BUSINESS SESSION 7

TOPIC: LIABILITIES OF AUSTRALIAN FREIGHT FORWARDERS

SPEAKER: David Goodwin, Manager, Group Planning and Development, ANL Ltd., VIC

COMMENTATOR: Guy Cassar, Transport Mutual Services Pty. Ltd., NSW

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LIABILITIES OF AUSTRALIAN FREIGHT FORWARDERS

BY

MR D J GOODWIN

See also Martin Davies' article on bailment in Australian Business Law Review

1. Introduction

Freight forwarders do not generally offer to carry goods themselves but, rather, offer to act as professional intermediaries between consignors and consignees. Thus, the courts have traditionally held that freight forwarders are merely agents for the owners of goods placed in their care. (1) However, a forwarder may structure its arrangements with its customers so that it puts itself in the position of a principal carrier. Furthermore, freight forwarders are not precluded from effecting part of the transit personally.

Forwarders naturally tend to seek to perform themselves as many of the operations which are incidental to the transit being arranged as it is economically and commercially viable to undertake. These incidental operations may include customs clearance, payment of import duties, the arranging of insurance, and the making of arrangements for domestic transport of goods from or to their place of origin or destination. Forwarders may undertake or arrange such operations through their own associates or branch offices, through arrangements with local agents, or by utilising sub-contractors throughout the various segments of the carriage.

In recent years, Australian and international courts have progressively widened the range of circumstances in which freight forwarders will be regarded as having contracted as carriers, and not merely as agents. Since characterisation of a forwarder as either a carrier or an agent will indicate who it is appropriate for the owner of a cargo which has been lost or damaged to sue, this emerging judicial approach may have important implications for the liability position of individual forwarders. The contractual provisions and documentary and business practices being employed by forwarders may, in many cases, require revision.

This paper aims to examine the liabilities to which freight forwarders may be exposed in light of the current state of development of the law. It seeks to identify the factors which need to be considered to determine whether, in a given case, a forwarder has acted as agent or principal. After briefly outlining the unimodal legal regimes applying in Australia to transport by air, rail, road and sea, it then discusses a number of issues which have come to prominence as a result of the increased prevalence of combined transportation.

2. Causes of Action Available to Cargo Owners

A shipper or consignee which has entrusted its goods to a freight forwarder to arrange a transit, and has subsequently discovered that the goods have been lost or damaged in transit, will generally consider three alternative avenues of recourse:

- for breach of contract;
- in bailment;
- in tort.

2.1 Actions in Contract

Where an action is brought for loss of or damage to goods by a bill of lading holder, on the basis of a breach of the contract of carriage, it will be necessary for it to determine, from amongst the range of possible defendants, the identity of the "carrier" with whom it has its

contract.(2) Where the transit has been arranged per medium of a freight forwarder, the determination of this issue will depend upon whether the forwarder has acted merely as an agent or has placed itself, by means of its contract and the surrounding circumstances, in the position of a carrier. As will be seen from the discussion in Section 4 of this paper, the ascertainment of the status of the forwarder may require careful analysis of the particular facts of a given case, the characteristics of the modes of transport which have been employed and the wording of the documentation issued by the various transport operators.

Once the identity of the carrier has been determined, the precise terms of the contract of carriage must be ascertained in order to asses whether they have been breached, in light of the defences and recourses available to the carrier. In this regard, It is necessary to consider the effect of exclusion clauses in the contract of carriage, which may serve to relieve the carrier from liability except in unusual circumstances.

Certain rules relating to the interpretation of exclusion clauses, in the context of road transport, were outlined by Windeyer J. of the High Court of Australia in Thomas National Transport (Melbourne) Pty. Ltd. and Pay v. May & Baker (Australia) Pty. Ltd. (3). The first such rule was that exemption clauses are ordinarily construed strictly against the party for whose benefit they are inserted. Secondly, they are not construed as relieving that party against liability for its own negligence or that of its servants, unless such liability is expressly or by implication covered. Thirdly, a condition absolving a party from liability (in particular exonerating a bailee from liability for the loss of goods in its care) should only apply when the party is dealing with the goods in a way that can be regarded as in intended performance of its contractual

obligation, and not in a way that is quite alien to its contract (the "four corners" rule). Thus, if a widely drawn exclusion clause excludes a trucking company from liability in the event of the negligence of its own driver, the court may give effect to it.

The interpretation of exclusion clauses was considered again by the High Court in 1989 in Nissho Iwai Australia Ltd. v. Malaysian International Shipping Corporation, Berhad (4). The case concerned the theft of a container of frozen Malaysian prawns from Glebe Island Terminal in Sydney, shortly after discharge. The defendant shipping company sought to avoid liability by relying on an exemption clause in the bill of lading which provided that "Under no circumstances shall the carrier be liable or responsible in any capacity for or in respect of - (a) any loss of or damage to or in connection with goods which arises or is due to any occurrence.....".

The High Court, upholding the decisions of the trial judge and the New South Wales Court of Appeal, agreed that the exemption clause did protect the defendant from liability. The Court reconfirmed that "... the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentum in case of ambiguity." (5)

Importantly, their Honours recognised that the purpose of the contract would be frustrated if it was held that total non-delivery of the cargo fell within the clause. Thus, they were prepared to find that a properly

worded exemption clause may protect a party even though the exempted events would defeat the main object of the contract if they occurred. In this light it would appear that a carefully crafted exclusion clause has the potential to enable a carrier to enter into a binding contract and simultaneously exempt itself from liability for any cause whatsoever.

An independent contractor which is not a direct party to the contract of carriage, such as a stevedore or a sub-carrier, is generally unable to rely upon exclusion clauses in the contract of carriage.(6) However, the carrier may, by including in its bill of lading a "Himalaya Clause" providing that it contracts as agent on behalf of independent contractors such as stevedores and inland carriers, ensure that those parties become principals to the contract and are protected by the exclusion clauses.

An alternative manner of ensuring that sub-contractors enjoy the protection of the carrier's exclusion clauses is to include in the bill of lading a "circular indemnity" provision in which the goods owner promises that it will not sue the servants, agent or subcontractors of the carrier in respect of any claim it may have, and that, if any claim is made in breach of that promise, the goods owner will indemnify the carrier against all the consequences.

The recent case <u>Continental Seagram Pty. Ltd.</u> v. <u>A.B.C. Containerline N.V. Pty. Ltd.</u> (7) which involved theft of some Scotch whisky from the Glebe Island stevedoring terminal in Sydney, illustrated what can be achieved with an appropriately drawn exemption clause, and also the continuing effectiveness of the Himalaya clause. The carrier's bill of lading contained a blanket exclusion clause wide enough to protect the carrier from liability for theft of the goods by an employee of the carrier's

agent. Since the bill of lading also contained a Himalaya clause, the blanket exclusion was extended to the stevedoring company and the terminal operator. (8)

2.2 Actions in Bailment

see Martin Davies' article on bailment — Australian Business Law Review (1990 or 91)

In a situation where a freight forwarder is the contractual carrier, and has protected itself by means of exclusion clauses in its contract, the goods owner may elect to bring an action against the actual sea carrier in bailment.

A bailment has been defined as "a delivery of goods from one person (bailor) to another (bailee) upon a condition, express or implied, that when the period or purpose for which the goods were bailed has terminated or been fulfilled, they will be returned to the bailor or delivered according to his instructions." (9) The essential elements of a suit in bailment in the case of the contract of carriage are that the bailee has received the delivery or transfer of possession of the property, and also a specific mandate requiring the property to be dealt with in a particular fashion. Since the bailee has been given the physical possession of the goods, it must account for their whereabouts and condition.

Where a bailee is a common carrier, an absolute duty is imposed. A common carrier is liable to make good to the bailor any damage to or loss of the goods, irrespective of whether the damage or loss was due to its negligence. In contrast, a "private carrier" is free to negotiate special conditions of carriage with its customers. Most transport operators include in their contracts provisions which make it clear that they are not common carriers. The basic test of whether an operator is a common

carrier or a private carrier will be whether it reserves the right to refuse engagements. (10).

Whereas a common carrier is liable for loss of or damage to cargo whether it can disprove negligence or not, a private carrier will not be liable if the loss or damage occurring during transit did not result from its negligence. (11) However, the burden will be on the private carrier to prove that the loss or damage was not due to its negligence. (12)

A private carrier is free to protect itself from a claim in bailment by relying on exclusion clauses agreed between it and the cargo owner. Where a suit in bailment is brought against a sea-carrier which has made its arrangements with the cargo owner through a freight forwarder, ascertaining the applicable terms may be a matter of some complexity. The carrier will seek to rely upon either the exclusion clauses in its own contract with the forwarder or those in the forwarder's contract with the cargo owner, whichever afford it the greatest protection.

The exemption clauses in the contract between the forwarder and the carrier may apply to the relationship between the carrier and the goods owner if the goods owner "has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise"(13) "The owner of the goods (although not a party to the contract) is bound by those conditions if he impliedly consented to them as being in 'the known and contemplated form'".(14) Where the conditions in the contract between the shipper and forwarder and in the bill of lading between the forwarder and the sea carrier are substantially different, it is unlikely that the shipper will have consented to carriage on the sea-carrier's terms.(15)

For the sea-carrier to be able to defend the shipper's action by relying on the terms of its own contract with the forwarder, it is necessary that the shipper should have authorised the forwarder to enter into a sub-bailment on terms. This is because a sea carrier's reliance on the exclusion clauses in its own bill of lading will be based on the argument that it is a sub-bailee on terms from the forwarder, who accepted bailment of the goods from the shipper with authority to sub-bail.(16)

In Johnson Matthey & Co. Ltd. v. Constantine Terminals Ltd.(17), a sub-bailee sought to rely on exemptions in the contract between a goods owner and an intermediate party. Its contract with the intermediate party also included exemption clauses. Donaldson J. held that, since the two sets of clauses were not materially different, it was legitimate to infer that the bailor consented to a sub-bailment on the intermediate party's terms. The case has been interpreted as authority for the proposition that a bailor is bound by any terms which constitute the consideration upon which the sub-bailee accepted the goods, provided the bailee has at least ostensible authority to create a sub-bailment.(18)

If the contract between the shipper and the forwarder contains a Himalaya clause, any action in bailment brought by the goods owner against the sea carrier will be subject to the exclusion clauses in that contract. Where the shipper's contract with the forwarder contains a "circular indemnity" provision, the sea carrier may have an action in bailment against it struck out.(19)

2.3 Actions in Tort

The reasons for formulating a claim in tort in respect of loss or damage

to cargo are many and varied. It may be prudent to formulate an alternative claim in tort where it is not clear with whom the contract of carriage has been made. A particular defendant may be considered a better target to sue (particularly where the contracting party is insolvent). In the context of sea carriage, where a bill of lading has been issued by a freight forwarder which has itself contracted with the actual carrier, the purpose of a tort action may be to obtain the liability of a carrier which has participated in the performance of the carriage, but may not be a party to the forwarder's contract of carriage. (20)

The advantage to the shipper of proceeding against the sea carrier in tort rather than in bailment is that it is not necessary to rely upon the fact of bailment to give rise to a cause of action ie. there is no need to show a specific mandate requiring the goods to be dealt with in a particular manner. In addition, a subcontracting sea carrier may arguably be unable to raise the defences arising out of its own bill of lading against a claim of negligence.(21)

However, if the contract between the forwarder and the shipper contains a Himalaya clause, an action by the shipper against the actual carrier in tort will be subject to the exclusions and limitations contained in that contract. If the freight forwarder's contract with the shipper contains a circular indemnity clause the carrier may have a tortious action against it struck out, since the shipper will have agreed to sue only the forwarder.(22)

The shipper will need to overcome the problem of proving that there is sufficient proximity for the duty of care to arise. <u>Leigh and Sillivan Ltd.</u> v. <u>Aliakmon Shipping Co. Ltd. ("The Aliakmon")</u> (23) is authority for

the proposition that a buyer of goods damaged during shipment which had not yet acquired property in the goods at the time of damage and had no right to sue under s.1 of the UK Bills of Lading Act 1895 (24) does not have title to sue a negligent shipowner in tort. In these circumstances, an action in tort cannot be used to by-pass the contract terms and to deprive the sea carrier of the protection of the Hague Rules. (25)

3. Liability of the Forwarder as an Agent

In the event that a freight forwarder is found to have been acting as an agent and not as a principal, its liability will be governed by the normal rules of agency. (26) Although the precise duties of a "forwarding agent" in a particular case will depend upon the terms of the documents it has exchanged with the shipper, a forwarder held to be a mere agent will generally have only limited exposure for loss of or damage to cargo. By virtue of the agency the contract of carriage created will have been established between the forwarder's principal and the actual carrier, and the contractual terms governing the cargo owner's recourse will generally be those in the contract issued by the actual carrier. The forwarder's principal, normally the cargo owner, and not the forwarder, will be liable for any wrongful acts or omissions which are committed within the scope of the forwarder's authority.

For example, should a forwarder underpay wharfage charges, it is the cargo owner which will (subject to statute) be liable to the port authority, even though the shipper may have placed the forwarder in funds to pay the correct charges. The forwarder is entitled to be indemnified against all expenses incurred on behalf of the nominated principal and further to be

paid proper charges for its services (27), even if these were not originally contemplated.

There is a duty to exercise reasonable care in employing the persons who are to perform the carriage,(28) but having made the arrangements, a forwarding agent will be under no duty to supervise the actions of carriers which it may reasonably and properly expect to perform their normal obligations competently.

Nonetheless, the forwarder may not exceed its authority. It may be liable, for example, for delay due to its own negligence (29) and vicariously liable for the negligence of another agent which it has employed to perform its functions abroad. (30) Like any other agent, a forwarding agent will be subject to duties to exercise such care and diligence as is reasonable in the circumstances, to follow the lawful and reasonable instructions of the principal as to the manner of performance of its duties and to not allow its interests to conflict with those of its principal.

Since the general law duties of an agent may be varied by express agreement between the principal and agent, forwarders seeking to establish themselves as agents set out in their contracts with shippers terms which give them the broadest possible authority. A Forwarder's Certificate of Transport or other document issued by a forwarder will commonly incorporate by reference a standard set of forwarder's terms such as the Standard Trading Conditions of the Institute of Freight Forwarders Limited and state on its face words to the effect that the forwarder is "authorised to enter into contracts with carriers and others involved in the execution of the transport subject to the latter's usual terms and

conditions", that the issuer "does not act as Carrier but as Forwarder" and that it is "not responsible for the acts or omissions of Carriers involved in the execution of the transport or of other third parties".

4. Status of the Forwarder as Agent or Principal

In determining the appropriate action to be taken by a cargo owner which has entrusted its goods to a freight forwarder to arrange transportation, and subsequently discovered that the goods have been lost or damaged, it is necessary to determine at the outset whether the forwarder has participated in the transaction as a principal carrier or a "mere agent". An analysis of the cases suggests that the determination of a particular forwarder's status will depend on the nature of the contract between the parties and the surrounding circumstances.

4.1 Forwarder as Agent for the Shipper

Rowlatt, J. encapsulated the traditional view of the legal position of the freight forwarder in Jones v. European and General Express(31), where he said:

> "It must be clearly understood that a forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as an agent for the owner of the goods to make arrangements with the people who do carry - steamships, railways and so on - and to make arrangements so far as they are necessary for the immediate steps between the ship and the rail..."

Under this view, the forwarder contracts with the sea-carrier and any land-based transport operator as agent for the shipper of the goods (or the consignee of the goods if the sale contract is on FOB rather than C&F

terms). The shipper is the principal, and there is privity of contract between the shipper and the individual land and sea carriers engaged by the forwarder, but no direct contract between the forwarder and the shipper. The forwarder does not contract to carry and deliver the goods itself. In 1939, forwarders were defined as groups which were:

> willing to forward goods for you ... to the uttermost ends of the earth. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work, they have performed their contract". (32)

The basis of remuneration of the freight forwarder may be of relevance in determining whether it has acted as agent or principal. In Marston Excelsior Ltd. v. Arbuckle Smith & Co. Ltd. (33), Lord Denning M.R. found that, in light of the correspondence passed between the parties, "Arbuckle Smith were forwarding agents in the true sense of those words and not themselves carriers" (34), despite the fact that the forwarder had added ten per cent to the quote received from the barge operator which had arranged the European portion of the trip. The adding on of ten per cent for the forwarder's own profit was regarded as an indication that the forwarder was a contractor on its own account as principal (although the defendant's counsel successfully explained this away in the particular case as being "because of contingencies" since "costs might rise".(35)). Lord Denning expressed the view that the remuneration of forwarding agents should be structured so that clients were only charged the actual amounts paid by the forwarders to the principal carriers and "in addition, they could charge an agency fee for their services as forwarding agents".(36)

A freight forwarder was held to have been acting as an agent in the recent New South Wales case Kim Meller Imports Pty. Ltd. v. Eurolevant SpA & Ors.

(37) The facts concerned theft of a consignment of Italian shoes from a vessel, with the apparent complicity of members of the crew. The first defendant forwarder had issued a combined transport bill of lading which did not define the "carrier" and under the heading "shipper" named the forwarder "as forwarding agent". The plaintiff was named as "consignee" It was noted in the judgement that the conditions on the bill of lading appeared to contemplate that the "shipper" and "carrier" would be different entities. The second defendant sea carrier had also issued a combined transport bill of lading, and this named the forwarder as the shipper and itself as carrier. The forwarder was held to have acted as agent of the plaintiff in arranging for the carriage of the shoes by, and the issue of a bill of lading on behalf of, the second defendant. Two significant considerations contributing to this finding were the fact that the forwarder's bill of lading contained no terms and conditions, and the ambiguity in the forwarder's document as to the identity of the "carrier".

It should be noted that it is common for the forwarder to be named as the "shipper" on the sea-carrier's bill of lading. However, where the forwarder has entered into a contract with the sea-carrier as agent on behalf of the shipper as principal, this may merely signify that the shipper is an undisclosed principal.

4.2 Forwarder as Carrier

Scrutton (38) has itemised a number of factors which are indicators that a forwarder has contracted as a principal rather than an agent:

- that it issues its own "house bill of lading"; (39)
- that is has contracted for a lien in its own name; (40)

- that the carrying ship is owned by an associated company and managed by the forwarder; (41)
- that the forwarder agrees "to collect" rather than "to arrange for the collection of goods from the shipper"; (42)
- that the forwarder holds itself out as a "haulage, wharfage and lighterage contractor" although not owning any lighters; (43)
- that the forwarder takes a bill of lading from the sea-carrier naming itself as shipper; (44)
- that it books space at a concessionary rate of freight for the whole consignment in the hope of finding goods to fill it later.

However, notwithstanding the occasional exception, it has until very recently been regarded as unusual for a freight forwarder to be found to have contracted as principal to a contract for sea carriage.(45) Generally, the courts had been reluctant to ascribe to the freight forwarder the contractual status of carrier vis-a-vis the shipper, in the absence of any express terms to that effect.(46) This is no longer the case. Since the advent of containerisation, the courts have with increasing frequency identified circumstances in which freight forwarders can be regarded as having contracted with shippers as principals for the performance of entire intermodal transits.(47) Where a forwarder is not in a position to personally perform the whole carriage itself, it may subcontract out the performance of all or part of the carriage.

Lee Cooper v. Jeakins(48) was a case in which a freight forwarder was held to have been a principal to the contract with the shipper, but not to have acted as carrier. The finding that the forwarder had contracted as principal was based both on the conduct of the parties and the fact that the contractual documents did not expressly state that it was the agent of

the shipper.(49) It would seem from this case that the creation of a relationship of agency between forwarder and shipper may require an express statement.

In J Evans & Sons v. Merzario(50) involved a party whose principal business was that of road carriage also acting as a freight forwarder for other sections of the transit. In relation to the sea leg, the forwarder was said to have acted as a "transportation contractor".(51) In Salsi v. Jetspeed Air Services Ltd(52) the plaintiff air freightage broker was employed as agent by an Italian firm to arrange carriage of goods from Rome to Lagos in Nigeria. The plaintiff made arrangements with the defendant Jetspeed, which was a second air freightage broker, for the air carriage of the goods. The aircraft used was owned by an American company with which Jetspeed was closely connected. The court concluded that:

> "the defendants ... were contracting as principals. Their obligation was not to carry the goods, but equally it was not to procure a contract under which (the plaintiff) would become entitled to require the goods to be carried (the agency or brokerage situation). Their obligation was personally to procure that the goods be carried."(53)

The decision was in spite of the plaintiff's knowledge that the defendant freight forwarders had no ships or aircraft of their own and that the negotiations were dependent upon parallel negotiations with the American aircraft company. Considerable weight was given to the fact that the defendants issued invoices in their own name without any suggestion that the charter fixture or booking was with anyone else.

In the 1975 case of Chas Davis (Metal Brokers) Ltd v Gilyott & Scott Ltd (54), the plaintiff metal brokers had instructed the first defendants to deliver 110 ingots of tin to named consignees. The first defendants were a multiple group which undertook, amongst other functions, warehousing,

haulage, shipping and forwarding operations, and had for some time warehoused the tin. The first defendants had arranged with the second defendants (who were road hauliers) for the carriage of the goods, which were stolen in transit as a result of the negligence of the second defendants' servants. Although the first defendants had argued that they were mere forwarding agents and had contracted with the second defendants as agents for the plaintiffs, the first defendants were held to be the carriers. The second defendants were thus the sub-contractors of the first defendants.

The approach now likely to be taken by Australian courts in determining the nature of the relationship between shippers, forwarders and their subcontracting carriers is evident from the recent New South Wales case <u>Carrington Slipways Pty. Ltd.</u> v <u>Pacific Austral Pty. Ltd.</u>(55). The case involved the determination of a claim by Carrington Slipways against its freight forwarder, the charterers and owners of the carrying vessel and the discharging stevedores in respect of damage which occurred to a large diesel engine during unloading in Sydney. The damage had resulted from the negligence of the stevedores. Since a number of different bills of lading had been issued in respect of the shipment, the issue of whether Carrington Slipways had contracted with Pacific Austral as a principal or engaged it as its agent was of importance in determining which set of exclusion clauses applied to the carriage.

It was held to be quite clear that Pacific Austral had contracted as a principal.(56) The bill of lading which Pacific Austral had procured for its customer was a "PEACE Line" bill, and "PEACE Line" was a business name under which Pacific Austral itself operated. The letter of credit which had been obtained by Carrington Slipways from its bankers had directed

"PEACE Line of Bill of Lading <u>only</u> acceptable". Thus, the freight forwarder was restricted to negotiating a carriage of goods only with PEACE Line or on a PEACE Line bill of lading, "otherwise the letter of credit could not have its assigned operation".(57) Since the authority of Pacific Austral was quite specific, it was no mere agent. It had no authority to enter into any other bill of lading on behalf of Carrington Slipways and, in fact, had contracted with itself (ie. PEACE Line) as principal.

In the course of the judgment, Rogers, C.J. referred approvingly to a passage in an article in the 1986 Journal of Maritime Law & Commerce in which it was said that:

> "The courts will impute the intention to assume liability as a carrier whenever the freight forwarder makes representations amounting to a guarantee that the goods will be shipped in a certain manner"(58)

It is interesting to note that, in this case, the freight forwarder was contending that it was a principal, and was not seeking to argue that it was the agent of the consignee. As a principal, its position was protected by the package limitation provisions and exclusions of liability contained in the Hague Rules. One of its co-defendants, however, the owner of the ship and the employer of the crew, in seeking to argue the applicability of its own bill of lading, which offered it greater protection, was seeking to establish that Pacific Austral had acted as an agent. This case demonstrates that, provided appropriately worded exclusion clauses are included in the documentation issued to shippers by a freight forwarder, the protection it enjoys may be just as satisfactory when acting as a principal as when found to be a "mere agent" for the shipper.

Where a freight forwarder is held to be a contractual carrier, there is no privity of contract between the shipper and the sea-carrier. The shipper is not a party to the contract between the forwarder and the sea-carrier evidenced by the sea-carrier's bill of lading, which is issued to the forwarder as shipper. Any "certificate of transport" or "house bill" issued by the forwarder to the cargo owner will represent the contract between the forwarder and the shipper, and will be the operative document in determining the rights of the shipper in contract. There are thus two "live" bills of lading covering the one shipment of goods. By contrast, where the freight forwarder has merely acted as agent for the goods owner in arranging transport, its "certificate of transport" or "house bill" will not have the force of a bill of lading, but will be, at most, a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper.(59)

The importance of forwarders understanding whether they are carrying on business as agents or principals was illustrated in the recent Hong Kong case <u>Freight Systems Limited</u> v. <u>Korea Shipping Corporation</u>(60). A freight forwarder, Freight Systems, had arranged shipment and issued a house bill to Marianne Trading Limited, a shipper of a cargo of mushrooms, which was damaged in transit. In response to a claim against it by Marianne, Freight Systems had paid compensation for the damage, and subsequently sought an indemnity against the actual sea carrier. However, the bill of lading issued to the forwarder by the sea carrier had named the shipper as "Freight Systems Limited <u>on behalf of</u> Marianne Trading Limited. The forwarder was therefore held to have only acted as an agent in relation to the sea transit with the result that it had no right to sue on the carrier's bill. Thus, the forwarder was not entitled to make any recovery from the sea carrier, and was left out of pocket.

4.3 Forwarder as Agent and Principal Simultaneously

On occasions it may be difficult to distinguish the functions of a freight forwarder acting as an agent from its carrying out of other functions not connected with forwarding as part of the same operation. (61). Those forwarders which deal in international shipments by sea commonly perform a wide range of functions, including such complementary services as warehousing, insurance and packing, and may simultaneously act as freight or loading brokers and/or ship's agents.

In such circumstances, a forwarder may be both agent and carrier in respect of the same shipment at the same time, retaining the status of agent in respect of its freight forwarding operations and acting as a principal in respect of its ancillary activities. Similarly, where part of its operations consist of the business of road transport, a forwarder may perform the road portion of the transit itself and structure its contract with the shipper so that in arranging the other legs, such as the sea leg, it acts as the shipper's agent.

4.4 Forwarder as Agent for Both Carrier and Shipper

It is possible to identify circumstances in which forwarders can be regarded as acting as agent for both the carrier and the shipper simultaneously.(62)

One such circumstance is where a shipping company appoints a freight forwarder to act as its agent in a particular area, so that the forwarder acts both as a loading broker and a forwarder. As loading broker, the forwarder's function will be to advertise the shipping company's services

and obtain cargo to fill its vessels to capacity. These activities may be carried on in parallel with conventional freight forwarding activities. It is possible to contemplate a situation in which, in "selling" cargo space a forwarder is acting as the agent of a shipping company, yet in performing "ancillary functions, such as arranging insurance cover, clearing goods through Customs, etc" (63) the forwarder acts as the shipper's agent.

In the context of air carriage, I.A.T.A. Resolutions define the air freight forwarder as an agent acting on behalf of the air carrier as principal and having clearly defined duties in relation to the collection of charges, issuing of waybills, etc. (64). At the same time, "where a freight forwarder is an I.A.T.A. approved cargo sales agent, he will always act as an agent in relation to his client the shipper, at least as regards the air section of transit".(65)

5. Liabilities on a Unimodal Basis

In order to determine the liability position of a freight forwarder which has acted as a carrier with respect to a particular leg of transport, it is necessary to understand the distinctive legal regimes which have developed in Australia to regulate air, rail, road and sea transport.

5.1 Air Carriage

A large proportion of Australian freight forwarders are predominantly concerned with air transport. In respect of the carriage of cargo by air into and out of Australia, between the States, between the Territories and between the States and a Territory, liability is governed by the Civil

Aviation (Carrier's Liability) Act, 1959-1982 (Commonwealth) ("the CACL Act"). Liability for loss of or damage to cargo which has been carried wholly between places within a particular State and to which the CACL Act does not apply is governed by the applicable State legislation. (66)

The CACL Act incorporates into the domestic law of Australia, in specified circumstances, a number of international Conventions and a Protocol which are set out in its Schedules. Part II of the CACL Act relates to carriage to which the Warsaw Convention 1929 and the amending Hague Protocol 1955 apply. Part III relates to carriage to which the Warsaw Convention without the Hague Protocol applies. Carriage subject to the Guadalajara Convention 1961, which is supplementary to the Warsaw Convention, is dealt with in Part IIIA of the CACL Act.

Thus, in assessing the liability position of a freight forwarder in respect of a particular air carriage, the first enquiry is to assess whether it has acted as an agent or a principal carrier. Assuming the forwarder may be regarded as a carrier, it is then necessary to determine whether the carriage was purely intrastate, or whether the CACL Act applies. If liability is governed by the CACL Act, the next step is to decide which set of mandatory provisions applies - Warsaw as amended by Hague, Warsaw without Hague, or Warsaw as amended by Hague and supplemented by Guadalajara. By referring to the relevant Schedule of the CACL Act, it is then possible to ascertain the specific provisions which govern the carrier's liability.

Article 22 of the Warsaw Convention limits the liability to which an air carrier is exposed for loss of or damage to cargo to 250 Francs per kilogram (unless a higher value has been declared). However, a carrier

may not avail itself of the limitation if damage has been caused by the wilful misconduct of either the carrier or any agent of the carrier acting within the scope of its authority (67).

Where the Hague Protocol applies, the limitations of liability will not be available if it is proved that damage resulted from an act or omission of a carrier, its servants or an agent acting within the scope of its employment, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

The Guadalajara Convention has particular relevance to the liability position of the freight forwarder, since it delineates responsibilities where air carriage has been performed by a party other than the "contracting carrier", ie. the party which as a principal makes an agreement for carriage with the shipper(68). An "actual carrier" is defined as "a person, other than the contracting carrier, who by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated but who is not with respect to such part a successive carrier within Warsaw."(69) The Guadalajara Convention provides that the contracting carrier is responsible for the whole of the carriage contemplated by the agreement and the actual carrier is responsible only for the carriage which he performs(70). The cargo interest has the option of bringing its action for damages against the actual carrier, the contracting carrier or against both together or separately. In each case the limitations applying under the Warsaw Convention, or Warsaw as amended by the Hague Protocol, will apply. If an air freight forwarder has acted as a carrier on the basis of Warsaw as supplemented by Guadalajara, and further can be regarded as a "contracting

carrier", it will be liable to the cargo interest for any loss or damage arising in the course of the entire air carriage.

The Australian law governing the liabilities of air freight forwarders, domestically and internationally, was summarised in a paper delivered by a member of this Association, Peter McQueen, to the 1985 National Conference of the Aviation Law Association of Australia, and I would commend that paper to anyone involved as an operator or an adviser with the air freight forwarding industry (71).

5.2 Rail Carriage

A number of major Australian forwarding companies, generally subsidiaries of large transport conglomerates, specialise in domestic rail freight forwarding. These companies tend not to engage in international forwarding. They act as consolidation intermediaries and offer comprehensive freight services for small consignments, hiring space on interstate trains from the various rail authorities. On the major rail corridors such as Melbourne-Sydney or Sydney-Perth, entire trains may be hired on occasions. Profits are made by obtaining the benefit of reduced freight rates for whole railcar lots, ie. shippers will be offered parcels traffic at rates slightly cheaper than they would be able to obtain from the carrier themselves.

It is likely that the soon-to-be-finalised establishment of the National Rail Freight Corporation to undertake responsibility for interstate rail transport in Australia will diminish the demand for the services of rail freight forwarders. In the past these forwarders have profited from being better able to understand and deal with the intricacies of the various

state rail authorities than the general business community. Shippers of cargo will, in future, be able to deal directly with a single body, the NRFC, with sole responsibility for marketing interstate rail freight services.

There will be a conflict between the interests of the NRFC and the forwarders in that the former's profitability depends, to some extent, on the rail linehaul price it obtains from forwarders whilst the latter's profitability depends to a large extent on the difference between the linehaul buying price and the price it is able to obtain from its clients. However, a small number of major rail forwarders will continue to prosper, as they possess marketing skills which it will take the NRFC some years to acquire and have strong client relationships built up over many years. The NRFC is likely to be reliant on the support of these major forwarders if it is to be successful in its early stages.

Generally speaking, Australian railways are owned by State governments. Not surprisingly, State legislation provides the various railway authorities with a greater level of protection from liability than would exist if the common law position applied. Although the rail authorities are common carriers, the Commissioners of Railways are endowed with power to prescribe special conditions under which goods are to be carried, by making by-laws. (72)

A by-law validly made by a Commissioner of Railways will have the same effect as if a special contract in the same terms had been entered into between the railway authority and the owner of the goods. Alternatively, an authority may make a special contract with a particular consignee. (73) It is proposed that the liability position pertaining to carriage by the

NRFC will be made clear by an Act of the Commonwealth Parliament, and this has been recommended by the National Rail Freight Initiative Task Force, however the necessary legislation has not as yet been enacted.

In State Rail Authorities of NSW v. Everson, an unreported judgment of Mr Justice Hunt of the NSW Supreme Court (74) by-laws made by the State Rail Authority of New South Wales under s.64 of the Government Railways Act 1912 were held not to be binding on consignors unless the by-laws were "just and reasonable" in line with s.9 of the Common Carriers Act 1902 and the consignor had signed the special contract which it had entered into with the State Rail Authority.

It should be noted that, on the European continent, C.I.M. (the Convention for the International Carriage of Goods by Rail) limits liability for loss or damage to cargo carried to or from a contracting nation along C.I.M. designated routes at 17 SDR's per kilogram. Carriers are liable for loss, damage or delay unless an excepted peril can be proved. The convention has little relevance in Australia, although where an Australian forwarder has arranged a land transit at the European end of an international transit, it may be necessary to consider the effect of C.I.M..(75) It is not uncommon for overseas combined transport operators trading to Australia to issue bills of lading which purport to apply C.I.M. (or C.M.R.) terms by private contract to Australian domestic land carriage.

5.3 Road Carriage

Many Australian road transport operators are purely involved in contract haulage from point to point, often as sub-contractors to the large transport conglomerates or by arrangement with freight forwarders with

whom they have established business relationships. However, it is commonplace that the larger and more sophisticated hauliers also offer to their clients a forwarding capability, and become involved in arranging intermodal transport. A large freight forwarder may elect to operate an associated road haulage business as an adjunct to its forwarding operations.

The recommended procedure by which the contract between a road carrier and a shipper of goods should be established is that, prior to the transit, a written quote should be provided by the carrier specifically referring to its terms and conditions of carriage. Subsequently, a properly drafted consignment note, referring to and incorporating into the carriage contract the same set of terms as was contained in the quote, should be delivered for signature to the goods owner by the carrier's driver or other employee prior to or at the time that the goods are despatched.

However, participants in the road transport industry are not notorious for their strict attention to the documentary side of their businesses and it frequently happens that either the terms referred to in the written quote and in the consignment note are inconsistent, or that no contractual terms have been referred to at all in the exchanges between the parties prior to the transit. In such cases, it will be necessary to analyse the verbal statements which have been made by the parties, or the prior course of dealings between them, in order to determine the contractual terms governing a particular carriage. Reasonable notice should have been given to the shipper for particular terms to have become incorporated in the contract of carriage, and the sufficiency of the notice given may determine the extent of the carrier's liability.

Schenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd (76) involved a claim by an importer of machinery (Maplas) which had contracted with a freight forwarder (Schenker) to clear an expensive machine through customs and deliver it from a Melbourne wharf to Maplas' customer in Clayton. The machine was damaged when driven under a bridge by a road carrier engaged by Schenker. Maplas claimed against both the road carrier and Schenker. The road carrier had been negligent, however a clause in its trading conditions entitled it to be indemnified by Schenker. In the period from 1980 to 1986, Maplas had utilised Schenker's services at least a dozen times each year, on average. Since 1982, Schenker had utilised notepaper in its correspondence with Maplas which said, at the foot of the page "See overleaf for trading conditions". Twenty-six clauses of the trading conditions were printed on the reverse of the page in small but legible type. It was concluded that "judged objectively, Schenker was entitled reasonably to conclude by October 1986 that by continuing to conduct business with it on the basis of the correspondence bearing on its reverse the trading conditions and not objecting to them, Maplas had consented to their incorporation into the contract between it and Schenker".(77)

A road transport operator owes to an owner of goods in its possession a duty to take reasonable care of them. The operator will therefore be liable to compensate the goods owner for any loss or damage to the goods occurring whilst they were in the operator's custody, unless either:

- the operator can prove that there was no negligence on its part or that of its agents, or
- it can prove that it is exempted from liability by exclusion clauses in its contract.

In Thomas National Transport (Melbourne) Pty Ltd and Pay v May & Baker (78) one of the appellants was a large Victorian domestic forwarding organisation which employed about 20 carriers around Melbourne to collect goods and bring them to a central depot where they were sorted for onward movement by road, rail or by sea to Tasmania. In the case of interstate road shipments, transport was arranged with sub-contractors, who were carriers regularly and exclusively employed by TNT. Indeed, their vehicles carried TNT's name and were connected to the TNT depot by two-way radio. The action had been brought for damage to a shipment by fire whilst it was being carried by one of these sub-contractors. TNT claimed to be a mere forwarding agent, and therefore not liable for the loss, because the damage took place when the shipment was not in its possession. However, this argument was rejected by the High Court on the basis that TNT had actual possession of the goods as bailees throughout the whole transit, either by its own servants or through a subcontractor. TNT was held to be liable as bailee for the actions of its sub-bailee.

Rick Cobby Haulage Pty Ltd v Simsmetal Pty Limited (79) was a case in which the Full Court of the Supreme Court of South Australia considered the effect of an exemption clause on a bailee's liability. The plaintiff had contracted with the defendant carrier to transport a cargo of copper from Adelaide to Port Kembla. The defendant, consistent with its previous dealings with the plaintiff, engaged a subcontractor to perform the task, but both the subcontractor and the cargo disappeared without trace once the goods were picked up. Claims were made against the defendant for breach of contract and in negligence and conversion. Judgment was given in favour of the plaintiff, and the defendant was held to be in breach of its contractual duties to carry the goods safely and deliver them to Port Kembla and to engage a reliable carrier to carry the goods. The court

emphasised that a bailee for reward carries the onus of proving that loss or damage to goods entrusted to it has happened without its fault.

The decision was in spite of the inclusion in the carrier's contract with the plaintiff of a condition which said:

> "Unless otherwise expressly agreed in writing no responsibility will be accepted by the carrier for any loss of or damage to or misdelivery or non delivery of goods, parcels, packages, crates or cases, etc., or the contents thereof either in transit or in storage for any reason whatsoever."

The court felt that the exemption clause did not clearly indicate that misappropriation was an excluded event and that if protection for misappropriation was required that should be clearly stated in the terms of the contract. (80)

In Schenker v Maplas (81), the Victorian Court of Appeal had been asked to consider whether the freight forwarder, Schenker, was entitled to an indemnity from the shipper, Maplas in respect of the negligence of the road carrier it had engaged, by virtue of Clause 3 of its trading conditions, which provided:

> "Whenever the Company (Schenker) is instructed to undertake or arrange transport, storage or any other service, it shall be authorised to entrust the goods or arrangements to third parties subject to the latter's contractual conditions. The customer (Maplas) shall be bound by such conditions and shall indemnify the Company against any claims arising out of their acceptance."

On the basis of that clause, the freight forwarder was regarded as having made the contract with the road carrier as principal and not as agent, (82) and in addition Maplas was held to be under an obligation to indemnify Schenker against any claim based on a contractual condition incorporated in the contract between Schenker and the road carrier. McGarvie J. found that, "under its contract with Maplas, by which it was

instructed to arrange transport, Schenker was authorised to entrust the goods to third parties subject to the latter's contractual conditions".(83)

5.4 Sea Carriage

I would not presume, in a paper given to this Association, to attempt to summarise in a few paragraphs the law of carriage by sea. However, it is important to note that the provisions of the Hague Rules, which are incorporated into Australian law by the Sea Carriage of Goods Act 1924 (Cth), (84) are mandatorily applicable to any "carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port whether in or outside the Commonwealth" (85). They do not, however, apply to "the carriage of goods by sea from a port in any State to any other port in the same State" (86) unless the parties agree to incorporate them into the contract of carriage. The Hague Rules thus apply to all Australian coastal traffic between States, and to all exports by sea from Australia. During the period from the time when goods are loaded on to the time when they are discharged from a vessel, the limitations and obligations contained within the Rules will apply, notwithstanding any provision in a bill of lading purporting to confer greater protection on the carrier.

The Hague Rules, and their limitation of the liability of sea carriers for cargo damage to $200 per package, cannot be excluded by agreement of the parties to the detriment of the shipper's rights (87). By Articles I and II, the Rules are incorporated into all contracts of carriage covered by a bill of lading.(88)

The activities of Australian freight forwarders involved in the arranging of carriage by sea can be broadly categorised as pertaining to:

(i) the Bass Strait trade;

(ii) the Trans-Tasman trade; and

(iii) the remainder of the worldwide liner trades to and from Australia.

The practice of the carriers active in the Bass Strait trade is to not issue bills of lading, but rather non-negotiable consignment notes in simple terms. Although the Act provides that if a shipper asks for, he must be issued with, a bill of lading, it is not the practice of shippers or forwarders in the trade to require a bill of lading to be issued. Negotiable transport documents are not required in a trade with a transit time of less than 24 hours - it would be necessary to despatch all documents to consignees by air courier to ensure their availability for presentation upon discharge of the cargo, and this would be an additional cost for shippers. A system of consignment notes which name the consignee and simply require it to produce evidence of its identity to the sea carrier in order to obtain delivery of the cargo, is to be preferred.

In the Trans-Tasman trade, which again has a very short transit time, the use of non-negotiable documents, i.e. waybills, is also becoming increasingly prevalent. Sea carriers are encouraging shippers and forwarders to accept the issue of a simple waybill specifying a named consignee in lieu of a bill of lading.

This trend towards the increased use of non-negotiable shipping documentation in the short-haul Australasian shipping trades will increase the likelihood of forwarders in the trade being held to have contracted as principals with their customers. Where, for example, the contract between

the forwarder and the sea carrier is in the form of a simple waybill which names the forwarder as shipper, there will be nothing in that contract which implies that the forwarder has acted as an agent. Although freight forwarders may seek to affirm their agents status in the contractual arrangements they establish with their shipper clients, where the shipping contract is in the form of a waybill or a consignment note, they will be unable to support the position by referring to the detail of clauses in the underlying sea carriage contract. It should be noted that the provisions of the Carriage of Goods by Sea Bill 1991 extend, on a voluntary basis, to contracts of carriage evidenced by non-negotiable transport documents.

House bills which strive to give the impression that the forwarder is merely an agent rarely contain Himalaya clauses or "carrier's responsibility" clauses, particularly where they are based on the Standard Trading Conditions of the Institute of Freight Forwarders Ltd. (The evidence in the Carrington Slipways case disclosed that "today every bill of lading (but not necessarily house bills) has a Himalaya clause". (89)) There is a danger in this, for where a forwarder is nonetheless held to be a principal carrier and a goods owner is able to successfully bring an action, say in tort, against a subcontracting carrier which is not protected by a Himalaya clause, the sub-carrier may turn around and seek recovery from the forwarder/principal carrier, and the benefit of the exclusion clauses in the forwarder's contract with the goods owner will have been lost. This creates something of a conundrum for forwarders - if Himalaya clauses are included in their contracts, they are more likely to be found to be acting as principals, but if the circumstances are such that they are nevertheless held to be principals, it is in their interests to have such clauses in their bills of lading.

6. Issues Arising through the Rise of Combined Transport

A freight forwarder has been defined as:

> "any person which holds itself out to the general public to ... provide and arrange transportation of property, for compensation, and which may assemble and consolidate shipments of such property, and performs or provides for the performance of breakbulk and distributing operations with respect to such consolidated shipments and assumes responsibility for the transportation of such property from point of receipt to point of destination and utilises for the whole or any part of the transportation of such shipments, the services of a carrier or carriers, by sea, land or air, or any combination thereof." (90)

The explosion in containerised trade in the period since the 1960's has brought with it a dramatic increase in the number of transport operators wishing to provide a "door to door" service. The result has been the rise of Multimodal or Combined Transportation. The terms "intermodal transportation", "multimodal transportation" and "combined transportation" are believed to have different shades of meaning by those who show a preference for one or the other. For example, one view suggests that "multimodalism" involves an operator assuming responsibility for the performance of a door to door contract throughout the transit, whilst "intermodalism" is simply a movement of cargo by several transport systems without any suggestion of a single operator having responsibility throughout. However, in this writer's experience these terms are used interchangeably to describe a continuous shipment which moves in two or more modes of transportation.

The effect of combined transport has been that traditional borderlines between the activities of the various types of carriers have been broken down. Overlaps of activity have developed as carriers expand their activities by beginning to operate multimodally and compete with operators which have traditionally participated in other modes of transport. Multimodal transport involves not only more than one mode of transport,

but usually also more than one carrier, which adds to the complexity of the legal problems arising. The determination of the liability position of a freight forwarder involved in combined transport can be complicated by the overlap of very different regimes, and by the difficulty of assessing at which stage of the total transit the loss or damage occurred.

5.1 Use of Combined Transport and Through Transport Documents

The traditional pattern of carriage of goods by a single mode of transport led to the development of distinctive transport documents tailored for each mode, applying only to carriage by that mode, issued at the point of departure by that mode by the actual provider of the transport, and establishing its liability for loss or damage to goods whilst in its charge by reference to an International Convention, or to a national law, applying only to that mode of transport.(91) From the perspective of a cargo owner which has engaged a freight forwarder to arrange a through transit, the entire carriage may be viewed as one continuous transaction, however legally there are a number of quite distinct operations, and each may create different rights and liabilities between the parties. Although it is still often the case that a shipper whose cargo is being transported by a number of modes, whether arranging the transit itself, or utilising the services of a forwarder as an intermediary, will be issued with a series of separate single mode transport documents, it is today likely that a more sophisticated "start to finish" transport document will be issued.

Where a single document is issued covering an entire intermodal transit, it is in concept desirable that a uniform set of liability rules should be applied throughout. However, whilst one or more segments of a multimodal

transit may be governed by mandatory rules, no mandatory regime governs the whole carriage. A series of attempts have been made to overcome this fragmentary approach, culminating in the draft Transport Combine Merchandise (TCM) convention which was concluded in the early 1970's and, as we shall see, the 1980 Multimodal Convention. Neither convention has yet entered into force.

The need to create a satisfactory degree of standardisation in the contracts entered into between multimodal operators and cargo owners has, however, been met by the commercial market. A more consistent and predicable pattern of risk for loss or damage to goods, and a mitigation of the defects of the unimodal regimes has been achieved through the actions of multimodal operators in:

- Using appropriate paramount clauses to ensure a wider and more consistent application of the mandatory rules than they would have had of their own volition (e.g. the Hague Rules may be adopted for the sea leg of a transit, whether or not they apply by statute), and

- adopting as their own standard terms and conditions of business internationally agreed sets of rules. (92).

During the 1970's the international freight forwarders association, FIATA (the Federation Internationale des Associations de Transiteures et Assimiles) prepared its own set of standard conditions for combined transport bills of lading, based on the draft TCM Convention, and these are now commonly in use by forwarders. During the same period, various shipping conferences and the International Chamber of Commerce (ICC) also issued uniform rules for combined transport documents.(93)

The documents issued by most freight forwarders today are either based on, or are variants of, one of the standard forms.

A characteristic of a "combined transport document" is that the "combined transport operator" (this is the terminology used in the ICC document) undertakes the performance of the entire transport operation and will thus be primarily liable to the "Merchant", in accordance with the terms of the document throughout the carriage. The party issuing the combined transport document undertakes to perform, or in its own name procure performance of, the combined transport and at no stage will be in an "agent - only" position, unless this is specifically provided elsewhere, such as in a qualifying clause on the face of the document.

By contrast, a "through transport document" may be defined as a contract of carriage which involves more than one carrier in the course of a door to door transit. Such documents are often issued by road transport operators and sea carriers which also engage in forwarding. The party issuing the document will be stated by its terms to act as a principal only during carriage on its own vehicles or vessels, and as an agent only at all other times. A goods owner which has been issued with a through transport document will be in contract on the basis of different (and probably unknown) conditions at different stages of carriage, and responsibilities for the performance of the segments of the carriage will be dispersed over several carriers.

5.2 At What Stage of the Transit Did Loss or Damage Occur?

Because under the various unimodal liability regimes, a carrier's obligations are limited to the time that the cargo is in its hands, the

ascertainment of the stage at which loss or damage occurred can become a critical issue. When loss or damage can be attributed to a particular stage of transport, liability may be mandatorily governed by the appropriate unimodal regime, regardless of the private contract contained in a combined transport document. In relation to the sea carriage stage, the carrier's obligations generally exist only during the period from "tackle to tackle". During this period, the provisions of the Hague Rules will apply and any loss or damage will be subject both to its mandatory levels of liability and to its restrictions on contractual limitation of damage clauses. As was pointed out in a paper given to the 1983 annual conference of this Association, (94) multimodal container transport has made the assessment of the time when the loss occurred and hence the cause of the loss, much more difficult to assess. This is partly a result of the fact that cargo is no longer tallied in and out at each part of the journey as had previously been the case with conventional cargo, and also that it was moving from one form of transport to another without the opportunity for any intermediate inspection.

Clause 6.B of the FIATA Standard Terms provides:

> When in accordance with Clause 6.A.1 the Freight Forwarder is liable to pay compensation in respect of loss or damage to the goods and the stage of transportation where the loss or damage occurred is known, the liability of the Freight Forwarder in respect of such loss or damage shall be determined by the provisions contained in any International Convention or national law, which provisions
>
> (i) cannot be departed from by private contract, to the detriment of the claimant, and
> (ii) would have been applied if the Merchant had made a separate and direct contract with the Freight Forwarder in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply."

Clause 6.A.1. acknowledges the liability of the freight forwarder for loss or damage to goods in his charge during the traditional "tackle to tackle"

period. Clause 7 of the FIATA Standard Terms recognises the mandatoriness of the Hague Rules. However, where the issuer of a combined transport document has accepted liability on stated terms, for loss damage and delay throughout the entire transit and has been in possession of goods outside the traditional "tackle to tackle" period, the terms of the private contract, contained in the combined transport document may set out a different basis of liability.

These terms will clearly have effect, and not be overridden by a mandatory international convention, when loss or damage cannot be attributed to a particular stage of transport i.e. is "concealed". For example, Clause 6.A of the FIATA Standard Terms provides:

> "1) If the stage of the Carriage during which the loss or damage occurred is <u>not known</u>, the Freight Forwarder shall be relieved of liability for any loss or damage if such loss or damage was caused by:
>
> i) an act or omission of the Merchant,
> ii) insufficiency of or defective condition of packing or marking
> iii) handling, loading, stowage or unloading of the goods by or on behalf of the Merchant
> iv) inherent vice of the goods
> v) strike, lock-out, stoppage or restraint of labour, from whatever cause, whether partial or general,
> vi) a nuclear incident,
> vii) any cause or event which the Freight Forwarder could not avoid and the consequences whereof he could not prevent by the exercise or reasonable diligence.
> viii) compliance with instructions from any Person entitled to give them." (95)

<u>Mayhew Foods Ltd</u> v <u>Overseas Containers Ltd</u> (96) was a case in which a cargo of frozen chickens was carried from an inland destination in the U.K. via the port of Shoreham to Jeddah in Saudi Arabia under the cover of a combined transport document. Clause 6 of the OCL bill of lading, headed "Carrier's Responsibility - Combined Transport" provided that:

> "The Carrier shall be liable for loss or damage to the goods occurring between the time when he received the goods for transportation and the time of delivery".

OCL sought to limit the damages recoverable against it when the cargo defrosted by relying on the terms of another clause in its bill of lading which specified how any compensation recoverable should be calculated and set down an upper limit of U.S. $2 per kilo of gross weight of the goods loss or damaged. The shipper, however, claimed the relevant carriage was subject to the U.K. Carriage of Goods by Sea Act, 1971, and the Hague-Visby Rules and that accordingly the contractual limitation of damage clause was of no effect. The Court held that the Hague-Visby Rules clearly did not apply to inland transport prior to shipment on board a vessel because the Rules have the force of law only in relation to and in connection with the carriage of goods by sea in ships.

A forwarder which has undertaken responsibility as a principal may find that, in relation to the sea leg of the transit which it has arranged, its liability will be limited to the upper limits specified in the Hague Rules, whatever the provisions in the applicable bill of lading. However, in relation to any land legs, the wording of the contract established between the forwarder and the shipper will delineate the forwarder's liability for loss or damage to cargo. Freight forwarders should therefore ensure that the contractual provisions incorporated in their combined transport documents are those which confer the maximum allowable protection.

5.3 <u>The Multimodal Convention</u>

A series of attempts were made in the 1970's to develop an international legal regime for intermodal carriage, culminating in the Convention on International Multimodal Transport of Goods, adopted by UNCTAD in 1980.(97) The Multimodal Convention provides for the continuing viability

of the existing unimodal regimes, but at the same time proposes a simplified basis for determining responsibility for loss of or damage to cargo under a multimodal transport operation. The scheme of the Convention is that it divides intermodal carriage into two levels of legal relationships: one between the shipper and the multimodal transport operator ("MTO"), the other between the MTO and the actual carrier. This delineation of the relationships involved in the carriage into two levels has been described as the "major achievement" of the Convention.(98)

The Convention provides that any international intermodal carriage is governed by a single multimodal transport contract, which is between the shipper and the MTO. The MTO is liable to the shipper for any loss or damage at any stage in the carriage between taking charge of the goods and delivery, regardless of which mode of transportation is involved at the time of loss. There is no need for the shipper to pursue a particular unimodal carrier under whichever law applies to a particular leg - it simply claims against the MTO.

The MTO may either perform the various portions of the carriage itself, or may subcontract with unimodal carriers for some or all portions. It is left to the MTO to seek recovery under the relevant unimodal convention. The arrangements between the MTO and its subcontractors continue to be governed by existing laws and conventions.

The liability limit to which the MTO is exposed, however, is ten percent higher than under the Hamburg Rules (which is in turn 10% higher than that under the Hague/Visby Rules)(99). In addition, MTO liability is based upon a rebuttable presumption of fault compared with the position under

the Hague Rules where a burden of persuasion is with the shipper. The Convention would thus result in significantly increased costs for MTO's.

If the Convention were adopted, a new uniform level of liability for MTO's would be established, but at a higher level than applies currently, determined arbitrarily. For example, in respect of damage occurring at sea, the MTO would be liable to the shipper at a level significantly higher than the shipowner's liability under the Hague Rules, and would be unable to recover the difference against the sub-contracting carrier.

It is likely that, under a legal regime based on the Multimodal Convention, freight forwarders would be regarded as a common species of MTO. The result of its adoption would thus be an increase in the liability exposure and cost structure of the forwarding industry. Accordingly, freight forwarders should monitor and resist any proposed move towards adoption of the Multimodal Convention.

The case for introduction of the Multimodal Convention has clearly run out of steam. However, its proponents will surely discover new energy if and when the Hamburg Rules come into force, as the two schemes are seen to be interrelated.

7. Conclusion

Whereas it was once the case that by doing little more than describing itself as a "forwarding agent", a freight forwarder could avoid being treated in law as a principal with the liability of a carrier, Australian courts will now determine the question of whether a particular forwarder has contracted as an agent or a principal according to the facts of each

case. The question will turn on the construction of the forwarder's contract with the shipper and the surrounding circumstances, particularly the relationship between the forwarder and the actual carrier.

From the cases, it is possible to identify a number of factors which are indicators of the view likely to be taken by the courts. By taking account of such factors, forwarders may design their business arrangements so that they act in relation to their customers either as agents or as principals, whichever is preferred. What may be required is that each forwarder should make a philosophical decision as to the basis on which it wishes to conduct its business, then seek to structure its contractual arrangements and practices accordingly.

Provided it has acted within the scope of its authority, a forwarder held to be an agent of the shipper will have a very limited exposure to liability. Traditionally, forwarders have endeavoured to make clear that they are "mere agents". However, the wide operation which the courts give to contractual exclusion clauses means that, by including appropriately crafted clauses in the documents it issues to its clients, a forwarder may elect to act as a principal carrier and yet avoid any substantial exposure for loss of or damage to cargo.

It is submitted that, from a marketing perspective, there is considerable scope for forwarders to derive competitive advantage by issuing combined transport documents and being seen to have embraced the contractual responsibilities of a principal throughout the entire transit of their customers' cargoes.

FOOTNOTES

(1) Gillette Industries Ltd v W.H.Martin Ltd [1966] 1 Lloyd's Rep. 57

(2) See M. Gleeson, QC "Bills of Lading - Current Problems", Paper given to the 10th Annual Conference of the MLAANZ, Sydney, September 1983. See also M Davies "The Elusive Carrier: Whom Do I Sue and How?" (1991) 19 A.B.L.R. 230.

(3) [1966] 2 Lloyd's Rep. 347, per Windeyer, J at 358-9

(4) (1989) 63 A.L.J.R. 468. Case discussed by N Richardson in (1990) A.L.J. 94

(5) See also Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500 at 510

(6) Midland Silicones v Scruttons (1962) AC 446; Adler v Dickson [1955] 1 QB 158. See A. Mocatta, M. Mustill & S. Boyd, Scrutton on Charterparties and Bills of Lading, 19th Edition, London, Sweet & Maxwell, 1984 at 251

(7) (1990) unrep. Sup.Ct. N.S.W. (No. 12 of 1989). Case discussed by M. Davies in (1991) L.M.C.L.Q. 331.

(8) Special leave to appeal to the High Court was on 7 June 1991, refused to the plaintiff in the case of Rockwell Graphic Systems Ltd. v. Fremantle Terminals Ltd. (1990) unrep. Sup.Ct. W.A. (No. 2169 of 1987). Case discussed by M. Davies in (1991) L.M.C.L.Q. 332. It had been expected in some quarters that this case might lead to the demise of the Himalaya Clause in Australia.

(9) R B Vermeesch & K E Lindgren, Business Law of Australia, 6th Edition, Butterworths, Sydney, 1990 at 763

(10) Cowper v J G Goldner Pty Ltd (1986) 40 SASR 457

(11) R B Vermeesch & K E Lindgren, op. cit at 775

(12) Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd [1962] 1 QB 617

(13) Morris v Martin [1966] 1 QB 716 at 729 per Denning MR

(14) ibid quoting the words of Lord Sumner in Elder, Dempster & Co v Paterson, Zochonis & Co Ltd (1924) AC 522 at 564

(15) Carrington Slipways Pty Ltd v Pacific Austral Pty Ltd (1990) unrep. Sup. Ct. N.S.W. at 23-24 of the transcript.

(16) M Davies, "The Law of Contract with Special Reference to Maritime Contracts", a paper presented to the General Arbitration Course of the Institue of Arbitrators Australia held in Melbourne in August 1990, at 13.

(17) [1976] 2 Lloyd's Rep. 215

(18) Singer Co (UK) Ltd v Tees and Hartlepool Port Authority [1988] 2 Lloyd's Rep. 164; Carrington Slipways, op.cit

(19) As happened in Broken Hill Proprietary Co Ltd v Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 572 and Sidney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 587

(20) These issues were comprehensively discussed in the Frank Stewart Dethridge Memorial Address delivered by FMB Reynolds at the 1985 Melbourne Conference of this Association, entitled "The significance of tort in claims in respect of carriage by sea" and reproduced in (1986) L.M.C.L.Q. 97.

(21) Lee Cooper Ltd v C H Jeakins & Sons Ltd [1964] 1 Lloyd's Rep 300. See also J Gadsden Pty Ltd v Australian Coastal Shipping Commission [1977] 2 NSWLR 575

(22) Broken Hill Proprietary Co. Ltd. v. Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 572 and Sidney Cooke Ltd. v. Hapag-Lloyd Aktiengesellschaft [1980] 2 NSWLR 587.

(23) [1985] 1 Lloyd's Rep 199

(24) The comparable provision in Victoria is S 73 of the Goods Act 1958. See also s.50A of the Sale of Goods Act 1923 (NSW), S.5 of the Mercantile Acts 1867-1896 (Qld), s.14(1) of the Mercantile Law Act 1936 (SA), s.1 of the Bills of Lading Act 1857 (Tas); 20 Vic. No.7 (WA), s.13 of the Mercantile Law Act 1908 (NZ).

(25) Several of the ideas discussed in this section are drawn from a paper by M Davies entitled "The Law of Contract with Special Reference to Maritime Contracts" op.cit.

(26) R B Vermeesch & K E Lindgren, op. cit at 486-525. As to the general liabilities of a forwarder as an agent, see Scrutton on Charterparties and Bills of Lading, op.cit 42-4.

(27) Marston Excelsior v. Arbuckle Smith & Co. Ltd. [1971] 2 Lloyd's Rep. 306 at 310.

(28) C. A. Pisani & Co Ltd v Brown, Jenkinson & Co. Ltd. (1939) 64 Ll.L.Rep. 340

(29) Jones v European and General Express (1920) 25 Com. Cas.296 (KBD)

(30) Landauer v Smits & Co (1921) 6 Ll.L.Rep. 577

(31) (1920) 25 Com. Cas. 296 (KBD)

(32) C.A. Pisani & Co. Ltd. v. Brown, Jenkinson & Co. Ltd. (1939) 64Ll. L. Rep. 340 at 342, per Goddard, J.

(33) [1971] 2 Lloyd's Rep. 306

(34) ibid at 309-10

(35) ibid at 310

(36) ibid

(37) Unreported decision of the New South Wales Supreme Court handed down on 6 February 1989.

(38) Scrutton on Charterparties and Bills of Lading, op.cit Art. 24 at 43.

(39) Troy v. Eastern Co. of Warehouses (1921) 91 L.J.K.B. 632; but cf. A. Gagniere & Co. v. Eastern Co. of Warehouses (1921) 7 Ll.L.Rep. 188 at 189

(40) ibid

(41) Laundauer v. Smits & Co. supra. Cf. Marston Excelsior Ltd. v. Arbuckle Smith & Co. Ltd. [1971] 2 Lloyd's Rep. 306.

(42) Harris (Harella) Ltd. v. Continental Express Ltd. [1961] 1 Lloyd's Rep. 251.

(43) Elof Hansson Agency Ltd. v. Victoria Motor Haulage Co. Ltd. (1938) 43 Com. Cas. 260.

(44) This does not of itself make the forwarder liable as a carrier. See Platzhoff v. Lebean [1865] 4F. +F.545; Langley, Beldon & Gaunt Ltd. v. Morely, [1965] 1 Lloyd's Rep.297

(45) Langley, Beldon & Gaunt Ltd v Morley, supra at 306

(46) I C Holloway, op.cit at 244-249

(47) ibid at 247-8, in which the author suggests a distinction between the situation where a forwarder contracts as carrier, and the position of a forwarder as a principal to the contract with the shipper, though not as carrier.

(48) [1964] 1 Lloyd's Rep. 300 at 308

(49) See the discussion in I C Holloway, op.cit at 247-8

(50) [1975] 1 Lloyd's Rep. 162

(51) ibid at 168, per Kerr, J

(52) [1977] 2 Lloyd's Rep.57

(53) ibid at 60, per Donaldson, J

(54) [1975] 2 Lloyd's Rep. 422. Discussed by D J Hill in an article entitled "Forwarding and Sub-Contracting Complications" (1976) L.M.C.L.Q. 63.

(55) An unreported decision of the Supreme Court of NSW, handed down on 2 February 1989. An appeal from this decision is about to be heard.

(56) ibid at 17-18 of the transcript.

(57) ibid at 17

(58) ibid at 17, referring to I C Holloway, op. cit at 247

(59) A Gagniere & Co. v. Eastern Co. of Warehouses (1921) 7 Ll.L.R.188 at 189; Scrutton on Charterparties and Bills of Lading, op.cit at 384. Discussed in M. Davies, "The Elusive Carrier: Whom Do I Sue and How?" op.cit at 231.

(60) Summarised in Lloyd's Maritime Law Newsletter (No. 290) 1991

(61) Anglo African Shipping Company of New York Inc. v. J. Mortner Ltd. [1962] 1 Lloyd's Rep. 610 at 617

(62) See D.J.Hill, "The Freight Forwarder: His Status from a Comparative Viewpoint", (1975) L.M.C.L.Q. 27

(63) ibid at 28

(64) Perishables Transport Co. Ltd. v. N. Spyropoulos Ltd. [1964] 2 Lloyd's Rep. 379

(65) D J Hill, op. cit at 28

(66) For example, the Civil Aviation (Carrier's Liability) Act, 1967 (NSW).

(67) Warsaw Convention, Article 25.

(68) Guadalajara Convention, Article I(b).

(69) ibid, Article I(c).

(70) ibid, Article II.

(71) P McQueen, The Liability of The Air Freight Forwarder and Air Courier, Domestically and Internationally, Paper delivered at the National Conference of the Aviation Law Association of Australia, November 1985

(72) See Victorian Transport Act, 1983; NSW Government Railways Act 1912; Qld Railways Act 1914; S.A. Railways Act 1936; W.A. Government Railways Act 1904; Tasmanian Railway Management Act 1935 and Transport Act 1938; Seat of Government Railway Act 1928 and Australian National Railways Commission Act 1983 (Cwth Acts affecting the A.C.T. and Northern Territory)

(73) See the discussion in R.B. Vermeesch and K.E. Lindgren, op. cit at 778.

(74) (1985) unrep. Sup. Ct. N.S.W. (Decision delivered 27.5.85).

(75) Similarly, C.M.R. (the Convention for the International Carriage of Goods by Road) which was agreed upon at Geneva in 1956 and has been incorporated into U.K. law by the Carriage of Goods by Road Act 1965, does not have legal force in Australia. However, it may apply to a European land leg of a carriage to or from Australia (e.g. where a Danish cargo is transported via Hamburg). C.M.R. applies where cargo has crossed the frontier of a participating nation on a road vehicle and renders a road carrier liable for loss or damage from the time it takes over cargo until the time of delivery to the consignee, subject to a liability limitation of 8.33 SDRs per kilogram.

(76) [1990] V.R. 834

(77) ibid at 838-9, referring to the decision of Tadgell J. at first instance.

(78) (1966) 2 Lloyd's Rep.347

(79) An unreported decision of the Full Court of the Supreme Court of South Australia, handed down on 13 June 1986.

(80) ibid, per Mohr and Bollen JJ.

(81) [1990] V.R. 834.

(82) ibid, per Ormiston J. at 850-1.

(83) ibid at 840

(84) Legislation is currently before the Commonwealth parliament to replace the Sea Carriage of Goods Act 1924 with a new piece of legislation, the Carriage of Goods by Sea Act, which will enact into law the Hague-Visby Rules and enable the coming into force of the Hamburg Rules whenever a significant number of Australia's major trading partners adopt them.

(85) Section 4(1).

(86) Section 4(2). The Sea Carriage of Goods Act 1930 (Qld) applies the Hague Rules to intrastate carriage within Queensland, in certain circumstances.

(87) Schedule to the Sea Carriage of Goods Act, 1924, Art. III, rule 8.

(88) M. Davies & A. Hickey, Shipping Law, Law Book Company, Sydney, 1989 at 186-8.

(89) (1989) unrep. Sup. Ct. NSW at p.30 of the transcript.

(90) D. J. Hill, Freight Forwarders, Sweet & Maxwell, London, 1972 at 16.

(91) See the Introduction to the International Chamber of Commerce's 1973 brochure "Uniform Rules for a Combined Transport Document", reproduced in N.R. Gilchrist, "In Perspective - International Chamber of Commerce Uniform Rules for a Combined Transport Document" 1984, L.M.C.L.Q. 25.

(92) A. Diamond, QC "Legal Aspects of the Convention", a paper given to a seminar on "Multimodal Transport - the 1980 U.N. Convention" at Southampton University on 12 September 1980.

(93) See the Uniform Rules for Combined Transport Documents set out by the ICC in its Brochure No. 290. The ICC Council, at its meeting on 11 June 1991, approved new rules for multimodal transport documents, elaborated in conjunction with the UNCTAD secretariat. The new Rules will be known as the UNCTAD/ICC Rules for Multimodal Transport Documents, and will replace the existing 1975 ICC Rules for Combined Transport Documents.

(94) P Davies & B Thompson, "Cargo Damage and Liability Problems in Multimodal Transport", a paper given to the Annual Conference of the Maritime Law Association of Australia and New Zealand, Sydney, 1983.

(95) The Clause goes on to provide that the burden of proof of the named causes lies with the Freight Forwarder but that if it can be established that the loss or damage can be attributed to one or more of events, (ii), (iii) or (iv) it will be presumed that it was caused by such events.

(96) (1984) 1 Lloyd's Rep.317.

(97) At last count, the Convention had only been ratified by seven nations, well short of the thirty ratifications needed for it to enter into force.

(98) K Nasseri, "The Multimodal Convention", Journal of Maritime Law & Commerce, Vol. 19, No.2, April 1988, 231 at 237.

(99) ibid at 239.