THE CONTRACT OF CARRIAGE OF GOODS BY SEA: INTERNATIONAL REGULATION

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There have been three major attempts at international regulation of the contract of carriage of goods by sea during this century: the Hague Rules of the early 1920's, the Brussels Protocol 1968 and now the 1976 UNCITRAL Draft Convention on the Carriage of Goods by Sea. Of these three, only the Hague Rules have so far had a significant effect.

Some 80 States have given full or partial effect to the Rules. In Australia a version of the Rules has the force of law by the Commonwealth Sea-Carriage of Goods Act (1924). This Act incorporates the Rules as recommended by the Imperial Economic Conference of November 1923 for adoption by the Governments and Parliaments of the British Empire. The Act does not give full effect to the International Convention for the Unification of Certain Rules Relating to Bills of Lading[1] which was opened for signature at Brussels, 25 August 1924. The Rules as contained in the Schedule of the Act are identical, subject to minor variations, to Articles 1 to 8 of the Convention plus part of Article 9. There is considerable weight of opinion that the Uniform Rules of the Convention are contained in Articles 1 to 10.[2] Article 10 does not appear in the Schedule nor is it given effect in the body of the Act.

The Brussels Protocol[3] was an attempt to overcome certain problems which had arisen in relation to the Hague Rules. The Protocol itself was overtaken by the decision of the United Nations Commission on

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[1] The text of the Convention is reproduced in United Nations, *Register of Texts of Conventions and Other Instruments Concerning International Trade Law* (1973) ii, 130.

[2] A. N. Yiannopoulos, "Conflict of Laws and Unification of Law by International Convention: The Experience of the Brussels Convention of 1924" (1961) 21 *Louisiana Law Review* 553 at 570.

[3] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on 25 August 1924: the text is reproduced in the United Nations *op. cit. supra* n. 1 at 180.

International Trade Law (UNCITRAL) to define anew the rules and practices concerning the bill of lading. It will probably have only limited practical application.[4] The UNCITRAL Draft Covention, in its present form, was adopted at the Ninth Session of the Commission, April, 1976.[5] The Commission has requested the Secretariat of the United Nations to circulate the Draft to all member States and other interested bodies for comment. These comments, when received, will be analysed by the Secretariat and submitted, together with the Draft, to a Diplomatic Conference which UNCITRAL has recommended the General Assembly of the United Nations convene as soon as possible.

The following discussion will concentrate on the present application of the Hague Rules and the changes that may result from the UNCITRAL Draft Convention if and when it comes into force.

APPLICATION OF THE HAGUE RULES

Contracts Inherently Covered by the Rules

Article II of the Hague Rules subjects the carrier "under every contract of carriage of goods by sea" to certain responsibilities and liabilities as set out in Article III. He will not enjoy respite from these except insofar as Article IV applies. A "contract of carriage" is defined in Article I(b) as applying "only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea . . .". "Goods" are defined in Article I(c) to exclude "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried". "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

These provisions have been interpreted to include some contracts of carriage under which no bill of lading has actually been issued; this being the only interpretation consistent with Article III(3) referring to the issue of a bill of lading "on demand of the shipper". The matter turns on whether the shipper is entitled to demand a bill of lading under the original contract of carriage—it being acknowledged that "there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all".[6] If the contract of carriage makes no specific mention of the matter reference will have to be made to the practice of the trade in question. As was said by Lord Clyde in *Harland & Wolff, Ltd.* v. *Burns & Laird Lines Ltd.*:

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[4] The British Parliament has passed the Carriage of Goods by Sea Act (1971) U.K. giving effect to the Brussels Protocol amendments but the Act is not yet in force.

[5] This Article is based on the Draft which appears in *General Assembly Official Records*: Thirty-First Session, Supplement No. 17 (A/31/17).

[6] *Per* Lord Wright in *Vita Food Products Ltd.* v. *Unus Shipping Co. Ltd.* [1939] A.C. 277 at 294.

> Contracts of affreightment are often made by the signature of a simple freight note, or some similar mercantile writing, and may even be made without writing at all; and, in these cases, the conditions of the contract are accepted as being those which in the particular trade are subsequently incorporated in the bill of lading usual in that trade, that is to say, in the bill which, at or after shipment of the goods, the shipper becomes entitled to demand from the master or shipowner. In such cases, the contract of affreightment is truly "covered" by that bill not necessarily issued contemporaneously with the conclusion of the contract.[7]

The reasoning of Lord Clyde was taken up and supported by Devlin, J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*

> In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply. There is no English decision on this point; but I accept and follow without hesitation the reasoning of Lord President Clyde in *Harland and Wolff Ltd.* v. *Burns & Laird Lines Ltd.*[8]

This in turn was approved by Rand J. in the Canadian case of *Anticosti Shipping Company* v. *Viateur St.-Amand*[9] where it was held that a contract of carriage was covered by a bill of lading where both shipper and shipowner contemplated that the carriage would be performed in accordance with the latter's regular practice which was to issue bills of lading. The inherent scope of the Rules may thus be said to extend to all contracts for the carriage of "goods" by sea except to those under which the shipper is not entitled to demand from the carrier a bill of lading or similar document of title relating to the carriage of goods by sea.

What is meant by "bill of lading or similar document of title"? The bill of lading is usually defined in functional terms when examined from a legal point of view. It is said to be a document which acts as a receipt for the goods; which is evidence of the contract of carriage and which constitutes a symbol of the goods themselves *i.e.* a document of title whereby the goods may be disposed of by transfer of the bill.[10] Consequently, any document which performed these functions would come within the scope of the quoted phrase. Beyond that it is difficult to find any guidelines. The issue was raised by the Privy Council in *Kum* v. *Wah Tat Bank Ltd.*[11] but their Lordships did not find it necessary to rule on the matter.

> Unless negotiability is an essential characteristic of a bill of lading, then a custom to treat a mate's receipt as a bill of lading, that is,

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7 (1931) 40 Lloyd's L.R. 286 at 288.
8 [1954] 2 Q.B. 402 at 419-420.
9 [1959] 1 Lloyd's L.R. 352.
10 Clive M. Schmitthoff, *The Export Trade* (6th ed. 1975) p. 309.
11 [1971] 1 Lloyd's L.R. 439.

> as a non-negotiable bill of lading where so marked and otherwise as negotiable, would be unobjectionable . . . . But it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all . . . . There appears to be no authority on the effect of a non-negotiable bill of lading.[12]

A "received for shipment" bill is taken as being covered by the phrase.[13]

National Application of the Rules

The Brussels Convention was designed to limit the autonomy of the parties to a bill of lading; their freedom of contract was to be curtailed so as to avoid variations of liability dependent on the chosen law.[14] Article 10 reads:

> The provisions of this convention shall apply to all bills of lading issued in any of the contracting States.

Although there is argument on this point it would seem that Article 10 applies the rules of the Convention to all bills of lading issued in any of the Contracting States.

> Applied as such, or transformed into domestic law, Article X would import the uniform rules, irrespective of all other contacts, to all bills of lading issued in the forum state or in any other contracting state . . . . The only relevant contact for application of the uniform rules is the place of issue of the bill of lading in a contracting state; as to such bills of lading differences among national legislations are swept away.[15]

However, there is a Protocol of Signature to the Brussels Convention whereby:

> The high contracting parties may give effect to this convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation, the rules adopted under this convention.[16]

In taking advantage of this provision to enact domestic legislation many States did not incorporate the precise requirements of Article 10.

> On the choice of law level, the domestication of the Hague Rules raised the question whether the domestic Rules might receive the same broad range of application as the scope which Article X accords to the Convention Rules, and, more specifically, whether

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[12] *Id.* at 445-46.

[13] *Carver's Carriage by Sea* (12th ed. by Raoul Colinvaux 1971) p. 219; *Scrutton on Charterparties and Bills of Lading* (18th ed. by Sir Alan Abraham Mocatta Et Al. 1974) p. 416.

[14] T. M. C. Asser, "Choice of Law in Bills of Lading" (1974) 5 *Journal of Maritime Law and Commerce* 355.

[15] Yiannopoulos, *supra* n. 2, at 583. A contrary view is indicated in *Carver's Carriage by Sea, op. cit. supra* n. 13 p. 266.

[16] See the United Nations, *op. cit. supra* n. 1 at 137.

> a state is entitled to apply its domestic Rules to bills of lading issued in the territory of a foreign contracting state.[17]

On this basis some States ratified the Convention without further legislative action — thereby applying Article 10. Other States enacted legislation applicable only to outward shipments *e.g.* Britain. Yet others applied their legislation to both outward and inward shipments. Even here there were variations. For example, the relevant Swedish statute is applicable not only to the carriage of goods from Sweden to all foreign countries but also to the carriage of goods to Sweden if that carriage takes place from a country which itself is a Contracting State.[18] On the other hand, s. 13 of the Carriage of Goods by Sea Act (1936) U.S.A. provides:

> This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.

It thus extends to inward shipments from Non-contracting States and goes beyond the requirements of the Convention. The overall result of implementation of the Rules is consequently exceedingly diverse.

Section 4 of the Commonwealth Sea-Carriage of Goods Act (1924) gives the Hague Rules effect "in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port whether in or outside the Commonwealth" subject to the provisions of the Act. It is evident from this that the Act will have no application where there is no bill of lading as it does not make the Rules apply to contracts to which they are incapable of application in themselves.

The opening phrase of s. 4 reads: "Subject to the provisions of this Act". In *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* the identical words in s. 1 of the Newfoundland Carriage of Goods by Sea Act (1932) were held by the Privy Council to mean merely that the Rules were to apply subject to the modifications contained in other sections of the statute. In their Lordships' judgment s. 1 was the dominant section.[19]

It should be noted at this stage that there is ambiguity in s. 4; the words "from any port in the Commonwealth" may refer either to "carriage of goods by sea" or to "in ships carrying goods". However, Carver's[20] interpretation of these words in the United Kingdom Act as qualifying the former phrase — namely, "carriage of goods by sea" — would appear to be eminently reasonable; the result being that the Rules are to be applied only in cases where the goods are shipped in the Commonwealth.

Section 6 of the Commonwealth Act (1924) reads:

> Every bill of lading or similar document of title issued in the Commonwealth which contains or is evidence of any contract to which

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[17] Asser, *supra* n. 14 at 359.

[18] Kurt Grönfors, "The Mandatory and Contractual Regulation of Sea Transport" (1961) *Journal of Business Law* 46.

[19] *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd. supra* n. 6 at 289.

[20] *Carver's Carriage by Sea, op. cit. supra* n. 13 p. 214.

> the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

This express statement is known as the "paramount clause".

What is the situation if the section is not complied with? In the United Kingdom Carriage of Goods by Sea Act (1924) there is no penalty provided for failure to comply with the identical provision *i.e.* s. 3. In the Privy Council's view this would merely require the bill of lading to contain an express statement of the effect of s. 1 of that Act (*i.e.* the corresponding section to s. 4 of the Commonwealth Act).[21] In New Zealand a penalty is imposed for issuing a bill of lading which does not contain a statement that it is subject to the Rules.[22] The Commonwealth Sea-Carriage of Goods Act does not impose a penalty for derogation from s. 6. However, it does provide in s. 9(1):

> All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

The meaning of the introductory words of this section "document relating to the carriage of goods" was considered in the recent case of *John Churcher Pty. Ltd.* v. *Mitsui & Co. (Australia) Ltd.*[23] One of the questions at issue was whether a clause providing for arbitration in an f.o.b. contract was void as being contrary to the section. Was the document containing the contract one "relating to the carriage of goods"? Jeffrey, J. held that it was not.

> The expression "relating to" in this context is not equivalent to "having some relationship with" . . . . The statutory expression has a meaning more closely allied to "having as its subject matter", "being concerned with" or "involving as a discharge of obligations imposed thereby". A document does not relate to a transaction of a particular class unless it contains provisions operating upon that transaction, notwithstanding that its provisions do contemplate that the transaction in question will occur.[24]

Applicability of the Commonwealth Act

It is useful at this stage to examine situations where the Hague Rules will or will not be applicable to a contract of carriage of goods by sea under the Commonwealth Act.

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[21] *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd. supra* n. 6.
[22] Sea Carriage of Goods Act (1940) N.Z. s. 9(2).
[23] [1974] 2 N.S.W.L.R. 179.
[24] *Id.* at 184-185.

What of a contract that comes within the terms of s. 4 of the Commonwealth Act, the proper law is expressed to be Australian, there is a paramount clause as required by s. 6 and the action is begun in an Australian court? Clearly the Rules will apply.

What if a foreign law has been chosen as the proper law and there is no paramount clause? Once again the court should apply the Rules. It is doubtful whether s. 6 and s. 9(1) of the Commonwealth Act really add anything to the practical effect of s. 4 of that Act. Under Section 1 of the United Kingdom Act, the Act is said to apply to all contracts that come within its scope regardless of whether English law or foreign law is the proper law of the contract.[25] In other words, it is not possible for the parties to contract out of applying the Rules by means of choosing a different law when the English Parliament has said that such rules must apply:

> . . . it must be concluded that in both the Netherlands and the United Kingdom the courts will apply their respective Hague Rules legislation whenever a bill of lading comes within the terms of the boundary rule of that legislation.[26]

A similar result is reached in the United States where s. 13 of the Carriage of Goods by Sea Act has been interpreted as a rule of *public policy* which precludes any other choice of law with regard to bills of lading coming under it.[27] Consequently, if the court in Australia were to follow this approach, s. 6 and — at least on this point — s. 9(1) would be otiose for actions in local courts. Moreover, the framing of s. 9(1) — "shall be deemed to have intended to contract according to the laws in force at the place of shipment" — restricts the right of the parties to choose a proper law to govern their contract in matters not affected by the Hague Rules. Section 9(1) would thus seem to go beyond the purpose of the Commonwealth legislation.

The practical effect of s. 4 of the Commonwealth Act is strengthened by the exclusive jurisdiction given "Courts of the Commonwealth or of a State" by s. 9(1) applicable to outward shipments. Section 9(2) deals with the reverse transaction:

> Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

An agreement for arbitration in a foreign country or choice of a foreign forum would thus be ignored by the Australian courts if seized of the

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[25] *Dicey and Morris on the Conflict of Laws* (9th ed. by J. H. C. Morris 1973) p. 754.

[26] Asser, *supra* n. 14 at 367.

[27] Yiannopoulos, "Conflicts Problems in International Bills of Lading: Validity of 'Negligence' Clauses" (1958) 18 *Louisiana Law Review* 609 at 618.

dispute.[28] In the case of outward shipment the courts could then be expected to apply the Rules under the principles mentioned above.

In some other jurisdictions a similar result has been reached, in the absence of legislative provision, by the courts holding that "choice of forum clauses" are inconsistent with Article III(8) of the Rules:

> Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

An example is provided by the United States Court of Appeals for the Second Circuit in *Indussa Corporation* v. *S.S. Ranborg*:

> A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these régimes, requiring trial abroad *might* lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal . . . and [article III(8)] can well be read as covering a potential and not simply a demonstrable lessening of liability. . . . We think that Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed.[29]

What if the action is begun in a foreign court, the proper law is expressed to be Australian, but there is no paramount provision as required by s. 6? The matter will depend on what attitude the foreign court adopts towards the applicability of the proper law. For example, where a foreign country has adopted the Rules by municipal legislation, an English court would apply them to a bill of lading issued in that country itself, the law of that country being the proper law of the contract; even though there is no clause incorporating the Rules as required by municipal legislation.[30] This is done under the "boundary rule" of the legislation itself. A similar situation would prevail if action were begun in the Netherlands.[31]

Assume that once again action is begun in a foreign court but this time the parties have chosen the law of the place of the court as the proper law — in contravention of s. 9 — and have once again not included a paramount clause — thus contravening s. 6. Would an English

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[28] *Compagnie des Messageries Maritimes* v. *Wilson* (1954) 94 C.L.R. 577.
[29] 377 F. 2d 200 at 203, 204 (2d Cir. 1967).
[30] *Scrutton on Charterparties and Bills of Ladings, op. cit. supra* n.13 p. 404.
[31] Asser, *supra* n. 14 at 388.

court give effect to the Australian provisions? The application of s. 9 featured in *Ocean Steamship Co. Ltd.* v. *Queensland State Wheat Board*[32] although in that case the specific point in question was not at issue. As Du Parcq, L.J. said:

> It is unnecessary to consider in the present case whether the English courts would give effect to the provisions of s. 9 of the Australian Sea Carriage of Goods Act, 1924, if they were not incorporated in the contract between the parties.[33]

In that case the Commonwealth Act was specifically incorporated in bills of lading covering carriage of wheat from Brisbane to Glasgow. Clause 1 provided that all the terms, conditions, *etc.*, of the Act were to apply to the contract and anything contained in the contract which was inconsistent with the Act should be null and void. Clause 16 of the bill of lading provided that the contract was to be governed by the law of England. The Court held that as the parties had incorporated into the bill of lading all the terms, provisions and conditions of the Commonwealth Act, they had incorporated s. 9 and therefore clause 16 of the bill was null and void as being inconsistent with that section. Nevertheless, their Lordships intimated that they would have ignored the restriction of s. 9(1) on the competence of the parties if that section had not been so incorporated by the parties.[34]

If the English courts were thus to ignore the requirements of s. 9 would they also ignore the breach of s. 6 and the application of s. 4? A leading authority on such a situation is the Privy Council decision in *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.* which expressly disapproved of the Court of Appeal decision in *The Torni*.[35] The latter case arose from a dispute concerning carriage of oranges from Jaffa to Hull. A clause in the relevant bills of lading stated: "This bill of lading wherever signed is to be construed in accordance with English law". Clause 4 of the Palestine Carriage of Goods by Sea Ordinance (1926) incorporating the Hague Rules into the municipal law of the then mandated territory provided: "Every bill of lading . . . issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Ordinance and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement". No such clause was included. The Court of Appeal held that the bills of lading were subject to the provisions of the Ordinance and of the Rules; they should thus be construed according to English law but with these terms read into them. The

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[32] [1941] 1 K.B. 402.

[33] *Id.* at 418.

[34] *Dicey and Morris on the Conflict of Laws, op. cit. supra* n. 25 p. 822; P. E. Nygh, *Conflict of Laws in Australia* (3rd ed. 1976) p. 217. For a critical assessment of the attitude of the court see Falconbridge, *Essays on the Conflict of Laws* (2nd ed. 1954) p. 415.

[35] [1932] P. 78.

express terms of the Ordinance based on an international convention, could not be defeated by the mere insertion of a clause that the bills of lading were to be construed according to English law. Thus, in the words of Greer, L.J.:

> I find some difficulty in supposing that under those circumstances the shippers of these goods and the agents of the ship in Palestine did not make a contract which contained the provisions of the Ordinance. I think it is clearly established that making their contract as they did, subject to the laws which prevailed in the country where they made it, they made it just as much subject to the Rules contained in the Ordinance as if they had expressed it so in the document.[36]

In *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd.*[37] the Privy Council concluded that the provision whereby the bills of lading in *The Torni* were "to be construed in accordance with English law" was not substantially different from the provision in the subject case whereby the bill was to be "governed by English law".[38] Moreover, s. 3 of the Newfoundland Carriage of Goods by Sea Act (1932) being identical to s. 3 of the United Kingdom Act, it was held that the additional words—"and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement"—in the Palestine Ordinance added nothing of substance.[39] The Privy Council stated that the Court of Appeal decision was contrary to the principles on which they were proceeding and could not be supported.[40]

These principles related to the choice of the proper law of the contract and the effect of s. 3 of the Newfoundland Statute. The Privy Council stated that the proper law of the contract is to be ascertained by reference to the objective intention of the parties provided it is *bona fide* and legal and there is no reason for avoiding such choice on the ground of public policy.[41] As to s. 3, it was held that this was merely a "directory" provision and the failure to comply with its terms did not nullify the contract contained in the bill of lading.[42] On this basis the Council decided that the bills of lading were binding according to their terms.

As the contract was governed by English law, s. 1 of the Newfoundland Act, by which alone the contract could be made subject to the Rules, would be inapplicable. Moreover, in the opinion of the Privy Council "the omission of the clause paramount does not make the bills of lading illegal documents, in whole or in part, either within Newfound-

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[36] *Id.* at 87.
[37] [1939] A.C. 277.
[38] *Id.* at 298.
[39] *Id.* at 299.
[40] *Id.* at 299-300.
[41] *Id.* at 290.
[42] *Id.* at 295.

land or outside it".[43] On this basis, in the case of such a bill of lading as mentioned above, the question whether or not the contract of carriage of goods by sea is governed by the Hague Rules will depend on the foreign law imported as the proper law of contract and whether or not this applies to both inward and outward bills of lading. If the Hague Rules as implemented by that law apply only to outward bills of lading it would seem that they would be regarded as inapplicable; *contra* if they are applied to both inward and outward as in the case of the Carriage of Goods by Sea Act (1936) U.S.A..

It would be highly probable that a different situation would prevail if the relevant Commonwealth statute were in terms similar to that of the New Zealand legislation mentioned above—making the inclusion of a clause paramount "obligatory". Under the terms of the *Vita Food Products* decision an English court would appear to be required to give effect to such legislation and thus apply the Hague Rules to the bills of lading.

Contractual Incorporation of the Rules

The *Ocean Steamship Company* case is illustrative of the attitude of the English courts to incorporation of the Rules by contract. Where the Rules are expressly incorporated in a bill of lading in order to comply with foreign legislation English courts regard this as contractual incorporation where the foreign law is not the proper law of the bill.[44] Thus, in *Dobell & Co.* v. *The Steamship Rossmore Co. Ltd.*[45] — a case involving shipment of goods from Baltimore to Liverpool under a bill of lading incorporating by reference an Act of the United States Congress —Smith, L.J. said:[46]

> The material part of the bill of lading is the clause which incorporates the Act of Congress of February 13, 1893, and the bill of lading must be construed as if the provisions of that Act were actually incorporated into it.

Lord Esher, M.R. was even more specific:

> They then introduce into their bill of lading the words of the Harter Act, which I decline to construe as an Act, but which we must construe simply as words occurring in this bill of lading.[47]

Contractual incorporation, in the absence of clear words to the contrary, is regarded as co-extensive with the application of the Act incorporated.[48] However, difficulty may arise with application of the relevant legislation where, by its terms, it cannot apply to the bill of lading in question. Such was the situation in *Golodetz* v. *Kersten, Hunik*

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[43] *Ibid.*
[44] *Carver's Carriage by Sea, op. cit. supra* n. 13 p. 203.
[45] [1895] 2 Q.B. 408.
[46] *Id.* at 416-17.
[47] *Id.* at 413.
[48] *Carver's Carriage by Sea, op. cit. supra* n. 13.

& Co.[49] concerning carriage of goods from Rotterdam to London under bills of lading expressed to be subject to "[a]ll the terms, provisions and conditions of the Carriage of Goods by Sea Act (1924) and the schedule thereto . . . . If, or to the extent that, any term of this bill of lading is repugnant to or inconsistent with any thing in such Act or schedule, it shall be void". The difficulty with this was, of course, that the Carriage of Goods by Sea Act (1924) applies only to outward bills of lading. In the words of Bankes, L.J. this situation was resolved by regarding the parties as having "by agreement incorporated so much of the provisions of the Carriage of Goods by Sea Act (1924) as may be applied to an inward bill of lading".[50] If only the first part of the clause had existed Bankes, L.J. would have considered "that, although this is an inward bill of lading, it should be treated as an outward bill of lading, and that the clauses, so far as they are applicable, should be read into the contract".[51] The Rules may also be incorporated by contract in a bill of lading by reference to them as attached in the Schedule to the Carriage of Goods by Sea Act (1924): *Silver* v. *Ocean Steamship Co. Ltd.*[52]

Where the Rules are incorporated by contract it is a matter of contractual interpretation whether the undertaking of the parties is intended to result in a position similar to that which would have obtained had the Act applied of its own force or whether it is something less. Thus, in *Varnish & Co. Ltd.* v. *"Kheti" (Owners)*[53] a bill of lading for carriage of onions from Alexandria to Liverpool incorporated the Carriage of Goods by Sea Act (1924). Superimposed on the bill was an "Onions Clause" specifically agreeing on exemption for loss or damage. The Court held that the intention of stamping this clause on the bill was to excuse the shipowner from the consequences of failure on his part to properly care for the onions. It was clear that had the bill been subject to the Hague Rules by s. 1 of the Act, the "Onions Clause" would have been void by Article III(8). The reasoning in this case would appear to be at one with that of Swedish decisions in similar cases. The effect of these is summed up in the following words:

> . . . the bare existence of a clause paramount will in certain circumstances nullify exception clauses that go beyond the Hague Rules . . . . The clause paramount must attract attention as a main rule and the ensuing exception clauses must, when someone studies the document, stand out as clearly attached to the main rule in the sense of being exceptions from it—they must not be hidden away in the extensive text of the contract.[54]

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[49] (1926) 24 Lloyds L.R. 374.
[50] *Id.* at 375.
[51] *Ibid.*
[52] [1930] 1 K.B. 416.
[53] (1949) 82 Lloyds L.R. 525.
[54] Grönfors, *supra* n. 18 at 51-52.

It is evident from the above cases and the opinions of commentators that incorporation by contract has given the Hague Rules a "remarkably expansive character".[55] The underlying reasons for such incorporations have been listed as follows:

1. The Rules are commonly looked upon as an appropriate compromise between the interests of shipowners and shippers.
2. In limiting liability to a certain amount per package they are of advantage to underwriters.
3. The Rules offer a system of regulation under which the consequences of delinquency can be predicted as opposed to that of a possibly unknown legal system.
4. They are convenient where many consignments are carried on the one ship—the carriage of some of which must by legislation be governed by the Rules.[56]

Finally, it must be said that such extensive incorporation of the Rules by contract leads to a situation which mitigates to some extent the failure of nations to adopt a uniform system of applying the Hague Rules and the effect of such decisions as *Vita Food Products Inc.* v.*Unus Shipping Co. Ltd.*

APPLICATION OF THE UNCITRAL DRAFT CONVENTION

In 1968 the United Nations Conference on Trade and Development (UNCTAD) resolved to set up a Working Group on International Shipping Legislation.[57] The United Nations Secretariat prepared a comprehensive survey on the use of bills of lading for the Working Group.[58] It was then realized that any proposals would have to be based on a very detailed and technical analysis of the subject. Consequently, UNCTAD referred the matter to UNCITRAL which had already established a Working Group on International Legislation on Shipping. This Group met some eight times in formal session and, as has already been noted, produced a Draft Convention on Carriage of Goods by Sea. Although there has been criticism of particular aspects of the Draft,[59] indications are that there is considerable support for it both at governmental and private levels.

Contracts Inherently Covered by the Draft

Article 2 of the Draft applies it to "all contracts of carriage between ports . . . ". A "contract of carriage" is defined in Article 1(5) to mean "a contract whereby the carrier against payment of freight undertakes

[55] Schmitthoff, *op. cit. supra* n. 10 p. 313.

[56] Grönfors, *supra* n. 18 at 49.

[57] Resolution 14 (II) of 25 March 1968.

[58] U.N. Doc. TD/B/C.4/ISL/6 (Rev. 1). For the reasons underlying UNCTAD concern see "UNCITRAL: Revision of the Hague Rules" (1971) 5 *Journal of World Trade Law* 577.

[59] McGilchrist, "The New Hague Rules" (1974) 3 *Lloyd's Maritime and Commercial Law Quarterly* 255.

to carry goods by sea from one port to another". "Goods" include "live animals" and "where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, 'goods' includes such article of transport or packaging if supplied by the shipper".[60]

The inherent scope of the Draft is thus far wider than that of the Hague Rules. There are many contracts for carriage by sea which are not covered by a bill of lading. For example, in the Australian coastal trade a document called a "non-negotiable receipt" is usually issued. Furthermore, on some routes carriage is now so rapid that the issue of a bill of lading has become virtually impossible because of the time taken in preparing the documents.[61] Carriage under such documents as are issued could not be covered by the Rules. On the other hand, the Draft would be capable of application to such contracts of carriage. The only exception is in the case of a charterparty—the Draft is expressed not to be applicable to these.[62]

The reader will remember that the "bill of lading or similar document of title" to which the Rules refer is only relevant "insofar as such document relates to the carriage of goods by sea". This is said to cover "carriage on rivers and other waters where great ships go, *e.g.* a carriage from Quebec or Montreal to London".[63] Moreover, "carriage of goods" under the Rules covers the period from the time when the goods are loaded on to the time they are discharged from the ship. The Draft sets the period of responsibility of the carrier for the goods as covering "the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge". The Draft is thus more specific than the Rules and, from the carrier's point of view, is applicable for a more extensive period of time.

National Application of the Draft

As presently formulated the Draft will go a very long way towards resolving many of the problems that previous pages indicate have arisen in respect of the Hague Rules. Article 2 provides:

1. The provisions of this Convention shall be applicable to all contracts of carriage between ports in two different States, if:
   (a) The port of loading as provided for in the contract of carriage is located in a Contracting State, or
   (b) The port of discharge as provided for in the contract of carriage is located in a Contracting State, or

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[60] The Draft contains a special provision dealing with live animals and the liability the carrier incurs for carriage of same—see Art. 5(5).

[61] Goldring, "UNCITRAL Revision of the Hague Rules on Bills of Lading" in Attorney-General's Department, *Meeting on International Trade Law, 1974, Papers and Summary of Discussions* (1974) 67.

[62] Article 2(3).

[63] *Scrutton Charterparties and Bills of Lading, op. cit. supra* n. 13 p. 417.

(c) One of the optional ports of discharge provided for in the contract of carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) The bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(e) The bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

There is no suggestion that the Draft is to be taken as a mere model for municipal legislation. If the Draft becomes an international convention, States becoming party to it will be obliged to give effect to the provisions in accordance with their constitutional requirements. The argument[64] that domestic legislation extending to catch the situations specified in Article 2 is beyond the power of an individual State will not stand up. Particularly is this so when Article 2(2) is considered:

> The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.

The Draft refers to "contracts of carriage between ports in two different States". The restriction—"between ports in two different States"—was not present in the Rules. This was not to say that all States were prepared to apply the Rules to all carriage by sea—some were only prepared to apply the Rules to international carriage.[65] A similar situation in practice is reached with the Draft. States could apply the provisions of the Convention to intra-state trade if they wished.[66]

Article 2 reverses the trend that appeared in the Brussels Protocol of restricting application of the Rules to outward bills of lading. It takes up an approach set out in what is known as the Visby Rules—Rules suggested as an amendment to the Hague Rules. These merely provided that bills of lading in international carriage were governed by the Rules if either the port of loading or the port of discharge or one of the optional ports of discharge were in a Contracting State.[67]

As is obvious, the effect of any Convention adopting the Draft will depend to a great degree on the number of States that become party to it. If a large number of States do so it is difficult to envisage contracts for carriage by sea which would not be covered.

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[64] Asser, *supra* n. 14 at 359.

[65] See the reservation of Japan in United Nations, *op. cit. supra* n. 1 at 139 and A. N. Yiannopoulos, "Uniform Rules Governing Bills of Lading: The Brussels Convention of 1924 in the Light of National Legislation" (1961) 10 *American Journal of Comparative Law* 374.

[66] The words of the Convention are limiting only for the purposes of that document.

[67] Grönfors, "The Hague-Visby Rules" (1968) *Journal of Business Law* 201.

The Draft deals specifically with questions of jurisdiction and arbitration in Articles 21 and 22 respectively. The Hague Rules did not deal with these matters at all. In the Working Group debates leading up to the Draft many delegates, particularly from developing countries, spoke of the inequity of being forced to litigate or arbitrate their claims in a place having absolutely no connection with the transaction or one eminently convenient for the carrier but not *vice versa*. In the latter case the shipper might find it prohibitively expensive to litigate at the place of business of the carrier. The Working Group summarized the position in this way:

> These clauses [*i.e.* jurisdictional clauses] are normally prepared by carriers in the interest of their convenience in presenting their defences to cargo owners' claims for loss or damage to cargo. On the other hand, it has been contended that the place for suit specified in the bill of lading is often so inconvenient to cargo owners as to impede the full and fair presentation and adjudication of claims.[68]

Choice of forum clauses are common in bills of lading. The effectiveness of such clauses is tested when an action is brought in a court other than that chosen in the bill of lading. For example, we have already seen the effect of s. 9 of the Commonwealth Sea-Carriage of Goods Act and the little scope given to such clauses by the courts of the United States.

The Draft provides in Article 21(1):

> 1. In a legal proceeding relating to carriage of goods under this Convention the plaintiff, at his option, may bring an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places or ports:
>
> (a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or
>
> (b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
>
> (c) The port of loading or the port of discharge; or
>
> (d) Any additional place designated for that purpose in the contract of carriage.

Note that the ultimate choice of forum is thus at the option of the plaintiff:

> . . . the claimant would not be obliged to bring his action in the forum selected in the bill of lading, and would retain the choice of alternative places . . . .[69]

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[68] Responsibility of Ocean Carriers for Cargo—Bills of Lading: Report of the Secretary-General, Annex, Report of the Working Group on International Legislation on Shipping on the work of its third session, *UNCITRAL Yearbook* (1972) iii, 275.

[69] *Id.* at 282.

However, any agreement on choice of forum that the parties come to after a claim has arisen will be effective, notwithstanding Article 21(1).[70]

As for arbitration, the Working Party was aware that few bills of lading at present contain arbitration clauses. Nevertheless, they decided to limit the number of places in which arbitration could be brought. Such action was taken because it was felt that if provisions were adopted restricting choice of the judicial forum greater use may be made of arbitration in bills of lading. Accordingly, Article 22 allows the making of provision for arbitration in the event of a dispute but renders it subject to certain restrictions. It thus provides:

> 3. The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:
>
> (a) A place in a State within whose territory is situated:
>
> (i) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendants, or
>
> (ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
>
> (iii) The port of loading or the port of discharge, or
>
> (b) Any place designated for that purpose in the arbitration clause or agreement.

One effect of such a clause as this will be to undermine the practice whereby certain arbitral institutions have the power to select the place of arbitration. The parties in their contract may refer any dispute that might arise to arbitration under the rules of an arbitral institution. Those rules will often allow the parties the right to select the place of arbitration when the dispute arises. There is specific provision for this in the Draft:

> 6. Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.

However, if the parties cannot agree on an appropriate place the Draft gives the plaintiff the option of selecting it. This conflicts with the rules of some institutions which give the institution itself the power of selection in such a situation. However, while the parties' freedom may be cut down to this extent it is expanded when s. 9(1) and (2) of the Commonwealth Sea-Carriage of Goods Act is considered.

It should be noted that the plaintiff, as under the article on jurisdiction, has the option of choosing the place of arbitration:

> It was emphasized that the place designated in the bill of lading would only be one of the choices available to the plaintiff. The availability of all the choices specified in Article 2 is assured by

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[70] Article 21 (5).

paragraph (4) of the proposed draft provision under which, *inter alia*, any attempt to reduce the number of choices available to the plaintiff in paragraph (2) would be null and void.[71]

The arbitrator or arbitration tribunal will be obliged to apply the rules of the Convention adopting the Draft.[72]

CONCLUSION

The Hague Rules have had a considerable impact in the fifty odd years since their formulation. However, this impact has not been as great as it would have been had States carried through the intention behind the Brussels Convention; particularly as regards the import of Article 10. If the Hague Rules had in all States been made applicable to all bills of lading issued in any Contracting State the confused situation presented above would not now exist.

The UNCITRAL Draft carries forward the intention of the Brussels Convention as modified by the years of experience with the Rules. If adopted in its present form the Draft will go a long way towards a uniform regulation of the contract of carriage of goods by sea.

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[71] Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session, *UNCITRAL Yearbook* (1973) iv, 137, 145.

[72] Article 22(4).

CONCEPTIONS OF ACTION

*C. ARNOLD**

INTRODUCTION

Consider the following two sentences:

1. "Mr. J. killed a red deer by shooting it."
2. "Mr. T. blackmailed a woman by sending a threatening letter to her through the post."

Sentences such as these, which on the face of them refer to two actions that a man does, one of which he does by doing the other, raise an interesting jurisprudential and legal problem. They raise the problem of what the relation is that exists between such actions.

What relation exists between those actions people perform like killing and blackmailing, which they perform by performing other actions, and those other actions themselves (seemingly prior) like a person's shooting a gun or a person's sending off a letter? It is typical of *many* actions we perform that we perform them by performing others. Of course it could not be the case that *all* the actions we ever performed could only be performed by doing other actions. If that were the case we should never be able to get started on doing anything and hence we would never perform any action. Since we obviously do act, there must exist *some* actions which do not require other actions for their performance. We might call such actions "basic",[1] for now, leaving their analysis until later.

The question asked above can be profitably rephrased. What is the relation between a non-basic action and a basic action when, in a particular case, the non-basic action is performed by performing the basic action? The profit is this; in the long run we cannot clarify the "by-relation" coupling these actions unless we obtain a clear picture of the proper candidates for those first basic actions. The by-relation makes us think about the whole range of things we do from, as it were, the base upwards and requires a theory which will accommodate that range. Once a picture of basic actions emerges, the focus can shift to the "by-relation" itself between action and action, basic and non-basic.

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[1] A. Danto's expression in his "Basic Actions", (1965) 2 *Amer. Phil. Quart.* 141.

We are a long way from having an agreed theory about action in the books on Jurisprudence or in the cases. The books reveal an array of inconsistent conceptions of action. Recent decisions show the judges using varying and largely unsound accounts. It is not however surprising that there is little sound theory on the by-relation problem. The reason I think is this. There is much sound theory on a different relation, namely that existing between actions and the events which are their consequences. If we consider again those two opening sentences, examples of events would be, in the one case, the death of a deer or the flight of a bullet and in the other case the delivery of a letter. This different relation has often been confused with the by-relation. These two relations need to be separated and accounted for within a single conception of what an action is.

In this paper I defend a theory contained in Austin's general doctrine of action and recently reconstructed by Davidson[2] that the by-relation is an identity relation. The defence takes the form that expressions which refer to individual actions and which are joined with a "by" are essentially elliptical. Fully expanded such expressions, it is argued, are composed of two different descriptions of some single basic action, or bodily movement, and its consequences. Such a defence gives a more plausible conception of action than the rival accounts in cases and in textbooks. If the defence succeeds it has important consequences in connection with the dating and placing of actions in law.

TYPES AND TOKENS

As a preliminary to such a defence, a familiar distinction between types of action and individual actions i.e. between types and tokens must be drawn. This present section dwells on that distinction and adds remarks about identity as it concerns both types of action and individual actions.

Sentences like "Mr. Baxter posted a letter" and "Mr. Jemmison shot a red deer" are intended to refer to actions which actually have occurred. They are sentences about individual actions. For the most part I shall be concerned with such sentences and with individual actions which have occurred. Some sentences which are about actions do not refer to particular individual actions at all. Consider such sentences as "Shooting red deer is dangerous" or "Posting threatening letters at Christmas is anti-social". These sentences do not refer to any individual actions which have occurred. These and similar sentences are about types or kinds of action and they are often called "general action" sentences. For the most part it is action-types which concern theorists of law when they consider the objects of law or when they refer to the rules and principles of law as being action-guiding.

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[2] D. Davidson, "Agency" in *Agent, Action and Reason* (eds. Brinkley, Bronaugh and Marras), 1971, at pp. 18-25. I am indebted to this article. For another defence of identity see E. Anscombe, *"Intention"*, 1959, pp. 39-47.