THE HAGUE RULES REVISED: OPERATIONAL ASPECTS

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[*In this article, Mr O'Hare undertakes a survey of the operational aspects of the Hague Rules. He does this with a view to evaluating the success of those Rules as an international code of maritime law. His comments in this regard are of interest in relation to the proposed reforms in this area contained in the recent UNCITRAL Draft Convention.*]

Since 1970, the United Nations Commission on International Trade Law (UNCITRAL) has been preparing a Draft Convention to replace the *International Convention for the Unification of Certain Rules Relating to Bills of Lading* (1924), commonly known as the Hague Rules. The Draft Convention governing the liability of international cargo carriage by sea will be debated by the Commission in 1976 and presented to an international conference of plenipotentiaries for endorsement and recommendation to governments represented. The Draft Convention proposes to reallocate to the carrier risks which are presently borne by the cargo-owner.[1] The Draft also focuses on weaknesses experienced in the operation of the Hague Rules and it is to these aspects that this article is directed.

Since it came into force in 1931, the Hague Rules Convention has furnished international shipping with a code of standardized liability. Yet the success of any international code depends upon the efficiency of its operational aspects — its scope and application. The object of this article is to outline, in terms of Australian law, problems which inhibit the comprehensiveness of scope and uniformity in application of the Hague Rules and to canvass related reforms proposed by the UNCITRAL Draft Convention.

A. BACKGROUND

Bills of Lading

Since the sixteenth century the focal point of sea-carriage has been the bill of lading, that exceptional creature of the law merchant identifiable by its commercial versatility, yet defying legal definition. Although the common law courts are said to have absorbed the law merchant,[2] the relatively

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[1] For the issues examined by UNCITRAL see Sweeney J. C., 'The UNCITRAL Draft Convention; Part I' (1975) 7 *Journal of Maritime Law and Commerce* 69, 327.

[2] Holdsworth W., *A History of English Law* (1966) i, 570-3.

advanced concepts of the law merchant were not always compatible with doctrinal tenets of the common law. In particular, two customary functions of the bill of lading created some disharmony in the legal system until legitimised in Britain by the Bills of Lading Act 1855 and in Australia by derivative legislation reproduced in the various States.[3] Briefly, those two functions may be explained as follows:

1. As a document signed by the ship's master acknowledging delivery of the cargo on board ship, the bill of lading constituted a receipt. In an action against the master for loss of the cargo the bill of lading at common law was *prima facie*, but not conclusive, evidence of delivery.[4] This placed the consignee and subsequent holders under a distinct disadvantage when, from distant lands and under limitations of primitive communications, they needed to adduce further evidence to prove the bailment, or, having relied upon the bill of lading, they discovered that the goods were not in fact shipped as represented. This, of course, eroded the reliability of the bill of lading as indicia of title and weakened it as a means of securing finance.

The Bills of Lading Act[5] and its Australian counterparts[6] provide that the bill of lading is conclusive evidence of shipment[7] against the master or other signatory to the bill[8] in favour of the consignee or endorsee for value who takes the bill without notice to the contrary (and in the absence of certain exonerating factors).[9]

2. The commercial carriage transaction is a multipartite relationship the purpose of which is to deliver the cargo to the consignee or subsequent parties. It follows that the consignee and remoter parties require rights of possession over the cargo and rights of action against the carrier for loss of or damage to that cargo. The carrier in turn requires his liabilities to be mitigated by those parties in the manner which he could demand of the

[3] The State Acts first introducing the Imperial legislation were: N.S.W., 20 Vic. No. 13 (1857); Vic., The Instruments and Securities Statute 1864; Qld., Mercantile Act 1867; Tas., The Bills of Lading Act 1857; S.A., Bills of Lading Act 1859; W.A., 20 Vict. No. 7 (1856) adopted the Imperial Act.

[4] *Grant v. Norway* (1851) 10 C.B. 665; 138 E.R. 263; *Smith & Co. v. The Bedouin Steam Navigation Co. Ltd* [1896] A.C. 70; *Rosenfeld Hillas & Co. Pty Ltd v. The Ship 'Fort Laramie'* (1923) 32 C.L.R. 25.

[5] Bills of Lading Act 1855 (U.K.), s. 3.

[6] The current legislation is: N.S.W., Usury, Bills of Lading and Written Memoranda Act 1902, s. 7; Vic., Goods Act 1958, s. 74; Qld., Mercantile Acts 1867-96, s. 7; Tas., Bills of Lading Act 1857, s. 3; S.A., Mercantile Law Act 1936, s. 15; W.A. (by adoption 20 Vict. No. 7 (1856)), Bills of Lading Act 1855 (U.K.), s. 3.

[7] See *Cox, Patterson & Co. v. Bruce & Co.* (1886) 18 Q.B.D. 147; *Parsons v. New Zealand Shipping Co.* [1901] 1 K.B. 548; *Cremer v. General Carriers S.A.* [1974] 1 All E.R. 1.

[8] The shipowner is not estopped unless himself a signatory to the bill of lading or the signatory was authorized to sign and did in fact sign as his agent. See *Rosenfeld Hillas & Co. v. The Ship 'Fort Laramie'* (1922) 31 C.L.R. 56; (1923) 32 C.L.R. 25; *A.-G. of Ceylon v. Scindia Steam Navigation Co. Ltd India* [1962] A.C. 60.

[9] The Bills of Lading Act 1855 (U.K.), s. 3 contains a proviso exonerating the master if the misstatement is caused without default on his part and by the fraud of another. Of the Australian State sections, *supra* n. 6, only Tasmania and Western Australia reproduce the proviso, although a similar exemption is enacted in Victoria, Goods Act 1958, s. 77.

shipper. Yet according to common law doctrine, the only parties privy to the contract of shipment which governs the carriage were the shipper and the carrier. There was some doubt whether, without importing agency concepts, the consignee and remoter parties could assume the shipper's contractual rights of redress against the carrier, and whether the carrier could take advantage of any immunity agreed to by the shipper.[10] Both results were commercially unsatisfactory.

The Bills of Lading Act[11] and its Australian derivatives[12] provide that the consignee and endorsees of a bill of lading are vested of such rights and are subject to such liabilities in the bill of lading as if they had been parties to the contract.

Other common law countries followed suit to remove common law impediments affecting these two important functions of the bill of lading. New Zealand in the Mercantile Law Act 1880[13] and Canada in its Bills of Lading Act 1889[14] reproduced the British legislation. To solve the first problem, the United States departed from the approach adopted by the British connexions and in lieu of evidentiary estoppel the Bills of Lading Act 1916 (known as the Pomerene Act) furnished substantive redress against the carrier for the issue of a deceptive bill of lading.[15] The second issue was resolved by statutorily passing the shipper's title in the cargo to the consignee or holder for value.[16] Nineteenth century legislation thus secured the bill of lading as the linchpin of cargo transport by sea.

Carriers' Liability

As technological advancements improved the economies of merchant shipping, international trade intensified, necessitating the co-operation of the maritime nations on the high seas. In the late nineteenth and early twentieth centuries a number of international conventions standardized regulations on merchant shipping and ancillary services.[17] About this time, shipping lines formed cartels, or 'shipping conferences', to stabilize freights and rationalize services.[18] Favourable reports from governmental enquiries

[10] *Thompson v. Dominy* (1845) 14 M. & W. 403, 407-8; 153 E.R. 532, 534; *Sewell v. Burdick* (1884) 10 App. Cas. 74, 91; *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. Ltd* [1924] 1 K.B. 575, 595.

[11] Bills of Lading Act 1855 (U.K.), s. 1.

[12] For current legislation see *supra* n. 6: N.S.W., s. 5; Vic., s. 73; Qld., s. 5; Tas., s. 1; S.A., s. 14(1); W.A., s. 1.

[13] Now Mercantile Law Act 1908 (as amended).

[14] Now Bills of Lading Act R.S.C. 16.

[15] Bills of Lading Act 1916 (U.S.), s. 22.

[16] *Ibid.* s. 31.

[17] *E.g., Convention for the Protection of Submarine Cables* (1884); *Conference on the International General Average Rules (York-Antwerp Rules)* (1864, 1877 and 1890); *International Marine Conference* (1889); *Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea* (1910); *International Convention for the Safety of Life at Sea* (1914).

[18] The 'Conference system' is said to have originated with the opening of the Suez Canal in 1869, see Singh N., *International Conventions of Merchant Shipping* (1973) 1638. Agreements between shipping companies were known in 1868 but the first successful shipping conference was the Calcutta Conference regulating trade between U.K. and India, see Marx D., *International Shipping Cartels* (1953) 46.

in Australia,[19] Britain[20] and the United States[21] enabled shipowners to secure preferential treatment under anti-trust legislation[22] except for the practice of giving deferred rebates.[23]

About this time also, merchants' claims for standardized carriers' liability gained impetus. Although consignees and remoter parties were now privy to the bill of lading they had little or no opportunity to inspect it and evaluate its terms before delivery. English jurisprudence adhered to the precepts of freedom of contract and permitted the original parties to modify and negative the carrier's liability and thereby dictate the rights of the consignee over which he had little control. The superior bargaining power of the shipowners, their combination by cartels and the use of standard form bills of lading ensured that only marginal liability attached to carriers. However American thought was more receptive to the imposition of minimum standards of liability upon grounds of public policy. In 1893 the United States enacted the Harter Act, which declared void any provision in a bill of lading or shipping document which relieved the carrier from strict liability for making the ship seaworthy and for damage to or loss of cargo, subject to certain exemptions. Mercantile pressures proved successful in other trading nations. New Zealand with the Shipping and Seamen Act 1903,[24] Australia in its Sea-Carriage of Goods Act 1904 and Canada by the Water-Carriage of Goods Act 1910 each imposed minimum standards of liability on the carrier. However this legislation had little impact on international maritime trade while it remained essentially localized. Demands for universal uniform standards of liability went unheeded until the cessation of the First World War when both economic conditions and a climate of global co-operation favoured trading interests. Shipowners and shipbuilders had overreacted to wartime shipping losses and in the ensuing years overproduction caused a depression in the industry.[25] The time was ripe for merchants and shipowners to rationalize their contracts of shipment on an international scale.

[19] Australia, *Royal Commission on Ocean Shipping Services* (1906).

[20] United Kingdom, *Royal Commission on Shipping Rings* (1909) Cd 4668-70, 4685-6.

[21] United States Congress House of Representatives' Committee on Merchant Marine and Fisheries, Investigation of Shipping Combinations (1914), known as the Alexander Committee. Since then, the same body (Bonner Committee) and the House Judiciary Committee (Cellar Committee) have also approved the Conference system.

[22] See Shipping Act 1916 (U.S.), s. 814, where immunity is granted to approved agreements. See now Trade Practices Act 1974 (Cth) Part X and the *United Nations Conference on Trade and Development Final Act on a Code of Conduct for Liner Conferences* (1974).

[23] In the United States deferred rebates were declared illegal by Shipping Act 1916, s. 812. In Australia the Australian Industries Preservation Act 1906, s. 6 and 1909, s. 7A proscribed trade rebates until amended in 1930, s. 7C. The advisability of offering deferred rebates in Australia was considered in the *Final Report of the Imperial Shipping Committee on Deferred Rebate System* (1923) Cmnd 1802.

[24] Re-enacted in the Shipping and Seamen Act 1908, (N.Z.).

[25] See Jones L., *Shipbuilding in Britain between the Wars* (1957).

The evolution of uniform legislation flowed along two streams. Initially, the Imperial Shipping Committee in 1921 recommended the adoption of uniform legislation throughout the British Empire based on the Canadian Act. The proposal was submitted to the International Law Association which drafted a code, known as the 'Hague Rules', to be voluntarily incorporated *ne variatur* into bills of lading. With the object of producing British legislation, the Board of Trade invited shipowners' and traders' associations to comment on the form of a proposed Bill. As a result of submissions a number of amendments to the draft were accepted — amendments which are the source of interpretation problems today.

In the meantime, the International Law Association had asked the Comité Maritime International[26] to debate the Hague Rules and to promote the assembling of a Diplomatic Conference. At its conference in London in 1922, the Comité recommended further amendments to the draft which were put to the Diplomatic International Conference assembled in Brussels the same month. The Diplomatic Conference took the view that a voluntary code would prove to be unsuccessful and recommended that a Convention, based on the revised Hague Rules, be adopted in the domestic jurisdictions of member nations binding all bills of lading issued in those nations. The Conference reassembled in 1923 but the draft Convention met with objections that some provisions were inappropriate to European jurisprudence. It was only when delegates indicated that Britain intended to produce legislation on the existing draft that a compromise was reached in the form of a Protocol attached to the Convention.

The United States had taken steps to amend the Harter Act to accommodate an earlier draft of the Hague Rules but stayed proceedings pending the completion of the Convention. The nations of the British Empire, however, on the advice of the Imperial Economic Conference and accepting the proposal for mandatory rules, incorporated the Convention as it then stood into domestic legislation. Before its conclusion in 1924, the Convention underwent further, although inconsequential, amendment and it is the later text which has been adopted domestically by non-British countries. The Protocol to the Convention reserved the right of States to diverge from certain provisions of the Rules and this has introduced a significant element of diversity between nations. *The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* was signed at

[26] In association with the Belgian Maritime Law Association and with the support of the International Law Association, the Comité Maritime International was formed in 1897. Its illustrious history is recorded in Lilar A. and van den Bosch C., *Le Comité Maritime International* (1972). The Comité's traditional role of promoting Diplomatic Conferences through the Belgian Government has been partly superseded by the Inter-Governmental Maritime Consultative Organization. Nevertheless, as an association of Maritime Law Associations representing many countries of the world, the Comité continues to enjoy its acknowledged leadership in legislative reform on maritime issues.

Brussels on 25 August 1924, along with a convention limiting the liability of shipowners for, *inter alia*, obligations arising out of bills of lading.[27]

Despite significant changes in technology, shipping practices and economic influences and the introduction of a number of shipping and other transport conventions, the Hague Rules remained undisturbed until 1963, when the Comité Maritime International formulated the 'Visby Amendments' to the Hague Rules. Following the 1967 Diplomatic Conference on Maritime Law, the Visby Rules were embodied in a Protocol to amend the 1924 Convention, signed at Brussels on 23 February 1968. To come into force the Protocol requires the ratification or accession of ten States, of which at least five shall each have a gross tonnage of one million tons. Whilst the incorporation of the Hague Rules in domestic legislation is wide-spread among developed countries, the Visby amendments have not proven so popular.

The most significant variations in the unified Rules lies not so much in the differences between those based on the 1923 draft and the Convention text, but among the enabling legislation of the various countries. Britain incorporated the Hague Rules in a schedule to her Carriage of Goods by Sea Act in 1924. Australia followed suit in the Sea-Carriage of Goods Act 1924, Canada in her Water-Carriage of Goods Act 1936 and New Zealand in the Sea-Carriage of Goods Act 1940. The United States embodied the Rules in the Carriage of Goods by Sea Act 1936. The United Kingdom has since passed the Carriage of Goods by Sea Act 1971 which repeals the 1924 legislation and adopts the Visby amendments but, to date, this Act has not come into force.[28]

Towards the end of 1964, the United Nations Conference on Trade and Development (UNCTAD) was established as an organ of the United Nations.[29] Through its Trade and Development Board a Committee on Shipping was created to consider a wide range of shipping problems. A sub-committee on International Shipping Legislation was appointed to consider the implications of shipping legislation. Late in 1966, the United Nations created the United Nations Commission on International Trade Law (UNCITRAL) to which body UNCTAD has referred its proposals for draft legislation.[30] In 1971, in the light of UNCTAD resolutions, UNCITRAL resolved 'that within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading'.[31] UNCITRAL referred to the Working Group it had set up

[27] *International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Seagoing Vessels* (1924).

[28] See McGilchrist N. R., 'The New Hague Rules' [1974] *Lloyd's Maritime & Commercial Law Quarterly* 255.

[29] For a full account of the work of UNCTAD, see Singh N., *Achievements of UNCTAD I and II in the Field of Shipping and Invisibles* (1964).

[30] For the work of UNCITRAL generally see *United Nations Commission on International Trade Law Yearbook(s)*; Sweeney J. C., *op. cit.*

[31] UNCITRAL, *Report of the Working Group*, 1972 A/CN.9/63/Add.1, 6.

in 1969 specific topics relating to the Hague and Visby Rules for examination 'with a view to revising and amplifying the rules as appropriate and that a new international convention may, if appropriate, be prepared for adoption under the auspices of the United Nations'.[32] The relevant recommendations of the Working Group and the draft convention prepared by its Drafting Party will be canvassed in the text.

Pending the outcome of the UNCITRAL Draft, the 1968 Protocol and the enabling U.K. legislation of 1971 remain in a state of limbo. In 1974, the Comité Maritime International recommended a number of improvements to the Hague Rules and urged nations to ratify the Protocol.[33] While it makes significant amendments to the substantive provisions of the Hague Rules, the 1968 Protocol has no particular bearing on the issues of concern here. The purpose of the legislation is to protect the shipper and consignee from the inequality of bargaining power exhibited in adhesion contracts and uniformly to standardize the carrier's liability for international maritime transport.[34] The operational factors which contribute to the success of this objective are the issues for discussion here. They are the scope and application of the legislation.

B. DOCUMENTATION

Non-Negotiable Instruments

Where cargo is carried on general ship, which is to say the shipper does not charter the ship but merely engages the shipowner to carry his cargo to the consignee, the formal document which traditionally regulates the carriage is the bill of lading.[35] Even where a ship is chartered, frequently for carriage of bulk cargo or to a destination outside regular trade routes, the bill of lading is usually issued as a document of title for the convenience of the consignee. It is not surprising, therefore, that the founders of the Hague Rules decided to attach legal liability to the bill of lading itself.

The venerable bill of lading owes its universal popularity, not to its versatile legal characteristics, but to mercantile customs which have since been ratified by courts and complemented by legislatures. However, there is a danger in building a body of law on a particular commercial device. Should trade and commerce abandon that device in favour of another, modern law may be too inflexible to respond accordingly, thereby denying to the new device those advantages hitherto recognized by law and enabling parties to evade the legal control previously attaching to that device. The

[32] UNCITRAL, *Report of the Working Group*, 1974 A/CN.9/33, 4.
[33] [1974] *Lloyd's Maritime & Commercial Law Quarterly* 134.
[34] See *Riverstone Meat Co. Pty Ltd v. Lancashire Shipping Co. Ltd* [1961] A.C. 807, 836; *Caterpillar Overseas S.A. v. Steamship Expeditor and American Export Lines* (1963) 318 F. 2d. 720, 722.
[35] Sixteenth century examples of the bill of lading can be found in *Select Pleas in the Court of Admiralty* (SS.) Vols. I and II.

issue which concerns us here is whether the Hague Rules are comprehensive enough in scope to standardize liability when sea-carriage is divorced from the bill of lading.

The problem is particularly acute in trade routes where use of the bill of lading is declining. Its replacement answers to many names: non-negotiable bill of lading, non-negotiable receipt, shipping note or even an interim receipt such as a mate's receipt. Originally, and currently in Australian export, this type of instrument was confined to non-sale situations where the cargo is transported for the shipper's own use. It is commonly used in coastal trade and in international sales where the consignee has no need to negotiate the instrument for resale or financing. There are even cases where, despite its questionable legality, it is negotiated as security for finance. In order to test the scope of the Hague Rules this class of instrument may be represented by the non-negotiable receipt, but this exercise is equally valid irrespective of the type of instrument used, or, indeed, if no instrument, but say a computer entry, is employed.

Bills of Lading

Although the enacting legislation varies in terminology, the two drafts of the Hague Rules and the text of the Visby Rules are identical in the relevant provisions, unless otherwise indicated. Article II stipulates that the rules apply to every contract of carriage. Article I(b) confines 'contract of carriage' to contracts covered by a 'bill of lading or any similar document of title'. To qualify for inclusion, the non-negotiable receipt must be either a bill of lading or similar document of title.

The immediate difficulty in classifying the non-negotiable receipt by reference to the bill of lading is the inadequacy of a legal definition. Courts have come to recognize three mercantile characteristics in the classic bill of lading but it remains legally unclear whether these are definitional components or merely consequential features. The three characteristics of use are: as evidence of the contract of shipment, as receipt for the cargo and as indicia of the right to possession of the cargo. The need to identify the non-negotiable receipt as, or distinguish it from, the bill of lading justifies a brief excursus into these three features as components of the bill of lading.

Legal controversy surrounds the contractual status of the bill of lading.[36] Should a charterparty be signed, the bill of lading's contractual terms may be entirely nugatory, yet it is still classed as a bill of lading.[37] In the absence of a charterparty, the bill of lading is at least evidence of the contract of shipment between shippers and shipowners.[38] This feature

[36] For the classic debate on whether the bill of lading contains the contract or is merely evidence of the contract of shipment see Colinvaux R., *Carver's Carriage by Sea* (12th ed. 1971) i, 48 ff. The issue is not important here.

[37] *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475, 479.

[38] *Ibid.; Sewell v. Burdick* (1884) 10 App. Cas. 74, 105; *The Ardennes* [1951] 1 K.B. 55.

derives from the circumstances of its issue and not from an attribute peculiar to the bill of lading.[39] It is said to be evidence of the shipping contract because the parties, through their agents with implied enabling authority, reduce their contract to writing,[40] or because the parties intended to incorporate the terms of the bill of lading in their contract.[41] Therefore, it is neither the presence nor absence of contractual terms which isolates the bill of lading from any other instrument, and this feature cannot be essential to its definition. If the circumstances of its issue are conclusive, namely the issue of a document by the shipowner, master or agents upon receipt of the cargo, then the non-negotiable receipt issued in those circumstances cannot be distinguished from the bill of lading.

The most fundamental element of a bill of lading is that it is a receipt, acknowledging delivery of the cargo.[42] But shipping practice is familiar with other forms of receipt which do not share the rubric 'bill of lading' because the latter is said to be something more than a receipt.[43] The 'mate's receipt', for example, being an interim receipt given in the mate's personal capacity, is not a bill of lading because it does not bind the shipowner.[44] Yet a non-negotiable receipt may issue with the authority of the shipowner. Whatever formal ingredients are essential to the bill of lading, they may be present in the non-negotiable receipt so as to be indistinguishable in principle from the classic bill of lading.[45] It has been suggested that the bill of lading must acknowledge receipt of cargo on board ship (*i.e.* it must be a 'shipped' bill of lading) so as to distingush it from a warehouse receipt.[46] So may a non-negotiable receipt be drafted and issued. Moreover, this view would disqualify the 'received for shipment' receipt which is commonly issued under the label 'bill of lading'.[47]

The third and most celebrated feature of the classic bill of lading confers on the holder the right to possession of the cargo without the necessity of the carrier's attornment.[48] In short, it is a document of title. But since law admits to other documents of title, the bill of lading must be confined to one issued by or on behalf of a shipowner. Yet it is not entirely clear whether

[39] *Heskell v. Continental Express Ltd* [1950] 1 All E.R. 1033; *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402.

[40] *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475, 479.

[41] *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 419.

[42] *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475, 479; *Diamond Alkali Export Corporation v. Fl. Bourgeois* [1921] 3 K.B. 443, 449.

[43] *Kum v. Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439, 444.

[44] *Hathesing v. Laing* (1873) L.R. 17 Eq. 92; *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429.

[45] In *Hugh Mack & Co. Ltd v. Burns & Laird Lines Ltd* (1944) 77 Ll. L. Rep. 377, 383 the distinguishing features included its form, its time of issue, its stamping, the terms of acknowledgement, its retention by the shipper and that it was non-negotiable.

[46] *Diamond Alkali Export Corporation v. Fl. Bourgeois* [1921] 3 K.B. 443, 451-3; *cf. Automatic Totalisators Ltd v. Oceanic Steamship Co.* [1965] N.S.W.R. 702.

[47] As to whether a 'received for shipment' bill of lading qualifies as a bill of lading, see *infra* n. 64. For the purposes of the Hague Rules, the Sea-Carriage of Goods Act 1924 (Cth), s. 7 deems it to be a 'shipped' bill of lading.

[48] *Sanders v. Maclean* (1883) 11 Q.B.D. 327, 341; *Official Assignee of Madras v. Mercantile Bank of India Ltd* [1935] A.C. 53, 59.

all bills of lading, or only a certain species, are documents of title. Nor is it clear whether this is a definitional component or merely a legal quality flowing from the initial classification of an instrument as a bill of lading. In this conceptional framework it is difficult to classify the familiar 'non-negotiable' or 'straight' bill of lading which bears the commercial label of a bill of lading and which is recognized as such in the United States[49] yet which is not a document of title in the United Kingdom and Australia.[50]

It is not difficult to recognize a bill of lading by its form and circumstances of issue, for it is a commercial document that has been used for hundreds of years.[51] But, because of imprecision, it is difficult to legally classify an instrument which, departing from commercial orthodoxy, either adopts different form and circumstances (as in the case of 'non-negotiable' and 'received for shipment' bills of lading) or (as in the case of the non-negotiable receipt) retains similar form and circumstances but does not bear the nomenclature 'bill of lading'. And this identification becomes important when applying the Bills of Lading legislation, the provisions of which are exclusively reserved for bills of lading. Fortunately, it is not so crucial in applying the Hague Rules to non-negotiable receipts, which is the task at hand. It is clear from the definition 'bill of lading or similar document of title' that the Rules govern only documents of title and therefore only those bills of lading which are documents of title. True, the definition further reduces documents of title to those which are *similar* to bills of lading and this directs the enquiry back into the definitional conundrum.[52] But if the non-negotiable receipt is not a document of title, then irrespective of its classification as a bill of lading *per se*, it is not governed by the Hague Rules. The issue may then be resolved by shifting the enquiry from bills of lading to documents of title.

Documents of Title

The law relating to documents of title evolved from attempts to reconcile common law doctrines with the mercantile practice of disposing of goods in the possession or custody of such commercial bailees as warehousemen, carriers and mercantile agents. Consequential enactments are contained in the Factors Act 1889 (U.K.) and its Australian counterparts[53] which define 'document of title' for the purpose of the legislation. Commercially, the

[49] Bills of Lading Act 1916 (U.S.), s. 2.

[50] *Kum v. Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439.

[51] *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475, 481; *Rosenfeld Hillas & Co. v. The Ship 'Fort Laramie'* (1923) 32 C.L.R. 25, 31.

[52] In *Hugh Mack & Co. Ltd v. Burns & Laird Lines Ltd* (1944) 77 Ll.L. Rep. 377, 383 (*per* Lord Andrews C.J.) the view was expressed that if a 'non-negotiable receipt' were a document of title it was not *similar* to a bill of lading because of its form, content and circumstances of issue. As a definitional distinction this view is untenable. See *infra* n. 65.

[53] N.S.W., Factors (Mercantile Agents) Act 1923; Vic., Goods Act 1958 Part II; Qld., The Factors Act 1892; Tas., Factors Act 1891; S.A., Mercantile Law Act 1936; W.A., The Factors Acts 1823 to 1878 (adopting Imperial legislation by 7 Vict. No. 13 (1844) and amended by 42 Vict. No. 3 (1878)).

document of title is an instrument by which the bailor of goods, which are in the possession or custody of a commercial bailee, can transfer his right to possession of those goods to a third party without the physical delivery of the goods. Production of the document of title enables the holder thereof to receive delivery of the goods from the bailee. Documentary mobility over stationary goods was central to the law merchant yet treated with suspicion by the common law, yet the common law does preserve the qualities of the bill of lading and will recognize a document of title created by mercantile custom. It is not relevant here to pursue the technicalities of the document of title if we can identify those features of it and those principles on which the scope of the Rules will be applied.

For a document of title to be created by mercantile custom, two elements must be satisfied, one factual, the other legal. The first is that it must be established as a fact that its usage as a document of title has been generally accepted by all those who habitually engage in the particular trade or market concerned. Subject to evidence of the extent of its usage there is no legal objection to a non-negotiable receipt acquiring this mercantile status. The second, legal, element is, however, that the terms of the instrument cannot be repugnant to the qualities of a document of title. It is legally essential to the concept that the instrument be transferable and any expression to the contrary on the face of it disqualifies the instrument as a document of title. This was settled by the Privy Council in *Kum v. Wah Tat Bank Ltd*[54] in relation to the mate's receipt, which had achieved widespread mercantile usage as a transferable document of title in a particular market, but to which the Judicial Committee denied legal recognition because the presence of the words 'not negotiable' robbed it of that vital quality of transferability.

It is worth noting in passing that this reasoning disqualifies the non-negotiable bill of lading as a document of title.[55] This is of no real consequence to the proprietary rights of the consignee because the carrier, in accepting the cargo for delivery to the named consignee, attorns as bailee to the consignee and is therefore accountable to him at common law. However, the definitions in the Factors legislation and the preamble to the Bills of Lading Act (which is omitted from some of the comparable legislation in Australia)[56] both assume that the bill of lading is transferable. If this is so, it follows that the non-negotiable bill of lading is also denied ranking as a bill of lading and the carrier and consignee are not deemed to be privy to a contract under the Bills of Lading legislation.[57]

[54] [1971] 1 Lloyd's Rep. 439.

[55] By virtue of Bills of Lading Act 1916 (U.S.), s. 2 it is classed as a bill of lading in the United States.

[56] The preamble was included in all the introductory legislation, see *supra* n. 3, except that of Victoria, but is now contained in the current legislation, see *supra* n. 6, of only Queensland, Tasmania and Western Australia.

[57] They may be privy by application of common law principles. *Sanders v. Vanzeller* (1843) 4 Q.B. 260, 295-6; 114 E.R. 897, 911; *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154, 168.

At this point it is necessary to clarify the meaning of transferability and negotiability. It is quite clear that bills of lading and documents of title did not achieve that concept of negotiability which enables the holder in due course of a bill of exchange to acquire a better title than that of his transferor.[58] At most, the transferee of a document of title can acquire only that right to possession vested in his transferor. However, the term 'negotiable' is also used synonymously with 'transferable' and because classic negotiability was never conferred upon a document of title, the terminology 'non-negotiable' in this context should be construed as 'not transferable'. This approach was accepted by the Privy Council in *Kum v. Wah Tat Bank Ltd*,[59] but an argument has been advanced under the Hague Rules to attribute a further meaning to the expression 'negotiable'.

Article VI of the Rules enables the parties to escape the purview of the Rules in respect of transactions which are not in the ordinary course of trade, which justify a special agreement, where no bill of lading is issued and where the terms of carriage are embodied in a non-negotiable receipt. This article, it is argued, would be superfluous unless the non-negotiable receipt were governed by the Hague Rules and contemplated as a document of title. This line of reasoning could only be consistent with English and Australian law on documents of title if the term 'non-negotiable' does not deprive the receipt of transferability. That is to say 'not negotiable' should not be construed as meaning 'not transferable' but should be confined to being a reference to the inability to pass contractual rights and liabilities to the holder of the instrument as the bill of lading would do under the Bills of Lading Act. Consequently, the non-negotiable receipt would be construed as transferable and a document of title yet incapable of negotiating contractual terms. If this argument is accepted then the Hague Rules will govern commercial shipments carried under non-negotiable receipts as documents of title similar to bills of lading.

A number of factors erode this logical argument of its appeal. The first is the *Kum v. Wah Tat Bank* case, in which the Privy Council equated 'non-negotiable' with 'not transferable'.[60] It is submitted that the instrument in dispute before the Judicial Committee is indistinguishable from the non-negotiable receipt postulated here, although it is true the Committee was not called upon to consider its construction under the Hague Rules and the terminology employed is always capable of different meanings according to the intention of parties and local usage. Secondly, Article VI itself indicates that the receipt is not a bill of lading. As such it would never acquire the qualities of privity bestowed by the Bills of Lading legislation on bills of lading. The presence of the expression 'not-negotiable'

[58] *Lickbarrow v. Mason* (1790) 1 H.Bl. 357, 359-60; 126 E.R. 209, 211, reversed on other grounds (1793) 2 H.Bl. 211; 126 E.R. 511; *Sewell v. Burdick* (1884) 10 App. Cas. 74, 98; *Nippon Yusen Kaisha v. Ramjiban Serowgee* [1938] A.C. 429, 449.
[59] [1971] 1 Lloyd's Rep. 439, 444-5.
[60] *Ibid.*

is therefore meaningless because if omitted, the receipt as a bare document of title would not aspire to contractual negotiability. The only sense to be made of that expression is to assimilate it with pure transferability. Thirdly, the definition of 'contract of carriage' in Article I of the Hague Rules expands its application to a document issued under a charterparty from the moment when it 'regulates the relations between a carrier and a holder of the same'. It is arguable that this extract contemplates a document which is capable of transferring contractual terms beyond the consignee.[61] The difficulty with this counter-argument is that it would preclude from the Hague Rules all transferable documents of title which are not bills of lading under the Bills of Lading legislation. Fourthly, the non-negotiable receipt would have to be accommodated in the implied terms of sales contracts. There is authority that a C.I.F. contract implies that not only must the shipping documents, when presented, include a document of title but it must be one which vests in the consignee or holder of the contract of shipment.[62]

In summation, one argument would amplify the jurisdiction of the Hague Rules to cover the non-negotiable receipt by virtue of Article VI. Counter-arguments incline to Article VI as an expression of clarity and precaution: that the paradigm non-commercial non-negotiable receipt was never intended to invoke the application of the Hague Rules.

Legislation

In our quest to determine the extent of uniformity of liability under the non-negotiable receipt nothing has yet been said about the domestic legislation which introduces the Hague Rules. Section 6 of the Australian Sea-Carriage of Goods Act 1924 provides for a clause paramount incorporating the Hague Rules to be inserted in 'every bill of lading or similar document of title'. This phrase, being identical with that used in the Hague Rules, sheds no further light on the non-negotiable receipt. It is interesting to note that section 9 which entrenches jurisdiction in Australian courts and the application of Australian law does so in respect of any 'bill of lading or document relating to the carriage of goods'. Because this is not restricted to documents of title it may well include the non-negotiable receipt irrespective of its status as a document of title.[63] This, however, has no bearing on the carrier's liability under the Hague Rules.

The United Kingdom Carriage of Goods by Sea Act 1971 was intended to replace the 1924 legislation and to implement the Visby Rules. Section 1(4) retains the fiat that the Rules are to apply to only those contracts of carriage which utilize a 'bill of lading or any similar document of title'. But section 1(6)(b) specifically directs the Hague-Visby Rules, with stipulated

[61] *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 421.
[62] *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K.B. 495, 514.
[63] *John Churcher Pty Ltd v. Mitsui & Co. (Aust.) Ltd* [1974] 2 N.S.W.L.R. 179.

omissions and modifications, to the non-negotiable receipt if it is marked as such and the contract of shipment expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading. The implication of this provision is that non-negotiable receipts were previously excluded. If so, parties are free to use a non-negotiable receipt which may easily enable them to escape the scrutiny of the Rules and defeat the objective of the legislation.

Demanding Bills of Lading

Unorthodox forms of shipping documentation may qualify as bills of lading or similar documents of title if they meet the specifications of common law. Non-negotiable instruments fall on the wrong side of the definitional dividing line as do carriage arrangements which are not implemented by documentation. However, there remains one further means by which a shipper may convert a carriage alienated from the Rules into one attracting the protection of the Rules. Two provisions, on the surface, entitle him to demand a bill of lading from the carrier.

Article III rule 3 provides that, if the shipper so demands, the carrier shall issue a bill of lading identifying the cargo after receiving it in his charge. Article III rule 4 declares such a bill to be *prima facie* evidence of delivery. These rules are directed at the 'received for shipment' bill of lading which is an interim receipt issued before the cargo is loaded aboard ship. There is some doubt at common law that this instrument qualifies as a bill of lading[64] or similar document of title,[65] although the Australian Sea-Carriage of Goods Act 1924 uniquely deems it a valid bill of lading capable of negotiation in all respects as if it were a 'shipped' bill of lading.[66] The issue of the interim bill is of little use in protecting the shipper under the Rules themselves.[67] As we shall see,[68] the carrier incurs no liability under the Rules until he commences to load the cargo. The interim bill will support a general law action against the carrier, but, even under the Australian Act, may contain clauses exempting the carrier from liability during the interim custody of the cargo.

Article III rule 7 entitles the shipper to demand a 'shipped' bill of lading once the cargo has been loaded on board. Alternatively, the carrier may appropriately endorse a document of title which he has previously issued

[64] *Cf. The Ship 'Marlborough Hill' v. Alex Cowan & Sons* [1921] 1 A.C. 444; *Diamond Alkali Export Corporation v. Fl. Bourgeois* [1921] 3 K.B. 443, 452; *Automatic Totalisators Ltd v. Oceanic Steamship Co.* [1965] N.S.W.R. 702.

[65] In *Hugh Mack & Co. Ltd v. Burns & Laird Lines Ltd* (1944) 77 Ll. L. Rep. 377, 383 a 'received for shipment' bill of lading was classified as a 'similar document of title' in a judgment which inconsistently denied the same classification to a 'non-negotiable receipt'.

[66] S. 7. It may be restricted to a 'received for shipment' bill of lading which is issued pursuant to the demand of the shipper.

[67] It may, however, constitute evidence of the 'contemplation' of parties to issue a shipped bill of lading, *infra* n. 71.

[68] *Infra* p. 545 ff.

to the shipper. One might ask, if a previous document of title has issued, why it should not, in its own right, carry the application of the Rules without further endorsement. If the answer is that a 'similar document of title' in Article I(b) refers only to a document of title which acknowledges receipt of the cargo on board ship, then no interim documentation including the 'received for shipment' bill of lading would qualify in that capacity.[69]

Both 'demanding' rules are conceptually illogical. They impose liability on the carrier to issue the appropriate bill of lading only if the Rules apply to the carrier. And the Rules will only apply to the carrier under Article II if the contract of carriage, as defined in Article I(b), is 'covered' by a bill of lading or similar document of title. It is this circuitous problem which underlies the courts' refusal to permit a shipper to avail himself of the Rules' protection by demanding the issue of a bill of lading, unless it was expressed in the contract of shipment or implied by customary usage that one would issue.[70] If the parties, in concluding their contract, 'contemplate'[71] the issue of a bill of lading, then, irrespective of whether it is issued or demanded,[72] the contract of carriage will be 'covered' by the bill of lading and the Hague Rules.

The 'demanding' provisions serve little purpose. It would appear that if a bill of lading is contemplated, the Rules will govern the carriage even in default of a demand, while if other documentation is used there is no right of demand to attract the protection of the Rules. The judicial approach to construction of the Rules has been more restrictive than that which, on the whole, appears to have been intended. Article VI suggests that a contract of carriage should escape the Rules only if three conditions are satisfied: that no bill of lading is issued; that the contract is embodied in a non-negotiable receipt; that the carriage is not a commercial shipment made in the ordinary course of trade and the circumstances justify special agreement. And yet courts have excluded a non-mercantile carriage from the Rules which did not satisfy all three elements.[73]

Allied to this problem is the difficulty of the consignee in suing the carrier. If the shipper's contract with the carrier does not contemplate the issue of a bill, the consignee will have no protection under the Rules. Yet even where the Rules apply, if the shipper fails to demand a bill of lading or if it is not issued, the consignee may be confronted by the exacting task of either establishing an agency relationship with the shipper or bringing an

[69] *Supra* nn 64-5.

[70] *Harland & Wolff, Ltd v. The Burns & Laird Lines Ltd* [1931] S.C. 722, 728; *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 419; *Automatic Tube Co. Pty Ltd v. Adelaide Steamship (Operations) Ltd* (1966) 9 F.L.R. 130, 133.

[71] *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 419.

[72] *Automatic Tube Co. Pty Ltd v. Adelaide Steamship (Operations) Ltd* (1966) 9 F.L.R. 130.

[73] In *Harland & Wolff, Ltd v. The Burns & Laird Lines Ltd* [1931] S.C. 722, no non-negotiable receipt was issued.

action in the name of the shipper.[74] The Bills of Lading Act 1855 and its Australian derivatives only vest contractual rights and liabilities in the consignee where he holds a bill of lading.

Charterparties

The final issue which bears on this sequence is the place of the charterparty under the Rules. Article V excludes charterparties from the Rules. Yet Article I(b) includes a bill of lading issued under 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 same'.[75] These provisions conceal a number of anomalies and uncertainties.

The charterparty, *eo nomine*, has no technical meaning. It, like the bill of lading, is the description given to standard contracts which have proven historically and commercially popular. Legally, the importance of the charterparty resides in the contract embodied therein and each must be treated on its own facts. However, its historical and commercial use tolerates a classification of its contractual terms into two categories. The first embraces those terms by which the charterer charters a ship. In this category the contractual terms are not directed at the carriage of the charterer's goods. There being no contract of carriage between charterer and shipowner, the Hague Rules would not in any event apply to the contract even in the absence of the charterparty's exclusionary rules. Should the charterer agree to carry a third party's goods, of course, he will assume liability as carrier under that contract of carriage. The second category relates to those types or terms of charterparties by which the shipowner agrees to carry the charterer's cargo. To this extent the charterparty embodies a contract of carriage the exclusion of which from the Rules may not be justified if the Rules are to secure comprehensive coverage.

If the latter type of charterparty is coupled with a sales transaction between the charterer/shipper and a consignee, a bill of lading will usually issue as a document of title for the use of the consignee. It is said that such a bill of lading in the hands of the charterer/shipper is nothing more than a receipt.[76] This cannot mean that it loses its character as a document of title. It means that the terms of the bill of lading do not regulate the contract of carriage between the charterer and shipowner (this, of course, may be true of a bill of lading issued outside a charterparty, a further reason for challenging the distinction preserved by the Rules). It follows that the bill of lading issued under a charterparty cannot, within the meaning of Article I(b), regulate the contractual relations between a holder and the carrier before the bill is delivered to the consignee.[77] If so,

[74] *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 424.
[75] *Ibid.* 421.
[76] *Rodocanachi v. Milburn* (1886) 18 Q.B.D. 67, 75; *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475, 479.
[77] *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd* [1954] 2 Q.B. 402, 421; *Brandt v. Liverpool Brazil and River Plate Steam Navigation Co.* [1924] 1 K.B. 575, 596.

three weaknesses are exposed. First, if the Rules do not apply until the consignee receives the bill, the carrier is under no obligation to comply with the shipper's demand to issue a bill. Secondly, if the holder is to recover for loss or damage incurred before he received the bill, courts must construe the Rules as applying retrospectively.[78] Thirdly, since the bill of lading is a mere receipt and does not contain the contract of shipment, the contract between carrier and holder embodying the terms of the bill of lading may be inconsistent with the contract of shipment in the charterparty.

Proposed Reforms

In 1974, the UNCITRAL Working Group on International Legislation on Shipping reported on the documentary scope of the Hague and Visby Rules. By nominating the bill of lading as the fulcrum of the Rules, the 1924 Convention had intended to encapsulate all designated contracts of carriage. But the effectiveness of the Rules is diminished when the application of the Rules oscillates with the selection of documentation and when, in our system alone, the Rules give rise to such complexity and uncertainty. The solution lies not in the expansion of the documentary definitions to embrace alternative forms, but in the reduction of the definition to the physical fact of carriage, that is, possession or custody.

The Working Group appointed a Drafting Party to prepare a draft Convention revising the Rules. The Draft[79] proposes to attach liability to 'all contracts for carriage of goods by sea . . .' and omits reference to bills of lading and similar documents of title from the proposed definition of 'contract of carriage'. This should rectify the problems posed by the present operational boundaries of the Rules.

Unanimity is an unlikely outcome in the 21 member-nation Working Group. Some members subscribe to the view that parties should be free to negotiate their own terms of liability. They argue that the carrier cannot assert his bargaining superiority over an unwilling shipper if the latter retains the right to demand the protection of the Rules. But, of course, this will hold true only if the Rules govern the contract of carriage from inception and permit the shipper to elect for the Rules notwithstanding the terms of the contract. Implementing such a device would unduly complicate the Rules and exacerbate litigious difficulties. Generally the concept of free bargaining is rejected by the Draft which recommends the deletion of the ineffective Article VI. However, the Draft retains the right of the shipper to demand a bill of lading.

Under the Draft, the shipper is entitled to demand a bill of lading from the carrier when the cargo is received in the charge of the carrier and a 'shipped' bill of lading when the cargo is received on board. By virtue of

[78] *Monarch Steamship Co. v. Karlshamns Oljefabriker A.B.* [1949] A.C. 196; *Cremer v. General Carriers S.A.* [1974] 1 All E.R. 1; *The Albazero* [1975] 2 Lloyd's Rep. 295.

[79] A/CN.9/WG.111/(VIII)/CRP.39 (1975).

the proposed definition of 'bill of lading', the document issued in response to the shipper's demands must possess three qualities. First, it must be evidence of receipt, interim or 'shipped' as the case may be. Secondly, it must be evidence of the contract of carriage. Thirdly, it must undertake to deliver the cargo against surrender of the document.

These three components correspond with the three definitional components of the classic bill of lading. And because the carrier is obliged to issue the bill, irrespective of the terms of the contract of carriage or customary usage, the Draft clearly shifts its impact in favour of the consignee.

As a receipt, interim or 'shipped', the Draft provides that the bill of lading is *prima facie* evidence in the hands of the shipper and conclusive evidence in the hands of the consignee or other holder. As evidence of the contract, the Draft preserves an ambivalent position in our domestic law. To constitute evidence of the contract of shipment, the bill of lading depends upon the circumstances of each case. As between the carrier and shipper, the terms of the bill may be nugatory. Presumably under the Draft, the carrier is obliged to issue a document which faithfully reproduces the terms of the contract. Presumably it is open to the shipper to challenge the document on these grounds. But what of the consignee? Is he, as is the orthodox view, bound by the terms of the document issued notwithstanding a discrepancy between it and the contract of shipment? Commercially it is more convenient for the consignee to rely upon the terms contained in the documentation than in the contract of shipment, but is the carrier estopped from denying the authenticity of the terms in the bill of lading? As a document of title, the definition in the Draft requires the bill to be negotiable. This immediately excludes the straight bill of lading and non-negotiable receipt. It also means that an interim (hitherto 'received for shipment') bill of lading must be negotiable. Yet under the Bills of Lading legislation (ignoring the interplay of the Sea-Carriage of Goods Act with that legislation) the vesting of contractual rights in the consignee may depend upon the bill being classed as a 'shipped' bill of lading. In this respect domestic legislation should be clarified.

Suppose the carrier does not issue such a document, either because the shipper does not demand it or because the carrier refuses. The Rules, as proposed, will apply and bind the carrier to liability but the consignee faces the difficulty of enforcing the contract and proving the carrier's assumption of possession over the cargo. Should alternative forms of documentation issue, one would expect them to bear evidentiary value as receipts. The Draft provides that 'when a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shall be *prima facie* evidence of the taking over by the carrier of the goods as therein described'. This provision must face three objections. First, if the objective is to establish evidence of delivery to the carrier, the provision should not

be confined to documents which are evidence of the contract of carriage. Secondly, if the documentation is negotiated to the consignee, why should it not be conclusive evidence of its contents in the hands of the consignee. Thirdly, as the proposal stands, the only document which can satisfy its terms is one which would qualify as a defined bill of lading except that it is non-negotiable.

This provision is clearly directed at the non-negotiable receipt used as a substitute for the bill of lading. Its function here is reduced to evidence of the carrier's possession. So too, any other form of documentation may satisfy this requirement although it may not aspire to the elaborate formulation of this particular provision.

The Draft also proposes to exempt charterparties from its operation. However a bill of lading issued under a charterparty attracts the Draft where the bill of lading governs relations between its holder and the carrier. Not only does this fail to solve the existing issues but it introduces complexities of its own. To protect the consignee whose cargo is carried under charterparty, the carrier must issue documentation which complies with the Draft's definition of 'bill of lading'. Yet the non-negotiable bill of lading does not satisfy the requirement that the instrument be negotiable. And if the Draft does not govern the charterparty, the shipper cannot look to the 'demanding' provisions to compel the issue of a negotiable bill of lading. Furthermore, if the intention of the definition is that the bill of lading must evidence the contract between carrier and shipper (as distinct from a contract created between carrier and consignee) no documentation issued pursuant to the charterparty will comply with the definition.

C. PERIOD OF RESPONSIBILITY

At common law, the liability of a carrier for loss of or damage to cargo coincides with the duration of the bailment, the time during which he has possession or custody of the cargo. The legally sensitive regions of that period of liability are the two extremities — the moment when liability is assumed and the moment when liability is discharged. Under the Hague-Visby Rules the two extremities have been fixed by rules which are ambiguous in their construction and which may be inadequate for the reasonable protection of the shipper/consignee.

The Rules

The provisions relevant to the extremities of responsibility may be summarized briefly:

The definition of 'carriage of goods' in Article I(e) provides for coverage 'from the time when the goods are loaded on to the time they are discharged from the ship'.

Article II confers rights and imposes liabilities and Article VI permits parties in special circumstances to contract out of those rights and

liabilities, in relation to 'the loading, handling, stowage, carriage, custody, care and discharge' of the cargo. Article III rule 2 requires the carrier to properly and carefully 'load, handle, stow, carry, keep, care for, and discharge' the cargo.

Article VII expressly authorizes the parties to settle the terms of the carrier's liability 'prior to the loading on and subsequent to the discharge from the ship'.

The immediate problem of interpretation is to resolve the questions: Does liability commence at the beginning or conclusion of the loading process, or at some point in between? Does 'discharge' denote unloading or some other event, and if a substained process does liability terminate at the beginning, conclusion or some point in between? Having solved the interpretation problem, the principles must then be applied to the facts of loading and discharging.

Commencement of Responsibility

As between shipper and consignee, the sales contract may prescribe the obligations on the shipper to deliver the cargo for loading and will settle the passing of risk. But, of course, it will have no bearing on the carrier's liability which derives from common law as varied by the shipping contract and, where applicable, the Hague-Visby Rules. In order to concentrate on the Rules we must ignore, for the moment, the carrier's legal position outside the Rules as we must also his position under a charterparty which does not attract the Rules.

The earliest possible moment when the carrier can expose himself to liability under the Rules is the beginning of the loading process. To substantiate this preliminary observation we must dispose of two possible yet untenable arguments. First, responsibility imposed by Article III rule 2 for 'handling' the cargo cannot mean handling before loading because of the parameters drawn by the definition in Article I(e), because of the sequence of events arranged in Articles II, III and VI and because of the exclusion contained in Article VII. Secondly, other obligations in respect of conduct which may precede loading, for example Article III rule 1 'before . . . the voyage' and Article III rule 3 'after receiving the goods into his charge', have no bearing on the carrier's responsibility for damage to or loss of the cargo at those points of time.

The terminology employed by Articles II, III and VI suggests that the carrier incurs liability from inception of loading and continues throughout the process. The definition in Article I(e), however, suggests that responsibility commences on completion of the loading process. When the definition in Article I(e) is fed through the definition of 'contract of carriage' in Article I(b) into Article II, there is an apparent anomaly resulting from the two inconsistent interpretations. Article VII, which is specifically directed to the limits of responsibility, like Article I(e), uses the preposition

'on' suggesting physical contact with the ship, but unlike the definition, uses phraseology suggesting a sustained process and not a finite act of completion.

In *Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd*[80] Devlin J. rejected the argument that, under Article I(e), responsibility commenced on completion of loading. However, he was invited by counsel to hold that liability attaches as the cargo passes over the ship's railing.[81] The preposition 'on' contained in Article I(e) would then be used in the same manner as, free *on* board'. The invitation was refused, Devlin J. commenting:[82]

> Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.

Accepting that liability may be imposed on the carrier as early as the commencement of loading, it does not follow that he necessarily incurs liability from this point of time. The commencement of his responsibility will yet vary according to which of two constructions of Article III rule 2 is accepted. Article III rule 2 asserts liability to 'properly and carefully load' the cargo. It may mean 'that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully'.[83] In *Pyrene's* case, Devlin J. favoured the latter construction on the grounds that the Rules were not designed to dictate the scope of the contract but merely to import the standard of performance.

At first glance the Rules would place a demanding burden of liability on the carrier if he were responsible for loading in which he took no part, for which reason Devlin J. concluded that the parties should be free to determine by their own contract the part which each has to play. But the carrier is in a far better position than the consignee to indemnify himself from damage caused in the loading process. Indeed, if the shipper or port authorities undertook the loading, the carrier could resort to the defence under Article IV rule 2(q) that he was not privy to the fault nor were his servants or agents responsible. This approach would at least throw the onus of proof on the carrier, who is in a better position than the consignee to explain the damage and unravel the facts into agency and master-servant relationships. Should the defence fail and the carrier be liable, it is true he may have limited redress against port authorities, but so too would the consignee. And it is inconceivable that the carrier would not play at least a supervisory role in loading, even if the ship's tackle were not used.

Moreover, Devlin J.'s construction itself is capable of two interpretations where the carrier and others contribute to loading. First, that once the carrier participates in the loading process he incurs the liability of others

[80] [1954] 2 Q.B. 402, 416.
[81] *Ibid.* 414.
[82] *Ibid.* 419.
[83] *Ibid.* 417.

involved. This inevitably means untangling the relationships and seems to be the reason for the inclusion of the defence under Article IV rule 2(q). If this interpretation is correct it seems illogical that Article III rule 2 should not be read to impose *prima facie* liability on the carrier to load and then avail himself of the defence. Secondly, that the carrier's liability is proportional to his participation in the loading. This approach leads to the difficulty of relating the standard of care to the carrier's degree of involvement and it too would preferably be resolved by imposing liability on the carrier and leave him to explain the commitment of unrelated third parties towards the damage to or loss of the cargo. The approach of Devlin J. is unnecessarily complicated and defeats the objects of the Rules. Yet it has been approved by the House of Lords.[84]

Whatever meaning is attributed to the Rules, one should not treat with indifference the application of the Rules to the facts. When does loading begin? When is it completed? Of course each case must be treated on its own facts. The assumption made by courts and the industry alike is that loading commences upon the application of the ship's tackle. Indeed, in the International Law Association's original draft of the Hague Rules before amendment by interested business representatives, Article I(e) defined the carriage of goods as commencing when the cargo was 'received on the ship's tackle'. Yet under the present Rules it is open to a court to find that loading commenced at an earlier time with a preceding event. Why is not the removal of the cargo from storage and assembly on wharf part of the loading process? Or the loading of cargo into lighters for movement to the ship's side? More realistically, the use of mobile shore equipment to transport the cargo to the ship and load it could be construed as loading, or the propulsion of vehicles driven along the wharf and into a roll-on/roll-off vessel. Should a break in the movement, such as bringing the cargo to rest on the wharf, necessarily break the nexus of 'loading'? Courts have not explored these devices. Certainly the 'tackle to tackle' rule provides an identifiable event by which liability can be attached. Yet it does not always satisfy modern loading techniques nor is it necessarily a realistic assessment of the carrier's responsibility over cargo.

Termination of Responsibility

Termination of the carrier's liability will depend upon his obligations at common law under his contract (as vested in the consignee through the bill of lading) in so far as his liability extends beyond the ambit of the Hague-Visby Rules.

There can be little dispute that responsibility over the cargo ceases on completion of the discharge and that discharge denotes unloading.[85] In the original draft of the Rules, the operative word used was 'unload' and

[84] *Renton v. Palmyra Trading Corp. of Panama* [1957] A.C. 149.
[85] *Albacora S.R.L. v. Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep. 53, 64.

liability terminated when the cargo was 'unloaded from the ship's tackle'. Adapting the approach of *Pyrene's* case, the carrier's liability under Article III rule 2 terminates when he ceases to participate in the unloading process. Criticisms, corresponding to those advanced in respect of this construction of loading responsibilities, may be levelled at this opinion.

How far the unloading process can extend also is a question of fact. The accepted view is that, in the absence of specific terms, the cargo is discharged when it is safely unloaded alongside the ship whether it be on dock, at wharf or at anchorage. If so, the Rules implement the 'tackle to tackle' period of responsibility.

The Transport Sequence

Having isolated the internal inconsistencies in the Rules, we now survey the scope of the Rules in the perspective of the overall transport sequence in shipping cargo. For convenience, the sequence can be represented by nine phases, each distinguishable from the others by the differing responsibilities likely to arise in the operational sequence. Not all phases necessarily exist in each case, the operation will merge phases into one another and the method of operation may vary considerably. The nine phases are: (i) from shipper to transit storage; (ii) in transit storage; (iii) from storage to ship; (iv) loading; (v) carriage at sea; (vi) unloading; (vii) from ship to storage; (viii) in transit storage; (ix) from transit storage to consignee.

It is readily observed that the Hague Rules focus on the central phase (v). They extend no further than one phase in each direction, (iv) and (vi), giving rise to the 'tackle to tackle' rule. If *Pyrene's* case is accepted, phases (iv) and (vi) do not represent absolute periods of liability, merely the limits within which the carrier may be liable if he assumes some responsibility. Extending one phase further, (iii) and (vii), it is unlikely that the Rules impose liability unless his activity can be construed as part of the loading and unloading processes.

If one accepts the underlying philosophy of the view expressed in *Pyrene's* case, that liability attaches not to a period of time but to activity undertaken, there is cogent reason to challenge the scope of the present Rules. The Rules, as they stand, merely set limits of time or phase beyond which the carrier cannot be liable notwithstanding his participation. Of course, the carrier may be liable for his activities outside the ambit of the Rules, but his liability then will rest upon general law. The issue debated by the UNCITRAL Working Group is whether the parameters of the Rules should be extended beyond the 'tackle to tackle' phases to envelop other activities of the carrier.

Where the shipowner, himself or by sub-contracting, engages in land carriage, the traditional view is to distinguish his liability according to the nature of the carriage. Though the land carriage may be an integral

component of a 'combined transport' operation, many take the view that, by virtue of the differences in the nature of risks, the land carriage should not be governed by legislation on sea-carriage. It is difficult to see why minimum standards should not be imposed on the carrier so as to preclude an unwarranted limitation of his liability, though the preferable procedure may be to enact them through conventions directed to the risks of land carriage.[86]

Should the shipowner undertake storage, the usual approach again is to distinguish his liability *qua* warehouseman from that *qua* carrier. The different nature of the risks may justify this approach. Yet the existence of legislation importing standards of liability is in recognition of the superior bargaining power of the shipowner and his ability to escape liability, something which no less prevails in respect of storage. The consignee, in particular, is very vulnerable to conditions of storage beyond his control. It is difficult to hold the shipowner liable where the storage is conducted by a body, private company or statutory authority, quite independent of the shipowner. The shipowner may have no real control over the cargo in such circumstances and perhaps no rights of redress against the warehouseman. But nor would the shipping parties, particularly the consignee. The simple issue is who should bear the risk.

Arrangements for storage and stevedoring vary from port to port. The shipper/consignee or carrier may engage services. Stevedores may be privately employed or employed by statutory bodies. At some point in these peripheral phases the shipowner establishes some nexus with the cargo in a supervisory role ancillary to his carriage. Yet it is difficult to lay down an all-embracing principle of his responsibility to the cargo in these phases where other bodies are involved. Perhaps one can distinguish the pre-loading sequence from the post-discharge sequence. At common law the carrier does not assume responsibility as bailee until he takes possession of the cargo, so there is some reluctance to advance his liability to a time when he cannot exercise control over the cargo. Once in possession, his responsibilities are not discharged until he has delivered the cargo to the consignee. There is greater reason then to hold him liable until delivery is performed. Accepting the popular construction of the present Rules, the carrier's current legislative obligations expire when the cargo leaves the ship's tackle. His liability for loss of or damage to the cargo between then and actual delivery to the consignee is not governed by standardized rules even though it is an essential part of the carriage.

If the consignee or his representative takes delivery of the cargo on its release from the ship's tackle, few difficulties can arise. More usually there is a lapse of time before the consignee takes possession. What happens to

[86] Such as the International Conventions concerning the Carriage of Goods by Rail (CIM), Combined Transport of Goods (TCM) and Carriage of Goods by Road (CMR).

the cargo in this time will depend upon port customs and contractual arrangements between the parties. The cargo may have to be conveyed by lighters to the wharf, it may be left on the docks for collection or it may be stored. The consignee may seek redress at common law against these intermediaries, who cannot avail themselves of exemptions in the bill of lading which would absolve the carrier,[87] unless privity can be established.[88] By using the Himalaya clause[89] there is every possibility that carriers will secure protection at least for stevedores. And in each case the consignee is confronted with problems of proving when and how his cargo was damaged or lost and on which intermediary liability should fall. In other instances no bailee other than the carrier himself will be responsible for the cargo pending delivery. The carrier is under a duty to deliver the cargo to the holder of the bill of lading and he remains liable for negligence *qua* warehouseman after discharge of the cargo from ship.[90] But during this period he may utilize two common law devices to absolve himself from liability — the exemption clause and the concept of contractual delivery.

At common law the carrier was free to contract out of liability for loss of or damage to the cargo during carriage and after discharge notwithstanding that it in effect exonerated him from performance of the contract.[91] However, the 1904 legislation declared clauses void if they attempted to relieve the carrier from his duty to 'properly deliver' the cargo.[92] The exemption clause being no longer viable, shipowners drafted bills of lading in such a way as to prescribe delivery at the ship's tackle. The emphasis was no longer on a cesser of liability before delivery but on the performance of the contract upon discharge. In *The Australasian United Steam Navigation Co. Ltd v. Hiskens*[93] a majority in the High Court[94] took the view that the Act did not interfere with the freedom of the parties to stipulate the terms of delivery in their contract and that the carrier's liability terminated upon performance of delivery in accordance with the contract. The dissentient

[87] Earlier decisions placed the intermediary in the same legal position as the carrier, *Elder, Dempster & Co. Ltd v. Paterson, Zochonis & Co. Ltd* [1924] A.C. 522; *Gilbert, Stokes & Kerr Pty Ltd v. Dalgety & Co. Ltd* (1948) 48 S.R. (N.S.W.) 435; *Waters Trading Co. Ltd v. Dalgety & Co. Ltd* (1952) 52 S.R. (N.S.W.) 4. More recent decisions reject this view. *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd* (1955) 95 C.L.R. 43; *Midland Silicones Ltd v. Scruttons Ltd* [1962] A.C. 446; *Gilchrist Watt and Sanderson Pty Ltd v. York Products Ltd* (1970) 44 A.L.J.R. 269.

[88] *The New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154.

[89] So named to take advantage of *Adler v. Dickson* [1955] 1 Q.B. 158.

[90] *Westfal Larsen & Aktieselskab Co. v. Vacuum Oil Co. Pty Ltd* [1928] V.L.R. 188; *Fairfax v. The New Zealand Shipping Co. Ltd* (1912) 12 S.R. (N.S.W.) 572; *Gilchrist Watt and Sanderson Pty Ltd v. York Products Ltd* (1970) 44 A.L.J.R. 269.

[91] *Chartered Bank of India, Australia & China v. British India Steam Navigation Co. Ltd* [1909] A.C. 369; *Anselme Dewavrin v. Wilson's & N.E. Railway Shipping Co.* (1931) 39 Ll. L. Rep. 289; *Denham v. Clan Line Steamers, Ltd* (1929) 29 S.R. (N.S.W.) 65.

[92] Sea-Carriage of Goods Act 1904, s. 5.

[93] (1914) 18 C.L.R. 646.

[94] *Ibid.* Griffith C.J., Gavan Duffy and Rich JJ.

view[95] was that the carrier could not escape his obligations to actually or constructively deliver the cargo to the consignee by resorting to this contractual device.

The Hague Rules neither compel the carrier to deliver the cargo, nor impose liability beyond the ship's tackle. Consequently, the carrier may be successful in escaping liability by use of either or both of these devices.[96] The failure of the carrier to deliver cargo has been challenged under the fundamental breach doctrine[97] which must be read in the light of subsequent developments.[98] Certainly the cesser of liability clause is now more vulnerable than it was before 1904 but it is more difficult to assail a term which contractually prescribes the mode of delivery. Consequently, the law encourages the carrier, if freight is pre-paid and he has no reason to exercise a lien over the cargo, to deposit cargo on the wharf in accordance with the contract without any continuing obligations of storage.

There is little point in examining these cases and the law of bailment and exemption clauses in detail. What is important is to recognize the manipulations available under individual contracts and decide, as a uniform principle, at what point of the transport sequence the carrier should cease to bear the risk for the cargo. The Harter Act 1893 is preserved in the United States by the Carriage of Goods by Sea Act 1936 in so far as it imposes responsibility on the carrier before loading and after discharge of the cargo.[99] The Harter Act, as did the 1904 Australian legislation, declares void any attempt to negative responsibility for the proper delivery of the cargo.[1]

Proposed Reforms

The UNCITRAL Working Group seeks to clarify the moment of assumption and termination of liability. It also proposes to extend the period of liability beyond its present limits into the peripheral phases. Article 4 rule 1 of the Draft redefines 'carriage of goods' to cover the period during which the goods are in the charge of the carrier at the port of loading, during carriage, and at the port of discharge. The proposed period of responsibility does not necessarily coincide with the period of bailment in that the earliest assumption of liability under the Draft is at the port of loading and the latest termination of the liability is at the port of discharge. Land carriage to and from ports is therefore omitted from the

[95] *Ibid.* Isaacs and Powers JJ.
[96] *Keane v. Australian Steamships Pty Ltd* (1929) 41 C.L.R. 484; *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd* (1955) 95 C.L.R. 43; *Automatic Tube Co. Pty Ltd v. Adelaide Steamship (Operations) Ltd* (1966) 9 F.L.R. 130.
[97] *Sze Hai Tong Bank v. Rambler Cycle Co. Ltd* [1959] A.C. 576.
[98] *Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Harbutt's 'Plasticine' Ltd v. Wayne Tank and Pump Co. Ltd* [1970] 1 Q.B. 447.
[99] Carriage of Goods by Sea Act 1936 (U.S.), s. 12.
[1] Harter Act 1893 (U.S.), s. 1.

proposed Rules. However storage at the port and movement to and from storage may be governed by the proposals if undertaken by the carrier.

Article 4 rule 2 then proceeds to amplify the definition. It provides that the carrier shall be deemed to be in charge of the goods from the time he takes over the goods. No doubt this phraseology will be subjected to diverse interpretation and will of course reflect differing concepts of actual and constructive possession or custody in the various jurisdictions. An unduly restrictive interpretation will not advance responsibility beyond its present point of commencement. Certainly the proposed Rules will involve quite a close scrutiny of the fact situations in each case. To what extent a carrier who supervises independent stevedores can be said to be 'in charge of' or to have 'taken over' the goods is a matter for conjecture. In rule 3 the article does, however, provide that reference to the carrier shall mean the servants, agents or other persons acting pursuant to the instructions of the carrier. This of course will turn on local understanding of master-servant, agent and independent contractor concepts, and again each case will depend upon the degree of instruction given.

Proof that the carrier has taken over the cargo will be facilitated if documentary evidence is available. The Rules should prescribe the status of documentation which evidences receipt of the cargo. Article 18 of the Draft stipulates that a document other than a bill of lading is *prima facie* evidence of the taking over of the goods. Unfortunately this is restricted to documents which evidence the contract and therefore excludes all forms of interim receipts given by the carrier on delivery of the cargo into his charge. Under Article 14, the shipper may demand an interim bill of lading when the goods are received in the charge of the carrier but this begs the question of when in fact the goods are taken over by him.[2] Surely matters would be simplified if the issue of a receipt were to be *prima facie*, if not conclusive, evidence of the commencement of the bailment throwing the onus on the carrier to exculpate himself from liability. Under the proposed drafting, if the carrier issues documentation including an interim bill of lading before the cargo is 'at the port' his responsibility does not commence to run until the latter point.

Article 4 concentrates on a more precise statement of termination of liability. Rule 2 provides that the carrier shall be deemed to be in charge of the goods until he has delivered the goods in one of three situations. He may deliver the goods by handing the cargo to the consignee. This by itself extends the present concept of the Hague Rules to compel a proper delivery of the goods. Alternatively the carrier may deliver the goods by placing them at the disposal of the consignee in accordance with the contract or with the law or usage applicable at the port of discharge. The second leg of this alternative may raise local inconsistencies in the under-

[2] And requires the carrier to issue a document evidencing the contract. See *supra* p. 533 ff.

standing of constructive possession, but for the sake of commercial expediency this is unavoidable. The first leg which enables the carrier to fulfil delivery in accordance with the contract merely invites the problem which prevailed under the 1904 legislation where, in order to comply with the statutory obligation to deliver, bills of lading stipulated for delivery alongside ship. If the decisions of this era are followed, it is likely that Australian courts will find this acceptable and therefore defeat the extended protection of the consignee.[3] This unfortunate possibility should be removed if it is to jeopardize protection of the consignee beyond unloading. Moreover, the very availability of these conflicting arguments reduces the uniform effectiveness of the Rules. The third alternative by which the carrier is at liberty to deliver the goods is by handing the cargo to an authority as required by the law applicable at the port of discharge.

Article 10 of the Draft takes account of sub-contracting the sea-carriage as in trans-shipment. It provides that the contracting carrier shall be liable for the whole carriage and in addition each sub-carrier for the period of his actual carriage. Under Article 11, if the contract of shipment provides for through-carriage by a number of carriers, the position is the same except that the contracting carrier may exonerate himself if he can prove that the damage was caused by the fault of the actual subsidiary carrier. These provisions do not attempt to extend liability to land carriage in a combined transport operation.

The central notion of liability running from the time of acceptance to the time of delivery accords with other carriage Conventions.[4] And it is equally important to the cargo underwriter who is subrogated to the consignee's rights against the carrier.

D. GEOGRAPHIC APPLICATION

Jurisdiction

No attempt is made in the Hague Rules themselves to specify principles governing the jurisdiction of a court to entertain actions against a carrier. Jurisdiction therefore depends upon the domestic laws of the forum. This poses difficult enough problems to the consignee in bringing action against the shipowner, his branch, agency or ship within the consignee's jurisdiction. But if the shipowner can assert the contractual advantage which the rules were designed to neutralize, he may attempt to nominate exclusive jurisdiction and so deprive the consignee of the opportunity to commence action in his own jurisdiction. He may do this by means of a choice of

[3] See *supra* n. 96.

[4] *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (1929) art, 18, rule 2; *Convention on the Contract for the International Carriage of Goods by Road* (1956) art. 17; *International Convention on the Transport of Goods by Rail* (1970) art. 27.

forum clause or by means of a foreign arbitration clause. Both constitute a threat to a court's province of adjudication.

Choice of Forum

The Australian Sea-Carriage of Goods Act 1924 entrenches jurisdiction in Australian courts in respect of carriage to and from Australia. Section 9(1) and (2) renders void any attempt to oust or lessen jurisdiction. If the consignee can otherwise acquire jurisdiction in Australia, therefore, the carrier cannot rely upon a choice of forum clause to the contrary in an Australian court.[5]

To illustrate the diversity which can exist in the application of the Rules we should briefly consider the approach taken by other countries. English jurisprudence, for example, while it reserves an overriding discretion to the courts, favours freedom of parties to select their forum. The United States, however, has been reluctant to recognize a selection of jurisdiction outside the United States. So much so that English authors have commented:[6]

> The rebels of 1776 still flout our jurisdiction. Other countries have more respect for the British.

Parochial pomposity aside, the debate under the Hague Rules rests on two arguments. The first is whether a choice of forum clause contravenes Article III rule 8, which provides that any clause relieving the carrier from liability shall be void. The second is whether a choice of forum clause is against public policy.

The English courts have taken the view that the selection of a forum is procedural in nature and does not afford to the carrier any relief from substantive liability and does not, therefore, infringe the Rules.[7] As to the argument on public policy, the English courts reserve unto themselves an overriding discretion. However, with one prominent exception,[8] the courts have acceded to the parties' contractual selection and the onus of persuading the court to use its discretion to the contrary is said to be very heavy.[9] In *The Eleftheria*, Brandon J. said:[10]

> The principles established by the authorities can, I think, be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In

[5] *Compagnie des Messageries Maritimes v. Wilson* (1954) 94 C.L.R. 577.
[6] Colinvaux R., *Carver's Carriage by Sea* (12th ed. 1971) para. 279.
[7] *Maharani Woollen Mills Co. v. Anchor Line* (1927) 29 Ll. L. Rep. 169.
[8] *The Fehmarn* [1958] 1 All E.R. 333 in which the Court of Appeal refused to accede to a clause stipulating for jurisdiction in the U.S.S.R. notwithstanding that the choice of law was admitted to be Russian.
[9] *The Eleftheria* [1970] P. 94; and see *Mackender Hill and White v. Feldia A.G.* [1967] 2 Q.B. 590; *The Makefjell* [1975] 1 Lloyd's Rep. 528.
[10] [1970] P. 94, 99-100.

exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

United States courts, on the other hand, have challenged the validity of forum clauses under the American equivalent to Article III rule 8.[11] To do this the court must investigate each case on its own facts and attempt to forecast the result of the case if tried in the selected jurisdiction.[12] If the carrier is likely to derive any advantage in the predicted trial over an American trial the court will construe this as a lessening of liability emanating from the forum clause and declare the clause void.[13] On the public policy issue the American courts also exercise a discretion. But unlike their English counterparts whose underlying philosophy promotes freedom of the contract, the presumption in the United States is that the plaintiff should not be denied access to American courts.[14] To remove the action to a foreign court the defendant must show that it would prove to be a more convenient forum than the American court.[15] When the courts take into account such practical considerations as the additional cost and inconvenience to the plaintiff and the increased pressure on him to settle on less favourable terms[16] this becomes a difficult obstacle to overcome.

An attempt was made in the 1950's to align American law with the English approach on both bases.[17] While some decisions took advantage of this to relax the traditional line[18] the attempt has been judicially criticized.[19] The prevailing law does not proscribe forum clauses out of

[11] Carriage of Goods by Sea Act 1936 (U.S.), s. 3(8).

[12] On these issues see generally Denning S. M., 'Choice of Forum Clauses in Bills of Lading' [1970] *Journal of Martime Law and Commerce* 17.

[13] *Indussa Corp. v. SS. Ranborg* (1967) 377 F.2d 200; *General Motors Overseas Operation v. SS. Goettingen* (1964) 225 F. Supp. 902.

[14] *Wood and Selick Inc. v. Compagnie Générale Transatlantique* (1930) 43 F.2d 941.

[15] *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501.

[16] *Indussa Corp. v. SS. Ranborg* (1967) 377 F.2d 200; *Insurance Co. of North America v. N.V. Stoomvaart-Maatschappij 'Oostzee'* (1961) 201 F. Supp. 76.

[17] *W.H. Muller & Co. v. Swedish American Line* (1955) 224 F.2d 806; *Cerro De Pasco Copper Corp. v. Knut Knutsen* (1951) 187 F.2d 990.

[18] *Central Contracting Co. v. Maryland Casualty Co.* (1966) 367 F.2d 341; *Takemura & Co. v. The Tsuneshima Maru* (1962) 197 F. Supp. 909. In *Pakhuismeesteren S.A. v. The SS. Goettingen* (1963) 225 F. Supp. 888 a District Court judge acceded to the foreign court as a *forum conveniens* whereas in a dispute arising out of the same shipment the District Court judge in *General Motors Overseas Operation v. The SS. Goettingen* (1964) 225 F. Supp. 902 held the clause void as being likely to contravene the Hague Rules.

[19] *Carbon Black Export Inc. v. The SS. Monrosa* (1958) 254 F.2d 297; *Indussa Corp. v. SS. Ranborg* (1967) 377 F.2d 200.

hand but permits some flexibility in assessing the facts of each case both as to the prospective lessening of liability and the application of *forum non conveniens*.[20] Whether the decision in *Bremen v. Zapata*[21] heralds a change in legal policy remains to be seen. There the parties had contractually chosen England as the forum to resolve their disputes. One action was commenced in England where the courts accepted jurisdiction.[22] Another was brought in the United States where the courts also accepted jurisdiction until the Supreme Court capitulated. Burger C.J. said:[23]

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

This case did not involve a dispute under a bill of lading and did not invoke the Hague Rules legislation. At most it can reflect only a change in judicial attitude toward public policy which must succumb to the legislative argument should it prevail. Indeed the Chief Justice indicated that an enquiry was necessary in each case to ascertain that the parties' selection did not amount to the exertion of superior bargaining power by one over the other in a standard form contract and that he would only give effect to the parties' choice of forum if 'freely negotiated' and 'unaffected by overweening bargaining power'.[24]

It is clear that between the United Kingdom, the United States and Australia, the Hague Rules do not receive uniform application. The outcome of the parties' contractual choice of forum will depend upon the court which initially assumes jurisdiction. On the premise that the carrier retains a contractual advantage, the United Kingdom favours the carrier through its judicial preferences for freedom of contract. The United States presumptively favours the plaintiff with some judicial flexibility to accommodate the carrier. Australia legislatively entrenches the Rules in favour of the consignee. This not only produces diversity in the operation of the Rules, but can also promote forum shopping on the part of the plaintiff. However, it is important that any proposed solution to the problem takes into account that rarely is the shipper/consignee the plaintiff and the carrier the defendant. The formula for selecting jurisdiction must accommodate the insurers of these parties who, although subrogated to the rights of their clients, are in reality the parties who stand to be most inconvenienced by the manipulation of the forum.

[20] *Krenger v. Pennsylvania R.C.* (1949) 174 F.2d 556.
[21] *M/S Bremen and Unterweser Reederei G.m.b.H. v. Zapata Off-Shore Co.* (1972) 407 U.S. 1.
[22] [1968] 2 Lloyd's Rep. 158 (C.A.).
[23] (1972) 407 U.S. 1, 8-9.
[24] *Ibid.* 12.

Foreign Arbitration

An issue which has confronted the courts is whether an agreement for arbitration is incorporated in the bill of lading by reference to a charter-party.[25] For our purposes we must assume that the foreign arbitration clause does apply to the bill of lading. If properly drawn so as not to purport to oust the jurisdiction of the courts,[26] commercial arbitration is acceptable under the Australian legislation but not if the arbitration is to be held outside Australia or governed by foreign laws.[27] The entrenched jurisdiction in Australia is not duplicated in the United Kingdom or the United States. It is assumed that English courts, subject to their overriding discretion, would generally accede to the parties' agreement for foreign arbitration.[28] The question was posed in the United States whether a commitment to foreign arbitration can be challenged on the grounds that it is likely to reduce the carrier's liability under the Rules.[29] The issue is now precluded by the Arbitration Act 1947 which, if it takes precedence over the Carriage of Goods by Sea Act 1936, specifically validates arbitration clauses in bills of lading and renders a stay of proceedings mandatory on the courts.[30] This provision has been applied to foreign arbitration.[31] Moreover in 1970 the United States enacted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which binds its courts to recognize arbitration clauses in respect of contracting States.[32]

The effect of arbitration on Article III rule 6 needs to be clarified. Article III rule 6 imposes a limitation period in which a 'suit' under the Rules may be commenced. In England[33] this has been interpreted to include arbitration yet there is American authority to the contrary[34] thereby precluding judicial review if the arbitration is prolonged beyond the period

[25] *T.N. Thomas & Co. Ltd v. Portsea Steamship Co. Ltd* [1912] A.C. 1; *The Merak* [1965] 1 All E.R. 230. And see Davies D. A., 'Incorporation of Charterparty Terms into Bills of Lading' [1966] *Journal of Business Law* 326; McMahon J. P., 'The Hague Rules and Incorporation of Charter Party Arbitration into Bills of Lading' (1970) 2 *Journal of Maritime Law and Commerce* 1.

[26] *Scott v. Avery* (1865) 5 H.L.C. 811; 10 E.R. 1121.

[27] *Compagnie des Messageries Maritimes v. Wilson* (1954) 94 C.L.R. 577; *Huddart Parker Ltd v. The Ship 'Mill Hill' and her cargo* (1950) 81 C.L.R. 502; *John Churcher Pty Ltd v. Mitsui and Co. (Aust.) Ltd* [1974] 2 N.S.W.L.R. 179.

[28] *The Cap Blanco* [1913] 130; *cf. The 'Athenee'* (1922) 11 Ll. L. Rep. 6. And see *James Miller & Partners Ltd v. Whitworth Street Estates Manchester Ltd* [1970] A.C. 583.

[29] In *Indussa Corp. v. SS. Ranborg* (1967) 377 F.2d 200 the Court reserved its opinion on arbitration and indicated the Arbitration Act 1947 would prevail.

[30] Arbitration Act 1947 (U.S.), s. 1 defines 'Maritime Transactions' to include bills of lading. S. 2 declares arbitration in a maritime transaction to be valid and irrevocable. S. 3 demands a court to stay judicial proceedings.

[31] *Lowry & Co. v. SS. Le Moyne D'Iberville* (1966) 253 F. Supp. 396; *Mannesmann Rohrleitungsbau G.m.b.H. v. SS. Bernhard Howaldt* (1965) 254 F. Supp. 278.

[32] Art. 2, rule 3.

[33] *The Merak* [1965] 1 All E.R. 230; *cf. Compania Colombiana De Seguros v. Pacific Steam Navigation Co.* [1965] 1 Q.B. 101.

[34] *Son Shipping Co. v. De Fosse and Tanghe* (1952) 199 F.2d 687.

of limitation. Both American[35] and English[36] courts must rationalize arbitration clauses which prescribe a longer or shorter limitation period than prevails under the Rules.

As in the case of forum clauses, the diversity of law towards foreign arbitration clauses reflects the differing economic policies of these countries. The United Kingdom adopts a similar stand to forum clauses. The decision is vested in the judiciary which, subject to a discretion, observes the contractual choice, thereby supporting the carrier. Australia legislatively entrenches arbitration to the advantage of the consignee as it does with judicial jurisdiction. The United States, in contrast to the traditional judicial policy over forum clauses, legislatively confers freedom of choice in arbitration to the benefit of the carrier. Again, proposals for uniformity must accommodate the insurers.

Proposed Reforms

The Hague Rules are aimed at commercial transactions where commercial arbitration may be advantageous to the parties. For this reason the Draft proposals accept the principle of arbitration.[37] The rules governing the conduct of arbitration will vary according to the domestic laws applicable. Of course it is inappropriate that the Hague Rules should settle a common code to govern arbitration[38] but it should formulate a uniform principle for the selection of judicial forum and foreign arbitration.

Articles 21 and 22 of the UNCITRAL Draft specify a number of places wherein a court may assume jurisdiction or arbitration may take place. The proposals apply only if the selected place is in a contracting State. The feature of these two proposals however is that the option rests with the plaintiff, that is the shipper/consignee or his insurer. The places from which the plaintiff may select the court's jurisdiction or the arbitration are the place of the defendant's business, the place where the contract was made if the defendant has a place of business there and the contract was made through it, the port of loading, the port of discharge or a place designated in the contract. In addition, Article 21 rule 2 provides that a court of a contracting State will have jurisdiction if, according to its domestic law, it has power to arrest the carrying vessel. Should the plaintiff choose to bring his action under this head, the defendant has the right, on payment of a security, to insist upon the plaintiff removing his action to a court of one of the other jurisdictions referred to above.

[35] *Lowry & Co. v. SS. Le Moyne D'Iberville* (1966) 253 F. Supp. 396; *Kurt Orban Co. v. SS. Clymenia* (1970) 318 F. Supp. 1387.

[36] *Unicoopjapan and Marubeni-Iida Co. Ltd v. Ion Shipping Co.* [1971] 1 Lloyd's Rep. 541; *Overseas Tankship (U.K.) Ltd v. B.P. Tanker Co. Ltd* [1966] 2 Lloyd's Rep. 386; *H.E. Rolimpex Ltd v. Avra Shipping Co. Ltd* [1973] 2 Lloyd's Rep. 226.

[37] In the non-commercial *International Convention for the Unification of Certain Rules Relating to Carriage of Passengers by Sea* (1961) arbitration clauses are declared void.

[38] UNCITRAL is preparing a convention on Commercial Arbitration.

The Draft proposals improve the position of the consignee and his insurer. The opportunity of forum shopping does of course impose disadvantages on the carrier, but the choice of forum is restricted to places where, for the most part, the carrier is likely to have business connections. This is not necessarily true of the carrier's insurer. Yet in a commercial setting the insurance market is so concentrated that in many cases the forum which will be convenient to the consignee's insurer (usually selected by the shipper) will correspond with the choice of the carrier's insurer. It will be necessary for States adopting the proposals to ensure that the enacting legislation is not drafted so as to defeat uniformity and in the case of arbitration to ensure that it supersedes any conflicting domestic legislation. To avoid discrimination between arbitration and judicial proceedings, Article 20 of the Draft makes it clear that limitation periods under the Rules apply to legal and arbitral proceedings.

Choice of Law

For optimal performance, legislation of this type must eliminate opportunities to escape the Rules. It means that parties should not be free to contract out of the Rules by selecting a law to govern their dispute which does not incorporate the Hague Rules. But more than this, the legal process of determining the appropriate law to be applied should be uniform. If the Rules are identical in each jurisdiction the scope for manoeuvre is reduced. At present the Rules are not entirely identical. Moreover, differences do arise from country to country in the interpretation and conceptual understanding of even identical Rules. But the principal inconsistencies under the present system derive from the enacting legislation.

If we assume that a court has jurisdiction to hear a dispute we can briefly consider the process it will pursue to determine the law to be applied. Suppose the parties have chosen the proper law of the contract. The forum may abide by that selection and apply the subjectively chosen law which may or may not include legislation incorporating the Hague Rules. Alternatively, the forum may not recognize the parties' selection because its private international law rules do not admit to a choice or because legislation overrides the choice. Pausing here we should note that if the forum is Australia or England, the common law generally observes the parties' choice[39] unless the selection is not made *bona fide*, or is not legal, or is contrary to public policy.[40] In certain situations legislation in both these countries removes the choice. If the law of the forum, for whatever reason, rejects the selection or if no selection was made, then the forum will objectively determine the law to be applied, perhaps the law of the forum, the law of the most substantial connection or some other

[39] *Compagnie D'Armement Maritime S.A. v. Compagnie Tunisienne De Navigation S.A.* [1971] A.C. 572; *Tzortzis v. Monark Line A/G* [1968] 1 All E.R. 949; *The Makefjell* [1975] 1 Lloyd's Rep. 528.

[40] *Vita Food Products Inc. v. Unus Shipping Co. Ltd* [1939] A.C. 277.

law.[41] Having determined the law, it may or may not include legislation incorporating the Hague Rules.

The only single method of ensuring a uniform process of determination by all fora is to legislate in such a way that the parties' choice is eliminated and that the forum is bound to apply the law of the forum or a law which contains identical legislation. It assumes of course that forum shopping does not afford an avenue of escape. Article X of the Brussels Convention 1924 was intended to overcome these difficulties in that the Rules were to apply to all bills of lading issued in a contracting State. The Brussels Protocol 1968 repeals that provision and replaces it with a more elaborate formulation. Presently there are differences between the legislation in the United Kingdom, the United States and Australia. The Carriage of Goods by Sea Act (U.K.), both the 1924 and unproclaimed 1971 Acts, applies to carriage *from* the U.K. including coastal traffic. The Carriage of Goods by Sea Act 1936 (U.S.) applies to international carriage *to* and *from* the United States but not to local traffic. The Sea-Carriage of Goods Act 1924 (Cth) applies to carriage *from* Australia and inter-state but not intra-state trade.

Even some simple examples of trade between Australia and England illustrate the lack of uniform policy in applying the Hague Rules. Assume an hypothetical shipping transaction regulated by a bill of lading under which a dispute arises. Below are a number of variable factors in eight examples. Those variables are the place of shipment, the place of discharge, the place of the forum hearing the dispute and the law expressly selected by the parties to govern the bill of lading. We should consider which law will be applied and more particularly whether the Carriage of Goods by Sea Act (U.K.), the Sea-Carriage of Goods Act (Cth), both or neither will apply.

Example No.	*Shipper*	*Consignee*	*Forum*	*Choice of Law*
1	United Kingdom	Australia	United Kingdom	Australia
2	Australia	United Kingdom	Australia	England
3	United Kingdom	Australia	United Kingdom	England
4	Australia	United Kingdom	Australia	Australia
5	United Kingdom	Australia	Australia	England
6	Australia	United Kingdom	United Kingdom	Australia
7	United Kingdom	Australia	Australia	Australia
8	Australia	United Kingdom	United Kingdom	England

In Examples 1 and 2 the transaction is an outward carriage from the place of the forum. In both cases the legislation governing the forum applies to outward shipments and therefore binds the forum. The forum is unable to recognize the parties' selection and the law which will govern the transaction is contrary to the contractual choice. The governing law will include the Hague Rules even if a law had been chosen which did not subscribe to the Rules. The success of the Hague Rules here depends upon the selection of the forum.

In Examples 3 and 4 the parties' wishes are realized but not because the forum abides by their selection, merely because their choice happens to coincide with the legislation binding the forum. In all other respects they are identical with Examples 1 and 2.

In Examples 5 and 6 the legislation binding the forum does not apply to inbound traffic and the court is free to abide by the parties' nomination. In both cases the parties selected a law which contains legislation incorporating the Hague Rules and which, from the viewpoint of the chosen law, will govern the transaction as an outward shipment.[42] If the forum were a court in the United States, however, the American legislation would bind it to the inbound carriage. If the law chosen were of a country which did not subscribe to the Hague Rules the parties may escape its operation altogether subject to what is said in the next examples.

In Examples 7 and 8 again the legislation of the forum does not apply to inward traffic. If the court accedes to the parties' choice it will find that the parties have selected a law which, by virtue of the enabling legislation, does not apply to inward traffic. Three solutions are possible. First, the Hague Rules will not operate at all. Secondly, the courts will give a construction to their legislation that while it does apply to outward carriage it does not expressly preclude inward traffic. This solution is unlikely. Thirdly, if the parties have observed the clause paramount and the reference is clear,[43] the Hague Rules may be incorporated into the contract. If the parties referred merely to the Hague Rules[44] this alternative presents no problems other than determining which text of the Hague Rules was intended. But where reference is made to specific legislation or to the law of a country whose legislation applies only to outward traffic, a vicious circle is created. *Dicta* suggest that courts will assume that the parties intended to apply the substantive provisions of the legislation as if the shipment were outward bound.[45] Other cases in this situation have applied the nominated legislation without discussion of this issue.[46]

Proposed Reforms

Article 2 of the Draft should overcome any diversity in the law to govern

[41] *The Assunzione* [1954] 150; *Compagnie D'Armement Maritime S.A. v. Compagnie Tunisienne De Navigation* [1971] A.C. 572; *Coast Lines Ltd v. Hudig and Veder Chartering N.V.* [1972] 2 Q.B. 34.

[42] *Ocean Steam Ship Co. Ltd v. Queensland State Wheat Board* [1941] 1 K.B. 402; *Phillips & Co. (Smithfield) Ltd v. Clan Line Steamers Ltd* (1943) 76 Ll. L. Rep. 58; *Stafford Allen & Sons Ltd v. Pacific Steam Navigation Co.* [1956] 2 All E.R. 716; *Parke, Lacey, Hardie Ltd v. The 'Clan MacFadyen'* (1930) 30 S.R. (N.S.W.) 438.

[43] *The St. Joseph* [1933] P. 119, 135.

[44] *Waters Trading Co. v. Dalgety Ltd* (1952) 52 S.R. (N.S.W.) 435.

[45] *Golodetz v. Kersten, Hunik & Co.* (1926) 24 Ll.L. Rep. 374, 375.

[46] *Corporacion Argentina De Productores DeCarnes v. Royal Mail Lines Ltd* (1939) 64 Ll.L. Rep. 188; *Silver and Layton v. Ocean Steamship Co.* (1929) 34 Ll.L. Rep. 149; *Assoc. Lead Manufacturers Ltd v. Ellerman and Bucknall S.S. Co. Ltd* [1956] 2 Lloyd's Rep. 167. *Cf. W.R. Varnish & Co. v. 'Kheti'* (owners) (1949) 82 Ll.L. Rep. 525.

any disputes under the Rules. However it is essential that the enacting legislation does not negative its effect by stipulations which reduce the application of the Rules to directional traffic. Even then inconsistencies may arise in the enacting legislation and every attempt should be made to reduce that legislation to a bare skeleton which contains no substantive provisions but merely incorporates the Convention terms.

Article 2 provides that the carriage shall be governed by the Convention if the port of loading or the port of discharge is in a contracting State. It also provides that the parties may select the law of any State in which the Convention is in force. It follows that if the forum has jurisdiction to hear a dispute and the forum is domestically bound by legislation incorporating the Rules, then the Rules will uniformly apply to the carriage if the above conditions are satisfied. Of course if the forum's State does not subscribe to the Rules then it will depend upon its domestic laws as to whether the forum will recognize the parties' choice of law. Uniformity can be achieved only between contracting States.