SELECTED PROBLEMS OF MARITIME LAW UNDER THE HAGUE RULES

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Introduction

Steamship owners and other water carriers are benefited by special legislation exempting them from certain responsibilities which they would normally have. The legislation is quite international in its application in that the main trading nations of the world have adopted almost identical laws (known as the Hague Rules), the result of an international convention in 1924. Canada's version of the Rules is the *Water Carriage of Goods Act* (1936).

Three subjects of intense interest to ocean carriers and cargo claimants are deviation, fire, and deck cargo. Each in turn is considered below in the light of the Hague Rules.

I — Deviation

One of the great sources of controversy of pre-Hague Rules law arose whenever the vessel deviated from the agreed voyage. Was the contract breached as a result of the deviation and was the carrier responsible for the loss no matter how caused? The Hague Rules were desigued to define and fix the carriers' responsibilities in such cases as deviation, and, if not all the problems of deviation have been solved, there has been a surprising consistency in the jurisprudence of the various contracting countries of the world.

A deviation before the Rules was known as a change in the route of the planned voyage, and the result was that the carrier could not rely on the benefits of the law or of the contract. This placed him in a very vulnerable position.

The Rules do not define a deviation nor do they outline the consequences. Deviations are only referred to in Article IV (4) where what a deviation is not is set out. This article reads as follows:

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the Contract of Carriage and the carrier shall not be liable from any loss or damage resulting therefrom.

The Canadian and British Acts are identical while the American Act adds: "provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers, it shall *prima facie* be regarded as unreasonable."

Article IV (2-j) is also important and exculpates a carrier for loss or damage arising from "strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general." This section suggests that a carrier can deviate to another port if the discharge port is strike-bound in

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order to mitigate the damages because a carrier is always bound to mitigate the loss.

Reasonableness is the Criterion

Reasonableness of a deviation is the common law principle adopted verbatim by the Hague Rules. Whether deviation is reasonable or not has always been said to be a question of fact. Usually, the test of reasonableness is whether both parties are benefited by the deviation. In *Foscolo Mango v. Stag Line*,[1] it was held by the House of Lords that a deviation to land engineers, who were aboard to test a superheater, was not reasonable because it was for the sole benefit of shipowners. In referring to what is reasonable, Scrutton, L. J. said in the same case in the Court of Appeal:[2] "The interests to be considered must be those of the parties to the contract adventure which may include consideration of their underwriters." In the same case, Greer, L. J. said: "The words mean a deviation whether in the interests of the ship or the cargo owner or both, which no reasonably minded cargo owner would raise any objection to." However, these are not criteria that can be applied in every case. Perhaps a better criterion is whether the deviation is generally in the best interests and practices of commerce.

Strikes have often been held to be a reasonable cause of deviation.[3]

Canadian Jurisprudence

In the Canadian case of *Toronto Elevators Ltd. v. Colonial Steamships Ltd.*,[4] the vessel before discharging went two miles further downstream to turn and after turning, but before discharging, stopped to fuel and struck the fueling wharf, damaging cargo. It was held that the stopping to fuel was reasonable, the Court noting that if there had been a delay in unloading, the fuel might have been insufficient.

American Jurisprudence

The American Courts have been quite strict as to what is reasonable.

In the *Louise*,[5] it was held that: "Where a vessel sails in flagrantly unseaworthy condition and is forced to return to port for repairs, she is guilty of a deviation and is not entitled to retain prepaid freight; the bill of lading providing that freight shall be retained ship lost or not lost is displaced." Never-

[1](1931) 41 Lloyd's 165.

[2](1931) 39 Lloyd's 101.

[3]*Manx Fisher* [1954] A.M.C. 177. The vessel deviated to another port because of a strike. The bill of lading had a clause allowing such deviation or change of course, and it was held that this was not a deviation because it was permitted and reasonable. The Court noted that the decision of the carrier to divert should depend on all the cargo on board and not merely on any one shipment.

[4][1950] Ex. C.R. 371.

[5][1945] A.M.C. 363.

theless, returning to port for repairs is not a deviation even if the repairs are due to lack of due diligence when the return was required for the safety of the crew.[6] In such a case, cargo in any event could still claim on the grounds of lack of due diligence.

In the *Ruth Ann*,[7] discharge of cargo at Puerto Rico instead of Havana was held to be an unreasonable deviation by the U.S. Court of Appeals. The political situation in Cuba was well known when the bills of lading were signed. "Nor was such deviation excused by bill of lading clauses permitting calls at ports out of the usual order, or discharging goods into a safe place in order to prevent seizure or detention." However, in *American Tobacco v. Katingo Hadjipatera*,[8] rerouting of a vessel by naval authorities because of the outbreak of war excused the vessel from the effects of a long voyage and climate.

American Courts have also considered as a deviation not only geographical deviation but other breaches of the contract. Deviation therefore has a much broader connotation in the American Common Law.

Over-carriage of cargo has on occasion been declared a deviation as in the *Silvercypress*,[9] where over-carriage from Manila to Iloilo was held to be a deviation. The carrier was therefore liable for loss of the over-carried cargo by fire at Iloilo, although it would have otherwise been exonerated from liability for the fire. Mere non-delivery does not create a presumption, however, of over-carriage resulting in a deviation.[10]

In *Lafcomo*,[11] lily-of-the-valley pips were to be carried on deck under tarpaulins. No tarpaulins were supplied. It was held that the failure to use tarpaulins was a deviation from the agreed method of transportation and thus the carrier could not invoke an invoice value clause.

British Jurisprudence

The British jurisprudence is less strict than the American jurisprudence, perhaps because of the British principle that two persons may contract in any way they wish and the British reluctance to accept the Rules as an overriding statute limiting this right to contract.

Nevertheless, Scrutton, L. J. quickly seized upon the true nature of the Rules and declared in *Foscolo Mango and Co. Ltd. v. Stag Line Ltd.*:[12] "The provisions of the Act impart into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied

[6] *L.W. and P. Armstrong Inc. v. S.S. Mormacmar* [1952] A.M.C. 1088, at 1090.

[7] [1962] A.M.C. 117.

[8] [1949] A.M.C. 49.

[9] [1943] A.M.C. 510.

[10] *Shackman v. Cunard White Star* [1940] A.M.C. 971.

[11] [1947] A.M.C. 284.

[12] (1931) 39 Lloyd's 101, at 111.

upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it, which is not covered by the contract at all."

In *Frenkel v. Macandrews and Co. Ltd.*,[13] the bill of lading contained a clause: ". . . with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation." It was the regular practice of the carriers to go either direct or via Levante. It was known that the vessel was going via Levante. This was held to be the route and there was no deviation.

Consequences of a Deviation

If there is a deviation, then the carrier cannot rely upon the exculpatory exceptions in the Hague Rules and in some American judgments has been called the insurer.[14] It has also been commonly said that the common law consequences of deviation were unaffected by the Hague Rules.[15] It has been held as well that while upon the deviation, the carrier is not responsible for damage which might equally have occurred even had there been no deviation.[16]

In every case of deviation, it is first necessary to determine what the contract of carriage was. The bill of lading on its face will normally only declare the ports of loading and discharge; if it should mention a specific route or other ports of call, then of course that is in effect the route agreed upon. The real contract of carriage is not the bill of lading, it being only the best evidence of the contract.[17] The real geographical route would probably be found from a study of:

a) the customary routes taken by the line in the past,

b) the notices and advertisements before the voyage,

c) the booking-note and,

d) the bill of lading itself.

Burden of Proof

Because all the facts are available to the carrier, the carrier usually is given the burden of proving the geographical route contracted for and that the loss took place while the vessel was on that route. Claimant must then prove the deviation.

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[13](1929) 33 Lloyd's 191.

[14]*San Guiseppe* [1941] A.M.C. 1301; in *Singer Hosiery Mills v. Cunard White Star* [1951] A.M.C. 988, an overcarriage was held to be a deviation and the carrier was the insurer but the claimant still had to sue within the one year limit.

[15]*Foscolo Mango v. Stag Line* (1931) 41 Lloyd's 165, at 170.

[16]*San Guiseppe* [1941] A.M.C. 1301; *The Tai Shan* [1953] A.M.C. 887.

[17]Scrutton, *Charterparties and Bills of Lading* (1955), 16th edition, p. 10.

Nevertheless, the burden of proof in questions of deviation does not sit squarely on the shoulders of either party. Rather, deviation appears to be one of those legal questions in which each party is obliged to (and to protect its interests, should) do everything that it can to make proof of its own contentions and to contradict the contentions of the other side. If, however, a rule of burden of proof exists as to deviation, it is probably that the carrier must prove the geographic route of the contract and that the loss took place on the route. The deviation must then be proved by the claimant and the reasonableness of the deviation must at that point be proved by the carrier.

General Clauses

Some bills of lading contain general clauses permitting deviation. Where the general clause does not specifically refer to a particular port or a particular expected incident, it is merely a cover-all, and such a clause in my opinion is invalid because it permits unreasonable deviations contrary to the Rules. Such a clause does not allow the cargo claimant to know what can be expected nor permit him to know the route of the voyage at the time of the shipment.

Generally, the Courts have looked not so much at the clause permitting the deviation as at the deviation itself to determine if it is reasonable. In other words, the clause is of less importance than the actual facts of the deviation. Such a clause in no case will ever permit more than a reasonable deviation.[18] Learned Hand, J., in the *Blandon*[19] gave the rule in very clear terms. Referring to a general clause which read: "with liberty to call at any port or ports in or out of the customary route in any order . . .", he observed, "It is said that the clause will allow only reasonable deviations and this is indeed true, since such a clause is to be construed in its context."

[18]*G. H. Renton and Co. v. Palmyra Trading* (1956) 2 Lloyd's 379. A bill of lading incorporating the Canadian *Water Carriage of Goods Act* (1936) had a clause allowing discharge at another port in case of epidemics, strikes, etc. The ports of discharge were London and Hull and they were strike bound. The vessel discharged at Hamburg and it was held that the clause was not repugnant to the Hague Rules and to III(2) that "the carrier shall properly carry and discharge the goods." It was held that the clause was not concerned with deviation but with providing other ways of performing the contract if certain events should take place. In *Hirsh Lumber Co. v. Weyerhaeuser* [1956] A.M.C. 1294, a bill of lading between two American ports but involving Cogsa had a clause allowing the master to discharge at a port other than the proper destination when there might be "delay or difficulty" in the discharge. There was a strike and the U.S. Court of Appeals held that discharge could be made at Baltimore rather than Newark or New York. See also: *Ocean Liberty* [1952] A.M.C. 1681, [1953] 1 Lloyd's 38. In *Connolly Shaw v. A/S Det Norden Fjeldske* (1934) 49 Lloyd's 183, a shipment of lemons was carried under a bill of lading which had a deviation clause. The vessel deviated and took three days longer (upon a voyage of 22 days). Held: the clause gave the ship liberty to call at any port or ports, etc. as long as the object of the voyage was not frustrated, *i.e.*, the safe carriage of a perishable cargo; and there was no evidence that the extension of the voyage had caused measurable harm. Further, owing to the liberty given to the ship under the deviation clause, the arrival date could not have been anticipated within a day or so and therefore no loss of market could be shown (nor was a falling market anticipated).

[19]*The Blandon* 287 Fed. Rep. 722, [1923] A.M.C. 242.

II — Fire

Carriers by water are not responsible for damage to cargo caused by fire in virtue of the Hague Rules. This is a special privilege which is not given to land carriers and bailees who usually have little defence for damage by fire. The water carrier is ouly liable for fire if his personal fault actually caused the fire.

The exception for fire under the Hague Rules reads as follows:

IV (2) (b) "Fire, unless caused by the actual fault or privity of the carrier".

This exception benefits the owners of the vessel and the charterers and any others who may be defined as carriers.[20]

Due Diligence

The carrier, in order to exculpate itself under Article IV (2) (b) must first prove it exercised due diligence before and at the beginning of the voyage to make the vessel seaworthy in virtue of Article III (1).[21] This diligence can be delegated but carriers are responsible for the negligence of the agents, surveyors, etc. to whom they delegate their responsibilities.[22]

Burden of Proof

Once the carrier has proven it has exercised due diligence, then it must prove that the fire caused the loss. Here it should be noted that fire means a flame and not merely heat.[23]

It is not clear from the Act as to who then has the burden of proving the fault or privity of the carrier. American jurisprudence based on the *American Fire Statute*, 46 U.S. Code, Section 182, which differs in wording from the exception in the Hague Rules, places the burden of proof on the cargo claimant.[24] In Great Britain, where the fire statute is set out in the *Merchant Shipping*

[20]*The Shell Bar* [1955] A.M.C. 1429, [1953] 1 Lloyd's 38; see Article I (a) of the Rules. In the *Venice Maru* [1943] A.M.C. 1209, the fire statute was held to benefit the owner *in personam* as well as the ship *in rem*.

[21]*Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine* (1959) 2 Lloyd's 105. The Privy Council held that: "Article III, Rule I, was an overriding obligation, and if it was not fulfilled and the non-fulfilment caused damage, the immunities of Article IV could not be relied on."

[22]*Riverstone Meat* (Muncaster Castle) [1961] 1 Lloyd's 57, [1961] A.M.C. 1357.

[23]*Buckeye State* [1941] A.M.C. 1238. "Fire implies more than heat; if there is no glow or flame there is no fire" (Grain was damaged by light bulbs left on in the holds. The carrier was held liable and the fire statute did not apply); *American Tobacco Co. v. S.S. Katingo* [1949] A.M.C. 49, at p. 58: "It is urged that because some damage occurred by heating before the fire broke out, then, if the ship cannot prove what damage was solely caused by fire she is liable for all damage. This argument would nullify the fire statute in many, if not all, cases of spontaneous combustion—an absurd result."

[24]*Sandgate Castle* [1939] A.M.C. 463: "In a ship fire case, cargo claimants should be given wide latitude as to interrogatories, in their endeavour to discharge the heavy burden of proof placed on them." *The Shell Bar* [1955] A.M.C. 1429, [1953] I Lloyd's 38.

Act, 1894, Section 502 (1), the Courts have placed the burden on the carrier of proving that there was no fault or privity on its part.[25] Generally, the Courts of these two countries in deciding the exception under the Hague Rules have followed the jurisprudence already relating to their particular fire statutes. In my view, the burden of proof, is again one which is not clearly defined and where both claimant and carrier must do their utmost in proving the fault and privity on the one hand and in disproving it on the other. From a straight reading of the Act, however, I gather that the claimant has the burden of proving the fault and privity of the carrier after the carrier has first proven due diligence to make the vessel seaworthy and that fire caused the loss.

Fault of Carrier

The fault and privity of the carrier must be the fault of the carrier itself and not merely of an employee or agent. This normally means a senior employee or officer of the company.[26]

A carrier is not responsible for the fault of its agent, except before and at the beginning of the voyage. In consequence, the carrier is responsible for the thawing of frozen waste pipes by an acetylene torch which causes the vessel to be actually on fire at the beginning of the voyage, even though the cargo was only destroyed during the voyage.[27] However, if the employee or agent made

[25]*Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] A.C. 705.

[26]In *Maxine Footwear v. Canadian Government Merchant Marine* [1956] Ex. C.R. 234, it was held that under IV (2) (b), the fault and privity of a corporation is an act known by and under the instructions of the senior officer in question. In the *Anglo Indian* [1944] S.C.R. 409, [1944] A.M.C. 1407, fire caused by the heating of a cargo of concentrates was excused by the Supreme Court of Canada upon showing that skilled chemists were employed to test the cargo and recommend how it should be stored. One gathers that this judgment would not now be rendered in virtue of the House of Lords decision in *Riverstone Meat* [1961] I Lloyd's 57, [1961] A.M.C. 1357, and the Privy Council in *Maxine Footwear* [1959] 2 Lloyd's 105. It is to be noted as well in the *Anglo Indian* that the question of due diligence to make the vessel seaworthy at the beginning of the voyage and delegation of that diligence was not considered or pressed to any great extent. In the *Edmund Fanning* [1953] A.M.C. 86, acid was stowed above other chemicals. The vessel owners had employed an expediter to assist in stowing cargoes. This negligence was held to be within the terms "Fault and privity of the Carrier". The Court of Appeals failed to consider the question of delegation due diligence but instead seemed to extend the definition of the word "carrier". In the *Ocean Liberty* [1952] A.M.C. 1681, [1953] 1 Lloyd's 38, the acceptance of a large quantity of ammonium nitrate for a trans-Atlantic voyage without proper enquiry as to the possibility of spontaneous combustion would have constituted an actual fault of the carrier. Here, however, proper enquiries were made and thus the carrier was not at fault. In *American Tobacco v. Katingo* [1949] A.M.C. 49, at 58, improper stowage of the master was not held to be the fault of the vessel owner, nor is the fault of the charterer's agent fault of the charterer.

[27]*Maxine Footwear v. Canadian Government Merchant Marine* [1956] Ex. C.R. 234, at 247: "I think it is clear that in order to deprive the carrier of the benefit of the exception, the fault or privity must be in respect of that which causes the loss or damage in question." In *The Tai Shan* [1953] A.M.C. 887, a vessel deviated from its course and a fire started. It was held that even if the deviation was unreasonable the cargo interest had not sustained the burden of proving that there was a causal connection between the deviation and the fire.

the same error during the voyage, then the carrier could exculpate itself in virtue of Article IV (2) (b).

The fault of the carrier must be directly connected with the fire. To have committed a fault is not sufficient.

It should be noted finally that once a fire has been discovered, then the carrier can still be held responsible if it is negligent in extinguishing the fire because such negligence is in effect negligence in the care and custody of the cargo.[28]

General Average

The exemption of liability under the British fire statute gives the owner the right to general average[29] but this right is not given to the American owner.[30] The American practice seems to me to be more in accord with the principles of general average.

The Fire Statutes

Canada has no fire statute other than the fire exception in the Hague Rules. Great Britain and the United States not only have the fire exception in their versions of the Rules but fire statutes as well. The fire statutes are as follows:

> *American Fire Statute*:
> "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."
>
> 46 U.S. Code, Section 182.

The British equivalent is as follows:

> *Merchant Shipping Act*, 1894, Section 502:
> "The owner of a British sea-going ship or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:— (1) where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship . . ."

It is to be noted first of all that both fire statutes apply only to the owner of a vessel. It should be next noted that the fire statutes apply even when the Rules are not in force. (See Section 6 (2) of the British Act and Section 8 of Cogsa).

There do not appear to have been any conflicts to date between the Hague Rules and the fire statute in either Great Britain or the United States. There are two differences however as noted above:

a) Under the Hague Rules the carrier must have exercised due diligence before the voyage.

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[28] *American Mail Line v. Tokyo M. and F. Insurance Co.* [1959] A.M.C. 2220.

[29] *Tempus Shipping Co. Ltd. v. Louis Dreyfus and Co.* [1931] A.C. 726; (1931) 40 Lloyd's 217.

[30] *Zaca* [1939] A.M.C. 912; *Venice Maru* [1943] A.M.C. 277.

b) Under the Rules since the recent *Riverstone Meat*[31] decision, the owner is responsible if the agent or servant is negligent in making the ship seaworthy while the fire statutes only refer to the owner's personal fault.

In the *Maxine Footwear*[32] judgment where Canadian law was ruled upon, it was clearly held by the Privy Council that the carrier was responsible for fire damage because servants of the owner had not been duly diligent before and at the beginning of the voyage to make the ship seaworthy. If such a judgment had been tried under American and British law, where there is a fire statute, the Courts might have been reluctant to come to the same conclusion because the fire statutes make no reference to due diligence to make the vessel seaworthy. I believe however that the Hague Rules and the fire statute must be read together in America and Great Britain whenever the Rules apply and that due diligence to make the vessel seaworthy is a precedent condition.

The American solution to this dilemma seems to have been the widening of the definition of the term "carrier."[33]

The burden of proof under the fire statute has been upon the claimant in the United States[34] and upon the carrier in Great Britain.[35] This is one of those rare cases where America, a shipping country, has given the advantage to owners whilst Great Britain, a shipowning nation, has favoured shippers.

III — Deck Cargo and The Hague Rules

A clean bill of lading before the Hague Rules[36] and since has always meant that the cargo is carried under deck.[37] This is one of the basic principles that must be understood in any consideration of deck cargo in the light of the Hague Rules, or otherwise. Unfortunately, there is nothing in the Rules stipulating that a clean bill of lading means under-deck carriage. It would have been fitting to have included such a stipulation in Article III, Rule 3.

A second principle of the pre-Hague Rules common law, which is similar to the first principle, and which is not set out in the Rules, also has equal effect today. It is that, where the carrier contracts to carry goods without stipulating the place of stowage, it is understood in the contract that the goods are carried under-deck.[38]

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[31][1961] 1 Lloyd's 57; [1961] A.M.C. 1357.

[32][1959] 2 Lloyd's 105.

[33]*Ocean Liberty* [1952] A.M.C. 168; [1953] 1 Lloyd's 38; *Edmund Fanning* [1953] A.M.C. 86.

[34]*Silvercypress* [1943] A.M.C. 224; *The Venice Maru* [1941] A.M.C. 640, [1943] A.M.C. 277 and 1209.

[35]*Lennard's Carrying Co. v. Asiatic Petroleum Co.* [1915] A.C. 705.

[36]The Hague Rules define the rights and obligations of ocean carriers when a bill of lading is issued.

[37]*Schooner St. John's N.F.* [1923] A.M.C. 1131, "In the absence of a general port custom with notice of which all shippers are charged a clean bill of lading imports under deck stowage." *Jones and Guerrero v. Flying Clipper* [1954] A.M.C. 259; *T. Roberts and Co. v. Calmar SIS. Corp.* [1945] A.M.C. 375.

[38]*Royal Exchange Co. v. Dixon* (1887) 12 A.C. 11.

Deck cargo is particularly excluded by the Hague Rules under Article I (c) where goods are defined as "goods, wares, merchandise and articles of every kind whatsoever except . . . cargo which by the contract of carriage is stated as being carried on deck and is so carried."[39]

Custom

It should be noted that before the Hague Rules, if it was the custom to carry certain goods on deck in a certain trade, then the bill of lading did not need to mention that the goods were in fact carried on deck. A good example of the custom was the carriage of pulpwood and lumber in the St. Lawrence River trade by goelettes. Goelettes are built for deck carriage, and part of the cargo is normally carried on deck. This third pre-Hague Rules principle has little basis for application now because the Rules are not silent but stipulate "which by the contract of carriage is *stated* as being carried on deck." Most texts and authors seem to take the position that the principle of custom is still carried on under the Rules. There appears to be no Hague Rules judgment on the point, however, and no basis for the position in the Rules themselves.

The Rules therefore apply in the following cases:

a) cargo is carried under-deck and a clean bill of lading is issued;

b) cargo is carried under-deck and is "stated" as carried on deck;

c) cargo is carried on deck and is not "stated" as carried on deck;

d) cargo is carried on deck and is stated as carried on deck but the bill of lading by a special clause invokes the Rules as to deck cargo.

The Rules do not apply when cargo is carried on deck and the face of the bill of lading states that the cargo is on deck.

A General Deck Stowage Clause Is Not A Statement

It should be made clear that a general clause among the clauses in a bill of lading is not a statement that cargo is carried on deck. This can be seen from a reading of Article I (c). See also *Svenska Traktor v. Maritime Agencies.*[40]

What is deck stowage? In *The Lossiebank*[41] it was held that "stowage of cargo in the ship's hospital, a steel structure on deck having heavy wooden doors which were burst in by a hurricane" was proper under-deck stowage.

[39]It should be noted that the Hague Rules can be applied to deck cargo if there is an express statement in the bill of lading that the Hague Rules will apply to deck cargo. In such a case the Rules would apply in every possible respect and the carrier must exercise care in the normal manner. In *Diethelm and Co. v. S.S. Flying Trader* [1956] A.M.C. 1550, it was held that the carrier and shipper can contract to invoke Cogsa to deck cargo. The carrier in this case alleged but did not prove peril of the sea and was thus held responsible. *Uniao de Transportadores v. Acoreanos* [1949] A.M.C. 1161; *West Kyska* [1946] A.M.C. 997; *Pannell v. S.S. American Flyer* [1958] A.M.C. 1428.

[40][1953] 2 Lloyd's 124.

[41][1938] A.M.C. 1033.

The Effect of Deck Carriage

The effect of deck carriage of goods so stated in the bill of lading is that the Rules do not apply[42] and consequently the carrier can insert into the bill of lading clauses which are contrary to the Rules. Nevertheless, if the goods are carried on deck, carriers are still obligated to be careful of the goods, must stow them properly, and must not be negligent.[43]

On the other hand, if the goods are in fact carried on deck when there is no mention in the bill of lading that they are carried on deck, then the carrier is the insurer of the goods.[44] American Courts have even considered this as a deviation.[45] It should be noted that the Rules apply in a case of goods carried on deck and not "stated" as being carried on deck. In such a case the carrier is responsible for any damage and cannot rely on IV (2) (a) to (q) in virtue of the breach of the preliminary obligation of Rule III (2), ". . . the carrier shall properly and carefully load, handle, *stow*, carry, keep, etc. . . ."[46] Deck stowage cannot be considered proper stowage. Deck carriage might also be considered to be a deviation in virtue of IV (4), but I believe it is best to consider it as a breach of the contract and to consider deviation as a change in the geographic route of the voyage.

If, however, there was deck carriage and a clean bill of lading was issued in error, then as between the original parties — shipper and carrier — the carrier may show that a clean or under-deck bill of lading was issued in error and that the parties had agreed to stowage on deck.[47]

General Clauses Permitting Deck Carriage

Confusion has arisen from clauses in bills of lading permitting deck cargo. The clause (joined with a non-responsibility clause) might read as it did in the *Svenska Traktor*:[40]

> Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss or damage or claim arising therefrom.

In my opinion such a clause is only valid if the goods are carried on deck and the bill of lading has a statement on its face that the goods are carried on deck.

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[42]*Aetna Ins. Co. v. Carl Matusek* [1956] A.M.C. 400. The one-year time limit was held inapplicable in this case of deck cargo which was noted as loaded on deck. Suit taken 14 months later was held to be valid.

[43]*Globe Solvents Co. v. S.S. California* [1946] A.M.C. 674; *Ponce* [1946] A.M.C. 1124. Here it was held that, "Where goods are loaded on deck at shipper's risk the carrier is not relieved of due care and attention toward the cargo." *Cour d'Appel d'Aix* [1961] D.M.F. 525; *The Stranna* (1938) 60 Lloyd's 51; *Cour d'Appel d'Aix* [1952] D.M.F. 413; *Cour d'Appel de Paris* [1953] D.M.F. 130.

[44]*Royal Exchange Co. v. Dixon* (1887) 12 A.C. 11; *Idefjord* [1940] A.M.C. 1280.

[45]*Jones and Guerrero v. Flying Clipper* [1954] A.M.C. 259. The carrier issued a clean bill of lading but stowed goods on deck. This was a deviation and consequently the bill of lading did not apply and the limitation per package did not apply.

[46]Italics added.

[47]*Texas Petroleum Corp. v. S.S. Lykes* [1944] A.M.C. 1128.

The problem arises if the bill of lading contains a general clause as above but the face of the bill of lading does not state deck carriage. Under such circumstances I consider that there has been an unjustifiable deck carriage and a breach of the contract and for at least four reasons:

1) To my mind the general clause is merely an option which the carrier does not ordinarily have (see the second principle above). If the bill of lading does not bear a statement of the deck carriage, then the option has not been exercised. This was the position taken by the U.S. Supreme Court in *St. John's N. F.*[48]

2) Another argument which to me is irrefutable is that the typewritten wording on the face of a bill of lading has precedence over the printed clauses in a bill of lading. A clean bill of lading is a statement of under-deck stowage which contradicts the printed general clause.

3) To consider a general clause as valid if there is no statement of deck carriage would in effect permit a non-responsibility clause, hidden in the clauses of the bill of lading. Such a non-responsibility clause is invalid in virtue of the Hague Rules (Rule III,8), which Rules it must be remembered apply in this case.

4) Finally, the deck stowage would not be considered as proper stowage under III (2) of the Rules, and in this case the carrier would be responsible for this lack of care.

I believe that a general deck carriage clause without a statement of deck carriage is an option not exercised and a fundamental breach of the contract and the Rules. The remark of Lord Atkin in *Stag Line v. Foscolo Mango*[49] would seem to apply:

> . . . I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act; and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of the "contract of carriage of goods by sea" to which the Act applies.

There are a number of decisions concerning general clauses which I believe are erroneous. In *Svenska Traktor*[40] the Court held that a general liberty clause is not a statement that the goods are carried on deck, but ignored whether the clause was an option, and also that the printed clause was contradicted by the clean typed face of the bill of lading. The Court applied the Hague Rules in

[48]*Schooner St. John's N.F.* [1923] A.M.C. 259. A freight reservation was entered into containing the clause "on or under deck, ship's option". A clean bill of lading was issued which did not contain a general clause. The U.S. Supreme Court took the reservation and the bill of lading together as the contract and declared that the carrier had an option to carry on or under deck but that the issuance by the ship of a clean bill of lading on its face amounts to a positive representation that the option has been exercised and that goods will go under deck.

[49][1932] A.C. 328, at p. 340, (1931) 41 Lloyd's 165, at p. 170.

virtue of a clause to that effect in the bill of lading (ignoring that the Rules applied in any event), but then ignored Rule III (2), and Rule III (8). The judgment seems particularly weak because the bill of lading clause invoking the Rules further provided: "If, or to the extent that any terms of this bill of lading is repugnant to or inconsistent with anything of such Act or Schedule, it shall be void". The Court found that the non-responsibility clause was repugnant to the Act but held that the liberty to carry on deck was not contrary to III (2). Other judgments are *Armour v. Walford*[50] and the *Peter Helms*,[51] the first deciding the question on pre-Hague Rules law in Great Britain and the second an American decision which does not refer to the Hague Rules and which erroneously draws from *St. John's N.F.*[47] that a bill of lading containing a general clause permitting deck carriage but no statement of deck carriage is not a clean bill of lading. The United States Supreme Court in *St. John's N.F.* took the opposite position, holding that the contract was the freight reservation and the bill of lading taken together, and although the freight reservation contained a general deck carriage clause there was a clean bill of lading because no statement appeared on the face of the bill of lading. In *Delawanna, Inc. v. Blijdendijk*[52] it was held that: "When a bill of lading expressly provides that cargo may be stowed on deck or under deck, the holder of a 'clean' bill of lading may not complain of damage caused by the goods being carried on deck." Here again the meaning of the Supreme Court in *St. John's N.F.* was confused.

American Tobacco v. Katingo Hadjipatera[53] is indirectly to the same effect. All four above-mentioned judgments I believe are erroneous for the four reasons enumerated above. To consider a general deck carriage clause as valid without a statement on the bill of lading is in effect to sanction a non-responsibility clause. Such a clause is not beneficial to the shipping industry or commerce in general while the carrier can perfectly protect himself by stating on the face of the bill of lading that a cargo is carried on deck. Carriers are reluctant to so clause the face of their bills of lading because banks will not discount them. The clean bill of lading with a general liberty clause among the many clauses is usually an intentional dissimulation. This practice should not be protected by the Courts who should follow the decision of Woolsey, J. in *Italian Importing Co. v. Navigazione* (The Carso).[54] There it was held that: "A bill of lading is a document of dignity and Courts should do everything in their power to preserve its integrity in international trade, for there especially confidence is of the essence."

[50][1921] 3 KB 473; (1921) 8 Lloyd's 446 and 497.

[51][1938] A.M.C. 1220.

[52][1950] A.M.C. 1235.

[53][1949] A.M.C. 49.

[54](1930) 38 Lloyd's 22, at p. 30, [1930] A.M.C. 1743, at p. 1758.

CASE and COMMENT