 AMC 971 at 973 (S.D.N.Y. 1940).
[55][1944] S.C.R. 409, [1944] 4 D.L.R. 721.
[56][1944] S.C.R. 409 at 417, [1944] 4 D.L.R. 721 at 727.
[57][1944] S.C.R. 409 at 432-33, [1944] 4 D.L.R. 721 at 741 (emphasis added).

iii) In *Ocean Steamship Co.* v. *Queensland State Wheat Board*,[58] the *Vita Food Products* decision was circumvented. A shipment of wheat was carried under bills of lading from Australia to Liverpool and Glasgow, and clause 1 of the bill of lading invoked the Australian *Sea-Carriage of Goods Act, 1924*[59] (the *Hague Rules*), while clause 16 declared: "The contract evidenced by this bill of lading shall be governed by the law of England." It was held by the Court of Appeal that the provision as to English law was null and void in virtue of s. 9 of the *Australian Act*, which specifically provides that parties to a contract relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the law in force at the place of shipment and any contrary agreement is void.[60]

Section 9 of the *Australian Act* thus does contain more forceful language than s. 1 of the *Newfoundland Act*. Nevertheless, both s. 9 (Australia) and s. 1 (Newfoundland) are force of law provisions, and should be applied in a similar fashion to defeat attempts to derogate from the national versions of the *Hague Rules*.

iv) Denning L.J. in *Boissevain* v. *Weil* gave a much better conflict rule than had Lord Wright in *Vita Food Products* and directly opposed the finding in *Vita Food Products*:

> Notwithstanding what was said in *Vita Food Products* v. *Unus Shipping Co.*, I do not believe that parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account.[61]

Today, although intention can be considered as only one contact (or connecting factor) amongst many in arriving at the proper law of the contract, it is my view that "express choice" of the parties is binding unless contrary to public policy/ order, a mandatory law or was made to evade the law.

v) In the *Morviken*, Lord Diplock expressed his malaise with "the wide ranging dicta" in *Vita Food Products* by stating that it was

> no longer necessary to embark upon what I have always found to be an unrewarding task of ascertaining precisely what those dicta meant.[62]

V. *Vita Food Products* and the *Visby Rules*

The *Visby Rules* solve the problem of the mandatory nature of the *Hague Rules* raised by *Vita Food Products*, by confirming at article 10 that the *Hague*

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[58][1941] 1 K.B. 402, [1941] 1 All E.R. 158 (C.A.).
[59]No. 22 of 1924 [hereinafter *Australian Act*].
[60][1941] 1 K.B. 402 at 412, 415, [1941] 1 All E.R. 158 at 161, 164.
[61][1949] 1 K.B. 482 at 491 (C.A.).
[62][1983] 1 Lloyd's Rep. 1 at 9 (H.L.).

Rules have the force of law.[63] The U.K. *Carriage of Goods by Sea Act*[64] is to the same effect.

VI. Application of *Vita Food Products* in Canadian Courts

The significance of *Vita Food Products* in Canadian courts relates to two aspects: express choice of law and restrictions upon it; and the imperative or directory nature of a statutory provision.[65]

In *George C. Anspach Co. Ltd* v. *C.N.R. Co.*,[66] the Ontario High Court followed *Vita Food Products* in finding that the proper law of the contract was the law which the parties intended or may be presumed to have intended to apply. An express choice of law, however, will be subject to the mandatory rules of the place of contract. In this manner, *Vita Food Products* was followed by the British Columbia Supreme Court in *Nike Infomatic Systems Ltd.* v. *Avac Systems Ltd*,[67] and applied by the Federal Court of Appeal in *United Nations* v. *Atlantic Seaways Corp.*[68] Since then, the *Vita Food Products* approach to the express choice of law in a contract has been applied,[69] discussed,[70] and noticed,[71] by the Alberta Court of Queen's Bench, as well as considered by the British Columbia Supreme Court.[72]

In other words, the *dictum* set out in *Vita Food Products* that a contract made in contravention of a statute might still be upheld unless serious grounds were involved,[73] was applied by the British Columbia Court of Appeal[74] and the

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[63]*Supra*, note 2. See also *The "Morviken," ibid., The Benarty*, [1984] 2 Lloyd's Rep. 244, [1984] 3 W.L.R. 1082 (C.A.), commented upon by Francis Reynolds, "Foreign Tonnage Limitation Not a Ground for Refusing Stay of Action" [1984] L.M.C.L.Q. 545; *The Anders Maersk*, [1986] 1 Lloyd's Rep. 483 (Hong Kong Supreme Court).

[64](1971) U.K., c. 19, ss 1(2), 1(3), 1(6).

[65]The most important Canadian decision commenting on *Vita Food Products* was of course *Dominion Glass Co. Ltd.* v. *The Anglo Indian*, *supra*, note 55.

[66][1950] O.W.N. 274 (H.C.).

[67](1979), 16 B.C.L.R. 139, 8 B.L.R. 196 (S.C.) [hereinafter *Nike*].

[68][1979] 2 F.C. 541, 99 D.L.R. (3d) 609, 28 N.R. 207 (C.A.) [hereinafter *Atlantic Seaways*].

[69]*Greenshields Inc.* v. *Johnston*, [1981] 3 W.W.R. 313, 28 A.R. 1, 119 D.L.R. (3d) 714 (Q.B.), aff'd [1982] 2 W.W.R. 97, 17 Alta. L.R. (2d) 318, 131 D.L.R. (3d) 234, 35 A.R. 487 (C.A.) [hereinafter *Greenshields*].

[70]*Bank of Montreal* v. *Snoxell* (1982), 143 D.L.R. (3d) 349, 44 A.R. 224 (Q.B.) [hereinafter *Snoxell*].

[71]*Skeggs* v. *Whissell* (1985), 63 A.R. 348 (Alta. Q.B.) [hereinafter *Skeggs*].

[72]*Avenue Properties* v. *First City Development Corp.* (1985), 65 B.C.L.R. 301 (S.C.), rev'd (1986), 7 B.C.L.R. (2d) 45, [1987] 1 W.W.R. 249, 32 D.L.R. (4th) 40 (C.A.) [hereinafter *Avenue Properties*].

[73][1939] A.C. 277 at 293, 1939 AMC 257 at 266, [1939] 2 D.L.R. 1 at 10-11, 63 Ll.L. Rep. 21 at 29.

[74]*Ardekany* v. *Dominion of Can. General Ins. Co.* (1986), 7 B.C.L.R. (2d) 1, [1987] 1 W.W.R. 57, 32 D.L.R. (4th) 23 (C.A.).

Ontario District Court,[75] as well as being considered by the Ontario High Court.[76]

Another application of *Vita Food Products* in Canada has been with respect to the question of whether a mandatory provision is imperative or directory. The Courts of Appeal in Ontario[77] and British Columbia[78] have applied the *dictum* approved in *Vita Food Products* that the real intention of the legislature is to be ascertained by a consideration of the "whole scope of the statute."[79] The Manitoba Court of Queen's Bench referred to the same *dictum* in finding that one must look at the "general scope and object" of a statute to determine whether it is mandatory or directory.[80]

VII. The *Rome Convention, 1980*

A. *New Conflict Rules in Contract*

The question of the forum recognizing the mandatory nature of foreign law requires proper rules of conflict of law or a proper conflict of law convention or statute.

The *Rome Convention on Contractual Obligations* is law today in the United Kingdom.[81] By art. 3(1) a contract shall be governed by the law chosen by the parties, either expressly or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. Thus the term in the bill of lading in *Vita Food Products*: "This contract shall be governed by English law" would more than comply with the express intention requirement of art. 3(1) of the *Rome Convention, 1980.*

Article 3(3), however, of the *Rome Convention, 1980* forbids the derogation from the "mandatory rules" of a country "where all the other elements relevant to the situation at the time of the choice are connected ... ." But not "*all* the other elements" in *Vita Food Products* pointed to Newfoundland, as the ship was Canadian and the shipment was to the United States. This illustrates the very limited application of art. 3(3).

Article 7(1), nevertheless, gives the court discretion to apply the mandatory rules of a third country (neither the forum nor the place of the *lex causae*) with

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[75]*Fauman* v. *Cooke* (1986), 41 M.V.R. 60 at 68 (Ont. Dist. Ct.).

[76]*Shakur* v. *Pilot Insurance Co.*, [1988] I.L.R. 1-2349, 33 C.C.L.I. 272 (Ont. H.C.).

[77]*Re Bank of Western Canada*, [1970] 1 O.R. 427 (C.A.).

[78]*Stephen* v. *Stewart (No. 1)*, [1943] 3 W.W.R. 580, [1944] 1 D.L.R. 305, 59 B.C.R. 410 (C.A.).

[79][1939] A.C. 277 at 293, 1939 AMC 257 at 266, [1939] 2 D.L.R. 1 at 10, 63 Ll.L. Rep. 21 at 29, citing Lord Campbell in *Liverpool Borough Bank* v. *Turner* (1860), 2 De G.F. & J. 502 at 508, 45 E.R. 715 at 718 (Ch.).

[80]*R.* v. *Zorn* (1986), 47 M.V.R. 62 at 67, 45 Man. R. (2d) 218 at 222 (Man. Q.B.).

[81]*Contracts (Applicable Law) Act 1990* (U.K.), c. 36.

which the situation has a close connection. Thus, very probably, the *Hague Rules* would be applied in a modern *Vita Food Products* situation, if an analogous case arose today in a European country party to the *Rome Convention, 1980.*

B. The "Vita Food Products *Reservation"*

Unfortunately, the United Kingdom version of the *Rome Convention, 1980*,[82] specifically excludes art. 7(1). This is perhaps an English harkening back to Lord Wright's *Vita Food Products* findings that a Nova Scotia court would not have been obliged to regard the bills of lading in question in the same way as a Newfoundland court. Thus the mandatory rules of what would be the law of the closely connected third jurisdiction can be ignored by a United Kingdom court.

C. Public Policy/Ordre Public

Nor could *ordre public* be raised by art. 16 of the *Rome Convention, 1980*, because it is *ordre public* of the *forum* which must be violated. In *Vita Food*

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[82]*Ibid.* s. 2(2). The basic reasons for the U.K.'s rejection of art. 7(1) of the *Rome Convention, 1980* were summarized by David Jackson in "Mandatory Rules and Rules of 'Ordre Public'" in P.M. North, ed., *Contract Conflicts* (Amsterdam: North-Holland, 1982) 59 at 73:

> Objections voiced against the provision are that it gives greater effect to a law of a close connection than the law of the closest connection, that it will create indefensible uncertainty and that courts are ill equipped to analyse the nature and purpose of a foreign legal rule.

See also P.M. North, "The E.E.C. Convention on the Law Applicable to Contractual Obligations (1980): Its History and Main Features," in *ibid.*, 3 at 19-20; C.G.J. Morse, "The E.E.C. Convention on the Law Applicable to Contractual Obligations" (1982) 2 Yearbook of European Law 107 at 147.

On the other hand, P. Lagarde, "The European Convention on the Law Applicable to Contractual Obligations: An Apologia" (1981) 22 Virg. J. Int. L. 91 at 103, stresses the importance of art. 7(1):

> The basic idea stems from an awareness of the necessary unity existing between the legal policies of the various States. An international contract is always connected with several countries. Although the law of the country with which it has the most real connection should usually prevail, certain rules of other countries with which the situation has a significant connection should not necessarily be eliminated. That is particularly true in the case where these rules are so important that a State requires their application for all contracts, whether or not that State's law is the proper law.

O. Lando, "The EEC Convention on the Law Applicable to Contractual Obligations" (1987) 24 C.M.L.R. 159 at 213-14, while recognizing that art. 7(1) makes for uncertainty, nevertheless argues that this is the price that must be paid for achieving the goal of moving away from "national egoism" in choice of law rules and allowing foreign legislation to operate when it is necessary and reasonable to do so, even if it is not part of the proper law.

Lando likewise points out (*ibid.* at 210) that provisions similar to art. 7(1) are included in the Hague Agency Convention, 1978 (at art. 16) and in the Hague Convention on the Law Applicable to Trusts etc, 1984 (at art. 16(2)). See also A. Philip, "Mandatory Rules, Public Law and Choice of Law," in P.M. North, ed., *ibid.* at 104.

Products, the forum was Nova Scotia, Canada and the mandatory *Hague Rules* which were violated were not of the forum but of Newfoundland. As well the *Hague Rules* are today considered as mandatory, but not of *ordre public*, a distinction not clearly recognized in 1939 when Lord Wright rendered his decision.

D. Conclusion

The *Rome Convention, 1980* does solve the *Vita Food Products* mandatory rules dilemma, but the exclusion of art. 7(1) by the 1990 U.K. statute would leave a U.K. court with the option of ignoring mandatory rules of a closely connected third country.

VIII. What Can Be Learned from *Vita Food Products*?

A. Introduction

The decision in *Vita Food Products* not only decided a number of questions, some correctly and some incorrectly, but also raised others which are very pertinent today both in respect to carriage of goods and conflicts of law.

B. Carriage of Goods by Sea Questions

1. Validity of the Bill of Lading Without the Paramount Clause

Vita Food Products decided, and it is generally agreed today, that the bill of lading is valid under the *Hague Rules* whether or not it contains a paramount clause.[83]

2. Are the *Hague Rules* Mandatory Without a Paramount Clause?

In places, *Vita Food Products* seems to imply, if not stand for, the principle that the *Hague Rules* are not mandatory when the bill of lading does not contain a paramount clause. This finding is now discredited.[84]

C. Conflict of Law Questions

a) The importance of the *express intention* of the parties was emphasized in *Vita Food Products* and was a step forward from the classic *lex loci contractus* principle:

> In their Lordships' opinion, the express words of the bill of lading must receive effect, with the result that the contract is governed by English law ... the proper law of the contract is the law which the parties intended to apply.[85]

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[83]*Supra*, text accompanying note 21.
[84]*Supra*, text accompanying notes 54 to 62.
[85]*Supra*, note 13.

The decision went too far, however, in ignoring the mandatory law of the place of the contract and the place of shipment. As well, when the Court recognized "English law" expressly chosen by the parties, it ignored that the *Hague Rules* are a mandatory part of "English law."[86]

b) The choice (*intention expressed*) of another law must be *bona fide*: "the *intention expressed* is *bona fide* and legal ... ."[87] In effect, there must be an *express* and clear choice and this principle enunciated in *Vita Food Products* is important and correct. No doubt the choice was *bona fide* or in good faith or innocent, being the result of bills of lading issued in error, but was there any real "intention expressed"? The intention was far from clear, as the bill of lading was old and used in error[88] and, like every bill of lading, was not signed by the shipper or consignee and was no doubt issued after shipment.[89]

c) The choice of another law must be *"legal."*[90] This is another properly expressed principle, but was not followed in *Vita Food Products*. In effect, the choice made in Newfoundland of English law was illegal, being contrary to the mandatory nature of the Newfoundland version of the *Hague Rules*, as Lord Wright, himself, acknowledged:

> A court in Newfoundland would be bound to apply the law enacted by its own Legislature, if it applied, and thus might treat the bills as illegal... .[91]

d) The choice of a foreign law will be respected by the courts, "provided there is no reason for avoidmg the choice on the ground of public policy."[92] Once again, Lord Wright correctly expounded an important conflicts of law principle, but then failed to apply it as he should have done. He did not recognize, as Scrutton L.J. had in *The Torni*,[93] the public policy character[94] of the *Hague Rules*, being, as they are, *international* norms, aimed at establishing *uniform* standards and regulations governing the carriage of goods by sea in the major shipping nations of the world. Rather, he interpreted "public policy" in the traditional, narrow, not to say "provincial" manner, limiting the concept to the public policy of the *forum*. Thus, he was at peace with himself in concluding that,

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[86]*Infra*, text accompanying note 105.

[87][1939] A.C. 277 at 290, 1939 AMC 257 at 264, [1939] 2 D.L.R. 1 at 8, 63 Ll.L. Rep. 21 at 27.

[88]*Supra*, note 9.

[89]For the bill of lading as contract, see Tetley, *supra*, note 2 at 216-18.

[90]*Supra*, note 87.

[91][1939] A.C. 277 at 292; 1939 AMC 257 at 265, [1939] 2 D.L.R. 1 at 9-10, 63 Ll.L. Rep. 21 at 28.

[92][1939] A.C. 277 at 290, 1939 AMC 257 at 264, [1939] 2 D.L.R. 1 at 8, 63 Ll.L. Rep. 21 at 28.

[93]*Supra*, note 22.

[94]Today, we would probably speak of the "mandatory" rather than "public policy" character of the *Hague Rules*. In 1939, when *Vita Food Products* was decided, however, the distinction between "mandatory rules" and "public policy/public order" was not clearly recognized.

whereas a court in *Newfoundland* might rightly have treated the bills of lading in question as illegal on grounds of public policy, a *Nova Scotia* court need not have taken the same view.[95]

e) Today, in some legal systems, the parties are *not* usually permitted to choose a totally unconnected law, despite Lord Wright's *dictum* that:

> [c]onnection with English law is not, as a matter of principle, essential.[96]

The law chosen must have some bearing on the contract of the parties or provide some benefit to the parties.

f) May the parties choose their own law, despite the mandatory nature of the law in force at the place of contracting? And, more important, will a foreign court recognize as applicable that law chosen by the parties?

Evasion of the law includes the avoidance of an otherwise mandatory law, through the use of an express choice of law clause in a contract. The evasion doctrine, which is part of the civil law, does not appear formally in the English common law:

> English private international law does not have any general doctrine by which a person's intentions are reprobated because they have chosen to evade the application of the rules of one legal system by resort to another one.[97]

In practice, however, common law jurisdictions usually refuse attempts to evade mandatory laws by express choice in contracts, on the grounds that the choice must be *bona fide* and legal. For example, six Canadian judgments accepted the "*bona fide* and legal" requirements that are found in *Vita Food Products* in cases of express choice of law.[98] The Canadian judicial consensus as to the meaning of "bona fide" was well set out in *Atlantic Seaways*:

> But the chief qualification of the freedom to choose the proper law of the contract, and the meaning to be attributed to the words "bona fide and legal" in the dictum of Lord Wright, would seem to be that the proper law must not have been chosen to evade a mandatory provision of the law with which the contract has its closest and most real connection.[99]

Four of the six cases indicate that a *bona fide* choice is one not done to escape a mandatory law.[100] In the other two judgments, "*bona fide*" was not defined by

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[95]*Supra*, note 91.

[96][1939] A.C. 277 at 290-91, 1939 AMC 257 at 264-65, [1939] 2 D.L.R. 1 at 8-9, 63 Ll.L. Rep. 21 at 28. See Lando, *supra*, note 82 at 169.

[97]J.G. Collier, *Conflict of Laws* (Cambridge: Cambridge U. Press, 1987) at 147.

[98]*Snoxell*, *supra*, note 70; *Greenshields*, *supra*, note 69; *Atlantic Seaways*, *supra*, note 68; *Nike*, *supra*, note 67; *Skeggs*, *supra*, note 71; *Avenue Properties*, *supra*, note 72.

[99] [1979] 2 F.C. at 555; 99 D.L.R. (3d) at 621; 28 N.R. at 221.

[100]*Snoxell*, *supra*, note 70; *Greenshields*, *supra*, note 69; *Atlantic Seaways*, *supra*, note 68; *Nike*, *supra*, note 67.

the court.[101] One can conclude that at least with respect to contracts, the evasion doctrine is being applied by Canadian common law courts.

It is also noteworthy that "the mandatory rules of the law of another country with which the situation has a close connection" may be recognized by art. 7(1) of the *Rome Convention, 1980*. See as well art. 3079 of the *Civil Code of Quebec*,[102] adopted in December 1991, which is to the same effect. It is also noteworthy, however, that the *U.K. Contracts (Applicable Law) Act* 1990,[103] which adopted the *Rome Convention, 1980* into English law, has excluded art. 7(1) of the *Rome Convention, 1980* as stated above.

g) *Vita Food Products*, by invoking "English law" as the choice of the parties, fails to take into account the fact that the *Hague Rules* were at that time a part of "English law," in the form of the then U.K. *Carriage of Goods by Sea Act 1924*.[104] Also ignored was the fact that the English *Carriage of Goods by Sea Act 1924* was mandatory and should have been applied to the bill of lading contract by Lord Wright's own reasoning. English law to Lord Wright seems to be English "common" law, and not English statute law or even *mandatory* English statute law.[105]

The assumption that "English law" did not include the mandatory U.K. *Carriage of Goods by Sea Act* (the U.K. version of the *Hague Rules*) because the *Act* only applies outward from an English port is to ignore the whole nature of incorporation by reference of a law. Any incorporation by reference of a law must be done, making necessary adjustments *mutatis mutandis*.[106]

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[101]*Skeggs, supra*, note 71; *Avenue Properties, supra*, note 72.

[102]Bill 125, *Civil Code of Québec*, 1st Sess., 34th Leg. Qué., 1990 (assented to 18 December 1991, S.Q. 1991, c. 64 but not yet in force).

[103]*Supra*, note 81. This exclusion (at s. 2(2) of the Act) seems to be intended to maintain in English law, the principal finding of *Vita Food Products*.

[104](1924) 14 & 15 Geo. 5, c. 22 (repealed).

[105]Lord Wright's thinking in this regard is still reflected in contemporary Englisb cases. For example, in *The Komninos S, supra*, note 4, the Court of Appeal decided that *English law* was the proper law of a contract of carriage of a cargo from Greece to Italy, because the bill of lading, issued in Greece, provided that all disputes should be referred to "British Courts." Nevertheless, the Court held that the U.K.'s *Carriage of Goods by Sea Act*, 1971 (giving effect to the *Hague/Visby Rules*) did *not* apply to the contract merely on the strength of that choice of forum clause. Nor could it apply on any other basis, since the shipment was not from a U.K. port, and since Greece, where the bill of lading was issued and from which the goods were shipped, was not a party to the *Hague/Visby Rules*. In consequence, the carrier was entitled to rely on English law (meaning English common law) which permitted exemption clauses in the bill, whicb would have been invalid had the *Hague/Visby Rules* applied. (In my view, this finding is incorrect and very unfortunate).

[106]See Hugessen J. in *The Mercury Bell*, [1986] 2 F.C. 454 at 468-69, to the effect that when the *lex fori* is applied in place of unproven foreign law, it includes not only the common law of the forum but also statutes forming part of "the general law of the country" and that, in applying that law, "the court must make necessary adjustments; in legal jargon, the law is read *mutatis*

When the carriage of goods by sea contract takes the major step of by-passing a mandatory law of the place of contract and shipment to incorporate other laws by two very general words "English law," one would expect that incorporation would include the mandatory *Carriage of Goods by Sea Act* of English law.

To assume that only "English common law" is meant is a very large assumption. It can also be argued that, like the U.K. *Carriage of Goods by Sea Act*, "English common law" only applies to English shipments.

h) Will the *lex loci contractus* or the proper law of the contract or the law of the forum be used to interpret and construe the contract? Lord Wright made it quite clear that:

> The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms.[107]

He also held that it is the proper law of the contract which "defines its nature, obligation and interpretation."[108] Today this rule is generally accepted.

Lord Wright, unfortunately, lost sight of the fact that the "proper law of the contract" to be applied in interpreting the contract and defining its obligatory content, includes the *public policy* of that proper law. Had he truly applied the principle of contract law which he was purporting to uphold, he would have applied the *Hague Rules* to the interpretation of the bills of lading concerned, since those *Rules* were and are part and parcel of the public policy of the proper (English) law of merchant shipping in respect of all outbound shipments.

i) Does *renvoi* apply to the determination of the proper law of a contract? Lord Wright seems to apply the conflict rules of the proper law rather than the forum where he stated:

> Hence English rules relating *to the conflict of laws* must be applied to determine how the bills of lading are affected... .[109]

This has been described by Falconbridge[110] as a "*lapsus calami*", criticized by J.H.C. Morris,[111] and indirectly rejected in *Re United Railways of The*

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mutandis." In my view, the same principles should be followed when a contract incorporates a foreign law by reference, as in the *Vita Food Products* case. The Court of Appeal, in *The Komninos S*, *supra*, note 4, inferred a choice of "*English law*" as the proper law of the contract from a bill of lading clause that merely called for submission of disputes to "*British Courts*," and yet could not bring itself to take the additional (and more logical) step of concluding that "English law" included the English legislation giving the force of law to the *Hague/Visby Rules*.

[107][1939] A.C. 277 at 291, 1939 AMC 257 at 264, [1939] 2 D.L.R. 1 at 9, 63 Ll.L. Rep. 21 at 28.

[108][1939] A.C. 277 at 292, 1939 AMC 257 at 265, [1939] 2 D.L.R. 1 at 9, 63 Ll.L. Rep. 21 at 28.

[109]*Ibid.* (emphasis added).

[110]*Supra*, note 35 at 404.

[111]*The Conflict of Laws*, *supra*, note 32 at 270 and 475.

Havana and Regla Warehouses Ltd. ("the principle of renvoi finds no place in the field of contract").[112] *Dicey & Morris* concludes politely that the *dictum* from *Vita Food Products* "must now be taken to have been overruled."[113] The *Rome Convention, 1980*, at article 15, also excludes *renvoi* altogether in respect to contract.[114]

Renvoi is the reference by the forum to the conflict rules of a foreign state. The purpose of *renvoi* is the application by the forum of the same law as would have been applied by the foreign state. It is submitted that the *renvoi dictum* espoused in *Vita Food Products* is in error, not merely because it can result in judicial ping-pong between the forum and the foreign state, but because merchants seek certainty in their transactions and it is reasonable to assume that they include in their contracts only clauses which they understand. To consider a choice of law clause as incorporating foreign conflict rules imparts uncertainty to a business relationship. The parties could not in general be expected to foresee the different results that could be generated by an application of foreign conflict rules.

j) Should not a conflict decision bring uniformity and certainty to the conflict of laws? Unfortunately, Lord Wright takes quite the opposite view when he points out that if suit were brought in Newfoundland, that court would apply its own law:

> A court in Newfoundland would be bound to apply the law enacted by its own legislature, if it applied, and thus might treat the bills as illegal just as the Supreme Court of the United States... .[115]

Thus Lord Wright and his main proposition support uncertainty and forum shopping.

k) Is there a distinction between "mandatory," "force of law" and "public policy/order" (*ordre public*)?

A subtle question is raised by *Vita Food Products* and subsequent decisions. Is there a distinction to be made amongst the three terms: "mandatory," "force of law" and "public policy/public order"? The distinction was not clearly recognized when *Vita Food Products* was decided, but is of greater significance today.

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[112][1960] Ch. 52 at 115 (C.A.). See also *Amin Rasheed Shipping Corp.* v. *Kuwait*, [1984] A.C. 50 at 61-62 (H.L.).

[113]*Supra*, note 38, vol. 1 at 82 n. 48. As support, *Amin Rasheed Shipping Corp., ibid.*, is cited, as well as *Re United Railways of The Havana And Regla Warehouses Ltd.*, [1960] Ch. 52 at 96-97, 115 (C.A.), and *Rosencrantz* v. *Union Contractors Ltd.* (1960), 23 D.L.R. (2d) 473 (B.C.S.C.). See also *Ocean Steamship Co.* v. *Queensland*, [1941] 1 K.B. 402 (C.A.).

[114]*Supra*, note 5, art. 15.

[115][1939] A.C. 277 at 292, 1939 AMC 257 at 265, [1939] 2 D.L.R. 1 at 9, 63 Ll.L. Rep. 21 at 28.

Generally, it can be concluded that "mandatory" and "force of law" are the same,[116] at least in respect to carriage of goods by sea. The *Visby Rules*, at article 10, have the force of law, but only confirmed what had already been declared at article 3(8), namely that the *Hague Rules* are mandatory and that no agreement can relieve or lessen the carrier's liability under the *Hague Rules* or the *Hague/Visby Rules*.

Public order is a broad general standard of social, and often moral, conduct and any act which is beneath that standard may be rescinded by the courts of a civil law jurisdiction.

Public policy consists of fundamental principles of justice, including natural justice in a common law jurisdiction.

Public policy is presumably concerned with justice, while public order is presumably concerned with high moral conduct in a civilized society. When compared and scrutinized in actual decisions, however, public policy and public order do not appear to be too different.

Mandatory rules, on the other hand, are compulsorily applicable norms, prescribed by law, to govern some act or operation, but which do not lay down any general standard of social behaviour related to morality or reflect any particular requirement of fundamental justice.

Modern authorities and conventions usually distinguish between mandatory rules and public policy/order. The *Rome Convention, 1980*, for example, at arts 3(3), 7 and 16, distinguishes between mandatory rules and public order.

The U.K. *Contracts (Applicable Law) Act 1990*,[117] which adopted the *Rome Convention, 1980* into English law, also distinguishes public order from mandatory rules, but, by its s. 2(2), has excluded art. 7(1) of the *Convention* from its provisions, thereby permitting U.K. courts to avoid even having to consider the possible applicability of the mandatory rules of closely connected law.[118]

Conclusion

A review today of *Vita Food Products* illustrates how far English (and by extension Canadian and Commonwealth) conflict law has evolved since 1939 and how so many accepted conflict rules of 1939 are no longer authority. Nevertheless, *Vita Food Products* still validly stands for the principle that the absence of the paramount clause in a bill of lading does not result in nullity of the bill of lading contract. The decision also stands for the proposition that express choice of the parties is a major consideration in the choice of contract

[116]*Supra*, note 5, art. 3(3).

[117]*Supra*, note 81.

[118]This exclusion unfortunately seems to follow the finding in *Vita Food Products*.

law, as seen in the *Restatement Second*[119] at s. 187 and in Rule 180 of *Dicey and Morris*.[120]

Thereafter, however, the decision contains confusing *dicta* which are now considered wrong or half-truths. (It was Stephen Leacock who said a half-truth is like half a brick; it has more effect because it flies further). In the half-truth category is the validity of the choice of a totally unconnected law. Totally incorrect is the ignoring of a mandatory foreign law, although art. 7(1) of the *Rome Convention, 1980* has been excluded from English law[121] and thus echoes Lord Wright's *dictum*. General conflict of law thinking is, however, in the other direction.

In summary, one can say that although *Vita Food Products* was a landmark decision in its day, it has been by-passed by more recent decisions, by legislation and treaties and by modern conflict of law theory. Nevertheless, it is still with us in some of its aspects and will remain so in the future.

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[119]*Restatement (Second) of the Conflict of Laws* (St. Paul, Minn.: American Law Institute Publishers, 1971), adopted by the American Law Institute at Washington, D.C., May 23, 1969.

[120]*Supra*, note 38 at 1161-62.

[121]*Supra*, note 81, s. 2(2).