From Booking Note to Volume Contract – The ARDENNES Revisited

David G. Colford

BRISSET BISHOP
2020 University
Suite 2020
Montreal, Quebec
H3A 2A5

Tony Young

LCL Navigation Ltd.
2 Place Alexis Nihon
Suite 995
Montreal, Quebec
H3Z 3C1

FROM BOOKING NOTE TO VOLUME CONTRACT

David Colford
Brisset Bishop

It is quite noticeable in the legal literature that much is written about Contracts of Carriage,[1] or about "Bills of Lading"[2], or even about "Marine Cargo Claims"[3] where the emphasis is always on the execution – and mostly about the poor execution by one or both parties to the contract of carriage and the legal consequences of that poor execution.

Little attention is spent on the activity which precedes the actual transport and how much can go wrong during the contract of carriage which flows from whatever was agreed upon, originally, with respect to the ship description, its seaworthiness, ports of loading and of discharge, rights to deviate during the voyage, facilities for reception and delivery of cargo, the financial details re stevedoring, freight, demurrage and despatch, rights of cancellation by either party, cargo description, size and dimensions, quantity and special characteristics , limitation and exclusion clauses, whether a bill of lading will be issued, or whether only a carrier's receipt and the conditions for delivery, lien, general average, New Jason, cesser, strike, war risk and ice clauses, governing law and forum selection clauses for disputes and, of course, the broker's commission.

The non-liner trade is well served by Voyage Charters by Julian Cooke et al, which has become the standard reference.

In the liner-trade, little has been written about booking notes, reservation slips, tonnage contracts and various other terms to describe service agreements. Our Canadian – Anglo case law provide examples of where things go all wrong, even though the actual execution of the contract occurs, for the most part, without incident.

In Cormorant Bulk Carriers v Canficorp,[4] the shipper on booking his cargo of asbestos from Quebec to Kuwait, is asked "is the cargo going to Kuwait or Baghdad?" and responds "the cargo was sold CIF Kuwait" which the ship operator accepted The operator knew that the Kuwaiti Port Authority designated a special berth for any cargo ultimately bound for Iraq, and ships carrying Iraqi bound cargo incurred lengthy delay before accessing the berth. . During the loading of the cargo at Quebec City, the operator noticed the markings on the bags "Asbestos: Baghdad" and stopped loading. Whence the dilemma to which the shipper undertook to reimburse any extra expenses caused by delay as a result of the markings. Unfortunately, the

---

[1] chapters in E. Gold's Maritime Law, Scrutton on Charter Parties
[2] N. Gaskell, Bills of Lading: Law and Contracts, Carver on Bills of Lading
[3] by William Tetley, of McGill University
[4] [1985] A.M.C.1444 (Can. FCA), (1984) 54 N.R.66

receivers were Iraqi who intended on forwarding the cargo following discharge from Kuwait to Baghdad and the operator's worst fears were realized. When the ship arrived, the Kuwaiti Port Authority refused to accept that the "cargo was sold CIF Kuwait" and sent the ship out to the narrows to wait for a couple of weeks before the special berth became available. When the operator presented his claim for over $100,000 in extra hire it had to pay, the shipper casually remarked that the cargo was covered by Master's bills of lading and that he was not the carrier! The court found that the agreement of indemnity quite properly arose from the relationship between the parties to the booking note.

An earlier major decision of the Federal Court of Appeal, in Saint John Shipbuilding v Kingsland Maritime Corp. [5] described a situation where an FOB buyer booked space in St. John's with the ship's local agent for transport of heavy machinery from Norway to St. John's. The ship's local agent didn't have any of his booking forms on hand and was induced to use the customer's purchase form to record the transaction. All went well with the loading and the ship's bill of lading which contained its usual terms was issued. As the discharge required specialty handling, the ship's local agent engaged the local stevedore on a cost plus basis. Neither bothered with signing any forms. During discharge, the stevedore dropped the machinery. When the bill for $1 million was presented both the stevedore and the ship thought that the bill of lading regular terms which included a package limitation and a clause giving the stevedore the benefit of the same limitation. The Court held that the contract was not in the bill of lading at all; it was in the purchase order form prepared by the buyer – receiver of the cargo which provided no form of exclusion or limitation of liability and also stipulated that laws of New Brunswick applied whatever those laws involved for maritime carriage! The carrier was not sued but it would appear that it would have been condemned for the whole amount as common carrier. The stevedore thought it was protected by the bill of lading clause which gave it a right to limit its liability to about $1,500, but the court raised the issue as to how the stevedore can be protected by a clause which is not part of the contract of carriage? Or by its standard terms and conditions which were never incorporated into whatever contract it entered into with the carrier!

Every carriage of goods is basically a bijural operation – there is the contract precedent, sometimes called "the contract **for** carriage" where a carrier has to agree to provide services leading to the transport for a freight amount and the contract **of** carriage or the bailment involving the loading, stowage, carriage and discharge of cargo.

In The Torenia [6] per Hobhouse, J: "In ascertaining the effect of the contract one must take into account the nature of the contract. The contract here is a contract in a bill of lading; it is a contract of carriage – that is to say, a species of a contract of bailment. It is not, as Mr. Pollock for the defendants at one stage argued, a mere contract for the carriage of goods. Charter-parties are typically contracts for the carriage of goods. They are executory. They are intended to give rise to bailments (not necessarily between the parties to the charter-party). They may include terms of an intended bailment, but they are not normally the contract of bailment itself. They cover other matters besides the bailor/ bailee relationship..."]

---

[5] (1981) 126 D.L.R.(3d) 332 (FCA)

[6] [1986] 2 Lloyd's Rep. 210 (Q.B.) at 216

Of course the two contracts merge at one point[7] and sometimes they do not through fault[8] or no fault of the parties[9] but we all know that in Anglo-Canadian maritime law, due to the impact of the Bills of Lading Act, there is often a dichotomy between what the contract of carriage is for the parties to that contract and what contract is vested as a result of consignment or endorsement of a bill of lading.

In Leduc v Ward,[10] it was held that in the hands of an endorsee, the contract of carriage is only what was written within the four corners of the back of the bill of lading, because that was all the endorsee paid for! Rules of evidence prevented any introduction of testimony or other written evidence to vary or contradict the terms of the bill.

On the other hand, in The Ardennes [11] in the hands of the shipper, the bill of lading is described as the "best evidence" but not evidence exclusive to all else. Plaintiff was an exporter of mandarin oranges who was anxious that his cargo to be loaded at Carthogena, Spain arrive in London on or before the end of November. He claimed a promise was made to him by the sub-agent of the carrier that if he presented a minimum amount of cargo for loading at Carthogena, then the carrier would proceed from Carthogena directly to London. While she was loading the mandarin oranges, the cargo interests in Valencia protested that they had been promised that the vessel would proceed directly to Antwerp with their cargo prior to going to London. Upon departure, the master was instructed to proceed to Antwerp. The ship arrived in London after the end of November and the plaintiff seeks to recover the higher duty that he had to pay as a result of changes in the customs duties laws.

The carrier opposed clauses in the bill of lading giving the carrier complete liberty to change the route and to call on any port. Per Lord Goddard:

> "It is well settled that the a bill of lading is not in itself the contract between the ship owner and the shipper of goods, though it has been said to be excellent evidence of its terms...The contract has come into existence before the bill of lading is signed; it is signed by one party only and handed to the shipper usually after the goods have been put on board. No doubt if the shipper finds it contains terms with which he is not content or does not contain some term for which he has stipulated, he might if there were time demand his goods back; but he is not in my opinion for that reason prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed different from that which is found in the document or containing some additional term. He is no party to the preparation of the bill of lading, nor does he sign it...."

---

[7] see the operation described in Grace Kennedy v Canada Jamaica Line [1967] 1 Lloyd's Rep. 336 (Exch. Ct.), Grace Plastics Ltd. v The Bernd Wesch II [1971] F.C.273, Weyerhauser Company v Anglo-Canadian Shipping, (1984) 16 F.T.R.4, Lantic Sugar v Blue Tower Trading (1991) 52 F.T.R. 161, Union Carbide v Fednav (1998) 131 F.T.R.241)

[8] see Alcan Aluminum v Unican International (1996) 113 F.T.R.81

[9] see Imperial Smelting v Joseph Constantine SS Line (1941) 70 Ll.L.Rep.1 (H.L.)

[10] (1888) 6 Asp.M.L.C.290 (CA)

[11] (1950) 84 Ll. L. Rep. 340; [1951] 1 K.B. 55 (C.A.)

Evidently, it is desirable that the contract of carriage be the same for all parties to that contract which necessitates reform of our bills of lading legislation and that the result of a dispute not depend on the rules of evidence in the forum in which the dispute is being adjudicated.

In Canada, this contract precedent is a totally unregulated field of activity; in fact, if you glance through the Canadian Transportation Act, there appears to be a gap missing in the Canadian Transport Agency's jurisdiction to supervise misbehaviour by shipping and carriers in marine modes of transport. There is total freedom of contract subject to considerations of public policy, such as the Competition Act – prominent was the clause that the carrier herein to the booking note contract had the complete liberty to substitute another carrier to perform the obligations of the contract of carriage to its complete exoneration.

The contract of carriage itself – loading, stowing, securing, caring for, carrying and discharge – are regulated by international convention whether a variation of the Hague/Visby / Hamburg regimes which provide a simple code of conduct on a "tackle-to-tackle" basis with well defined consequences, yet do not address issues of the contract that leads to the contract of carriage.

The Americans have devoted considerable attention to these contracts precedent for reasons that have nothing to do with regulating the content and behaviour of parties, but for competition purposes. However, the unintended consequence has been the development of a business process which has become acceptable in the United States and permeates much of what passes for Canadian shipping in the liner – trade.

The next speaker on our program, Mr. Tony Young earns his living as a freight consolidator and will talk about today's culture of service agreements particularly in the containerized world. For the sake of reference, herein below, I include the definitions of "service agreement" to be found in the American legislation and of "volume contract" to be found in the Rotterdam Rules whose adoption is presently being considered by Canada's government and its major trading partners.

Service Agreements are defined in under the U.S. Shipping Act of 1984, amended by the Ocean Shipping Reform Act of 1998 as follows:

> "Service Contract" means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the party of any party.

Rotterdam Rules definition of volume contract art. 1(2):

"volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

David G. Colford
BRISSET BISHOP
June 15, 2009

David G. Colford

BRISSET BISHOP
2020 University, suite 2020
Montreal, Quebec
H3A 2A5
Tel (514)393-3700
Fax (514) 393-1211
www.brissetbishop.com
E-mail davidcolford@brissetbishop.com

David has practiced maritime law with Brisset Bishop in Montreal since 1980, and specializes in litigation and arbitration of maritime commercial matters, such as cargo claims, contract disputes and tortious liability. He is a lecturer at McGill Law Faculty, promotes the Rotterdam Rules and rides horses.

ROTTERDAM RULES

The New UNCITRAL Convention
The Impact of "Volume Contracts"

By Tony Young, LCL Navigation
Chairman, CIFFA Sub-committee on Transport Law

WHAT IS A VOLUME CONTRACT?

- **Deregulation of the shipping industry**
  - 1998 USA: *Ocean Shipping Reform Act* allowed for confidential "service contracts"
  - 2001 Canada: Bill C-14 Amendment of *Shipping Conferences Exemption Act* followed suit
  - Confidential Service Contracts become pervasive in the container shipping industry

Deregulation of the shipping industry

- Common Carrier Tariffs no longer required
- Ocean carriage a matter of confidential private agreement between Carrier and Shipper
- Everything subject to negotiation
  - Guarantee of vessel space by the Carrier
  - Guarantee of cargo volume by the Shipper
  - Confidential freight rates
  - What about carrier liability?

COGSA 1998 (a proposed bill)

- **Why should liability limitations not be a matter of private contract as well?**
  - COGSA 1936 [Hague Rules] outdated
  - Shipper: $500 per package too little
  - Shipper: Liability should be Door-to-Door
  - Carrier: OK, OK but with exceptions
    - "Service Contract" like Charter Party therefore exempt
      - CIFFA objected to the unilateral U.S. move
      - Extra-territoriality of U.S. COGSA on Canadian trade
      - Discrimination of the Non-Vessel-Operating Common Carriers

WASHINGTON GOES TO UNCITRAL

- COGSA '98 never makes it to the Senate floor
- USA decides to work through Comité Maritime International – Success!
- Major influence in drafting the Rotterdam Rules
- Aim of worldwide uniformity
- Raised maximum liability levels
- Door-to-Door application!
- BUT....negotiable through volume contracts

FROM DEREGULATION TO DEROGATION

- The Real Impact of Volume Contracts Under the Rotterdam Rules
  - Derogation from liability limitations down to "NIL"
  - (except in certain basic due diligence requirements)
  - Trade-off is cost savings for the carrier; hence lower freight rates
  - Cargo insurance premium will rise if there was no subrogation against the carrier

HOW DOES IT WORK, LEGALLY SPEAKING?

- Volume Contract must state the particulars of the derogation and must be individually negotiated
  - Evidence of Shipper's acknowledgement and acceptance of the derogation clause in the volume contract
  - Evidence of the Third Party's acknowledgment and express acceptance of the derogation clause in the Shipper's volume contract
  - Burden on the Carrier to provide such evidence should there be a claim

HOW MIGHT IT WORK IN PRACTICE?

- Volume Contracts will become more formal, requiring signatures from both Carrier and Shipper

- Every individual booking will require acknowledgement and consent from the Third Party (Consignee if Shipper has the Volume Contract or Shipper if vice-versa) to the derogation clause(s)

IMMEDIATE CONSEQUENCES AND LONG TERM OUTLOOK

- In practice, third party acceptance of derogation clauses, shipment by shipment, impractical if not impossible to manage
- Carrier will simply insist on a **circular indemnity** clause in the volume contract, thus necessitating "no-subrogation" (no recovery) cargo insurance.
- Will such a cargo policy become available in the insurance market?
- If it does, it will mean no claims, hence no suits against the carrier on typical cargo losses
- That is the real consequence of the Volume Contract exemption under those Rottendam Rules!

TONY YOUNG

In 1981, when Tony Young was working as a sales representative for the world's largest container carrier Maersk Line, he quickly learned what the lawyers have always been arguing in the courts: that you didn't have to be the ship owner to be deemed the carrier. So he promptly quit his job at Maersk Line and started his own shipping company called LCL Navigation, a non-vessel-operating common carrier or what came to be termed "NVOCC" in the U.S. Shipping Act of 1984, giving it legal status in U.S. courts, and subject to regulation by the FMC. NVOCCs neither own nor operate any ship but they issue bills of lading legitimately as contractual carriers just like the big shipping lines. His company was one of the first such entities to be created in Canada, competing head on with the big established shipping lines, eventually shutting them out of the LCL consolidation business and relegating them to strictly carrying FCLs or fully shipper loaded container units.

Mr. Young is also the Chairman of the Transport Law Subcommittee of the Canadian International Freight Forwarders Association, of which he has been a director, on and off since 1987. He has represented CIFFA at the OECD Workshop on the issues of transport Law in Paris in 2001 and at the CMI International Subcommittee Conference in Singapore in 2002. He has also been representing CIFFA as a constituent member of the Executive Committee of the CMLA between 2001 and 2005 and has written numerous articles on the issues of transport law in several trade publications and has made numerous submissions to Transport Canada on behalf of his association on this topic.

He has been retired from day to day management of his company of late and has gone back to university when the recent announcement of the Rotterdam Rules brought him back to active duty.

He is married and a father of three children ranging in age from two and half to twelve. He is a former student of Professor Tetley, who told him that one of his courses was enough and he faithfully consults his Marine Cargo Claims, 3rd edition whenever he has to deal with a claims matter.