

# **Bills of Lading vs Sea Waybills, and The Himalaya Clause**

Peter G. Pamel and Robert C. Wilkins  
Borden Ladner Gervais, LLP

Presented at the NJI/CMLA, Federal Court and Federal Court of Appeal  
Canadian Maritime Law Association Seminar  
April 15, 2011  
Fairmont Château Laurier, Ottawa

## **1) Introduction**

Bills of lading and sea waybills are two of the most common forms of transport document used in contemporary shipping. Their similarities and difference, and respective uses, in such trade should be clearly understood by all who are involved in that activity. In particular the meaning of “document of title” used in respect of bills of lading, and whether sea waybills are or are not also such documents of title, have given rise to much debate, which has now largely been resolved in major shipping nations. Also, the impact on these transport documents of compulsorily applicable liability regimes set out in international carriage of goods by sea conventions is also essential to a proper grasp of the role these documents play in international maritime commerce.

It is also interesting to examine how parties other than carriers, shippers and consignees can and do benefit from certain clauses in ocean bills of lading and sea waybills which purport to confer on such third parties or classes of them the exemptions from, and limitations of, liability which marine carriers assume in the performance of their functions.

This paper will attempt to provide an overview of these issues, with special reference to how they are addressed in Canadian maritime law.

## **2) Bills of Lading and Sea Waybills in Modern Shipping**

Bills of lading and sea waybills are the two basic documents that attest to the carriage of goods by water, both domestically within Canada and internationally. They have much in common as well as some differences. It is important to understand the basic character of each, as well as the different types of bills of lading that exist, and how they are used in contemporary shipping on the oceans of the world.

Goods require transport by sea, in most cases, because they have been sold by a seller to a buyer. Often, these two parties are in different countries or in two geographically separated regions of the same country. Often too, where the seller and buyer are strangers and do not trust one another fully, the sale is financed by a documentary credit (letter of credit) issued by the purchaser’s bank in his country in favour of the

seller's bank in his country. It is important to distinguish the contract of sale of the goods, and the possible documentary credit arrangements which may attend that sale, from the contract for the carriage of the goods from the port of loading to the port of discharge or, as is more often the case, from place of receipt of the goods by the carrier to place of delivery. Sea waybills and bills of lading are documents attesting to the contract of *carriage*, although they are, of course, closely related to the underlying contract of sale, and, where applicable, to the documentary credit transaction of the banks concerned as well.

### A) Sea Waybills

The sea waybill is a non-negotiable receipt for the goods loaded aboard the carrying vessel at the port of loading, which also evidences the terms and conditions of the contract of carriage. They are not negotiable documents, nor documents of title.<sup>1</sup> The sea waybill is described in the U.K.'s *Carriage of Goods by Sea Act 1992*<sup>2</sup> as "any document which is not a bill of lading but (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract." (subsect. 1(3)).

Because the waybill is *non-negotiable*, banks involved in documentary credit sales, in most cases, do not allow for the use of waybills in such transactions, especially where the cargo concerned is one likely to be sold and resold one or more times while it is in transit.<sup>3</sup> On the other hand, the sea waybill, unlike the bill of lading, does not have to be tendered by the named consignee or its agent at the port of discharge or place of delivery in order to take possession of the goods there. It suffices if the consignee identifies itself as the party identified as such in the document.<sup>4</sup> For this reason, the sea waybill lends itself well to contemporary international maritime commerce where

<sup>1</sup> E. Gold, A. Chircop & H. Kindred, *Maritime Law* (Toronto: Irwin Law, 2003) at 414.

<sup>2</sup> U.K. 1992, c. 50.

<sup>3</sup> See the Report of the United Nations Conference on Trade and Development (UNCTAD), "The Use of Transport Documents in International Trade", UNCTAD/SDTE/TLB/2003/3, dated November 26, 2003. concerning a survey conducted by UNCTAD with large container operators and several national shipping lines, as well as shippers and their associations, freight forwarders and banks. The survey showed that 88% of respondents had used, issued or required negotiable bills of lading. Of these, 70% used such bills of lading mainly or exclusively. The main reason given was the security provided by negotiable bills of lading under letter of credit transactions. The security of delivery and payment were also cited as reasons for the continuing preference for bills of lading. By comparison, only 51% of respondents stated that they used, issued or required sea waybills. Only 23% of respondents used waybills for the majority of transactions and a mere 18% reported that they used waybills for only 10% or less of all transactions.

<sup>4</sup> *The Rafaella S*, [2003] 2 Lloyd's Rep. 113 at 133 (C.A.), upheld [2005] 1 Lloyd's Rep. 347 (H.L.); *Peer Voss v. APL Co. Pte. Ltd.*, [2002] 2 Lloyd's Rep. 707, 722: "The sea waybill is retained by the shipper and all the consignee need show to take delivery is proof of his identity. It is a receipt, not a document of title. It, unlike a BL, cannot be used as a security to obtain financing." See also the CMI Uniform Rules for Sea Waybills 1990 at subrule 7(i): "The carrier shall deliver the goods to the consignee upon production of proper identification." See also Gold, Chircop & Kindred, *Maritime Law*, 2003 at 414 and 415, note 28, explaining that no special form of identification is needed but that sometimes presentation of the *pro forma* invoice is requested. This invoice is not the commercial invoice, but is a price quotation sent by the shipper in advance of the goods to the consignee to enable the latter to obtain an import licence or to arrange financing.

negotiability of the transport document is not required by the parties to the contract of sale or by the banks involved in financing the purchase through documentary credits, because the waybill consignee does not need to wait for the waybill to arrive by mail from the shipper or to make its way through the complex and rigorous checking process to which bills of lading are exposed in the banking chain in a documentary credit sale. At the same time, the shipper with whom the carrier has contracted remains in control of the goods until just before delivery, and may change the delivery instructions as permitted under the terms of the contract of carriage.<sup>5</sup>

## B) Bills of Lading

Bills of lading fulfill three basic functions. They are receipts for the goods; they evidence the terms of the contract of carriage (by way of clauses usually printed on one side of the document); and (except for the nominative or “straight” bill of lading) they are said to be “negotiable documents of title”.<sup>6</sup> Terming them “documents of title” is really a misnomer, as discussed below, but that term is so steeped in traditional usage as to be virtually impossible to eradicate at this juncture, at least in the English-speaking world.

Similar to sea waybills, bills of lading today usually are standard-form contracts which, in general, are seen as the best evidence of the contract of carriage, although not necessarily the exclusive evidence.<sup>7</sup>

### i) The Three Types of Bills of Lading

Bills of lading are of three types: a) the nominative or “straight” bill; b) the “order” bill; and c) the “bearer” bill.<sup>8</sup> All bills of lading are normally issued in at least three

<sup>5</sup> See *The Rafaela S.*, [2005] 1 Lloyd’s Rep. 347, 360 (H.L.), citing *Schmitthoff’s Export Trade: The Law and Practice of International Trade*, 10<sup>th</sup> ed., 2000, para. 15-033 at 281, stated in pertinent part: “A sea waybill is a non-negotiable transport document and its great advantage is that its presentation by the consignee is not required in order for him, on production of satisfactory identification, to take delivery of the goods, thus avoiding delay both for him and the carrier where the goods arrive before the waybill.”

<sup>6</sup> See generally W. Tetley, *Marine Cargo Claims*, 4th ed., vol. 1, (Montreal: Les Éditions Yvon Blais Inc., 2008) at 524-539; Gold, Chircop & Kindred, *Maritime Law*, 2003 at 408; *Canadian General Electric Co. v. Armateurs du St-Laurent Inc.*, [1977] 1 F.C. 215 at para. 14 (Fed. C. Can. *per* Dubé J.), reversed on other grounds, [1977] 2 F.C. 503 (Fed. C.A.).

<sup>7</sup> *Sewell v. Burdick* (1884), 10 App. Cas. 74, 105; *The Ardennes* [1951] 1 K.B. 55, 59, (1950), 84 Ll. L. Rep. 340, 344 (*per* Lord Goddard). In addition to the terms and conditions printed on the bill of lading, the contract of carriage arguably also includes the carrier’s advertisement of its services, the freight tariff, the carrier’s booking note (a document reserving space on the carrying vessel before the bill of lading or waybill is issued), and oral or written communications between the shipper or consignee (or their agent) and the carrier (or its agent). But in general, one looks first to the bill of lading or the sea waybill document to ascertain the terms and conditions of the contract of carriage.

<sup>8</sup> There is also a “received for shipment” bill of lading, issued when goods have been received by the carrier or its agent but have yet to be loaded on board the carrying ship. Once the goods are so loaded, the bill is stamped “on board”. The shipper may demand a “shipped” bill of lading and must surrender the “received for shipment” bill when the “shipped” bill is issued. In addition, carriers often issue “short form” bills of lading containing, on its face, a clause stating that the terms of the carrier’s standard long form bill of lading are incorporated, which form can be obtained at the carrier’s head office. The incorporation then

originals, usually by the master or an agent of the carrier. In the past, one original was normally given to the shipper for transmission to the consignee (or a bank), one kept by the shipping line (the carrier) for its records, and one carried on board attached to the ship's manifest.<sup>9</sup> Today, we often see shipping lines, in particular those in the liner trade, issuing all three originals to the shipper or its agents, the freight forwarder. Once one of the originals is tendered or surrendered to the carrier or its agent in order to take delivery of the cargo, the other originals are void.<sup>10</sup> In documentary credit transactions, the bill of lading, together with other "shipping documents" (including the sales invoice, the certificate of origin, etc.), must be surrendered to the seller's bank (the "advising bank") and transferred thence to the buyer's bank (the "issuing bank") which issued the documentary credit in favour of the seller, and then eventually to the buyer, so as to permit him to take delivery of the goods at the port of discharge. The banks scrutinize the bill of lading rigorously to ensure its conformity to the terms of the documentary credit.<sup>11</sup> In practice, slowness of mail delivery and the risk that bills of lading will get caught up in the banking system, mean that at times the cargoes in question arrive at the port of destination before the bills of lading reach the hands of the purchasing consignee or endorsee or its agent.

The "straight" bill of lading, like the sea waybill, is a receipt for the goods issued by the carrier or its agent and it also evidences the terms of the contract of carriage. Like the sea waybill, it is not negotiable. Or, more precisely, it is negotiable only once, from the original shipper to the named consignee. Unlike a sea waybill, however, one of the originals of the bill of lading must be surrendered by the named consignee or its agent to the carrier or its agent at the port of discharge or place of delivery, in order to permit the consignee to take delivery of the cargo in question.<sup>12</sup>

The "to order" bill of lading is one which consigns the goods *to the order* of a specified person, who may even be the seller itself or the seller's bank. The seller endorses the bill of lading over to, for example, the buyer upon payment and transfers the rights relating to the document to him. For example, the bill of lading is endorsed

---

replaces the verbatim recitation of the clauses in small print on the bill. See Tetley, *Marine Cargo Claims*, 4<sup>th</sup> ed., 2008, vol. 1 at 552-553.

<sup>9</sup> Gold, Chircop & Kindred, *Maritime Law*, 2003 at 410.

<sup>10</sup> A typical attestation clause to this effect is found on the standard-form Bill of Lading of Zim Integrated Shipping Services Ltd., reading: "IN WITNESS whereof the Master or Agent of the said vessel has signed the number of original Bills of Lading stated below. All of this tenor and date. If this Bill of Lading is consigned to order, one shall be surrendered before delivery and the others to stand void."

<sup>11</sup> For a clear explanation of the functioning of documentary credit sales, see Sir Roy Goode, *Commercial Law*, 2 Ed. (London: Penguin Books, 1995) at 960-1025.

<sup>12</sup> *The Rafaela S*, [2003] 2 Lloyd's Rep. 113 (C.A.), upheld [2005] 1 Lloyd's Rep. 347 (H.L.). See also *Peer Voss v. APL Co. Pte. Ltd.*, [2002] 2 Lloyd's Rep. 707 (Singapore C.A.). Note, however, that in the United States, the *Federal Bills of Lading Act*, 49 U.S.Code 80110(b)(2), specifies that the carrier "... may deliver the goods covered by a bill of lading to ... (2) the consignee named in a nonnegotiable bill" No mention of presentation of the bill by the consignee is made. Accordingly, in the U.S., unlike in the U.K. and Commonwealth countries such as Canada, the nonnegotiable ("straight") bill of lading is essentially similar to the non-negotiable sea waybill. See W. Tetley, *Marine Cargo Claims*, 4th ed., 2008, vol. 1 at 468-469.

“to the order of XYZ Co. Ltd. or assigns”. The order bill is said to be negotiated by endorsement and delivery. One of the originals of the order bill of lading must be surrendered to the carrier or its agent at the port of discharge or place of delivery in order to take delivery of the goods.

The “bearer” bill of lading may take a number of forms. It may state that it is “to bearer”. Or it may be a bill of lading that mentions no particular consignee. Or it may be an order bill of lading that fails to mention to whose order it is made. It may also be a bill of lading that is endorsed in blank (e.g. if it is merely signed by its holder, without specifying to whose order it and the goods concerned are consigned). The bearer bill of lading is transferred by simple delivery. The last such bearer must surrender the bill of lading to the carrier or its agent at the port of discharge in order to take delivery of the goods.

What is common to all bills of lading is that the holder (whether named in the bill of lading or simple endorsee) has the right of possession of the goods, and shipping lines, upon receipt of one original, are obliged to deliver the goods accordingly.

### 3) International Instruments Governing Bills of Lading and Sea Waybills

#### A) Bills of Lading

Originally, at common law, carriers of goods by sea were regarded as “insurers” of the cargoes committed to their care, and benefited from only a few defences (e.g. Act of God, act of the King’s enemies, inherent vice of goods, fault of the shipper). But they were permitted to relieve or lessen their liability by contract. In the nineteenth century (the heyday of *laissez faire* capitalism), carriers, availing themselves of that freedom, tended to impose bill of lading terms which exempted them from liability for virtually any cause of cargo loss or damage. Gradually, the unfairness of this system to cargo interests, which encouraged carrier negligence, led legislators in a number of countries to pass legislation establishing some minimal obligations and liabilities on maritime carriers, as well as restricting their capacity to exclude or limit their liability unreasonably by contract.<sup>13</sup> At the same time they were accorded the right to limit their liability to specified sums of money.

The first international convention on the subject, reflecting the broad lines of this earlier national legislation, was adopted in 1924 and is commonly called the “Hague Rules”.<sup>14</sup> The Hague Rules were drafted by the Comité Maritime International (the

<sup>13</sup> See, for example, the 1893 *Harter Act* in the United States (Act of February 13, 1893, ch. 105, 27 Stat. 445-446, formerly codified at U.S. Code Appx. 190-196, as amended by the Act of October 6, 2006, Public Law 109-304, §6, 120 Stat 1485, enacting 46 U.S. Code 30701-30707). See also the Australian *Sea-Carriage of Goods Act 1904*, No. 14 of 1904 and Canada’s *Water Carriage of Goods Act* of 1910, 9 & 10 Edw. 7, c. 61 (Can.). For a brief overview of these historical developments from a Canadian perspective, see Gold, Chircop & Kindred, *Maritime Law*, 2003 at 433-436.

<sup>14</sup> The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, August 25, 1924 and in force June 2, 1931. An earlier draft of the Rules had been prepared at The Hague, and the subsequent Convention, although signed in Brussels, has generally been referred to in English as the “Hague Rules”, but in French as the *Convention de Bruxelles*.

“CMI”) - a private, international association of maritime jurists founded in Antwerp in 1897, to which belong a number of national maritime law associations, including The Canadian Maritime Law Association representing Canada. Some important changes, also drafted by the CMI, were made to the Hague Rules 1924 by the Visby Protocol of 1968.<sup>15</sup> Then in 1979, another Protocol was adopted at the initiative of the CMI, changing the basic monetary unit referred to in the Convention from Poincaré gold francs to Special Drawing Rights (SDRs) of the International Monetary Fund. This amendment is often referred to as the “SDR Protocol”.<sup>16</sup>

Today in Canada, the rights and immunities, liabilities and limitations of carriers of goods by water under bills of lading are governed, in respect of both domestic and international shipments, by the Hague-Visby Rules,<sup>17</sup> as enacted by the *Marine Liability Act*, Part 5.<sup>18</sup> The regime applies from “tackle to tackle” (i.e. from loading of the goods aboard the carrying ship at the port of loading to their discharge at the port of destination) (arts. I(e) and II), although the parties are free to extend their application by contract to the pre-loading and/or post-discharge periods (art. VII). The Hague-Visby Rules constitute the most common international carriage of goods by sea liability regime at present, to which are party most of Canada’s major trading partners (e.g. the U.K., Japan, most European Union States, etc.). The notable exception is the United States. The U.S.A. continues to adhere to its own *Carriage of Goods by Sea Act* of 1936 (“COGSA”),<sup>19</sup> which is a national enactment of the Hague Rules 1924 with some American modifications. Unlike most national laws implementing the Hague and Hague-Visby Rules, which give the Rules effect with respect only to outbound shipments, US COGSA applies to shipments both to and from the United States. This can create major conflict of laws problems for courts around the world.

---

<sup>15</sup> The Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, February 23, 1968, which entered into force June 23, 1977. The Hague Rules 1924, as amended by the Visby Protocol 1968, are often called the “Hague-Visby Rules 1968”. The Protocol was the outcome of the CMI Conference held in Stockholm in 1963. The CMI met and approved the Protocol after the Conference in the historic city of Visby on the island of Gotland, therefore accounting for the name “Visby Rules” or “Visby Protocol”. The Protocol was only officially adopted in Brussels in 1968, however.

<sup>16</sup> The Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968), adopted at Brussels, December 21, 1979, which Protocol came into force February 14, 1984 (the “Hague-Visby Rules 1968/1979”).

<sup>17</sup> The term “Hague-Visby Rules” as used in this article refers to the Hague Rules 1924, as amended by the Protocols of 1968 and 1979.

<sup>18</sup> S.C. 2001, c. 6, subsect. 43(1) and (2). The Hague-Visby Rules are set out in Schedule 3 of the *Marine Liability Act* (hereafter “MLA”). By subsect. 43(3) of the MLA, Canada, although it has never formally ratified or acceded to the Hague-Visby Rules, is nevertheless considered a “Contracting State” to the Convention concerned.

<sup>19</sup> Act of April 16, 1936, ch. 229, 49 Stat. 1207-1213, formerly codified at 46 U.S.Code Appx. 1300-1315, but now reproduced as a note to 46 U.S. Code 30701, pursuant to Public Law 109-304, § 6(c), Oct. 6, 2006, 120 Stat. 1516.

Canada has also enacted, by way of the *Marine Liability Act*,<sup>20</sup> another international convention on carriage of cargo by sea, the Hamburg Rules 1978.<sup>21</sup> They were drafted, not by the CMI, but rather by the United Nations Commission on International Trade Law (UNCITRAL). The Hamburg Rules have proven less popular internationally than the Hague or Hague-Visby Rules, and have yet to be implemented by any of Canada's major trading partners.<sup>22</sup> Accordingly the *Marine Liability Act* requires the federal Minister of Transport to submit a report to Parliament every five years, as to whether the Hague-Visby Rules should be replaced by the Hamburg Rules. The last such report, submitted at the end of 2009, recommended against such a transition.<sup>23</sup> It remains to be seen whether Canada will eventually give the force of law to the Hamburg Rules or whether, instead, it will ratify the more recent international marine cargo liability convention – the Rotterdam Rules,<sup>24</sup> or, indeed, whether it will choose to remain a Hague-Visby State.

The typical bill of lading also generally provides a law and jurisdiction clause, which specifies the regime or regimes to govern the carrier's liability. Such clauses identifying the law applicable to the contract of carriage in question are normally enforced, except where they conflict with mandatory regimes imposed by national legislation.<sup>25</sup> These clauses can sometimes be multifaceted. See, for example, the standard-form Bill of Lading of Zim Integrated Shipping Services Ltd., which provides, at clause 4(II) on "Responsibility":

II. (a) During the period of carriage, the Carrier's liability and responsibility shall be in accordance with the terms of this Bill of Lading and the Carrier's tariffs, and except for shipments carried to or from the

<sup>20</sup> See the *Marine Liability Act*, S.C. 2001, c. 6, subsect. 45(1) and (2). The Hamburg Rules are set out in Schedule 4 of the MLA.

<sup>21</sup> The United Nations Convention on the Carriage of Goods by Sea, adopted at Hamburg, March 31, 1978 and in force as of November 1, 1992. The Hamburg Rules provide higher limits of carrier liability than the Hague and Hague-Visby Rules, apply from "port to port" (rather than only from "tackle to tackle") and include provisions on jurisdiction and arbitration not found in the Hague or Hague-Visby regimes. These features are among those that have dissuaded some States from becoming party to the Hamburg Convention.

<sup>22</sup> Thirty-four States are presently party to the Hamburg Rules. See the website of the United Nations Commission on International Trade Law (UNCITRAL) at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/Hamburg\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html) (last visited: February 21, 2011).

<sup>23</sup> See "Report to Parliament - Marine Liability Act, Part 5 - Liability for the Carriage of Goods by Water" (Document No.: TP 14947E), on-line at <http://www.tc.gc.ca/eng/policy/report-acf-hamburg-menu-1099.htm> (last visited: February 21, 2011).

<sup>24</sup> The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted at Rotterdam, September 23, 2009 but not yet in force. See text at: [http://www.uncitral.org/pdf/english/texts/transport/rotterdam\\_rules/09-85608\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf) (last visited: February 21, 2011).

<sup>25</sup> For example, under art. X of the Hague-Visby Rules, those Rules are mandatorily applicable where the bill of lading is issued in a Contracting State, or where the carriage is from a port in a Contracting State, or where the contract contained in or evidenced by the bill of lading provides that the Rules or the legislation of any State giving effect to them are to govern the contract. Each Contracting State is obliged to apply the Rules to such bills of lading, regardless of the "proper law" of the contract which the parties may specify in the bill of lading itself.

U.S.A., shall be subject to the rules contained in the International Convention for Unification of Certain Rules Relating to Bills of Lading dated 25<sup>th</sup> August 1924 as amended in the Protocol to Amend the International Convention of the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968 and in the Brussels Protocol, 1979 (hereinafter referred to as “the Hague Rules”) which are hereby fully incorporated in this Bill of Lading, along with any legislation making the Hague Rules or any amendment thereto compulsorily applicable to this Bill of lading.

(b) for shipments to or from the U.S.A., this bill of lading shall be only subject to the U.S. Carriage of Goods By Sea Act, 46 U.S.C. 1300 et seq. (US COGSA) which Act shall by this contract also apply before loading and after discharging as long as the goods remain in the Carrier’s custody or control.

## B) Sea Waybills

Sea waybills are not considered by most authorities to be governed *pleno jure* by the Hague or Hague-Visby Rules. The reasoning underpinning this position is that those Rules, by their art. II, only apply to “every contract of carriage of goods by sea”, and art. I(b) defines the term “contract of carriage” as meaning only contracts of carriage covered by a “bill of lading or similar document of title”. Because the sea waybill is, in the opinion of most maritime jurists, not a “bill of lading” or a “similar document of title”, the general view is that the Hague and Hague-Visby regimes of carriage by sea do not govern sea waybills by their own force, but only if a national statute or some contractual incorporation renders one or other of those conventions applicable to the contract of carriage which the waybill evidences. This position finds support in United Kingdom decisions such as *Harland & Wolf v. Burns & Laird Lines*,<sup>26</sup> *Hugh Mack & Co. v. Burns & Laird Lines*,<sup>27</sup> and *The European Enterprise*.<sup>28</sup> In the United States, the Ninth Circuit, in *Starrag v. Maersk Inc.*,<sup>29</sup> took a similar position. In Canada, Dubé J. of the Federal Court held that a non-negotiable receipt was not a bill of lading under the Hague Rules in *Canadian General Electric v. Les Armateurs du St-Laurent (The Maurice Desgagnés)*.<sup>30</sup>

More recently, this understanding has been reiterated by the Federal Court in respect of the Hague-Visby Rules, in *Cami Automotive Inc. v. Westwood Shipping Lines Inc. (The Westwood Anette)*.<sup>31</sup> This was a cargo claim relating to goods damaged in a railway accident after their carriage by sea from Japan to Canada. The marine

<sup>26</sup> (1931) 40 Ll. L. Rep. 286 (Scottish Ct. of Session), although the documents there, described as “sailing bills” were not fully described in the judgment as being non-negotiable receipts.

<sup>27</sup> (1944) 77 Ll. L. Rep. 377 (Northern Ireland C.A.).

<sup>28</sup> [1989] 2 Lloyd’s Rep. 185, 188 (relating to a non-negotiable consignment note/waybill).

<sup>29</sup> 486 F.3d 607, 612, note 5, 2007 AMC 1217, 1221, note 5 (9 Cir. 2007), referring to the non-negotiable sea waybill in that case as the “short form”.

<sup>30</sup> [1977] 1 F.C. 215 (Fed. C. Can.), reversed on other grounds, [1977] 2 F.C. 503 (Fed. C.A.).

<sup>31</sup> 2009 FC 664 (Fed. C. Can. *per* Blanchard J.).



carriage had been covered by a document which the Court, after careful analysis, concluded was a non-negotiable sea waybill, rather than a negotiable or a “straight” bill of lading. The Federal Court, speaking through Blanchard J., invoking *The Rafaela S.*,<sup>32</sup> held that a waybill, unlike a straight bill of lading, is not a “document of title” requiring presentation at the port of discharge.<sup>33</sup> The waybill in this case required US COGSA to apply to the contract of carriage evidenced by the document if the Hague-Visby Rules were not compulsorily applicable to that contract under the law of the place where the dispute was adjudicated (Canada). It was therefore necessary to determine whether the Hague-Visby Rules, as enacted for Canada by the *Marine Liability Act*, applied to sea waybills. The learned justice observed:

42. Since COGSA applies only if the Hague-Visby Rules are not compulsorily applicable to this waybill in Canada, the first step in determining which regime governs the transportation under this waybill is to examine whether or not the Hague-Visby Rules are compulsorily applicable.

43. Section 43 of the *Marine Liability Act* (2001, c.6) is the statutory provision giving the Hague-Visby Rules force of law in Canada in respect of contracts for the carriage of goods by water between different states. These states are enumerated in Article X of the Hague-Visby Rules. It is undisputed that both Canada and Japan are contracting states for the purposes of Article X. (Affidavit of Shuji Yamaguchi, signed January 29, 2009).

44. The Hague-Visby Rules only apply to “contract[s] for carriage”. This term is defined in article 1 of the Hague-Visby Rules as those contracts covered by “a bill of lading or any similar document of title”. Since the Shipping Document at issue is not a bill of lading, in order for the Hague-Visby Rules to compulsorily apply, the waybill must be a “similar document of title”. As mentioned above, it is clear, that waybills, by definition, are not documents of title.

45. Since the impugned shipping document is not a bill of lading or similar document of title the Hague-Visby Rules do not compulsorily apply. It follows therefore, pursuant to Clause 2 of the waybill, that the applicable regulatory regime in this instance is COGSA.

The *Westwood Anette* is under appeal to the Federal Court of Appeal. The judgment in first instance adopts the prevailing international understanding that the Hague and Hague-Visby Rules do not apply to waybills by their own force. Keeping Canadian maritime law in accord with the prevalent thinking of other maritime law jurists and scholars around the globe is important. In this regard, it seems proper to recall the

---

<sup>32</sup> [2003] 2 Lloyd’s Rep. 113 (C.A.), upheld [2005] 1 Lloyd’s Rep. 347 (H.L.).

<sup>33</sup> 2009 FC 664 at para. 17.

haunting words of Lord Macmillan in *Foscolo Mango v. Stag Line*,<sup>34</sup> written some eighty years ago:

It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.

Although the Hague and Hague-Visby Rules do not apply automatically to sea waybills, one or other of those liability regimes is very often made applicable to contracts of carriage evidenced by sea waybills by way of contractual incorporation of those Rules into the waybills, or else by national legislation or international conventions.

Contractual incorporation is quite frequent.<sup>35</sup> Waybills also often incorporate by reference the CMI Uniform Rules for Sea Waybills 1990.<sup>36</sup> These Rules are a set of provisions for waybill carriage, adopted by the Comité Maritime International (CMI), which carriers may *voluntarily* incorporate into their waybills.<sup>37</sup> Rule 4(i) provides that the carriage of goods is subject to “any International Convention or National Law which is, or if the contract of carriage had been covered by a bill of lading or similar document of title would have been, compulsorily applicable thereto. Such convention or law shall apply notwithstanding anything inconsistent therewith in the contract of carriage.”<sup>38</sup>

---

<sup>34</sup> (1931) 41 Ll. L. Rep. 165, 174, [1932] A.C. 328, 350 (H.L.). This holding was approved in Canada in *Dominion Glass Co. Ltd. v. The Anglo Indian*, [1944] S.C.R. 409, 420 and in *Maxine Footwear Co. v. Canadian Government Merchant Marine Ltd.*, [1959] A.C. 589, 603, [1959] 2 Lloyd’s Rep. 105, 113 (P.C.). See also in Australia, *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corp. (The Bunga Seroja)* (1998), 158 A.L.R. 1, 41, [1999] 1 Lloyd’s Rep. 512, 536 (Aust. H.C.): “In construing a text such as the Hague Rules, this Court, to the greatest extent possible, should prefer the construction which is most consistent with that which has attracted general international support rather than one which represents only a local or minority opinion.”

<sup>35</sup> See, for example, the standard-form Sea Waybill of Zim Integrated Shipping Services Ltd., at clause 4(II)(a) and (b), which is in similar language to the corresponding clause cited above from that company’s standard-form Bill of Lading.

<sup>36</sup> For the English text of the CMI Uniform Rules for Sea Waybills 1990, see (1991) 22 Journal of Maritime Law and Commerce 617-619. The Uniform Rules are also available on-line, for example at: <http://web.uct.ac.za/depts/shiplaw/cmi/cmiwaybl.htm>.

<sup>37</sup> The CMI Uniform Rules for Sea Waybills 1990 have been incorporated by reference into many standard-form waybills, including those developed by the Baltic and International Maritime Council (BIMCO), such as the Non-Negotiable General Sea Waybill, Revised 1995 (code name: “Genwaybill”); the Non-Negotiable Liner Sea Waybill (code name: “Linewaybill”); the Combined Transport Sea Waybill 1995 (code name: “Combiconwaybill”); and the Multimodal Transport Waybill 1995 (code name: “Multiwaybill”).

<sup>38</sup> See also rule 8, providing: “In the event of anything contained in these Rules or any such provisions as are incorporated into the contract of carriage by virtue of Rule 4, being inconsistent with the provisions of any International Convention or National Law compulsorily applicable to the contract of carriage, such Rules and provisions shall to that extent but no further be null and void.”

National legislation in a number of countries renders the Hague-Visby regime or a national modification of it applicable to the maritime carriage of goods under sea waybills. In the United Kingdom, the *Carriage of Goods by Sea Act 1971*,<sup>39</sup> giving the force of law to the Hague-Visby Rules, provides at paragraph 1(6)(b) as follows:

Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to:

...

- (b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading.<sup>40</sup>

In some other countries too, the water carriage of goods under sea waybills is regulated by national statutes. Examples are Australia,<sup>41</sup> New Zealand,<sup>42</sup> the Nordic countries<sup>43</sup> and South Africa,<sup>44</sup> as well as Singapore.<sup>45</sup>

The very fact that these countries considered it necessary to enact specific legislation to bring sea waybills within the ambit of their compulsorily applicable national maritime carriage of goods regimes is evidence of the general worldwide view that sea waybills are not subject to the Hague or Hague-Visby Rules by force of law. This point was stated expressly by Blanchard J. in *The Westwood Anette*.<sup>46</sup>

The CMI Uniform Rules also appear to reflect the general international understanding that waybills are not subject to the Hague or Hague-Visby regimes *pleno jure*,

<sup>39</sup> U.K. 1971, c. 19 as amended.

<sup>40</sup> The receipt must be marked non-negotiable and must contain an express term stating explicitly that the Rules apply to it “as if the receipt were a bill of lading”. See *The European Enterprise*, [1989] 2 Lloyd’s Rep. 185, 189.

<sup>41</sup> See, for example, Australia, with its *Carriage of Goods by Sea Act 1991*, Act No. 160 of 1991, Schedule 1A (Schedule of Modifications), enacted by the *Carriage of Goods by Sea Regulations 1998*, Statutory Rule No. 174 of 1997, at art. 1(1)(g)(iv), defining “sea carriage document” to include sea waybills, as well as consignment notes and ship’s delivery orders. See also art. 10(1): “Subject to paragraph 6, these Rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside Australia, regardless of the form in which the sea carriage document is issued.”

<sup>42</sup> *Marine Transport Act 1994*, Act 104 of 1994, subsect. 209(2).

<sup>43</sup> See the Nordic Maritime Code 1994 (applying in Denmark, Norway, Sweden and Finland). For example, see the Finnish version of the Code, at chap. 13, sect. 1(5), defining “transport document” to mean “a bill of lading or any other document which evidences a contract of carriage”.

<sup>44</sup> See South Africa’s *Carriage of Goods by Sea Act 1986*, Act No. 1 of 1986, at paragraph 1(1)(c), applying the Hague-Visby Rules to non-negotiable documents.

<sup>45</sup> See Singapore’s *Carriage of Goods by Sea Act*, Act 30 of 1972, as amended by Act 6 of 1995, paragraphs 3(4)(b), 5(a) and 5(b).

<sup>46</sup> 2009 FC 664 at para. 46: “Professor William Tetley, in his treatise entitled *Marine Cargo Claims*, 4 Ed, (Quebec: Thompson Carswell, 2008) vol. 2 at 2304, informs us that countries such as the U.K., South Africa, New Zealand, Singapore, Australia, and the Nordic countries, have all passed legislation which enables the Hague-Visby Rules (or adaptations thereof) to apply to sea waybills. Clearly then, those jurisdictions did not consider that the Hague-Visby Rules applied to sea waybills on their own accord. No such legislation providing for the application of the Hague-Visby Rules to sea waybills has been passed in Canada.”

because at subrule 1(ii) they provide: “They [the CMI Rules] shall apply when adopted by a contract of carriage which is not covered by a bill of lading or similar document of title, whether the contract be in writing or not.”

More modern international conventions on the carriage of goods by sea apply to waybills. The Hamburg Rules 1978, for example, by art. 2(1), apply to “all contracts of carriage between two different states”, which would include waybills, inasmuch as they evidence contracts of carriage of goods by sea. So in States party to the Hamburg Rules, waybills are subject to that international convention.

The Rotterdam Rules 2009, define “transport document” to include a document issued under a contract of carriage by the carrier and evidences or contains a contract of carriage (art. 1(14)). Those Rules expressly apply to a “non-negotiable transport document” and a “non-negotiable electronic transport record” (arts. 1(16) and 1(20)) as well as to a “negotiable transport document” and a “negotiable electronic transport record” (arts. 1(15) and 1(19)). Hence sea waybills (printed or electronic) are covered, as well as bills of lading (printed or electronic).

Should Canada decide to give the force of law to the Hamburg Rules or to ratify the Rotterdam Rules, waybills will then be subject to one or other of those international maritime transport of goods conventions. Alternatively, the *Marine Liability Act* could be amended to achieve the same end.

#### 4) The Bill of Lading as a “Document of Title” – a Misleading Misnomer

Art. I(b) of the Hague-Visby Rules, unchanged from the original Hague Rules of 1924, provides:

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,

...

(b) “contract of carriage” 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 water, including any bill of lading or any *similar document as aforesaid* issued under or pursuant to a charterparty 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; [Emphasis added]

When one refers to a bill of lading as a “document of title”, as the English text of art. I(b) does, one is tempted to think that the bill of lading attests to the ownership of the goods which it concerns. Accordingly, it would be logical to conclude that the negotiation of an order bill of lading or of a bearer bill of lading from its original holder (usually the shipper) to its original consignee, and then perhaps on to other endorsees or bearers in a chain of subsequent holders, would, in effect, suffice to convey to such transferees the right of ownership of the goods to which the bill of

lading relates. On further examination, however, that is not the true meaning of “document of title” in relation to negotiable bills of lading.

Calling a bill of lading a “document of title” is really a misnomer if one construes that term to refer to the transfer of property in the goods to which the bill relates. The true character of the bill of lading becomes especially clear when one considers the French text of the original Hague Rules (the sole authentic version of those Rules), and in particular of art. I(b) (which remains unchanged in the Hague-Visby Rules). That provision refers to a “*contrat constaté par un connaissance ou par tout document similaire formant titre pour le transport des marchandises par mer.*” As Lord Steyn observed in his speech in *The Rafaela S*, the authoritative French version of art. I(b) “... contains no reference to the English concept of a ‘document of title’ at all. Instead it focuses on the right to possession of the goods vesting in the holder of the document. This makes it singularly inappropriate to invoke the meaning of ‘document of title’ at common law.”<sup>47</sup> Lord Rodger of Earlsferry, for his part, opined that “*tout document similaire*” was simply a document:<sup>48</sup>

... that entitles the holder to have the goods carried by sea – and, obviously, to have them delivered to the appropriate person at the end of the voyage. Nothing is said about the document having any effect in relation to the title to the goods, in a property sense.

In other words, a bill of lading is, in fact, a document of *delivery*, relating to the right of possession of the goods it mentions, not a document of *title* relating to the right of property in those goods.

As Mustill, L.J. as he then was stated in *The Delfini*,<sup>49</sup> in addition to being a receipt for the goods and evidence of the contract of carriage, the bill of lading fulfills two distinct functions:

1. It is a symbol of constructive possession of the goods which (unlike many such symbols) can transfer constructive possession by endorsement and transfer: it is a transferable “key to the warehouse”.
2. It is a document which, although not itself capable of directly transferring property in the goods which it represents, merely by endorsement and delivery, nevertheless is capable of being part of the mechanism by which property is passed.

Simon Baughen<sup>50</sup> has commented on the need to distinguish between the function of the bill of lading as a document transferring “constructive possession” of the goods, and its (sometime) function as a document of title transferring ownership. The second function is only performed where transfer of ownership is the intention of the parties to the bill.

<sup>47</sup> [2005] 1 Lloyd’s Rep. 347, 359.

<sup>48</sup> *Ibid.*, at 364.

<sup>49</sup> [1990] 1 Lloyd’s Rep. 252 at 268 (C.A.).

<sup>50</sup> S. Baughen, *Shipping Law*, 3rd ed. (London and Sydney: Cavendish Publishing Limited, 2004) at 6-8.

Therefore, as our own Professor William Tetley has perceptively written:<sup>51</sup>

The term “document of title” as applied to a bill of lading generally refers *not* to “title” in the sense of *ownership* of the goods carried under the bill, but, more precisely, to the right to *possession* of them. “Title” thus has to do primarily with the right of the consignee or last endorsee of the bill to demand delivery of the goods from the carrier or its agent at the port of discharge. In this sense, the bill of lading, although traditionally termed a “document of *title*”, is really better understood as being a document of *transfer*.

Indeed, even the Incoterms of the International Chamber of Commerce (particularly FOB, FAS, CIF and CFR), which are terms of sale in worldwide usage in respect of the sale of goods carried by sea, do not concern themselves with the passing of title (property) in the goods, but only with the passing of risk. The passing of property is properly left to the terms and conditions of the contract of sale.<sup>52</sup>

#### A) The *Bills of Lading Act* and the Bill of Lading as a Document of Title

The impression that the negotiation of the bill of lading conveys title (in the sense of property) in the goods mentioned in the bill is unfortunately reinforced by the terms of Canada’s *Bills of Lading Act*,<sup>53</sup> which provides at sect. 2:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading *to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement*, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself. [Emphasis added]

The Canadian *Bills of Lading Act* dates from 1889.<sup>54</sup> It was copied almost *verbatim* from the U.K.’s *Bills of Lading Act, 1855*,<sup>55</sup> now repealed,<sup>56</sup> and has never been amended.

The purpose of the 1855 enactment in the United Kingdom (which Canada copied in 1889) was to provide for rights of suit in contract against the carrier by the consignee or endorsee of a bill of lading, even though in many cases, it was the shipper, rather than the consignee or any endorsee of the bill, who had actually contracted for the carriage with the carrier (and suffered the loss), thus raising a problem of lack of privity of contract. The statute resolved this difficulty by conferring contractual rights

<sup>51</sup> *Marine Cargo Claims*, 4th ed., 2008, vol. 1 at 533.

<sup>52</sup> See International Chamber of Commerce, *Incoterms 2010* (Paris: ICC Publications No. 715EF, 2010), Introduction, para. 4. Incoterms 2010 came into force on January 1, 2011.

<sup>53</sup> R.S.C. 1985, c. B-5.

<sup>54</sup> 52 Vict. c. 30 (Can.).

<sup>55</sup> 18 & 19 Vict. c. 111.

<sup>56</sup> See the U.K.’s *Carriage of Goods by Sea Act 1924*, U.K. 1924, c. 50, subsect. 6(2).

of suit on the consignees and endorsees of bills of lading who had become owners of the goods in question “upon or by reason of” the consignment or endorsement of those instruments, whether or not they had actually concluded the relevant contracts of carriage of those goods with the carriers.

This association of the passing of title in the goods with the consignment or endorsement of the bill of lading was understandable in 1855, because at that time, and indeed long before that, in the unwritten custom of merchants that had evolved in Europe over centuries, the transfer of possession of the bill of lading almost always went hand in hand with the transfer of ownership of the cargo to which the bill related.<sup>57</sup>

As time passed, however, things changed. In the twentieth century in particular, the link between ownership of the goods and the negotiation of the bill of lading became less automatic. In some cases, the seller/shipper reserved to himself a right of disposal of the goods, with the result that the order bill was endorsed, not in order to transfer property in the merchandise involved, but merely to permit the consignee or endorsee to take delivery of it as agent for the shipper. Another problem occurred where goods carried in bulk were lost in transit, thus precluding the consignee or endorsee of the bill from claiming that he had acquired title to the cargo upon or by reason of the bill’s consignment or endorsement. Also, where goods are shipped in bulk under several bills of lading, the requirement of the *Sale of Goods Act*,<sup>58</sup> requiring that the goods be “ascertained” before ownership of them may pass, posed a further problem in respect of the transfer of rights of suit being dependent upon the consignment or endorsement of the bill.<sup>59</sup>

The English courts, with their typical common law creativity, managed to mitigate the effects of these problems of who could sue the carrier for cargo loss or damage, by resorting to the law of tort or the law of bailment, and by developing theories of “implied contract” or “special contract”.<sup>60</sup> But ultimately, the U.K. Parliament adopted the *Carriage of Goods by Sea Act 1992*,<sup>61</sup> which finally broke the link between the transfer of possession of the bill of lading and the passing of property in the goods as the criterion of the transfer of the right of suing the carrier contractually. Today, the right of the consignee or endorsee to sue the ocean carrier in contract in the U.K. depends merely upon the cargo plaintiff being the “lawful holder” of the bill of lading.<sup>62</sup> The consignee named in a sea waybill, “to whom delivery of the goods to

---

<sup>57</sup> Note, however, that under the 1855 statute, the transfer of a bill of lading really created only a rebuttable *presumption* that title to the goods was meant to pass by its transfer. See, for example, *The Aliakmon*, [1985] 1 Lloyd’s Rep. 199, 204 (C.A.), where that presumption was held to have been rebutted.

<sup>58</sup> U.K. 1979, c. 54, sect. 16.

<sup>59</sup> See Tetley, *Marine Cargo Claims*, 4<sup>th</sup> ed., 2008, vol. 1 at 456-457 for a summary of some of these problems.

<sup>60</sup> *Ibid.* at 457-458.

<sup>61</sup> U.K. 1992, c. 50.

<sup>62</sup> *Carriage of Goods by Sea Act 1992*, paragraph 2(1)(a): “Subject to the following provisions of this section, a person who becomes: (a) the lawful holder of a bill of lading;... shall (by virtue of becoming the holder of the bill...) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.” A person in possession of the bill who is identified in it as the

which a sea waybill relates is to be made by the carrier” in accordance with the contract of carriage may also sue the carrier in contract.<sup>63</sup> The right of suit in the United Kingdom, at least under order and bearer (i.e. negotiable) bills of lading, is thus totally divorced today from the question of where ownership of the merchandise lies or whether or not property in the goods in question passes “upon or by reason of” the consignment or endorsement of the bill of lading. In Canada, however, the failure to modify our *Bills of Lading Act* in a manner similar to that employed in the United Kingdom means that the problem remains to be addressed.

It is to be hoped that Transport Canada, in conjunction with the CMLA and other stakeholders, will take up the challenge of updating of the *Bills of Lading Act* when the Department officials embark upon their promised in-depth examination of carriage by goods by water law in Canada – a review which they have undertaken to conduct before their next quinquennial review, in 2015, of the advisability of Canada implementing the Hamburg Rules to replace the Hague-Visby Rules.<sup>64</sup> At that time, it is to be hoped that they will see fit to recommend revising or replacing our 1889 statute with a more modern enactment, which will sever, once and for all, the misleading connection between the transfer of the rights and obligations under the bill of lading, and the transfer of ownership of the goods it contemplates, in relation to conveying rights of action in contract against water carriers of merchandise.

In consequence, although the term “document of title” is solidly entrenched in maritime law vocabulary surrounding the Hague and Hague-Visby Rules, the bill of lading should be understood to be what it really is, and indeed always has been: a document of *possession*, used not to identify who owns the goods or to convey such ownership, but purely and simply to specify who has a right to take delivery of them from the carrier at the port of discharge.

In the *Westwood Anette*, Blanchard J. stated:

In other words, whatever its form, a bill of lading must be presented at the port of discharge to ensure the delivery of the goods. This is because both a negotiable and non-negotiable bill of lading are documents of title. A waybill, on the other hand, is distinguished from both bills of lading and straight bills of lading based on the fact that waybills are not documents of title. As such, they need not be presented to the carrier.

The point of the trial judge was that sea waybills were not to be considered as bills of lading for the purposes of the application of the Hague-Visby Rules. However when speaking of bills of lading being documents of title, his Lordship’s comments must be

---

consignee of the goods is the holder and is regarded as the lawful holder wherever he has become the holder of the bill in good faith. See paragraph 5(2)(a). Similar rights of suit in contract are granted by paragraph 2(1)(b) and (c) of the same statute to persons entitled to delivery of the goods under a sea waybill and persons to whom a ship’s delivery order relates.

<sup>63</sup> *Ibid.*, paragraph 2(1)(b).

<sup>64</sup> “Report to Parliament - Marine Liability Act, Part 5 - Liability for the Carriage of Goods by Water” (Document No.: TP 14947E), *supra*, at Part V, Conclusion.



read to mean documents evidencing the right of possession or transfer. What is clear is that unlike bills of lading, sea waybills need not be tendered to the carrier in order to secure possession of the cargo. In fact sea waybills are often exchanged only electronically, there being no physical document to be surrendered to the carrier.

#### B) The “Negotiability” of Order and Bearer Bills of Lading

Another terminological ambiguity surrounding bills of lading deserves at least a passing mention. When one says that an order bill of lading or a bearer bill of lading is a “negotiable” document, one must be clear as to the meaning of that adjective. In particular, it must be understood that such a bill of lading is not “negotiable” in the same sense as a bill of exchange or a cheque. It does not convey to the consignee or endorsee a better title than the transferor of the instrument possessed, as does the negotiation of a cheque or bill of exchange. Rather the order or bearer bill of lading is “negotiable” only in the sense that it is transferable.<sup>65</sup>

### 5) The Himalaya Clause – Another Pillar of Carriage of Goods by Sea Law

Just as bills of lading and sea waybills play a key role in contemporary shipping, some of the clauses typically found in those instruments also play a tremendously important role in modern law relating to the carriage of goods by sea. Among these is the contractual term commonly called the “Himalaya Clause”.

The Himalaya Clause takes its name from the good ship HIMALAYA, a passenger vessel. One day in 1952, a passenger called Mrs. Adler was in the process of boarding the ship in the Port of Trieste, when she fell some sixteen feet from a gangway that she alleged had been negligently secured by the crew. Her passenger ticket contained a non-responsibility clause exempting the carrier from liability for her injuries, so the lady took suit against the master, a Mr. Dickson, as well as the boatswain. The case – *Adler v. Dickson (The Himalaya)* – went to the English Court of Appeal.<sup>66</sup> The Lords Justices there held that Mrs. Adler’s passenger ticket did not, either expressly or by implication, benefit servants or agents of the carrier, with the result that Dickson was not protected by the ticket’s exception clause. The Court, speaking through Denning L.J., nevertheless declared that in the carriage of passengers, as well as the carriage of goods, the law permitted a carrier to stipulate not only for himself, but also for those whom he engaged to carry out the contract.<sup>67</sup> It was not long before the decision came to the attention of carriers of goods, and clauses began to be inserted in bills of lading the purpose of which was to extend to servants and agents of carriers (such as stevedores and terminal operators, who perform services before loading and after

---

<sup>65</sup> See *Kum v. Wah Tat Bank*, [1971] 1 Lloyd’s Rep. 439, 446 (P.C. *per* Lord Devlin); *Nippon Yusen Kaisha v. Ramjiban Serowgee*, [1938] A.C. 429, 449 (P.C. *per* Lord Wright): “a bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and... the transferee of a bill of lading does not get a better title than his transferor.” See also Gold, Chircop & Kindred, *Maritime Law*, 2003 at 413: “Strictly speaking, the value represented by the bill of lading is not negotiated, as a negotiable instrument, such as a cheque may be, but is simply transferred.”

<sup>66</sup> [1954] 2 Lloyd’s Rep. 267 (C.A.).

<sup>67</sup> *Ibid.* at 272.

discharge) the immunities and limitations of liability which the carriers themselves enjoyed under the terms of the contracts of carriage concerned. These clauses, in fond memory of Mrs. Adler, came to be known as “Himalaya Clauses”.<sup>68</sup>

The major problem with Himalaya Clauses, of course, was that the third parties seeking the benefit of the carrier’s exemptions and limitations had not contracted directly with the shippers or consignees. The latter had contracted only with the carrier. Accordingly, the Himalaya Clause seemed to fly in the face of the venerable common law principle of privity of contract.<sup>69</sup> There was also the problem of what consideration could be said to have passed from the third party to the carrier to support the third party benefit.

Viscount Simonds laid the foundation for the resolution of these problems in *Midland Silicones Ltd. v. Scruttons Ltd.*, by enunciating what came to be called the “agency theory”:<sup>70</sup>

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. And then to affect the consignee it would be necessary to show that the provisions of the Bills of lading Act, 1855, apply.

In due course, in *The Eurymedon*,<sup>71</sup> the Privy Council concluded that the stevedores provided consideration for the benefit conveyed by the Clause simply by discharging the cargo from the vessel:

The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading.

---

<sup>68</sup> As Mr. Justice Harrington of the Federal Court noted in his decision in *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.*, [2009] 2 F.C.R. 496 at para. 54, referring to the *Adler v. Dickson* decision: “Since then, benefits have been successfully extended to employees, servants, agents and subcontractors by means of a Himalaya Clause.”

<sup>69</sup> See *Dunlop Pneumatic Tyre v. Selfridge and Co. Ltd.*, [1915] A.C. 847, 853 (H.L. *per* Viscount Haldane): “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract.”

<sup>70</sup> [1962] A.C. 446, 474, (1961) 2 Lloyd’s Rep. 365, 374 (H.L.).

<sup>71</sup> *New Zealand Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd.*, [1975] A.C. 154, 168, [1974] 1 Lloyd’s Rep. 534, 539 (P.C.).

Despite criticisms, the Himalaya Clause has generally been regarded as useful. In *The Rigoletto*,<sup>72</sup> for example, Rix L.J. declared:

Lord Reid's fourfold test for the successful invocation of a direct contract between shipper and stevedore via a Himalaya clause contained in a contract of carriage between shipper and carrier is set out in *Midland Silicones v. Scruttons*.... Forty years on, there now tends to be little difficulty in giving successful effect to that test: see *The Eurymedon*, [1974] 1 Lloyd's Rep. 534; [1975] A.C. 154, *The New York Star*, [1980] 2 Lloyd's Rep. 317; [1981] 1 W.L.R. 138, *The Mahkutai*, [1996] 2 Lloyd's Rep. 1 at p. 8, [1996] A.C. 650 at pp. 664-665.

The Himalaya Clause, based on Lord Reid's agency theory, was finally adopted in the United States by the Supreme Court in *Robert C. Herd & Co. v. Krawill Machinery Corp.*<sup>73</sup> and in Canada by the Supreme Court of Canada in *The Buenos Aires Maru*.<sup>74</sup> The Himalaya Clause is now firmly entrenched in Canadian maritime law.

As time has passed, the Himalaya Clause has developed and widened to include more beneficiaries and additional benefits. A typical Himalaya Clause today may be found in Clause 4 of the standard-form Bill of Lading of Zim Integrated Shipping Services Ltd., providing, in Clause 4(IV):

IV. It is hereby expressly agreed that no servant or agent of the Carrier (including any stevedore, terminal operator, sub-carrier or independent contractor employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment. Without prejudice to the generality of the foregoing provisions of this Clause, every right, including the right to litigate in the agreed jurisdiction as mentioned in Clause 24 hereof, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to every such servant or agent of the Carrier (including any stevedore, terminal operator, sub-carrier, or independent contractor) acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the carrier, if necessary, is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons as aforesaid, and all such persons shall to this extent be or deemed to be parties to this contract. In any event whatsoever the aggregate of the amounts recoverable from the Carrier and his servants or agents, sub-carriers or independent contractors, including any stevedore or

<sup>72</sup> [2000] 2 Lloyd's Rep. 532, 542 (C.A.).

<sup>73</sup> 359 U.S. 297, 1959 AMC 879 (1959).

<sup>74</sup> *ITO – International Terminal Operators v. Miida Electronics (The Buenos Aires Maru)*, [1986] 1 S.C.R. 752, 782-794.

terminal operator, shall in no case exceed the limits provided for in this Bill of Lading.

#### A) The Prohibition of Suit Clause and the Circular Indemnity Clause

A further development in marine bills of lading has been the emergence of what are termed “Prohibition of Suit Clauses”. These are typically found within provisions known as “Circular Indemnity Clauses”.

Essentially, by means of a Circular Indemnity Clause, the “Merchant” makes a promise not to sue the servants, agents, stevedores, terminal operators or subcontractors of the carrier. This is the “Prohibition of Suit Clause”. The “Merchant” is usually defined in the bill of lading to include the shipper, the consignee, the holder of the bill of lading, the receiver of the goods and any person owning or entitled to the possession of the goods or of the bill of lading, and anyone acting on behalf of any such person. The Merchant also contracts to the effect that if, contrary to his promise, such a cargo claim is made, the cargo owner will indemnify the carrier against all the consequences. In this way, the cargo owner will eventually have to meet his own claim, thus giving rise to circular indemnity.

The wording of a typical Circular Indemnity Clause, including the Prohibition of Suit Clause embedded within it, may be found in the classic decision upholding the provision – *The Elbe Maru*.<sup>75</sup>

Sub-Contracting... (2) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.

The Circular Indemnity Clause has frequently been incorporated into bills of lading, challenged at law, and usually upheld in decisions from Australia<sup>76</sup> and Hong Kong.<sup>77</sup> In Canada, the Clause has similarly been found applicable, in *Ford Aquitaine SAS v. The Canmar Pride*.<sup>78</sup>

#### B) The Himalaya Clause, Prohibition of Suit Clause and Circular Indemnity Clause Combined

<sup>75</sup> [1978] 1 Lloyd’s Rep. 206, 207.

<sup>76</sup> See *B.H.P. v. Hapag-Lloyd Aktiengesellschaft*, [1980] 2 N.S.W.L.R. 572; *Sidney Cooke Ltd. v. Hapag-Lloyd Aktiengesellschaft* [1980] 2 N.S.W.L.R. 587; *Godina v. Patrick Operations*, [1984] 1 Lloyd’s Rep. 333 (N.S.W. C.A.); *Chapman Marine Pty. Ltd. v. Wilhelmsen Lines A/S*, 1999 AMC 1221, 1238-1240 (Fed. C. Aust.).

<sup>77</sup> *The Nedlloyd Colombo*, [1998] 2 HKLR 53, 60 (Hong Kong C.A.); *Vander Limited v. P. & O. Nedlloyd B.V.*, [1998] HKEC 928 (Hong Kong H.C.).

<sup>78</sup> (2004) 267 F.T.R. 115, para. 37 (Fed. C. Can. *per* Morneau P.), upheld on other grounds, [2005] 4 F.C.R. 441 (Fed. C. Can.). The clause was also upheld in *Bombardier Inc. v. Canadian Pacific Ltd.*, [1988] O.J. No. 1807 (Ont. H.C.), varied on appeal, (1991), 7 O.R. (3d) 559 (Ont. C.A.).

Today, many carriers have taken the further step of combining a Himalaya Clause with a Prohibition of Suit Clause and a Circular Indemnity Clause, in their standard-form bills of lading. Harrington J. noted this development in his judgment in *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.*<sup>79</sup>

69. In maritime matters, the courts have always frowned upon efforts to avoid exemption and limitation clauses by suing the opposite party's servants, agents and subcontractors (*Elder, Dempster & Co. v. Paterson, Zachonis & Co.*, [1924] A.C. 522, 18 Ll. L. Rep. 319 (U.K. H.L.)). It has been sound commercial practice, since at least Lord Denning's decision in the *Himalaya*, to attempt by contract, in one way or another, to protect employees, servants, agents and subcontractors who actually perform a maritime contract. *Apart from the Himalaya Clause, maritime law has also developed forbearance of suit and circular indemnity clauses by which the shipper promises not to sue subcontractors and if anyone else does, to fully indemnify the carrier.* These clauses were upheld in England in *Nippon Yusen Kaisha v. "Elbe Maru" (The)* (1977), [1978] 1 Lloyd's Rep. 206 (Eng. Comm. Ct.) (the *Elbe Maru*). The circular indemnity clause was upheld by Mr. Justice Chadwick of the Supreme Court of Ontario in *Bombardier Inc. v. Canadian Pacific Ltd.*, [1988] O.J. No. 1807 (Ont. H.C.). His decision was varied on appeal (1991), (1991), 7 O.R. (3d) 559, 85 D.L.R. (4<sup>th</sup>) 558 (Ont. C.A.) so that the Court of Appeal did not have to deal with the clause. [Emphasis added]

70. More recently, Prothonotary Morneau upheld the forbearance of suit clause in *Ford Aquitaine Industries SAS c. "Canmar Pride" (The)*, 2004 FC 1437, 267 F.T.R. 115 (Eng.), [2004] F.C.J. No. 1743 (F.C.). His decision was affirmed on appeal but Mr. Justice Lemieux did not deal with this point, 2005 FC 431, [2005] 4 F.C.R. 441, [2005] F.C.J. No. 535 (F.C.). Extending insurance benefits to subcontractors, by express wording, or at least by necessary implication, is well known in the construction industry (*Commonwealth Construction Co. v. Imperial Oil Ltd* (1976), [1978] 1 S.C.R. 317 (S.C.C.)).

A good example of this melding of Himalaya, Prohibition of Suit (what Harrington J. calls "forbearance of suit" clauses) and Circular Indemnity provisions is to be found in the Hapag-Lloyd Bill of Lading at its subclauses 4.2 to 4.3, which form part of clause 4 on "Subcontracting":

4.2 The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any servant, agent or Subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with the Goods or the Carriage of the

---

<sup>79</sup> 2008 FC 801, [2009] 4 F.C.R. 496 at para. 69 (Fed. C. Can.), affirmed without discussion of this specific point, 2009 FCA 119 (Fed. C.A.).

Goods whether or not arising out of negligence on the part of such Person, and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing every such servant, agent and Subcontractor shall have the benefit of all Terms and Conditions of whatsoever nature herein contained or otherwise benefiting the Carrier including clause 26 hereof, the law and jurisdiction clause, as if such Terms and Conditions (including clause 26 hereof) were expressly for their benefit and in entering into this contract, the Carrier, to the extent of such Terms and Conditions, does so on its own behalf, and also as agent and trustee for such servants, agents and Subcontractors.

4.3 The provisions of the second sentence of clause 4.2 including but not limited to the undertaking of the Merchant contained therein shall extend to all claims or allegations of whatsoever nature against other Persons chartering space on the carrying vessel.

4.4 The Merchant further undertakes that no claim or allegation in respect of the Goods shall be made against the Carrier by any Person other than in accordance with the Terms and Conditions of this bill of lading which imposes or attempts to impose upon the Carrier any liability whatsoever in connection with the Goods or the Carriage of the Goods, whether or not arising out of negligence on the part of the Carrier, and if any such or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.

Thus, not only servants, agents and subcontractors of the carrier, but now other charterers of space on the carrying ship as well, are promised that no suit (in contract, tort, bailment or on any other legal basis) will be taken against them and that, if any such action should nevertheless be instituted, the Merchant will compensate them fully. In addition, all those third parties enjoy the benefit from the carrier's limitations of, and immunities from, liability, even where the cargo loss or damage in question has been caused by their own negligence.

The carrier itself is then exempted from suit by any person, except as the bill of lading authorizes, even in respect of its own negligence in the carriage of the goods, and is entitled to indemnification if the Merchant breaches its undertaking not to sue.

The validity and enforceability of these provisions depends on certain conditions. The intention to confer the benefits contemplated on the third parties must be clear and the wording must suffice to effect that purpose. The class of third party beneficiaries must be equally clearly identified in the provisions, and the party or parties seeking the protection of those provisions must fall within that class.<sup>80</sup> And there must be

---

<sup>80</sup> In *Timberwest Forest Corp. v. Pacific Link Ocean Services Corp.*, *supra*, for example, marine insurance waiver of subrogation clauses were held applicable to certain parties who fell within the wide definition of "Carrier" and "ship" in the bill of lading issued by the time charterer, and the explicit wording of the

some agency or trust basis for the conferral of the benefits on the third parties. Although the rules are evolving, the carrier must be expressly or by implication instructed in some other contract (e.g. the stevedoring contract or the terminal operating agreement) to contractually benefit the third parties contemplated.

### C) The Principled Exception to Privity in Canada

Canada has taken yet another step in relaxing the rigid common law rule of privity of contract in *London Drugs v. Kuehne & Nagel International Ltd.*<sup>81</sup> and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*<sup>82</sup> By an “incremental change” deemed necessary to keep Canadian common law in line with the evolution of society, the Supreme Court of Canada, through judge-made law, has developed a “principled exception” to the traditional privity rule, whereby a third party may benefit from a contract if the parties thereto intended to extend the benefit to that party and the activities performed by that party were the very ones contemplated as falling within the scope of the contract.<sup>83</sup>

Thus in Canada today, third party benefit in maritime carriage of goods cases is generally available to many parties involved in the performance of the contract of carriage, under Himalaya Clauses, often buttressed by Protection of Suit and/or Circular Indemnity Clauses, according to Lord Reid’s agency theory, first set forth in *Midland Silicones*. Those provisions are now established features of bills of lading and even sea waybills in Canada’s domestic and international maritime trade, upheld repeatedly by courts around the world as well as in this country. These contractual terms seem destined to continue supplying the benefits sought by servants, agents and independent contractors of water carriers of goods. The principled exception to privity announced in *London Drugs* and *Fraser River*, however, provides an interesting alternative legal basis for such protections, and one which avoids some of

---

Himalaya clause of that bill, which extended all defences, exemptions and immunities of the Carrier to “every employee, agent and independent contractor of the Carrier, as well as the owner, operator, manager, charterer, master, officers and crew of any other vessels owned or operated by related or unrelated companies, and stevedores, longshoremen, terminal operators and others used and employed by the Carrier in the performance of its work and services.” Note also that railways carrying goods inland from seaports have been held entitled to benefit from ocean carrier’s exemptions and limitations of liability as stipulated in marine bills of lading and sea waybills, where the wording of those documents was wide enough to include them. See, for example, *Boutique Jacob Inc. v. Pantainer Ltd.*, 2008 FCA 85, 375 N.R. 160 (Fed. C.A.) (bill of lading) and *Cami Automotive Inc. v. Westwood Shipping Lines Inc. (The Westwood Anette)*, 2009 FC 664 (Fed. C. Can.) (waybill).

<sup>81</sup> [1992] 3 S.C.R. 299. See S.M. Waddams, “Privity of Contract in the Supreme Court of Canada” (1993) 109 L.Q.R. 349.

<sup>82</sup> [1999] 3 S.C.R. 108. See J. Brock, “A ‘Principled’ Exception to Privity of Contract” (2000) 58 U.T. Fac. L.R. 53. It is interesting as well to note how the United Kingdom has also relaxed the privity doctrine, not through case law, but rather through its *Contracts (Rights of Third Parties) Act 1999*, U.K. 1999, 31. See generally, Sir G.H. Treitel, “The Contracts (Rights of Third Parties) Act 1999 and the Law of Carriage of Goods by Sea”, being chap 17 of F.D. Rose, ed., *Lex Mercatoria (Essays on International Commercial Law in Honour of Francis Reynolds)* (London: LLP, 2000) at 345-379.

<sup>83</sup> See Tetley, *Marine Cargo Claims*, 4th ed., 2008, vol. 2 at pp. 1872-1874. See also Harrington J. in *Timberwest Forest Corp.*, *supra*, 2008 FC 801, [2009] 4 F.C.R. 496 at para. 67.

the issues that may arise with the Himalaya Clause, notably authorization, ratification and consideration.

## 6) Conclusion

Bills of lading and sea waybills are key components of water carriage of cargoes on the oceans of the world. They have common features and differences, which suit them for different trades and different transport situations. The concept of “document of title” so often ascribed to the bill of lading really refers to the right of possession, rather than ownership, as well as to the requirement for presentation of the instrument, while negotiability as a feature of order and bearer bills has a particular meaning, not to be confused with its meaning in respect of negotiable instruments in the law of banking.

The weight of legal opinion, among both courts and judges, both internationally and now in Canada as well, is that bills of lading of all three types (straight, order or bearer) are subject to the Hague and Hague-Visby Rules, but that those conventional regimes do not apply to sea waybills. Nevertheless, those conventions can, and very often are, made applicable to waybills, either by national legislation or by international conventions, such as the Hamburg Rules, as they will be if and when the Rotterdam Rules come into force.

This paper has also traced the development of Himalaya Clauses, Prohibition of Suit Clauses and Circular Indemnity Clauses, founded on Lord Reid’s agency theory, which, alone or in combination, have become standard terms of virtually all bills of lading and sea waybills in modern water carriage of merchandise. They continue to be of major significance in contemporary maritime transport of goods. The principled exception to privity, as developed by Canada’s Supreme Court and as now applied in maritime cases by the distinguished judges of our Federal Court and our Federal Court of Appeal provide a clear and most interesting additional legal basis for extending the carrier’s exemptions and limitations to a potentially wide range of third parties, who often play crucial roles in the overall process of marine transportation both within Canadian waters and in international commerce.