B/L in the hands of the Shipper

- At what point is the contract of carriage concluded?
- Orally or in writing before the B/L is presented for signature

- *The Ardennes* (1951) : shipowners attempted to rely on a "liberty to deviate" clause in the B/L whilst they had earlier assured the charterers that the vessel would proceed directly to discharge port.

The Ardennes (1951) per Goddard CJ

"It is I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of the goods, though it has been said to be excellent evidence of its terms…The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not in my opinion thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed and that it was different from that which is found in the document contained some additional term. He is not party to the preparation of the bill, nor does he sign it."

B/L in the hands of Endorsee

- Once the B/L is transferred for value to a third party, the B/L becomes the contract of carriage. *Leduc v Ward* (1888) 20 QBD 475
- ShipOwners relied against an endorsee on a term of contract concluded with the shipper which was not contained in the B/L.
- Lord Esher:" it may be true that the contract of carriage is made before the B/L is issued because it would generally be made before the goods are sent down to the ship. But when the goods are put on board and the captain has authority to reduce the contract into writing; and then the general doctrine of law is applicable by which, where the contract is reduced to writing, which is intended to constitute the contract, parole evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract (for the endorsee)".

- COGSA 1992 s 4

  "A bill of lading shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of receipt for shipment."

B/L in the hands of the Charterer (Shipper)

- The charter party does not exist in a vacuum. There is a tripartite relationship between the ShipOwner, Charterer and B/L holder.
- Under CIF contracts the Charterer is often also the Shipper
- As between the ShipOwner and the Charterer, the contract governing their respective rights and obligations is the Charter Party.
- Where the Charterer is the shipper, the B/L operates as a mere receipt of goods . It has no contractual effect until transferred to an endorsee.
- *Rodocanachi v Milburn* (1886) CA - shipowners attempted to rely on exemption clause contained in the B/L but not in C/P.

B/L in the hands of the Charterer (Endorsee)

- The Charterer is the FOB Buyer of the goods
- *President of India v Metcalf* [1969]
- FOB Buyer of goods shipped was the Charterer and B/L holder by endorsement
- C/P contained arbitration clause. The arbitration clause was not properly incorporated in the B/L
- The Charterer claimed short delivery in arbitration proceedings
- Shipowners refused to submit to arbitration proceedings because the B/L did not contain arbitration clause.
- Held (by Lord Denning): Since the contract was the C/P, the arbitration clause was effective.

Charter party bills of lading

- Incorporation into bills of lading of charterparty terms
- A matter of construction
- General words of incorporation such as "all terms, conditions and exception of the c/p dated are incorporated herein"
- General words of incorporation not sufficient for arbitration clauses. However a skillfully drafted incorporation clause may assist:
- see incorporation clause of CONGEN Bill: "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated*".
- Identification of C/P. In absence of stipulation, incorporation is *presumed* to be the head charter party.

Charter party bills of lading

- Assuming the incorporation is wide enough, the terms in the c/p must "make sense" to the overall B/L contract
- Linguistics: does Charterer in c/p equate to Receiver?
- Consider T*he Miramar* (1984) : Owners claimed consignee to be liable for demurrage pursuant to C/P clause providing "Charterers to pay demurrage": Held: obligation to pay demurrage could not be construed as having effect against the Consignee/Endorsee.
- The clause must relate to the receipt, carriage and delivery of the goods.

Charter party bills of lading

- **Conclusion on Incorporation**

- For the incorporation to be effective, the words of incorporation must be found in the B/L
- The words of incorporation must be specific and apt in describing the particular clauses to be incorporated.
- The terms incorporated must be consistent with the remaining terms of the B/L

Identity of the Carrier

- Identifies who is responsible to perform the contract of carriage:

- Two issued to consider

- 1. The identity of the carrier, and in particular whether the shipowner or the charterer is the carrier under the contract

- 2. The identity of the other party to the contract, and in particular whether the contractual rights and obligations of the original party (the shipper) have been transferred to a subsequent holder of the bill of lading (COGSA 1992)

Identity of the Carrier

- A matter of construction, the B/L is considered as a whole: the terms and the signature
- The Master is presumed to be the agent of the Ship Owners unless he signs as agents for the Charterers.
- Bills of lading naming / identifying the Charterers on the front of the Bill may be sufficient to displace the presumption.
- Demise clauses: Some bills of lading make it clear who is the carrier. Most used in liner trades when as result of transshipment goods are carried on ships owned or operated by the Line.

Identity of the Carrier - *The Starsin* (2003) HL

- *The Starsin* was time chartered by CPS Ltd. Cargo loaded wet and consignments were discharged in a damaged condition. Claimants were holders of bills of lading as required by COGSA 1992.
- The bills of lading were liner bills and were clearly marked with CPS (T/Charterer's) logo. The signature box on the face contained the words "As Agent for Continental Pacific Shipping (The Carrier)". It was accompanied by the rubber stamp of the CPS port agents in Malaysia.
- The reverse of the bill contained two pertinent clauses:
  - cl.1 provided that "carrier" meant the party on whose behalf the bill had been signed.
  - Cl. 33 (Identity) "*The contract evidenced by this bill of lading is between the merchant and the owners of the vessel named herein….and it is therefore agreed that said Shipowner only be liable for any damage or loss*"

The Starsin (continued)

- The identity of the carrier was relevant for the cargo interest suing the head owners - CPS became insolvent.
- The court will take a mercantile view. They will construe the B/L commercially, reading the document in a "business sense" as opposed to a "legal sense". The bills of lading must be read so as not to frustrate the reasonable expectation of businessmen.
- Words added on the front of the B/L, such as the signature, took precedence over the printed words on the back of the B/L
- Are the clauses at the back of the bills accessible to a reasonable reader as opposed to a lawyer? They need only to be construed in a business like manner. The legalistic approach taken in the *Flecha* (1999) was disapproved.

The Starsin (continued)

- Relevant to the decision, ICC Uniform Customs and Practice for Documentary Credits UCP 500 includes

- Art 23 : If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which
    - appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
    - the carrier or a named agent for or on behalf of the carrier, or
    - the master or a named agent for or on behalf of the master.

Clause Paramount

- Why do we need one in the contract of carriage ?
- Clause Paramount gives effect to one of the Conventions on cargo liability =
- Hague Rules 1924
- Hague Visby Rules 1968
- Hamburg Rules 1978

Clause Paramount

- UK has implemented the Hague-Visby regime through the enactment of the Carriage of Goods by Sea Act (COGSA 1971).
- The rules have mandatory application which means they may apply irrespective of the existence of a clause Paramount.

Clause Paramount

"The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924 ("the Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1968 ("the Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation of the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments. ….."

Clause Paramount

"……

When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place, the Hague Rules as enacted in the country of destination apply compulsorily to this Contract. ……"

Clause Paramount

"……

The Protocol signed at Brussels on 21 December 1979 ("the SDR Protocol 1979") shall apply where the Hague-Visby Rules apply, whether mandatorily or by this Contract.

The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals."

Application of the HVR Rules

- The Rules apply to the document covering the carriage rather than to the contract of carriage; see Art I(b)

  " *Contract of carriage applies only to contracts of carriage covered by a bill of lading or similar document of title*."
- Art I(b) also provides that the HVR will not apply to bills of lading issued under charterparties as long as such bills of lading are in the hands of the charterers.
- Art I(b): Once the B/L is transferred to a third party (endorsee), the Rules will apply.

Application of the Rules (cont'd)

- If the contract of carriage is intended to be covered by a B/L, the HVR will apply even if a bill of lading has not yet been issued (*Pyrene v Scindia Navigation* [1954] 2 QB 402)
- The cargo was damaged during the loading operation. The Rules applied because a B/L was intended to be issued in due course.

Application of the Rules (cont'd)

- Art X of HVR The rules apply to carriage between ports of two different States if
  - the bill of lading is issued in a contracting state, or
  - the carriage is from a port in a contracting state, or
  - the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract.

Excluded cargoes

- HVR Art I(c) " '***Goods' includes goods, wares, merchandise, and articles of every kind whatsoever except:***
- ***Live Animals***
- ***Cargo which by the contract of carriage is :***
- ***a) stated as being carried on deck***
- ***b) and is so carried***"
- So the important test is whether the two points above are satisfied. An agreement to carry goods on deck is not sufficient to displace the application of the Rules.

Excluded Cargoes

- *Svenska Traktor v Maritime Agencies* [1953] 2 QB 295
- The B/L gave the Carriers the option (liberty clause) to carry cargo on deck. The cargo was duly loaded on deck, but the B/L did not state so.
- Held: The Rules applied.

UNCTAD/ICC Rules for Multimodal Transport Documents

1. **Applicability**
   These Rules apply when they are incorporated, however this is made, in writing, orally or otherwise, into a contract of carriage by reference to the "UNCTAD/ICC Rules for multimodal transport documents", irrespective of whether there is a unimodal or a multimodal transport contract involving one or several modes of transport or whether a document has been issued or not.

UNCTAD/ICC Rules for Multimodal Transport Documents

2. Definitions

2.1. Multimodal transport contract (multimodal transport contract) means a single contract for the carriage of goods by at least two different modes of transport.

2.2. Multimodal transport operator (MTO) means any person who concludes a multimodal transport contract and assumes responsibility for the performance thereof as a carrier.

2.3. Carrier means the person who actually performs or undertakes to perform the carriage, or part thereof, whether he is identical with the multimodal transport operator or not.

2.4. Consignor means the person who concludes the multimodal transport contract with the multimodal transport operator.

UNCTAD/ICC Rules for Multimodal Transport Documents

2. Definitions

2.5. Consignee means the person entitled to receive the goods from the multimodal transport operator.

2.6. Multimodal transport document (MT document) means a document evidencing a multimodal transport contract and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be,
(a) issued in a negotiable form or,
(b) issued in a non-negotiable form indicating a named consignee.

2.7. Taken in charge means that the goods have been handed over to and accepted for carriage by the MTO.

UNCTAD/ICC Rules for Multimodal Transport Documents

2. Definitions

2.8. Delivery means
(a) the handing over of the goods to the consignee, or
(b) the placing of the goods at the disposal of the consignee in accordance with the multimodal transport contract or with the law or usage of the particular trade applicable at the place of delivery, or
(c) the handing over of the goods to an authority or other third party to whom, pursuant to the law or regulations applicable at the place of delivery, the goods must be handed over.

Forwarding Agents

The forwarding agent - who is often also known as a "forwarder" - will then organise the inland transport of the cargo to the port of loading, including the collection of goods from a factory and transportation to an I.C.D. (Inland Clearance Depot) where the goods are stuffed into containers, which are then in turn taken (sometimes `in bond' under customs seal) to a container collection terminal or direct to the vessel by road or by rail.

Sometimes freight forwarders group together (or "consolidate") different smaller parcels of cargo in an ICD, thereby creating LCL's (Less than full Container Loads) rather than fill an entire 20' container (TEU = Twenty foot or metric Equivalent Unit).

This is known as "consolidation" or "groupage" and allows smaller consignments to be shipped economically and speedily by fast container vessel rather than by a conventional break-bulk cargo vessel which takes longer to load and has a greater likelihood of loss or damage to small items of cargo.

After arranging for the inland transportation of the consignment of goods to the load port, the freight forwarder will either issue the liner company's own bill of lading or his own format bill of lading.

This is most frequently a normal Conline Bill of Lading with the freight forwarder's logo and full style in the (otherwise blank) top right corner of the page.

Forwarding Agents also organise the completion of all the myriad of necessary paperwork on behalf of the client.

Apart from bills of Lading, this includes:-

* Certificates of Origin,
* All Customs formalities, with particular attention to shipping goods from an EU country to a non EU country,
* Interpreting the "Hazardous Goods" notice codes in strict accordance with the recognised international bodies, such as the IMO (International Maritime Organisation) and the EC road haulage regulations,
* Providing these documents to the relevant parties, including the road hauliers who will be transporting the goods to the load port.

Freight forwarders are responsible for export (or import) customs documentation and clearance, including accurate declaration of the goods in accordance with an internationally recognised tariff (see above).

Freight forwarders also arrange for an export licence and a certificate of origin, which may have to be certified at the local Chamber of Commerce and if necessary also legalised at the embassy or consulate of the destination / importing country, especially when shipping goods to Arab countries and in particular to Saudi Arabia.

Freight forwarders are also frequently asked to arrange for insurance cover for the transportation of a consignment either by multi-modal / through transport or simply during carriage by sea.

For all this work they can levy a minimal documentation charge, as well as receive an agreed agency fee from the shipper and a small commission known as an "FAC" = Forwarding Agents' Commission. (*This is not to be confused with the same initials in tramp shipping which refer to the speed of loading or discharging i.e. `Fast As Can'.*) This commission is paid by the liner company and is based on the value of the freight.

The issuer of a bill of lading should always ensure that

* the bill of lading is drawn up in accordance with the Principal's guidelines and conforms to the agency agreement;

* the bill of lading accurately reflects the routing of the transport and identifies any transhipment ports in order to avoid unnecessary exposure to vessel deviation, which might otherwise cause any defences or limits mentioned in the bill of lading from being upheld;

* no cargoes are accepted which fall outside the scope of either the Principal's guidelines or the freight forwarder's authority and dangerous goods should be carefully checked;

* the bill of lading should only be signed by authorised signatories who are so recognised by the Principal;

* any NVOCC bill of lading should only be issued as "shipped on board" after the shipping line has issued its "shipped on board" ocean bill of lading - and there should only be one set of bills of lading in circulation at any one time;

* the shipper is not given any guaranteed delivery time, merely an ETA (Estimated Time of Arrival) the accuracy of which is beyond the control of the issuer of the bill of lading;

* the bill of lading should not include any mention of the value of the cargo (unless "ad valorem" shipment has been agreed), since this value might influence the liability exposure of either the NVOCC or the Principal;

* the bill of lading accurately reflects the physical condition of the cargo;

* the NVOCC's terms and conditions of business are known by the shippers and the Principals.

The NVOCC or freight forwarder is also advised never to release a bill of lading against a mere promise to pay freight, nor to entrust collection of freight to an inland transportation delivery driver, nor to assume any foreign banking or other regulation instead of verifying it.

Freight Forwarders must also be aware of the extent of their liability towards either their Principal or a third party

You will have seen that freight forwarders are thus expected to have a very wide knowledge of

* types of cargo and their dangers or peculiarities,
* methods of packing,
* suitability of different types of insurance,
* modes of transportation and the suitability of each type of carrier for his Principal shipper's needs,
* commercial geography,
* law of carriage,
* finance of international trade incl letters of credit,
* Customs regulations,
* other documentary requirements and
* legal obligations and responsibilities.