Consequences of a Reservation in the Bill of Lading*

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1) Introduction

In carriage of goods by sea industry it is wildly accepted that bill of lading plays very important roles not only its role as a document evidencing contract of carriage but also as a document containing statement of fact that are useful for parties involved in a contract particularly statements as to the apparent order and condition of the goods and the particulars of the goods. In practical approach the carrier do have a tool to modify or exclude the legal effect of the statement in the bill of lading provides in laws to the extent that it is allowed and it reflect the genuine condition of the goods received from the shipper. Such a tool is a reservation inserted in the bill of lading. A reservation also plays very important roles in this respect. In the sense that a reservation can even destroy evidentiary value of a statement as to the apparent order and condition of the goods or the leading marks, number, quantity or weight of the goods stated in the bill of lading. This therefore gives rise to the differentiation of the implementation of the applicable laws.

There are three international conventions and one statue that shall be considered and discussed in this dissertation. The conventions and a statute are the Hague Rules, Hague-Visby Rules, Hamburg Rules and the Carriage of Goods by Sea Act B.E. 2534 of Thailand (the Thai COGSA).

The discussion shall be the consequences of having or not having a reservation in the bill of lading. These shall be considered in term of evidentiary value, in other words the burden of proof whether can be shifted from a carrier to the claimant or not as a result of a reservation.

It is important to note that each of the Conventions and Act has it own regime or framework generating in it. It is not necessarily that the same result should be reached from the particular consideration. However it is expected in this dissertation that business efficacy will be taken into account when considering and interpreting each provisions. It is expected also that useful and practicable results can be concluded in this dissertation particularly in respect of the Thai COGSA.

2) Bill of lading in respect of goods received

The functions of the bill of lading are evidence of title on the goods, evidence of the contract of carriage of goods by sea, and a receipt of the goods. For the purpose of this dissertation, therefore, a bill of lading shall be considered and discussed solely in relation to its role, as a receipt of goods and its impact on the rights and duties of the carrier and its subsequent role in term of evidentiary value.

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2.1) Receipt as to the apparent order and condition.

The bill of lading plays important roles in the contract of carriage of goods by sea, the role it plays as a receipt is considered to be the most important role of the bill of lading[1]. Firstly the bill of lading issued by the carrier states the apparent order and condition of the goods received from the shipper or his agent. Secondly the bill of lading issued by the carrier contains a statement as to leading marks, number, quantity or weight of the goods as furnished by the shipper or his agent. We shall now consider its first characteristic.

The term *'apparent order and condition of the goods'* is provided in the Hague Rules, article 3 paragraph 3 (c) and in the Hamburg Rules article 15 paragraph 1 (b) and 16 paragraph 2 but only stated '*the apparent condition of the goods*'.

Article 3 paragraph 3 (c) of the Hague Rules provides that:

"On demand of the shipper, the carrier shall issue to the shipper a bill of lading showing:

(c)The apparent order and condition of the goods".

Article 15 paragraph 1 (b) of the Hamburg Rules provides that:

"The bill of lading must include, inter alia, the following particulars:

(b) The apparent condition of the goods".

In practice, the carriers or the shipowners may state in the bill of lading a statement such as '*shipped in good order and condition*'. This means that apparently, and so far as met by the eyes and externally the goods were placed in good order on board the ship, but this does not extend to the quality of the goods that was not apparent upon reasonable inspection having regard to the circumstances of loading[2]. However this explanation can be referred only to non-containerized goods, for nowadays goods are increasingly transported in containers. Therefore such statements are only of limited value because they refer merely to outward apparent condition of the container or other packaging, and not to the condition of the goods inside[3]. If the bill of lading contains the statement produced by the shipper it is the '*clean bill of lading*' containing an unqualified statement.

In the common law context, the statement '*in apparent good order and condition*', if inserted in the bill of lading by the carrier, is an '*estoppel*' by his conduct to preclude him from denying the existence of the statement of fact which he has formerly asserted and by virtue of which he has willfully caused another, for example, consignee or third person, to believe the existence of a certain state of things and induced him to act on that belief so as to change his own previous position. The carrier is excluded from asserting against the consignee or the third person a different state of things as existing at the same time and whatever the carrier's real intention may be, he is deemed to act willfully if the carrier so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he

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[1] Leo D'Arcy. Carole Murray and Barbara Cleave, Schmitthoff's Export Trade, 2000, p. 284-285.

[2] Ibid. p. 285.

[3] John F Wilson. Carriage of goods by Sea, 2001, p. 128.

should act upon it and the estoppel has been variously treated as conclusive presumption of law, as solemn admissions and as conclusive evidence [4].

However the estoppel principle works only when the consignee relies on the statement. The extent of the meaning of the word '*rely*' was stated by Scrutton L.J. in Silver v. Ocean Steamship Co[5]:

"The mercantile importance of a clean bill is so obvious and important that the fact that the consignee took the bill which in fact is clean, without objection, is quite sufficient evidence that he relied on it".

In the CMI Draft Instrument on Transport Law prepared by the Committee Maritime International Sub Committee on the Uniformity of the Carriage of Goods By Sea, in article

8.2.1 (d) provides that[6]:

A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment.

And in article 8.2.2 provides the meaning of the '*apparent order and condition*' that[7]:

"It refers to the order and condition of the goods based on (a) a reasonable external inspection of the goods as packed at the time the shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record".

The provisions seem to comply with the actual practice of carriers. The provisions make it clear that the term *'apparent order and condition of the goods*' means order and condition at the time the carrier or a performing party receives them for shipment. Therefore, this is consistent with the common law concept in that the carrier who issues a clean bill of lading does not promise to deliver the goods in apparent good order and condition to the consignee, and may prove that the goods were damaged subsequent to the issue of the bill of lading by an excepted peril. But he is prevented from denying that he received the goods in apparent good order and condition and cannot escape liability by alleging that an excepted peril such as insufficient packing existed prior to the issue of the clean bill[8]

The provisions in CMI Draft Instrument make it clear that, before the statement of the apparent order and condition of the goods is inserted in the bill of lading, the carrier himself acknowledges the order and condition of the goods by inspecting and if he should learn that the goods, which can be reasonably external inspection, for example, motor car or steel, for some reasons had been damaged or rust, then he should clause the bill of lading so that the real external description or condition of the goods can be recognized by the consignee or third person. The statement of the apparent order and condition of the goods functions in relation to damage to the goods if arrived in damaged condition in the sense that the carrier received the goods from the shipper without any damage but the damage took place after delivering to the carrier.

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[4] John Huxley Buzzard, Richard May and M.N. Howard. Phipson on Evidence, 1976, p. 912,916.

[5] [1930], 1 K.B.416.

[6] CMI Draft Instrument, 2001, p.41.

[7] Ibid. p.42.

[8] Leo D' Arcy, Carole Murray and Barbara Cleave. op cit, p.286.

It should be noted that the above mentioned is different from statements concerning marks, number, quantity or weight of the goods in the sense that the carrier has to state marks, number, quantity or weight in the bill of lading according to the information as furnished by the shipper. Whereas the carrier himself has to inspect and state the apparent order and condition of the goods as obtained from such inspection. Therefore with regard to liability of the shipper in respect of the goods shipped on board the ship it could not be considered that the shipper is deemed to have guaranteed to or indemnified the carrier for loss of or damage to the ship due to the statement of the apparent order and condition of the goods because such statement was not furnished by the shipper as provide in article 3 paragraph 5 of the Hague Rules and article 17 paragraph 1 of the Hamburg Rules.

2.2) Receipt as to marks, number, quantity and weight.

Another role of the bill of lading that shall be considered is the role in respect of receipt as to marks, number, quantity and weight. For the apparent order and condition of the goods, the carrier has the duty to examine or inspect the external state of the goods. Whereas the statement stated by the carrier in the bill of lading in relation to marks, number, quantity or weight is given by the shipper or his agent. The functions of marks, number, quantity or weight relate to any claim for the loss of or damage to the goods at the port of discharge.

It is the duty of the carrier to show the particulars in the bill of lading, the Hague Rules provide in article 3 paragraph 3 (a) and (b) that:

" After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) *The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage*;

(b) Either the number of the packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper".

And the Hamburg Rules provide in article 15 paragraph 1 (a) that:

"The bill of lading must include, inter alia, the following particular:

(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper".

When these two provisions are compared it can be seen that there is a slight difference between them. That is to say the Hague Rules require the carrier to show leading marks or number or quantity or weight. Whereas the Hamburg Rules require the carrier to show leading marks or the number and the quantity or weight of the goods.

Information with regard to marks, number, quantity or weight of the goods is furnished to the carrier by the shipper to prepare the bill of lading. However in practice it has not meant that

the shipper plays no part in actually preparing such bill of lading[9]. In addition the information about the goods in the bill of lading can be used by the carrier in calculating the correct freight[10]. These marks can refer to the type of liquid in a container or the type of fruit packed in a crate[11]

With regard to the marks, they are necessary to identify the goods, as it is usually that the goods are shipped on board the ship together with other goods. This is adopted from common law principles in that such marks have to be attached to the goods as essential to their description[12] and not merely attached for their own bookkeeping purposes as the marks were not material to the identity of the goods.[13]

There is a difference between the Hague Rules and the Hamburg Rules in that article 15 paragraph 1 of the latter includes a word '*must*' while article 3 paragraph 3 (a) and (b) of the former do not include such a word. Therefore it is explained that there is no obligation on the shipowner under the Hague Rules to acknowledge in the bill of lading any quality marks attached to the goods[14] except where so demand by the shipper[15]

With regard to number of packages or pieces, quantity and weight of the goods, it can actually be said that number, quantity or weight can also be referred to quantity of the goods. The same is also true with regard to marks; the carrier is under no obligation under the Hague Rules to state the quantity of the goods unless it is demanded by the shipper.

3) Reservation in a bill of lading

Another function of the bill of lading in this respect is it is evidence of the marks, number, quantity or weight of the goods received by the carrier or his agent. The statement as to the particulars supplied by the shipper or his agent. This information may be correct or incorrect after the carrier has a chance to inspect or examine, or sometimes the carrier has no chance to do so, as in the case of containerized goods, therefore, the carrier has no idea as to whether the information is correct.

The CMI Draft Instrument explains the reality concerning reservation in practice that[16]:

"...Although current law generally permits the carrier to protect itself by omitting from the contract particulars a description of the goods that it is unable to verify, this protection is essentially meaningless in practice. Even if the carrier is unable to verify the description, the typical shipper still requires a transport document or electronic record describing the goods in order to receive payment under the sales contract. Commercial pressures therefore deny the carrier the one form of protection that is clearly recognized under current law. Qualifying clauses represent the carrier's attempt to regain its protection".

In this regard, the Hamburg Rules afford the carrier a tool to be inserted in a bill of lading called *'reservation*'.

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[9] Nicholas Gaskell. Bill of Lading: Law and Contracts, 2000, p. 209.
[10] Ibid. p. 209.
[11] John F Wilson. op cit. p. 133.
[12] Ibid. p. 132.
[13] Parsons v. New Zealand Shipping Co. [1901] 1 K.B. 548.
[14] John F Wilson. op. cit. p. 133.
[15] Article 3 para. 3.
[16] CMI. op. cit. p. 45.

Although the Hamburg Rules provide the carrier a qualified statement, *reservation*, to be inserted in a bill of lading, but the Rules have not provided a definition of the reservation. So before considering further, it is proposed to define such term.

An international convention that provides the definition of reservation, which in my opinion can be taken in to account for the purposes of comparison is the Vienna Convention on the Law of Treaties, 1969. In article 2 paragraph 1 (d) of the Convention provides that:

"Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect to certain provision of the treaty in their application to that State".

The definition of a reservation under the Vienna Convention on the Law of Treaties, 1969 can be said to consist of:

- Unilateral statement
- Made by a State
- In the situation where it has to sign ,*etc.* a treaty
- To exclude or to modify the legal effect of the treaty.

We are now to apply the above elements into the following and to the extent that appropriates to the functions and nature of a bill of lading:

- Unilateral statement
- Made by a carrier
- With appropriate clause
- In specific circumstances
- To exclude or to modify the legal effect of the bill of lading.

These shall be considered below. However the first four elements shall be simultaneously considered together with the elements of good faith and extent to which a reservation operates in the bill of lading. The last element shall be considered in chapter four of this dissertation.

3.1) A unilateral statement made by a carrier.

In practice, the carrier states in the bill of lading information as to quantity and quality of the goods received from the shipper, for which he may have two choices. Firstly he may state such statement the same as provided by the shipper. Secondly he may insert a reservation or qualified statement in the bill of lading. At common law, by virtue of freedom of contract the carrier can destroy evidentiary effect of a representation quantity in the bill of lading by a suitable endorsement, such as *'weight and quantity unknown', 'shipper load and count', 'said to weigh 50 tones', 'said to contain', etc.*[17] In the Hague Rules, if applicable, article 3 paragraph 3 provides that:

"*Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable*

[17] John F Wilson. op.cit. p.126.

grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking".

The provision entitles the carrier in defensive or passive manner; it could mean that the carrier, where the Hague Rules are applicable, could have the right to state nothing in the bill of lading in respect of quality or quantity of the goods. This may lead to doubt that the carrier in the Hague Rules is not allowed to insert a reservation in the bill of lading. And if the reservation is inserted, it may contradict article 3 paragraph 8 because it could mean that the reservation relieves or lessens the carrier from liability for loss of or damage to the goods as provided in this article or this Convention respectively. However in *The Mata K*[18] Clarke J considered that a '*weight unknown*' clause was not a clause… relieving the carrier from liability for loss or damage to or in connection with goods within article 3 paragraph 8 the liability must refer to the primary liabilities under article 3 paragraph 1 and paragraph 2.[19]

Although, in my opinion, the reservation under the Hague Rules has not been expressly mentioned in article 3 paragraph 3 to afford the carrier a duty to insert a reservation as directly mentioned in the Hamburg Rules article 16 paragraph 1 as to marks, number, quantity and weight, but in article 7 of the Hague Rules provides that:

"*Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea".*

This means that the Hague Rules also allow the carrier to insert a reservation.

The Hamburg Rules though provide in article 16 paragraph 1 a reservation to be inserted. But this provision must be read together with article 23 that provides that:

"*Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention…"*

Furthermore the Hamburg Rules require the carrier to insert in the bill of lading a reservation while the Hague Rules require only that the suspected particulars need not be stated where the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking[20]. However in practice the shippers prepare most of the bills of lading and present to the carrier for signature, therefore the carriers customarily insert a reservation in the bills of lading[21].

The symbolic nature of the bill of lading in common law contributed to the idea that the statements in the bill of lading were not contractual, but merely recorded what the bill of lading represented.[22] Therefore, the fact that the particulars were declared by the shipper was obviously not thought to be a reservation by itself.[23]

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[18] [1998] 2 Lloyd's Rep. 614,619.

[19] Nicholas Gaskell. op.cit. 237-238.

[20] Article 3 para 3 second part.

[21] The UNCTAD. Report on the Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention, 1991, p.130.

[22] Michael D. Bools. The bill of lading: A Document of Title to Goods an Anglo-American Comparison, 1997, p. 119.

[23] Nicholas Gaskell. op cit. p. 234.

3.2) Appropriate clause.

We shall see that reservations, such as, '*said to contain, weight unknown, shipper weight load and count, said to weigh, bagged grain shipped in apparent good order and condition, some bags were wet and torn'*[24], are clauses produced by the sole discretion of the carrier in the situation where he has reasonable grounds to suspect that the information furnished by the shipper or his agent does not accurately represent the goods delivered to him. However the statement inserted by the carrier must contain a qualification concerning the order or condition of the goods. Therefore the effect of the words *'in apparent good order and condition'* is not nullified by the addition of *'condition unknown*', *'contents unknown*' or *'quality unknown*'[25]. Furthermore, a clause which does not refer to the state of the goods when loaded but refers to the subsequent fate of the goods and their state when discharged does not make the bill of lading a claused bill[26]. Hence in *The Galatia* [27] the clause in the bill of lading stated '*cargo covered by this bill of lading has been discharged... damage by fire and/or water used to extinguish fire for which general average declared'* did not affect the bill of lading.

Under the UK Carriage of Goods by Sea Act 1971 section 3 paragraph 3, the shipper is entitled to demand a clear statement in the bill of lading as to some of the particulars that the carrier may be in doubt and the carrier can not insert a vague statement, such as, '*unknown'*. Such qualified statement is ineffective in the law[28]. Under the Hague Rules article 3 paragraph 3 and the Hamburg Rules article 14 paragraph 1 also provide the same as the UK Act, and under the Thai COGSA section 12 and 18 provide also that a bill of lading issued on demand of the shipper. This may be brought to the same construction that under the Thai COGSA the carrier could not insert a qualified statement with the word '*unknown*' in order to be effective as a reservation.

3.3) Specific circumstances.

In relation to the principle of good faith, the carrier is considered to have a right of insertion in the bill of lading of a reservation, when he has reasonable grounds to suspect that the information provided by the shipper is incorrect, or when he has no reasonable means of checking the goods received. In this regard, the Hague Rules article 3 paragraph 3 second part, Hamburg Rules article 16 paragraph 1 and the Thai COGSA in respect of the particulars of the goods provide two circumstances for the reservation to be inserted. First when the carrier has reasonable grounds to suspect that the goods do not accurately represent the goods received. Second when the carrier has no reasonable means to check the goods. Therefore reservation inserted by the carrier must be in accordance with these requirements in one way or another. However the Conventions provide nothing concerning duty of the carrier to check the information that he suspected not accurately. This, therefore, in practice defers to the carrier's discretion to consider whether he should or should not insert a reservation.

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[24] Koji Takahashi. Bill of Lading as a Receipt, p. 2. In http://tls.bham.ac.uk/koji/international – trade/bill-0f-lading-as-receopt.htm.

[25] Stewart C. Boyd, Andrew S. Burrows and David Foxton. Scrutton on Charterparties and Bill of Lading, 1996, p. 120.

[26] Leo D' Arcy, Carole Murray and Babara Cleave. op cit., p.278.

[27] [1980] 1 W.L.R. 495.CA.

[28] Leo D' Arcy, Carole Murray and Barbara Cleave. op cit., p.287.

3.4) Good faith.

This element is a general principle required by laws in every matter as the International Court of Justice stated in the Nuclear Tests case[29] that:

"…One of the basic principle governing the creation and performance of legal obligations, whatever their sources, is the principle of good faith…"

Particularly in the civil law system such as in the Thai Civil and Commercial Code section 5 provides that:

"*Every person must, in the exercise of his rights and in the performance of his obligations, act in good faith".*

Therefore in the CMI Draft Instrument article 8.3.1 provides that[30]:

"The carrier if he acts in good faith when issuing a transport document or an electronic record may qualify the information regarding leading marks, number, quantity or weight."

Although this requirement is not found in the Hague Rules and Hamburg Rules and the Thai COGSA, however, it can be said that it is also a requirement for reservation made under the said laws. The reason for such a conclusion is that when a reservation is inserted in the bill of lading the carrier may escape from liabilities for loss of or damage to the goods delivered to the consignee or third person. If the carrier has acknowledged that the quality or quantity of the goods are in accordance with the information supplied by the shipper but the carrier act in bad faith in order to escape from responsibility and liability, then he may insert in the bill of lading a reservation contradict such fact. If at the port of discharge the goods were, in whole or in part, lost or damaged, the burden of proof may be cast on the claimant, which could be difficult for the consignee or third person who is the claimant in order to prove the fact and the carrier may easily escape from responsibility and liability on such loss or damage. In this regard, the CMI Draft Instrument, in article 8.3.2 paragraph 1 (B) therefore provides that[31]:

"*A carrier acts in "good faith" when issuing a transport document or an electronic record if*

(i) the carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and

(ii) the carrier has not intentionally failed to determine whether the material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading".

3.5)To what extent does a reservation operate in the bill of lading?

As we have seen, the elements of a reservation consist of unilateral statement made by a carrier, appropriate clause, specific circumstance and good faith.

When these requirements are met the reservation is functioning in the bill of lading. The extent to which the reservation is working, however, still depends on what sort of statement is inserted. This is because the carrier may, in order to qualify the information shown in the bill of lading, insert a reservation or statement that may vary upon the circumstances that he

[29] [1974] ICJ Rep. 253.
[30] CMI. op.cit. p. 44.
[31] CMI. op.cit. p.46.

thinks fit to protect himself from the information, in whole or in part, shown in the bill of lading as to either order and condition, marks, number, quantity or weight of the goods. This happens mostly when the carrier has no reasonable means of checking the goods in a container in which the shipper furnished the information, for instance, '*it contains 1,000 cartons of pairs of shoes*'. Hence the carrier may insert a reservation in order to indicate that he only certify that the amount is as informed by the shipper and that he can not certify that the exact amount of shoes are packed in the container. Another example would be when the shipper delivers rice in bags and supplies to the carrier as to the number and weight of the rice a statement stating *'10,000 bags of rice, total weight 500,000 kilograms'*, if the carrier, when

receives the rice, receives a different amount then he may insert a reservation as to number and weight of the rice in the bill of lading in which it may indicate that '*shipper count and weight 10,000 bags total weight 500,000 kilograms but the carrier count 9,800 bags total weight 490,000 kilograms'*. Therefore the number of bags that has evidentiary value for the consignee or third person is the rice received by the carrier amounts to 9,800 bags and weight 490,000 kilograms.

In this respect, although the Hague Rules have not provided in any provision regarding the extent to which a reservation will operate, there is a view that the carrier is obliged to make one statement if there is a demand from the shipper, but entitled to qualify any others[32] because the Hague Rules article 3 paragraph 3 (b) provides that '*either number, or quantity or weight'*.

In addition the Hague Rules derive from the common law concept. Hence the result in this respect can be considered from the common law courts' view. In *New Chinese Antimony Company Ltd v Ocean Steamship Company Ltd*[33] (before the Hague Rules) where there was a reservation in typing *'No. Mark. A quantity said to be 937 tons*' and a printed clause*' weight, measurement, contents and value unknown*' the Court of Appeal held that:

"*The trial judge was wrong to assume that the 937 tons had been shipped. The effect of the clausing was to nullify any acknowledgement, so that the bill of lading was not prima facie evidence of anything".*

And in *Oricon Waren-Handelsgesellschaft m.b.H. v. Intergram N.V.*[34] where the bills of lading were issued for copra cake, one of which stated '*2,000 packages*' and underneath, *'Description of goods. Said to weigh gross 105,000 kgs. Said to weigh net 100,000 kgs'.* The court held that[35] :

"*To be plain under the Hague Rules that the bills were prima facie evidence as to the number of the packages shipped and no evidence whatever of the weight of goods shipped".*

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[32] Nicholas Gaskell. op. cit. p.232.
[33] [1917] 2 K.B.664.
[34] [1967] 2 Lloyd's Rep. 82, 90.
[35] Nicholas Gaskell. op cit., p. 232-233.However, article 3 paragraph 8 was not considered in this case.

4) Consequences of a reservation in the bill of lading

One of the most important questions in civil litigation is; where does the burden of proof lie? This fact is also true in cargo claim litigation in which the carrier and the shipper or named consignee or consignee or third person is disputing. In addition, the question of burden of proof is a rule of public order or public policy. It is the duty of the court to draw the burden of proof in accordance with the substantive law in dispute. As the US Second Circuit Court pointed out in *Encyclopedia Inc v. S.S. Hong Kong producer*[36] that:

> *"The burden of proof that COGSA has placed on the carrier is a major weapon in the shipper's arsenal."*

A general principle of the law of evidence is that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and remains unchanged throughout the trial. If the party who holds this burden has not discharged, the decision would be against him[37]. The standard of proof in this kind of cases is on the balance of probability that may vary from case to case[38].

The Hague Rules and Hamburg Rules have altered the general law of evidence by providing a presumption of law in favor of one party who is released from the burden of proof and shifts the same to the other. There are two types of presumptions of law. Firstly, a rebuttable presumption. Secondly, a conclusive presumption. A statement relating to the order and condition and marks, number, quantity or weight in a bill of lading gives rise to such

presumption sometimes rebuttable prima facie evidence otherwise conclusive evidence. But if there is no presumption in favor of a particular party the bill of lading would be ordinary evidence.

4.1) Consequences of not inserting a reservation.

There are two issues to be addressed. First the consequences as to the apparent order and condition of the goods. Second the consequences as to marks, number, quantity and weight of the goods.

4.1.1) Consequences as to the apparent order and condition.

Under the Hague Rules carrier is under an obligation, upon demand of the shipper, to issue a bill of lading showing among other things the apparent order and condition of the goods[39]. The carrier is under a duty to check the goods and make such statement. The consequences of stating the apparent order and condition of the goods, under the Hague – Visby Rules, in the light of the presumption of law and the burden of proof, are the following:

1) Between the carrier and the shipper or named consignee[40], the bill of lading is prima facie evidence[41] of the goods received by the carrier. In this case, where the goods at

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[36] [1969] 2 Lloyd's Rep. 536.
[37] John Huxley Buzzard. op. cit. p. 36-37.
[38] Ibid. p. 53.
[39] Article 3 para. 3.
[40] The consignee in this sense means a person who is a party to the contract of carriage by sea, either concluded by himself or his agent, as well as a consignee, for example, a buyer in a FOB sale contract.
[41] Article 3 para.4.

the port of discharge were damaged. The claimant can rely on the statement '*the goods are in apparent good order and condition'* in the bill of lading. The claimant is therefore discharged from the duty to prove that the goods while delivering at the port of loading were not in a damaged condition. However two sets of facts that have to be proved are; the goods were in a damaged condition at the port of discharge and the amount lost[42]. But the carrier has a rebuttable burden of proof that in fact the goods were damaged prior to the receiving from the shipper at the port of loading. In so doing, he has a burden to adduce other evidence either by way of documents or by way of witnesses to support his argument. If he can prove on the balance of

probability that the goods were damaged without his fault. The judge may in his discretion find the carrier not liable. Hence the carrier can escape from responsibility and liability for the damage to the goods. However none of the parties during the proceeding would know exactly its situation in terms of how the balance of probability exists until the trial is concluded. Therefore in practice the claimant, even where the burden of proof does not cast on him, may have to safeguard his position by destroying the evidence adduced by the carrier by way of cross examination and thereafter, he may adduce other evidence to diminish the evidentiary value of the carrier's evidence. Simultaneously he can introduce his evidence to support the merit of the case. Notwithstanding if the balance of probability after trying is so close or in other word the facts available after trying cannot be concluded in one way or another. The burden of proof will play the most important role in this situation. Because the judge is forced to determine and decide by considering further who is to fulfill the burden of proof. If the burden lies with the carrier then the carrier shall lose the case.

2) Between the carrier and the consignee[43] or third person, the bill of lading is conclusive evidence[44] as therein described. By using the same situation mentioned above. The claimant can rely on the statement. He needs not adduce any evidence to

destroy the carrier's evidence. The judge can easily conclude that at the port of loading the carrier had received the goods in good order and condition.

However the claimant still has to prove that at the port of discharge the goods were damaged and he suffered from such damage for certain amount. The carrier is not allowed to adduce any evidence to prove the contrary. The only way to escape from the liability is to prove that he had exercised due diligence and he could have the benefit of the excepted perils; in other words the goods were not damaged while in his custody.

Under the Hamburg Rules and Thai COGSA, as in the Hague and Hague-Visby Rules, the carrier is under an obligation, upon demand of the shipper, to issue a bill of lading including among other things, a statement as to the apparent condition of the goods[45]. However there is a slight difference in that whereas the Hague Rules included '*order'* but the two latter did not.

But with regard to the consequences of stating or not stating the term '*the apparent condition of the goods'* the Hamburg Rules and Thai COGSA provide the same result that if the carrier

[42] William Tetley.The burden and order of proof, p. 19. At WWW. tetley.law.mcgill.ca/.
[43] Consignee in this sense means a person to whom the bill of lading is transferred.
[44] Article 3 para.4.
[45] The Hamburg Rules article 14 para 1 and 15 para 1(b).
The Thai COGSA section 12 and 18(2).

fails to note on the bill of lading as to such term he is deemed to have noted that the goods were in apparent good condition[46], therefore conclusive.

Hence under the Hamburg Rules and Thai COGSA, the shipper or named consignee and the consignee or third person are released from the burden of proving that the goods were in apparent good condition while they were being delivered to the carrier at the port of loading. The carrier cannot prove the fact to the contrary and the same result as described in the 2) above shall be concluded.

But in the Hague Rules, it is arguable that what would happen if, instead of inserting a reservation such as '*condition wet and torn*', the carrier failed to note at all as to the apparent order and condition of the goods. The carrier's obligation under article 3 paragraph 3 is to show information as to the apparent order and condition and to provide the consignee a bill of lading that effectively operates as a receipt of the goods[47]. Hence when the carrier fail to note at all, it should be deemed that he received the goods in good order and condition. Since under the Hague Rules, the carrier also has the right to insert a reservation, if he, after inspecting the goods, considered that the goods were not in good order and condition. Therefore when the carrier failed to fulfill the right and duty under the Rules. He should not be allowed to escape from the responsibility and liability if the goods, at the port of discharge, were damaged. On the other hand the carrier under the Hague Rules[48] has the right not to state or show marks, number, quantity and weight. This is indicated why the Hamburg Rules provide a conclusive presumption as to the apparent condition of the goods if the carrier fails to make such note.

However it may be arguable that when the carrier, under the Hague Rules, fails to make such note there is no statement for the claimant to rely on. Therefore the consequence is that the bill of lading is not either prima facie or conclusive evidence. Further under article 3 paragraph 5 the shipper is deemed only to guarantee and indemnify the carrier in respect of particulars as furnished by the shipper himself. He is not deemed as such to guarantee the apparent order and condition of the goods. There is no obligation on the shipper in this regard. Therefore, under article 2 '*… the carrier… shall be subject to the responsibility and liability and entitled to the right and immunities hereinafter set forth'*, the carrier should be regarded as under no mandatory duty, but rather depends on his discretion to state such statement only when he thinks fit.

Under the Hague-Visby Rules, the term as to the apparent order and condition shall be either prima facie or conclusive evidence[49]. Whereas under the Hamburg Rules[50] and Thai

COGSA[51] they provide that '*if the carrier failed to note on the bill of lading, he is deemed to have noted that the goods were in apparent good condition'*. This indicates that at least the carrier has to state something as to the apparent condition of the goods either the goods are in good, bad condition or he has no means of checking because the goods were packed in a container. This reflects two things; first the carrier can escape from the conclusive presumption by stating such facts. Second is to reflect the reality condition of the goods.

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[46] The Hamburg Rules article 16 para 2.
The Thai COGSA section 24.
[47] John F Wilson. Carriage of Goods by Sea, 2001.,p. 197.
[48] Article 3 para. 3.
[49] Article 3 para. 4.
[50] Article 16 para. 2.
[51] Section 24.

Nonetheless there is nothing stipulate as to the evidentiary effect in respect of either prima facie or conclusive evidence when the carrier notes that '*the goods were in apparent good condition'*. However question being asked that whether article 16 paragraph 3 of the Hamburg Rules and section 23 and 25 of the Thai COGSA can be applied to this situation in that the note or statement shall be prima facie or conclusive evidence. The answer, in my opinion, would be that from their wording and systematical enactment they could not be regarded or construed to the extent that can be applied to this situation. Article 16 paragraph 3 obviously indicates that it apply to a reservation in respect of marks, number, quantity and weight by using the word *'particulars'* and '*description'* which is only limited to article 16 paragraph 1, whereas the apparent condition of the goods is provided in paragraph 2. The same can also be reached under the Thai COGSA section 23, 24 and 25 which are identical to the Hamburg Rules article 16 paragraph 1, 2 and 3 respectively.

To this stage in my opinion the only way to give effect to the statement '*in apparent good condition'* being that is to apply the principle of *estoppel* under the common law concept. The statement of fact relating to the external nature of the goods as inspected by the carrier. Therefore in this situation the common law principle of *estoppel* can be applied as regard the statement is an *estoppel* by the carrier own conduct so to preclude him from denying the existence of the statement which he formerly asserted. Further his willful conduct that causes the shipper, named consignee, consignee or third person to believe the certain state of the goods and faithfully rely on the statement could exclude the carrier from asserting against that persons a difference state of the goods as existing at the same time and whatever the carrier's real intention may be. Therefore the followed consequence of the estoppel principal seems to be even more than that of the consequence under the Hague Rules. Because under the principle of estoppel the evidentiary value of the bill of lading containing the statement as to the goods were in good condition seems to be tantamount to conclusive evidence and therefore the situation in 2) under the Hague-Visby Rules as explained above can be applied to this situation. This is therefore indicated that the consequence after the carrier stated the statement as to the good condition of the goods received is remained the same as in article 16 paragraph 2 and section 24. Therefore there is nothing to worry about the Hamburg Rules article 23 and the Thai COGSA section 17, which relate to derogation from the provision of the Convention or shifting of the burden of proof.

The only thing that is doubtful being that whether the principle of estoppel can be recognized by courts in the civil law countries as a general principle of law, if they do not have a particular provision to deal with the estoppel principle.

4.1.2) Consequences as to marks, number, quantity and weight.

Again under the Hague Rules, the Hamburg Rules and the Thai COGSA the carrier is under the obligation to state or show in the bill of lading marks, number, quantity and weight of the goods if so demanded by the shipper[52]. The carrier is not bound to state or show the particulars as furnished by the shipper if:

1) He knows or has reasonable grounds to suspect the particulars do not accurately represent the goods; or

[52] The Hague Rules article 3 para. 3(a), (b).
The Hamburg Rules article 14 para.1, and 15 para.1 (a).
The Thai COGSA section 12 and 18.

2) He has no reasonable means to check the goods, i.e., the goods were packed in container.

However there is a difference in respect of duty provided by the Laws upon the carrier in that, under the Hague Rules the carrier can, in so far as a reservation is not concerned, either;

1) to state or show nothing concerning the particulars[53]; or

2) to state or show some particulars but not stating or showing some,

if the carrier has reasonable grounds to suspect or has no reasonable means of checking. This is unlike the Hamburg Rules and the Thai COGSA. The carrier has a certain duty to insert a reservation in the bill of lading specifying the inaccuracies.

The consequences of not stating or showing anything or not inserting a reservation in this regard are affected by the Hague Rules, the Hamburg Rules and the Thai COGSA which are the following[54]:

1) Between the carrier and the shipper or named consignee the bill of lading is prima facie evidence.

2) Between the carrier and the consignee or third person the bill of lading is conclusive evidence.

Consequences of both of which can be considered under the same situation as described under the Hague Rules in the 1) and 2) of 4.1.1 above.

4.2) Consequences of inserting a reservation.

In general, under the three Laws, there are provisions allowing the insertion of a reservation.

The effects of not inserting a reservation, as we have seen from the fore going section, give rise to the evidentiary effects. But there is no provision precisely providing for the consequences of inserting a reservation. There is only a provision in the three Laws[55] which provide for broad consequence of a reservation in the sense that a reservation cannot affect the statement in the bill of lading to the extent that derogates or lessens or releases the carrier from responsibility and liability fixed in the Laws[56] otherwise it shall be null and void. In addition, as mentioned earlier as to *the Mata K* case the only consequence that can be allowed is the evidentiary effect of a reservation. Therefore we shall consider this issue further.

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[53] The Hague Rules article 3 para.3.

[54] The Hague Rules article 3 para. 4.
The Hamburg Rules article 16 para.3.
The Thai COGSA section 25.

[55] The Hague Rules article 3 para.8 and article 7.
The Hamburg Rules article 23.
The Thai COGSA section 17 (1), (3).

[56] But for the Thai COGSA section 17(3) it shall be discussed further.

4.2.1) Consequences as to the apparent order and condition.

Under the Hague Rules[57], where the carrier inserts a reservation to exclude or modify the legal effect of the statement in respect of the apparent order and condition of the goods[58]. The consequence is to shift the burden of proof from the carrier to the claimant. A reservation in respect of the apparent order and condition of the goods is, for instance, '*bagged gain shipped in apparent good order and condition; some bags were wet and torn*'[59].

Article 7 of the Hague Rules generally allows a reservation to be made in the bill of lading, in other words the carrier can inserts a reservation both for the apparent order and condition and the particulars of the goods. Whereas the Hamburg Rules[60] and Thai COGSA[61] seem to imply that the carrier is not allowed to make a reservation in respect of the apparent condition of the goods. Because article 16 paragraph 3 and section 23 and 24 seem to indicate that a reservation is to be made only in respect of particulars as furnished by the shipper, but not for the apparent condition of the goods that can be found after the carrier exercises the duty of inspection. Notwithstanding in the situation where the carrier, after inspecting the goods at the port of loading, found that the goods were in bad or damaged condition or in case of containerized goods he could not inspect the goods inside. The carrier, under the Hamburg Rules and Thai COGSA, should be allowed to do something in order to escape or safeguard by giving legal effect to the evidentiary value of the bill of lading. In addition, from the wording of article 16 paragraph 2 and section 24 indicate that the carrier is not restricted to note only when the goods were in good condition. He can also note to reflect the genuine condition of the goods such as bad or damaged condition or even when he has no means of checking the goods in a container.

As mentioned above the Hamburg Rules article 16 paragraph 2 and the Thai COGSA section 24 provide the highest presumption of law in favor of the claimant where the carrier failed to note the apparent condition of the goods at all, he is deemed to have noted that the goods were in apparent good condition. Taking into consideration the nature of the statement inserted by the carrier such as '*the apparent condition; some bags are wet and torn*' or *'containerized goods condition unknown'* in the bill of lading. What would be the result where the carrier inserted such statement in the bill of lading? Such statements are inserted with the intention to destroy the highest presumption of law-conclusive presumption- in article 16 paragraph 2 and section 24 which is also allowed by the provisions. The further result seems to indicate that after inserting the reservation the conclusive presumption should not be allowed to exist any more. So the subsequent question is whether it gives rise to the shifting of the burden of proof from the carrier to the claimant. If the answer is yes other two questions are that to what extent is it shifted and are there any difference consequences where the bill of lading is in the hands of different claimants.

To answer the first question as to whether it gives rise to the shifting of the burden of proof, it seems to me that when the provisions so allow as a condition to make a reservation to destroy the conclusive presumption therein the presumption should not survive any more. To this stage therefore there is nothing with regard to the apparent condition of the goods contains in the bill of lading. The claimant either the shipper, named consignee, consignee or third person can rely on nothing in respect of the apparent condition of the goods. Hence this is not to shift

[57] Article 3 para.4.
[58] Compania Naviera Vascongada v. Churchill & Sim [1906] 1 K.B. 237.
[59] Koji Takahashi, op cit., p. 2.
[60] Article 16 para. 3.
[61] Section 23 and 24.

the burden of proof, but rather the insertion of a reservation is to make the evidentiary value of the bill of lading remain unchanged, that is to say the ordinary evidence. Therefore the answer to this question is no, the other two questions are not necessarily to be answered.

Assuming that in a situation where a shipper delivered goods to a carrier at the port of loading. The carrier, after inspecting the goods, inserts a reservation in the bill of lading '*the apparent condition; some bags are wet and torn'*. At the port of discharge the goods were damaged as such. The shipper brings in an action against the carrier for the damage suffered. Under the Hamburg Rules and Thai COGSA and subject to the interpretation described above, the shipper must destroy the fact indicated in the bill of lading. He shall have the burden to proof that at the port of loading the goods were in good condition or the amount of the goods damaged at the port of discharge is different from the damage at the port of loading as well as the monetary amount. The carrier shall have the burden to proof that the goods were not damaged while in his custody and he also can benefit from the reservation inserted.

4.2.2) Consequences as to marks, number, quantity and weight.

Under the Hague Rules, Hamburg Rules and Thai COGSA where no reservation has been made the particulars as stated in the bill of lading can be the following:

1) Prima facie evidence in the hands of the shipper or named consignee; or
2) Conclusive evidence in the hands of the consignee or third person.

But when a reservation was made, under the Hague and Hague-Visby Rules if applicable, the reservation can even destroy the evidentiary value of a statement in a bill of lading. The bill of lading will become ordinary evidence in the hands of the claimant. The construction of the English court to article 3 paragraph 8, which it held that[62] '*within article 3 paragraph 8 the liability must refer to the primary liabilities under article3 paragraph1 and 2'*. In other words a reservation under the Hague Rules and Hague-Visby Rules give rise to the shifting of the burden of proof[63], which is considered to be a direct consequence of a reservation made in the bill of lading. Although sometimes the subsequent result of shifting of the burden of proof can give rise to release or lessen the carrier's responsibility and liability, this is considered an indirect consequence, which is not prohibited under the Convention.

But the situation under the Hamburg Rules and the Thai COGSA may not necessarily be the same. Article 23 of the Convention provides that:

"*Any stipulation in… a bill of lading …is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention…"*

Section 17 of the Thai COGSA provides that:

" Any terms in a contract of carriage of goods by sea shall be null and void if its object or its bearings bring directly or indirectly the following results:

(1) Relief of the carrier from any of his duties or liabilities as provided for in this Act;

(2) ..

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[62] The Mata K [1998] 2 Lloyd's Rep.614, 619.
[63] The Esmeralda I [1988] 1 Lloyd's Rep. 206.

(3) Shifting of the burden of proof imposed by this Act upon the carrier, from the carrier to the shipper or any other third person.

(4) ...”

It should be borne in mind that the Hamburg Rules[64] and the Thai COGSA[65] apply to the carrier’s responsibility and liability at the time when the carrier received the goods from the shipper at the port of loading to the port of discharge or port to port principle[66]. The Laws prohibit any stipulation that directly or indirectly derogates from the provisions of the Convention or its objector its bearing bring directly or in directly to the shifting of the burden of proof imposed by the Act on the carrier to the shipper or third person.

So if the carrier inserts a reservation such as ‘*said to contain, shipper weigh load and count or said to weigh’* and at the port of discharge the goods were lost or damaged. It cannot be construed that prior to the delivery of the goods at the port of loading and by virtue of the reservation, the goods had already been lost or damaged, and therefore the goods had not been lost or damaged while in the custody of the carrier. This is to construe the result of the reservation so as to directly release or lessen the carrier from his responsibility and liability which is clearly prohibited by the Laws.

But for the result as to the shifting of the burden of proof, it should be separately determined under the Hamburg Rules and the Thai COGSA because in this regard the Thai COGSA has its own section 17 (3) precisely prohibiting further the shifting of burden of proof.

Under the Hamburg Rules, if a reservation is inserted the results would be as follow:

1) Where the bill of lading is in the hands of the shipper or named consignee, and where there is not a reservation was inserted the burden of proof is on the carrier. When a reservation is inserted, the burden of proof is shifted from the carrier to the claimant. The claimant, as in situation 1) under the Hague Rules in 4.1.1) above, cannot rely on the statement in the bill of lading. The bill of lading in this case shall be regarded as of ordinary evidence. He shall have the burden to prove that the goods were in accordance with the particulars as furnished to the carrier at the port of loading including the burden of proving that the goods, at the port of discharge

   were lost or damaged and the amount suffered. If the claimant fails to adduce such proof, the fact shall be concluded that the goods were lost or damaged, to the extent that the reservation was made, prior to the delivery to the carrier. As a result, the carrier is not liable to that extent. It is, in my opinion, an indirect derogation, and therefore the reservation is null and void.

2) Where the bill of lading is in the hands of the consignee or third person and where there is not a reservation was inserted. The bill of lading shall be conclusive evidence. But when a reservation was inserted the Hamburg Rules do not provide for the consequences in this respect, then the following consequences may be possible:

   2.1) The evidentiary value of the bill of lading was absolutely destroyed and it becomes ordinary evidence. The claimant shall have the burden of proof. This

[64] Article 4.
[65] Section 39.
[66] Christof F. Luddekr and Andrew Johnson. op.cit, p. 7.

construction is consistent with the decision of the English and Tunisian court as mentioned in the foregoing chapter. However it still constitutes a doubt as to the shifting of the burden of proof, which its consequence is indirect derogation.

2.2) If it is assumed that article 16 paragraph 3 has been enacted in hierarchy so as to be an ordinary evidence, prima facie evidence and conclusive evidence respectively. Therefore when a reservation was inserted, the evidentiary value of the bill of lading would be changed from conclusive to be prima facie evidence. This construction may be compared with a clause which provides that '*the bill of lading shall be conclusive evidence unless error is proved'*. In this case the bill of lading is no more than prima facie evidence[67]. But, again, the result is to shift the burden of proof.

2.3) Where the bill of lading is in the hands of a consignee or third person it shall be conclusive evidence and remain unchanged. Though a reservation was inserted; assuming that where the law stipulates that the bill of lading shall be conclusive evidence in the hands of third person. It means that the law requires special treatment for that person, who has the bill of lading and acts in good faith and relies on the statement in the bill of lading, by not allowing the evidentiary value of the bill of lading to be destroyed.

Furthermore the burden to prove the relevant facts is more difficult when the claimant is a consignee or third person living in another country other than the country of the port of loading. As we have seen from the dissenting opinion in the judgement[68] of the Thai Court which submitted that:

> *"..The fact that the plaintiff and the shipper are in different countries. Therefore proving the fact as has been placed by the majority might be impracticable or impossible"*

The UNCTAD secretariat seems to have the same view as well in its commentary on the CMI draft instrument on transport law in which it submitted that[69]:

> *" This is of particulars importance where a third party consignee, with no connection to the initial shipper, may have no other evidence available of what was delivered to the carrier for transport."*

Hence there may be some specific situations where shifting of the burden of proof would lead to unjust result. The utmost importance of the burden of proof is also accepted by the US Second Circuit Court in *Encyclopedia Britannica Inc v. S.S. Hong Kong Producer*[70] holding that:

> "*This effect a shift in the burden of proof from the carrier, as provided by COGSA, to a shipper, COGSA had effected a change from the pre-Harter Act situation when the burden of proof was on the shipper by shifting it to the carrier. The burden of proof which COGSA has placed on*

[67] Stewart C Boyd, Andrew s Burrows and David Foxton. op.cit. p. 119.
[68] Case no. 195/2541[1998]
[69] The UNCTAD. Commentary by the UNCTAD Secretariat on Draft Instrument on Transport Law, 13 March 2002, p.49.
[70] [1969] 2 Lloyd's Rep.536 (2 Cir. 1969).

the carrier is a major weapon in the shipper arsenal. It is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier's hand's…"

In this construction a reservation as a practical matter of the carriage by sea industry is useless for the carrier upon application of the Hamburg Rules because it shall be null and void and gives no legal effect at all.

However in order to give business efficacy to the industry by taking into account article 3 with regard to its international character and the need to promote uniformity. It would be more practicable to confer a legal effect to a reservation as a Tunisian court[71] has decided in *Carte v. Sudcargos[1996]* [72] by allowing the shifting of burden of proof as it has usually been decided by English courts (Nonetheless what will be the case when article 23 is applied was not mentioned). But it is wondered that under the different régimes, should the Conventions be construed to the same result? However in order to give some effect to a reservation under the Hamburg Rules particularly when containerized goods are concerned we may construe that a reservation does not give rise to the shifting of the burden of proof. But it should be regarded as a notice of fact to be used to reinforce and support the carrier's argument. While he is proving exercise of reasonable care on his part. Such notice of fact regarding the particulars will be used to support his proof in order to show that the loss of or damage to the goods caused by the fault of the shipper particularly on insufficiency of packing or packing unsuitable for the condition of the goods and insufficiency or inadequacy of marks.

The position is somewhat further different when determining section 17 (3) of the Thai COGSA. The provisions in the Act with regard to rights and duties of parties to the contract were drafted in order to balance the rights and duties of the parties involved and therefore any terms falling into the prohibited provision is null and void[73].

Under the Thai COGSA there seems to be no room to construe that the shifting of burden of proof is allowed as a result of a reservation. The reasons are that firstly, if it is construed that a reservation inserted gives rise to modify the status of the statement in the bill of lading. This means that the presumptions of law have been chanced which are tantamount to shift the burden of proof. Secondly section 25 provides for the result of not having a reservation in the bill of lading in respect of presumptions of law, i.e., prima facie and conclusive evidence which are the same matter as the burden of proof imposed on the carrier by the Thai COGSA. Having said that such a reservation, if inserted, should be regarded as a statement of fact to remind the parties involved that there are some things not accurately representing the goods in question. This can be used, at the time when litigation takes place, by the carrier to reinforce its other evidence in proving that the loss of or damage to the goods has occurred at the time of the receipt of the goods from the shipper at the port of loading, or in order to escape from the liability, the notice of fact may be used to reinforce and support the carrier's argument as to the fault of the shipper or consignee. Particularly on insufficiency of packing unsuitable for the condition of the goods and insufficiency or inadequacy of marks. The argument available in section 52 which provides that:

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[71] Tunisia is a party to the Hamburg Rules.

[72] D. Bovio. The First Decision Applying the Hamburg Rules, in Lloyd's Maritime and Commercial Law Quarterly, 1997., p. 351-358.

[73] Pathaichit Eageariyakorn. op.cit. p. 406.

"The carrier shall not be liable for loss, damage or delay in delivery, if the carrier can prove that the loss, damage or delay in delivery arose or resulting from:

1)…

9) Fault of the shipper or consignee, particularly on insufficiency of packing or packing unsuitable for the condition of the goods and insufficiency or inadequacy of marks"

Nonetheless it must not be construed to the extent that is to shift the burden of proof from the carrier to the claimant; otherwise it shall be null and void. This may be a reason why the Supreme Court of Thailand did not mention the reservation made in the case and its consequences.

However where the bill of lading is in the hands of the consignee or third person and a reservation was inserted the consequence thereof may be construed as explained in the 2.3) above in that the bill of lading containing the statement shall be conclusive evidence and remain unchanged.

From the above constructions it can be seen that there are two possible ways to assert the consequences of a reservation in the bill of lading. Firstly a reservation either in the hands of the shipper, named consignee, consignee or third person can only be a notice of fact to be used to reinforce or support evidence of the carrier. Secondly where the bill of lading is in the hands of the consignee or third person a reservation gives no effect to the evidentiary value of the bill of lading. Therefore the bill of lading remains conclusive evidence.

To this end, in my opinion, it may be better if a reservation can confer some effect to the bill of lading in order to, at least, comply with the shipping industrial practice but only when the bill of lading is in the hands of the shipper or named consignee.

5) Conclusions

It has been found that the Hague Rules, Hamburg Rules and Thai COGSA fail to provide for the consequences of a reservation in the bill of lading. In this situation, therefore, a provision in the Hague Rules, Hamburg Rules and Thai COGSA has been considered. That is to say article 3 paragraph 8, article 23 and section 17 respectively.

Article 3 paragraph 8 provides that:

"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 than as provided in this Convention, shall be null and void and of no effect…"

Article 23 provides that:

"Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention…"

Section 17 provides that:

"Any terms in a contract of carriage of goods by sea shall be null and void if its object or it bearing directly or indirectly the following results:

(1) *Relief of the carrier from any of his duties or liabilities as provided in this Act;*

(2) *...;*

(3) *shifting of the burden of proof imposed by this Act upon the carrier, from the carrier to the shipper or any third person;*

(4) *....”*

In comparison it will be seen that section 17 has the narrowest effect in respect of the consequences of a reservation, followed by article 23 and article 3 paragraph 8 respectively. Therefore it is a question of interpretation in order to give effect to a reservation in the bill of lading under each law. Under the Hague Rules, the English courts in *the Mata K*[74] submitted that within article 3 paragraph 8 the liability must refer to the primary liabilities under article 3 paragraph 1 and 2. Therefore this means that the consequences of a reservation is to shift a burden of proof from the carrier to the claimant as was decided in *New Chinese Antimony Company Ltd v. Ocean Steamship Company Ltd*[75]. In other words the consequence is not a direct consequence to relieve, or lessen the liability of the carrier. But the consequence of which is only indirect in the sense that the reservation directly gives rise to the shifting of the burden of proof but the subsequent consequence may give rise to relieve or lessen the carrier from his liability.

Under the Hamburg Rules article 23, the term ‘*derogates directly or indirectly’* is used to prohibit the consequence of a reservation. So if it is strictly construed, the shifting of burden of proof would be an indirect derogation. However a Tunisian court in *Carte v. Sudcargos*[76] held that it gives rise to the shifting of burden of proof.

Under the Thai COGSA section 17 (1) and (3), therefore, seems to be stricter than the Hamburg Rules because it obviously prohibits the consequence as to the shifting of burden of proof. Hence it seems to be no other means to construe to the extent that the shifting is allowed under the Thai COGSA.

6) Suggestions

Although it has been concluded in this dissertation that by virtue of the Hamburg Rules article 23 and the Thai COGSA section 17 a reservation seem to play the limited roles in the bill of lading except in respect of the apparent condition of the goods. However in order to comply with the practicable sea carriage in international trade and give some business efficacy to the sea carriage industry in so far as the particulars of the goods in the bill of lading in the hands of the shipper or named consignee are concerned, the following are suggested:

1) A reservation in the bill of lading should be regarded as a notice of fact as to the particulars of the goods in question at the time the goods were received from the shipper;
2) The notice of fact when used by the carrier. It should be regarded as a piece of evidence to reinforce and support other evidences of the carrier in proceeding;

[74] [1998] 2 Lloyd’s Rep. 614, 619.
[75] [1917] 2 K.B. 664.
[76] D. Bovio. op.cit. p. 351- 358.

3) The notice of fact shall be assessed and weighed by the competent court in connection with other evidences adduced by the carrier.

Notwithstanding for the bill of lading in the hands of the consignee or third person acting in good faith it should be construed that the information as to particulars of the goods in the bill of lading remain unchanged even when a reservation was inserted.

With regard to the apparent condition of the goods where the carrier, under the Hamburg Rules and Thai COGSA if applicable, makes a statement indicating that the goods were in apparent good condition such statement should be regard as estoppel by the carrier's conduct.

Bibliography

English

Books

1. D' Arcy, Leo. Murrey, Carole., Cleave, Barbary. Schmitthoff's Export Trade: The Law and Practice of International Trade, Tenth Edition, 2000. Sweet & Maxwell, London.
2. Astle, W.E. Legal Developments in Maritime Commerce, 1983. Fairplay Publications.
3. Baughen, Simon. Shipping Law, Second Edition, 2001. Cavendish Publishing, London.
4. Bools, Michael D., The Bill of Lading: A Document of Title to Goods: an Anglo-American Comparison, 1997. LLP, London.
5. Boyd, Stewart C., Burrows, Andrew., Foxton, David. Scrutton on Charter Parties and Bills of Lading, Twentieth Edition, 1996. Sweet & Maxwell, London.
6. Buzzard, John Huxley., May, Richard., Howard, M.N. Phipson on Evidence, Twelfth Edition, 1976. Sweet & Maxwell, London.
7. Dockray, Martin. Cases and Materials on the Carriage of Goods by Sea, Second Edition, 1997. Cavendish Publishing Limited, London.
8. Honka, Hannu. New Carriage of Goods by Sea: The Nordic Approach Including Comparison With Some Other Jurisdictions. 1997. Institute of Maritime and Commercial Law Abo Akademi University,Abo.
9. Gaskell, Nicholas., Asariotis, Regina., Baatz, Yvonne. Bill of Lading: Law and Contracts, 2000. LLP, London.
10. Ivamy, E.R. Hardy. Casebook on Carriage by Sea, Six Editions, 1985. Lloyd's of London Press Ltd, London.
11. Luddeke, Christof F., Johnson, Andrew. A Guide to the Hamburg Rules, 1991. Lloyd's of London Press Limited, London.
12. Mankabady, Samir. The Hamburg Rules on the Carriage of Goods by Sea, 1978. A.W. Sijthoff, Boston.
13. Wilson, John F. Carriage of Goods by Sea, Fourth Edition, 2001. Longman, Essex.

Reports

1. Committee Maritime International. CMI Draft Instrument on Transport Law. December 10, 2001.
2. United Nations. United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978. Official Records. 1981, New York.
3. United Nations Conference on Trade and Development. The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention. 1991, New York.
4. United Nations Conference on Trade and Development. Commentary by the UNCTAD Secretariat on Draft Instrument on Transport Law. 13 March 2002.

Articles

1. Bovio, D., The First Decision Applying the Hamburg Rules. In Lloyd's Maritime and Commercial Law Quarterly, 1997, p. 351-358.
1. Committee Maritime International. Work in Progress: Issues of Transport Law, Comments of National Association and Observers on the Consultation Paper. At the CMI Homepage.
2. TaKahashi, Koji. Bill of Lading as a Receipt. At WWW. tls.bham.ac.uk/koji/international-trade/bill-of-lading-as-receipt.htm.
3. Tetley, William, Prof. Chapter 6: The Burden and Order of Proof, 2000. At WWW. tetley.law.mcgill.ca/.
4. Tetley, William, Prof. Seven Rules of Interpretation (Construction) of Bills of Lading, 2001. At WWW. Tetley.law.mcgill.ca/.
5. Tetley, William, Prof. US COGSA and Other Developments, 2001. At WWW. tetley.law.mcgill.ca/.

Thai

Books

1. Pathaichit Eageariyakorn, Prof. Droit Maritime Francais, 1996. Thammasat University, Bangkok.
2. Pathaichit Eageariyakorn, Prof. Carriage of Goods by Sea, Second Edition, 1998. Thammasat University, Bangkok.

Articles

1. Somporn Paisin. Thai Shipowners' Weak Points. In Thai Bar Association Law Review, Volume 4, 1988. Thai Bar Association, Bangkok.
2. Somporn Paisin. Thai COGSA and Hague, Hague-Visby and Hamburg Rules. In Maritime Journal, Volume 1, 1992. Office of Maritime Promotion Commission, Bangkok.

International Conventions and Protocols

1. International Convention for the Unification of Certain Rules Relating to Bills of Lading. Brussels, August 25, 1924.
2. United Nations Convention on the Carriage of Goods by Sea. 1978.
3. United Nations Convention on the Law of Treaties. Vienna, May 23, 1969, U.N. Doc. A/CONF. 39/27.
4. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. Brussels, 1968.

5. The CMI Draft Instrument on Transport Law, 2002.