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## **BILLS OF LADING, WAYBILLS AND THE HAGUE-VISBY RULES**

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### **Introduction**

The application of the Hague-Visby Rules to contracts for the carriage of goods by sea is often assumed and taken for granted by shippers, cargo underwriters and brokers. In the past, this assumption was justified when the vast majority of sea carriage was done under a traditional bill of lading. However, the nature of sea carriage and the participants have changed in the past 25 years. We have seen an overwhelming increase in container traffic, an increase in liner services and an increase in the involvement of freight forwarders and consolidators. These changes, in particular the increasing involvement of intermediaries, have resulted in the greater use of waybills in contracts for the carriage of goods by sea as opposed to the traditional bill of lading. This change has been gradual and has gone largely unnoticed by many in the industry. However, the use of waybills as opposed to bills of lading has very important ramifications which cargo underwriters and brokers should be aware of. Specifically, the liability regime applicable to a contract for the carriage of goods under a waybill is very different from that under a bill of lading. Carriage under a waybill will not normally be governed by the Hague-Visby Rules.

### **The Nature and Types of Bills of Lading**

There are various types of documents used in the carriage of goods by sea which are often loosely described as bills of lading because they all look quite similar and they all contain or are evidence of the terms of the contract of carriage. However, looks are deceiving when talking about bills of lading and waybills. They are different documents that do different things. There are three general categories of shipping documents as follows:

- To Order bill of lading
- Straight bill of lading
- Waybill

The “to order” bill of lading is the traditional bill of lading that contains or is evidence of the terms of the contract of carriage. It is not made out to a particular person/consignee but is rather made out “to order”. This bill of lading is like a hat (or coat) check in that the goods described in the bill of lading will be delivered by the carrier to whomever presents an original copy of the bill of lading. The “to order” bill of lading is often used in commercial transactions between a seller and buyer as it is negotiable and transferrable. In a typical commercial transaction the “to order” bill of lading is endorsed by the seller/consignor to a particular entity and then sent to an intermediary (often a commercial bank) who then delivers the endorsed bill of lading to the buyer in exchange for payment. The buyer can then obtain delivery of the goods from the carrier by surrendering the endorsed bill of lading to the carrier.

The “straight” bill of lading is similar to the “to order” bill of lading in that it also contains the terms of the contract of carriage and must likewise be given to the carrier to obtain delivery of the goods. It differs from the “to order” bill of lading in that a straight bill of lading is made out to a named person/consignee. Straight bills of lading can also be used in commercial transactions but are usually not so used.

Both “to order” and “straight” bills of lading are considered true bills of lading because they can be exchanged for the goods described within them and are therefore documents of title. This is the key identifying characteristic of a bill of lading.

Waybills, which are also often called Seabills, Sea Waybills or non-negotiable receipts, are similar to “to order” and “straight” bills of lading in that they also contain the terms of the contract of carriage. However, they are also quite different in that the carrier will deliver goods carried under a waybill to the person named in the waybill upon proof of identity alone. The original waybill cannot be and need not be surrendered to the carrier to obtain delivery of the goods. Waybills are therefore not negotiable and not documents of title.

The vital difference between waybills and “to order” or “straight” bills of lading is that they are not negotiable and not documents of title. This is the distinction that has important ramifications for the application of the Hague-Visby Rules.

### **Is it a bill of lading or a waybill?**

How do you determine if a particular shipping document is a true bill of lading or a waybill? The answer is usually to look at the attestation clause in the document and at any other terms and

conditions included in the document. If the attestation clause requires presentation and surrender of the shipping document to obtain delivery of the goods, it is a true bill of lading, regardless of what the document might otherwise be called. A typical attestation clause in a true bill of lading is as follows:

*SHIPPED on board in apparent good order and condition (unless otherwise stated herein) for carriage to the Port of discharge to be delivered in the like good order and condition at the Port of discharge **unto the lawful holder of the Bill of Lading. One original Bill of Lading must be surrendered** duly endorsed in exchange for the cargo or delivery order, whereupon all other Bills of Lading to be void.*

In contrast, the attestation clause in a waybill is usually something like the following:

*SHIPPED on board in apparent good order and condition (unless otherwise stated herein). The goods shipped under this Sea Waybill **will be delivered to the Party named as Consignee** or its authorised agent on production of proof of identity without any documentary formalities.*

### **The Hague-Visby Rules and Their Application**

The application of the Hague-Visby Rules (the “Rules”) to a contract for the international carriage of goods by sea is dependent upon s. 43(1) of the *Marine Liability Act*, S.C. 2001, c.6 (“MLA”), and articles II and X of the Rules. (The application of the Rules to domestic carriage is governed by different factors and is not considered in the paper.)

Section 43(1) of the MLA provides:

*43. (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.*

Article X of the Rules provides:

*The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:*

*(a) the bill of lading is issued in a Contracting State, or*

*(b) the carriage is from a port in a Contracting State, or*

*(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,*

*whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.*

Article II of the Rules provides:

*Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.*

Pursuant to s. 43(1) of the MLA articles II and X of the Rules, the Rules will apply where 1. there is a “contract of carriage” and 2. the bill of lading is issued in a Contracting State, or the bill of lading relates to carriage from a Contracting State, or the contract contained in or evidenced by the bill of lading incorporates the Rules.

It is important to note that the application of the Rules depends upon the existence of both a contract of carriage and a “bill of lading”. The term bill of lading is not a defined term in the Rules. However, the term “contract of carriage” is used throughout the Rules and is defined in art. 1(b) as follows:

*(b) “contract of carriage” applies only to contracts of carriage covered by a bill of lading **or any similar document of title**, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;*

It is to be noted that “contract of carriage” refers only to “contracts of carriage covered by a bill of lading or any similar document of title”. The Rules therefore recognize that a bill of lading must be a document of title and, when s. 43(1) of the MLA and articles II and X of the Rules are read and considered together, it is apparent that the Rules only apply where there is a true bill of lading or a similar document of title. This would apparently preclude the application of the Rules to contracts of carriage under waybills, which are not documents of title.

### **The Tetley View**

Before proceeding to review the case authorities that have addressed the issue of whether the Rules apply to waybills it is first useful to consider what Professor Tetley has to say on the topic in his text *Marine Cargo Claims*. I start with Professor Tetley because I believe that his writings on this topic are widely read in Canada and are a source of confusion, if not outright misunderstanding.

In both the third and fourth edition of his text Professor Tetley says that the Rules apply to waybills or non-negotiable receipts as well as negotiable bills of lading. He reaches this conclusion through a consideration of art. 6 of the Rules which provides:

*SPECIAL CONDITIONS*

*Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by water, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.*

*Any agreement so entered into shall have full legal effect.*

*Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.*

The above art. 6 permits the parties to contract out of the Rules by issuing non-negotiable receipts but further stipulates that this is not permitted for “ordinary commercial shipments”.

Relying primarily on art. 6, Professor Tetley says:

*The Rules are ambiguous and state, at arts. 1(b) and 2, that they apply to bills of lading or similar documents of title. But art. 3(8) declares the Rules to be of public order, while art. 6 stipulates that the Rules may only be avoided by the issue of non-negotiable receipts under certain specific conditions. From art. 1(b), art. 2, art. 3(8) and art. 6, taken together, one must conclude that the most rational interpretation (and the best solution to the ambiguity) is that the Hague or Hague/Visby rules apply to all contracts of carriage of goods by sea, except for carriage under non-negotiable receipts which comply with art. 6 and the national coasting-trade when permitted by statute.*

Professor Tetley’s analysis is somewhat logical and supports his conclusion if one accepts that the Rules are ambiguous and that art. 6 of the Rules is the clause to govern their overall interpretation and application. However, the analysis does not hold up to close scrutiny as it essentially ignores the clear requirements in art. X that there be a bill of lading (which the rules recognize is different from a non-negotiable receipt) and it ignores the definition of “contract of carriage” in art. 1(b).

## The Law

The most recent Canadian case that addressed this issue is *Cami Automotive Inc. v Westwood Shipping Lines Inc.*, 2009 FC 64, affd. 2012 FCA 16. In this case the plaintiffs sued the defendants for damage to cargo carried under a through bill of lading. The cargo was damaged as a result of a train derailment. One of the issues in the case was whether the shipping document was a bill of lading or waybill. The trial Judge held that it was a waybill noting that it was titled “Waybill” , it contained a stamp indicating delivery would be made to the named consignee (without production of the original) and only one copy was issued (bills of lading are usually issued in triplicate).

*[31] To summarize, on its face, the WSL Shipping Document is entitled “waybill”, both stamps suggest that the WSL Shipping Document is a waybill, and the terms attached to the shipping document cannot be used to differentiate between a waybill and a bill of lading. Further, only one copy of the WSL Shipping Document was issued, and its presentation was not required for delivery of the Goods. In my view, the above findings indicate that the shipping document is a waybill and not a bill of lading...*

The trial Judge next considered whether the Rules applied to the waybill and held that they did not.

*[44] The Hague-Visby Rules only apply to “contract[s] for carriage”. This term is defined in article 1 of the Hague-Visby Rules as those contracts covered by “a bill of lading or any similar document of title”. Since the Shipping Document at issue is not a bill of lading, in order for the Hague-Visby Rules to compulsorily apply, the waybill must be a “similar document of title”. As mentioned above, it is clear, that waybills, by definition, are not documents of title.*

The judgement of the trial Judge was appealed to the Federal Court of Appeal. The appeal was dismissed with the Federal Court of Appeal merely saying that the trial Judge committed no errors.

*[4] Turning now to the appeal, despite the numerous arguments made by counsel for the appellants, we are all of the view that this appeal cannot succeed.*

*[5] Given these arguments, we need say no more than we have not been persuaded that the Federal Court Judge committed errors of law or principle that warrant our intervention. Nor have we been persuaded that the Federal Court Judge committed palpable and overriding errors while making his findings of fact.*

The jurisprudence of other countries is of limited assistance in resolving the issue of the application of the Rules to waybills as many countries have passed legislation making the Rules applicable. The absence of such legislation in Canada was considered by the trial Judge in the *Cami Automotive* case as yet another reason why the Rules did not apply to waybills.

*[46] Professor William Tetley, in his treatise entitled Marine Cargo Claims, 4 Ed, (Quebec: Thompson Carswell, 2008) vol. 2 at 2304, informs us that countries such as the U.K., South Africa, New Zealand, Singapore, Australia, and the Nordic countries, have all passed legislation which enables the Hague-Visby Rules (or adaptations thereof) to apply to sea waybills. Clearly then, those jurisdictions did not consider that the Hague-Visby Rules applied to sea waybills on their own accord. No such legislation providing for the application of the Hague-Visby Rules to sea waybills has been passed in Canada.*

The decision in *Cami Automotive* is supported in most of the texts and jurisprudence. For example, in *Essentials of Canadian Maritime Law* at pp. 440-441, the authors say:

*Transport documents that are not documents of title, such as sea waybills, are outside the operation of the rules.*

### **What happens when the Rules do not apply by force of law?**

When the Rules do not apply by force of law to a contract of carriage, the rights and liabilities of the parties are governed by the common law and the terms of the contract. In sea carriage there are almost always extensive terms and conditions on the reverse side of any waybill and these must be looked at carefully.

It is common for waybills to incorporate by reference either the Hague Rules or the Hague-Visby Rules, thus making the contract of carriage subject to one or the other of these Rules. Regrettably for cargo underwriters, it is much more common for the Hague Rules to be incorporated into a waybill than it is for the Hague-Visby Rules. As the Hague Rules generally have much lower limits of liability (\$500 per package), this can have serious ramifications for subrogation recoveries. Moreover, the terms of a waybill will often set the limitation at an amount lower than \$500 per package.

Additionally, waybills will frequently have a limitation period that is less than the one year period prescribed by the Rules. It is not unusual for a waybill to prescribe a 9 month limitation period.