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LEGISLATIVE NOTES

COMMENTARY ON SECTION 7-503(3) OF THE UNIFORM COMMERCIAL CODE AND THE "FREIGHT FORWARDER PROBLEM"

Section 7-503(3) of the Uniform Commercial Code provides:

Title to goods based upon a bill of lading issued to a freight forwarder is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this Article pursuant to its own bill of lading discharges the carrier's obligation to deliver.

The theory of the drafters in designing this section is set forth in Official Comment three to the section, stating that "the bill on its face gives notice of the fact that a freight forwarder is in the picture. . . ."¹ This section determines the priorities of conflicting claims based on bills of lading issued by both the forwarder and the underlying carrier. A reading of this section, in light of the official comment, suggests that the drafters envisioned problems which they attempted to remedy by establishing these priorities. This commentary will examine the actual extent of the "freight forwarder problem" on the basis of interviews and correspondence with practitioners in the freight forwarder and related industries. Finally, any changes that seem desirable will be suggested.

THE "PROBLEM"

Freight forwarders are required by the Interstate Commerce Commission² to issue bills of lading to the shipper.³ The freight forwarder also receives a bill of lading from the underlying carrier. This required "overissue" of bills of lading could result in a conflict between persons claiming title through the carrier's bill, since bills of lading are permitted to be negotiable under the Code.⁴ In requiring this "overissue,"⁵ the I.C.C. would seem to be losing sight of the purposes for which a bill of lading is issued. A bill of lading can be characterized as three things: a receipt for goods issued by a carrier to a shipper;⁶ a contract between the carrier and shipper; and a document of title. As a receipt for goods, the bill of lading is evidence that the shipper has placed goods in the carrier's

1. Official Comment 3 to Uniform Commercial Code § 7-503.

2. Hereinafter cited I.C.C.

3. Federal Bills of Lading Act, 49 U.S.C. §§ 81-124.

4. Uniform Commercial Code § 7-501.

5. *Chicago, M., St. P. & P. Ry. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949).

6. A forwarder acts as both a "carrier" and a "shipper." When a forwarder receives goods from a shipper it is acting as a "carrier" and when it turns the goods over to the carrier it is acting as a "shipper." See the discussion of this dual role of the forwarder in *Republic Carloading & Distrib. Co. v. Missouri Pac. Ry.*, 302 F.2d 381 (8th Cir. 1962).

care. In its character as a contract between the shipper and carrier, it is a contract of carriage, a statement of liability, a statement of the tariff, and indicates the identity of the shipper and carrier, the place of destination and the identity of the consignee. Negotiability or non-negotiability is also indicated on the face of the bill. When the bill is negotiable in form (an order bill), title to goods in transit can be transferred by negotiation of the bill of lading alone.⁷ It is this situation to which the Code directs its attention. If the freight forwarder were to receive a negotiable bill from a carrier and then proceed to negotiate the bill to a holder of a duly negotiated document, such a holder would, under the Code, take subject to the rights of the party holding the freight forwarder's bill.

THE FREIGHT FORWARDER

The domestic freight forwarding industry began with the decision of the United States Supreme Court in *I.C.C. v. Delaware, L. & W. R.R.*⁸ The Court held that although the rules of the I.C.C. forbade the granting of lower freight rates to volume shippers, it was permissible to charge different rates for carload shipments than for less-than-carload shipments. This decision resulted in the inception of the forwarding business as it now exists: the freight forwarder consolidates less-than-carload shipments and reaps the benefits of the spread between the two rates. Today, the forwarding industry is regulated under part IV of the I.C.C. Act.⁹ A freight forwarder is characterized under the act as "both the receiving and delivering transportation company."¹⁰ Since the forwarder is the receiving transportation company and represents to the public that it is a carrier, the shipper believes the forwarder to be the carrier even though the forwarder does not own the means of transportation. The carrier, however, must treat the forwarder as another shipper of goods and therefore entitled to be treated in the same manner as any other shipper. Thus, the forwarder will receive a bill of lading for the consolidated shipment. It is this dual role of the forwarder that allows the "overissue" of bills of lading to occur.¹¹

There also exists the problem of liability for goods damaged or lost in shipment. The shipper's position is that the forwarder has accepted the responsibility for the safe delivery of the goods and, therefore, is responsible for goods lost or damaged in shipment. The rules of the I.C.C. support this position and require the forwarder to indemnify the shipper for damages regardless of fault.¹² As mentioned before, the carrier treats the forwarder as a shipper, so that the

7. Uniform Commercial Code § 7-502.

8. 220 U.S. 225 (1911).

9. Freight Forwarders Act, 49 U.S.C. §§ 1001-22.

10. Freight Forwarders Act, 49 U.S.C. § 1013.

11. Republic Carloading & Distrib. Co. v. Missouri Pac. Ry., 302 F.2d 381 (8th Cir. 1962).

12. Lifschultz Fast Freight Extension—Wisconsin, 285 I.C.C. 569 (1954); Adanac Freight Forwarders Ltd., Freight Forwarders Application, 265 I.C.C. 627 (1949); Bills of Lading of Freight Forwarders, 259 I.C.C. 277 (1944). See also Letter From H. Neil Garson, Secretary, I.C.C., Washington, D.C. to Author, February 20, 1967, on file in Buffalo L. Rev. office.

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carrier is liable to the forwarder for damage, the same as to any other shipper.¹³ Although such determinations of responsibility have been made by the I.C.C., the Commission has not chosen to deal with the problem of priorities of title when there is an "overissue" of this nature of a bill of lading.

IS THE "OVERISSUE" A REAL OR ILLUSORY PROBLEM?

The many persons interviewed were unanimous in their belief that the "freight forwarder problem" is illusory. They explained that a negotiable bill of lading may be issued to a shipper for many legitimate reasons. For example, the shipper may wish to transfer the title by using the document (the bill of lading) or the goods.¹⁴ By negotiating the bill of lading this objective can be reached while the goods are in transit. The freight forwarder, while being characterized as a shipper, differs from the usual shipper in that he can have no legitimate reason for wanting to transfer the title. Thus, the power to transfer title (by using a negotiable bill of lading) should not be given to a forwarder because there can be no legitimate reason for a forwarder to request such a negotiable bill of lading.¹⁵ Negotiable bills of lading should only be issued to shippers requiring such bills. Practice dictates that a negotiable bill of lading will be issued only at the specific request of the shipper and, unless instructed otherwise, a non-negotiable bill of lading (a straight bill) will be issued by the carrier. For these reasons the practitioners interviewed felt that the "forwarder problem" was illusory and academic.

Another reason advanced for the non-existence of recorded problems in this area is set forth in Official Comment three to section 7-503 of the Uniform Commercial Code. There it is stated that anyone buying a bill issued to a forwarder would recognize it as a forwarder's bill because the face of the bill would contain the name of the party to whom the bill was issued, thus presumably giving a purchaser notice that a freight forwarder is involved.¹⁶ However some commentators have suggested that the name of the forwarding company might not identify it as being in the forwarding business.¹⁷ This would seem very unlikely, however, because forwarders represent themselves as being carriers and the vast majority of, if not all, forwarders have names that are indicative of a transportation company. Thus, it would appear that anyone attempting to purchase such a bill would, or should, be on notice of suspicious circumstances and should therefore take subject to the bill issued by the forwarder. The practitioners felt, for those reasons, that the "freight forwarder problem" is illusory. It was impossible for them to visualize a forwarder demanding a negotiable bill of lading

13. *Ibid.*

14. Uniform Commercial Code § 7-502.

15. Interviews with attorneys in trucking and forwarding industry, especially: Mr. Giles Morrow, U.S. Freight Co., New York, New York, and Mr. Beardsly, American Trucking Association, Washington, D.C.

16. Official Comment 3 to Uniform Commercial Code § 7-503. Bearer bills are permitted under the Code but their use is so rare as to present no real problem.

17. See, *e.g.*, State of New Jersey, Study of the Commercial Code 562-563 (1960).

and then negotiating it. Hence, it would seem that section 7-503(3) of the Uniform Commercial Code is unnecessary since the priorities set out will never be in issue.

IS THIS "OVERISSUE" PROBLEM PRESENT IN OTHER
AREAS OF FREIGHT FORWARDING?

Air forwarders operate in much the same as way land forwarders.¹⁸ The air forwarder issues a bill of lading to the shipper and in turn receives a bill of lading from the underlying air carrier.¹⁹ Thus, the "freight forwarder problem" also exists in the air forwarding industry to the same extent as it does in the land forwarding industry. Ocean forwarders, however, generally do not issue bills of lading to the shipper but merely act as the shipper's agent in arranging for the transportation of goods through an ocean carrier.²⁰ Indeed, by regulation the ocean forwarder is prohibited from issuing a "receipt" for goods that is not in a form readily distinguishable from an ocean bill of lading.²¹ However, it must be noted that neither the air forwarder nor the ocean freight forwarding situations are identical to the domestic land forwarding situation. The domestic land forwarder is a consolidator of goods and derives its income from the difference between the carload and less-than-carload shipment rates, while both the air and ocean forwarders act as expeditors and their profits are usually a percentage of the total freight bill.

However, in the relatively new area of transportation by container (containerization),²² the ocean forwarder acts much like the domestic land forwarder in that it is a consolidator of goods. The ocean freight forwarder becomes known as a "non-vessel operating common carrier by water" (NVOCC) and when acting as a NVOCC it will issue an ocean bill of lading.²³ The NVOCC operates as a forwarder since it will be both the receiving and delivering transportation com-

18. The Air Express division of R.E.A. Express Co. would seem at first glance an air forwarder. This, however, is not the case because that company is in partnership with the air carrier for the limited purpose of the Air Express operation. This partnership makes the express company and the air carrier one transportation company thus allowing the freight to travel the entire route with the bill of lading issued by the express company. Interview with Mr. Nemmer, R.E.A. Express Co., Buffalo, New York, April 11, 1967.

19. Air carriers issue "Airbills" which are similar in nature to bills of lading. See Uniform Commercial Code § 1-201(6); Interview with Mr. Finkney, Emery Air Freight Co., Buffalo, New York, April 11, 1967.

20. *United States v. American Union Transport, Inc.*, 327 U.S. 437 (1946). See also Letter From Gerald Ullman, Esq., to Author, February 13, 1967, on file in Buffalo L. Rev. office.

21. Federal Maritime Comm'n Gen. Order 4, Rule 510.23(i), 46 C.F.R. § 510.23(i) (1963).

22. Containerization is the method of transporting goods that utilizes a single container to hold the freight (in large quantities—usually one half of a trailerload) from point of production or consolidation to destination whether the carriage be by land, air or sea. The containers are of uniform size so that the carriers are able to design the ships, trucks, trains, and planes to hold the maximum number of these containers and also reduce the handling costs of repeated loading and unloading from various carriers. The containers can be sealed so that through international shipments may by-pass customs in various countries (except the country of destination) thereby saving much time.

23. *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 Fed. Maritime Bd. 771 (1952); *Common Carriers by Water—Status of Express Cos., Truck Lines & Other Non-*

pany, and, like the domestic forwarders, own no means of transportation. Presently "the number of ocean freight forwarders operating as NVOCCs has been limited and there have been no problems . . . in the duplication of bills of lading,"²⁴ even though, as in the domestic field, both the forwarder and the underlying carrier issue bills of lading.

CONCLUSION

The "freight forwarder problem" appears to be a theoretical and not a practical problem. While in theory it is possible to have competing holders of bills of lading for the same goods in the freight forwarder situation, the facts would suggest that the problem never arises in practice. Although the possibility does exist that a freight forwarder might demand and get a negotiable bill of lading and thereafter negotiate it to a holder of a duly negotiated document, the possibility seems quite remote. A simple way to eliminate the doubt that this problem might ever arise would be an I.C.C. regulation forbidding the issuance of a negotiable bill of lading to a freight forwarder. Other alternatives, equally simple, could remove all doubt that a forwarder might be able to negotiate its bill to a holder of a duly negotiated document; for example, different color bills of lading could be required to be issued to a forwarder than to a "usual" shipper; or the carrier could be required to write on the bill of lading, after the forwarder's name the fact that it is a forwarder (*i.e.*, "John Doe Co., a forwarder"). There are, as seen, many easy cures to the "freight forwarder problem" that would make section 7-503(3) of the Uniform Commercial Code as unnecessary in theory as it is in reality.

HENRY K. GARSON

DOES RESIDENCE EQUAL DOMICILE? DIVORCE REGULATION UNDER
NEW YORK DOMESTIC RELATIONS LAW SECTION 250

Section 250¹ of the New York Domestic Relations Law was approved on April 27, 1966, and will become effective September 1, 1967. It provides:

Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.²

Vessel Carriers, 6 Fed. Maritime Bd. 245 (1961). See also Letter From Gerald Ullman Esq., *supra* note 20.

24. Letter From Gerald Ullman Esq., *supra* note 20.

1. N.Y. Sess. Laws 1966, ch. 254, § 11.
2. N.Y. Sess. Laws 1966, ch. 254, § 11.