

## Is the Motor Carrier Protected Under the Ocean Bill of Lading

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The typical ocean Bill of Lading in its common form contain numerous terms and conditions usually found on the reverse side. Typical clauses include sub-contracting and indemnity provisions (Himalaya clause) and carrier's responsibility provisions.

In a recent British Columbia Court of Appeal decision in *Valmet Paper Machinery Inc. v. H.A. Davis Transport Ltd.*, the Court of Appeal considered a decision of the Trial Judge Groberman J. wherein he awarded the plaintiff shippers the sum of \$1,244,000 for the destruction of a piece of equipment known as a rewinder, in the course of it being carried by a truck of the appellant motor carrier. The rewinder had been loaded to the ship at Helsinki, transhipped at Bremerhaven to a vessel bound for Los Angeles, transhipped at Los Angeles and off loaded at Vancouver. The rewinder subsequently fell off the truck near Cameron Lake on Vancouver Island in consequence of the undisputed negligence of the motor carrier and its driver.

### **The Himalaya Clause**

The motor carrier asserted that they could not be sued for the loss because the Bill of Lading issued by the ocean carrier at Helsinki contained a Himalaya clause which protected them from liability. Alternatively, the motor carrier argued that it could limit its liability under its own "bill of lading" issued at Vancouver for the motor carriage of the rewinder from Vancouver to Port Alberni.

Clause 6 of the ocean carrier's Bill of Lading contained a carrier's responsibility clause. A portion of that clause states as follows:

"If the Carriage called for by this Bill of Lading includes inland transportation in North America the Carrier without assuming liability undertakes to procure as Merchant's Agent and at Merchant's risk and expense such transportation by inland carriers authorized by competent authority to engage in inland transportation in North America

and such transportation shall be subject to the inland carrier's contract of carriage and tariff.”

The Court of Appeal considered the Bill of Lading and held that taken as a whole it creates two legal regimes: the first is a contract of carriage by sea from Helsinki to Vancouver, the parties to which are the shippers and the ocean carrier; and the other is a contract between the shippers and the ocean carrier authorizing and requiring the ocean carrier as agent for the shippers to make on their behalf a contract with someone for carriage of the goods from Vancouver to the ultimate destination. That is what was contemplated by clause 6 of the Bill of Lading referred to above.

The Court of Appeal then considered whether the obligation undertaken by the motor carrier to truck the rewriter from Vancouver could be said to fall within the Himalaya clause 4 of the Bill of Lading which would prevent the shippers from proceeding against the motor carrier.

The Court of Appeal answered the question by finding that a careful reading of the Himalaya clause 4 shows that it does not extend to an inland motor carrier who, by the instrumentality of the carrier by sea, has entered into a contract with the shipper (merchant). Clause 4 is a covenant not to sue anyone other than the carrier who then under clause 6 is entitled to limit its liability.

The Court of Appeal went on to say that because the carriage by land was in “North America” clause 6 takes the hiring by the ocean carrier as agent for the merchant out of the protection of the Himalaya clause 4. Therefore, the motor carrier was not within the class of persons intended to be protected.

### **The Motor Carrier's Bill of Lading**

In the alternative, the motor carrier argued that the Trial Judge was in error when he held that by failing to issue the Bill of Lading as required by the *Motor Carrier Regulations*, the appellant motor carrier could not limit its liability. The Court of Appeal acknowledged that if the motor carrier could invoke Articles 9 and 10 of the *Motor Carrier Regulations*, then the appeal would be allowed and the judgment against the motor carrier reduced to its limit of \$117,923.

Those articles provided that it could limit its liability to \$4.41 per kilogram computed on the total weight of the shipment as agreed between the parties to the Bill of Lading. The difficulty is that

the motor carrier's driver did not meet any employee of the ocean carrier at Vanterm when the rewriter was picked up and thus no Bill of Lading was handed to any individual. Evidence presented in the case showed that it is often impossible to meet the requirement of the *Motor Carrier Regulations* that a Bill of Lading must be issued at the time the cargo is accepted. The accepted practice in the industry was for the driver to complete the Bill of Lading and deliver it to the consignee for signature to confirm delivery of the cargo.

The Court of Appeal analyzed the issue of business and industry usage in some detail. However, the court observed that the difficulty here was that not only did the motor carrier bill not conform in its content to the Regulations but also the motor carrier disobeyed the Regulations in two respects: (i) the Bill of Lading was not issued at the time of shipment of freight; (ii) the Bill of Lading was not signed by the consignor or his agent.

The Court of Appeal concluded its decision by stating the following:

“I am prepared to assume, for the purposes of this case, that the evidence supports a finding that the usage in this market, at least when goods are picked up at an ocean terminal, is not to deliver the bill of lading at the time the goods are picked up, and not to obtain at that time, or perhaps ever, the signature of the consignor.

But the difficulty is that the usage is contrary to law, and an illegal usage, unless perhaps express consent is given to it, cannot avail.”

The Court of Appeal held that the motor carrier was not entitled to limit its liability and dismissed the appeal. The case is interesting on two points. First, the Himalaya clause in ocean Bills of Lading that protect subcontracted carriers will be seriously impacted when the Bill of Lading requires that the ocean carrier engage the services of an onward carrier as agent for the merchant. Secondly, companies ought to be very careful of relying upon a business or industry usage or custom that falls short of regulatory requirements particularly where that custom may be looked to for enforcement of liability limits.

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