JUDGMENT : Mr Justice Langley: Commercial Court . 17th April 2002.

THE APPEAL

1. The Claimant buyers appeal, with the leave of Morison J, against an Interim Final Arbitration Award dated 30 May 2001 made by Michael Mabbs, Mark Hamsher and Christopher J W Moss. The Respondents ("MSC") were the demise charterers of the vessels "Rosemary" and "Rafaela S". The goods suffered damage when on board the Rafaela S.

2. Leave was granted under Section 1 of the Arbitration Act 1979 as the reference was conducted before the 1996 Arbitration Act came into force.

THE AWARD

3. The subject of the Award was a preliminary issue, conducted on the assumed basis that MSC were liable in contract and tort for the damage to the goods, to determine whether the relevant shipment was one in respect of which MSC was entitled to limit its liability under the U.S. Carriage of Goods by Sea Act 1936 ("USCOGSA") or only in accordance with the more generous regime of the Hague or Hague-Visby Rules enacted by the Carriage of Goods by Sea Act 1971 ("COGSA 1971").

4. That issue required the determination of two questions:
   i) Whether, as the buyers contended, the "straight consigned" Bill of Lading dated 18 December 1989 issued by MSC was a Bill of Lading within the meaning of Section 1(4) of COGSA 1971 ("Issue 1"); and
   ii) Whether, as the buyers also contended, the "port of shipment" for the carriage of the goods pursuant to that "Bill of Lading" was a port in the United Kingdom (namely Felixstowe) within Section 1(3) of COGSA 1971 ("Issue 2"). Issue 2 itself depended upon whether there was a single contract of shipment from Durban to Boston or two contracts of carriage from Durban to Felixstowe and Felixstowe to Boston. Neither South Africa or the USA are parties to the Brussels Convention and the Hague Rules scheduled to COGSA 1971.

5. It is not in dispute that if the answer to either of these questions is in the negative then USCOGSA applied. That was because even if there were two contracts of carriage it was accepted by the buyers that each would have been on the terms of the straight consigned Bill of Lading: see ***Pyrene Co v Scindia Navigation Co*** [1954] 2 QB 402 at 419-20; ***Stafford-Allen v Pacific Steam Navigation Co*** [1956] 1 Lloyd's Rep 104.

6. MSC succeeded on both questions in the Arbitration.

"THE BILL OF LADING"

7. The goods were 4 containers of printing machinery. They were shipped on board the Rosemary at Durban. The "Bill of Lading" was issued at Durban. The Buyers were named as the consignees.

8. The relevant sections on the face of the Bill of Lading were completed as follows:
   Box (2) Consignee: (B/L not negotiable unless "ORDER OF")
   J.I. MacWilliam Company Inc.,
   Box 6, New Town Branch,
   Boston, Mass. 02258, USA
   (6) Vessel ROSEMARY
   (7) Port of Loading DURBAN
   (8) Port of Discharge FELIXSTOWE
   (9) Final Destination (through transport) BOSTON
   Freight Payable at DESTINATION

9. The printed language on the front of the Bill of Lading included:
   i) If box 5 and/or 9 filled out this is a through Bill of Lading (see clause 3).
   ii) Received in apparent good order and condition .....
   In WITNESS whereof the number of Original Bills of Lading stated above (3) all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.

10. On the reverse of the Bill of Lading, the relevant printed terms of the contract of carriage provided as follows:

    "Clause 1:
    1 PARAMOUNT CLAUSE ..... this Bill of Lading shall have effect subject to the ..... Hague Rules ..... the Hague Rules shall not apply where ..... this bill of lading is subject to any compulsory applicable enactment, including Hague-Visby Rules ... If goods are shipped to or from the United States, this bill of lading shall be subject to US Carriage of Goods by Sea Act 1936.

    Clause 3:
    3. SUBSTITUION OF VESSEL, THROUGH TRANSPORT, TRANSSHIPMENT AND FORWARDING.
    The carrier agrees to carry the goods from the Port of Loading to the Port of Discharge, and shall have the right at its sole discretion to substitute other vessels, feederships, lighters or other modes of transport for the vessel named herein ... If boxes 5 and/or 9 are filled out, the carrier will, acting as the shipper's agent, only arrange for transport of the cargo by other carriers from the place of origin to Port of Loading and/or from Port of Discharge to destination ... It is expressly understood that the Carrier's liability as "carrier" applies only from the Port of Loading to Port of Discharge under this B/L and only while the goods remain in its actual custody and control.....

Clause 21:

21 CLAIMS VALUATION, PACKAGE LIMITATION, TIME-BAR. ... In case goods are shipped to or from the United States, the carrier's liability shall be limited to $500 per package or customary freight unit, unless excess value is inserted on the face hereof and extra charge is paid....."

THE CARRIAGE

11. The cargo was carried from Durban to Felixstowe on the Rosemary. On arrival at Felixstowe the cargo was unloaded and shipped aboard another of MSC's vessels, the Rafaela S, bound for Boston. A fresh bill of lading was not issued in respect of the Felixstowe-Boston leg of the journey.

12. The Buyers allege that the cargo was damaged beyond economic repair, during the Felixstowe-Boston voyage.

THE SUBMISSIONS

13. The Buyers contended that the Hague-Visby Rules applied compulsorily to the Felixstowe-Boston leg of the journey on the basis that:
    i) The contract of carriage contained in or evidenced by the Bill of Lading terminated at Felixstowe.
    ii) A fresh bill of lading ought to have been issued in respect of the Felixstowe-Boston leg of the voyage.
    iii) The bill of lading would have been issued in the UK.
    iv) Accordingly, the Port of shipment was Felixstowe and not Durban and pursuant to Section 1(3) of COGSA 1971 the Rules compulsorily applied to the carriage.

14. MSC submitted that the Hague-Visby Rules did not apply because:
    i) A straight consigned bill of lading is not a bill of lading within Section 1(4) of COGSA 1971. The Rules were not, therefore, compulsorily applicable to the Bill of Lading nor would they have been applicable to a fresh bill of lading had one been issued in relation to the Felixstowe-Boston leg.
    ii) The whole voyage from Durban to Boston was governed by one contract of carriage, namely that contained in or evidenced by the Bill of Lading. Accordingly, the port of shipment was Durban and not Felixstowe.

THE REASONS FOR THE AWARD

15. The Arbitrators decided on Issue 1 that:
    i) The Bill of Lading was non negotiable;
    ii) It was not therefore a document of title in the accepted sense;
    iii) The form of the Bill of Lading used was designed for various circumstances including when the Bill was to be negotiable and when it was to be non negotiable. The form of the Bill therefore had to be construed in the light of the particular circumstances of each case and in some circumstances parts of the form would have to be read as if the words "if applicable" had been inserted;
    iv) The requirement that delivery be made against the Bill and only against the Bill in the printed language on the front of the Bill was intended for use when the Bill was negotiable and was not applicable when the Bill was non negotiable as in such a case the carrier was plainly obliged to the named consignee and only that person if he was to comply with the contract;
    v) The Bill in this case was straight consigned and hence was not a Bill of Lading under the 1971 Act.

16. The Arbitrators also decided on Issue 2 that:
    i) The Bill of Lading covered the entire shipment from Durban to Boston and requirement shipment for the entirety of the passage to Boston;
    ii) The Bill contained the contract between shipper and carrier;
    iii) The terms of the Bill required MSC to carry the cargo themselves as far as Felixstowe and then gave them the option to use another carrier for the balance of the shipment. If they did not use another carrier and merely completed the carriage themselves then no fresh contract or shipment arose.

ISSUE 1

17. Section 1(4) of COGSA 1971 provides:
    "nothing in this section shall be taken as applying anything in the Rules to any contract for the carriage of goods by sea, unless the contract expressly or by implication provides for the issue of a ***bill of lading or any similar document of title"***

18. Section 1(6)(a) provides: *"the Rules shall have the force of law in relation to - (a) any* ***bill of lading***"

19. Schedule - The Hague Rules as amended by the Brussels Protocol 1968 provide:
    "Article I ... (b) 'Contract of carriage' applies only to contracts of carriage covered by a ***bill of lading or any similar document of title....***
    Article II ... under every contract of carriage of goods by sea the carrier, in relation to 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 .....
    Article III Rule 7 .... the bill of lading to be issued by the carrier .... to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up ***any document of title*** *to such goods, he shall render the same against the issue of the 'shipped' bill of lading."*

20. There is no definition of a "bill of lading" in COGSA 1971. But plainly the sub-section is referring to a bill of lading as a document of title. Mr Croall submits that it is also plainly referring to a negotiable or transferable document of title in the sense that property in the goods can be transferred by endorsement and delivery of the bill itself. That is not the case with a straight consigned bill of lading such as this bill of lading is agreed to be. Mr

Schaff submits that there is no authority which conclusively determines that a straight consigned bill of lading is not within section 1(4) of the Act and that as this bill of lading was a document of title "in the hands of the named consignee" and it was (so he submits) "the Buyers' document of title" or "his document of title" so it falls within the sub-section. Mr Schaff submits (albeit there is no evidence before the court as to the sale contract) that the bill of lading was the document which between seller and buyer would be delivered when title passed under the contract of sale and, relying on the printed words on the Bill of Lading, was the document which the consignees were required to produce and which MSC was required to have produced for delivery of the cargo to be made.

21. In my judgment Mr Croall is right and Mr Schaff wrong in these submissions. A "document of title" in this context is, I think, the antithesis of a document which can evidence the title of only one person. It is general not specific to one person. It is a document by which goods can be transferred by endorsement and delivery of the document itself. A straight consigned Bill of Lading is not such a document. Indeed the parties to this Bill have a choice, exercisable by inclusion in Box (2) of the words "Order of" before naming the Consignee, whether or not to constitute the Bill a document of title in the sense to which I have referred.

22. Whilst in terms of strict analysis Mr Schaff is right that no binding authority has determined the question, the consistent and overwhelming burden of judicial and other legal sources is against his submission.

23. The established definition of a bill of lading includes the characteristic of "transferability" of title to the goods: Scrutton on Charterparties, 20th Ed. Article 2, pages 1-2; Benjamin's Sale of Goods, 5th Ed. para 18-007; Carver on Bills of Lading, 1st Ed para 6-007 and 6-014. The Law of Commission Report (Law Com No 196) which led to the Carriage of Goods by Sea Act 1992 noted, at paragraph 2.50, that a straight consigned bill of lading was not a document of title at common law. The terms of the 1992 Act itself reflect that in Section 1(2). I also agree with Mr Croall that the *travaux préparatoires* for the Hague Rules support the same conclusion. So, too, do the terms of Section 1(6)(b) of COGSA 1971 itself which makes express provision for circumstances in which "a non-negotiable document" may result in application of the Rules.

24. In ***The Happy Ranger*** [2001] 2 Lloyd's Rep 530 at page 539, and following the reasoning of Bingham LJ in ***The Captain Gregos*** [1990] 1 Lloyd's Rep 310 at 317-8, Tomlinson J said: *"it also seems to me plain that the expression bill of lading as used in both section 1(4) of the COGSA 1971 and in Article 1(b) of the Rules set out in the Schedule thereto must refer to a negotiable or transferable document of title. This is plainly what Lord Justice Bingham thought, and in my view the language used, with its reference to any similar document of title, does not readily admit of any other construction."*

25. I agree. In ***Hugh Mack & Co v Burns & Laird Lines*** [1944] Lloyd's Rep 377 at 383 Andrews LCJ held that "above all" the reason why a receipt for goods marked "non-negotiable" was not "similar to" a bill of lading was precisely because it was not "a negotiable instrument, the endorsement and delivery of which may affect the property in the goods shipped".

26. Although Mr Schaff relied upon the authors of Schmitoff's Export Trade, 10th Ed at paras 15-024 and 15-038 as expressing a contrary view I am far from certain that they do not. But even if that is the case it is a view which I think to be out of line with the language of the Act and the opinions and authorities to which I have referred.

27. That is sufficient, in agreement with the arbitrators, to dispose of this Appeal in favour of MSC. But I would add that in any event I do not think the printed words in the Bill of Lading requiring surrender of the Bill against delivery of the goods can bear even the weight which Mr Schaff seeks to put on them. MSC were obliged to deliver the cargo to and only to the consignees. That obligation and the concomitant entitlement of the consignees is not affected by whether or not the consignee has or surrenders the Bill of Lading. It is a consequence of the agreement between MSC and the shipper to be found in the fact that the Bill of Lading names the consignee without the words "Order of". Nor does MSC need the protection of delivering only in exchange for the Bill of Lading as it would with a transferable Bill. Whilst the point is one of some nicety, I also agree with the Arbitrators that delivery against the Bill of Lading was not necessary. The printed words appear in a document which can be used either as a straight consigned bill of lading or as a transferable bill of lading. The language used is indicative ("duly endorsed") of the latter. The proper construction and application of the words may properly be influenced by the chosen use: ***The Chitral*** [2000] 1 Lloyd's Rep 529.

ISSUE 2

28. It is not necessary to address this issue but as it was fully argued and I differ from the conclusion of the Arbitrators upon it, I should shortly give my reasons for doing so.

29. The terms of the Bill of Lading in my judgment plainly contemplated a shipment from Durban to Felixstowe as the "port of discharge". Boston was the "final destination" and Clause 3 of the printed terms entitled MSC, as agent, to arrange further transport from Felixstowe to Boston. I cannot read clause 3 as giving MSC an "option" to complete a single shipment from Durban to Boston itself with a power to tranship en route (see ***The Anders Maersk*** [1986] 1 Lloyd's Rep 483 and contrast ***Stafford-Allen,*** above). Had only one "shipment" been intended Box 8 would, I think, have been completed by entering Boston not Felixstowe.

30. The only factor on which Mr Croall relies as pointing towards a single shipment is that the freight was payable at Boston. But I do not find that convincing. It is no surprise that the freight should be payable at Boston when it is not in issue that MSC was also obliged to arrange the shipment of the cargo from Felixstowe to Boston.

31. The contract has, of course, to be construed at the time it was made. At that time I think the parties plainly contemplated and the contract provided for two shipments under separate contracts. The fact that in the event MSC performed both shipments cannot alter the construction of the contract. Moreover even what occurred is consistent with that construction. The cargo was discharged from the Rosemary at Felixstowe and loaded on the Rafaela S.

CONCLUSION

32. In the overall result, however, as I stated at the conclusion of the hearing, the Appeal will be dismissed and I will hear the parties on any consequential orders when this judgment is handed down.

Mr A. Schaff QC (instructed by Clyde & Co) for the Appellants
Mr S. Croall (instructed by Duval Vassiliades) for the Respondents