

4. COMMENTARIES AND CASE NOTES

A. NON-VESSEL OWNING COMMON CARRIERS — THE PROBLEMS

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As mentioned elsewhere in this edition of the Journal, at the 1983 Annual General Meeting and Conference of the New Zealand Branch, a paper was delivered on the problems arising as a consequence of the increasing prominence of Non-Vessel Owning Common Carriers. This paper is reproduced below.

The history of such organisations is an interesting one and the problems which they generate are topical and of importance to all those concerned with transport documentation and documentary credits. This paper examines both these aspects.

Recent advertisements in the New Zealand Shipping Gazette have highlighted and publicised the services of N.V.O.C.C. operators.

There is no doubt that the organisation known as Non-Vessel Owning Common Carrier is operating in a big way and is very much part of the international shipping scene, particularly with outwards shipments from the U.S.A. Where has this expression come from and what does it mean? The term came from the United States in the early 1960s and it is the Federal Maritime Commission, or F.M.C., that apparently has to be given the credit for the expression N.V.O.C.C.. The F.M.C. has decided that a person may be considered a common carrier by water in foreign commerce under the Shipping Act 1916 (U.S.) c. 451 even though he does not own or operate any vessels. All he needs to do is

1. hold himself out to provide transportation or hire by water in inter-state or foreign commerce, and
2. assume responsibility for or have responsibility imposed by law for the safe transportation of the shipments, and
3. arrange in his own name with underlying water carriers for the performance of such transportation.

Essentially then, the N.V.O.C.C. is a freight forwarder who sells a combined transport package incorporating a sea transit. He is not a ship owner, nor does he appear to be normally involved in the chartering of ships although no doubt he could do this. Under the jurisdiction of the F.M.C. it is quite clear that the word "carrier" is used in the sense of someone who enters into a contract of carriage, as opposed to being the actual carrier even for only one of several stages in the contracting voyage or journey.

I must say that I thought that a "common carrier" was something historic, certainly in respect of English law. Anthony Diamond Q.C. recently stated that

in the United States, however, all this is somewhat different. To see whether someone is a common carrier the courts look to see — not just what the contract says — but whether the carrier holds himself out, by advertisement, by the solicitation of business, and by the establishment of tariffs and by other conduct, as someone who provides transportation in inter-state or foreign commerce. American Courts, by the 19th century, had developed a doctrine that freedom of contract was mitigated by the need to enforce public policy. Thus clauses in contracts exempting carriers for loss due to their own negligence might be held to be void as contrary to public policy. Finally, far from becoming a historical relic, the concept of a common carrier is of the very basis of the modern American legislation that applies to carriers and freight forwarders. This regulation has been built on two main principles — private enterprise and the public good — and it is the concept of the “common carrier” which has provided the link between these principles.¹

We, therefore, find that the term “common carrier”, so far as the N.V.O.C.C. is concerned, is very much tied up with American law and has little or no legal validity outside the U.S.A. Perhaps for this reason the term “Non-Vessel Owing Carrier” or “N.V.O.C.” is a better way for us to think of this type of operator, thereby avoiding the use of the expression “common carrier” which can be dangerously misleading.

There has been an enormous growth in this type of operator in the last two or three years and New Zealand is only now starting to become much more aware of what is involved.

An indication of just what is happening in this particular industry in the U.S.A. was given in an article written by W. A. Maron, President of the New York Foreign Freight Forwarders and Brokers Association. He stated “[a]t latest count well over 600 non-vessel-operating common carriers nationwide have filed tariffs with the Federal Maritime Commission”.² He considers that this rate of growth is alarming and that it is about time for the maritime industry and, in particular, shippers to take a much closer look at these and proceed with caution in dealing with them. It is interesting to note that Maron considers the N.V.O.C.s to be “born of deregulation and fed by the state of the art of containerization”.³

Why the caution in dealing with them? William Maron⁴ considers that it is the very things that have attracted so many to becoming N.V.O.C.s and that facilitate their operation which should give us

¹ A. Diamond Q.C. in a paper simply entitled “The N.V.O.C.C.”

² W. A. Maron, “Non-Vessel Operators: Proceed with Caution”.

³ *Ibid.*

⁴ *Ibid.*

cause for concern. The major factors are ease of entry to the business and the promise of a high rate of return. He observes that, unlike the measure of control imposed on foreign freight forwarders operating by the requirements of the F.M.C., the N.V.O.C. operates in its present form with neither a licence nor under regulatory control. He indicates that currently all the N.V.O.C. has to do is file a tariff with the F.M.C. and he is in business — no character check, proof of competency or evidence of sound financial condition is necessary. He adds unreservedly that as a foreign freight forwarder he is deeply concerned.

Underwriters are particularly concerned with Mr Maron's comment that the N.V.O.C. is not answerable to anyone. The shipper to register a complaint, curb an abuse or recover a loss cannot look to the F.M.C. In fact, if an N.V.O.C. were to go out of business today for financial reasons it could open up tomorrow under a different name just by filing the tariff. Mr Maron also suggested that without licensing and bonding requirements, shippers should be aware of the additional risks they are taking with the N.V.O.C. He can act as a forwarder under his tariff without a licence while he is acting as a carrier without equipment and facilities or financial soundness. He essentially lives off the difference he can get between the full container load (F.C.L.) rate from the shipping companies and the freight that he is able to charge for mostly less than container load (L.C.L.) movements from his own shippers. It is apparent that this can be open to abuse with advantage to the N.V.O.C. operator by giving him cost advantage in freight that has to pay but at the expense of increased risk to the cargo owner as a result of additional and unnecessary transshipment and handling. Also he may use non-conference and independently owned vessels of doubtful parentage.

The N.V.O.C. is widely used on the American run to New Zealand. A typical document issued by operators on this run may describe itself as a Uniform Through Export Bill of Lading. Inspection of such documents may show that apart from having no address which should be very disconcerting to the owner of the goods, they are, in my view, misleading as to the actual role that the issuer of the document or N.V.O.C. takes. The bill of lading is signed as agent for the carrier but on examining the document we find that the terms and conditions on the reverse side of the bill of lading show that the term “carrier” means the issuer or N.V.O.C. It is quite apparent that many people in our business are assuming that in fact this bill of lading is signed as an agent of an actual ocean carrier participating in the Pacific/Australia/New Zealand Conference. This, of course, is quite erroneous as I also consider is the use of the term “bill of lading” to describe the document.

The terms and conditions of the contract in respect of these Uniform Through Export Bills of Lading are worthy of considerable attention.

They include among other matters the option to arrange insurance with the N.V.O.C. and, furthermore, the bill of lading document provides space for the amount of coverage to be shown and the nature of that coverage. Obviously, it is essential that anyone purchasing this insurance is satisfied as to the security of the insurance being purchased and also regarding the actual conditions of insurance that apply.

It is also interesting to note that these N.V.O.C.s in their capacity as "carrier" by definition in the document may at their discretion arrange for carriage by any vessel or by any other means of transport and through any route whatsoever, whether or not such route is a direct advertised or customary route. They then go on to state that any action taken by the carrier under this clause or delay resulting therefrom, shall be deemed to be included within the contractual carriage and shall not be a deviation. This, of course, immediately comes into conflict with the whole business of marine insurance as we understand it, where routes are expected to be recognised routes and are normally direct routes and variation is only covered from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

Apart from the fact that the "carrier", as I have already indicated, acknowledges liability in terms of the Carriage of Goods by Sea Act 1936 (U.S.) c. 229, he makes it quite clear that he has no liability outside this area. The N.V.O.C. may state that as "carrier" they shall be under no liability in any capacity whatsoever for loss or mis-delivery of or damage to the goods, howsoever caused, whether or not through negligence of the carrier, servants or agents or sub-contractors or for direct or indirect loss or damage caused by delay or for any indirect or consequential loss or damage.

Latest advice from the International Chamber of Commerce, or I.C.C. as it is known, is that N.V.O.C. bills of lading are, in fact, currently under review, particularly with regard to requirements of transport documentation. The *Uniform Customs and Practice for Documentary Credits* of the I.C.C., in connection with *Uniform Rules for a Combined Transport Document*, does not specify the form of document and/or the issue thereof. On the other hand, the *Uniform Customs and Practice for Documentary Credits* provides, in connection with marine bills of lading, that banks must reject bills of lading issued by forwarding agents or under and subject to a charter party unless specifically authorised in the letter of credit. The view has been expressed that if an N.V.O.C. does accept primary liability as a carrier then their status is distinguishable as a forwarding agent or charterer who issues bills of lading.

Due to the fact that banks have to be ultra conservative, and even though they are obviously looking at the whole question, it would seem unlikely that they are going to allow these so called bills of lading

to be accepted as documents of title unless their status can be shown to be not less than that of bills of lading issued by reputable and established shipowners.

In the particular example I have in mind the relationship between the N.V.O.C. and the vessel is that of a shipper on F.C.L. terms. The N.V.O.C. has no authority to sign bills of lading on behalf of the vessel, or any other vessel operation. They are acting, in fact, as a freight consolidator and present a packed container to the ocean carrier for carriage to New Zealand. On receipt of the ocean carrier's bill of lading the ocean carrier's agent will issue the usual vessel's delivery order, in this case to the consolidator's agent who then issues sub-orders to the various holders of the consolidator's bills of lading.

It is interesting to note that because of the New Zealand Watersiders' Conditions, containers having more than one consignee have to be de-vanned at a container terminal. As a result, the consolidator has to indemnify the vessel from liability resulting from the "change of mode", namely from F.C.L. to L.C.L. and, consequently, the consolidator accepts responsibility.

According to my information, in the U.S.A. the customary title for these documents are "bills of lading". The bills of lading issued by N.V.O.C.s that I have seen appear imprecise, and according to their printed terms, can be treated as evidence of title to the goods. Some of these documents are expressly subject to the Carriage of Goods by Sea Act 1936 (U.S.), in respect of loading until discharge from the ocean vessel. However, some of these documents also purport to be subject to the conditions of carriage of the sub-contractor responsible for the transit by sea but it is apparent, from the information I have, that there has been no authority given to it in this regard. Also, although there is a twelve month time limit for suit under the American Carriage of Goods legislation, some of the documents issued by N.V.O.C.s limit it to nine months from delivery and they also contain referrals to the laws of American states. This latter point would appear to be overruled in New Zealand law in respect of the sea transit at least.

If the so called Non-Vessel Owning Common Carrier is a person of repute and with sound financial base and issuing bills of lading or similar documents which accept the responsibilities and liabilities under the Carriage of Goods by Sea Act 1936 (U.S.), then probably there is little cause for concern. However, as I have indicated earlier, there is, in fact, no onus on them to do this.

Subrogation, of course, would normally be pursued against the N.V.O.C. who may well have some protection under the ocean bill of lading that he received from the ocean carrier. It is a common practice, of course, for the ocean carrier to issue F.A.K., or freight of all kinds bills of lading, under which they will be able to treat their liability as

that of a package, namely one container. Since the N.V.O.C. issues an enumerated bill of lading, his liability is likely to apply to each package, which may be considerably more than that of the ocean carrier. In this instance, recovery prospects are only as good as his insurance and financial strength.

It is my own view, and that of the Marine Underwriting Committee, that the use of the term "bill of lading" should be closely controlled. It seems very important that it is not confused in any way with the bill of lading issued by the ocean carrier and should, therefore, be clearly defined as say a "forwarders bill of lading" or similar. However, I consider that the term "bill of lading" should be reserved exclusively for use by shipowners or ocean carriers.

I have drawn your attention to the very open and unregulated system that prevails so far as N.V.O.C.s and similar type freight forwarders are concerned. No doubt, some readers may say that New Zealand's adoption of the Hamburg Rules would most likely take care of the problem of control. However, lawyers are the only people likely to get any real benefit out of the adoption of the Hamburg Rules! There is nothing to prevent our own Government adopting the Hague-Visby Rules and at the same time extending their jurisdiction to include all documents covering carriage by sea, whether or not an actual bill of lading or similar type of document has been issued. Certainly, it is a matter of concern that a non-negotiable document or waybill used for the carriage of goods in international trade, appears to be outside the scope of the Rules although, of course, the bill of lading or similar type of document of title is not.