

THE MARITIME LAW ASSOCIATION OF THE UNITED STATES

Report of the Bill of Lading Committee

It will be recalled that, pursuant to the request of the Bill of Lading Commission of the Comité Maritime International at Brighton, your Committee prepared a proposed First Draft of International Convention based on the criminal provisions of the Pomerene Act. The theory underlying the proposed convention was that, by uniform international legislation accompanied by publicity, the issuing of clean bills of lading for damaged cargo could be minimized.

The Committee's draft convention was submitted to the Association at the annual meeting on May 6, 1955 and later was circulated as part of Association Document No. 389, for the comments of the membership. On the basis of comments received and after discussion of the matter by the Executive Committee of the Association, a revised First Draft Convention was submitted to the Comité under date of June 28, 1955. A copy of that draft is attached hereto.

The main difference between the draft contained in Document No. 389 and the First Draft Convention submitted to the Comité Maritime International was the elimination of Article III because it had become clear that the proposed Article III would be unacceptable to the banks. Improvements in wording and punctuation were also made.

Subsequent to the submission to the Comité of the proposed First Draft, comments were received from certain members of our Association to the effect that the commercial necessities were such that the use of clean bills of lading for goods not completely in apparent good order and condition would have to continue, regardless of any prohibitory legislation which might be enacted. It thus became apparent that a different solution to the problem would have to

be found; such a solution might make prohibitory legislation unnecessary.

On the way to the Madrid Conference, your chairman became convinced that the problem could be solved only by modification of the rigid requirement of absolutely clean bills of lading for the transportation of goods sold under letters of credit.

Bills of lading are designed to serve a dual function: they are contracts of carriage and receipts for the goods, to define the extent of the carrier's responsibility. In addition, commercial practice has relied on their representations as to the external appearance of the goods.

In the days of small ships carrying small shipments, usually from near the place of packaging to their ultimate destination, requiring absolutely clean bills of lading was commercially feasible. The packages could be counted easily and any dispute as to the number of packages could be resolved on the spot. If a package suffered damage while being taken to the ship, it could be repaired or replaced at once.

In modern commerce, goods are sometimes shipped in great numbers, 10,000 packages in a single shipment being not uncommon, and they are sometimes moved hundreds of miles, being handled several times, before being tendered for ocean transportation. Under these conditions, goods sometimes sustain damage before ocean shipment and disputes arise as to the apparent condition of the goods and as to the number of packages shipped. In such instances, it may be impossible to remedy the superficial appearance of the packages without returning them to their place of origin or repacking them at great expense, and it may be impossible to verify the marks and number of packages without discharging and reloading thousands of them.

In addition, the use of second-hand containers and unfamiliar new containers gives rise to debate. The use of old, frequently stained, burlap wrappings and the difficulties attending the introduction of paper cartons instead of wooden cases for ocean transportation are familiar illustrations.

Discharging and reloading cargo for recounting, returning goods to their place of origin for repacking, and, often, replacement of slightly damaged goods involve substantial commercial losses and

delays, sometimes with little or no commercial gain. It is commercially desirable for such goods to move without delay. The requirement of clean bills of lading obstructs the movement of such goods and, under commercial pressure, some shippers and carriers at times have resorted to the issuance of falsely clean bills of lading as a detour around this obstacle. This practice is generally condemned and is criminal in many countries.

It appears that bankers are unwilling to take the responsibility of deciding whether minor damage to a particular shipment is or is not such as to require its rejection. Bankers deal only with papers and do not see the goods. On the other hand, carriers have in the past been making such decisions in deciding whether or not to issue a clean bill of lading.

Other objections to letter of credit terms permitting payment against claused bills of lading are the difficulty of assessing the amount by which the payment should be reduced and the difficulty which a buyer has in obtaining redress against a shipper in a distant land, as contrasted to the readily available remedy against the carrier under its bill of lading. It is not to be expected that changes can be made in the present letter of credit requirements unless, in exchange therefor, a substantially equivalent, commercially feasible, aboveboard and legally proper commercial practice can be devised.

The foregoing considerations led to the formulation of a proposal by the United States Delegation for discussion at the Madrid Conference that the International Chamber of Commerce amend its "Uniform Customs and Practice for Commercial Documentary Credits" to permit the negotiation of claused bills of lading against full payment for the goods if accompanied by a letter of indemnity, executed by the shipper and the carrier, to indemnify the consignee for any loss or damage indicated by the clause inserted in the bill of lading. A copy of this proposal is attached hereto, marked Exhibit A.

Three members of the Committee consider that the suggestion has disadvantages serious enough to require rejection altogether of any supplemental indemnity proposal including a provision for indemnity by a carrier. The other five members of the Committee consider that the advantages outweigh the disadvantages and that the amended proposal hereinafter mentioned should be given serious consideration by the Association.

The members of your Committee favoring consideration of the credit arrangement described in the suggested Resolution claim it would have the following advantages :

(1) A shipment as to which there was slight damage or dispute could be carried promptly without involving any element of fraud.

(2) The combination of claused bill of lading and supplemental indemnity would give the consignee the equivalent of the rights of the innocent holder for value of a clean bill of lading.

(3) The carrier would have a legally enforceable right against the shipper and, if it wished to do so, could obtain an enforceable bank guaranty or other security as a condition of its executing the supplemental indemnity.

(4) As there would no longer be any legitimate reason for a shipper to ask a carrier for a clean bill of lading for damaged goods, carriers would have an additional ground for resisting requests.

The members of your Committee opposing the suggestion claim that the credit arrangement described in the suggested Resolution would have the following disadvantages :

(1) The carrier, although it is under no liability whatever therefor, undertakes to pay to the bill of lading holder the amount of loss or damage noted on the bill of lading, namely for shortshipment and preshipment damage. This would include even cases where the bill of lading purchaser had advance knowledge of the preshipment deficiency.

(2) There would be serious risk that when goods were found damaged during ocean transportation by a cause for which the carrier is not liable, the carrier would be held to have the burden of segregating the preshipment damage from the damage done during transportation. If the carrier were unable to carry this burden as to the consignee, it would have a liability which would not properly be its own and as against the shipper could not prove its damages under the indemnity.

(3) The procedure by which the carrier may enter indemnity agreements for the benefit of shippers must be subject to

the pressures of traffic and will inevitably produce preferential treatment of certain substantial shippers, depending upon their known capacities or tendencies to respond or meet their obligations under their indemnity agreements.

(4) The credit arrangement, which is suggested as an expedient, would be a partial solution at best; requiring the agreement of the shipper, consignee and carrier, its application could be prevented by any of these parties.

(5) It would raise special problems as to insurance, which would not be covered by the carrier's ordinary insurance arrangements, and which conceivably could leave the carrier at least partially uninsured.

(6) Dispute among the carrier's underwriters as to the liability of each under their respective policies may place an undue burden on the carrier in recovering proper indemnity.

(7) The carrier would be saddled not only with the expense of suing the shipper on the indemnity in a distant land but also with the burden of proving that it was legally liable to the bill of lading holder. Such burden usually would be insuperable and thus the right of indemnity against the shipper would usually be illusory.

(8) There is question whether there would be jurisdiction in admiralty of a suit against the carrier on the indemnity. If there should be no admiralty jurisdiction, the carrier could be faced with a suit in admiralty for such loss or damage as may have occurred on the voyage and a suit at law on the indemnity.

(9) It is reasonable to assume that the very language of the notations or reservations will raise controversy as to what is covered or intended.

(10) It is reasonable to assume that notations or reservations will be made covering apparent conditions which as of the present time are not considered indications of bad order. If so, the carrier would be undertaking to pay for losses for which it would not be liable if a clean bill of lading were issued.

The proposed Resolution was circulated to the Conference by the United States Delegation as a basis for discussion by the Confer-

ence and was well received, although naturally there was an almost unanimous feeling that the proposal would require very careful study. Because of the limitations of our Articles of Association and By-laws, the Resolution could not be put forward on behalf of our Association even as a proposal for discussion and for this reason the Bill of Lading Commission felt that it could not take any action in connection with it. Consequently, the Bill of Lading Commission proposed a Resolution, of which a copy is attached hereto, which was adopted by the Conference, directing the Bureau Permanent to circulate the First Draft Convention to the National Associations and calling on the National Associations to submit to the Bureau Permanent not later than June 30, 1956 such other proposals as they may formulate on the topic.

The Madrid proposal was considered by a committee of New York bankers which deals with foreign credit matters and your Committee was informed that the bankers would be unalterably opposed to that proposal because it would make the proposed new practice automatically effective unless the buyer specifically provided against it in the letter of credit and also because the proposal did not give to the banks sufficient protection against liability.

Your Committee felt that in a number of respects the Madrid proposal was somewhat vaguely phrased and that the proposed practice, if adopted, should not be limited to c.i.f. transactions.

Attached hereto, marked "Exhibit B", is a revised suggestion for study by the Association.

While it seems illogical for a carrier to enter into an undertaking to a consignee in respect to damage or shortage occurring before shipment, those of your Committee favoring consideration of the suggestion feel that, unless such an undertaking were included in the proposal, so that a claused bill of lading together with its supplemental indemnity would be the equivalent of a clean bill of lading, the suggestion would not be acceptable to consignees. The other members of your Committee are of the opinion that such indemnification by carriers is so illogical and so far removed from any proper carrier function that shippers and consignees should find another solution to that part of the problem in cases where consignees are not willing to rely on the financial responsibility of the shippers.

The members of your Committee favoring consideration of the proposal will move at the Annual Meeting of our Association on May 18, 1956 that our Association recommend the attached revised suggested Resolution for favorable action by the Comité Maritime International.

In view of the time limitation imposed by the resolution of the Comité, definite action will have to be taken at our Annual Meeting.

Preparatory to the Annual Meeting, your Committee would appreciate receiving comments of the members regarding the suggested Resolution, so that such comments can be summarized in your Committee's report to be presented at the Annual Meeting and, if it appears desirable to do so, a revision of the suggested Resolution, or a new suggestion, can be prepared. Such comments should be submitted in writing to the chairman as soon as possible and in any event not later than April 16, 1956.

Respectfully submitted,

HARRY L. HAEHL, JR.
WILLIAM L. HAMM
HERBERT M. LORD
HENRY J. READ
GREGORY S. RIVKINS
MICHAEL F. WHALEN
JOHN W. R. ZISGEN
JOHN C. MOORE, *Chairman*

March 6, 1956.

FIRST DRAFT CONVENTION

The High Contracting Parties,

Having recognized that the unimpaired credit of negotiable bills of lading in respect to their recitations as to the number of packages or pieces, the quantity or weight, and the apparent order and condition of the goods is essential to international commerce and that it is necessary to protect this interest against any abuse in practice by the issuance of bills of lading containing false statements in any of those respects, have decided to conclude a convention for this purpose, and thereto have agreed as follows:

Article I

Any person who, knowingly or with intent to defraud, makes or issues or aids in making or issuing or procures or aids in procuring the making or issuing of, or negotiates or transfers for value any negotiable bill of lading for the transportation of goods by sea from a port or place in a country which has ratified this convention to a port or place in another country, which bill of lading contains a false statement as to the number of packages or pieces, the quantity or weight, or the apparent condition of the goods, shall be guilty of a penal offense.

Article II

Any person who, knowingly or with intent to defraud, requests a carrier or a carrier's representative to make or issue a negotiable bill of lading containing a false statement as to the number of packages or pieces, the quantity or weight, or the apparent condition of the goods and any person who procures or causes another to make such a request shall, whether or not the request is complied with, likewise be guilty of a penal offense.

Article III

The High Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of any of the penal offenses defined in the present Convention.

EXHIBIT A

INTERNATIONAL MARITIME COMMITTEE

**The United States Delegation Proposes, as a Basis for
Discussion by the Conference, the Attached Resolution**

Madrid, September 19, 1955

**International Maritime Committee Resolution Regarding
Bills of Lading and Letters of Indemnity**

THE CONFERENCE bearing in mind that the unimpaired credit of the Bill of Lading as a document of title to goods has become essential to international commerce,

RECOGNIZING (1) that many types of goods are normally shipped with external appearances which give rise to dispute as to whether the goods are in apparent good order and condition, (2) that in the course of handling before shipment on ocean vessels small damages frequently occur and (3) that after completion of loading honest disputes may occur as to the number of packages and other particulars, which disputes frequently cannot be resolved without expenses and delays which would unduly burden the flow of commerce,

RECOGNIZING, THEREFORE, that there are many circumstances which it is not correct to issue unclausd bills of lading,

RECOGNIZING, MOREOVER, that the requirement of unclausd bills of lading as a necessary credit document in connection with c.i.f. sales has, as a matter of commercial necessity, given rise to the artificial practice of issuing unclausd bills of lading against letters of indemnity given by shippers, without which practice international commerce would be seriously hampered unless the rigid requirement of unclausd bills of lading is relaxed,

RECOGNIZING, ALSO, that in relying on unclausd bills of lading in connection with credit transactions, Banks rely not merely on the description of the goods contained in such bills of lading, but, more importantly, on the legal obligation of the carriers to make good

any inaccuracies in such description, and most of all on the legal obligation of the shippers to ship goods complying with the terms of the contract of sale, and

RECOGNIZING, FINALLY, that the practice of issuing unclausal bills of lading against letters of indemnity in commercially justified cases has increasingly led to the use of the same device in unjustifiable cases, resulting in serious frauds, an evil which causes losses to consignees, underwriters and shipowners and which must be stamped out by all possible means, but that it is not feasible by legislation to distinguish between justifiable and unjustifiable cases,

PUTS ON RECORD the unanimous agreement of the meeting that it is necessary to change the credit requirements of c.i.f. transactions to deal correctly with the needs of modern commerce in such a way as to avoid the necessity of issuing letters of indemnity against unclausal bills of lading in circumstances hitherto considered commercially justifiable and thus making feasible the prevention of this practice in all circumstances;

RESPECTFULLY URGES the International Chamber of Commerce to amend Paragraph 1 of Article 18 of its "Uniform Customs and Practice for Commercial Documentary Credits" to read as follows:

"Shipping documents bearing reservations as to the apparent "good order or condition of the goods or the packaging" may "be refused except in the case of Sea or Ocean bills of lading "which shall be accepted if accompanied by a 'Shipper's Supplemental Indemnity' in the form attached hereto (so made "out as to give indemnity against the reservations contained in "such bill of lading), duly executed by the shipper and by the "carrier".

PROPOSES for the consideration of the International Chamber of Commerce the form of Shipper's Supplemental Indemnity attached hereto,

RESPECTFULLY POINTS OUT to the International Chamber of Commerce that such a combination of clausal bill of lading and supplemental indemnity would give security fully equal to an unclausal bill of lading and avoid the difficulties caused by the present practice,

INSTRUCTS the Bureau Permanent to transmit copies of these proceedings to the International Chamber of Commerce, to follow what is done and to keep the members of the International Maritime Committee informed of all developments.

PROPOSED FORM OF
SHIPPER'S SUPPLEMENTAL INDEMNITY

/s B/L No.

Dated at on

Letter of Credit No.

The above mentioned bill of lading contains the following reservation relating to the goods:

(quote the text of the reservation)

Notwithstanding the above-quoted reservation, the undersigned shipper considers that it is in the best interest of the buyer that the goods be delivered under the applicable contract of sale and paid for under the above letter of credit because at the time of shipment:

(strike out inapplicable words)

(a) The condition of the goods complied with the requirements of the contract of sale and the reservation is due to a difference of opinion between the carrier and the shipper.

(b) The (i) marks, (ii) number, (iii) quantity and (iv) weight of the goods were/was in fact as stated in the bill of lading apart from the reservation and the reservation is due to a difference of opinion between the carrier and the shipper.

(c) The discrepancy was negligible and could not be remedied without disproportionate (i) expense, (ii) delay to the goods; (iii) delay to the vessel at the expense of the goods.

Accordingly, in consideration of the acceptance of this undertaking to supplement the above-mentioned bill of lading, the shipper agrees fully to indemnify the consignee or endorsee of said bill of lading in respect to all loss, damages and expenses arising or resulting from the acceptance of the bill of lading clauséd as quoted above.

In consideration of the acceptance of this undertaking to supplement the above-mentioned bill of lading, the carrier hereby under-

takes fully to indemnify the consignee or endorsee of said bill of lading in respect to all loss, damages and expenses arising or resulting from the acceptance of the bill of lading claused as quoted above, reserving its right to a like indemnification from the shipper.

In consideration of the carrier's giving the undertaking set forth above, the shipper hereby undertakes fully to indemnify the carrier in respect to all loss, damages and expenses arising or resulting from the giving of such undertaking.

Shipper

Carrier

MARGINAL CLAUSES

Resolution Adopted by the Comité Maritime International at Madrid, Spain on September 24, 1955

The Conference, having heard the Report made by the President of the International Commission on Marginal Clauses, requests the Administrative Council:

- (i) to circulate as soon as possible among the National Associations:
 - (a) the text of the First Draft Convention prepared by the Maritime Law Association of the United States, annexed to a Note from the said Association dated New York 28th June, 1955.
 - (b) Such other proposals on the topic under review as may be submitted to the Administrative Council by any National Association on or before the 30th June, 1956.
- (ii) to suggest to the National Associations that they report on the above mentioned First Draft Convention and proposals to the Administrative Council on or before the 31st December, 1956.
- (iii) to transmit the above mentioned Draft, proposals and reports to the International Commission for further study for the purpose of reporting again to the Conference.

EXHIBIT B

International Maritime Committee Resolution Regarding Bills of Lading and Letters of Indemnity

1. THE CONFERENCE, bearing in mind that the unimpaired credit of the Bill of Lading as a document of title to goods has become essential to international commerce,

2. RECOGNIZING (1) that many types of goods are normally shipped with external appearances which give rise to dispute as to whether the goods are in apparent good order and condition, (2) that in the course of handling before shipment on ocean vessels small damages frequently occur and (3) that after completion of loading honest disputes may occur as to the number of packages and other particulars, which disputes frequently cannot be resolved without expenses and delays which would unduly burden the flow of commerce,

3. RECOGNIZING, THEREFORE, that there are many circumstances which it is not correct to issue unclausal bills of lading,

4. RECOGNIZING, MOREOVER, that the requirement of unclausal bills of lading as a necessary credit document in connection with international sales of goods has, as a matter of commercial necessity, given rise to the artificial practice of issuing unclausal bills of lading against letters of indemnity given by shippers, without which practice international commerce would be seriously hampered unless the rigid requirement of unclausal bills of lading is relaxed,

5. RECOGNIZING, ALSO, that in relying on unclausal bills of lading in connection with credit transactions, Banks rely not merely on the description of the goods contained in such bills of lading, but, more importantly, on the legal obligation of the carriers to make good any inaccuracies in such description, and most of all on the legal obligation of the shippers to ship goods complying with the terms of the contract of sale, and

6. RECOGNIZING, FINALLY, that the practice of issuing unclausal bills of lading against letters of indemnity in commercially justified

cases has increasingly led to the use of the same device in unjustifiable cases, resulting in serious frauds, an evil which causes losses to consignees, underwriters and shipowners and which must be stamped out by all possible means, but that it is not feasible by legislation to distinguish between justifiable and unjustifiable cases,

7. PUTS ON RECORD the unanimous agreement of the meeting that it is necessary to change the credit requirements of international sales to deal correctly with the needs of modern commerce in such a way as to avoid the necessity of issuing letters of indemnity against unclaused bills of lading in circumstances hitherto considered commercially justifiable and thus making feasible the prevention of this practice in all circumstances;

8. RESPECTFULLY URGES the International Chamber of Commerce to add to its "Uniform Customs and Practice for Commercial Documentary Credits" a new Article 18 A to read as follows:

"ARTICLE 18 A. If the credit contains the provision, 'shipper's supplemental indemnity acceptable', shipping documents bearing reservations as to the apparent good order or condition of the goods or the packaging may be refused except in the case of Sea or Ocean bills of lading which shall be accepted if accompanied by a 'Shipper's Supplemental Indemnity' in the form attached hereto (so made out as to give indemnity against the reservations contained in such bill of lading), duly executed by the shipper and by the carrier."

9. SUGGESTS to the International Chamber of Commerce that, concomitant with the adoption of the proposed Article 18 A, Article 11 of its "Uniform Customs and Practice for Commercial Documentary Credits" be amended by the insertion of "shippers" before "carriers" in the next to last line of said Article.

10. PROPOSES for the consideration of the International Chamber of Commerce the form of Shipper's Supplemental Indemnity attached hereto,

11. RESPECTFULLY POINTS OUT to the International Chamber of Commerce that such a combination of claused bill of lading and supplemental indemnity would give security fully equal to an un-

clauséd bill of lading and avoid the difficulties caused by the present practice,

12. INSTRUCTS the Bureau Permanent to transmit copies of these proceedings to the International Chamber of Commerce and to all other organizations which publish definitions of trade terms, to follow what is done and to keep the members of the International Maritime Committee informed of all developments.

PROPOSED FORM OF
SHIPPER'S SUPPLEMENTAL INDEMNITY

/s B/L No.
Dated at on
Letter of Credit No.

The above mentioned bill of lading contains the following reservation relating to the goods:

(quote the text of the reservation)

Notwithstanding the above-quoted reservation, the undersigned shipper considers that it is in the best interest of the buyer that the goods be delivered under the applicable contract of sale and paid for under the above letter of credit because at the time of shipment:

(strike out inapplicable words)

(a) The condition of the goods complied with the requirements of the contract of sale and the reservation is due to a difference of opinion between the carrier and the shipper.

(b) The (i) leading marks, (ii) number, (iii) quantity and (iv) weight of the goods were/was in fact as stated in the bill of lading without the reservation and the reservation is due to a difference of opinion between the carrier and the shipper.

(c) The damage giving rise to the reservation was negligible and could not be remedied without disproportionate (i) expense, (ii) delay to the goods, (iii) delay to the vessel.

Accordingly, in consideration of the acceptance of this undertaking to supplement the above-mentioned bill of lading, the shipper agrees

fully to indemnify the consignee, endorsee or holder of said bill of lading in respect to all loss, damages and expenses arising or resulting from the goods being damaged, short, slack or differently marked at the time of shipment, to the extent that such damage, shortage, or slackage or difference in marks is indicated by the above-quoted reservation.

In consideration of the acceptance of this undertaking to supplement the above-mentioned bill of lading, the carrier hereby undertakes fully to indemnify the consignee, endorsee or holder of said bill of lading in respect to all loss, damages and expenses arising or resulting from the goods being damaged, short, slack or differently marked at the time of shipment to the extent that such damage, shortage, or slackage or difference in marks is indicated by the above-quoted reservation, reserving its right to a like indemnification from the shipper.

In consideration of the carrier's giving the undertaking set forth above, the shipper hereby represents to the carrier that under the terms of the above letter of credit the use of a supplemental indemnity in this form is authorized by the buyer and undertakes fully to indemnify the carrier in respect to all loss, damages and expenses arising or resulting from the giving of such undertaking.

Shipper

Carrier