

THE COMBINED TRANSPORT BILL OF LADING
by R.E. Cooper.

1. Introduction.

The combined transport bill of lading is a document which has become increasingly common in international trade. It is the product of commercial men providing a document to meet a revolution in transportation methods. It is called a bill of lading and by implication is intended to fulfill the purpose and functions of a conventional ocean bill of lading.

In this paper it is proposed to look at the conventional bill of lading and evaluate the combined transport bill of lading thereby. Finally, the terms of the common form of combined transport bill will be considered and matters of interest commented upon. Those terms which are taken from, or have their genesis in, the conventional bill of lading, or, as a matter of construction have been previously considered by the Courts, have not been considered.

2. Bill of Lading.

A bill of lading is evidence of an underlying contract of bailment. It may itself constitute such a contract. Under the contract the shipowner undertakes to deliver the goods shipped to the order or assigns of the shipper. The shipowner acquires a special property in the cargo sufficient to support his possession of it. The general property in the cargo remains in the shipper until he has done some act sufficient at law to transfer property.

The endorsement of the bill of lading is simply a direction of the delivery of the goods. Where the endorsement is in blank, receipt of the goods by the holder of the bill upon its presentation to the shipowner will be a sufficient discharge to him. To this extent a bill of lading is

assignable. (1).

When property in the goods passes depends on the intention of the parties to the sale. Property does not pass automatically on the endorsement or assignment of the bill of lading unless the parties so intend. (2).

A bill of lading is negotiable only in the sense that the holder or indorsee in due course may sue upon the bill by virtue of section 1 of the Bills of Lading Act 1855, as enacted in the various Australian States. A bill of lading is not truly negotiable in the sense that a bill of exchange is, in that a holder for value obtains no better title in the goods than was held by the assignor of the goods to him.

A bill of lading is a document of title in that it is a document giving the holder a right to the goods on their discharge from the ship. Accordingly it is transferable. However as a document of title its operation is limited to the period of holding by the ship owner and it does not guarantee ownership or property in the goods. Its use as a document of title after discharge of the cargo is insubstantial. (3).

Historically the bill of lading developed as a document in maritime trade. Its use has essentially been limited to the carriage of goods by sea and its general form

(1) See generally Lickbarrow v. Mason (1794) 5 T.R. 683.

(2) Sewell v. Burdick (1884) 10 App.Cas. 74.

(3) See Carver "British Shipping Laws" Vol. 1 at p.217

is inappropriate to other than sea carriage. Nevertheless a bill of lading is used in land transport in some countries e.g. United States of America. (4). In those jurisdictions the term as understood by commerce and the Courts may bear a broad definition. However it is submitted that in the common law countries the term bears a narrower definition and the Courts are inclined to regard it as a document limited to sea carriage (5). With the movement in most developed countries to unitized cargo such a distinction in meaning may be of importance.

3. Combined Transport Bill of Lading.

A combined transport bill of lading is a document evidencing the carriage of goods from A to B by more than one mode of transport. In the context of this paper it is limited to the issueance of a document involving a sea movement as one of the modes of transport. The document is becoming increasingly common because of the degree of containerization and unitization in Australian sea trades.

Although of recent widespread use the multi-modal contract of carriage evidenced by a bill of lading was considered by the Court in Greeves v. West India & Pacific S.S. Co. Ltd. (1870) 22 L.T. 615. The action was brought by the original consignor to recover freight paid for the rail sector of a carriage from Liverpool to San Francisco via Colm

(4) See Report by Secretariat of UNCTAD. "Bills of Lading" New York 1971 at p.5, 11.

(5) Diamond Alkali v. Bourgeois (1921) 3 K.B. 443.

The ship and cargo were lost en route to Colon. The question of the nature and effect of the bill of lading qua bill of lading was not in issue. The Court held that such a contract was a contract for the entire carriage and not a number of separate contracts of carriage. Accordingly the freight was not recoverable. (6). A similar view of the indivisible nature of the contract was taken in Canadian Industries Ltd. v. Canadian National Railways (1940) 3 D.L.R. 621.

The company issuing a combined transport bill of lading will, in the absence of contractual terms limiting responsibility, be responsible for the entire journey. (7). Carriers other than the one issuing the bill of lading will generally be regarded as subcontractors and not parties to the bill. (8).

4. The Combined Transport Operator.

A combined transport bill of lading is, in practice, issued by a combined transport operator. The operator undertakes responsibility for the entire carriage. He may perform the contract by using, either wholly or in part, his own means of transportation. He may elect to subcontract out the entire carriage. Whether a freight forwarder is a non-vessel operating carrier (N.V.O.C.) will depend upon the terms of the contract he enters into with the shipper. Generally,

(6) See also The Hibernian (1907) P.277.

(7) Aberdeen Col. Co. v. Ellerman's Aulson Line (1933) S.C.9.

(8) Bristol & Exeter Railway v. Collins & H.L.C. 194.

he will issue a document which is loosely called a "house bill of lading". Whether it is a true bill of lading, or a combined transport bill of lading, depends upon the basis on which the forwarder contracts with the shipper. It is important to a shipper to be fully aware of the exact basis on which a freight forwarder is contracting. It seriously affects the worth and legal effect of the documents he receives and his rights to sue for loss or damage to the cargo.

In past years the Courts have been reluctant to give documents issued by forwarding agents in the form of bills of lading the legal status of bills. In A. Gagniere & Co. v. Eastern Co. of Warehouses (1921) 7 Ll.L.R. 88, the Court held that a forwarding agent acting in his usual capacity, when issuing a house bill of lading, did no more than issue a document which is a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. At about the same time Lord Justice Rowlatt thought that it would be exceptional for a forwarding agent to contract as a principal. (9). Such a view has now been doubted. (10). There is no doubt that the developments of containerized or unitized cargo, with lower tariffs for F.C.L. cargo, and the increased efficiency of multi-modal movements have broadened the role of the traditional forwarding agent. Many of them have become cargo consolidators. Many road

(9) Jones v. European & General Express Co. (1920) 25 Comm. Cas. 296).

(10) Langley, Beldon & Gaunt Ltd. v. Morley (1965) 1 L.R. 297 at 306).

transport operators, who previously acted as forwarding agents in respect of carriage by other modes, are themselves now offering a through movement. For this reason the earlier decisions dealing with the capacity in which freight forwarders contract with shippers should be viewed with caution.

Within Australia the use of house bills of lading by non vessel operating carriers on outward trades, other than the Australia-New Zealand trade, is very rare. However their use on the Europe-Australia inward trade is not uncommon. For this reason it is necessary to look at those circumstances the Courts will regard as significant when it is not clear on the face of the document in which capacity the forwarder has contracted. Where a forwarder issues a document in the traditional bill of lading form, (11) takes his income in a lump sum from freight rather than as commission, (12) arranges carriage in a ship owned by an associated company and managed by the forwarder, (13), or agrees to collect goods himself from the shipper rather than making arrangements to collect them (14) there will be some evidence that the forwarder contracted as a principal.

If it is determined that the forwarder did not contract as a principal then the so called house bill of lading is not a bill of lading at all (15) and in the absence of any custom

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- (11) Troy v. Eastern Co. of Warehouses (1921) 8 Ll.L.Rep.17;
(12) Troy's case (supra);
(13) Landauer & Co. v. Smits & CO. (1921) 6 Ll.L.R. 297;
(14) Harris v. Continental Express Ltd. (1961) 1 Ll.L.R. 251;
(15) See generally Scrutton on Charter Parties, 18th ed., at p. 378.

would not be a document of title.

If the forwarder contracted as a principal then the combined transport bill of lading issued by him would, it is suggested, stand on the same footing as a combined transport bill of lading issued by a vessel operating combined transport operator. Such a view is consistent with the view expressed above that the term "bill of lading" was in this country, likely to be restricted to the traditional view, viz that the cargo was shipped on board an ocean vessel and the shipment evidenced by a document issued by the owner or master of the ship. The combined transport bill of lading is a "received for shipment" document. It was assumed by the English Courts in Troy v. The Eastern Company of Warehouses (1921) 8 Ll.L.R. 17; Landauer & Co. v. Smits & Co. (1921) 6 Ll.L.R. 577 and Midland Rubber Company v. Robert Park & Co. (1922) 11 Ll.L.R. 119 that freight forwarders had the capacity to issue through bills of lading. A combined transport bill of lading or through bill of lading is essentially only a document that evidences a contract to arrange carriage from A to B involving more than one mode. There is no limitation on the capacity of a person to enter into such a contract.

5. The Bills of Lading Act of 1855.

The significance of the capacity in which a carrier issues a combined transport bill may lie in whether a combined transport bill of lading is a bill of lading for the purposes of the Bills of Lading Act of 1855. The vessel operating carrier has the power to note a "received for shipment" document and convert it into a "shipped on board" document. He does not issue a separate ocean bill of

lading. While this may not be critical in determining whether the combined document is a document of title it may be critical in determining its use under the Bills of Lading Act of 1855. The doubt has arisen because the combined transport bill of lading was unknown in 1794 when Lickbarrow v. Mason (1794) 5 T.R 683 was decided. It was similarly unknown at the time of the passing of the Bills of Lading Act of 1855. If it is only the shipowner or master who can issue a document which acknowledges that the goods have in fact been received on board, and the language of the Act is drawn in those terms, then prima facie the non-vessel operating carrier cannot perform this act. The sea carrier sub-contracts with the forwarder as his principal. He issues his own ocean sea bill. He does not note the forwarder's bill nor issue the ocean bill as agent for the forwarder. If he did, the ocean bill would supercede the forwarder's combined transport bill of lading.

The Hague Rules 1924 as implemented in this country, it is submitted, admit of a non-vessel operating carrier being a "carrier" within the meaning of Article 1. It is reasonable to infer that the legislature intended that all carriers under the Rules would be treated similarly and have power to perform the functions which are normally incidental to sea carriage. One particular incident is the issue of a bill of lading (16). If there is a limitation on a non-vessel operating carrier issuing this type of document then, at worst, the carrier must be able to issue another document of title.

(16) See paragraph 8 below.

6. As a document of TITLE.

The Privy Council in The Marlborough Hill (1921) 1 A.C. 444, accepted that a "received for shipment" bill of lading, which named a particular ship, was a bill of lading for the purposes of the Bills of Lading Act 1855. (17). The Council held that the categories of bills of lading are not closed. It is open to show that, by the custom of particular trades or routes, new categories of documents, treated as documents of title, can be regarded as bills of lading within the meaning of the Act. In Kum & Anor. v. Wah Tat Bank Ltd. (1971) 1 Ll.L.R. 439 the Privy Council held that, as a general proposition, any document could be created a document of title by local custom (18) provided that the form of the document is not inconsistent with the custom. The effect of these decisions is that it is open to prove that the combined transport bill of lading is a document of title by the custom of merchants. (19). The difficulty with this approach is that there is an evidentiary onus to prove the existence of the custom. One cannot rely on the statutory recognition of the custom which supports the ocean bill of lading, and is set out in the Act of 1855.

Notwithstanding the above there remains doubt as to the capacity of a non-vessel operating carrier, offering a multi-modal service, to issue a document which is, or has the same legal status as, an ocean bill of lading. This doubt exists irrespective of the capacity

(17) But see Diamond Alkali Export Corp. v. Bourgeois [1921] 3 K.B. 443.

(18) (1971) 1 Ll.L.R. 439 at 443;

(19) See also Scrutton on Charter parties, 18th ed. at pp.376-377.

of a vessel operating carrier to issue such a document.

The position was summarised by Lord Devlin at the Genoa Seminar on Combined Transport in 1972. The recommendation of the seminar was that the Combined Transport Operator should not be a vessel operating carrier. Rather he should arrange transport by sub-contracts with uni-modal carriers. In referring to the document that the combined transport operator would issue Lord Devlin said:

"To mark the difference in legal character between these sub-contracts of carriage and the main contract evidenced by the Combined Transport Document itself, it is preferable that the description 'bill of lading' should not be applied to the latter." (20.)

His Lordship considered that transferability of the document could be provided for as a matter of contract by relying on the terms of the document itself. But the question of the Combined Transport document having the same "negotiability" as an ocean bill of lading, whereby the owner could transfer proprietary rights in goods while in transit, was a difficult problem, possibly beyond solution under certain systems of law, in the absence of an international convention. (21).

7. What are the Consequences if it is not a Document of Title

If one fails to prove the document as a document of title by custom, or if, for any other reason, the combined transport bill is not a bill under the Act of 1855, what are

(20) 1972. Journal of Business Law 269 at p.271.

(21) 1972. Journal of Business Law at 271-272.

the consequences? It would place shipowners in a difficult position with respect to enforcing limitation clauses against transferees (22) or obtaining from the transferee unpaid freight or demurrage. It would place in doubt the effectiveness of a tender of the document under c.i.f. or f.o.b. (23) contracts and leave the indorsee limited to an action in tort with none in contract (24).

One solution to the problem is to rely on the implied contract which arises between the transferee and the shipowner when the document is presented and the goods claimed. The Court of Appeal in Brandt v. Liverpool, Brazil and River Plate Steamship Navigation Co. [1924] 1 K.B. 575 held that an implied contract incorporating the terms of the bill of lading arose when the bill of lading was tendered by the holder to the shipowner at the time of delivery. The undertakings of the indorsee were to pay the freight and be bound by the terms of the bill of lading. The shipowner undertook to deliver the goods in the condition in which, under the terms of the contract of carriage, they should have been delivered. The existence of such an implied agreement was again affirmed in Cremer v. General Credits SA (1973) 2 Ll.L.R. 366 at p. 371. (25).

Where one can prove that there is a specific agreement to accept a combined transport bill of lading in a c.i.f.

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- (22) Morris v. C.W. Martin & Sons (1966) 1 Q.B. 716.
(23) Yelo v. S.M. Machado & Co. Ltd. (1952) 1 Lloyd's R. 183;
(24) Gillespie Bros. & Co. Ltd. v. Roy Bowles Transport (1973) 1 Ll.L.R. 10.
(25) See also The Eurymedon [1975] A.C. 154.

contract, or where it can be proved that it is the custom in the particular trade, then the tender of such a document will be a sufficient tender. If either of these conditions is not fulfilled then it will not be a sufficient tender. (26).

The possible adverse consequences of tendering a combined transport bill of lading in performance of a c.i.f. contract have been ameliorated by the introduction of "The Uniform Customs and Practice for Commercial Documentary Credits 1974" sponsored by the International Chamber of Commerce (27). Under article 23 of the Uniform Customs, bankers will accept combined transport bills of lading provided that the credit calls for a multi-modal movement. Article 19 provides for the acceptance of through bills of lading covering several modes, provided the bill of lading is issued by a shipping company. But where bankers' credits are not involved, or where the terms of the credit are limited to ocean bills, the tender of a combined transport bill of lading may have serious consequences.

Where the multi-modal movement involves a sea/air movement it is questionable whether the combined transport bill of lading is sufficient tender under a c.i.f. contract or indeed is a document of title. While a bill of lading is a document of title, the air consignment note is not. Further, there is no commercial custom that goods are delivered against

(26) See *Diamond Alkali* (1921) 3 K.B. 443.

(27) 1 C.C. Doc. No. 470/247.

the production of either an air consignment note or a combined transport bill of lading where the air leg is the last leg (28).

8. Application of the Hague Rules:

The Sea Carriage of Goods Act 1924 applies to contracts for the carriage of goods by sea which are covered by a bill of lading or any similar document of title. (29). It is submitted that, subject to sufficient proof of custom, the combined transport bill of lading would be accepted as a document of title. As a consequence the Act will apply to the sea leg of the movement. (30).

It does not appear to be relevant for the purpose of the act whether the contracting carrier is a vessel or a non-vessel operating carrier. The definition of "carrier" is not limited to either the owner or charterer of a ship who enter a contract of carriage with the shipper. The words in the definition are illustrative only and do not operate as words of limitation. (31).

If the contention that a non-vessel operating carrier cannot issue a bill of lading is correct then it is difficult to make sense of, or give effect to Art 3 (7) of the Rules. Under the article a shipper is entitled to demand that the "carrier" issue a bill of lading to him. The bill of lading contemplated by Art. 1(a) is both a document of title and a conventional bill of lading. Two possibilities are open

(28) See Schmitthoff "The Export Trade", 6th ed. at p.319.

(29) Art 1 (a).

(30) Art. 1(b). "....insofar as such document relates to the carriage of goods by sea" See also Pyrene & Co. v. Scindia Nancy Co. (1954) 2 Q.B. 402.

(31) Carver "British Shipping Laws", 11th ed. vol. 1 paras. 233-4).

The first is that the non-vessel operating carrier is not a carrier within the definition. This view is not acceptable. It is difficult to think of a vessel operating carrier who is not either an owner or charterer. As the definition uses the term "includes" it is clear that other categories of carriers are covered. It is submitted that the natural meaning of "carrier" in the Rules is any contracting carrier. However, it is conceded that a contrary argument can be based on the broad definition of a bill of lading or other document of title available in other jurisdictions. Such a definition could mean that the carrier must himself operate one mode of transport on the first segment of the movement and issue a document covering the through movement. For example, a road operator issuing a land bill of lading or a consignment note which is treated as a document of title.

The second possibility is that where the carrier issues a bill of lading or similar document of title at the request of the shipper, such a document operates only for the purposes of the Hague Rules. This would allow the rules to apply in respect of the contract of carriage. The Rules contemplate that the bill of lading will be a document of title. They do not specify the significance or purpose of that characteristic under the rules. Is the document to be a document of title for some purposes and not for others? It is submitted that this result is unsatisfactory and unintended. The patent intention of the rules is that a carrier can issue a bill of lading or similar document of title. The rules either assume the power of the carrier to do so or operate as a special grant of power. In common law countries it is arguable that, in giving effect to the Hague Rules 1924, the legislature has given statutory recognition to an internationally agreed convention allowing the issue of a bill of lading or similar document by

a non-vessel operating carrier. If this contention is correct, then, once issued, that bill of lading should be sufficient for the purposes of the Bills of Lading Act of 1855.

9. The Terms of the Document.

In 1973 the International Chamber of Commerce adopted the "Uniform Rules for the Combined Transport Document." (32). These rules, with amendments, are widely employed by combined transport operators servicing Australian inward and outward trades. (33).

(a) Identity of Carrier In the past, establishing the identity of the carrier has caused problems to shippers desirous of instituting recovery actions. The position is improved by making specific provision for the carrier's name on the face of the bill. There is no demise clause in the document. Therefore, the named carrier will in any event be liable on his contract for loss or damage to the goods. The bill states that the contract is made between the shipper and the carrier named on the face of the bill. It may be argued that such a term defines absolutely the parties to the contract. The shipper may, by the terms of the document have limited his right of action under the bill to one against the named carrier even if that carrier is a charterer other than by demise. He may have no action in contract against the ship owner. (34). The problem may be overcome when the goods are shipped on board a named ship and the combined transport bill noted as "shipped on board". By the noting the owner of the vessel may be deemed to become a party to the contract, or a separate contract may arise with the owner and the combined transport bill of lading may be treated as an ocean bill evidencing that contract as noted.

(32) I.C.C. Brochure 273, November, 1973.

(33) For the purposes of this paper the terms of the Australia-Europe container service have been considered and are annexed.

(34) See Apex (Trinidad) Oilfields Ltd. v. Lunham & Moore Shipping Ltd. (1962) 2 Ll.R.203: but see Epstein v. U.S.A. (1949) A.M.C. 1598 which held that any contract which has the effect of limiting a shipper's rights to recovery is void under Art 3(8) of the Rules; see also Samuel v. West Hartlepool Steam Navigation Co. (1906) 11 Comm. Cas. 115.

If there is no intention in the combined transport document to limit any action to an action against the named carrier, then an anomalous situation will arise in respect of non vessel operating carriers. The combined transport bill of lading is a "received for shipment" bill of lading. The N.V.O.C. may have booked space on a particular ship in his own name. He is at no time acting as the agent of the owner or charterer of the ship. His contract is merely to procure shipment on a named ship. The ship operator contracts with the N.V.O.C. as principal. There is no privity of contract between the ship operator and the original shipper. Although the ship operator may be liable to the original shipper in tort as a bailee, he will not be liable on the contract of affreightment between the original shipper and the N.V.O.C. (35). Similarly an admiralty action in rem would not lie against the ship where the carrier was an N.V.O.C. because the owner of the ship would not be liable in personam. (36).

Even where a vessel operator issues a combined transport bill of lading he may, for the purpose of that transaction, be an N.V.O.C.. Such a situation is common where liner conferences operating a cargo pooling arrangement offer a combined transport service. On any one ship there may be containers carried under the separate bills of lading of different companies

(b) The "merchant". The definition of "merchant" in clause 1 is broad. It seeks to cover the true owner of the goods and so limit his

(35) Gilbespie Bros. & Co. Ltd. v. Ry Bowles Transport
(1973) 1 Ll.R. 10; Morris v. C.W. Martin & Sons
(1966) 1 Q.B. 716.

(36) The St. Merriel (1963) 1 Ll.R. 63/

tortious rights by attaching thereto the exemptions contained in the bill. It is doubtful that such an approach is effective in the absence of privity between the true owner and the carrier. The onus of proving privity would be on the carrier. If privity cannot be proved then the carrier may seek indemnity from the shipper making the contract and accepting the bill on the basis of a breach of warranty of authority (37).

(c) Sub-contractors, Stevedores, servants and agent

An attempt has been made in clause 4 of the bill to exempt from all liability the carrier's servants, agents and sub contractors, including stevedores. Prima facie the clause satisfies the requirements laid down by the Privy Council in The Eurymedon, (New Zealand Shipping Co. v. A.M. Satterthwaite & Co. (1975) A.C. 154). (38).

Notwithstanding The Eurymedon the Court in New Zealand has recently denied a stevedore the benefit of an exemption clause contained in a bill of lading. (39). In Herrick's case the Court construed the exemption clause narrowly. It held that "agents and servants" did not include sub-contractors, that the stevedore was not named in the bill, as it was in the Eurymedon, and finally that there had been no proof of prior authorisation or subsequent ratification of the contract by the stevedore. (40). It is clear that the New Zealand Courts intend to construe exemption clauses narrowly and that the occasions on which the full effect of the Eurymedon decision is

(37) Clause 3.

(38) See at pp.166-168

(39) Herrick v. Leonard & Dingby Ltd. (1975) 2 N.Z.L.R. 566;

(40) A full discussion of the judgment is found in [1976] 39 M.L.R. 466.

implemented will be few. Having regard to the disapproving attitude taken by the High Court to such clauses, in Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd. (1956) 95 C.L.R. 43 it is possible that Australian Courts will follow the New Zealand lead. However, it should be noted that the approach of the Privy Council in The Eurymedon was applied by the New South Wales Supreme Court in Samond & Spraggon v. Joint Cargo Services (1975) (41).

(d) The Carrier's Liability.

The carrier's liability under the bill is set out in clause 5(b). It provides for strict liability from the time of taking over the cargo until its delivery in accordance with the terms of the bill. The liability is subject to exemptions which pick up the major exemptions of Art.4(2) of the Hague Rules. The onus of proving an exemption is on the carrier. The carrier is required to show only that a particular exempted event "could" have been a cause of the loss or damage. Once he has done so it is prima facie evidence that the damage was so caused. The onus then moves to the Merchant to negate such a cause. Under the Hague Rules an exemption which a carrier desires to rely upon must be proved by him. The normal civil standard of proof applies, i.e. the carrier must establish a prima facie case that an exempted cause was a reasonably possible cause of the loss (42). The standard of proof provided for in the bill is

(41) Noted in (1976) 1 L.M.C.L.Q. 766.

(42) The Xantho (1886) 2 T.L.R. 704.

thus consistent with that required under the Hague Rules.

Where loss or damage cannot be established as having occurred on any particular mode, liability is limited to a stated figure per kilo of the weight of goods lost or damaged. In practice this ranges between \$2.00 and \$2.50 U.S. per kilo. The weight criteria avoids the container/package problem under the Hague Rules.

Where damage can be ascertained as occurring on any particular mode then, at the option of either the carrier or the merchant, any unimodal convention applicable by appropriate national law shall apply. (43). However the option given to the parties appears illusory. If a unimodal convention, which cannot be contracted out of by the parties (44) applies by virtue of national law, then the convention will apply in any event irrespective of an election by either party. The election appears to have some value only where there is a choice between two or more applicable conventions or national laws.

Alternatively the Hague Rules 1924 may be chosen. This alternative would not be available where national law requires the application of a unimodal convention or law. The Hague rules option would appear to be relevant where national law allows the use of a unimodal convention or national law. There is no preference

(43) See clause 5 (b) (2) (a);

(44) See clause 5 (b) (2) (a);

(45) See clause 5 (b) (2) (b).

given to the merchants choice when he chooses a modal convention in lieu of the Hague Rules (46). Therefore a carrier can effectively veto that choice and invoke the Hague Rules.

Where it can be established ~~that~~ the damage occurred on the sea leg of the movement, then, under the proper law of the contract, the Hague Rules may apply to the carriage in any event. It is important to note that the 1924 Convention has not been implemented in exactly the same terms by all adopting countries. In some cases clauses 5(b)(2)(b) may be void as lessening the liability or obligations that would otherwise apply under the rules as implemented. (47). This is important in relation to imports from America where the difference between "unit" and "customary freight unit" can materially affect the limitation of damages recoverable.

It is not proposed to consider the provisions of international conventions for road or rail transport in this work. Nevertheless shippers receiving imports from Europe which have commenced the journey by road or rail, with the original carrier or forwarder contracting the entire

(46) Clause 5 (b) (2) (b)

(47) See Art.3(8) of the Hague Rules.

journey, should consider whether such unimodal conventions apply. If they do, then the limits of liability and, the duty of care required of the carrier, are substantially higher than those provided for under the Hague Rules (48).

(e) The Container/Package Question:

When the Hague Rules do apply the container/package question under the limit of liability clause will arise. This question was fully canvassed in a paper by R. Salter at the April, 1976 Seminar of The Maritime Law Association of Australia (49). Since that paper was given, a further discussion of the question has been published, inspired in part by the Canadian decision in International Factory Sales Services Ltd.v. The Ship Aleksander Serafimovich and Or. (1975) 2 Lloyds Rep. 346 (50.). The thesis underlying the discussion is that the Canadian Court is rejecting the American jurisprudence in determining whether a container is a package. The author considers that the Court is taking a more liberal view of the word "package".

The Canadian Court is clearly impressed that containerization or unitization of cargo is for the mutual benefit of both carrier and shipper. Accordingly the Court is more inclined to look inside the container when beginning to count packages. In their judgments the Courts have highlighted the differences between the Hague Rules

(48) The possibility of the C.M.R. Convention applying is considered in Scrutton on Charter Parties 18th ed. at pp.374-376.

(49) See also J. Goldring (1974) Aust. B.L.R. 127;

(50) See McEwen "Per Package Limitation - A diverging approach in Canadian Courts (1976) 3 L.M.C.L.Q. 269.

as implemented in the U.S.A. and in Canada (51). The Canadian Act is, in all important respects, the same as the Australian Sea Carriage of Goods Act 1924. When the Australian Courts eventually rule on container/package issue, it is reasonable to speculate that greater weight will be given to the Canadian jurisprudence than will be given to the American.

(f) Carrier supplied Containers. Clause 5(d) of the bill deals with the carrier's liability for defective containers supplied by him for the use of the shipper. At common law the carrier, as hirer of the container, impliedly warrants that the container is fit for the purpose for which it is hired. (52). The fact that the shipper has a reasonable opportunity of inspection will not displace the warranty. (53). The exemption in clause 5(d) covering patent defects limits the operation of the common law. In practice the exemption may be ineffective where second and third generation containers are used. Carriers check the suitability of containers by placing a man inside the container to conduct a visual inspection. He looks to see whether light enters through perforations or gaps. It would be unreasonable to require shippers to exercise a higher degree of diligence than the carrier in inspecting the container or to perform anything other than a light entry test.

(51) See Falcon bridge Nickel Mines v. Chimo Shipping (1974) 5 S.C.R. 933.

(52) Read v. Dean (1949) 1 K.B. 188; Derbyshire Building Co. Pty. Ltd. v. Becher (1962) A.L.R. 796;

(53) Jones v. Page (1867) 15 L.T. 619.

Similarly, to the extent that a carrier relies on a container fitting in the hoists as the test of its being in square, the shipper must be allowed to adopt the same procedure. It is interesting to note that marine cargo underwriters regard such tests as totally inadequate. They claim that, often as not, a container which has passed such a test still allows water to enter when externally hosed.

(g) Time bar: The provision in clause 5(c)(2) requiring suit to be instituted in 11 months (some bills provide 9 months) is a valid clause if the mode of transport on which the damage occurred is not discoverable. If however the damage is established as happening on the sea leg and the Hague Rules apply by force of national law, any time-bar less than 12 months will be void and of no effect.

10. Conclusions.

In making any overall assessment of the combined transport bill of lading it is necessary to approach it in two ways:

- (1) The document itself as a commercial document; and
- (2) The contractual terms of the document from the view point of commercial certainty and legal effect.

The terms are generally certain. They have been prepared by the International Chamber of Commerce after protracted discussion and negotiation. They express much of the case law applicable to ocean bills of lading. Any defects in the terms are essentially matters of drafting. Some provisions e.g. the time bar provision, are misleading because the genesis of the document was for

a combined transport operator who was a non-vessel operating carrier. The I.C.C. rules were essentially designed to create a uniform system of liability where the place of damage could not be ascertained - a significant problem with multimodal transport. A difficulty does arise when attempts are made to superimpose a network system of liability. It is not merely a matter of imposing varying limits of liability, it is a matter of imposing differing tests of liability and different practice requirements, many of which cannot be contracted out of. Overall the meshing of the two approaches is satisfactory if for no other reason that that practical commercial considerations favour taking \$2.50 U.S. per kilo as a sum certain. The only danger is that people forget the underlying modal conventions which may apply and may act to their detriment.

The major problem with the combined transport bill of lading is as a commercial document. The problem lies in the requirement to prove that it is either a true bill of lading, or a document of title. It is unsatisfactory for a shipper to have to investigate whether, in his particular contract, the contracting carrier, regardless of his usual or apparent role, was a vessel or a non-vessel operating carrier, if this distinction should ultimately prove to be significant. Carriers need to know who will be bound by the document. Holders in due course and indorsees need to know if they are bound by the document and what interests or rights, if any, are transferred to them on indorsement. Difficulties in financing sales and tendering with Combined Transport Bills of Lading have been partially overcome by the

I.C.C. Uniform Practices for Bankers Credits. But the I.C.C. rules do not overcome all the problems and the tender of such a bill under a c.i.f. contract is still uncertain. The requirement of the proof of the custom or usage in any particular trade is both expensive and risky.

These problems were overcome in relation to conventional ocean bills of lading by legislation and the development of case law. That the legislation has become outmoded is clear. That case law may not develop uniformly or quickly enough is unsatisfactory. There is a present need to develop an international convention dealing with multimodal transportation and this task has commenced in the United Nations Trade and Development Board. It is highly desirable that any convention deal completely with multimodal transportation and that existing modal conventions be superceded where questions of documentation or liability arise. If this is done then there is no reason why the combined transport bill of lading, should not be given the legal recognition and effect it needs having regard to its widespread use and de facto acceptance by international trade.

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