29 January 2021

Mr. Francois Marier
Director, International Marine Policy
Transport Canada
330 Sparks Street
Ottawa, ON
K1A 0N8

Dear Mr. Marier,

We are writing on behalf of the Shipping Federation of Canada, which is the national voice of the owners, operators and agents of foreign flag ships that carry Canada's imports and exports to and from world markets. Our members represent over 200 shipping companies whose vessels make thousands of voyages between Canadian ports and international markets every year, carrying hundreds of millions of tonnes of cargo, ranging from dry bulk commodities such as grain and coal – to liquid bulks such as crude oil and oil products – to containerized consumer and manufactured goods. These ships carry the vast majority of Canada's (non-U.S.) international trade and thus play an essential role in the Canadian economy and the prosperity of all Canadians.

We appreciate this opportunity to comment on Transport Canada's discussion paper, which presents a number of potential options for amending Part V of the *Marine Liability Act* (MLA) in order to update and modernize Canada's liability regime governing the carriage of goods by water. Although we agree that some elements of Part V are outdated and need to be modernized, we are by no means advocating for a wholescale revision of this section of the Act. Indeed, we view the majority of Part V's provisions as being fundamentally sound, particularly insofar as they provide a framework based on the *Hague-Visby Rules* that seeks to strike an appropriate balance between shipper and shipowner needs, and maintains consistency between Canada's marine liability regime and the regimes of its major trading partners.

We are aware that some countries have sought to modernize their liability regimes in recent years by adopting a "hybrid" approach that is based on the *Hague-Visby Rules* but also incorporates elements of other regimes, including the *Hamburg Rules*. We find it challenging to support this kind of piecemeal approach, which we view as being antithetical to the principle of global regulatory consistency that is so important to the shipping industry. At a minimum, we would caution that context matters in any effort to assess the relevance of such an approach in Canada. More specifically, Canada's dependence on foreign flag ships to move its international trade – and the resulting need to balance the interests of Canada's importers and exporters with the availability of shipping services to reliably move their goods to and from world markets - must factor into any debate on the degree to which the current regime needs to be modernized and how this can be best achieved.

With this background in mind, we offer the following comments with respect to the specific questions and proposals set forth in Transport Canada's discussion paper.

1. Reference to Hamburg Rules

It is our understanding that Section 45 of the *Marine Liability Act* (Part 5), which would have given the *Hamburg Rules* the force of law in Canada when enacted, was repealed on December 31, 2020 under the provisions of the *Statutes Repeal Act.* We view this as an appropriate course of action, given that the *Hamburg Rules* have failed to garner a meaningful level of international support in the 40-plus years since their adoption, and the 34 countries which are signatories to the Rules represent less than 4 percent of Canada's maritime trade.

Given the repeal of Section 45, the next logical step in updating Part V is to revise section 44, which calls for the Minister of Transport to submit a report to Parliament every five years on whether the *Hague-Visby Rules* should be replaced by the *Hamburg Rules*. More specifically, we recommend that section 44 be re-written to provide a mechanism for periodically reviewing Canada's carriage of goods regime (in order to ensure its consistency with evolving practices within the global shipping industry), while removing the current linkage between such a mechanism and ongoing consideration of the *Hamburg Rules*. Failure to amend section 44 in this respect will perpetuate the view that these rules are the only viable alternative when considering reforms to the current regime and maintain the expectation that Canada will forever be on the cusp of becoming a *Hamburg Rules* country.

We further recommend that the reference to the *Hamburg Rules* found in Section 46 of the Act be removed (as it is not relevant given the extremely low level of implementation of those Rules by the international shipping industry), and that the reference to the Rules found in Section 41 of the Act also be removed (as the above changes make it unnecessary for the Act to any longer provide a definition of the Rules).

2. Assertion of Canadian Jurisdiction in all Cases

We have read with interest Transport Canada's comments on the potential need to amend Section 46 of the *Marine Liability Act* in order to assert Canadian jurisdiction in all claims to which the Act applies, and must note that we are both puzzled and concerned by this proposal.

We are puzzled because Canadian shippers are already afforded substantial jurisdictional protection under Section 46 of the Act, which gives them the option of instituting proceedings in Canada even if the contract of carriage contains a foreign jurisdiction clause - provided the case has a sufficient connection to Canada (i.e. the actual or intended port of loading or discharge under the contract is Canada; the defendant resides or has a place of business in Canada; or the contract was made in Canada). The intent of this provision is to protect Canadian shippers from having to litigate claims against carriers in a foreign forum where the expense may be prohibitive, in a context where the shipper's perceived lack of bargaining power vis a vis the shipowner may have been a factor that led to the inclusion of a foreign jurisdiction clause in the contract of carriage.

The protections that Section 46 extends to shippers are balanced by the Federal Court's ongoing ability, provided under Section 50 of the *Federal Courts Act*, to stay proceedings in Canada on the basis of *forum non conveniens*. In other words, the court continues to have discretion to stay cases in which the jurisdiction chosen by the plaintiff is inappropriate due to an insufficient connection to Canada and where there is an obviously superior jurisdiction elsewhere. Making ALL claims ALWAYS subject to Canadian jurisdiction – as suggested in Transport Canada's discussion paper - would strip the court of this power, thereby eliminating an important legal check with respect to the assessment of jurisdictional appropriateness.

Asserting Canadian jurisdiction in all cases would also result in any shipowner who enters into a contract of carriage with a Canadian cargo interest automatically losing the ability to access foreign adjudication / arbitration in the event of any claim, regardless of the claim's connection (or lack thereof) to Canada, or of the legitimate merits of an alternative jurisdiction elsewhere. This would represent a significant disadvantage for any shipowner involved in the movement of cargo to Canada (and a potential disincentive for any shipowner considering doing business with a Canadian cargo interest) - in a context where Canadian shippers already enjoy substantial jurisdictional protection by virtue of section 46 of the *Marine Liability Act*, and where Transport Canada has provided no evidence to illustrate the need for additional protection in this respect. Indeed, given the above, we would characterize the proposal to assert Canadian jurisdiction in all cases as a solution to a problem that does not exist, and one which would do serious harm to the balance between shipper and shipowner interests that is an essential element of Canada's current regime.

3. Extension of Jurisdictional Protection to Charterparties

We have also read with interest the discussion paper's comments on the proposed extension of the jurisdictional protection provided under Section 46 of the *Marine Liability Act* to charterparties (and to voyage charters in particular), with a view to benefitting Canadian shippers who use such charters and promoting more consistent treatment between voyage charters and other types of carriage of goods contracts.

We have a number of serious concerns about this proposal, not the least of which is the fact that it ignores the fundamental difference between a "contract for the carriage of goods by water" and a "charter party," and the very different commercial realities under which the two are negotiated. More specifically, a charter party is NOT a contract between a shipper and a carrier for the carriage of goods from one point to another (with the bill of lading serving as the primary evidence of the contract's existence), but rather a contract of hire between a shipowner and a charterer for the use of a vessel in accordance with specific conditions. As noted by Justice Gauthier in the Federal Court of Appeal's ruling in the *Canada Moon* case, a charterparty is unlike a contract of carriage precisely because it is negotiated between "commercial entities **dealing directly with each other**, whose execution and enforcement are the private concern of the contracting parties" (our bold).

The above being the case, we can see no compelling reason for extending the jurisdictional protections that are afforded under Section 46 to charter parties, as those protections are designed to redress any perceived inequities that may exist under a contract of carriage between a carrier and a shipper, which may result in some shippers believing that they are subject to jurisdiction and arbitration clauses that they either did not fully understand or were unable to renegotiate at the outset. Given that such inequities do not arise in the much more direct contractual relationship between a shipowner and charterer, Section 46's jurisdictional protection become unnecessary, and indeed, fall outside the scope of the situation that Section 46 is designed to address.

Extending section 46 of the *Marine Liability Act* to encompass voyage charters would significantly constrain the contractual freedom of shipowners to negotiate a key charterparty term, and deprive them of the ability to have disputes heard in jurisdictions that have an extensive body of historically acquired knowledge and expertise in adjudicating and arbitrating charterparty claims. Such action would also create a legal quagmire with respect to enforceability.

We see virtually no evidence to support a case for extending Section 46's jurisdictional protections to charterparties, and believe that such action would not only put the Canadian regime significantly out of step with that of its major trading partners, but also represent an unprecedented departure from commonly accepted principles of maritime law as relates to the contractual relationship between

shipowners and charterers. These are serious impacts that must factor into any discussion on the degree to which Canada's carriage of goods by water regime should be modernized, and how best to achieve the (in our view) limited changes that are necessary in a manner that does not disincentive carriers from serving Canadian ports - to the detriment of the Canadian cargo interests whose ability to move their goods to and from world markets is inextricably linked to the services those carriers provide.

4. Mandatory Application of *Hague-Visby Rules* Beyond the Tackle-to-Tackle Period

The Transport Canada discussion paper suggests that in a modernized Canadian carriage of goods regime, the application of the *Hague-Visby Rules* would be compulsorily extended beyond the tackle-to-tackle period to cover the entire time for which the carrier is "in charge" of the goods; that is, from the time the goods are delivered to the load port to the time they are picked up at the discharge port. This would represent a significant change from current practice, under which carriers have the freedom (subject to agreement with the shipper) to decide which regime will govern their responsibility during this period – depending on the particularities of the case involved. As an example, some carriers may agree to contractually extend the application of the *Hague-Visby Rules* to the pre-load and post-discharge period, while others may decide to apply another set of rules (such as those provided under *US COGSA*) or to have specific terms and conditions governed by local law at the load and discharge ports – all subject to a range of factors, including the circumstances of the voyage, the location of the load and discharge ports, the nature of the trade, etc.

It is important to note that industry preferences vary widely with respect to when the carrier agrees to take custody of cargo, and it is incorrect to assume (especially in the non-container trade) that there is a global practice of carriers agreeing to take custody from the time the cargo is delivered to the warehouse at the load port to the time it is delivered to the warehouse at the discharge port. And, even in trades where such practice may exist, the parties are still free to agree to contractually apply the *Hague-Visby Rules* beyond the tackle-to-tackle period, failing which local law will govern the carrier's responsibility for this period.

It is also important to note that land risks (before loading and after discharge) are very different from the risks that occur on board a ship at sea. Consequently, there is good reason why the *Hague-Visby Rules* apply to the tackle-to-tackle period only, as they deal with risks such as perils of the sea or errors in the navigation or management of the ship, which only exist on board and are within the carrier's ability to control. The carrier's ability to control risks on land is much more variable, and will depend on the circumstances involved as well as the type of trade the ship is engaged in – which is why carrier's freedom to assess risk during the pre-load and post-discharge period, and to manage liability accordingly, is so important.

By way of illustration, let's consider a shipment of steel coils loaded at a Belgian port and discharging at a Canadian port. Under the current regime, the *Hague-Visby Rules* would apply to the tackle-to-tackle period, and the parties to the contract of carriage would be free to decide how to handle liability for the pre-load or post-discharge period. If the parties agreed to contractually apply a US$500 per package limitation to that period, and one of the steel coils were to be damaged before loading or after discharge, the carrier's liability would be limited to a total of US$500. However, if the *Hague Visby Rules* were to be compulsorily extended to the port-to-port period, the carrier could have to pay a $20,000 claim in full for a 10-ton damaged coil, which is 40 times higher than the US$500 per package limitation.

This scenario is instructive not because of the specific dollar figures involved, but because it illustrates what is really at stake in this discussion, which is the carrier's current ability to manage his or her liability for the pre-load and post-discharge period, which is based in large part on an assessment of the degree to which the carrier can control risk during that period. Extension of the *Hague-Visby Rules* to the port-

to-port period would deprive the carrier of this longstanding protection, in a context where there are other avenues for covering liability for this period (including agreement to contractually extend the *Hague Visby Rules* beyond tackle-to-tackle) - where doing so makes sense from a sectoral and contractual point of view.

Although we are aware that a limited number of countries have amended their carriage of goods regimes to compulsorily apply the *Hague-Visby Rules* to the port-to-port period, we do not believe that Transport Canada has provided any real justification for taking similar action in Canada. As we alluded to in our opening comments, the mere fact of another country (or countries) having made targeted changes to its (or their) regime(s) should not necessarily lead to the conclusion that similar changes are appropriate in a Canadian context, particularly when such changes are not reflective of a larger global trend. We would therefore argue strongly against any change to the *Marine Liability Act* that would constrain the carrier's freedom to contract liability beyond the tackle-to-tackle period or alter the balance between shippers and carriers that exists under the current regime.

5. Mandatory Application of *Hague-Visby Rules* to Sea Waybills and Similar Non-Negotiable Documents

The Transport Canada discussion paper raises the possibility of amending Canada's carriage of goods regime so as to compulsorily apply the *Hague-Visby Rules* to sea waybills and other non-negotiable documents. This would represent a significant change from current practice, as Canadian courts have ruled that sea waybills (and documents such as booking notes) are not compulsorily subject to the *Hague-Visby Rules* because they are not documents of title (and are therefore not captured by the term "contract of carriage covered by a bill of lading or any similar document of title" as defined under the *Hague-Visby Rules*).

Nevertheless, given the extent to which such documents (and sea waybills in particular) are used in the maritime industry, shippers and carriers often agree to contractually incorporate the *Hague-Visby Rules* into these documents, thereby rendering themselves subject to the corresponding limits of liability. This being said (and subject to the shipper's agreement), carriers may also elect to exercise the right to incorporate a different regime when using such documents, should both parties decide that circumstances so warrant. The carrier's right to limit its liability in this respect was affirmed in the 2009 *Cami Automotive v. Westwood Shipping Lines* case, in which the Canadian court ruled that Westwood Shipping's liability for the cargo in question was limited to a total of $150,000 because it had been carried under a sea waybill that incorporated *US COGSA* and its $500 package limitation – a figure which would have been significantly higher had the *Hague Visby Rules* (and their 2 SDRs per kilo limitation of liability) been compulsorily applied to the sea waybill as a matter of course.

As was the case in our earlier comments on the mandatory extension of the *Hague Visby Rules* beyond the tackle-to-tackle period, the above scenario is instructive not because of the dollar figures involved, but because it illustrates what is really at stake in this discussion, which is the carrier's ability to manage liability based on the circumstances involved. The mandatory application of the *Hague-Visby Rules* to sea waybills and other non-negotiable documents would deprive the carrier of this longstanding protection, in a context where other avenues for covering liability for shipments involving such documents (including agreement to contractually extend the *Hague Visby Rules* into these documents) already exist, and where the regimes of Canada's major trading partners continue to provide this protection.

6. Mandatory Application of *Hague-Visby Rules* to Electronic Versions of Contractual Documents

Needless to say, our objection to any change to Canada's carriage of goods regime in order to have the *Hague-Visby Rules* compulsorily apply to sea waybills and other similar non-negotiable documents also extends to electronic versions of such documents (and we therefore cannot support the discussion paper's proposals in this respect).

However, we have no objection to the application of the *Hague-Visby Rules* to electronic versions of bills of lading and similar documents of title that **are** captured under the *Marine Liability Act*. We would therefore strongly support amendments to Canada's regime that would give shippers and carriers the option of using electronic versions of bills of lading and similar documents of title, subject to the consent and agreement of the parties involved. These electronic documents would be governed by the terms and conditions of the *Hague Visby Rules* and would therefore have the same legal status as their paper-based counterparts.

Given the degree to which the maritime sector's reliance on electronic documentation has grown in recent years, such action would represent an important step towards modernizing Canada's carriage of goods regime to more fully reflect long-term changes in industry operations and practices. Equally important from our perspective is that this could be accomplished without impacting the balance between shipper and shipowner rights that is provided under the *Hague Visby Rules*, and without placing Canada out of step with the regimes of its major trading partners.

7. Mandatory Application of *Hague-Visby Rules* to Inbound Shipments

The final point we wish to raise in our submission relates to the discussion paper's proposal to amend Canada's carriage of goods regime to compulsorily apply the *Hague Visby Rules* to inbound shipments to Canada. This would represent a significant change from current practice, under which the liability regime that applies to an inbound shipment is determined through contractual negotiation between the carrier and shipper or is governed by the prevailing law at the shipment's place of origin.

The mandatory application of the *Hague Visby Rules* to inbound shipments would deprive shippers and carriers of their freedom to contractually incorporate an agreed-upon liability regime for such shipments, and also give rise to conflict of law issues, as the applicable law (and resulting outcome) in any given case would vary (to a potentially significant degree) depending on the jurisdiction in which the case is heard. As an example, a claim involving a shipment originating from the U.S. would have a substantively different outcome if the case were heard in the U.S. (where *US COGSA* would apply by force of law) than if it were heard in Canada (where the *Hague Visby Rules* would apply). The possibility of such disparate outcomes – and the forum shopping this would inevitably create – would add a great deal of legal uncertainty to the Canadian regime, in a context where shippers and carriers already have avenues for agreeing on an appropriate liability regime for inbound shipments at the outset of their negotiations.

The discussion paper suggests that the above-noted conflict of law issues could be minimized by implementing a more limited inbound application of the *Hague Visby Rules*, under which Canada's regime would stipulate that the Rules would only be extended to inbound cargo originating in states that are NOT party to an internationally recognized carriage of goods regime (the logic being that the amended Canadian regime would then only apply to a relatively small portion of Canada's international trade). We have a number of concerns regarding such an approach, not the least of which is the fact that it would do nothing to address the larger concern of maintaining the parties' freedom to contractually incorporate the liability regime of their choice, whether this be an internationally recognized regime such as Hague, Hague-Visby or Hamburg, or another regime such as *US COGSA*.

As a final comment on this subject, we would note that insofar as the discussion paper fails to provide concrete evidence justifying the need to extend application of the *Hague-Visby Rules* to inbound shipments in a Canadian context, undertaking such action would amount to the imposition of a solution on a problem that does not exist – with that solution then creating another problem (conflict of law issues and legal uncertainty) that requires yet another solution (inbound application of the *Hague Visby Rules* on a limited basis). We believe that this kind of piecemeal approach to amending aspects of Canada's carriage of goods regime will incrementally weaken the regime overall and is antithetical to the principle of global regulatory consistency that is so essential to the operation of the shipping industry.

****

In the concluding section of its discussion paper, Transport Canada highlights the importance of ensuring that any proposals to amend Canada's carriage of goods regime are based on a "clear, evidence-based rationale." We fully concur with this statement. However, we do not believe that the proposals contained in the discussion paper are adequately supported by such a rationale, insofar as they neither concretely demonstrate the need for the changes proposed or identify the measurable benefits that would arise from their implementation. Although the paper makes reference to changes that some other countries have made to their carriage of goods regimes – the existence of such changes cannot, in and of themselves, serve as the main rationale for considering similar reforms a Canadian context.

As noted in our comments, we fully support the need to ensure that Canada's carriage of goods regime reflects the evolving realities of shipping industry practices and operations, and to make adjustments to the regime when demonstrably warranted. However, such action must be undertaken with an overall view to appropriately balancing the rights and responsibilities of shippers with those of carriers, and to maintaining consistency between Canada's regime and those of its major trading partners.

We trust that Transport Canada will give these comments due consideration and are available to provide additional information as required.

Sincerely,

Michael H. Broad
President
SHIPPING FEDERATION OF CANADA