

SHIPPING CONFERENCES

AMOS HERMAN, LL.B., S.J.D.

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Preface

On October 9, 1983, the Code of Conduct for Liner Conferences entered into force. The introduction of an international regulatory scheme for liner conferences marks the beginning of a new era in the field of shipping transportation of general cargo.

This book has two main goals: first to describe and analyse the shipping conference system with an emphasis on the different attitudes which the U.S., India, Australia, and the U.K. have toward the regulation of shipping conferences. Second, to concentrate on the two international codes for conferences that were adopted in the last decade. Each of the aforementioned countries holds a different view regarding the function of conferences. The U.K. believes in *laissez-faire* in shipping, thus no government regulations exist to control the conference system. However, the U.K. has enacted, very recently, the Merchant Shipping (Liner Conferences) Act 1982, which incorporates the UNCTAD Conference's Code.

The U.K. represents the carriers' interests. In the U.S. free competition is enforced. Business trusts are outlawed. Only in special cases, where it is to the public's benefit, are combinations allowed to exist, to a limited degree, under governmental supervision, and this is the case with shipping conferences. Yet, even in the U.S. views are expressed in favour of closing conferences and the withdrawal from the obligation of conferences to file tariffs with an agency of the U.S. Government.

Australia represents the line that goes in between the two extremes. Conferences are free to operate there, but on the outbound trade they are subject to loose governmental control. India, as a developing country, characterizes the problems of a shippers' nation struggling to develop its fleet. As to the above-mentioned codes, the developing countries do not accept the principles of self-regulation of the Code of Practice for Conferences adopted in 1971 by the Committee of European and Japanese National Shipowners Association (CENSA). The maritime nations voted against the United Nations Conference on Trade and Development (UNCTAD) Code of Conduct for Liner Conferences which was adopted in Geneva in 1974. The UNCTAD Code includes promotional, economic aspects, which the developing countries wanted to separate from a Code aimed at controlling conferences. In principle, the UNCTAD Code and the CENSA Code together with the U.S. Shipping Act and the Australian Trade Practices Act of 1974 agree on the machinery to regulate conferences. The target of this study is to find a compromise between these different approaches that will take into consideration the special needs of the developing countries without losing the benefits of the comparative advantages of free maritime transportation.

And finally, I want to express my deep and sincere thanks to Ms. Cary Kittle Williams of Charlottesville, Va. and Washington, D.C., for her support, assistance and encouragement during the period of preparation of the research for this work and to Ms. E. M. Hanson of Houston, Texas, for her cooperation and understanding.

Tel-Aviv
July 1983

Amos Herman

CHAPTER 1

A General Overview of Seaborne Transportation

The seaborne trade is carried in various forms of maritime transportation. Most of the forms are not interchangeable though some of them are overlapping. The cargo is carried in vessels sailing under different flags having the right, under the freedom of the seas principle, to move to almost every port on the globe.¹

Over 80 per cent of world trade by volume is carried by ship² despite the growth of overland and air transport.

The three main categories of ships are as follows: dry bulk carriers, liquid bulk carriers such as tankers, and general cargo carriers.

Usually the general cargo category includes all movements of cargo except the seven major bulk commodities which consist of oil, iron and manganese ores, coal, grain, bauxite, and phosphates.

The bulk carriers are normally chartered to one shipper at a time. The general cargo carriers offer their services to a variety of shippers with a variety of goods on the same route at the same time. The general cargo carriers are usually common carriers holding themselves out to the public as engaged in the business of transporting persons or property from one given place to another for consideration.³

The common, general cargo, carriers operate on particular geographic routes with a fixed schedule and a fixed set of rates. They are generally called liners. They carry a variety of cargo composed of numerous parcels from different shippers to different receivers. The distribution of general cargo among a number of ports and the frequency of service are the main features of liner service.

Generally, there is no substantial body of cargo that can be considered the sole preserve of either liners or tramps.⁴ The process of 'topping up' by tramps and the occasional carriage by liners of bulk cargo ensures that

1. L. Oppenheim, *International Law*, edited by H. Lauterpacht (8th ed., 1955), Vol. I, 588–594.

2. Farthing, 'Shipowners View on Liner Conferences', 12 *Intereconomics* 379 (1972).

3. *Ballentine Law Dictionary* (3rd ed., 1969), 226.

4. Tramp is a form of service not a type or a category of vessel. Tramp service is usually performed by bulk cargo carriers, and the vessels are called after the type of service they perform. Tramps do not sail on a fixed schedule and have no fixed freight rates. The tramps move to where the cargo is and carry it to where needed. As many tramps are bulk carriers, they carry normally full loads of one commodity at the service of a single shipper. Tramps will compete with liners when their cargo is scarce or when their holds still have room for more cargo.

tramps and liners trespass on each other's preserve.⁵ Yet, physical conditions will not allow a container ship to carry oil in bulk or a bulk carrier to carry refrigerated meat. About 22,500 ocean-going merchant ships, both bulk and general cargo carriers, of over 1,000 gross tons⁶ ply the oceans, creating a network of trade routes to supply the needs of the national and international economies.

The eight major routes in the seaborne trade are as follows:

- (1) the North Atlantic route;
- (2) the Mediterranean-Asian-Australian (Suez Canal) route;
- (3) the South American route, including trade from North America to the East and West Coasts of South America;
- (4) the Caribbean Sea route;
- (5) the South Pacific route;
- (6) the North Pacific route;
- (7) the European-East Coast of South America route; and
- (8) the South African route.⁷

The bill of lading which is evidence of the contract of carriage includes the terms and conditions of the shipment. It is a receipt signed by or on behalf of the carrier and is issued to the shipper. The bill of lading acknowledges that goods, as described in it, have either been shipped in a particular vessel to a specified destination or have been received in the shipowner's custody for shipment.⁸

The shipper who sells his goods to an overseas buyer, the consignee, normally sells the cargo either in c.i.f. terms or in f.o.b. terms. C.i.f. stands for Cost of the goods together with Insurance of the goods during transit, and the Freight to the port of destination. The f.o.b. form is a contract for the sale of goods Free On Board. In the c.i.f. contract it is the responsibility of the seller to cover the subjects of shipping and insuring the cargo, while in f.o.b. the buyer has to take care of the carriage and insurance of the merchandise.⁹

The price for carriage is the freight rate which is calculated either by weight or by volume or sometimes *ad valorem*. Usually rates are based on whichever provides a greater revenue, the weight ton (2,240 lbs.) or the measurement ton (40 cubic feet). The ton on which the rate is based is the revenue ton. The liner rates are imposed unilaterally by the shipowner and are found in a tariff. The tramp rates are fixed individually for each voyage or for each period of time the vessel is used. The tramp rates, which are called fixtures, are included in the charterparties, the vessels' hiring contracts.

5. E. Bennathan and A. A. Walters, 'Shipping Conferences: An Economic Analysis', 4 *Journal of Maritime Law and Commerce* 93 at 95 (1972).

6. U.S. Department of Commerce, Maritime Administration, *Annual Report 1975* at 73.

7. Lane C. Kendall, *The Business of Shipping* (1973), 3.

8. See generally, William Payne, *Payne and Ivory's Carriage of Goods By Sea* (11th ed., 1979).

9. See generally D. M. Sassoon, *C.I.F. and F.O.B. Contracts* (2nd ed., 1975).

There are two main measures of ship's size used for statistical purposes. Gross tonnage (Gross Registered Tons or GRT) indicates the total cubic capacity of the enclosed space on a ship. Dead Weight Ton (DWT) denotes the maximum load which a vessel can carry before submerging the load line. It exceeds the maximum weight of cargo by the weight of fuel, fresh water and stores. GRT is often used for the measurement of general cargo ships while DWT is used for tankers and bulk carriers.

Different goods vary in what is known as their stowage factor, the number of measurement tons of cubic meters or feet of space occupied. The size of vessels varies from small coastal boats with 500 GRT to huge tankers of 250,000 DWT. Ships are normally built to serve a special purpose or a specific trade.

Among the general cargo vessels there are the conventional breakbulk carriers, the multideck vessels, whose size varies from 5–15,000 GRT. A subgroup of the conventional breakbulk carriers are the refrigerator ships that were built to carry meat and fresh fruits and vegetables. There are also special automobile carriers. Some ships are equipped with special handling means to lift heavy cargo, while others were built with shallow drafts to enter ports in rivers like the Plate and the Bay of Bengal. The latest trend in general cargo shipping is the building of ships designed to carry unitized cargo. The most popular one is the containership which is built to carry 2,000 containers. Containers vary in sizes, the most common are the 20 feet long, 8 feet high and 8 feet wide. There are containers which are 40 feet long and others which are considerably smaller. Other ships were designed to carry barges which are released once the ship reaches her destination. It has been estimated that whilst two-thirds of world seaborne trade by volume is carried on liners, this represents only one-quarter of the trade by weight.¹⁰

The demand for shipping services depends on the demand for the various commodities carried by the vessels. Only a little of the demand for shipping is due to internal factors in the shipping industry itself. The ease by which a vessel can be moved from one trade route to another, the freedom of the seas which permits any ship to enter almost any trade at any time, and the interchangeability of many vessels make the response to market demands very prompt. The supply of shipping services, though very elastic in normal days, may become very inelastic if the existing tonnage is exhausted because building new ships is a long and expensive process.

The present day merchant fleet is owned predominantly by the developed countries. In 1981, the world's total tonnage in million GRT was about 415. The share of the developed countries was about 213 million GRT which amounts to about 50 per cent. 105 million GRT were registered in Liberia, Panama, and other countries that supply flags of convenience. This tonnage is dominated by entities from developed countries. 40.4 million GRT belonged to the socialist countries. 55 million GRT was the share of

10. Committee of Inquiry into Shipping, Cmnd 4337 (1970) at 97 (hereinafter cited as the Rochdale Report).

developing countries. This share represents 14 per cent of the total world tonnage.¹¹

Although, basically, the structure of today's shipping industry still reflects the political and economic conditions of the late nineteenth century, the emergence of the 'third world' and the socialist countries changes this picture. The move from sail to steam boats over a hundred years ago caused a big revolution in the shipping industry. The introduction of container-ships and highly specialized and huge vessels is today's revolution which has as strong an impact on the field as the industrial revolution had on it in the nineteenth century. The acquisition of new vessels and the development of new fleets require large amounts of capital which are increasingly beyond the means of individual shipowners. The estimated price for new and ready liner type vessels of 15,000 DWT was \$14 million in the year 1981.¹² A new containership with a carrying capacity of 1,600 containers costs about \$30-35 million, excluding the containers which cost \$2000 each. In order to supply an adequate service, a containership needs three times her container's carrying capacity. This adds \$9 millions to the price.

In some parts of the world the shipping business is totally private, *i.e.*, U.K. and Norway. In other parts it is totally government owned, *i.e.*, the Soviet Block. In India, for example, both forms coexist. Though shipping is a business, elements of national security, macro-economics, and prestige, are very strongly involved. The establishment or expansion of national fleets is not limited, therefore, solely to economic factors. There is no precise formula for each country that can tell the 'right' size of a national fleet. Each nation makes its own weighing, based on various grounds, when it comes to determining the destiny of its merchant marine.

In 1981, the total world tonnage in DWT was 697 million.¹³ The general cargo carriers tonnage amounted to over 116 million DWT.¹⁴ Altogether in 1979, the world fleet loaded 3,827 million tons of cargo and unloaded 3,814 million tons.¹⁵

Cargo is transported overseas either in full shiploads of a commodity or in smaller quantities, too little to justify bulk movement. Of the latter kind, many products are of such a nature that they cannot be handled by bulk transfer methods. These small quantities, the general cargo, move in liner vessels. The general cargo can be divided into three major groups. The first group, manufactured goods, includes food products for direct consumption. This group amounts to about 50 per cent by value of the total seaborne trade but only to about 15 per cent by volume.¹⁶ The second group is composed of the semi-manufactured goods including chemicals and

11. Review of Maritime Transport 1981, UN Doc. TD/B/C.4/251(1982), Table 4 (hereinafter cited 1981 Review).

12. *Id.*, Table 16.

13. *Id.*, Table 7.

14. *Id.*, Table 7.

15. *Id.*, Table 12.

16. S. A. Lawrance, *International Sea Transport, The Years Ahead* (1972), 137.

machinery components. The third group is comprised of raw materials moving in small quantities such as natural rubber, wool, timber, cotton, etc.

The shipper of general cargo has to adjust himself to the routes and schedules of the liners, while the bulk shipper charters a vessel when and where he pleases. The carriers of general cargo respond to the needs of the trade. They establish suitable sea routes, supply adequate vessels and handling equipment, and adjust the frequencies of sailings. Adequacy of liner service is a very complicated matter because of the diversity of cargo shipped and the great numbers of ports of call. It is also very difficult to predict the demand for shipping capacity in an international market where forces of free competition are mingled with politics.

SOME HISTORICAL REMARKS

After the Middle Ages when international trade started to develop, the merchants needed vessels to ship their merchandise. At first they owned the individual boats in which they shipped various types of goods. Later, when the trade expanded and colonies were discovered and established, the shipping became an independent service. Cargo and passengers were carried for freight and fares. The technological conditions did not allow a fixed schedule because the sailboats were exposed to the weather. Therefore, the cargo did not flow steadily. With the years, the steamboat was invented, and the flow of cargo increased. The shipowners were then able to sail on a regular basis and to set a tariff for their services. In the early stages, liner owners could promise only scheduled departures. It was very difficult to predict the period of voyage. With the advancement of technology, annual plans could be drawn, and fixed schedules could be kept. The industrial revolution brought with it new dimensions in manufacturing, consumerism and marketing, aside from the social impact it had on the modern world. New markets were needed for the products and new sources of materials were required for the growing industry and population. Maritime transportation was necessary to meet those demands. In 1850, the world fleet consisted of about 7 million tons out of which over 90 per cent was sailboats. By 1900, the world tonnage amounted to 29 millions tons.¹⁷ In 1885, in the U.K., there were already more gross registered tons of steamships than sailboats.¹⁸ They were not dependent on weather conditions. Deakin and Seward¹⁹ stated that it took a sailboat an average of 60 to 65 days to get from the U.K. to Australia. This voyage was shortened by about 15 days between 1873 and 1897 with the use of steamships. The opening of the Suez Canal in 1869 significantly cut the

17. Level and Structure of Freight Rates Conference Practices and Adequacy of Shipping Services, UN Doc. TD/B/C.4/30/Rev. 1 (1969) at 5.

18. Deakin and Seward, *Shipping Conferences – A Study of Their Origins, Development and Economic Practices* (1973), 15 (hereinafter cited as Deakin and Seward).

19. *Id.*

duration of the voyages from Europe to India and the Far East. The same amount of cargo that required, at the beginning of the nineteenth century, four sailboats could be carried on one steamship for half the time by the end of the century. These factors, together with the fact that cargo movement did not keep pace with the fleets' expansion, created a new problem. The trade routes became overtonnaged. The immediate reaction of the shipowners was to lower their rates in order to attract customers. This caused a chain reaction. Freight rates were brought down to the level of direct voyage costs. The cut-throat competition was so fierce as to be murderous. The only means for the shipowners to survive was to get together and coordinate their operations on the route. Controlling competition amongst themselves and creating a united front to fight other carriers were the initial steps taken by the shipowners. The first gathering took place on the U.K.-Calcutta route in 1875 where a few competing shipowners decided to cooperate. They established a uniform tariff that secured for them reasonable profits and allotted sailings for each vessel. Thus, the first shipping conference was created. Complaints against this new body were soon to come. The complaints came from two sources, shippers and shipowners who were not admitted to the conference. The uniform rates applied equally to all shippers regardless of size and special past relations and concessions. The big shippers complained that they were used to getting discounts from the carriers. They said that as big and regular customers they deserved preferential treatment in the form of reduced rates. When the conference refused to grant them discounts, they turned to independent carriers who agreed to carry their cargo for lower rates. The conference, in order not to lose good, regular customers, agreed to decrease its rates. In consideration for the lower prices, the shippers agreed to ship their cargo exclusively on conference vessels. Thus, the first loyalty agreement was signed in 1877.²⁰

The second source of complaint came from the shipowners who were excluded from the conference. It is best exemplified in the classical case of *The Mogul S.S. Co. v. McGregor, Gour and Co. and Others*.²¹ The plaintiffs claimed they they

have suffered damage by reason of the defendants as and being owners of numerous steamers trading between ports in Yangtse-Kiang River and London, *conspiring together* and with other persons . . . to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs, from shippers, to be carried from ports in the said river to London, for reward, to the plaintiffs in that behalf. . . . The said conspiracy consisted and consists of *a combination and agreement by and amongst the defendants*, as and being owners of steamers trading as aforesaid, and having by reason of such combination and agreement control of the homeward shipping trade pursuant to which *shippers were and are bribed, coerced, and induced to agree to forbear from shipping cargoes by the steamers of the plaintiffs*.²²

20. S. G. Sturmeay, *British Shipping and World Competition* (1962), 324 (hereinafter cited as Sturmeay).

21. (1885) 15 Q.B.D. 476.

22. *Id.* 476-477 (emphasis added).

All the way up to the House of Lords,²³ the justices were of the opinion that this kind of 'combination to trade and to offer in respect of prices, discounts, and other trade facilities' is lawful.²⁴ Even if the rival is driven out of business, as long as unlawful means are not employed, there is nothing wrong with this kind of combination. When the cooperating lines' plan is to monopolize the trade, without the direct intention to injure the independent carrier, Common Law does not regard it as illegal conspiracy and treats it as any other commercial dealing.

Legal suits were not the only means resorted to by the shipowners outside the conference. They competed with the conferences by lowering their rates to a level beneath the conference's rates and fought fiercely for each ton of cargo that was available. The conferences, in order to drive the outsider away from the routes they operated on, introduced fighting ships as a method to compete with the other carriers. The conference members joined together in this project by placing a vessel on berth next to an outsider. The fighting vessel was scheduled to sail when the independent was and charged lower rates than he did. The losses accrued by the fighting ships were spread among the conference members. Independent carriers who did not have the financial means and backing to participate in such a war either had to withdraw from the particular trade route or entirely drop out of the business. The strong ones prevailed and eventually joined the conferences. In *U.S. v. Hamburg-American S.S. Line et al.*,²⁵ the matter of fighting ships first reached the courts. In that particular case, a conference engaged in the transatlantic passenger business used a fighting ship to drive competitors away from their route. The conference employed a vessel specifically for the purpose of fighting by placing it on berth near a competitive boat and by charging lower rates than the former. The fighting ship did not belong to any of the conference members and was used solely for combating. It was held that a fighting ship constitutes an unreasonable and undue restraint on the trade and commerce in violation of the antitrust laws.²⁶ Later on, in the U.S. Shipping Act of 1916,²⁷ the use of fighting ships was prohibited.²⁸ Only the U.S., so far, has specifically outlawed fighting ships. The UNCTAD Code of Conduct for Liner Conferences²⁹ prohibits in Article 18 the use of fighting ships.

Another way for conferences to fight competition was to establish tying arrangements with shippers. By tying the shipper to the conference, or to one of its members, the steady flow of cargo was secured. The tying arrangements vary in their degree of tightness and scope. One mode of arrangement is the deferred rebate system whereby the shipper is entitled to

23. [1892] A.C. 25.

24. *Id.*, per Lord Halsbury at 40.

25. 216 F. 791, Dist. Ct. S.D.N.Y. (1914).

26. This decision was reversed on grounds of mootness because of the outbreak of the First World War, 239 U.S. 466 (1915).

27. 39 Stat. 728.

28. 39 Stat. 733, § 14; 46 USC, § 812.

29. TD/Code/Rev. 1 (1974).

a rebate from the carrier after an agreed period in which the shipper sends his cargo exclusively with the carrier. The rebates vary from 5 to 20 per cent of the freight rates. Another way of tying shippers to conferences is the dual rate contract. This device entitles shippers to an instant reduction in the freight rate in consideration for their exclusive patronage during the contract period.

Until about one hundred years ago, the differentiation between bulk vessels and general cargo carriers hardly existed. The first oil products were contained in barrels whereas grains and coal were packed in sacks. They all moved in the same type of vessels. The first shipping conferences consisted of ships carrying all kinds of cargo without distinction. When movement of raw materials increased, bulk carriers were built to carry these commodities in full ship loads without packing. Transporting in bulk became a separate branch in the shipping industry. Because of the difference in nature between bulk cargo and general cargo, the relationship between carriers and shippers, in these two fields, is different. In bulk cargo businesses, shippers often own the vessels or charter them for long periods of time. The market of shippers and carriers is centralized and things are conducted from very few international bourses. General cargo is heterogeneous, it is composed of small parcels, and is spread all over the world. As a result, a different maritime transportation system is required. The same competitive forces of one hundred years ago still exist in the general cargo transport branch of shipping. While bulk carriers could branch out of conferences to adopt their own fashion of sea carriage, general cargo carriers and shippers had to stick to the same method; thus, the conference system was not only kept alive but even prospered over the years. The need for conferences was not restricted to the U.K.-Calcutta trade where the first conference was established. The liners' combinations spread rapidly throughout the world. They limited rate wars; thus, stabilizing the freight rates, and, thereby, permitting a regular and steady service. About 350 conferences currently operate in ocean transportation.³⁰ Conferences are international bodies which consist of members from many different countries. They vary in size from only two members to over twenty members³¹; and they vary in scope of geographical coverage, from two ports to a range of over twenty ports located in three different continents.³² Conferences that cover short routes are called 'short sea conferences'. 'Deep sea conferences' cover long distances. Conferences differ not only in size and geographical coverage but also in the structure of their contracts. Some conferences have only a uniform rate agreement with very loose ties while others pool their trade and revenues.

The monopolistic aspects of the conferences, *i.e.*, fixing rates, allocating sailings, pooling trade, etc., raised questions as to the legality and justification of their existence. The first to conduct a public inquiry into the

30 *Croner's World Directory of Freight Conferences* (1983) (hereinafter cited as Croner).

31. The Association of West India Transatlantic S.S. Lines has over thirty shipping companies members: Croner, 24.

32. The North Atlantic Mediterranean Freight Conference: Croner, 95.

subject were the British. In 1906, the Royal Commission on Shipping Rings was appointed. In 1909, after three years of thorough investigations, the Commission came out with its report.³³ The Commission concluded, in its majority decision, that the conference system, as a whole, does not operate to the detriment of the British economy. A system of checks and balances is inherent in the conference itself, *i.e.*, the internal competition among the member lines. Outside competition from independent carriers and the common actions taken by shippers secure the phenomenon from abusing its powers in an unreasonable manner. The majority did not consider legislation as a solution to control the powers of the conferences. The Commission recommended the formation of shippers' organizations for the purpose of negotiating with conferences as collective representatives of the users of conferences services. The majority further recommended that the Board of Trade should keep conference practices under review by demanding the filing of conference agreements with it and the publication of their tariffs. The minority group demanded more stern action by the authorities to avoid monopoly abuses. The Commission's majority report recognized the advantages of the conference system, *i.e.*, the stability of rates and the regularity of service. The majority concluded that the advantages of the conferences are substantially dependent on the tying arrangements, the deferred rebates, or some other system which is equally as effective. The only method the majority saw as necessary to secure the fairness of these arrangements was the depositing of the agreements with the Board of Trade. Even the minority did not recommend any legislation which might prohibit or restrict tying devices. The minority concluded that the conference system does not necessarily supply regular and adequate service, and the stable rate is not such a big advantage because it is usually higher than the competitive rates. However, the minority opinion did not suggest the abolishing of the conference system. The recommendations of the Royal Commission were not implemented in England, probably because of the strong position the shipowners held in that maritime nation.

In the U.S. in 1912, a Congressional Committee, the House of Representatives Merchant Marine and Fisheries Committee, under the chairmanship of Representative Joshua Alexander, undertook the task of inquiring into the modes and practices of shipping conferences. The Alexander Committee (named after its chairman) faced a double problem. First, the U.S. was not a maritime power; and second, the existence of the antitrust laws which state that 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal'.³⁴ Against this kind of background the Committee's task was much more complicated than the one of the British Commission. Other factors which added to the problem were a couple of Bills that Congress had before it even before the start of the actual work by the Alexander Committee. Those

33. Cmnd No. 4668 (1909).

34. Sherman Act of 1890, § 1; 15 USC, § 1.