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CURRENT TRENDS IN SHIPPING LAW

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In dealing with current trends in shipping law I have taken five areas and tried to present a note of the difficulties which exist and at the same time use modern cases as a means of illustrating the problems which still exist in the particular area. It will be appreciated that my choice of areas is somewhat arbitrary. I was warned not to deliver an oration on the Hamburg Rules, but have found it necessary to refer to certain Articles as a means of showing what in 1978 was thought to be forward thinking. There are obviously areas which others will think more important. For example I have not made mention of the welter of cases which continue to haunt us in respect of laytime and demurrage and whose clauses stand to my mind as a monument to ignorance and incompetence, or is it to greed or just economic ineptitude? Similarly I have not dealt with the problems of withdrawal of vessel for non-payment of hire, another area of growth, at least in the United Kingdom.

In view of the fact that both Australia and New Zealand are rather more lands of cargo owners than ship owners I have concentrated on matters which it seems to me are particularly relevant. The paper

opens with what I consider to be one of the more important issues of the present time, the use of jurisdiction clauses, or, more correctly, the way in which jurisdiction clauses are being treated in the United Kingdom. My second and third issues deal with the problems of determining just who the cargo owner is to sue and the constant problem of clean bills of lading and the giving of indemnities, in both these cases I have made reference to the Hamburg Rules and details of the particular Rules appear in the Appendix to the paper. My fourth issue is concerned with Marine Insurance, in particular Warranties, though if time permitted I would like to have extended this to deal also with Non-disclosure and Misrepresentation. Finally I have taken a look at the present state of Admiralty Jurisdiction on a world basis, at the proliferation of the conventions, and perhaps to your dismay I shall end with a request for you to consider whether in fact we do not need just one further convention.

Jurisdiction Clauses

> "No person can by an agreement between themselves exclude the jurisdiction of the King's Courts."

That statement was made in 1796 by Eyre C.J. and has remained the foundation from which most courts start when faced with a contract under which the parties have agreed to submit to a foreign jurisdiction.
Some countries specifically enact that any attempt to exclude the jurisdiction of their courts shall be null and void. A limited example of this can be found in section 310 of the South African Merchant Shipping Act - No. 57 of 1951 under a heading which states:

> "Miscellaneous provisions as to contents and effect of contracts for carriage of goods by sea"

goes on to provide:

(6) Any stipulation or agreement whether made in the Republic or elsewhere, purporting to oust or lessen the jurisdiction of the courts of the Republic in respect of any bill of lading or documents relating to the carriage of goods by sea from any port in the Republic to any other port, whether in or outside the Republic, or from any port outside the Republic to any port in the Republic shall be null and void and of no effect."

Eyre C.J., however, was merely giving himself room to manoeuvre before going on to adopt a more common sense approach to the difficulty. If I may edit his words slightly, he was dealing with foreigners at the

time, but I do not think that colours the words he used, he stated:

> "when parties... bind themselves... not to sue in any other (country) and when by suing here they put the defendant under an intolerable hardship I think we ought to look into the contracts, in order to see what effect it would have, and how it could be enforced in the country... when the first thing that stares us in the face is an agreement that they will not resort to our laws. There is nothing unreasonable in this..."

The court sent the case home to Holland. This position continued for some time, but in 1913 in the Cap Blanco we find recognition of the growing sophistication of commercial contracts of the time. In what may not be considered a totally memorable judgment Sir Samuel Evans, in speaking of a jurisdiction clause requiring the case to be heard before the courts of Hamburg said:

> "It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid trial here under the jurisdiction which I decide exists in this Court. In dealing with commercial documents of this kind effect must be given, if the terms of the contract permit it,

to the obvious intention and agreement of the parties...."

The point to note is that the emphasis is first on the fact that the court had jurisdiction but that there was no need to enforce the right to exercise that right. This impartiality came to grief in 1922 in The Athenee when the Court of Appeal refused to honour a French jurisdiction clause and further decided not even to apply French law.

The position of a defendant where the court decides to take the case but to apply the foreign law have been stressed by one learned writer as follows:

"The proof of foreign law may cause a considerable financial hardship to the foreign party who had not, in the light of the agreement expected to face litigation other than the chosen forum ... it will be desirable for the foreign party to call expert witnesses to advise the Court of the forum on the correct application of the foreign law. If almost equal expense will enure whether the case is heard in the chosen forum or elsewhere, prima facie the parties should be held to the form stipulated in their contract."

Some recent cases in the English courts may cause some to wonder just where we are headed at the present time. The first, The Adoph Warski, required that disputes under the bill of lading should be heard in Poland according to Polish law. The Hague Rules applied to the contract and the cargo receivers with full knowledge that they must commence their proceeding in Poland within one year period from delivery failed to do so, even though the carriers had earlier refused to grant any extention of the period in that country. The cargo receivers did commence proceedings in England within the one year period, and the carriers moved for the action to be stayed.

Mr. Justice Brandon, in considering reasonableness as one of the tests, found that the clause was reasonable, but decided that this in itself was not enough, in his words:

> "It does not, however, follow from this that it would be right to enforce those clauses in every case irrespective of the circumstances. The Court may be more willing to grant a stay where a clause is reasonable than where it is not, but that is as far as it does."

What then did make the learned judge decide that he would take the case, apart from an apparent and no doubt reasonable belief that he could handle the Polish law side? If anything it appears to have the fact that the time bar had fallen in Poland and the carriers, quite justifiably in my opinion, refused to agree to waive it if the case was sent to its proper home. On this the judge pronounced:

> "There are, as it seems to me, two conflicting policy considerations in relation to this matter. On the one hand, it is undesirable to allow a party, who has agreed to have claims decided in a particular forum abroad, to evade his obligation by the simple expedient of beginning an action in England in time while allowing time to run out in the foreign forum concerned. On the other hand it is also undesirable to allow a clause, the purpose of which is to ensure that claims are decided in a particular forum abroad, to be used as a means, in effect, of preventing such claims being decided on their merits in any forum at all."

Mr. Justice Brandon therefore held that the test of reasonableness and lack of serious prejudice to the party seeking to rely on the clause should carry the day and refused to stay the action; a decision upheld by the Court of Appeal.

The case may be contrasted with that of The Makefjell where the same judge, upheld again in the Court of Appeal, decided that a claim arising under a bill of lading which contained a Norwegian jurisdiction clause should indeed be heard by the Court chosen by the parties. In the course of that judgment Mr. Justice Brandon seems to have got it right when he said:

> "It seems to me to be important when considering the present case, to bear in mind that (the jurisdiction clause) is intended to cover all claims by cargo interests against the defendants in their capacity as shipowners; that a large number of such claims will necessarily be for damage to cargo discovered on or after discharge. If all or most such cases are to be treated as exceptions to the general rule, there is... a danger that such exceptions would be so frequent as to undermine the generality of the rule... Such an outcome would, in my view, involve a departure from the basic principle that the foreign jurisdiction clauses should be enforced save only in cases which can truly be described as exceptional."

In dealing with such clauses the most usual words to be bandied about seem to be concerned with such matters as "Prejudice, Hardship and Convenience." In The Eleftheria in 1969 Mr. Justice Brandon, in a case involving a Greek jurisdiction clause, set out the following as being the distilled wisdom of the cases up to that time:

> "The principles established by the authorities can, I think, be summarized as follows:
>
> (1) Where the plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.
>
> (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
>
> (3) The burden of proving such strong cause is on the plaintiffs.
>
> (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.
>
> (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

(b) Whether the law of the foreign Court applies, and if so, whether it differs from English law in any material respects.

(c) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would -

(i) be deprived of security for that claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England;

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

Recently, however, what must surely be regarded as the high water mark in refusing to grant a stay was reached in The El Amria where Mr. Justice Sheen, our still somewhat new Admiralty judge, in refusing to grant a stay in the case of an Egyptian jurisdiction clause, delivered himself of the following remarkable judgment:

> "There has been much argument on this application as to the advantages and disadvantages of the system of administering justice in Egypt as compared with the system in England. This is a matter of some delicacy. I am conscious of the obvious difficulty of reaching an impartial conclusion. But I feel bound to say that on the totality of the evidence I am left with the impression that if this matter were to be heard in Egypt, the parties would not obtain the full and thorough investigation into the merits of the case, which they both want. The time allocated for a hearing in Egypt, and the method of proceeding, would not permit all witnesses to be fully heard."

Shortly afterwards in The Star of Luxor, again involving an Egyptian clause, Mr. Justice Sheen appears to have realised the dangers inherent in the earlier judgment; declared that that case was a very special one on its own facts and refused to entertain the case; which is probably as well if the learned judge was not to spend the rest of his life sitting at the new Egyptian

Admiralty Court of first instance.

Whatever may be one's personal feelings in relation to jurisdiction clauses, there appears to have been sufficient acceptance of them for a place to have been found in the Hamburg Rules. Thus Article 21 r.1 provides that at the option of the plaintiff an action may be commenced at:

> "(d) at any place designated for that purpose in the contract of carriage by sea."

The Article further provides that the action may also be maintained at any port of place where the carrying vessel, or sister ship of the same, has been arrrested. But in this case the defendant has the right to require the action to be removed to one of the four places set out in rule 1, which would include the place chosen by the parties. What is interesting is the provision of rule 3 of Article 21 which declares:

> "No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitue an obstacle to the jurisdiction of the Contracting State for provisionsal or protective measures."

It will be interesting to see just what sort of measures come to be adopted on the grounds of being 'protective'.

The clearest approach to jurisdiction clauses, in the light of the fact that we now live in what we believe to be the enlightened eighties, is to my mind to be found in the judgment of Burger C.J. in an American case The Chaparral in 1972 where an agreement provided for disputes to be

"treated before the London Court of Justice".

In upholding the clause the very learned judge said:

> "The argument that (forum and selection) clauses are improper because they tend to oust the jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular Court and has little place in an era when all Courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of their tribunals. No one seriously contends in this case that the forum selection clause "ousted" the District Court of jurisdiction over the (plaintiffs) action. The threshold question is whether that

Court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given effect to."

First Find Your Carrier

It may well be that it would have been more orderly to have discussed this particular topic before looking at the effect of a jurisdiction clause. Oddly enough the problem of who is the carrier and the extent of his liability to a cargo receiver when another party has been responsible for arranging the contract of carriage continue to cause problems, more particulalry in the common law countries of the world. We are all of us familiar with the problems which arise when a cargo receiver belatedly arrives and declares that his cargo either has not arrived or has arrived short or damaged. There is the initial requirement of seeking to establish just who was the carrier and whom, at least prima facie, is to become the defendant. The point is of course particularly important in a country of cargo owners where the carriage is likely to have been subject to the Hague or Hague Visby Rules and as a result of Article III r.6 there is just the bare year within which suit may be commenced. It is one of the more acceptable features of the Hamburg Rules that Artilce 20 provides:

> "Any action relating to carriage of goods under this convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years."

At least if, or should it be when, this comes into being the carrier will not be able to sit firmly on his right to bring an action for freight within six years whilst the cargo receiver finds himself possessed of a miserable twelve months from the date of delivery or the time when the goods ought to have been delivered. As those present will know any hope that may have lain in the fact that a 'special contract' between the original charterer/shipper and the carrier continued to exist even after the transfer of the bill of lading, which would have permitted the former to sue as constructive trustee for the now bill of lading holder, was laid to rest in The Albazero. It is true that the body is, or was not in fact quite dead at the time of internment, but it lies now in a splendid state of suspended animation under a spell cast by the arch wizard Lord Diplock from which it is not likely to awake, unless the fairy prince of the Court of Appeal can produce another miracle.

There are two major difficulties which may arise in this area. The first is that of determining who is the carrier, the second is to what extent even when he has been found that carrier may be able to deny liability based either upon the lack of authority of

the agent purporting to act for him or on the grounds that the contract arranged was either so extraordinary or manifestly inconsistent that he cannot possibly be held to it.

Two recent examples which have come before the English Court may serve to illustrate this. The first is <u>The Venezuela</u> in which a vessel was sub-chartered to the defendants under a charter-party which provided that they or their agents might sign bills of lading on the defendants' usual form on master's behalf for cargo as presented. A bill of lading issued on the defendants ususal form by their agents stated:

> "1. Definitions (a) Carrier...is ..(the defendants) or (another company not involved in the dispute) depending upon which of the two is operating the vessel carrying the goods covered by this Bill of Lading...
> 2. Law of application. <u>If</u> (the defendant) is the carrier the Hague Rules shall apply to this contract."

The agents signed a bill of lading under which the eventual holder claimed damages for damage suffered by the cargo. The defendants claimed that the ship-owners were the proper defendants, a point which Mr. Justice Sheen would have accepted had the signature been merely that of the defendants' agents without more. But this was not the case. Following a scrawl

which was accepted as the signature of the agents there also appeared the printed name of the defendants, followed on the next and following lines by the name of the agents and the words "general agents and as agents for the Master". Accepting that save in the case of a demise charterparty the normal person to be responsible would be the shipowners the judge said:

> "the sub-charter contemplates that the charterers' agents may issue and sign bills of lading on the master's behalf. It does not follow, however, that all bills of lading signed during the time when the vessel was under the sub-charter must contain or evidence contracts with the shipowners. It was open to the charterers to make contracts on their own behalf".

From this the judge proceeded to look at the manner of the signature and also at the definitions of carrier as contained in clause 1 which seemed to suggest that only the defendants or one other company would be the carrier, and dismissed any difficulty which might be thought to arise by reason of the word 'If' (at the commencement of clause 2) by deciding that it in fact meant "Whether". Similarly the learned judge refused to be beaten by too much technical emphasis on language by use of the word "operating". In his view the defendants had not taken sufficient steps to ensure that a cargo receiver would not regard them as the carriers: In his words:

> "It seems to me that if (the defendants) did not wish to contract as "the carrier", then the bill of lading issued by (them) should at least have made it clear with which company the shipper was entering into the contract of carriage."

There is a lesson there that others might like to think about in the future.

It will have been appreciated that there was not in this case any use of the badly misnamed "Demise Clause" which may be significant. Certainly it played a part in the decision in <u>The Vikfrost</u>, again a case concerning sub-charters, but where there was not only a submission by the carriers that they were not parties to the contract of carriage with the original shipper, and hence with the now holder of the bill of lading, but that even if they might otherwise have been the bill of lading issued was either so extra-ordinary, or so manifestly inconsistent as not to be binding upon them. Before pursuing the facts of the case it might be as well to remember that long ago in <u>Knutsford</u> <u>v</u>. <u>Tillmans</u> in 1908 Lord Dunedin had said:

> "Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners".

In the early part of The Vikfrost the court dealt swiftly with a contention by the carriers that they were not liable despite the fact that the bill of lading, issued by the sub-charterers, or more particularly by their agents, who were held to have authority to sign on behalf of the sub-charterers, contained a demise clause. That clause it may be remembered provides:

> "If the ship is not owned by or chartered by demise to the Company or Line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the charterparty) this Bill of Lading shall only as a contract with the owner or demise charterer, as the case may be, as principal made through the agency of the said Company or Line who act as agents only and shall be under no personal liability whatsoever in respect thereof."

The Court of Appeal put any possible defence of the carrier in this respect at naught by relying on an earlier judgment of Brandon J. in The Berkshire and it was declared rather pithily by a member of that august court that:

> "I hold that the contract contained in or evidenced by the bill of lading purports to be a contract between the shippers and the shipowners, and not one between the shippers and the charterers".

That left counsel for the shipowner with one last uneasy stand, a protest that since the bill of lading contained a jurisdiction clause which was different from that to be found in the head or sub-charters this meant that the bill of lading contained a term that was extraordinarily or manifestly inconsistent with the terms of the charter-parties and therefore did not bind the carriers. In The Berkshire the learned judge had held that a demise clause was certainly not such a term as to enable a carrier to escape liability to a bill of lading holder. The issue in The Vikfrost was that the bill of lading signed by the agents of the sub-charterers contained a different jurisdiction clause from that which appeared in the head charter or the sub-charter. Was this then a manifestly inconsistent term? The unanimous view of the Court of Appeal was that it was not. In the words of Lord Justice Brown:

> "There is no inconcistency between the jurisdiction clause in the charterparty, and the jurisdiction clause in the bill of lading. The charterparty

> provided for disputes between owners and the charterers under the charter to be referred to arbitration in Oslo. This is not inconsistent with the provisions of the bill of lading that disputes under a different contract between different parties - the owners and bill of lading holders - are to be decided by the (High Court of England)."

Thus the mystery of just what is a manifestly inconsistent term remains and, at least in my view, even when it does finally emerge it should not be permitted to allow a carrier to escape liability to an innocent third party who has nothing to put him on notice. The owner has freely chosen his agent, in the shape of the charterer, and should shoulder whatever responsibilities may be placed there as a result of the actions of that worthy. After all the indemnity clause is freely available in most charterparties and even where it does not appear there in always the common law indemnity, that is as long as the action requested is not 'manifestly unlawful'!

The Hague and Hague/Visby Rules do nothing to provide any aid in this particular difficulty. What then of the Hamburg Rules? The carrier is defined by Article 1 as:

> ""Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper".

It further provides, however,

> ""Actual carrier" means any person to whom the performance of the carriage of the goods....has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted."

The difficulty is that the charterer does not in normal circumstances "enter into a contract of carriage" with the shipper, so that he would not become either "carrier" or "actual carrier" for the purposes of the Rules. In The Venezuela, however, the circumstances would have provided for a "carrier" and an "actual carrier" on the basis of the Rules. We should then perhaps notice that Article 14(1) provides:

> "A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier"

In so far as any other person signing is concerned the same rule provides:

> "The bill of lading may be signed by a person having authority from the carrier."

Further, in Article 15(1) (j) it is specifically required that the bill of lading be signed by:

"the carrier or other person acting on his behalf."

The more important aspects of the Rules lie perhaps in Articles 10 and 11. Article 10 may at first sight seem to provide some help for those who feel that "carriers" and "actual carriers" should be jointly and severally liable. Unfortunately a close look at Articles 11 and the reference in it to Article 21 will reveal that the whole thing is largely ethereal.

The only real solution from the point of view of an innocent third party holder of a bill of lading is to declare that a person responsible for arranging contracts of carriage of goods by sea should now be regarded as a special form of agent who by his actions accepts liability to indemnify the innocent holder in the event of that worthy being unable to obtain satisfaction from the carrier, which may or may not commend itself to those present.

THE STIGMA OF THE UNCLEAN BILL OF LADING

The importance of clean 'unclaused' shipping documents does not need to be stressed. We all know too well that one nasty 'notation' can lead to the toppling of an entire edifice of credit arrangements. Yet, somewhat strangely, the position of the clean bill of lading still remains blurred and it would seem now that there may indeed be some difference between what is accepted as a clean bill of lading, for the purpose of the common law and for the purposes of the Articles of the Uniform Customs and Practice for Documentary Credit.

The case of Arrospe v. Barr in 1881 does not help particularly, but it is interesting to look at the various opinions offered as to what, at that time was considered to be a 'clean' bill of lading. The President of the Scottish Court which decided the matter gives an opinion which is unlikely to get him into any trouble and provides at least something for everyone. In his words:

> "a clean bill of lading must be construed with reference to the circumstances of each particular case".

Lord Mure followed this up with:

> "a clean bill of lading must mean a bill in the ordinary uniform style recognised in all ports of this country, and without any special stipulation different from that ordinary style."

At the end of the day, and that includes up to the present day, I suppose that most of us think in terms of a clean bill of lading as being one which, in particular, shows the proper amount of goods to have been shipped on board "in apparent good order and condition". This is not, however, the form which appears in the U.C.P. for there in relation to documents to be presented it merely states that:

> "A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and or packaging."

The limits of this defintion, and the problems which may yet lie ahead of some of us, can be found in the facts and judgment in the recent case of The Galatia. The facts themselves are relatively straight forward, but gave rise to the question as to whether a 'notation' appended to a bill of lading in respect of damage suffered by cargo after it had been loaded on board in good condition meant that it was thereby rendered a

'dirty' bill of lading. The purchaser and two banks decided that it was and refused to accept it. The matter then passed into the more than capable hands of Mr. Justice Donaldson, and he then was. To his mind there could be no doubt but that it was indeed a clean bill. He did look, however, at the U.C.P. rules and drew attention to the fact that apart from whatever other defects it may have, it certainly did not give any information as to the time to which such notations as it mentioned were supposed to relate. Since the case before him was not subject to the U.C.P., and since the rules do not in any event have the force of law, there was no need to carry that point further. In his view it had not been proved that banks generally would refuse to accept such a bill of lading as being a clean bill, and even if they did it would be for no better reason than they felt they were applying the U.C.P. test. In his words:

> "What is really being said here is that the very fact that the buyers and two banks rejected these documents proves that they are not "clean". This is a proposition which I decline to accept."

Lord Justice Donaldson, long one of my favourite judges, is rated even higher in my esteem with that comment. He continued:

> "The bill of lading with which I am concerned casts no doubt whatsoever on the condition of the goods at (the time of shipment) and does not assert that at that time the shipowner had any claim whatsoever against the goods. It follows that in my judgment this bill of lading, unusual though it is, passes the legal test of cleanliness."

A further attempt by the purchasers to claim that the bill of lading "lacked merchantability" in that it was not "reasonably and readily fit to pass current in commerce" also failed, though the learned judge accepted that had it been so he would wholeheartedly have condemned it.

The obvious difficulties over 'clean' documents leads me therefore to the continuing grey area of the taking of indemnities by carriers in return for a clean bill of lading. All of us readily recall the nasty fate that can befall an innocent carrier who yields to the blandishments of a not so innocent shipper and the facts of <u>Brown Jenkinson v. Percy Dalton</u>. Since that time little has come to aid the carrier in relation to the legal position of such indemnities, or for that

matter to aid purchasers as to what exactly does or does not amount to a reservation on a bill of lading. A glimpse at the Hamburg Rules, which some think provides aid in this direction, may serve to show that the future is as bleak as the past.

Reservations and Guarantees

Although Art.15(1) states the bill of lading must contain these details as furnished by the shipper, yet this is not strictly true, since Art.16 provides some defence. Strangely although Art.15 uses the word must contain in relation to these particulars, Art.16 commences with the words "If the bill of lading contains" and then proceeds to relate to exactly those particulars which apparently must appear according to Art.15(1). Be that as it may, Art.16 clearly sets out the fact that a carrier, or other person acting on his behalf, must insert a reservation in respect of the particulars supplied by the shipper, other than that relating to the dangerous nature of the goods, in the following circumstances:

(a) where it is known that the particulars do not accurately represent the goods;

(b) where there are reasonable grounds to suspect that the particulars do not accurately represent the goods;

(c) where there were no reasonable means of checking such particulars.

It is not at all clear just what form the reservation is to take, particularly in respect of (b) and (c). Would it, for example, in the case of (b) be sufficient merely to note on the bill of lading, following the particulars, "Reasonable grounds to suspect not accurate" or must one spell out in more detail the grounds that makes your suspicion reasonable. In which case would a 'reservation' such as "shipper got it wrong last time" or "Shipper's eyes are too close together prove satisfactory? Similarly in the case of (c) is it enough to state "no reasonable means of checking", when in fact the cargo officer has merely had enough for that day and gone off on those other pursuits which make some South American ports so attractive?

Nor is the requirement under (a) any the more easy to deal with, at least from the point of view of collecting evidence to establish it.

It is best at this point to deal with the possible effect on the shipper in respect of incorrect particulars furnished by him. In the case of dangerous goods, these are dealt with separately by Art.13 which makes the shipper liable to the carrier or the actual carrier for any failure to disclose the dangerous nature of the goods as set out there. The other particulars so furnished, i.e. the general nature of the goods, their marks, number, weight and quantity are provided for in Art.16(1). This provides quite simply that the shipper is deemed to have guaranteed to the carrier the accuracy of these particulars. As a result, the shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars, even if the bill of lading has been transferred by the shipper to a third party.

There is nothing in Art.16 which actually states that this guarantee is restricted to circumstances where the carrier could not have known or had no reason to doubt the accuracy of the particulars. In other words, nothing set out seems to actually place a duty on the carrier to check the cargo, nor does it say that the carrier may not merely accept the

details as provided by the shipper. This view, however, is not widely accepted, albeit I can find nothing in the Rules which seems to indicate that there is a positive duty on the carrier, unless it is implicit in the words of Art.16(1) which say a reservation must be entered if the carrier "knows" etc. I am not convinced that a failure to act at all is a reason for implying constructive notice of discoverable inaccuracy in such a case. Certainly, as we shall see, where there is an actual letter of guarantee given in respect of a written omission of a reservation, where there is intent to defraud a third party, the right of the carrier to rely on this particular guarantee is expressly removed. Yet Art.17(3), which deals with this, seems to depend specifically upon an actual letter of guarantee having been issued by the shipper and to have no relevance at all to the 'statutory' right to a guarantee which arises without more under the provisions of Art.17(1). One final point in Art.12 it is stated that the shipper shall only be liable where there is fault or neglect by him, his servants or agents.

LETTERS OF GUARANTEE AND INDEMNITY

Under the common law of the United Kingdom the position of the carrier who took a letter of guarantee or of indemnity against the issuing of a clean bill of lading in respect of either known or suspected errors has been one of danger. It has been an undertaking which, if accepted, had mainly to be based upon honesty or trust, the former being the better of the two possibilities. To some extent it may be felt that the new Rules seek to clarify this position. Perhaps I may be forgiven if I leave some room for doubt in my understanding of what actual change has been introduced in relation to the common law of the United Kingdom, though I cannot speak for what others may discern.

Art.17(2) commences by pointing out that any such guarantee or indemnity, taken against the failure to enter a reservation either as to the particulars furnished by the shipper or as to the conditions of the goods shall be void and have no effect against a third party transferee. It is; however, Art.17(3) which provides the difficulty. In this rule it is provided that the letter of guarantee or indemnity is valid as against the shipper, but only if:

> by omitting the reservation the carrier or person acting on his behalf did not intend to defraud a third party, including a consignee, who acted in reliance on the absence of such reservation and thus on the description of goods as contained in the bill of lading.

It is the First part of the test which causes the problem. At what stage does the acceptance of a letter of guarantee or of indemnity cross the line between genuine doubt on the part of the carrier as to the need for a reservation, and the blatant acceptance that what is being done is wrong and therefore the court will say that the person so accepting the guarantee or indemnity must be taken to have known that a third party would be defrauded. Against this it may be argued, and in my view rightly, since it comes from no less a person than Professor Tetley, that the emphasis is upon the words "with intent to defraud". Does one "intend to defraud" when one's sole intention is to pay up the moment a third party suffers loss and then to seek to recoup from a given guarantor or indemnifier? Unfortunately the line will in the end have to be arbitrarily drawn. There will be black and there will be what may perhaps be described as slightly dark grey. Thankfully I do not have to sit in judgment upon the difference between them.

As mentioned earlier, this particular provision does not refer at all to the position of the carrier who, not taking a letter of guarantee or an indemnity, seeks to rely upon the 'statutory' indemnity given to him by the Rules in relation to inaccurate particulars provided by the shipper, particulars which do not include the condition of the goods. In this event there is a somewhat strange divergence. If the carrier takes a written letter of guarantee or of indemnity then Art.17(3) makes quite clear that insofar as it is adjudged that the carrier, or person signing on his behalf intended to defraud a third party, then the guarantee or indemnity is also invalid against the shipper who gave it. Yet if the carrier merely accepts such 'particulars' without more, then depending upon how one judges the duty of the carrier in such a case, it may be argued that in fact the carrier may rely upon the 'statutory' indemnity since that is exactly what Art.17(1) says he may do. If this is the case, then the Nelson 'blind eye' syndrome, so beloved of the English, may yet become the best possible approach of the carrier in such a situation. It is of course a pity, at least if one defends carriers, that this does not apply equally to the case of the condition of the goods. For here, I fear, the carrier, or those who

act for him, will have to continue to determine whether goods which appear to be in a somewhat less than 'good' condition, or whose packaging seems decidely suspect, nevertheless is still not such as to lead the court to determine that the taking of a letter of guarantee or of indemnity in such circumstances is sufficient to show intention to defraud. It will be a question of whose wrath is preferable. That of the shipper, who may be a valued client, in which case he may be honest and pay up, or that of the court, in which case the penalty may be very harsh indeed. To understand this it is necessary to move to the provisions of Art.17(4) which provides that in the case of 'intended' fraud, whether in the case of the particulars as furnished by the shipper or as to the condition of the goods, the carrier may not limit his liability as provided for by the Rules as against a claimant. Under these circumstances the carrier may do well to ponder upon the thought that if he, or his advisers, have any real doubts as to the likely approach of the court as to the 'intent' then the carrier would be best advised to accept, as against the third party, that the fault was all his and limit his liability accordingly, relying upon the possible honesty of the shipper. In the event that such honesty proves to be but a figment of the carrier's imagination, well it was ever thus.

Good Faith and Equity in Marine Insurance

No one doubts that by its very nature marine insurance is a risky business even merely by reason of the ordinary perils, perils enhanced and added to by reason of those who seek to use such insurance as an alternative means to playing the stock market. With this in mind it seems fair that the underwriter should receive all reasonable protection in the game of chance which he bravely, but knowingly, and voluntarily undertakes. There is just as much need, however, for the innocent assured to be protected against legal rules which grew up in a period when communication and knowledge were far less advanced than that which exists today. It is accepted that the contract of marine insurance is one uberrimae fidei, but it should be remembered that the requirement works in both directions. In 1757 Lee C.J. stressed, in dealing with the construction of policies, that:

> "they are to be construed, largely, for the benefit of trade, and for the assured."

Well to my mind the benefit of the assured seems to have suffered something of a reversal since that time and if there is a trade which has benefited most from the direction which the law has taken, it is that of marine underwriters.

The two areas in which the assured is most at risk arise in respect of the application of the doctrine of uberimae fidei, concerning non-disclosure and misrepresentation, and the use of the warranty.

In 1980, after a Working Paper had been issued on the subject the Law Commission in England declared:

> "The law relating to non-disclosure and breach of warranty is undoubtedly in need of reform and this reform had been too long delayed."

Those in the marine world whose hearts leapt at this news, it reflected judgment given about 160 years earlier, but one must not rush such matters, were doomed to disappointment, for that august body then went on to say: that it would have considered the position of marine insurance as well, if they believed it necessary: In their view, however,

> "We have no grounds for such a belief. The Marine Insurance Act 1906, together with subsequent case-law, contains comprehensive provisions which provide a context of certainty of law and practice in this country especially in relation to the conduct of international commerce. This basis of legal certainty has helped to establish London as the leading

> international market... and our insurance law and practice have been adopted by many other trading nations. The highly competitive nature of the international market .... makes this a highly relevant consideration."

The fact that the Law Commission of England, and incidentally Wales, felt this way did not of course mean that that protector of the innocents, UNCTAD, already off on a frolic of its own in relation to marine insurance, would not take the matter up. It is not without interest therefore that at a meeting of that body the United Kingdom representative on 6th August, 1979 stressed that the legal rules relating to misrepresentation and non-disclosure were in fact under review by the Law Commission and also the European Community. That was true in one sense save that both bodies had considered the above matters, including warranties, and both had in fact decided to exclude marine insurance from their considerations and recommendations. It will be noticed that the statement of the Law Commission, given above, in it must be admitted only the working paper, was in fact made some seven months before the statement at UNCTAD.

In the short time available here I would like to deal more particularly with the position of the warranty and the possible application of a 'held covered' clause.

Warranties, as we all know are fearsome things. If by mischance a statement sneaks from the slip onto the policy then it may be transformed from a mere statement, the relevance of which may be contested, to a binding statement from which only the absolute truth provides a defence. Let the facts of Yorkshire Insurance v. Campbell serve to remind us of this. There the subject-matter of the policy - a horse - was described in the proposal form as:

> "Bay Gelding by Soult X St. Paul (mare) 5 years... 2 hind legs white, blaze on face, slight chip off knee, grey hairs nr side belly."

The details of the proposal form were incorporated into the policy and the assured "warranted the truth of all statements."

Now it is a wise child that knows its own father, and the same is, I regret to say, true of horses. Though no one doubted that the pedigree of our gelding was just as good, despite what appears to have been an

apparent lapse by his sainted mother, I fear the facts were not true. The horse, it must be pointed out perished in a storm and not as a result of the disgrace it must have felt when the awful truth was known. The only issue for the court was did the facts on the proposal form constitute a warranty. Counsel for the defence said that the words were quite meaningless in the context of the policy, just as if, for example, the statement had declared that the horse had "carried fat gentlemen safely". The court disagreed, found that the words amounted to a warranty, and that they were not true. One wonders how far they would have gone. What if those grey hairs on that near side belly had been restored to their former luxuriant black by an industrious groom armed with a bottle of Grecian 2000 and intend that the horse should look its best for the voyage... would that too have been a breach of warranty, well apparently the answer must be yes, for there is no limit to such stupidity when once embarked upon.

Quite apart from the unrepaired breach of warranty, this strictness of the right to rely on such a breach by the underwriter continues even if

the assured has in fact repaired his breach before any form of loss occurs. This was not always so and there is a very interesting judgment of Abbot C.J., who did know a little about such things, in 1819 in Weir v. Anderson, which appears to have been the last gasp of sanity in this area, when, supported by two other men of clarity of thought, he said in relation to the contention that once a warranty had been broken it could not be repaired:

> "I confess that I was a little surprised at that proposition, because, if true in point of law, I fear we should find many cases indeed where it would turn out that the assured would have no claim upon the underwriters, because something was wanting, or something excessive, at the instance of the ship's departure, although the want had been supplied, or the excess removed before the loss happened."

In what can only be now defined as the work of a prophet he then went on to say:

> "These inconveniences, which would be continually happening in practice would lead to dangerous consequences, by opening the doors to underwriters to break their engagements by means of trivial circumstances, the effect of which no one ever contemplated."

As I commented earlier, it has taken the Law Commission of England and Wales 160 years to come to the same and to them apparently startling conclusion though not of course in Marine Insurance. Unfortunately the good attempt died fifty seven years later when the Privy Council, unable to actually avoid the above decision, decided that poor old Abbot C.J. did not really mean what he said, or if he did he was a little muddled, or in any event it was not necessary to the decision. He was accused of making a "proposition of perilous latitude" which could not be contemplated having regard to the dreadful task which came about as a result of the courthaving to determine what could be defined as "trivial things". Some might think that eighty per cent of the court's time in commercial cases is concerned solely with that particular art.

Against the above there is always the point that the assured can make use of a good 'held covered' clause, and,as long as he does not delay in notifying his underwriter of the breach that has occurred, all will be well. That point too has been subject to some curtailment by reason of a decision in Liberian Insurance Agency v. Mosse in 1977, by, I regret to say, Mr. Justice Donaldson. There, a policy declared the

the subject-matter to be "Enamelware (cups and plates) in wooden cases". This was incorrect but the policy had a 'held covered' clause in respect of errors of description. Mr. Justice Donaldson refused to operate the clause on the following ground:

> "In my judgment the clause only applies if the assured, on the basis of an accurate declaration of all the facts affecting the risk but excluding knowledge of what has to happen in the event, could have obtained a quotation in the market at a premium which could properly be described as a 'reasonable commercial rate'.

In the absence of proof that this could be obtained it was held the assured could not make use of the clause. Some may think that this is an unnecessary 'commercial' refinement, but it may come to have considerable importance in the future, though the cases where it is raised may not find their way before the court and enforced settlement may be the name of the game.

Regardless of the might of the Law Commission of England and Wales, who seem to spend rather too much time on a patriotic approach to possibility of reform,

I do believe that it is time for a change in relation to the legal approach to breach in relation to non-disclosure, misrepresentation and more particularly breach of warranty. In 1783 Lord Mansfiedl recognised the hardship of the legal approach when in Hibbert v. Pigou he said in respect of a breach:

> There is no latitude, no equity".

In respect of equity there is no doubt in my mind that Cotton got it right in his Lacon where he says:

> "Law and equity are two things which God hath joined, but which man has put assunder."

Certainly no underwriter appears to be in the van of those who would like to see them joined together again in this area of marine insurance.

Admiralty Practice

As may or may not be known the United Kingdom has now proceeded to a new Act in which part 1 of the 1956 Administration of Justice Act is repealed. This was the Part which set out the jurisdiction of the Admiralty Court and in particular the circumstances in which ships or sister ships might be arrested. Tn reality the only substantial change, if indeed it be that, arises in relation to the position of the ship in the hands of a demise charterer. The original part of the bill gave very wide powers in respect of ships even where the ship was under a demise charter-party. The effect of the amendment, made somewhat hurriedly in the House of Lords, is to provide that where a ship is under a demise charterparty at the time of the incident, for which the demise charterer is legally responsible, then as long as the ship remains under that demise charterparty it may be arrested. This does no more than allow for arrest in cases which conform to the Andrea Ursula formula. It does not permit arrest of any other ship which may be demise chartered to the defendant. No doubt the position of ships under demise charterparties will continue to cause difficulties for some time to come,

all as a result of the words "beneficial owner as respects all the shares", the actual legal meaning of which is far from clear but steadfastly maintained in the new Act.

Probably the only other major change in English Admiralty practice has come with the emergence and development of the Mareva Injunction. These now spill out of the High Court in what might be known as the confetti syndrome. A ticker-tape reception in New YOrk is probably only just a little more profuse in its use of paper. The actual jurisdictional basis of the injunction is s.45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 which provides, inter alia,

> "The High Court may grant ... an injunction ... by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so."

The provision as can be seen is extremely wide. The major rules for its being granted can be summarised as follows;as requiring the plaintiff to have a good arguable case; to have right of action within the jurisdiction; to show that a real danger that the money or other asset sought to be made subject to the

injunction will be removed from the jurisdiction, and that it is just and convenient for the court to grant the injunction. An early requirement that the defendant must be an alien has fallen by the wayside. The dangers of such a power can not to my mind be overestimated. It is easy to foresee that creditors, hearing that a Mareva Injunction has been granted against their debtor, might well swoop in and destroy what otherwise may be a perfectly sound business in the general business sense.

The words of Lord Denning M.R. in The Assios in 1979 ought to be read out to each judge who is about to let one fly:

> "The Mareva Injunction has proved most valuable in practice to the City of London and to all those who operate in the shipping world and elsewhere. But we must be careful that it is not stretched too far, else we would be endangering it. It must be kept for proper circumstances and not extended so far as to be a danger to the proper conduct of business. So while supporting it wholeheartedly for all proper cases, we must be careful that it is not extended too far."

Some may well think that it has already been extended or stretched too far, and that it is not the Injunction that is suffering as a result of this, but perfectly honest shipowners. What does emerge from the whole business is that if the Court is suddenly going to launch a weapon of this sort on the business community then it ought to have called a committee to hew out the precise limits of its powers and use and not to have wittingly given birth to a lucrative seam from which only the lawyers seem to stand to gain.

I mentioned at the outset that I wished to look at Admiralty Practice on a world wide basis. In most other spheres we are already being subject to Conventions, Marine Insurance is already under discussion and charterparties are being threatened by the ever extending tentacles of IMCO. The only sphere which seems to have been ignored, and which to my mind is the least contentious, is that of the actual practice of Admiralty Law in the sense of court procedure and remedies available. It is true that there is a convention on Maritime liens, though few adhere to it. In that one area alone it is a matter for each jurisdiction to determine just what sort of claim will give rise to a maritime lien and thus totally inhibit the

free transfer of vessels. Knowing just what countries actually permit arrest, or more particularly sister-ship arrest, is no easy matter, whilst the rules relating to security and other remedies defy the imagination in some cases, and I do not refer here to the extra-judicial remedy known as the 'greasy palm' which may be needed in some places in order to ease the path of what until then was thought to be a very simple case. Added to this may be the laws of registration of ships and ships' mortgages.

Some courts are still depending upon old English Admiralty Laws which have long passed away. For example, certainly until recently, the Israeli Admiralty Court would permit the arrest of a vessel only if there is a lien conferred by statute, namely, the English Admiralty Court Act of 1840 or 1861. Admiralty jurisdiction in South Africa has similar problems. The nicest illustration however, is presented by Ireland. In Volume II of Maritime Law, edited by the International Bar Association we learn that there is only one local Admiralty Court in Ireland, that of Cork, in respect of which the following extract appears:

> "The Judge of the Cork Local Admiralty Court has for the past two years or so declined to exercise his Admiralty Jurisdiction on the grounds that such jurisdiction is possibly unconstitutional. An appeal to the Supreme Court was made about two years ago and dismissed on a technical point without the constitutional issue being decided".

Indeed the two volumes which presently exist of this work provide a valuable insight into the fact that what is desperately needed is a Convention which will set out the entire of the workings relating to Admiralty Practice: a Convention which would contain not only the laws which presently appear in the more advanced maritime states but also the rules of court which govern such matters as applications for security, for being able to intervene and the right to costs. To me, at least, it is strange that while we go on making Conventions on all the other issues we completely ignore the actual mechanics for enforcement. How nice it would be to know that if a ship is arrested in Wales there is not a chance that the local Admiralty

Judge will decide to dredge up the Laws of Hywell the Good, splendid though they are. Would it really be such a terrible thing, except to the members of 2 and 3 Essex Court and one or two others in King's Bench Walk or Queen Elizabeth Buildings if the secrecy which seems to be inherent in Admiralty procedure was finally stripped away and we could in fact do as Lord Denning M.R. so often does, albeit to the total bewilderment of the House of Lords, make reference to the Admiralty Law of the World?

Appendix I

HAMBURG RULES

Article 1

r.1. "Carrier" means any person by whom or in whose name a contract of carriage by sea has been concluded with a shipper.

r.2. "Actual carrier" means any person to whom the performance of the carriage of goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

r.3. "Shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by who, or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

r.4. "Consignee" means the person entitled to take delivery of the goods.

Article 10. Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the

carrier nevertheless remains responsible for the entire carriage according the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7, and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.

6. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Article 11. Through carriage

1. Notwithstanding the provisions of paragraph 1 of article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery

has been caused by such an occurrence rests upon the carrier.

2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

HAMBURG RULES 1978

ARTICLES 21

Article 21. Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situtated, is competent and within the jurisdiction of which is situated one of the following places:

   (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or

   (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

   (c) the port of loading or the port of discharge; or

   (d) any additional place designated for that purpose in the contract of carriage by sea.

2. (a) Notwithstanding the preceding provisions of this article an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his chocie, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgment that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.