Selected Problems Under the Hague Rules *

William Tetley **

The Hague Rules have been adopted by approximately 100 states, colonies and principalities throughout the world (Canada's version is the Water Carriage of Goods Act — 1936). The rules specifically prohibit limitation of liability clauses in virtue of Article 3, 8), which reads as follows:

> "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 the Convention, shall be null and void and of no effect.
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> A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

At times, Jurisdiction Clauses and Arbitration Clauses have been held invalid because they result in the carrier's liability being reduced. Letters of Indemnity have been another method of limiting liability. Jurisdiction and Arbitration clauses as well as Letters of Indemnity are discussed below.

JURISDICTION CLAUSES

Many bills of lading contain clauses stating that suit, if taken, must be taken in a particular place. Such clauses are invalid in many countries, and in Australia [1] and Belgium they are invalid by the terms of the local Hague Rules legislation. The Australia Sea Carriage of Goods Act 1924, Section 9, holds invalid any clauses ousting Commonwealth of Australia or State courts. Section 9 reads as follows:

> "(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,

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** Of the Bar of Montreal.

[1] *Wilson v. Compagnie des Messageries Maritimes* (1954) 1 Lloyd's 229; (1954) 2 Lloyd's 544. A French bill of lading for a shipment from France to Australia called for suit in France. The Supreme Court of New South Wales upheld by the Australian High Court declared that a clause calling for actions to be tried in a French court was invalid.

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.

(2) 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 in Australia shall be illegal, null and void, and of no effect."

The Canadian pre Hague Rules Act of 1910 contained a prohibition against certain foreign jurisdiction clauses [2] and its absence in the Canadian Act of 1936 perhaps indicates that such clauses are not contrary to the 1936 Act. Nevertheless, jurisdiction in Canada seems to be a question over which each court has discretion.

Most nations give their courts the discretion to accept or refuse jurisdiction. The decision of the U.S. Court of Appeals in *Mandu-Derderah* is a good example.[3] It was held that an American Court may exercise its discretion and take jurisdiction of a suit by German cargo underwriters against a Brazilian vessel arising out of collision in foreign waters with a German vessel. It was noted that the collision had not been litigated elsewhere and there was no forum common to both parties; while the court having taken jurisdiction should not relinquish it after the lapse of so much time that the parties cannot sue elsewhere.

In some nations the court takes the position that its jurisdiction was granted by law and that two contracting parties cannot contract out of the law. For example, the courts of the Province of Quebec are very reluctant to refuse jurisdiction.[4]

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[2] Section 5 of the Canadian Act of 1910 read in part: "... any stipulation or agreement purporting to oust or lessen the jurisdiction of any court having jurisdiction at the port of loading in Canada in respect of the bill of lading or ... document, shall be illegal, null and void, and of no effect."

[3] 1939 A.M.C. 287.

[4] *Gordon & Gotch v. M.A.N.Z. Line Ltd.* (1940) 68 B.R. 428. A shipment was carried from the Province of Quebec to Australia by MANZ Line which has its head office in the Province. The Court (upheld in appeal) declared it had jurisdiction and would hear the case despite a bill of lading clause reading "any dispute ... shall be decided by the courts of the country of discharge". *National Gypsum Company, Inc. v. Northern Sales Ltd.* (1963) 2 Lloyd's 499; 1964 S.C.R. 144. The Supreme Court of Canada agreed that the Exchequer Court (Quebec Admiralty District) could insist on retaining jurisdiction even where arbitration by two non-Canadians had been validly agreed upon in New York under New York law in a New York Produce Exchange Charter. *Fehmarn* (1957) 2 Lloyd's 551 at p. 552. Willmer (J.) upheld in appeal: "... it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, *prima facie*, this Court will stay proceeding, instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so."

Staying the action

Many courts often stay an action until it has been heard elsewhere and thus reserve their right to review the foreign judgment or even rehear the whole case. Staying an action, rather than dismissing it, usually results in greater equity because the court which is given jurisdiction by the jurisdiction clause may refuse jurisdiction, or may declare the delay for suit has expired, etc. The original court may then hear the case, because it has only been stayed and not dismissed.[5]

Reasonableness as a criterion

Reasonableness is usually the criterion for deciding whether or not a jurisdiction clause should be honoured. What is reasonable is a question of fact for the appreciation of the Court. The following are some useful examples:

In *Nieto v. S.S. Tinnum* 1958 A.M.C. 2555, cargo was carried from Mexico to Cuba on a West German vessel, and suit was taken in the Southern District of New York by a Mexican merchant. A jurisdiction clause in the bill of lading called for the deciding of all disputes under German law in Hamburg. It was held that the clause was reasonable because: Headnote —

"1) No factor connected the dispute with the U.S.A.
2) The parties had agreed to German law in Hamburg.
3) There is no allegation that Hamburg will not provide a fair hearing.
4) Alleged greater expense of Hamburg over Southern District of New York was unpersuasive".

In the *Vestris*, (1932) 43 Lloyd's 86, cargo was carried to South America from New York. Suit was taken in New York but was discontinued, one gathers, because the lawyers for claimants did not have authority from the claimants to institute suit. The bill of lading called for proceedings in New York, but the carrier was domiciled in London. Action was taken in London after long negotiations there. The British court in its discretion refused to stay the action because defendants were in Great Britain and discussions had taken place there for two years.

In the *Archsum*, 1962 A.M.C. 999, a U.S. District Court noted that it had jurisdiction over a shipment from Antwerp to the United

[5] *Birks Crawford Ltd. v. S.S. Stromboli* 1955 Ex. C.R. 1. Here an Admiralty Court in Canada stayed an action in Canada so that it could be litigated at Genoa, Italy, according to a jurisdiction clause in the bill of lading.

States despite a clause that German law and Hamburg courts had sole application and jurisdiction. However, the court went on to find the clause reasonable, because German law was no more restrictive than American law and because suit was not timebarred in Germany. The Court therefore ordered suit in Hamburg.

In the *Takemura & Co. v. Tsuneshima Maru* 1962 A.M.C. 1217 suit was taken in New York despite a bill of lading clause calling for suit in Japan. The carrier waived the time bar for suit in Japan and so the New York court refused jurisdiction. Headnote :

"Reasonableness of bill of lading clauses requiring exclusive resort to foreign courts depends upon factors similar to those involved in deciding forum non conveniens-availability of witnesses and the ability of the foreign forum to adjudicate the matter fairly".

The *Court d'Appel d'Alger* (Venezia, February 27, 1962) 1963 D.M.F. 156, held that when suit is possible against both the stevedore and the carrier and the bill of lading (which does not apply to the stevedore) has a jurisdiction clause then the clause does not apply and suit can be taken where the two defendants can be joined.

In *Jefferson Ins. Co. v. Cia Colonial de Nay,* 1954 A.M.C. 1314, a bill of lading was issued in Angola for carriage of coffee to New York. There were transshipments en route at Luanda and Lisbon. The first carrier was sued at New York and it was held that the carrier could be sued at New York despite a bill of lading jurisdiction clause calling for suit in Portugal and despite the fact that other proceedings had been taken in Lisbon. "I do not find that any injustice will result thereby". p. 1315.

Muller & Co. v. Swedish Amer. Line, Ltd., 1955 A.M.C. 1687

The U.S. Court of Appeals upheld a jurisdiction clause calling for suit in Sweden. The Court noted that Cogsa did not prohibit such a clause. ". . . if Congress had intended to invalidate such agreements, it would have done so in a forth-right manner as was done in the Canadian Act of 1910." p. 1688.

"Further, there is no contention that the Swedish courts are not capable of adjudicating this case fairly and justly". p. 1690.

In the *Geisha,* 1951 A.M.C. 630, the U.S. Court of Appeals denied jurisdiction in New York of a suit arising from a cargo claim with attachment of a Norwegian credit in the hands of a New York ship agency. A clause in a Peruvian bill of lading to the effect that disputes in a shipment from Peru to Belgium be decided in Norway was held valid. The bill of lading was signed by the shipper and was valid by the law of Peru and Norway.

Change of jurisdiction changing rights and responsibility

If a change in jurisdiction would increase or decrease the rights of the claimant or of the carrier, then the courts are normally reluctant to refuse jurisdiction. This was the position taken by a New York District Court, upheld in Appeal, in *Muller & Co. v. Swedish Amer. Line Ltd.*,[6] when a Swedish vessel manned by a Swedish crew was lost at sea on a voyage from Sweden towards Philadelphia. The bill of lading called for Swedish law and jurisdiction. The court held that the clause did not lessen or relieve the carrier's liability and was therefore valid. The principle was illustrated in two related but not incompatible judgments rendered in the Southern District of New York within 29 days of each other. In the first judgment *Pakhuismeesteren S.A. v. "Gottingen" (No. 1)* [7] McLean D.J. declined jurisdiction to hear a case in the Southern District of New York because the bill of lading called for suit according to German law in Hamburg Courts. McLean D.J. held this to be reasonable. In the second judgment, The "Gottingen" (No. 2) [8] relating to *claims by other cargo* interests against the same vessel on the same voyage under similar bills of lading Feinberg D.J. accepted jurisdiction despite the jurisdiction clause because affidavits had been produced to the effect that peril of the sea jurisprudence in Germany was different to Cogsa, that the difference was in favour of the carrier and thus Sect. 3, 8) of Cogsa would be violated.

In rem and personam

The courts seem extremely reluctant to refuse jurisdiction in an in rem action. In *Carbon Black Export v. Monrosa* [9] a normal jurisdiction clause read "Clause 27 — Also, that no legal proceedings may be brought against the Captain or shipowners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there." The U.S. Court of Appeals held: "There is nothing in clause 27 which has any tendency to establish that the parties intended it should be made applicable to an in rem proceeding against the ship itself". p. 1339.

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[6] 1955 A.M.C. 1687.

[7] 1964 A.M.C. 757; (1964) 2 Lloyd's 35.

[8] (1964) 2 Lloyd's 37.

[9] 1958 A.M.C. 1335; upheld by the U.S. Supreme Court, 1959 A.M.C. 1327.

Aetna Insurance v. Satrustegui [10] concerned a shipment from Valencia, Spain, to Puerto Rico under a bill of lading which had a clause calling for suit in Barcelona. The U.S. District Court exercised its discretion and declined jurisdiction of the personam action because a) the clause was voluntarily arrived at, b) it was not against public policy, and c) it was reasonable, because all eyewitnesses of the loading were in Spain. However, in virtue of the U.S. Supreme Court decision in *Carbon Black Export v. Monrosa* [9] the in rem action was not refused but retained by the U.S. District Court.

In *Peugeot Inc. v. S.S. Honestas* [11] a U.S. District Court retained jurisdiction of a claim arising from the carriage of French cars on an Italian ship from LeHavre to New York. The vessel was attached in rem in Norfolk, although the English bill of lading contained clauses invoking Italian law and courts. It was noted that the law of Italy applied, but the Court retained jurisdiction in this case without trying to create a general rule. The Court stated "... where there has been an in rem process attaching the vessel, the Court in which the process originated cannot be ousted of jurisdiction in the technical sense by agreement of the parties. However, the mere fact that the action is in rem does not command the Court to exercise jurisdiction." p. 1691

In *Anglo-American Grain Co v. S/T Mina D'Amico* [12] the vessel was attached in rem, but a U.S. District Court declined jurisdiction, exercising its discretion because, amongst other reasons, the shipment was from Bombay to Hamburg, the collision took place off Spain, and no American interests were involved.

The clause should be definite and clear

In many countries a jurisdiction clause is not valid unless it specifies the actual court.

The *Tribunal de Commerce d'Alger* (Mercurius, Feb. 2, 1959) [13] held that a clause calling for suit in the country where the carrier had its head office is not precise enough because the fact that the carrier is called the Rotterdam Fruit Line is not sufficient to decide with certainty that the head office is in Rotterdam.

Cour d'Appel de Rouen (Mirzan, July 20, 1960) [14] A bill of lading referred to the long form bill of lading which in turn contained a

[10] 1960 A.M.C. 891.
[11] 1960 A.M.C. 1690.
[12] 1959 A.M.C. 511.
[13] 1959 D.M.F. 618.
[14] 1961 D.M.F. 724.

jurisdiction clause. Held that the vagueness of the bill of lading did not permit the shipper to know the full effect of the jurisdiction clause and consequently it was inapplicable.

Cour d'Appel de Rouen (Oris, March 3, 1961) [15]

A bill of lading contained a jurisdiction clause but the bill of lading was not signed by the shipper. Nevertheless, the consignee used the bill of lading to receive his goods and in consequence the jurisdiction clause was held valid as against him.

In the *Media* [16] an action was stayed in England in virtue of a clause calling for jurisdiction either in the United Kingdom or at destination (Calcutta) at shipowners' option. It is submitted that such a clause with alternative jurisdictions subject to the whim of one party is unreasonable and unclear and today would probably be considered invalid by most courts.

Does a jurisdiction clause contradict Article 3, 8) of the rules ?

In *Maharani Woolen Mills Co. v. Anchor Line*,[17] Scrutton, L.J. held that there was no contradiction in a clause reading "all claims arising shall be determined at the port of destination according to British laws". However, the port of destination was Bombay, which would have applied British law anyway. One gathers that if the jurisdiction clause had resulted in a Court invoking different law which lessened the carrier's responsibility, then such a clause would have contradicted Article 3, 8).

Burden of proof

If a court normally has jurisdiction and suit is taken there, then one would expect that the burden of proof is on the person invoking the jurisdiction clause. This was the position taken in *Carbon Black Export v. S.S. Monrosa* [18] where the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert* (1946, 330 U.S. 501 at 508) is cited "But unless the balance is strongly in favour of the defendant, the plaintiff's choice of forum should rarely be disturbed."

However, in Great Britain where the Courts seem to be much more willing to recognize the rights of the parties to contract in almost any way they please, the opposite view is taken. There, the

[15] 1961 D.M.F. 726.
[16] (1931) 41 Lloyd's 80.
[17] (1927) 29 Lloyd's 169.
[18] 1958 A.M.C. 1335 at p. 1341.

burden is on the person wishing to upset the jurisdiction clause. See the Fehymarn [19] upheld in Appeal [20] where Willmer (J) stated "it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, prima facie, this Court will stay proceedings instituted in this country in breach of such agreement and will only allow them to proceed when satisfied that it is just and proper to do so."

General conclusions concerning Jurisdiction clauses

The Hague Rules themselves (except for rare cases such as Belgium, Australia and France's internal act) are silent on the validity of jurisdiction clauses. Whether a court will accept or refuse jurisdiction is usually a question of discretion. Some courts refuse to recognize jurisdiction clauses in any case and always retain jurisdiction, other courts will stay the action, and some courts will refuse jurisdiction altogether.

1) Staying the action is often the most equitable solution because the court which is given jurisdiction by the jurisdiction clause may refuse jurisdiction.

2) Reasonableness is the usual criterion used by courts in deciding whether a jurisdiction clause should be honoured.

3) A jurisdiction clause should designate as clearly as possible the court given jurisdiction.

4) Jurisdiction clauses are rarely valid against a person not a party to the bill of lading — e.g., the stevedore or the charterer who did not issue the bill of lading. Nor are jurisdiction clauses usually valid if they result in a jurisdiction in which other parties who should be party to the action cannot be joined.

5) If the court referred to in a jurisdiction clause is subject to different law which latter will decrease the rights of the parties, the jurisdiction clause is usually held invalid.

6) Jurisdiction clauses are rarely honoured in, in rem proceedings.

7) It would seem that the burden of proof in America is on the person wishing to alter the jurisdiction of the court, and in Great Britain the burden of proof is on the person wishing to contravene the jurisdiction clause.

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[19] (1957) 1 Lloyd's 511 at p. 514.
[20] (1957) 2 Lloyd's 551.

ARBITRATION CLAUSES

The Hague Rules are silent as to the validity of arbitration clauses. Generally, it can be said that arbitration clauses are valid under the Rules providing they do not reduce the responsibilities of the carrier under Article 3, 8). It is difficult to give general principles relating to the validity of arbitration clauses, but the following are useful guideposts.

Only invoked against the parties to the agreement

The arbitration clause usually cannot be invoked against a person not a party to the contract containing the arbitration clause. Thus, in *Instituto Cubano v. T/V Golden West* [1], a time charter did not contain an arbitration clause, but the time charterer entered into sub-charter with the shipper and also issued a bill of lading to the shipper. The bill of lading invoked the clauses of the sub-charter, and the sub-charter contained an arbitration clause. It was held that the shipper could not force the vessel owner to arbitrate because the vessel owner "was not a party to any Charter incorporated in the bills of lading that provided for submission of shortage claims to arbitration".

Arbitration must be clearly invoked

In *Bernuth, Lembcke Co., Inc. v. S/S Acasta* [2], a charter contained an arbitration clause. A sub-charter containing an identical arbitration clause was entered into with a shipper, to whom was issued a bill of lading which did not contain an arbitration clause although the bills of lading invoked the conditions of the sub-charter. It was held that the bills of lading were the only contract between the vessel owner and the shipper, and as the bills of lading did not contain an arbitration clause, the shipper was in no way bound to proceed to arbitration. The general reference in the bills of lading "on payment of freight and all other conditions as per charter party", was insufficient to incorporate the arbitration clause in the charter into the bills of lading.

In *Son Shipping Co. v. De Fosse & Tanghe,* [3] the United States Court of Appeals held that the shipper was obliged to arbitrate under a bill of lading which invoked a charter party, which in turn contained an arbitration clause. The bill of lading clause invoking the charter party clauses was, the court held, "in language so plain that its mean-

[1] 1957 A.M.C. 1481 at p. 1484.
[2] 1952 A.M.C. 1789.
[3] 1952 A.M.C. 1931 at p. 1932; (1951 A.M.C. 286 in first instance).

ing is unmistakable". The bill of lading clause was as follows: "This shipment is carried under and pursuant to the terms of the charter dated Antwerp, June 29th, 1948, between Son Shipping Company and De Fosse & Tanghe, charterer, and all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment".

Reasonableness is often the criterion

An arbitration clause will usually be valid if its effect is reasonable.

In the *Pine Hill* [4], suit was taken against a charterer and a bill of lading holder by the owner of a vessel. The charterer tried to invoke the arbitration clause in the charter, which clause was not in the bill of lading, but it was held by McNair (J) that to grant the right of arbitration for the charterer would be to agree to two tribunals. Thus the arbitration was refused.

In *Uniao de Transportadores v. Acoreanos* [5], an arbitration clause calling for Lisbon arbitration in a New York bill of lading issued by a Portuguese ocean carrier to a Portuguese shipper was held to be valid. The New York court therefore stayed the action pending the arbitration.

In *Denny, Mott & Dickson Ltd. v. Lynn Shipping Co. Ltd.*[6], an arbitration clause read: "All claims must be made in writing and the Claimant's Arbitrator must be appointed within twelve months of the date of final discharge otherwise the claim shall be deemed waived and absolutely barred". The twelve month delay was held to be valid as concerns cargo falling under the Hague Rules, because the carrier's rights and immunities were unchanged. One gathers that a three months delay would have been invalid and might have annulled the whole arbitration clause because of the one year delay for suit in the Hague Rules.

The *Tribunal de Commerce de la Seine (Norma, May 9, 1950)* [7], held that a clause calling for arbitration in a foreign country is proper, having no other consequence than to give jurisdiction to foreign courts to examine the regularity of the arbitration proceeding.

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[4] (1958) 2 Lloyd's 146.
[5] 1949 A.M.C. 1161.
[6] (1963) 1 Lloyd's 339.
[7] 1951 D.M.F. 129.

Arbitration can be waived

In the *Elizabeth "H"* [8], a clause in a charter party called for arbitration in New York. The bill of lading invoked "all terms whatsoever of the said charter . . .". Endorsees of bills of lading claimed as cargo owners and seized the vessel in England. The vessel was released after the vessel owners P & I Club put up a letter of undertaking. One year and a half later, the vessel owners tried to set aside the writ on the grounds of an arbitration clause in the charter party. One gathers the court would have upheld the arbitration clause here if the owners had not provided the letter of undertaking. Instead, the court denied the right to arbitrate. Hewson (J) stated:

> "I think I have said enough to show that, in my view, this action of defendants or their agents in this case was an agreement to accept this Court's jurisdiction and to vary the arbitration clause."

Arbitration and procedure

An arbitration clause should not affect the law involved or the rights of the parties. Arbitration should result only in a different and usually quicker method of settlement of disputes. Some courts, however, are reluctant to recognize the right to arbitrate on the grounds that it offends public order. *National Gypsum Inc. v. Northern Sales* [9] is an example where the Exchequer Court of Canada in Admiralty, sitting in Montreal, Province of Quebec, refused to dismiss or even stay an action arising from an obligation to present a vessel at Montreal under a charter party entered into in New York between two non-Canadian carrier affecting a non-Canadian vessel. The charter party contained a normal New York Produce Exchange Arbitration Clause, calling for arbitration in New York City. The grounds were that proceeding before the courts of the Province of Quebec was a matter of public order and could not be thwarted. The decision was upheld by the Canadian Supreme Court 3-2.

It is submitted that this is an excessive use of jurisdiction, particularly because the parties, who were foreigners, had agreed validly according to the law of the place where they contracted (New York) to arbitrate in virtue of the law of that place (New York).

In France

The French courts have been reluctant to permit arbitration to exclude their jurisdiction. Nevertheless, where the Hague Rules apply, arbitration has been permitted if the parties have actually

[8] (1962) 1 Lloyd's 172 at p.179.
[9] (1963) 2 Lloyd's 499.

consented to the arbitration and know the details and terms of the arbitration clause.

The *Cour d'Appel d'Aix (Massilia, December 9, 1960)* [10] refused to permit arbitration, but retained jurisdiction, because the bill of lading invoking the charter party clause did not give the text of the arbitration clause. The headnote succinctly sets out the effect of the judgment:

> "La clause compromissoire de la charte-partie n'est pas opposable au porteur du connaissement bien que ce dernier porte la mention marginale, dactylographiée mais non approuvée, de référence à ladite charte-partie, lorsque le texte de celle-ci n'est pas annexé au connaissement, lequel ne porte aucune indication permettant à un tiers porteur de prendre connaissance de ses clauses et qu'il n'a pas été indiqué que les porteurs du connaissement aient reçu communication du texte de cette charte-partie."[11]

The local French Act of April 2, 1936, which applies to local carriage, contains particular restrictions as to arbitration at Article 10, as follows:

> "La clause compromissoire ne pourra en aucun cas conférer aux arbitres le pouvoir d'amiables compositeurs."
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> "Est nulle et non avenue, en matière de navigation réservée, toute clause, y compris le cas de prévision d'arbitrage, qui aurait pour effet de déplacer le lieu où doit être jugé le litige selon les règles portées à la présente loi."

The effect of the foregoing is:

1. That the arbitrators must apply the law of April 2, 1936 in their decision and, for example, cannot apply local customs or substitute their own principles no matter how equitable.

2. As concerns reserved navigation (i.e. carriage from one port in France to another port in France, which carriage must be in a French vessel), the arbitration clause cannot result in the arbitration taking place elsewhere than where suit must normally be taken.

LETTERS OF INDEMNITY

A letter of indemnity, in respect to carriage of goods, is a written undertaking by a shipper to indemnify a carrier for any responsibility that the carrier may incur for having issued a clean bill of lading when in actual fact the goods received were not in apparent good order

[10] 1961 D.M.F. 163.

[11] Translation: An arbitration clause in a charter party cannot be invoked against a bill of lading holder although the bill of lading bears a marginal note, typed but unapproved, referring to the said charter party, when the text of the arbitration clause is not annexed to the bill of lading, which latter bears no indication to a third party holder permitting him to take notice of the charter clauses and when it was not shown that the holder of the bill of lading was apprised of the text of the charter party.

and condition. Issue of such a bill of lading is contrary to Article 3, 3) (c) of the Hague Rules.

The letter of indemnity is an attempt by the carrier to satisfy its client, the shipper, while the shipper's purpose is to obtain payment or immediate credit in virtue of a document which it knows to be incorrect and misleading. The letter of indemnity is thus a fraud, and has been treated as much by the courts of the world.

Thus in *Tribunal de Commerce de la Seine* (Thésée, March 10, 1958) [1] — Headnote:

> "La délivrance d'un connaissement net, à la demande du chargeur, et contre remise d'une lettre de garantie délivrée par ce dernier, malgré l'état apparent de la marchandise qui nécessitait des réserves, constitue une fraude qui engage la responsabilité du transporteur maritime à l'égard du destinataire et de ses assureurs."

The effect of a letter of indemnity

A carrier cannot use the letter of indemnity against the claim of a consignee or other third party. This was pointed out in *Continex v. S.S. Flying Trader* [2] where the Court stated:

> "When a carrier issues a clean bill of lading for goods manifestly damaged he is estopped to deny the assertion against a purchaser of the bill of lading who has been misled to his damage by reliance on the representation."

In *Copco Steel and Eng. Co. v. SS Alwaki* [3] a clean bill of lading was given although the bundles of steel had "light atmospheric rust". A letter of indemnity was issued and the purchaser of the goods recovered the cost of removing heavier flaking damage. One gathers the Court was very unsympathetic to the carrier for the additional damage because of the letter of indemnity.

In *Empresa Central Mercantil v. Brasileiro* [4] it was held — Headnote:

> "Ocean carrier having accepted rusty steel cargo on 'clean' bill of lading in order to enable the shipper/seller to obtain payment for the goods under confirmed credit terms at a bank, and having accepted a shipper's letter of indemnity against resulting claims (which was reported to the cargo

[1] 1958 D.M.F. 414. *Translation:* "The delivery of a clean bill of lading at the request of the shipper, and against the provision of a letter of indemnity, by this latter, despite the apparent condition of the merchandise which requires notations, is a fraud which makes the ocean carrier responsible to the consignee and his underwriters."

[2] 1952 A.M.C. 1499 at p. 1501.

[3] 1955 A.M.C. 2001.

[4] 1957 A.M.C. 218.

underwriters), the court, in a suit by the buyer/consignee, condemned the carrier for practicing deception."

Local legislation as well usually makes it clear that a letter of indemnity cannot be used against a third party consignee. The Canadian Bills of Lading Act 1952, R.S.C. Chapter 16, is typical. Article 4 reads as follows:

> "Every Bill of Lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, is conclusive evidence of such shipment as against the master or other person signing the Bill of Lading, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the Bill of Lading has actual notice, at the time of receiving it, that the goods had not in fact been laden on hoard, or unless such Bill of Lading has a stipulation to the contrary; but the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fault of the shipper or of the holder, or of some person under whom the holder claims."

The Civil Code of the Province of Quebec, Canada, Article 1212, is also typical of internal legislation, and reads:

> "Counter-letters have effect between the parties to them only; they do not make proof against third persons."

Carrier v. Shipper

Because of the fraud, one might conclude that the carrier has no claim against the shipper because the whole contract is invalid. On occasion the courts have allowed the recourse action, and on others they have disallowed it.

In *Brown, Jenkinson v. Percy Dalton*,[5] the court of first instance held the shipper responsible to the carrier because, although the parties had conspired to make a false statement on the bill of lading, the parties had not sustained any loss as a result of such conspiracy. In appeal,[6] however, the claim of the carrier against the shipper was disallowed. The letter of indemnity, being a fraud, could not be relied on even by the carrier as against the shipper.

In *Ben Line v. Joseph Heureux*,[7] the carrier was permitted to sue the shipper by the court of appeal. It was held, however, that the exact terms of the letter of indemnity applied and no more. "Several bundles dirty before shipment" does not include wet staining of the whole shipment. The carrier could claim as against the shipper for only a few dirty bundles and not for those which were wet.

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[5] (1957) 1 Lloyd's 31.
[6] (1957) 2 Lloyd's 1.
[7] (1935) 52 Lloyd's 27.

In *Tribunal de Commerce de Rouen* (Capitaine Lacoley, June 24, 1952) [8] the court permitted the carrier to sue the shipper.

Delay for suit

The delay for suit between the carrier and shipper has been held to be the one year [8], but in my opinion, the one year delay of the Hague Rules should not apply. Rather the delay should be the normal delay between merchants who make a contract, and in this case the contract is the letter of indemnity. In most jurisdictions this delay is five or seven years.

Special damages

The *Tribunal de Commerce de Rouen* (Nido, February 23, 1962) [9] held: Headnote —

> "Le transporteur maritime et le chargeur responsables d'actes frauduleux dans la délivrance d'un connaissement net et d'une lettre de garantie doivent des dommages-intérêts complémentaires au destinataire pour résistance abusive à la demande en justice formée contre eux."

Judgment was therefore given for damages of 425,061.69 NF (approximately $85,000.00 U.S.) and for special damages of 50,000 NF (approx. $10,000.00 U.S.) because of the contestation by the carrier of the claimant's action after a letter of indemnity had been issued by the carrier.

The view that the consignee is not sufficiently recompensed for the loss under a letter of indemnity by ordinary damages obtained by court action was expressed by Pearce L.J. in *Brown, Jenkinson v. Percy Dalton*:[10]

> "It is not enough that the banks or the purchasers who may have been misled by clean bills of lading may have recourse at a law against the shipowner. They are intending to buy goods, not law suits."

No special damages were, however, considered in case because the action was between carrier and shipper.

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[8] 1953 D.M.F. 34. In this case the French Local Act of April 2, 1938 applied, but the principle is the same here as in the Hague Rules.

[9] 1962 D.M.F. 294. *Translation :* "The ocean carrier and the shipper responsible for fraudulent acts in the delivery of a clean bill of lading and a letter of guaranty owe additional damages to the consignee for abusive resistance to the claim in law against them."

[10] (1957) 2 Lloyd's 1 at p. 13.

When is a letter of indemnity permissible ?

A letter of indemnity is never permissible if it contravenes 3, 3) (c) and can never be invoked against an innocent third party but it is less reprehensible under certain circumstances.

In *Tribunal de Commerce de la Seine* (Thésée, March 10, 1958)[11] it was held: Headnote —

> "La pratique de la lettre de garantie se justifie seulement en effet lorsqu'à raison de la rapidité des opérations imposés par l'exploitation rationnelle des lignes régnlières, il n'est pas possible au capitaine de procéder avec une précision rigoureuse à la vérification des indications fournies par le chargeur avant l'embarquement."

In *Brown, Jenkinson v. Percy Dalton,*[10] it was held by Pierce L.J.:

> "In trivial matters and in cases of *bona fide* dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice (of issuing a letter of indemnity) is useful."

CONCLUSION

From a study of Jurisdiction and Arbitration Clauses as well as Letters of Indemnity, it is apparent that the Courts of all countries have been reluctant to permit carriers to limit their responsibility beyond the degree of responsibility set out in the Rules. This reluctance has existed whether Article 3, 8) of the Hague Rules has been directly applied or whether the broad general principles of maritime law have been relied on.

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[11] 1958 D.M.F. 414. *Translation:* "The practice of issuing a letter of indemnity is only justified when by reason of the speed of the operations necessary for the normal exploitation of regular oceanlines, it is impossible for the master to verify with rigorous precision the information funrished by the carrier before shipment."