

WEIGHING UP BENEFITS OF THE SEA WAYBILL

by

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Except in certain circumstances the sea waybill, with the appropriate legal framework and wording, can perform all the necessary functions of the bill of lading and, I suggest, perform them better.

The sea waybill, like the bill of lading, serves as a receipt and provides evidence of carriage between the carrier and cargo interests. However, unlike the bill of lading, it is non-negotiable and does not have a transferability function. As such, it cannot serve as a document of title.

The bill of lading will continue to be required where there is a need for a document of title: but where it is not, a sea waybill can and should be used.

Advantages of using sea waybills are:

- There is no requirement to send a sea waybill to destination to secure delivery of cargo as its holder has no right of possession in respect of the cargo. This avoids delays that can occur when the cargo arrives at destination before the bill of lading.
- Given the absence of this requirement there is no need for a letter of indemnity to allow for delivery of cargo at destination.
- It can be used as a paper document or an electronic message. As such, it is an ideal medium to bridge the gap between paper and electronic trading. It assists paperless transactions and can itself be described as a paperless system as the hard copy serves no unique purpose in the transaction.
- There is potential for a reduction in the incidence of loss or damage to cargo and reduced operating costs which result from less delay in the delivery of cargo at destination.
- There is flexibility in the control which the shipper can exercise over the cargo until its arrival at destination or at some prior time as agreed with the consignee. This can be achieved by incorporating a control clause into the terms of the waybill. This is a clause by which the shipper

irrevocably renounces any right to vary the identity of the consignee of the cargo during transit from the time of acceptance of the sea waybill by a bank against a letter of credit transaction. Acceptance would be confirmed by the bank to the carrier.

- It potentially reduces the risk of fraud.
- It provides flexibility during transactions which call either for documentary credits or those which do not. In this regard, it should be noted that the Uniform Customs and Practice for Documentary Credits (UCP500), which became operable from January 1, 1994, includes the "non-negotiable sea waybill" as a transport document which can be specified in the documentary credit.

Alternatively, there are frequent instances where no documentary credit transactions are required. Examples include shipments between associated companies or branches of transnational companies where the security of such transactions is not required or where there are open account sales.

Even taking all these benefits into account, for the sea waybill to gain widespread acceptance as the appropriate transport document it is necessary for all the various interests - shipper, consignee, bank and insurer - to have their own requirements satisfied.

The shipper is looking to retain control over the cargo until he is paid or has had his bill of exchange accepted.

The consignee wants to make sure that the shipper (his seller) does not get paid until he gives up control of the goods.

The bank requires security for the payment it makes on behalf of the consignee in a documentary credit transaction where the bank is advancing monies against documents.

The insurer wants to be certain that if he has to pay a claim, his recourse under subrogation rights against the carrier is on acceptable terms.

The interests of traders can be protected by updating the current Australian bills of lading legislation (as has occurred in the UK - see the recent Commonwealth Attorney General's discussion paper on that legislation). This would ensure that consignees, under sea waybills, are in the same position as consignees under bills of lading in that they become parties to the contract of carriage and therefore are able to sue and be sued on that contract in their name.

Further, the incorporation of a control clause will allow for the payment of the shipper to trigger the passing of the control of the cargo to the consignee, thereby eliminating the shipper's ability to vary the identity of the party entitled to receive the cargo while the cargo is in transit.

Insurers require the right to recourse against the carrier pursuant to a cargo liability regime based on the Hague or Hague/Visby Rules.

Under current law in Australia (see Section 10 of the Carriage of Goods by Sea Act 1991) it is not mandatory for sea waybills to incorporate the Hague Visby Rules which are referred to in that Act as the amended Hague Rules.

It is no doubt a matter of concern to insurers that in these circumstances there is no requirement that the sea waybill incorporates this liability regime. Carriers are free to exclude their liability or limit that liability below the minimum levels set out in the amended Hague Rules. But how many carriers do, in fact, attempt to apply a different liability regime in respect of a sea waybill compared with the mandatory regime in respect of the bill of lading?

Subject to private negotiations between the cargo and carrier interests as to the incorporation of the amended Hague Rules into contracts of carriage covered by sea waybills, insurers could insist, as a condition of the insurance provided, that sea waybills incorporate the CMI Uniform Rules for Sea Waybills whose adoption was approved by the CMI in 1990.

By using these Uniform Rules, the contract of carriage which the sea waybill covers will be subject to the same regime as if the contract of carriage had been covered by a bill of lading. In this way, incorporation of the amended Hague Rules is effected.

Thus if traders wish to become an active player in the electronic trading environment, the appropriate sea transport document which they should call for is the sea waybill.