CMI UNIFORM RULES FOR SEAWAYBILLS

By: Stuart Hetherington

The Uniform Rules for Seawaybills which were drafted in Paris had their origin in a Colloquium on Bills of Lading held in Venice in 1983. It was decided at that Colloquium that the practice of issuing bills of lading when a negotiable document was not required should be discouraged and that uniform rules for incorporation in seawaybills should be prepared and their adoption encouraged.

Various reasons have been given for the necessity to have greater use of seawaybills in international trade. One is to avoid delay in cases where the vessel arrives before a bill of lading and another is to assist in the elimination of fraud.

It is clear that the need for seawaybills is most common on short sea trades such as the English Channel, the North Atlantic and in our own part of the world, the Tasman trades. It was indicated during the course of the sessions that 85% of the cargo on the North Atlantic liner trades is not sold in transit. In contrast, however, there are a number of countries (Taiwan and India were both mentioned) which do not allow seawaybills to be issued). This apparently applies to the World Food Programme which requires combined transport bills.

The first point to note about the Rules is that they will apply "when adopted by a contract of carriage". Thus it is necessary for the parties to a contract of carriage (shipper and carrier) to agree to incorporate the Rules in their contractual documentation. A second point to note is that the contract of carriage is not required to be documented.

A suggestion was made that a provision should be inserted in the Rules to the effect that any written seawaybill should state on its face that it is not a negotiable document and not a document of title. That suggestion was not accepted.

The Canadian Maritime Law Association sought an amendment to the definition of "carrier" and "shipper" so that those words meant "the parties so recognised according to the law applicable to the contract of carriage." This was not accepted.

The main debate at the Paris conference centered around the terms of Rule 3. It has been incorporated to overcome the problem that the Bills of Lading Act 1855 (Imp.) only applies to bills of lading and not to seawaybills and thus a consignee pursuant to a seawaybill cannot obtain the benefits (or indeed the obligations), which are obtained pursuant to that Act, which arise under the bill of lading. This is not a problem for civil law countries and accordingly there was much debate as to whether or not such a provision was necessary. Lord Justice Lloyd, who chaired these sessions, at one stage seemed to agree that such a provision may not be necessary as the United Kingdom Parliament, he said, would be legislating in the near future to remedy this situation. He also queried the effectiveness of such a clause in any event. Both the Canadian and Australian delegations expressed the view that it was unlikely their legislatures would move so quickly and therefore a provision such as that contained in Rule 3 is necessary to provide some measure of protection to the consignee. Not only was there considerable discussion generated by the civil law countries as to the necessity for this rule but also the Americans were involved as they did not want phraseology which might bear the implication that a seawaybill is not a

bill of lading. The Pomerene Act of the U.S. makes a carrier liable to the owner of the goods under a "straight bill" of lading. They therefore do not have the same problems as common law countries by reason of the fact that the Bills of Lading Act 1855 applies only to negotiable documents. The United States delegation unsuccessfully suggested the addition of a clause which reads as follows :

> "These rules are intended to apply to non-negotiable documents of title, to be issued in countries whose law does not provide for the equivalent of a seawaybill, as described herein. They are not intended for use for cargo loaded in countries (eg USA), which law already provides for the equivalent of seawaybills."

During debate upon Rule 3 Lord Justice Lloyd indicated that amendments to the Bills of Lading Act could provide that the consignee would be liable for breaches of contract committed after the cargo had been shipped but not before.

Rule 4 makes the Rules subject to the liability regime which would otherwise have applied had a bill of lading been issued. It is therefore necessary to look to the law of the country of shipment to ascertain what its legislation provides concerning the applicability of Hague, Hague-Visby or Hamburg Rules for bills of lading and then apply those requirements as if they referred to a seawaybill. It is important to note that in some jurisdictions (Italy and Holland were mentioned) the carrier needs to print any terms and conditions of trade on the back of such documentation. Some countries using seawaybills at the present time do not adopt this practice and simply refer to their standard terms and conditions on the face of the document. The Canadian Maritime Law

Association sought an amendment to Rule 4(ii)(b) to the effect that the contract of carriage would be subject to the carrier's "standard terms and conditions actually appearing on the waybill". Opposing that amendment Mr J Richardson of P&OCL said that such a provision would not assist a consignee since the waybill only goes to a shipper in any event and as it was hoped that these Rules would be consistent with the EDI Rules it will be necessary to incorporate the conditions by reference in any event.

Apart from Rule 3 the next most contentious provision was Rule 6. That seeks to identify the points of time at which the shipper or the consignee shall have the right of control of the goods. Rule 6(i) provides that the shipper "shall be the only party entitled to give the carrier instructions in relation to the contract of carriage" unless he has exercised the option given to him by sub-rule (ii). The Canadian Maritime Law Association suggested that the shipper should have the option which could be exercised "not later than the date of departure of the carrying vessel from the port of loading". This was not accepted. It is important to note that unless there is some prohibition placed upon the shipper by the "applicable law" the name of the consignee may be changed by the shipper "at any time up to the consignee claiming delivery of the goods after their arrival at destination, provided he gives the carrier reasonable notice in writing, or by some other means acceptable to the carrier, thereby undertaking to indemnify the carrier against any additional expense caused thereby."

A great deal of discussion took place concerning the point of time which the shipper's "right of control" should be terminated. The Australian

delegation unsuccessfully sought to amend the wording of Rule 6(i) so as to delete the words "their arrival" and replacing them by the words "they have become available for delivery". The reason for this was that it was envisaged that a consignee might seek to assert that goods had arrived at their destination when they were still on board a vessel and not discharged and there may in some circumstances be a considerable delay before the usual time at which a consignee might be entitled to claim delivery. By claiming delivery at an earlier point of time the consignee could thereby prejudice a shipper wanting to maintain the option of arranging for delivery to another party for a longer period. Another concern was that by using the words "their arrival at destination" the rule makes it somewhat ambiguous as to whether or not "destination" was intended to refer to "ultimate destination" or the port at which the vessel was to discharge the cargo. The use of the words "available for delivery at destination" were intended to indicate that the consignee could not claim delivery before the usual time that he might expect to obtain delivery in accordance with the contract.

Subrule 6(ii) is a provision pursuant to which the shipper is given an option to transfer the right of control to the consignee. This must be exercised "not later than receipt of the goods by the carrier". The exercise of the option is required to be noted both on the seawaybill or similar document, if any. The Australian delegation sought a further amendment to this clause, which was also unsuccessful, which would have required the words "or otherwise recorded in writing" to be inserted at the end of the second sentence. The reason for this, is that, as has already been mentioned, the intention, as evidenced in Rule 1(ii) is that these rules can apply to an oral contract. It was thought advisable that

the parties should be required to evidence the exercise of the option to transfer the right of control in some written document where there might otherwise not be any written document evidencing the contract of carriage. Interestingly, the French delegation wanted to give the consignee the right of control and not the shipper. The rationale being that as the shipper and the consignee are identified in the seawaybill, it not being anticipated that the document would be negotiated (nor indeed is it possible for it to be negotiated), once the goods have left the shipper's possession and it has been paid it is not interested in what happens to them. No other delegation supported this suggestion since the shipper may wish to arrange for delivery to himself if, for instance, the consignee has gone into liquidation or even the related company to the shipper, to whom the goods are being sent, has gone into liquidation.

Rule 7 also caused some controversy in that both the the United Kingdom and Australian delegations, supported by some others, thought the language was too simplistic. It was contended that a carrier will rarely, if ever, give delivery to "the consignee" as required in Rule 7. It was thought that this should be clarified by referring to the "consignee, its servant or agent". The same point was made in relation to subrule 7(ii) which provides an exclusion from liability for the carrier where there has been a wrongful delivery provided the carrier can prove "that he has exercised reasonable care to ascertain that the party claiming to be the consignee is in fact that party." The Australian delegation suggested an amendment to that subrule so that the last line would read "the party claiming delivery of the goods is the consignee or its nominee." Unfortunately this amendment was also defeated. Some

civil law countries wanted the English text to be changed from "reasonable care" to "due diligence" in order to equate with the French text. This was rejected by the English speaking countries who considered that "reasonable care" was a more appropriate description.

Another amendment which was suggested, but not approved, included one from the British Maritime Law Association to add a "jurisdiction clause", entitling the shipper or consignee at their option to bring proceedings against the carrier in the territory of the place where the goods were taken over or were delivered or agreed to be delivered.

There were 64 delegates attending the seawaybills sessions representing some 23 nations as well as Bimco.