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# SEA WAYBILLS, ARE THEY A TRAP FOR CARGO CLAIMANTS?

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## INTRODUCTION

Sea waybills and Bills of Lading are two of the most common forms of contracts of carriage found in modern shipping. There are important distinctions between the two which this article intends to make apparent. The most fundamental of these differences is that the Hague or Hague-Visby Rules (the "H/HV Rules"), which apply in many trades to Bills of Lading, are considered by most authorities not to be compulsorily applicable to Sea waybills as a result of the wording of the H/HV Rules.

There are exceptions to this general rule, the most important of which is that the parties can incorporate those rules contractually i.e. by reference in the Sea waybill. The trap is that when incorporating the H/HV Rules contractually, the carrier may create specific exceptions; the most usual of these exceptions is to reduce the package limitation.

In order to explain the position in greater detail, this newsletter examines (1) the differences between Bills of Lading and Sea waybills (2) the reason why it is generally held that the H/HV Rules do not apply compulsorily to Sea waybills in trades where they would apply to Bills of Lading and (3) the reasons for caution when considering the contractual incorporation of the H/HV Rules into a Sea waybill.

## Bills of lading vs Sea waybills

A bill of lading may either "contain" or only "be evidence of" a contract of carriage. Waybills share this characteristic. Therefore, these two documents resemble each other to the extent that both contain or evidence contracts of carriage.

Secondly, a bill of lading is a document issued by a carrier to a shipper of goods, in which the carrier acknowledges the receipt of the goods on board a named vessel. The bill of lading is therefore a receipt for the goods described therein. A waybill resembles a bill of lading in that it is also a receipt for the goods shipped on board a vessel.

Finally, the last main characteristic of a bill of lading is its recognition as a 'document of title'. *Carver on Bills of Lading*[1] defines a document of title to goods as "a document relating to goods the transfer of which operates as a transfer of the constructive possession of the goods, and if may so intended operate as a transfer of the property in them". Therefore, the common law concept of a bill of lading is its quality of being 'transferable'. This means that the bill of lading would enable its holder to duly transfer these documents to a third party and if so intended by the parties, to transfer the constructive possession and/or property of the goods described in them. Commercial practice and judicial decisions

[1] Sir Guenter Treitel QC, F.M.B. Reynolds QC, *Carver on Bills of Lading* (3rd ed., Sweet & Maxwell, London, 2011)

have recognised this class of documents as the only documents of title at common law. Furthermore, bills of lading are central to the operation of documentary credits, which are the principal methods of financing international sales as it provides Banks with the necessary security to enable the financing to take place.

On the other hand, a waybill is a non-negotiable document and they are not documents of title in the common law sense. Section 1(2)(a) of the Carriage of Goods by Sea Act 1992 Act stipulates that:

"References in this Act to a bill of lading-
(a) do not include references to a document which is incapable of transfer either by endorsement or, as a bearer bill, by delivery without indorsement;

It follows that a document which does not entitle the parties to transfer title in the goods is not a bill of lading. Consequently, if the document only gives the right for the goods to be delivered to one party without any further words such as order or to bearer, then the document is arguably a non-negotiable document or sea waybill. Transport under a Sea waybill should not require production of the bill by the receiver for the delivery of cargo. The receiver should be able to collect the cargo upon simple production of satisfactory identification.

## Exceptions to the hague and the hague-visby rules

The central issue with Sea waybills is whether a Sea waybill triggers the compulsory application of the Rules, that is the provision that the Rules are only engaged in respect of contracts of carriage "covered by a bill of lading or similar document of title"[2]. We have pointed out above that a waybill differs from a bill of lading. A Sea waybill is a non-negotiable document and would therefore not trigger the compulsory effect of the Rules (save where the enabling legislation of a particular country is not the same as that in England). On a broader footing it is apparent that if the draftsmen of the Rules had intended to include these documents, special provision to that effect would have certainly been drafted.

The parties would normally incorporate the Rules by reference in the Sea waybill. If the Rules have been contractually incorporated, the carrier may impose on the cargo claimants certain exceptions. The most usual of these exceptions is to reduce the package limitation regime. An example of this wording is as follows:

*The following definitions shall apply in this Sea waybill:*

*Hague Rules: means the provisions of the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25th August 1924 with the express exclusion of Article IX.*

Article IX of the English Act provides as follows: "*The monetary units mentioned in these Rules are to be taken to be gold value*".

[2] Carriage of Goods by Sea Act 1971, Article I (b)

The effect of this express exclusion is that the carrier would be able to apply a lower package limitation by excluding the effect of expressing the sterling figure as a gold value figure. This means that the first sentence of Article IX, which was intended to qualify the reference to "£100 sterling" in Article IV, rule 5, would be inapplicable. The cargo claimants should be aware of this fact and not find themselves trapped in a lower package limitation regime when the goods have been damaged or destroyed.

## CONCLUSION

Caution is needed when contractually incorporating the H/HV Rules into Sea waybills. In the light of the observations made above, cargo claimants need to be aware of the potential legal consequences when a Sea waybill has been issued.

If the Hague Rules are contractually incorporated but the parties have agreed to expressly exclude Article IX as per the example above, then the package limitation in Article IV rule 5 would be determined by reference to £100 sterling only and not to the gold value of that sum, which would be considerably greater. As the incorporation of the Rules in a Sea waybill is purely contractual the courts would not render the clause null and void by virtue of Article III rule 8.

This article is intended only to give general guidance and reference in respect of the law. You are recommended to always consult a lawyer with any particular problem or query you may have.

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