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To: Transport Industry Operators

HVR apply to inland transport? (II)

Remember our Chans advice/59 that the Hong Kong Court of Appeal held the Hague Visby Rules not applicable to the inland transport? The Hong Kong Court of Appeal had based its decision on the landmark case of Pyrene Co Ltd v Scindia Steam Navigation Co Ltd [14/4/1954]. In this issue of Chans advice, we would like to examine this landmark case.

This case raised questions of importance upon the interpretation of the Hague Rules and their applicability to a f.o.b. seller. The seller sold a piece of machinery, a fire tender, to a buyer for delivery f.o.b. London. The buyer nominated the *Jalazad*, one of a shipowner's vessels, as the ship to be loaded under the contract of sale, and made all the arrangements for the carriage of the goods. While the tender was being lifted on to the vessel by the ship's tackle, and before it was across the rail it was, through the fault of the ship, dropped and damaged. Under the contract of sale the property had not then passed to the buyer. The damage to the tender cost £966 to repair and the seller sued for that sum. The shipowner admitted liability but claimed that the amount was limited under article 4, rule 5, of the Hague Rules. The limit stated in that rule is £100, but this is subject to article 9 which prescribes that the figure is to be taken to be gold value. There were doubts about the interpretation and effect of this latter article, and they had been very sensibly resolved for the parties to this case by the acceptance of the British Maritime Law Association's Agreement of August 1, 1950, which fixed the limit at £200. The fire tender was not the only piece of machinery supplied by the seller for shipment on board this ship, though it was the only piece which was damaged before shipment. A bill of lading had been prepared to cover the whole shipment; and it was issued to the buyer in due course but with the fire tender deleted from it. The bill of lading incorporated the Hague Rules and was subject to their provisions, as by the Carriage of Goodsby Sea Act, 1924, s. 3, it was bound to be. It was not disputed that the contract of carriage was actually created before the issue of the bill of lading which evidenced its terms.

The seller's argument turned upon the meaning to be given to article 1 (e), which defines "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship." The seller said that these goods never were loaded on to the ship. The seller contended, therefore, that the accident occurred outside the period specified in article 1 (e). So, the seller said, article 4, rule 5 (which limits liability), and, indeed, all the other rules which regulate the rights and responsibilities of the shipowner, did not apply. They are made applicable by article 2, which provides that "under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." "Contract of carriage" is defined in article 1 (b); the term "applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea." Then it is paragraph (e) of this article 1 which contains the definition of "carriage of goods" on which the seller relied. It was in this way, the seller argued, that if the casualty did not fall within the period covered by this last definition the rules did not apply to it.

In the Judge's judgment this argument was fallacious, the cause of the fallacy perhaps lying in the supposition inherent in it that the rights and liabilities under the rules attached to a period of time. The Judge thought that they attached to a contract or part of a contract. The Judge said "part of a contract" because a single contract might cover both inland and sea transport; and in that case the only part of it that fell within the rules was that which, to use the words in the definition of "contract of carriage" in article 1 (b), "relates to the carriage of goods by sea." Even if "carriage of goods by sea" were given by definition the most restricted meaning possible, for example, the period of the voyage, the loading of the goods (by which the Judge meant the whole operation of loading whichever side of the ship's rail) would still *relate* to the carriage on the voyage and so be within the "contract of carriage." Article 2 was the crucial article which for this purpose had to be construed. It

was this article that gave the carrier all his rights and immunities, including the right to limit his liability. He was entitled to do that "in relation to the loading" and "under every contract of carriage." The Judge stated his view of article 1 (e). In his judgment, no special significance needed be given to the phrase "loaded on." It was not intended to specify a precise moment of time. It was legitimate in England to look at section 1 of the Act, which applied the rules not to a period of time but "in relation to and in connexion with the carriage of goods by sea." The rules themselves showed the same thing. The obligations in article 3, rule 1, for example, to use due diligence to make the ship seaworthy and man and equip her properly were independent of time. The operation of the rules was determined by the limits of the contract of carriage by sea and not by any limits of time. The function of article 1 (e) was, the Judge thought, only to assist in the definition of contract of carriage. The Judge pointed out, there was excluded from that definition any part of a larger contract which related, for example, to inland transport. It was natural to divide such a contract into periods, a period of inland transport, followed perhaps by a period of sea transport and then again by a period of inland transport. Discharging from rail at the port of loading might fall into the first period; loading on to the ship into the second. The reference to "when the goods are loaded on" in article 1 (e) was not, the Judge thought, intended to do more than identify the first operation in the series which constituted the carriage of goods by sea; as "when they are discharged" denoted the last. The use of the rather loose word "cover," the Judge thought, supported this view. It was more reasonable to read the rules as contemplating loading and discharging as single operations. It was no doubt possible to read article 1 (e) literally as defining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why excluded loading from the period and included discharging? How gave effect to the frequent references to loading in other rules? How reconciled it with article 7 which allows freedom of contract "prior to the loading on and subsequent to the discharge from"? Manifestly both operations must be included. That brought the Judge back to the view that article 1 (e) was naming the first and last of a series of operations which included in between loading and discharging, "handling, stowage, carriage, custody and care." This was, in fact, the list of operations to which article 2 was by its own terms applied. The Judge thought, therefore, that article 1 (e), which was the spearhead of the seller’s argument, turned out to be an ineffective weapon. The rules’ object as it was put, the Judge thought, correctly in Carver's Carriage of Goods by Sea, 9th ed. (1952), p. 186, was to define not the scope of the contract service but the terms on which that service was to be performed. The extent to which the carrier had to undertake the loading of the vessel might depend not only upon different systems of law but upon the custom and practice of the port and the nature of the cargo. It was difficult to believe that the rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. The carrier was practically bound to play some part in the loading and discharging, so that both operations were naturally included in those covered by the contract of carriage. But the Judge saw no reason why the rules should not leave the parties free to determine by their own contract the part which each had to play. On this view the whole contract of carriage was subject to the rules, but the extent to which loading and discharging were brought within the carrier's obligations was left to the parties themselves to decide. The Judge rejected the interpretation of loading in article 2 as covering only the operation after the ship's rail. It was sufficient for the Judge to say that on the facts of this case the rights and immunities under the rules extended to the whole of the loading carried out by the shipowner and, therefore, the seller's first point failed.

The next contention on behalf of the seller was that the rules were incorporated in the contract of carriage only if a bill of lading was issued. The basis for this was in the definition of article 1 (b) of "contract of carriage"; and it "applies only to contracts of carriage covered by a bill of lading." The use of the word "covered" recognized the fact that the contract of carriage was always concluded before the bill of lading, which evidenced its terms, was actually issued. When parties entered into a contract of carriage in the expectation that a bill of lading would be issued to cover it, they entered into it upon those terms which they knew or expected the bill of lading to contain. Those terms must be in force from the inception of the contract; if it were otherwise the bill of lading would not evidence the contract but would be a variation of it. Moreover, it would be absurd to suppose that the parties intended the terms of the contract to be changed when the bill of lading was issued: for the issue of the bill of lading did not necessarily mark any stage in the development of the contract; often it was not issued till after the ship had sailed, and if there was pressure of office work on the ship's agent it might be delayed several days. In the Judge’s judgment, whenever a contract of carriage was concluded, and it was contemplated that a bill of lading would, in due course, be issued in respect of it, that contract was from its creation "covered" by a bill of lading, and was therefore from its inception a contract of carriage within the meaning of the rules and to which the rules applied.

The seller contended that the parties in this case contemplated a shipped bill of lading and, therefore, that they intended the application of the rules to the contract to be conditional upon the issue of a shipped bill. No

doubt the parties contemplated a shipped bill of lading. But then they also contemplated a shipment. When no shipment took place there was nothing in this contract, the Judge thought, to prevent the shipper from demanding under article 3, rule 3, a "received for shipment" bill if it were of any use to him. The seller's point, the Judge thought, was that if a bill of lading as contemplated was issued, the terms of it (including the rules) operated retrospectively; if the bill was not issued, the terms did not come into operation at all. But the Judge could see no reason for treating the bill of lading differently from any other formal contractual document. If the agreement was made "subject to" bill of lading there would be room for the seller's argument; but there would also be no legal contract at all until the bill of lading was issued, and it was not suggested that this was the case here.

The Judge had now arrived at the conclusion that the rules applied to the contract between the shipowner and the buyer so as to entitle the shipowner, if they were sued by the buyer, to limit their liability. The seller's last contention was that they were not a party to the contract between the shipowner and the buyer or to any similar contract; and that, even if they were, the limitation would not apply to them.

It was convenient to take the last part of this contention first, for it raised only a short point. Even if, so it was argued, the seller were a party to the contract made by the buyer and the rules were a part of the contract, the rules could not affect the seller; for by their own terms they regulate only the relations between the carrier and the holder of the bill of lading and the seller were never holders of the bill of lading. Article 2 granted rights to and imposed responsibilities upon the carrier "under any contract of carriage." Prima facie those rights and responsibilities must be against or towards every other party to the contract. But, so it was contended, "contract of carriage" by its definition excluded all parties except the carrier and the holder of the bill of lading. This contention derived from the concluding words of article 1 (b) "from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same." In the Judge's judgment, those words did not apply to bills of lading generally but only to bills of lading issued under a charterparty; and even then they were intended to define not the parties to the contract but the moment at which the bill of lading became a contractual document within the meaning of the rules. The Judge based this conclusion upon the sense of the paragraph as a whole as well as upon its punctuation. If there was any doubt the French text (set out in Carver, 9th ed., p. 1065) made it quite clear.

The Judge came next to the question whether the seller were privy to the contract of carriage. A similar question had arisen before in relation to stevedores and other agents of the carrier. If the carrier employed a third party, such as stevedores, to perform part of his duties under the contract of carriage, could the third party claim the protection of the contract; or could the shipper, if his goods were damaged, sue the third party in tort? The point arose in Elder Dempster & Co. Ld. v. Paterson Zochonis & Co. Ld. The bill of lading was issued on behalf of time charterers; but the goods were handled and damaged by the crew who were servants of the shipowner. The charterers were protected by exceptions in the bill of lading; but the shipper claimed to sue the shipowner in tort for the action of his servants. The claim failed. Scrutton L.J. in the Court of Appeal, and Viscount Cave, put it on the ground of agency: the charterer in entering into the contract of carriage acted on behalf and for the benefit of those others who might be given duties to perform under it. Two New South Wales cases, Gilbert Stokes and Kerr Proprietary Ld. v. Dalagency & Co. Ld., and Waters Trading Co. Ld. v. Dalagency & Co. Ld., and one United States case, Collins & Co. v. Panama Railroad Co., had been concerned with the Hague Rules and had allowed stevedores to claim the benefit of them. All these people were on the carrier's side; they were his privies and came into the contract under his aegis.

In the case in question, the Judge had to consider the third party was on the shipper's side; if he was privy to the contract it was the act of the shipper that made him so. If he was privy to it he could not, of course, take the benefits without the burdens, or enforce liability without limitation if the contract gave limitation.

There was nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary. It was a principle which had constantly to be invoked where the property in the subject-matter of the contract was likely to be transferred during the currency of the contract. In marine insurance the policy was always expressly taken out for the benefit of those to whom the property "doth, may or shall appertain." In bills of lading the indorsement of the bill passed the title to the goods by virtue of the custom of merchants, as found in Lickbarrow v. Mason, but did not at common law transfer the benefit of the contract of carriage. The Bills of Lading Act, 1855, s. 1, gave the indorsee or named consignee a statutory right to sue; the Judicature Act, 1873, s. 25 (6), later performed the same function for the assignee under the ordinary contract. But just as before 1873 the assignee could always sue in the name of the assignor, so before 1855 the consignee could sue in the name of the consignor. The principle was described by Lord

Blackburn in his Contract of Sale, 3rd ed. (1910), pp. 422 and 423, as follows (the language quoted was Lord Blackburn's, written before 1855): "Even if the assignee of the bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the original contractor as his trustee; for, in general, contracts do not by the law of England run with goods, and no custom has ever been recognized making the contract contained in a bill of lading an exception." The author continued: "If, however, the goods when shipped are not the property of the shipper, he in general acts in shipping them as agent for the owner of the goods." In this type of case the seller as shipper made the contract for the benefit of the buyer. The converse might be equally true. There was no difficulty in principle about the concept of an f.o.b. buyer making a contract of affreightment for the benefit of the seller as well as for himself.

The contract of sale provided for delivery f.o.b. London, the price including dock and harbour dues and port rates to be paid by the seller; and further expressly provided that freight was to be engaged by the buyer, who was to give due notice to the seller when and on board what vessel the goods were to be delivered. Payment was to be made twenty-one days after delivery and after receipt of certain documents for which the contract called, such as invoice, inspection certificate, etc., and of the dock company's or mate's receipt. It was agreed that the property did not pass till delivery over the ship's rail.

It was worth noting that the problem which the Judge had to consider did not arise as a matter of course in every f.o.b. contract. The f.o.b. contract had become a flexible instrument. In what counsel called the classic type as described, for example, in Wimble, Sons & Co. Ld. v. Rosenberg & Sons the buyer's duty was to nominate the ship, and the seller's to put the goods on board for account of the buyer and procure a bill of lading in terms usual in the trade. In such a case the seller was directly a party to the contract of carriage at least until he took out the bill of lading in the buyer's name. Sometimes the seller was asked to make the necessary arrangements; and the contract might then provide for his taking the bill of lading in his own name and obtaining payment against the transfer, as in a c.i.f. contract. Sometimes the buyer engaged his own forwarding agent at the port of loading to book space and to procure the bill of lading; if freight had to be paid in advance this method might be the most convenient. In such a case the seller discharged his duty by putting the goods on board, getting the mate's receipt and handing it to the forwarding agent to enable him to obtain the bill of lading. The case in question belonged to this third type; and it was only in this type, the Judge thought, that any doubt could arise about the seller being a party to the contract.

The contract of carriage in this case was made in the office of Bahr Behrend & Co., for they were both agents for the buyer and freight brokers for the shipowner. An instruction came to Bahr Behrend from the buyer to arrange for the shipment of these goods among other cargo, and a note by Bahr Behrend dated March 29, 1951, recorded that the shipment was booked per the *Jalazed.* The ordinary practice was for the buyer to prepare a bill of lading and to send it to Bahr Behrend. Bahr Behrend checked the items on it from a return made out by the cargo superintendent after shipment and then signed and issued the bill of lading on behalf of the shipowner generally some days after the ship had sailed, dependent on the volume of the cargo to be dealt with. It was the practice in the Port of London for all loading to be done by the port authority at the ship's expense. The whole charge, therefore, for loading from alongside was paid by the ship and covered by the freight; in this case, it included the cost of lighterage from the dock to the ship's side. On April 7 Bahr Behrend, on behalf of the buyer, notified the seller that space had been engaged, and instructed them to dispatch the goods to arrive alongside the vessel.

The question at once arose: if, as the seller contended, there was no contractual relationship between them and the shipowner, how did they get these goods on board? The Judge looked at the situation first from the standpoint of the shipper, the buyer. In the ordinary case, where the shipper took out a bill of lading or an insurance policy, he had at the time of the contract himself got the property in the goods; the question whether he contracted for the benefit of subsequent owners depended on proof of his intention at the time of contracting. But where, as in this case, he had not got the property at the time of the contract, and did not intend to acquire it before the contract began to operate, he must act as agent. He could not intend otherwise; the intention was inherent in the act; he must either professed agency or confessed himself a wrongdoer. For if the shipowner lifted the seller's goods from the dock without the seller's authority he was guilty of conversion to which the shipper, by requiring him to do it, made himself a party. The Judge then looked at it from the standpoint of the ship. If the shipowners were sued for conversion they would surely have redress against the shipper. A person who requested a carrier to handle goods must have the right to deal with them or it would not be safe to contract with him. A shipowner could not be supposed to inquire whether the goods he handled did or did not belong to the shipper who entrusted them to his care; if the goods were not

the shipper's there must be implied a warranty of authority by him that he had the right to contract with regard to them. Then from the standpoint of the seller, if his goods were left behind, and it was said to him: "You made no contract with the ship; what else did you expect?" he would answer, the Judge thought, that he naturally supposed that all the necessary arrangements had been made by the shippers.

In brief, the Judge thought the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him. If it were intended that he should be a party to the whole of the contract his position would be that of an undisclosed principal and the ordinary law of agency would apply. But that was obviously not intended; he could not, for example, be sued for the freight. This was the sort of situation that was covered by the wider principle; the third party took those benefits of the contract which appertain to his interest therein, but took them, of course, subject to whatever qualifications with regard to them the contract imposed. It was argued that it was not reasonable to suppose that the seller would submit to the terms of a contract whose detail he did not know and which might not give him the sort of protection of which he would approve. The Judge did not think that as a matter of business this was so. Most people boarded a bus or train without considering what protection they would get in the event of an accident. The Judge saw nothing unreasonably imprudent in a seller assuming that the buyer, whose stake in the contract was greater than his, would have obtained whatever terms were usual in the trade; if he were legally minded enough to inquire what they were, the answer would be that by statutory requirement the contract was governed by the Hague Rules.

If this conclusion was wrong, there was an alternative way by which, on the facts of this case, the same result would be achieved. By delivering the goods alongside the seller impliedly invited the shipowner to load them, and the shipowner by lifting the goods impliedly accepted that invitation. The implied contract so created must incorporate the shipowner's usual terms; none other could have been contemplated; the shipowner would not contract for the loading of the goods on terms different from those which he offered for the voyage as a whole. This simple solution was the one which Lord Sumner preferred in Elder Dempster & Co. Ld. v. Paterson Zochonis & Co. Ld., and which was adopted in respect of the stevedores' liability in the cases the Judge had mentioned. But, as the Judge had said, the problem in those cases was a rather different one, and the Judge did not think that the solution fitted so well the circumstances of this case. First, it meant that if the goods were not lifted there would be no contract; and a solution that left it in the air was not so acceptable as one that covered it. Secondly, the Judge found it difficult to infer that the shipowner by lifting the goods intended to make any new contract; he would not know where the property in the goods lay; the Judge thought he must have supposed that he was acting under a contract already made through Bahr Behrend, and on the assumption that Bahr Behrend had authority to make it. Thirdly, the Judge doubted whether the seller intended to make any separate contract when he sent down the goods; the Judge thought that he, too, would have supposed that they would be dealt with under the contract of affreightment. But while the Judge did not accept this as the right solution, the Judge thought it was preferable to the alternative of a "bald bailment" which Lord Sumner rejected in Elder Dempster & Co. Ld. v. Paterson Zochonis & Co. Ld., and for which the seller was, in effect, contending in this case.

In the Judge’s judgment the seller were bound by the Hague Rules as embodied in the contract of carriage and, accordingly, could recover no more than £200. There would be judgment for them for that sum.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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Multi-modal transportation involves far more complicated liability regime than port-to-port or airport-to-airport carriage. Pure international sea or air transport often affords better protection by international conventions. Conversely, multi-modal transport entails a variety of operational risk elements on top when the cargo is in- transit warehouse and during overland delivery. Fortunately, these risks are controllable but not without deliberate efforts. Sun-Mobility is the popular risk managers of many multi-modal operators providing professional assistance in liability insurance, contract advice, claims handling, and as a matter of fact risk consultant for their staff around-the-clock.