

# Rafaela S change to Rule 2, Section 17 no impact on waybills

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Several Members have contacted the Managers in connection with the use of waybills and the recently agreed change to the Rules regarding delivery of cargoes carried under straight bills of lading, a change which reflects equivalent changes to the Pooling Agreement, occasioned by the case of the RAFAELA S.

This note describes the main features of that case and explains why, despite the wording of the new Rule (which takes effect from 20 February 2009) the Rule is unlikely to have much relevance to the normal use of waybills.

## Background

The RAFAELA S case involved a cargo which was carried on board two chartered ships; from Durban to Felixstowe on board the ROSEMARY, and from Felixstowe to Boston USA on the RAFAELA S. The voyage took place in 1989/1990, but the case only reached the highest court in England, the House of Lords, in 2005.

The cargo suffered major damage on the second leg of the voyage. The carriers sought to apply US COGSA Package Limitation (\$500 per package) to the claim, and cargo claimants tried to avoid this by arguing that English law and Hague-Visby Rules applied to the carriage. To succeed with this, the claimants had to show that the document under which the goods were carried was a bill of lading or similar document, and this was the main argument before the court.

The RAFAELA S did not involve a waybill, but a "straight bill of lading". The contract was on the standard bill of lading form, but the boxes on the face of this particular bill were filled in so that there was only one possible receiver i.e. the goods were consigned to "J I McWilliam Company Inc"

without any terms such as "or order" or anything else which would allow the cargo to be sold against endorsement or transfer of the bill.

While such bills are not common, English law has traditionally called these bills, which do not have the possibility of being endorsed or transferred to somebody else, "straight bills of lading" or "non-negotiable" bills of lading, as opposed to the normal form of bill of lading which can be negotiated or transferred between merchants while the ship is at sea.

The document was on a form normally used as a bill of lading, was described throughout its clauses as a "Bill of Lading", and had a clause which stated "One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order".

Although the carrier argued that a "straight B/L" was not really a B/L, the Law Lords appeared to take this clause into account in arriving at the conclusion that the document was indeed a B/L. The Law Lords also decided that this document required presentation at the place of delivery.

This caused some concern for Owners, and P&I Clubs, as it was previously assumed that a "straight B/L" meant that ownership of cargo could not be transferred while the cargo was onboard ship, and the shipowner could safely deliver to the named receiver without the need to see a B/L at the place of delivery.

In the light of that concern, it was agreed by the Clubs that the Pooling Agreement should be amended to address the risk of delivery of cargo without presentation of a straight bill of lading.

## Effect on Waybills

This case turned on a "straight bill of lading", and not a waybill. The Law Lords did not give much guidance on the subject of waybills, although Steyn LJ did quote approvingly from one legal textbook definition that;

"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".

Notwithstanding this, the amendment made to the Pooling Agreement was one that provided for

restrictions on cover not only in the case of delivery of cargo without production of a straight B/L, but also in the case of delivery without production of a waybill or other similar document evidencing the contract of carriage, if it had express terms requiring its production at the discharge port, or if the law of the contract required this.

As applied to a waybill, cover would therefore be prejudiced only in the case of a

"waybill... where such production [of the waybill at the port of discharge] is required by the express terms of that document or the law to which that document, or the contract of carriage contained in or evidenced by it, is subject..."

However most waybills clearly say that cargo will be delivered without any documentation at the port of delivery, and, unless there is some peculiarity in the governing law of the particular waybill, such waybills will therefore never be caught under the Club's Rule change.

In short, although the International Group has been cautious in redrafting the Pooling Agreement and although that caution is reflected in the Rule change, cover for liabilities arising from the normal use of waybills should be unaffected.

