

Noting Exceptions in Shipping Documents

The Courts are currently dealing with a set of facts which has significance to all of those who create or rely upon notations and exceptions in shipping documents. The case which proceeded before the B.C. Supreme Court in 2001 and the B.C. Court of Appeal in 2003 and a companion case seeking indemnity, heard by the B.C. Supreme Court in 2005, involved the carriage of wood products from British Columbia to Europe.

The cargo to be carried aboard the vessel consisted of 1,725 packages of green heat-treated Douglas fir lumber. The cargo was loaded with part of the cargo stowed on deck and part of the cargo stowed below deck. After loading the lumber in British Columbia, the Vessel proceeded to Portland, Oregon where it loaded a cargo of soda ash. During the loading of soda ash, cargo stowed on deck was covered to protect it from contamination, however, when the soda ash was being unloaded at the discharge port, the deck cargo was not covered which resulted in contamination and damage to the wood products.

Following loading under the supervision of a supercargo employed by the Carrier, document clerks for the Shipper obtained the Mate's Receipt; Summary Mate's Receipt and the Lumber Line Up from the Carrier and then proceeded to prepare bills of lading for the ultimate Consignee. At the request of the Consignee, the Shipper prepared two separate bills of lading, one for each of its customers in Europe. Two days later, the

Shipper faxed the Carrier with instructions for the Carrier to issue its master bill of lading.

The master bill of lading issued by the Carrier contained the following notation:

“2,304,888 FBM of which 1,982,204 FBM loaded on deck without liability for loss or damage how-so-ever caused”

The two bills of lading issued by the Shipper contained the following notation:

“stowage: 86% OD 14% UD”

“OD” was agreed to be On Deck and “UD” was agreed to refer to Under Deck stowage.

The importance of the notations stems from the right of carriers to limit or exclude their liability for on deck stowage by excluding the cargo from the definition of “goods” as defined in Article I of the Hague-Visby Rules, now incorporated in to the *Marine Liability Act*. Under the *Marine Liability Act*, the following definition of goods can be found

“Goods: includes goods, wares, merchandise and articles of every kind whatsoever, except ... cargo which by the contract of carriage is stated as being carried on deck and is so carried ...”

Article III, s.8 of the Hague-Visby Rules sets out the consequence of cargo being “goods” 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 as provided in these Rules, shall be null and void and of no effect.”

As a result, only if cargo is “stated as being carried on deck and is so carried” can any exclusion contained in the carrier’s bill of lading be effective so as to take the cargo out of the protections of the Hague-Visby Rules and subject it to any liability clauses contained in the bills of lading.

The booking arrangements between the Carrier, Shipper and Consignee specified that all cargo could be carried on deck and freight was paid on that basis.

In determining the ability of the Consignee to recover against the Carrier, the Court hearing the initial action determined that it was the Shipper’s bills of lading which were determinative of the rights as between the Consignee and the Carrier.

Notwithstanding that the notation of 86% OD and 14% UD were arithmetically correct, the Court held that the notation of 86% OD and 14% UD contained on each of the two bills of lading issued by the Shipper to the Consignee were not sufficient to exclude the on deck cargo from the definition of goods under the Hague-Visby Rules.

As there were two consignees, the Court was not able to determine what percentage of on deck and what percentage of under deck cargo related to each consignee and to the bill of lading for that specific cargo. As the percentage of cargo for Consignee A could theoretically be higher or lower than Consignee B, the Court found that there was a

potential asymmetry between what is “stated as being carried on deck” and what “is so carried”.

The Court stated that as much as the bills of lading in question “may represent an actual practice in which the stowage of cargo is subject to available space rather than prior agreement, that practice ultimately must recognize the need for some precision and accuracy in identifying the stowage arrangements because of the legal implications and obligations they create.”

The Court went on to state that “there is no need to demonstrate an absolute uncertainty with regard to the conditions of stowage; it is sufficient if the description creates uncertainty in such that the degree of potential risk to the owner and the legal implications to all parties are not readily ascertainable through a review of the contract of carriage.”

The Carrier having been found liable in the first instance then turned to the Shipper relying upon a clause in the Contract of Affreightment (COA) between the parties dealing with bills of lading which stated as follows:

“16. Bills of Lading:

Cargo hereunder shall be carried subject to CARRIER’s Bill of Lading as attached.

SHIPPER to issue its own Bills of Lading with CARRIER issuing to SHIPPER master Bill(s) of Lading covering entire shipment.

CARRIER to be responsible per COA and CARRIER's Bill of Lading. The first to prevail if conflicts between the two occur. SHIPPER will initially settle cargo claims that are presented to them, having right of recourse for same against CARRIER, subject to any variances between SHIPPER's and CARRIER's Bills of Lading. However, as a pre-condition to the right of recourse against CARRIER for such claims SHIPPER should give prompt notification to CARRIER of any proposed settlement and obtain CARRIER's concurrence.

SHIPPER shall indemnify and hold CARRIER/Owner's harmless for any and all consequences, damages, claims, losses, expenses or costs of whatsoever nature which CARRIER/Owner may incur due to any variance in SHIPPER's Bill of Lading vis a vis CARRIER's/Owner's Bill of Lading. In the event of conflict between the terms of such Bills of Lading and this Contract, the terms of this Contract shall govern." (emphasis added)

While a number of arguments were raised by the Carrier and the Shipper, Mr. Justice Cohen defined the primary issue to be decided in determining if the Carrier would recover against the Shipper pursuant to the indemnity clause in the COA was whether the Carrier could establish that the loss occurred due to a variance in the Shipper's bills of lading vis a vis the Carrier's bill of lading.

In determining whether there was a variance between the Carrier's bill of lading and the two bills of lading issued by the Shipper, it was argued that the description in the Carrier's bill of lading stating that "2,304,888 FBM of which 1,982,204 FBM loaded on deck" was a correct statement. However, when the Shipper converted the notation utilizing the mate's receipts on to its bills of lading as 86% OD and 14% UD and split the

cargo to two bills of lading, this created inaccurate descriptions of each portion of the cargo.

On the other hand, the Shipper argued that “variance” within the meaning of the COA must refer to a numerical variance for a failure to incorporate remarks as to pre-existing damage noted on the mate’s receipt or Carrier’s bill of lading into the Shipper’s bill of lading. It submitted that the proportions noted in the Shipper’s bills of lading were the same information contained in the Carrier’s bill of lading simply stated in a different form.

In analyzing whether there was a “variance” between the Carrier’s bill of lading and the Shipper’s bills of lading, Mr. Justice Cohen went through a similar analysis to that of the Supreme Court and Court of Appeal in determining the rights of the Consignee as against the Carrier in the first instance.

In assessing the previous judgments, Mr. Justice Cohen determined that it was the ability to determine value of the goods carried on deck which is relevant for the purpose of determining whether or not the cargo carried on deck is “goods” within the meaning of the Hague-Visby Rules. That is “the specific packages of lumber stowed on and under deck and their respective values must be identified by the carrier to be excluded from the definition of “goods” in the Hague-Visby Rules”.

While it is not necessary to specify the dollar value of the goods, the Court determined that it must be possible to correlate a potential value to the cargos on deck.

In a manner similar to the Court's determination with respect to the Consignee's claim, in which it was determined that it would be impossible to correlate as between the two Shipper's bills of lading what proportion of cargo was carried on deck or under deck, Mr. Justice Cohen determined that a similar problem existed with the bill of lading issued by the Carrier.

Of significance, the cargo of lumber involved was of varying dimensions and hence the packages would have different values ranging between 550 dollars per MFBM and 1,060 dollars per MFBM depending on such dimensions. The Court held that without a precise calculation of the packages or volume of lumber of each type stowed on deck, the description would not allow the Consignee to determine the respective values at risk on deck during the carriage of the cargo. The Court did not address the fact that the Consignee would have been aware from the outset that all of its cargo could have been carried as on deck cargo and any below deck carriage could only reduce that expected risk.

In determining that the bill of lading issued by the Carrier and the two bills of lading issued by the Shipper contained the same basic problem, the Court determined that there was no "variance" within the meaning of the COA that would allow the Carrier to turn to the Shipper and seek indemnity under the contract or at common law.

While it was not a necessary component for the decision, the Court went on to assess what it saw as the root cause of the problem and determined that it was not the conversion of the numerical totals of on deck and under deck cargo to the percentage ratios seen in the Shipper's bills of lading but was in fact "the imprecise calculation of the on and under deck cargo noted on the mate's receipts that cause the mischief in this case".

A second significant issue that has arisen in this case was the argument by the Shipper that the Carrier was estopped from claiming indemnification as a result of its undertaking to handle the claim in the first instance.

Estoppel is an equitable concept which can be used by a party to protect itself in circumstances where it would be inequitable for the plaintiff's claim to succeed.

The Court cited Fridman in *The Law of Contracts in Canada* in setting out the essential features of estoppel as follows:

- a) an existing legal relationship between the parties at the time the statement on which the estoppel is founded was made;
- b) a clear promise or representation made by the party against whom the estoppel is claimed, establishing his intent to be bound by what he has said;
- c) reliance, by the party raising the estoppel, upon the statement or conduct of the party against whom the estoppel is raised;
- d) the party to whom the representation was made must have acted upon it to his detriment; and

e) the promisee must have acted equitably.

The Court further cited the decision in *John Burrows Ltd. v. Subsurface Surveys Ltd.*, a 1968 decision of the Supreme Court of Canada, in which Mr. Justice Ritchie stated:

“[Estoppel] cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.”

The Shipper’s claim for estoppel was based on the Carrier’s assertion that it would “handle the [Consignees] claims” which the Shipper says was interpreted to be that the Shipper would have no further involvement in the claims beyond being kept informed.

The Court found that the evidence in this case fell short of establishing that the Carrier had intended to forsake any right to claim indemnity from the Shipper. However, parties who may wish to handle claims in the first instance but wish to look eventually to others

to pay, should spell out that such claims handling is without prejudice to the rights of indemnity.

While the decision in this case is currently under appeal, for the time being those who wish to rely on deck cargo exclusions should assess the way in which they note and describe the deck cargo in question. Those completing such documents must be wary of generic notations or notations which do not allow the consignee to ascertain with some degree of precision what specific components of its cargo are being subjected to on deck conditions and the exclusions contained in the carrier's bill of lading.