The Way of the Waybill:
By the Way Side? No Way or Way?

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The use of waybills is not a new or original means of documenting the transportation of goods. The term "Waybill" and forms denominated as such have been used in air carriage and railroad carriage, among other forms of transportation. Indeed, the Warsaw Convention specifically speaks to "Air Waybill"[2] It is not the purpose of this paper to address all forms of waybills, but rather to deal with the Sea Waybill.

The principle use of Sea Waybill today can be said to be the avoidance of the requirement that a carrier deliver goods only against the surrender of a bill of lading. With the advent of containerization, as well as improvement in vessel operations, voyages which took weeks were reduced to days and discharging time which took days was reduced to hours. Given the speed of transportation, cargo would quickly become available for delivery; however, in many instances, the transportation of the cargo became faster then the passage of the documentation; usually a negotiable bill of lading or a non-negotiable bill of lading.

Should the carrier make delivery without requiring the surrender of the bill of lading, it faced potential liability for wrongful delivery of the goods, along with the attendant legal fees and administrative costs which might well follow.

While it might be said that an ocean carrier is principally interested in booking tonnage, carrying that tonnage and delivering it as promptly as possible (i.e., the transportation of the goods safely and quickly), at the same time, having taken goods into its custody, the carrier not only undertakes responsibilities with respect to the safety of the goods, but is also tasked with responsibility to see that the goods are delivered properly. In effect, one might say that the ocean carrier takes part in the sales transaction; i.e., seeing that the goods are delivered to the "proper party".

While the subject of this paper is Sea Waybills, a review of bills of lading, negotiable and non-negotiable, and the implications of delivery without surrender will be helpful in understanding the generation and use of the Sea Waybill.

The standard effect of delivering cargo without requiring the surrender of the bill of lading was stated in Allied Chemical International v. Companhia De Navegacao Lloyd Brazileiro:[3]

> "absent a valid agreement to the contrary, the carrier the issuer of the bill of lading, is responsible for releasing the cargo only to the party who presents the original bill of lading. … If the carrier delivers the goods to one other than the authorized holder of the bill of lading, the carrier is liable for mis-delivery unless the shipper "induced" the mis-delivery." (at page 481).

In that case, the cargo had been delivered to a warehouse which was under the control of the local Port Authority. At the request of the consignee, the carrier's agent issued a declaration that the freight and applicable tax had been paid. Goods would be released by the Port Authority against either the surrender of an original bill of lading or a declaration from the ocean carrier. By virtue of the declaration, the consignee obtained possession of the cargo although it had not paid for the goods. The court held the carrier to have some continuing responsibility with respect to the goods and, when the release of the goods to the consignee was authorized without demanding production of the bill of lading, the carrier acted at its own peril.[4]

In many cases, ocean carriers have delivered cargo against a letter of indemnity or guarantee. This method of delivering goods is essentially based on commercial considerations, not legal ones.

An ocean carrier was held liable to an exporter when it had delivered the goods to an insolvent consignee. The carrier delivered the goods against the consignee's corporate guarantee. The carrier's bill of lading had a specific provision requiring it to obtain an original, properly endorsed bill of lading from the consignee prior to delivery of the goods. The carrier was found liable for mis-delivery. The case does not elucidate whether the carrier ever collected on the guarantee it accepted; however, if the consignee did not pay the shipper it might well be assumed it did not pay the carrier either.[5]

In the United States, the Pomerene Act (also referred to as the Federal Bills of Lading Act) makes the distinction between negotiable bills of lading and non-negotiable bills of lading and specifically provides, in the situation of a non-negotiable bill of lading, for delivery to the named consignee or a "person entitled to their possession".

With respect to a negotiable bill of lading, the carrier may deliver to a person in possession of the negotiable bill if the goods are deliverable to the order of that person or the bill has been endorsed to that person or in blank by the consignee or another endorsee.[6]

If the carrier fails to take up a negotiable bill of lading the carrier may be liable for damages for failure to delivery the goods to a person purchasing the bill for value in good faith, whether the

purchase was before or after delivery and even when delivery was made to the person entitled to the goods.[7]

The act applies to a bill of lading issued by a common carrier between places in the United States or its territories and "from a place in a state to a place in a foreign country".[8]

In the case of Chilewich Partners v. M.V. ALLIGATOR FORTUNE et al,[9], the Ocean Carrier was sued for alleged improper delivery of shipments to a purchaser of cattle hides. The shipments were from the United States to Korea. The court found the purchaser was lawfully entitled to possession within the meaning of the Pomerene Act even though letters of guarantee were given by the purchaser in exchange for delivery without obtaining surrender of the original bills of lading. It should be noted that the court took note of the fact that the shipper who sued not only expected, but actually urged the carrier to make delivery without insisting on guarantees or the production of original bills of lading.

In Ace Bag & Burlap Co. Inc. v. Sea-Land Service, Inc.[10], a cargo of Jute bags was placed in a private bonded warehouse by the carrier in compliance with orders of the local Customs Authorities. Pilferage occurred while in the warehouse. A suit by the owner of the bags was dismissed with the court finding the ocean carrier had properly delivered the bags when it acted pursuant to the order of the Honduran Customs Authorities and the Honduran Customs Authorities were "persons entitled to possession of the goods".

While the Pomerene Act makes a distinction between negotiable bills of lading and non-negotiable bills of lading (previously referred to in the Act as "Order" and "Straight" bills of lading), neither the Hague Rules nor COGSA make such a specific distinction. Indeed, there have been several cases in other jurisdictions which essentially treat a negotiable bill of lading and non-negotiable bill of lading the same as regards delivery against surrender of the document.

In APL v. Voss Peer[11], the Singapore Court of Appeal considered a straight bill of lading and made a distinction between "bill of lading" and "Sea Waybill". It found that a straight bill of lading is similar in effect to a SeaWaybill, but it is not the same. The Court found production or surrender of the straight bill of lading to be a pre-requisite to obtaining delivery of the cargo.

The Court of Appeal for England in J. I. Macwilliam Mediterranean Shipping Company S.A.[12] considered the issue of a straight bill of lading. In a thorough and detailed review of the background of the Hague rules, Lord Justice Rix found a straight bill of lading to be, in function and form, closer to a negotiable bill of lading than to a non-negotiable receipt or waybill. In that case, the straight bill of lading also provided it must be produced to obtain delivery of cargo.

Considering this, the court found it to be a document of title and, going further, said it should be deemed to be a document of title even without the provision in it that it be produced for delivery.

The foregoing examples indicate that under the Pomerene Act, an ocean carrier may deliver the goods without taking up a straight bill of lading; however, the same cannot be said should the Pomerene Act not be applicable. Indeed, given the factor that the United States imports more shipments than it exports, the party who would usually bring an action against a carrier for delivering goods without surrender of the bill of lading would be the overseas shipper/seller. It would logically follow that the carrier would face such action in a non-U.S. jurisdiction and, as noted above, the U.S. Pomerene Act only applies to export shipments in foreign trade.

The Sea Waybill does not fall within the definitions of the Hague Rules, the Hague-Visby Rules or U.S. COGSA (or even the U.S. Pomerene Act)[13] Thus, the use of the Sea Waybill or "Receipt" has become a commercial tool, particularly where companies ship to themselves or where consignees take title to the goods at or before shipment. The need for the "protection" of the negotiable bill of lading, i.e., surrender against delivery, is not really a determining factor.

Most of the Sea Waybills or Receipts are used in the transportation of containerized shipments by common carriers. They usually will have a provision (Paramount Clause) which will incorporate the terms of the Hague Rules, Hague-Visby Rules or U.S. COGSA. Although the ocean carrier may which to avoid using the term "bill of lading", at the same time, the carrier likely wishes to take advantage of the provisions of these regimes (as applicable) and the Sea Waybill will usually contain provisions similar to that found in the carrier's standard bill of lading form. For example, the Ocean Carrier will likely make reference to the defense of package limitation, time for suit or the enumerated defenses available, whether specifically set forth in the waybill or by way of incorporating the terms of the Hague Rules, Hague-Visby Rules, or U.S. COGSA.

A recent decision by Judge Haight of the U.S. District Court for the Southern District of New York raises somewhat of a specter as to whether the Ocean Carrier will effect the protection it wishes, while at the same time using a form of documentation which may be commercially advantageous to its customers so far as speed of delivery of the goods shipped.[14]

In a detailed and lengthy decision, Judge Haight considered several issues in an action brought for alleged damages to shipments of citrus fruit caused by failure to maintain cargo at temperatures specified by the U.S. Department of Agriculture. This would then require a quarantine period of the cargo before it could be sold in the United States. The citrus fruit was shipped to Canada where it was sold without quarantine and suffered a loss in price, compared with the value in the U.S. had it been able to be sold promptly at the time of delivery in the U.S.

While the case involved various issues raised by the parties, Judge Haight's treatment of the application of the Harter Act[15] is noteworthy.

A defense to the claim was asserted based upon the "quarantine" exception contained in COGSA.[16] As to one container (where the parties agreed any reduction in temperature occurred onboard), Judge Haight found the carrier's defense based upon quarantine could be asserted without the carrier proving it did not cause the quarantine requirement by its negligence. The burden would then shift to the cargo claimant to show that the carrier's fault caused the requirement.

Judge Haight went on to note that for the balance of the shipments concerned, the delay involved was not between loading and discharge, but subsequent to discharge.

The bills of lading incorporated U.S. COGSA and provided that it should be applicable prior to loading and subsequent to discharge to the time of delivery. Judge Haight found that the provisions of U.S. COGSA applied ashore only as contractual terms and that those terms must be considered under the provisions of the Harter Act.

Finding the quarantine exception in COGSA would shift the burden to the cargo plaintiff to show that the defendant was negligent, Judge Haight stated that this was a violation of §190 of the Harter Act (that a carrier may not be relieved from liability for its negligence in failing to properly load, stow, care for or deliver cargo) and the defense of quarantine could not be invoked through contract.

Judge Haight did make a distinction between defenses enumerated in COGSA (such as Act of God) which would be valid (proof of an Act of God would necessarily involve the carrier also "proving" lack of negligence); comparing it with the fire exception which, when, considered merely as a contractual term, would not pass muster under Harter as "fire", without more, would shift the burden to the shipper to show negligence on the part of the carrier.

Simply stated, Judge Haight found that the provisions of U.S. COGSA or those found in the bill of lading, when considered only as contractual terms must be considered under the prohibition of the Harter Act.

§190 of the Harter Act provides as follows:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United states and foreign ports to insert in any bill of lading or shipping document any clause, convenant, or agreement

> whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

It should be noted that the prohibition stated therein applies to "any bill of lading or shipping document". The section concludes with the statement that any and all words or clauses of such import "inserted in bills of lading or shipping receipts shall be null and void and of no effect". Although a Sea Waybill may not be a document of title or a "bill of lading" so as to fall within the ambit of the Hague Rules or U.S. COGSA, it is submitted that a Sea Waybill could well be taken to be a "shipping document" or a "shipping receipt".

Given this, and following Judge Haight's reasoning, a Sea Waybill would not of itself be subject to the Hague Rules or U.S. COGSA but would be subject to the Harter Act. Thus, any provisions in the Sea Waybill dealing with responsibility or incorporation of the Hague Rules or U.S. COGSA would be considered as contractual terms and subject to the prohibitions of §190 of the Harter Act. If so, it is possible that in issuing waybills by way of commercial accommodation, ocean carriers could face exposure to risks where they thought defenses were available, but would not be if Judge Haight's reasoning should be followed.

At the end of the day, the current effort by UNCITRAL (with the assistance of the CMI) could well make this paper academic. Although still in the drafting stage, the working draft appears to be painting with a broad brush as to what agreements or contracts will be covered (regardless of name) and may also contain provisions which would answer the question of whether or when a carrier may delivery without insisting upon surrender of the "shipping document".

In the interim, ocean carriers apparently will have to face the quandary which appears to be presented by the reasoning of Judge Haight's decision on the point.

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ENDNOTES

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[2] Warsaw Convention (1929) as amended by the Hague Protocol of 1955, Chapter II, Section 3, Article 5 1.

[3] 775 F2d 476 (1985)

[4] but see Ace Bag & Burlap Co. Inc. v. Sea-Land Services, Inc., infra.

[5] C-Art Ltd. v. Hong Kong Islands Line America, S.A., 940 F.2d 530 (1991)

[6] 49U.S.C. Section 80110(b)

[7] 49 U.S.C. Section 80111(c)

[8] 49 U.S.C. Section 80102

[9] 853 F. Supp. 744 (1994)

[10] 40 F. Supp. 2d 233 (1999)

[11] [2002] 2 Lloyd's Rep. 707

[12] 2003 AMC 2035 (2003)

[13] In J.C.B. Sales Ltd. v. Wallenius Lines 124 F.3d 132 (1997) the Second Circuit Court of Appeals dealt with a "Non-Negotiable Data Freight Receipt" and affirmed the District Court's holding that the DFR was not a "bill of lading or similar document of title."

[14] Sunpride (Cape) (Pty) v. Mediterranean Shipping Co. S.A.,. 2004 AMC.1

[15] 46 USC Sections 190-196

[16] 46 USC 1303(2)(h)