THE CARRIAGE OF GOODS BY SEA ACT 1992

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From 16th September 1992, the Carriage of Goods by Sea Act 1992 has been in force. This replaced the Bills of Lading Act 1855. The new law abolishes some over technical defences to cargo claims. However, as with all new laws, the intention to revise some characteristics of the existing law, may bring its own problems.

INTRODUCTION

The 1992 Act is based upon the 1991 report by the Law Commissions of England and Scotland. This Report "Rights of Suit in Respect of Carriage of Goods by Sea" considered and analysed common problems arising from the 1855 Act. The Law Commissions consulted widely among lawyers, academics, ship owners and traders. The critical areas that were considered included: the separating of the transfer of contractual rights from the passing of property (including how far obligations should be imposed on a carrier in favour of strangers to the original contracts of carriage with the carrier); to what extent contractual obligations to the carrier should be binding on stranger to the original contract of carriage; the consequences of inaccurate bills of lading;

the increasing use of waybills and the extent to which the transfer of rights under these should be similar to the transfer of rights under bills of lading and, in addition, considering the future of the law in the light of technological developments and how these affect the transfer of contractual rights.

The Law Commissions proposed a Bill to be put before Parliament. This draft Bill has now passed into law as the 1992 Act.

THE SEPARATION OF CONTRACTUAL RIGHTS FROM THE PASSING OF PROPERTY

Under the 1885 Act, the rights against a carrier were transferred to the consignee of goods named in the bill of lading and to every endorsee "to whom property and the goods therein mentioned shall pass upon or by reason of such consignment or endorsement".

This proved a problematical requirement for banks (among others) who might take bills of lading as security, but who never required property by consignment or endorsement. Furthermore, where property passed other than by consignment or endorsement of the bill of lading, no rights under the bill of lading were transferred. This latter kind of case caused particular difficulties with regard to claims relating to bulk cargoes where the 1855 Act became affected by the Sale of Goods Act, another 19th Century Act (but whose latest form was passed in 1979). According to Section 16 of the Sale of Goods Act, property passed only when "ascertained" to a particular receiver. In this sense, to "ascertain" property means, broadly speaking, to separate it such that it can be identified as being belonging to a particular receiver. Where property remained in bulk (for example, a ship full of grain with no distinguishable portions of cargo that could be allocated or "ascertained" as belonging to any particular receiver), then the unfortunate receiver could not claim from the carrier under the bill of

lading for complete or short or total non-delivery because, as is obvious, the undelivered cargo was never "ascertained".

The 1992 Act takes a quite radical but also fairly simple approach to this problem. This is to follow the American approach (adopted as long ago as 1916) whereby the lawful holder of a bill of lading is entitled to sue to carrier in contract for loss or damage to the goods covered by the bill (and whether or not property passes by reason of consignment or endorsement of the bill). This approach also has the advantage of being common in many european countries. The 1992 Act contains this reform in Section 2(1) which provides that anyone who becomes the lawful holder of a bill of lading (or, following the 1992 Act, a waybill or delivery order) is entitled, just by becoming the holder of that bill (etc) or by being the person to whom delivery was to be made to exercise all rights of suit under the contract of carriage.

By transferring rights to the holders of bills of lading or those entitled to delivery, it is clear that persons who have not suffered a loss may be able to sue. However, the Law Commissions took the view that it was better for a sea carrier not to be able to rely on technical defences rather than allow someone who has suffered no loss to bring an action. The sea carrier is still protected from any serious claim for damages by the fact that the English Court will not award significant damages to those that have suffered no loss. The drawback, however, is that the shipowner may be put to some considerable inconvinience by defending a claim (and possibly dealing with an arrest) in the meantime.

A further danger might be that bills of lading could be endorsed after delivery of the goods, perhaps creating a trade in bills of lading simply to create opportunities for suing carriers. The 1992 Act makes some attempt to deal with this problem (rather than leaving it to the existing rather obscure English

law relating to trading in actions - which is generally illegal). Section 2(2) prevents the transfer of rights that would otherwise take place according to the Act where the holder of the bill does not become entitled to such before the right to possession of the cargo ceases to attach to the possessor of the bill. The problem with this is that it may not be at all clear from a particular bill of lading whether such rights have been lost or not. The position of the carrier (and indeed the bill of lading holder) may therefore still give rise to problems and some confusion.

IMPOSING OBLIGATIONS TO THE CARRIER UPON THE BILL OF LADING (ETC) HOLDER

The 1855 Act provided in its introduction that rights against the carrier should pass with the property, but nothing is said about the transfer of any obligations owed to the carrier. Rather than leaving the carrier only with a right to sue the shipper or character (if appropriate) the new Act takes the more consistent approach by imposing on any person claiming delivery "the same liabilities under that contract as if he had been a party to that contract". This in fact could have the effect of imposing obligations even if the cargo is not actually received - for example if it is destroyed before unloading but after damage has been incurred.

Perhaps unfairly, the Act does not limit the obligations that cannot be transferred onto a Receiver. In particular, he may be liable for the shipper's loading of dangerous goods. There may therefore be a new growth of claims by receivers against shippers, trying to seek indemnities for claims for carriers. On the other hand, the Act also makes it clear that the original contracting parties' rights and obligations are not terminated. This therefore would appear to give the carrier the option of suing either the shipper or the receiver. This choice may yet bring

uncomfortable results with commercial considerations coming into the decision as to which of the parties should be sued.

INACCURATE STATEMENTS

In the old 1855 Act, (Section 3) statements in bills of lading were held to be conclusive evidence "as against the Master or other person signing" the bills of lading. This was an expression treated very narrowly by the Courts who, strangely, decided that where no goods at all were shipped, a Master could not bind the carrier by his signature although the carrier would be bound if some (but not the stated quantity) of goods were carried. Section 4 of the 1992 Act corrects this peculiarity and makes such descriptions conclusive whether or not a part cargo has or has not been loaded.

However, what this reform does not do is deal with the frequent reservations contained in bills of lading which deny that the bills of lading are actually statements of quantity or where the insertions themselves are qualified as being "said to be" or otherwise.

THE WAYBILL

In recent years, particularly in short regular voyages, (for example ro-ro traffic across the English Channel and North Sea) the use of Waybills has become common. The Waybill is a receipt for goods and frequently incorporates contract terms but it is not something that is capable of transferring property, or it was not before the 1992 Act. Under the old law, the question of property transfer had to be dealt with in other contracts and the use of a Waybill also had the advantage for the carrier of avoiding automatic legislation such as the Hague Visby Rules. The 1992 Act grants the same rights to the Waybill holder as it does to the bill of lading holder but at the

same time obligations are also now imposed on the consignee under a Waybill, as they are to a receiver under a bill of lading.

THE FUTURE

It took the English Parliament 137 years to revise the Bills of Lading Act 1855. Whilst it is to be hoped that the relevant law may come to be reviewed before the year 2129, the 1992 Act does allow for changes in technology regarding bills of lading (for example the use of electronic data interchange and electronic data processing, respectively EDI and EDP). No specific laws are included in the Act but power is given to the Secretary of State to introduce regulations to deal with technological advances such as these.

CONCLUSIONS

The 1992 Act is not the "Cargo Interest' Charter" that some shipowners had feared and some cargo owners had sought. Whilst rights of suit against the carrier have been extended, the carrier has also had its rights increased. Whilst it may be more tempting to arrest a vessel and sue a substantional carrier with a security than it may be to seek an indemnity from shipper or receiver who may not even own a telex machine, the logic of the changes is reasonably clear. It will, however, take some time to see whether the reforms are an unfair addition to carrier's existing liabilities or whether the rights and liability situation has really been simplified and made fairer as has been Parliament's intention.