Italy: The Carriage of Goods by Sea Act 1992

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In order to clearly explain the effects of the Carriage of Goods by Sea Act 1992[1] and to make an attempt to consider whether or not the new legislation can be regarded as an exhaustive and satisfactory piece of work we have to go back to 1855.

The Bills of Lading Act 1855[2] was passed basically to solve the problem concerning the position of the buyer of goods carried by sea in three particular situations:

I. When the goods are damaged is transit,

II. When there is a short delivery,

III. When the goods are lost.

The problem was that under international standard contracts of sale the buyer accepts the risk of loss from the time of shipment. Even if he has transferred to the carrier a document of title representing the goods (presumably a bill of lading) he is not privy to the contract of carriage (because the carriage contract is between the seller and the carrier) and consequently he cannot bring a contractual claim against the carrier[3]. The doctrine of privity of contract states, in fact, that only the immediate parties to the contract may derive rights or incur obligation under the contract. In other words the buyer would be considered a stranger to that contract[4]. In international contracts of sale that can cause al lot of problems because the buyer is the one who has a realistic interest about the performance of the carrier.

On Italian Law and in many other civil law jurisdictions there is not such a problem because, for example, art. 1411 of the Italian Civil Code states that a stipulation in favour of a third person is valid when the stipulator has an interest therein. The third person acquires a right against the promisor as a result of such stipulation, unless otherwise agreed. The stipulation, however, can be revoked or modified by the stipulator until the third person declares to the promisor, that he intends to avail himself of the stipulation. In case of revocation of the stipulation or refusal of the third person to avail himself of it, the obligation of performance for the benefit of the stipulator remains, unless it appears otherwise from the intention of the parties or the nature of the contract.

Even if the doctrine of privity has been changed by section 1 of the Contracts (Rights of Third Parties) Act 1999, section 6(5) of the latter explicitly excludes contracts of carriage from the effects of the Act. Unfortunately the topic of this work is not completely related with the problems concerning the 1999 Act and the eventual rights of third parties and does not take into consideration all the inconveniences created by the doctrine of privity[5].

The main scope of the entire 1855 Act was to keep the English law attractive to international traders and to international buyers who wanted to maintain the right to sue the carrier for the above reasons even if they were not a part of the contract of carriage without changing the rule of privity.

Notwithstanding, the 1855 Act did not solve the problems and the first judicial criticism came in 1890[6] whilst the courts started to search for some solution to the problems we will be mentioning.

Section 1 of the 1855 Act applied to: "Every consignee of goods named in a Bill of Lading, and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement as if the contract contained in the bill of lading had been made with himself".

The first problem relates to the passing of property that section 1 of the 1855 Act relies on so as to make possible the transfer of rights and liabilities; section 1 could apply in three common situations: if the bill of lading was endorsed as a form of security, if it was transferred to an agent of the seller in order to collect the goods and deliver them to the effective buyer, if there was a leasing contract instead of a contract of sale[7].

Another problem was about the necessity for the property to pass "upon or by reason of such consignment or indorsement". The main deficiency of the Bills of Lading Act 1855 has been noted in the case of bulk shipments, which were not foreseen when the Act

was born. Section 16 of the Sale of Goods Act, in fact, would prevent the passing of property in the goods to the buyer when they remained unascertained. But there is more: with reference to the above thoughts about the passing of property the section would not apply also in the frequent case of a retention of title or where title passed before shipment.

Moreover a vast number of documents of transport, such as waybills and ship's delivery orders, very much used these days, do not equate with a "bill of lading", which is however not defined in the 1855 Act.

As noted above, a difficult case was where the property passed before the bill of lading was transferred because the property could not pass "by reason" of the transfer of the bill of lading. In the *Captain Gregos*[8], for example, the property passed to the buyer at the time of shipment and to the sub-buyer when the ship reached the Dutch coasts but the bills of lading were never transferred to the sub-buyer. In consequence of this neither buyer was able to claim under the Bills of Lading Act 1855 against the carrier for short delivery. Moreover in *The Delfini*[9] case the load was released against an indemnity from the shipper and the court stated that section 1 of the Bills of Lading Act 1855 could not apply because "the property passed to the consignee before the bill of lading reached him"[10].

When the 1855 Act did not help them, the endorsees sought to claim in the tort of negligence for damages but this approach was ended when the House of Lords, in *The Aliakmon*[11], stated the need of a proprietary interest in the goods at the time of damage.

An imaginative attempt to solve the problems created by the narrow structure of the 1855 Act was the possibility of the implication of a contract between the carrier and the buyer: the "*Brandt* contracts". The name came from the name of a leading case, *Brandt v Liverpool*[12], but the use of the implied contract dates from the 1811 case of *Cock v Taylor*[13]. The issues were about whether such a contract has been concluded and whether there was a lack of consideration. The consideration given by the buyer for the obligations of the carrier with reference to the bill of lading will normally be the imbursement of any outstanding freight[14] or demurrage[15]. The possibility of the implication of a *Brandt* contract was considered even when the buyer presented, instead of a bill of lading, a delivery order[16] or an indemnity[17]. However the courts in many occasions avoided the possibility of implying a *Brandt* contract. In *The Aramis*[18] case, for example, a number of bills of lading were issued for the carrying of Argentinean linseed expellers. The goods were delivered partially against one bill of lading and nothing was delivered against the other one but it was ambiguous why a loss had arisen. The insufficiency of the good was probably due to an over-delivery at the previous port and the agents of the unsatisfied buyers decided to sue the carrier. Obviously they could not rely on section 1 of the 1855 Act and they opted to argue an implied contract. Even though the Court of the Appeal recognized the utility and the convenience of the implied contract it was held that in that particular case the facts were insufficient to justify implication and Bingham LJ said: "There does not, however, appear to have been a case in which a contract has been implied from the mere facts (a) that an endorsee, entitled as holder of a bill of lading to demand delivery, does so, and (b) that the shipowner, bound by contract with his shipper (and perhaps his charterer) to deliver goods to any party presenting the bill of lading, duly makes such delivery"[19]. In *The Gudermes* the court found that the co-operation between the endorsee and the carrier was not enough to imply a *Brandt* contract[20] and Staughton LJ stated that there is a *Brandt* contract merely where the parties' actions are "consistent only with there being a new contract implied, and inconsistent with there being no such contract"[21].

What about the claims by the shipper? The shipper is normally a party of the contract of carriage and, in consequence of this, he has the right to enforce it; however where the goods are sold before the damage takes place the shipper does not have any more interest in suing the carrier[22]. Before the 1855 Act, *The Dunlop v Lambert*[23] case allowed a shipper in some cases to sue the seller for the full extent of the damage on behalf of the buyer who had suffered the real loss contrary to the rule that someone who suffers no quantifiable loss is entitled only to nominal damages for breach of contract. Of course the excess damages must be restored to the party that suffered the real loss. In *The Albazero* case the House of Lord stated that the rule in *Dunlop v Lambert* had been largely replaced by the 1855 Act and by the doctrine of Brandt contracts confining the above mentioned rule only to cases where there was no passing of contractual rights to the buyer[24]. It is unfortunately now unclear whether the rule survives in other cases.

This was a necessary brief introduction in order to explain the reasons that determined, in 1991, the recommendation of the Law Commission for a reform on this field[25]. In consequence of the recommendation of the Law Commission, the Carriage of Goods by Sea Act 1992 came into force on 16 September 1992. Basically the new Act introduced a different scheme of liability disconnected from the passing of property, and related to the endorsement of the bill of lading or otherwise.

Section 2(1) provides that: "Subject to the following provisions of this section, a person who becomes-

a. the lawful holder of a bill of lading;
b. the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract: or
c. the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract".

Section 2(1) of the Act expressly relates only to the "lawful holder" of the bill of lading and Section 5(2) provides that: "References in

this Act to the holder of a bill of lading are references to any of the following persons, that is to say-

a. a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;
b. a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;
c. a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder failing within paragraph (a) or (b) above had not the transaction being effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith".

Unfortunately the Act does not provide a definition of the concept of *good faith*. On the other hand, in *The Aegean Sea*[26], Thomas J referred to the concept of *good faith* in a narrow means: "In the commercial context of bills of lading the meaning of the term good faith should be clear, capable of unambiguous application and be consistent with the usage in other contexts and countries"[27].

Moreover, the Act does not only split the correlation between the passing of property and the contractual rights as above stated, but also solves many of the problems of the old law. With reference to section 2(2) a bank to whom a bill or lading is transferred or the goods are consigned only by way of security can now rely to the rights conferred by the new Act that applies even where the transfer of the bill of lading follows the delivery of the goods provided that the transfer has been made: "(a) by virtue of a transaction effected in pursuance of any contractual or other arrangement made before the time when such a right to possession ceased to attach to possession of the bill; or (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements".

The problem which arose in *The Delfini* with regards to the 1855 Act has been definitely solved.

Furthermore the new Act applies, following section 2 (1), not only to bills of lading but also to waybills and ship's delivery orders. According to section 1 (5) the Secretary of State may also "by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to" the issue of a document in relation to the Act, the indorsement, delivery or other transfer of such a document or everything else in relation to such a document. The main issue is that where an electronic bill of lading is developed the Act will cover it. However a large number of documents may not be covered by the provisions of the Act; section 1(1) provides that the Act applies to any bill of lading, sea waybill and ship's delivery order and, in consequence of this, some of the multimodal transport documents might not be protected by the provisions of the Act. It is also uncertain whether the Act can be applied to bills issued under a charterparty, since in the case of charterparty the contract is contained in the charter where section 5(1) requires that the "contract of carriage" is the one "contained in or evidenced" by the bill or the waybill. The Act does not cover merchant's delivery orders and, since section 4(1) requires a ship's delivery order to contain an undertaking "by the carrier to a person identified in the document", it also excludes ship's delivery orders where issued by the bill of lading holder.

As emphasised above the scope of section 2(1) is to transfer the rights to suit to the "lawful holder" of the bill and to the person who is the person to whom delivery of the goods to which a sea waybill or ship's delivery order relates. However, in consequence of the provision of this section, the transfer divests the original shipper of the possibility of a claim against the carrier. Moreover section 2(5) states that where rights are transferred by virtue of section 2(1), the described transfer shall extinguish also any entitlement to those rights which derives from the original party to the contract of carriage in the bill of lading or, in the case of any other document to which the Act applies "from the previous operation of that subsection in relation to that document". However, the section provides that "the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order".

However, even if section 2(1) does not deprive the shipper of all contractual rights[28], the second limb of the provision affects the rights of the sellers to bring an action even though the latter may have a legitimate interest in suing the carrier after the transfer of the bill. As a partial exception section 2(4) allows a person to whom the rights to claim have been transferred under section 2(1) to exercise the mentioned rights for the benefit of "a person with any interest or right in or in relation to goods to which the document relates" and who suffered loss or damage in consequence of the breach of the contract of carriage. These rights can be exercised "to the same extent as they could have been exercised if they have been vested in the person for whose benefit they are exercised".

Section 3 of the new Act, in partial accordance with the 1855 Act, states that the person in whom rights are vested by virtue of section 2 shall "become subject to the same liabilities under that contract as if he had been a party to that contract". Moreover, contrary to the provision of the old Act and in order to avoid the liability of banks, the statute provides that the transfer of liabilities will be effective only if the person to whom these rights are transferred: "(a) takes or demands delivery from the carrier of any of the goods to which the document relates; (b) makes a claim under the contract of carriage against the carrier in respect of any of these goods; or (c) is a person who, at a time before those rights were vested on him, took or demanded delivery from the carrier of any of these goods". Banks collecting bill of ladings or any other document under the Act as security are now protected against liability unless they take or demand delivery, make a claim against the carrier or took or demanded delivery at the time before the rights

were vested. Notwithstanding the provisions concerning the transfer of rights, section 3 (3) states that the imposition of such liabilities "shall be without prejudice to the liabilities under the contract of any person as an original party to the contract". This was the position also of the 1855 Act and in other words means that the original shipper remains liable even where liabilities are imposed by the Act on someone else[29].

It is clear now that a person can become liable on a bill of lading only if he tries to enforce the contract of carriage in a way described by section 3 (1). What happens then when an intermediary become liable under section 3 but then transfers the bill to someone else? Section 2 (5) provides that, by transferring the bill, he has lost the rights to enforce the bill. The question whether or not an intermediate who transfers the bill to another party can become liable has been examined in *The Berge Sisar*[30]. In this case the plaintiff, Borealis, bought from Stargas a cargo containing 43,000 tonnes of propane. After the arrival Borealis took a small quantity of the goods from the cargo with the purposes of sampling and discovered that the goods were not of the quality requested by the contact. The carrier brought a claim for corrosion damages on the assumption that, by taking delivery of a quantity of goods, the buyer became liable on the contract. On the other hand the bill were indorsed to Dow Europe and the question was whether or not the buyer was still liable under section 3(1) of the Carriage of Goods by Sea Act. The Court of Appeal held by majority that the liability of the buyer was divested when he transferred the bill of lading to Dow Europe because the buyer or the intermediate holder of the bill of lading would become irreversibly liable only if the steps he takes to enforce the contract "preclude any further dealing with the goods"[31]. The House of Lords have recently examined the question[32] on appeal and stated that the routine sampling did not show the willingness of Borealis to receive a cargo into the terminal and consequently Borealis never become liable. Even if this assumption was sufficient to dismiss the Appeal, the House of Lords also considered whether an endorsee of a bill of lading ceases to be liable when he transfers the bill of lading to someone else. The judgement of Lord Hobhouse of Woodborough, followed by unanimous decision of the House of Lords, makes a clear point on this matter where it provides that: "The liability is dependent upon the possession of the rights. It follows that, as there is no provision to the contrary, the Act should be construed as providing that, if the person should cease to have the rights vested in him, he should no longer be subject to the liabilities"[33]. He considered that the meaning of the new Act is to preserve the 140 years old decision in *Smurthwaite v. Wilkins* where Erle CJ stated: "The contention is that the consignee or assignee shall always remain liable like the consignor although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the act of parliament"[34].

Despite its brevity the Carriage of Goods by Sea Act 1992 is a considerable improvement for both national and international trade law. As noted it solves many of the problems related to the old law and it can be considered, at least for the possibility of introduction of an electronic bill of lading, the carriage law for the 21st century. However, some problems are still unsolved and, as seen in the *Berge Sisar*, some of its terms can be regarded as potentially unfair.

Endnotes:

[1] Carriage of Goods by Sea Act 1992, c. 50.

[2] Bills of Lading Act 1855, c.

[3] Robert Bradgate and Fidelma White, "The Carriage of Goods by Sea Act 1992" [1993] MLR 188 at 189.

[4] Robert Bradgate, *Commercial Law* (London, Edinburgh, Dublin: Butterworths, 2000) at 754.

[5] For a brief explanation of the problems concernine the rights of third parties see Robert Bradgate, *Commercial Law* (London, Edinburgh, Dublin: Butterworths, 2000) at 763-765 and *New Zealand Shipping Co Ltd* [1975] AC 154.

[6] T.G. Carter, "On Some Defects in the Bills of Lading Act 1855" (1890) 23 LQR 289.

[7] Robert Bradgate, *Commercial Law* (London, Edinburgh, Dublin: Butterworths, 2000) at 755.

[8] *Cia Portorafti Commerciale SA v. Ultramar Panama Inc* [1990] 2 Lloyd's Rep 395.

[9] *Enichem Anic SpA v Ampelos Shipping Co Ltd* [1990] 1 Lloyd's Rep. 252.

[10] Robert Bradgate, *Commercial Law* (London, Edinburgh, Dublin: Butterworths, 2000) at 755.

[11] *Leigh anb Sillavan v Aliakmon Shipping Co* [1986] AC 785.

[12] *Brandt v Liverpool Brazil and River Plate Steam Navigation Co* [1924] 1 KB 575.

[13] *Cock v Taylor* (1811) 13 East 399.

[14] ibid.

[15] *Stindt c Roberts* (1848) 17 LJQB 166.

[16] *Cremery General Carriers SA* [1974] 1 WLR 341.

[17] *Ilyssia Cia Naviera SA v Bamaodah* [1985] 1 Lloyd's Rep 107.

[18] *The Aramis* [1989] 1 Lloyd's Rep. 213.

[19] ibid. at 224.

[20] *Mitsui & Co Ltd v Novorossiysk Shipping Co* [1993] 1 Lloyd's rep 311.

[21] ibid. at 320.

[22] Robert Bradgate, *Commercial Law* (London, Edinburgh, Dublin: Butterworths, 2000) at 754.

[23] *Dunlop v Lambert* (1839) 6 C1 & F 600.

[24] *The Albazero* [1977] AC 774.

[25] Law Com 196, "Rights of Suit in Respect of Carriage of Goods by Sea" (1991).

[26] *Aegean sea Traders Corpn v Respol Petroleo SA* [1998] 2 Lloyd's Rep 39.

[27] *Aegean sea Traders Corpn v Respol Petroleo SA* [1998] 2 Lloyd's Rep 39 at 60.

[28] E.g. a shipper under a sea waybill has the possibility under section 2(1)(b) to overcome the effects of the transfer.

[29] See *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605.

[30] *Borealis AB v Stargas Ltd* [1998] All ER 821.

[31] Per Millett LJ in *Borealis AB v Stargas Ltd* [1998] All ER 821 at 837.

[32] *Borealis AB v Stargas Ltd* [2001] 1 Lloyd's Rep. 663.

[33] ibid. at 678.

[34] *Smurthwaite v. Wilkins* (1862) 11 C.B. (N.S.) 842 at 848.

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