BILLS OF LADING AND THE UNIFICATION OF MARITIME LAW IN THE ENGLISH COURTS

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IN WORDS which are now classic Roscoe Pound has epitomised the eternal antinomy between the demands of legal certainty and of legal progress.[1] One special aspect of this conflict of social needs is the cycle of diversity and uniformity which is so conspicuous a feature of the mercantile and maritime law of the commercial world. At a time when the Royal Justices of Henry II were hammering out the pattern of the common law on the anvil of English custom, the law of Western Europe already enjoyed a degree of uniformity greater than we know to-day in at least two respects. The first, with which we are not here concerned, was the law of the universal catholic church of Rome; the second the law merchant. Both were not only bodies of substantive law, but also systems of special jurisdiction. Neither knew frontiers of land or sea, while both were relatively far in advance of the systems of indigenous local law within the territorial limits of which they operated. In these fields, despite regional variations such as those of English canon law[2] and the various codes of maritime law applying in the Mediterranean, the Baltic or the North Sea,[3] substantial uniformity was a fact and internationalism a reality. And over all reigned the common charter of humanity in the shape of natural law.

But the centrifugal force of civilization which led through the Renaissance to the break-up of the Holy Roman Empire and the growth of the concept of independent sovereignties, which led also to the rejection by Henry VIII of the supremacy of the Roman Church, carried with it the subjection of the jurisdiction of courts merchant in England to that of the courts of common law and Admiralty, jealous of their prestige and very

[1] "Law must be stable and yet it cannot stand still"—Interpretations of Legal History (1923) p. 1.

[2] Lyndewode, Provinciale (Paris, 1501).

[3] As represented by the Consolato del Mare, the Laws of Wisby and the Laws of Oleron.

conscious of the strength of their full stature. Yet, despite the conflict of jurisdictions which characterizes the history of English courts,[4] the steady growth of commerce and the sudden and, for the most part, violent era of colonization, ensured that maritime and mercantile law in their substantive sense retained their integrity and international character, while the liberal attitude of the common law courts[5] towards mercantile custom enabled the law merchant to reflect the changing needs of a progressive business community.

But this very fact in turn was the cause of an era of diversity in the disproportionate development of mercantile and maritime law in the various countries of Western Europe. While France, Spain, Portugal, the Netherlands and England were, to a greater or less degree, expanding their commerce and colonization, other countries, such as the German states, but excluding the Free Cities, remained predominantly agricultural. The additions to mercantile law in England came about largely through the customary practices of London merchants as they met new problems of the age of commerce heralded by the opening of the eighteenth century. Economic and commercial needs, varying in different countries, led to corresponding differences in commercial law, while the success and enterprise of British shipping gave predominance to variations which English maritime practice introduced into the general maritime law through the medium of the Court of Admiralty. The era of intense industrialisation in England preceded that on the Continent and in America, and it was in this nineteenth century atmosphere of commerce that English maritime and mercantile law were developed in the interests of an exporting community which enjoyed an increasingly major proportion of the sea-carrying trade. If these economic factors were partly responsible for a diversity which occurred in the shipping and commercial law of England and other countries in the nineteenth century, they provided in turn the pattern of a more highly developed system which influenced the evolution of foreign law and stimulated the movement towards unification by international convention.

Before 1850 charter-parties and bills of lading were generally subject to common law rules, and shipowners could and did make numerous and varied exceptions to their common law liability as carriers. Both forms of contract are of early origin, bills of lading going back to the sixteenth century[6] and charter-parties probably much earlier. According to

[4] Graveson, Conflict of Laws (1948) pp. 19–20.

[5] Particularly under the influence of Lord Holt and Lord Mansfield.

[6] Schmitthoff, The Export Trade (1948) p. 238. Scrutton, The Contract of Af-

Comyns in the eighteenth century, action in Covenant lay for breach of the contract of charter-party;[7] and if a shipowner failed to exclude or limit his liability, he was on the analogy of the common carrier liable for damage to cargo through the perils of the sea, though in no way negligent.[8] The completely divergent attitude of English and United States Courts in respect of provisions limiting liability is noteworthy in this connection, for while the former allowed such exemptions, putting on them a narrow construction, the latter have held that exemption from liability for negligence for the unseaworthiness of a ship or proper care of the cargo was contrary to public policy and void.[9] Though clauses of exemption appeared in both charter-parties and bills of lading, the need for uniform legislation was far greater in the latter case; for while the charter-party was a contractual document binding only the parties to it, who could, or should, be fully aware of its terms and their implication, bills of lading if made out to order or bearer had, by the middle of the nineteenth century at the latest, become by virtue of mercantile custom and statute,[10] quasi-negotiable documents of title of an international character on which third parties, such as an importer's bankers, should be able to rely without the need for a complicated investigation of special terms between the original parties to the bill.[11]

Under such circumstances some measure of standardization became imperative, as in the case of bills of exchange, and the United States led the way with the Harter Act of 1893. The attractive advantages of uniformity at first led to legislation on the pattern of the Harter Act in a number of British jurisdictions, of which the most important were Australia (Sea Carriage of Goods Act), 1904, New Zealand, 1908, and Canada (Water Carriage of Goods Act), 1910. But this legislation, in the words of Foote,[12] "Instead of securing uniformity, . . . added to complexity." Furthermore businessmen were having second thoughts. The conflict, to which we have already referred, [13] between the ideas of an objective law and a subjective will, was beginning to appear in the expression of a desire among merchants

freightment as expressed in Charterparties and Bills of Lading (15th ed. 1948) p. 492, reproduces a bill of lading of 1538 taken from the Selden Society's "Select Pleas in the Court of Admiralty," Vol. I, p. 61.

[7] Digest (1st ed.) Vol. 4, p. 193; (5th ed.) Vol. 5, p. 96.

[8] Forward v. Pittard (1785) 1 T.R. 27 (judgment of Lord Mansfield).

[9] Foote, Private International Law (5th ed. 1925) p. 441.

[10] Bills of Lading Act, 1855.

[11] Scrutton, Charterparties (15th ed.) p. 439.

[12] *Op. cit.*, p. 441.

[13] The Proper Law of Commercial Contracts as developed in the English Legal System, above.

to retain their individual freedom of contracting, and to limit standardization by retaining the power to incorporate voluntarily into their contracts a standard body of rules. It was a compromise which might well have succeeded in those respects in which uniform legislation has failed.

As various writers have explained,[14] the so-called Hague Rules drafted by the International Law Association in 1921 for voluntary incorporation into bills of lading were used as the substantial basis of compulsory uniformity by the Brussels Conference in 1922 and, in particular, recommended for legislative enactment throughout the British Empire by the Imperial Economic Conference of 1923. Approximately fifty separate jurisdictions in the British Empire[15] and approximately ten non-British countries[16] have adopted the Rules on a compulsory basis, with or without modifications. A preliminary formal difference, which is of some importance, exists in the method adopted by various parties to the Convention to give effect to its terms. While the British countries have usually enacted short statutes including the Hague Rules as a separate schedule, Continental countries have tended to incorporate the Rules into the body of their commercial codes, while the United States has followed a similar practice in the Carriage of Goods by Sea Act, 1936.

Perhaps a more practical question for the exporting manufacturer and his legal adviser is whether in fact uniformity exists in the law of bills of lading to-day. Dean Falconbridge asserts that this is substantially the case.[17] Bateson, J., was of a somewhat different opinion when he remarked:[18]

"The nations have not adopted a uniform system of applying the Hague Rules. Most nations have not embodied them in their law at all, others differ in the way they have adopted them. The Belgian Code in adopting the Convention enacts that the Rules should apply to both inward and outward bills of lading, the English Act applies the Rules to outward bills of lading only. The Belgian law says that bills of lading are 'governed by' the Rules; the law in force in Palestine says the Rules are deemed to be inserted. It is somewhat alarming to contemplate how many doors to confusion are opened by these attempts to legislate for the whole world."

[14] Scrutton, *op cit.*, p. 440; Falconbridge, Essays on the Conflict of Laws (1947) p. 335; Preamble to Carriage of Goods by Sea Act, 1924; Foote, *op. cit.*, p. 441.

[15] For list see Scrutton, *op. cit.*, pp. 537–8.

[16] Belgium (1928), France (1936), U.S.A. (1936), Sweden (1936), Denmark (1937), Norway (1938), and Finland (1939) are the chief ones. The Netherlands (1924 and 1926) Italy (1931), and Germany (1937) made certain amendments to their commercial or maritime codes. See Knauth, Ocean Bills of Lading (3rd. ed. 1947) p. 81.

[17] *Op. cit.*, pp. 335–36.

[18] The St. Joseph [1933] P. 119.

Where, then, does the truth lie? There are two separate considerations. In the first place, those countries which have adopted the Hague Rules (and they are commercially important countries) have achieved a considerable degree of uniformity in the formal acceptance of the Rules. But, secondly, the interpretation which the courts of those countries put upon the Rules constitutes a largely hidden element of divergence in this apparent uniformity. It is a question of words and their meaning. Both the United States and Russia, for example, favour democracy. In the general field of bills of lading, the term f.o.b. means one thing in American and another in English law.[19] Again, the overriding effect of American doctrines of public policy in relation to exemption clauses has already been seen.

The English Carriage of Goods by Sea Act, 1924, of which the schedule contains the Hague Rules, is in accord with the majority of similar legislation in dealing only with outward bills of lading, that is, for the carriage of goods from United Kingdom ports. It differs in the first instance in this material respect from the United States Carriage of Goods by Sea Act, 1936, which applies to carriage "to or from ports of the United States in foreign trade."[20] The provisions of the Belgian Commercial Code resemble those of the American Act in this respect,[21] while those of the British Dominions apply only to outward bills. However, the English courts have to deal with the application of the Hague Rules to inward carriage in two major groups of cases—those in which the Rules or the provisions of the English Act are incorporated by reference and so construed as terms of the bill, and those in which the court decides on general principles that the proper law of the contract is a foreign one by which the Hague Rules apply to the bill in question, which will normally be a case of an outward bill for carriage from some foreign country to England.

Although the English Act[22] provides that every bill of lading to which the Rules apply "shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act," it should be noted that it does not apply to the carriage of goods where no bill of lading has been issued; that it does not provide imperatively that the Act and Rules shall apply despite omission of reference to them, whether by accident or design; and that failure to express the subjection of the contract to the Rules does not (probably) render the bill of lading void.[23]

[19] Schmitthoff, *op. cit.*, p. 12.

[20] S. 13.

[21] The St. Joseph, above.

[22] S. 3.

[23] Scrutton, *op. cit.*, p. 449, on the authority of Vita Food Products v. Unus Shipping Co. [1939] A. C. 277.

In certain of these respects differences occur in the Australian and Palestinian legislation. By section 9(1) of the Australian Sea-Carriage of Goods Act, 1924:

"All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect."

This provision would not, however, be of decisive effect if the parties to a bill of lading for carriage from an Australian port included an express choice of some other law, for example, English, as the proper law, and were careful to refer to the Schedule of the Australian Act, which embodies the Hague Rules, not to the Act itself. This appears to be a rational deduction from the decision of the Court of Appeal in *Ocean Steamship Company* v. *Queensland State Wheat Board*,[24] to which we have already referred.[25] One finds a further divergence on this point in the provision of the Palestine Carriage of Goods by Sea Ordinance[26] which formed the crux of the dispute in *The Torni*.[27] In addition to following the general terms of section 3 of the English Carriage of Goods by Sea Act, 1924, the Palestine Government, in the words of Scrutton, L.J.,[28] "have anticipated that people in Palestine might disobey the law, and so they have added the following words: 'and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement.' "

Other differences of a less spectacular nature exist between the various enactments. Thus, while the Hague Rules as adopted in the English Act exempt the carrier from loss or damage caused by strikes or lock-outs,[29] the American Act[30] with more foresight but less respect for uniformity adds a proviso against relieving a carrier from responsibility for his own acts, which may well be the cause of a strike leading to loss of or damage to cargo. Again, Article 4 of the Rules provides general exemption from liability for loss or damage caused by "any reasonable deviation," while the American Act[31] raises a statutory *prima facie* presumption that a

[24] [1941] 1 All E. R. 158.
[25] The Proper Law of Commercial Contracts, above.
[26] (1926) Cap. 12, Revised Ed. 1933.
[27] [1932] P. 78.
[28] The Torni [1932] P. 78, at 83.
[29] Article IV (2) (j).
[30] Carriage of Goods by Sea Act, 1936, s. 4(2) (j).
[31] S. 4(4).

deviation for the purpose of loading or unloading cargo or passengers is to be regarded as unreasonable. Finally, the American Act appears to be intended to carry out not only the general purpose of unification of the law of bills of lading, but also the special one of promoting the foreign commerce of the United States. For this purpose section 14 empowers the President to suspend certain provisions of the Act on certification "that the foreign commerce of the United States in its competition with that of other nations, is prejudiced by the provisions . . . of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea."

These variations in the form, substance and purpose of adoption of the Hague Rules are important qualifications on uniformity, but it would be an exaggeration to state simply that we are back to the common law rules of bills of lading. For the English courts, at least, have endeavoured to promote uniformity in this sphere. This desire found expression in the judgments of the Court of Appeal in *The Torni*,[32] while a liberal attitude towards the construction of the Rules is apparent in the words of Lord Macmillan in *Stag Line* v. *Foscolo Mango*:[33] "As these rules must come under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of an antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation." Differences of construction of the same expression have to some extent been overcome in the general field of mercantile law by reference to codes of standardized interpretation, such as Incoterms, 1936, issued by the International Chamber of Commerce, or by reference to some specific legal system;[34] but any assistance which might be afforded to the courts in this way depends on the possibility of parties anticipating a dispute which they do not expect to occur.

The whole question of interpretation, validity, and effect is closely associated in England with the doctrine of the proper law of a contract, and many of the leading decisions on this doctrine concern bills of lading and charter-parties. The Hague Rules, it will be recalled, apply only to the former. As we have already discussed many of the relevant cases in connection with the proper law, it is only necessary to mention their special application to the problem before us, that of uniformity. In its objective

[32] [1932] P. 78.

[33] [1932] A. C. 328, at 350.

[34] Schmitthoff, The Export Trade, p. 6.

sense the doctrine of proper law would promote uniformity by emphasizing the factors of real connection in the contract. In its subjective sense, when parties expressly select as the proper law a legal system which has not adopted the Hague Rules, uniformity suffers. It is for this reason that Falconbridge[35] deplores the decision of the Privy Council in the *Vita Food Case*,[36] observing, "It would seem to be regrettable that the Privy Council has without apparent necessity seriously impaired the efficacy of the effort made in various parts of the British Empire to give effect to an international Convention."[37]

The dualism of freedom of contract and precedent based on factors of real connection[38] is strikingly apparent in the decisions of *The Torni*[39] and *Vita Food Products* v. *Unus Shipping Company*. In the years between them it seems that the pendulum had again swung from uniformity to diversity, from standardization to free will. And Lord Justice Scrutton himself, whose concern in *The Torni*[40] to achieve the unifying policy of the Hague Rules was disapproved by the Privy Council, stands as the author of the standard work on Charterparties and Bills of Lading, of which the present learned Editors adopt the Privy Council's view.[41] It is, perhaps, only necessary to recall the various rules and presumptions effective in the English and American legal systems for the ascertainment of the law which shall govern a bill of lading. Where the intention of the parties is not expressed in words, which would be decisive,[42] presumptions exist in English law in favour of the law of the flag, particularly in respect of contracts actually made in the course of a sea voyage,[43] though this presumption may easily be rebutted when a contract is made on land, as most bills of lading are, before the voyage begins.[44] It is significant that the abandonment of the general maritime law[45] in favour of the proper law on a presumption of the law of the flag came in 1865,[46] an important year in English law in which judicial expression was being given to the idea of liberty of contract.[47]

[35] *Op. cit.*, p. 339.
[36] [1939] A. C. 277.
[37] *Op. cit.*, p. 340.
[38] The Proper Law of Commercial Contracts, above.
[39] [1932] P. 78.
[40] Above.
[41] Scrutton, *op. cit.*, pp. 441–2.
[42] Vita Food Case [1939] A. C. 277.
[43] Lloyd. v. Guibert (1865) L. R. 1 Q. B. 115; The Njegos [1936] P. 90.
[44] The Industrie [1894] P. 58, 72.
[45] The Hamburg (1864) 2 Moo. P. C. (N.S.) 289.
[46] Lloyd v. Guibert, above.
[47] Lloyd v. Guibert, above; P. & O. Steam Navigation Co. v. Shand (1865) 3 Moo. P. C. (N.S.) 272.

American law, on the other hand, would apparently determine the liability of a carrier by the *lex loci contractus*,[48] though this applies only to contractual liability, since according to the *Restatement*[49] the limitation of liability for maritime torts (which may well arise in relation to the obligations under a bill of lading) depends on the *lex fori*. Contractual liability, however, as Beale points out,[50] has in many cases been determined by the *lex loci solutionis*, the place of delivery, in accordance with the principle of the Harter Act, applying as it did to shipments from abroad.[51] In this respect the Carriage of Goods by Sea Act, 1936, will have caused no change in principle, since it applies to both inward and outward bills of lading; but on the vital question of the law applicable to exemption clauses American courts, both before and since this legislation, have decided quite simply on grounds of public policy, as Dr. Rabel has observed,[52] sometimes in the surprising manner of *Oceanic Steam Navigation Company* v. *Corcoran*.[53]

Quite apart from the variable factors of the English and other doctrines of the proper law and the differences in enactment of the Hague Rules in various countries, there are two questions which should not be overlooked. The first is the extent to which the Hague Rules themselves are designed to achieve complete uniformity; and the second, in part at least consequent on the first, is the extent to which those Rules have been adopted into a particular legal system. Considerations of time compel me to confine the second question to English law. As to the first point, considerable latitude is conferred by the Rules themselves in the following respects:

1. The maximum liability of £100 or $500 a package or unit, fixed by Article IV (5), may by the same Article be increased by agreement of the parties.

2. By Article V, "A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper." This provision appears to be drawn in sufficiently wide terms to allow parties by agreement to exclude the real substance of the Rules, contained in Articles III and IV, and ensures uniformity on condition—the condition of the parties' free will and agreement not to vary standard provisions.

[48] Restatement of the Law of Conflict of Laws (1934) pars. 337, 338.
[49] Para. 411.
[50] Conflict of Laws, (1935) Vol. 2, pp. 1188–9.
[51] Knott v. Botany Mills, 179 U. S. 69 (1900).
[52] Rabel, The Conflict of Laws (1947) Vol. 2, pp. 419 ff.
[53] 9 F. (2d) 724 (1925).

3. A further variation of liability under the Rules is provided by Article VIII, stating that they "shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of liability of owners of sea-going vessels."

4. Again, by Article VI, parties may make any agreement they choose for the carriage of goods by sea outside the provisions of the Rules, but their contract shall be regarded as a receipt only for goods, not as a bill of lading. The extent of this freedom of contract is limited in somewhat vague terms by the Rules to cases in which the character of the property or the circumstances of the carriage reasonably justify a special agreement.

5. Finally, the Rules themselves are, from the point of view of uniformity, regrettably silent on the question of their application to outward or inward carriage only, or to both, a fact which leads to the diversity in their local enactment which we have seen in the case of the United States and England.

If the Rules themselves are thus an uncertain basis of uniformity, their embodiment in municipal legislation makes them even more so. The English Carriage of Goods by Sea Act, 1924, contains three qualifications on the Rules. The first, of particular importance for the export coal trade, is contained in section 5 of the Act, modifying Article III, Rules 4 and 5, and provides that in the case of bulk cargoes the mere fact of stating the weight as accepted by a third party other than the shipper or carrier shall not be *prima facie* evidence against the carrier of the receipt of that weight of goods, nor shall the shipper be deemed to have guaranteed the accuracy of the weight so stated. Secondly, the Act[54] preserves the effect of important sections of the Merchant Shipping Act, 1894, relating to the carriage of dangerous goods,[55] the effect of which is to vary the definition of "goods" in Article I(c) of the Rules; while other sections of the earlier Act which are preserved deal with the limitation of liability of owners of British ships,[56] in particular excluding liability without fault for loss or damage to cargo through fire on board ship. A third and minor qualification from the viewpoint of the conflict of laws, though commercially important in a more local sense, is the exclusion of Article VI of the Rules in relation to coastal shipping of the United Kingdom, including outward journeys to Eire.[57] These variations of the Rules, though important, are not disastrous to uniformity. Of greater significance are the elastic provisions of the Rules themselves. The English courts have in general been actuated by a desire to promote the

[54] S. 6(2).

[55] Merchant Shipping Act, 1894, ss. 446–450.

[56] *Id.*, ss. 502–3.

[57] Carriage of Goods by Sea Act, 1924, s. 4.

uniformity envisaged by the Rules, but when the Rules themselves allow such latitude to parties, it is not surprising to find the Privy Council giving effect to an express choice of a proper law factually unconnected with the contract.[58] The general tenour of the Rules and of their restricted embodiment in legislation of various countries can hardly raise a *prima facie* case of illegality if they are ignored,[59] though the individual terms of local legislation or local concepts of public policy may be decisive on this matter.

Merchants and shippers have for centuries demonstrated their ability to create uniform practices and customs to meet commercial needs. They have a tradition of living under the law which they create for themselves, and it may be that the attempt made in the various Carriage of Goods by Sea Acts and similar legislation to innovate from above rather than simply to codify the various rules which have developed from below, as in the case of sale of goods[60] and bills of exchange,[61] could not expect to meet with full success. The Hague Rules themselves are a half-hearted measure, wavering between the principles of uniformity and free enterprise. It is little wonder that their application has been somewhat diverse. Yet they have not been in vain. They have led to the acceptance of the idea of uniformity as an ideal, whether or not attainable; and particularly within the British Commonwealth they and their enacting legislation have achieved a measure of practical uniformity which is of real value in the conflict of laws in this field.

[58] Vita Food Case, above.

[59] But see The Torni [1932] P. 78. *Cf.* Vita Food Case, above, and Ocean S.S. Co. v. Queensland State Wheat Board [1941] 1 All E.R. 158.

[60] Sale of Goods Act, 1893.

[61] Bills of Exchange Act, 1882.