

Bills of Lading

A selection of articles previously published by Gard AS



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Introduction

This booklet contains a collection of loss prevention material relating to bills of lading and which has been published by Gard over the years.

Gard - the P&I Club - has considerable experience of bill of lading issues both from claims handling as well as from dealing with Member enquiries. Experience indicates that even the simplest of mistakes or an oversight in a bill of lading can lead to complex and expensive problems at a later date. These issues are important considering that the Member's P&I cover can often be at stake. Gard is committed to sharing its experience with others through the various loss prevention publications.

The bill of lading has its origins in the trade and carriage of goods by sea hundreds of years ago. It has since developed into a very important legal document, evidencing the carrier's receipt of the goods, the terms of the contract of carriage and the right to possession of the goods. With this important role come problems; one of

which is the required presentation of an original bill of lading in order to be able to take delivery of the cargo.

Although the practice of paperless trading is developing rapidly, shipowners and their Masters will, for many years to come, be burdened with the responsibility of signing and authorising signature of bills of lading, and delivering cargo against the same. The delivery of cargo carried under bills of lading is just one of the general topics covered by this compilation. Other topics include the clausing and dating of bills of lading; the identity of the carrier under bills of lading and, if the worse happens and a dispute arises, forum selection clauses. All of these topics and more are listed in the contents page of this compilation. Under each topic you will find listed relevant material previously published by Gard.

As an Appendix to this compilation, you will also find a copy of the contents page of Gard's Guidance on Bills of Lading publication. The purpose of that

publication is to be a practical reference guide and to assist the Master in avoiding any pitfalls and problems. The guidance explains, with examples where possible, what a bill of lading can and is used for, the obligations the Master has with regard to bills of lading, the consequences of things not being done correctly, what should be done/considered before signing bills of lading or authorising others to sign, how delivery against bills of lading should be made and how to deal with specific problems/issues that may arise. Should you wish to obtain a copy of the Guidance on Bills of Lading please contact Gard AS.

Hopefully, this compilation will be a useful aid in providing guidance, answers to a query, or at the very least a pointer in the right direction.

The law on bills of lading is not static and changes may affect any guidance provided in the material contained within this compilation. If in doubt or to confirm the current position, Gard is always on hand to assist.

English law - Switching bills of lading

Gard News 201,
February/April 2011

When a carrier receives a request to substitute the original set of bills of lading with a new set he should be aware of the risks involved. A recent English case considers some aspects of this problem.

A recent case¹ in the English High Court is one of very few on the not so uncommon practice of switching bills of lading, that is, substituting the original set of bills with a new set.

Background

Yekalon Industry Inc (Yekalon), a Chinese company, was a seller of 30 containers of tiles to Sonaec SA (Sonaec), with the goods being shipped on Maersk's liner service through local agents High Goal Logistics GD Ltd (High Goal). The bill of lading, which was later treated by the English courts as a waybill (and which term will be used in this article for the sake of clarity), named Sonaec as consignee and the shipper(s) as B & D Co Ltd P/C (pour compte de) Vernal Investment (Vernal) & Yekalon. Vernal is a subsidiary or associate company of Sonaec. The consignee was Sonaec Villas in Cotonou, Benin. The notify party was Vernal P/C Sonaec Villas. The containers were to be loaded in China for discharge in Benin.

Seller not paid

Shortly after the waybill had been issued (it remains unclear whether the containers were in fact shipped), seller Yekalon claimed that it had not been paid by buyer/consignee Sonaec and asked agent High Goal for the waybill. High Goal refused on the grounds that it had not received instructions from B & D Co Ltd acting on account of the shippers. Yekalon applied to the Chinese courts and obtained a declaration that Yekalon was entitled to possession of the waybill.

Switched bills

On declaring that they had still not been paid by Sonaec, Yekalon surrendered the original waybills to Maersk and requested a new bill issued to the order of Yekalon (which, being "to order", would make it a bill of lading). Yekalon subsequently found a new buyer and then surrendered the replacement bill of lading for a second

replacement naming the new buyer as the consignee.

Buyer commences proceedings against the carrier

Buyer Sonaec later commenced court proceedings against carrier Maersk in Benin, claiming that they were entitled to possession of the cargo. The Benin court made an interim ruling in favour of Sonaec requiring Maersk to ship the cargo to Sonaec and imposing a daily fine on Maersk of USD 4,800 until it complied. This was despite Maersk having challenged the Benin court's jurisdiction (the waybill contained an exclusive English law and jurisdiction clause) and also disputing that Sonaec no longer had title to sue since the waybill had been cancelled.

The carrier seeks relief from the English High Court

Having failed to persuade the Benin court, Maersk sought a declaration from the English High Court that Sonaec must submit its dispute to the latter court's jurisdiction and that Sonaec no longer had title to sue under the waybill. The High Court granted both declarations to Maersk and in reaching its decision the court had to tackle some difficult questions: was Sonaec a party to the waybill and was Sonaec still bound by the exclusive English law and jurisdiction clause after the waybill had been surrendered?

The court's answer to both questions was yes, but the question of whether the surrender of the waybill brought to an end the rights of Sonaec was more difficult. This was because the waybill stated that B & D Co Ltd acted on account of two entities, one of which was seller Yekalon and the other of which was Vernal, a subsidiary of buyer Sonaec. The court was ultimately persuaded by the Chinese court order to deliver the waybill to Yekalon, therefore giving Yekalon the right to re-direct delivery or to cancel the waybill.

Comment

Although Sonaec had submitted a written response to the English proceedings, it was not supported by a statement of truth, and Sonaec did not appear in the English court proceedings. Had they done so,

the declarations may not have been obtained as easily, particularly the declaration that only Yekalon had the right to re-direct delivery or to cancel the waybill, in circumstances where the waybill named B & D Co Ltd as acting for the account of two entities with opposing interests.

It may be of note that the judge appears to have been somewhat uncomfortable with the lack of evidence provided in the English proceedings, both as to Maersk's knowledge of certain documents that may have evidenced B & D Co Ltd's taking over of the goods for the account of Sonaec (referred to in the written response from Sonaec to the English proceedings) and Yekalon's evidence in the Chinese proceedings that they were the owner and shipper.

It is not clear whether Sonaec made any attempt to challenge the Chinese court decision or what effect the English court declarations had in the case overall.

Conclusion

The case highlights the importance of making clear who the shipper is in a bill, whether it is a waybill or bill of lading. If this is unclear, problems are likely to be encountered should the shipper request the carrier to re-direct delivery or issue replacement bills. The case also serves to stress the importance of establishing the proper party entitled to make such a request.

There are other risks associated with switching bills, which are beyond the scope of this article. At the very least the carrier should ensure that all original bills of the first set issued are surrendered before a new set is issued. If there is a request to change any details in the bills then advice should be sought before this is agreed.

Footnotes

1 A.P. Moller-Maersk A/S (trading as Maersk Line). v Sonaec Villas Cen Sad Fadoul [2010] EWHC 355 (Comm).

Egyptian law - Bill of lading reservations upheld

Gard News 197,
February/April 2010

A landmark judgment has been issued by the Supreme Court in Egypt upholding for the first time ever a defence based on reservations made by the carrier on a bill of lading.

Facts

A cargo of five containers said to contain 3,300 bags of PVC granules was shipped on board a vessel from Busan, Korea to Egypt in 2004. Upon the vessel's arrival at Alexandria the containers were all found to be empty. The Egyptian receivers filed a lawsuit against the carrier seeking compensation for the non-delivery of the cargo.

In 2007, a first instance court rejected the receivers' claim and allowed the defence presented on behalf of the carriers (that the containers had not been weighed at the loading port and had seals intact at discharge). The receivers filed an appeal and in 2008 the Court of Appeal reversed the first instance judgment and held the carrier responsible to pay compensation for non-delivery of the cargo plus interest

at the rate of five per cent per annum and costs. Carriers then appealed to the Supreme Court.

Appeal to the Supreme Court

The appeal was based on evidence that the containers in question had not been weighed at the loading port. In addition, on arrival at Alexandria the containers' seals were found to be intact without any sign of tampering. The Court of Appeal had failed to address these crucial facts. Furthermore, the following disclaimer appeared on the front side of the relevant bill of lading:

"Above particulars furnished by shippers, but without responsibility of or representation by carrier."
"Shipper's load, stow, weight and count."

The Supreme Court held that the above clauses in the bill of lading should have a binding effect on the parties to the contract of carriage, so in order to succeed with their claim the shippers had to provide evidence that

the 3,300 bags of PVC granules were inside the containers at the time they were loaded on board the vessel, which shippers were unable to do.

Conclusion

This is an unprecedented judgment in Egypt, which may not only have an effect on fraudulent cases of empty containers being shipped as loaded with cargo, but may also apply to partial shortages of containerised cargo and other modes of carriage.

We thank Mr Ahmed Metwally, of Eldib Pandi, Egypt, for the above information.



Spanish law – Validity of jurisdiction clause in a bill of lading

Gard News 194,
May/July 2009

The Spanish Supreme Court has recently ruled on the validity of a jurisdiction clause in a bill of lading.

Regulatory background

On 1st March 2002, EU Council Regulation 44/2001 came into force across the EU with the aim of unifying the recognition and enforcement of judgments in civil and commercial matters, replacing the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters (the Convention).¹ The decision reported in this article was given against the background of the 1968 Convention, as Regulation 44/2001 was not in force at the time the suit was originally filed. Nevertheless, the specific Convention provisions on which the decision is based have been essentially reproduced in Regulation 44/2001, so that the result will most probably be the same for cases brought under the Regulation.²

Article 17 of the Convention states that if the parties to a dispute, one or more of whom is domiciled in a contracting state, have agreed that a court or the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Article 17 also lays down the formal requirements of such jurisdiction agreements: (a) they must be in writing or evidenced in writing, or (b) in a form which accords with practices which the parties have established between themselves, or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

The arguments

Cargo interests commenced proceedings before the First Instance Court in Spain against a carrier for damage to cargo carried under a bill of lading. The carrier, relying on a printed clause in bold letters on the front of the bill of lading that referred to the English courts, challenged the jurisdiction of the Spanish courts and maintained the exclusive jurisdiction of the courts in London. Cargo interests alleged that the clause was not applicable, as it did not comply with the requirements of Article 17 of the Convention. In particular, cargo interests alleged that they had not signed the bill of lading and that they were not involved in the carriage of goods by sea.

Therefore the question to be considered by the Spanish courts was whether the clause on the front of the bill of lading constituted a valid agreement on jurisdiction in accordance with the requirements laid down in Article 17 of the Convention.

The First Instance Court and the Court of Appeal ruled in favour of the carrier. The cargo owner appealed to the Supreme Court.

The Supreme Court decision

The Supreme Court confirmed the First Instance Court and Court of Appeal decisions and upheld the validity of the jurisdiction clause in the bill of lading.

The court found that:

- The absence of the cargo interests' signature on the bill of lading could not mean that they had not accepted the conditions of carriage. The jurisdiction clause was clear and was printed in bold letters on the front of the bill of lading. Signature is only a means of expressing an agreement. Moreover, it is accepted that a party can give consent through lack of response or silence.
- Cargo interests were relying on the terms of the bill of lading to pursue the

claim for damage and were bound by the jurisdiction clause as well.

– Furthermore, in accordance with existing case law, the court considered the clause in the context of the maritime trade, where the parties consent to the jurisdiction clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.

Conclusion

A jurisdiction clause on the front of a bill of lading will satisfy the requirements of Article 17 of the Convention and bind the parties despite the absence of signature.

This decision of the Spanish Supreme Court is a welcome extension to the line of judgments under the Convention/Regulation 44/2001 holding jurisdiction clauses valid. The conclusion that a custom of the trade exists regarding the inclusion of jurisdiction clauses into bills of lading mirrors that of the Supreme Court of at least another EU state³ and is also a very positive legal development.

1 See article "Recognition and enforcement of judgments in the EU" in Gard News issue No. 169.

2 The relevant provisions are found in Article 17 a), b) and c) of the Convention, which have been incorporated into Article 23 of the Regulation. Although the caput of the articles have slightly different wordings, paragraphs a), b) and c) are identical.

3 See also article "Identity of carrier and jurisdiction clauses in Germany" in Gard News issue No. 186.

Fake CONGENBILLS

Gard News 187,
August/October 2007



Members should be aware that there are fake CONGENBILLS in circulation, which differ from the authorised version in key aspects.

Gard News would like to remind members and clients of the warning issued by BIMCO in relation to fake CONGENBILLS which are in circulation in the market.¹ BIMCO has received many enquiries, as has Gard, regarding bills entitled "CONGENBILL 2004", when in fact the latest edition of the CONGENBILL was issued by BIMCO in 1994. The fake version of the CONGENBILL differs from the authorised version in two key respects:

- a) The General Average clause incorporates the York-Antwerp Rules 2004.
- b) The both-to-blame collision clause is misprinted.

Since CONGENBILLS are specifically designed for use with corresponding BIMCO charterparties, a potential dispute could arise in respect of a conflict between a BIMCO charterparty whose standard terms incorporate

the York-Antwerp Rules 1994 and the fake CONGENBILL 2004 ostensibly incorporating the York-Antwerp Rules 2004.

The background to this issue is that the 2004 version of the York-Antwerp Rules is considered by several shipowner/operator organisations (in particular BIMCO and the International Chamber of Shipping) to be less advantageous to their members than is the 1994 version, and these organisations advise against the use of the 2004 version in charterparties and bills of lading.

In particular, the 2004 version of the York-Antwerp Rules disallows salvage expenses, which is a departure from several preceding versions of the York-Antwerp Rules. It should also be noted that the York-Antwerp Rules are not a convention and only take effect by being incorporated into individual contracts of affreightment, and earlier versions of the York-Antwerp Rules are often still incorporated into many contracts of affreightment. Gard recommends that where possible members and clients try to incorporate

the 1994 version of the Rules as the most updated and representing their best interests.

A supplementary point which may be of interest relates to whether the 2004 version of the Rules can be considered as an amendment to the 1994 Rules. This point arises because charterparties and bills of lading often incorporate the term "1994 Rules or any subsequent amendments". It was agreed at the CMI Conference in Vancouver in 2004, at which the 2004 version of the Rules were finalised, that this version of the Rules was not an amendment or modification of the 1994 Rules, but rather was a completely new set of Rules. Thus where contracts of affreightment such as CONGENBILL 1994 refer to "the York-Antwerp Rules 1994 or any subsequent modification thereof" the 1994 Rules still will apply.

Footnotes

¹ See www.bimco.org/Members%20Area/News/General_News/2006/11/1120-Warning%20Fraudulent%20CONGENBILL.aspx.

UCP 600 - How the new rules on documentary credits may affect contracts of carriage

Gard News 187,
August/October 2007

The ICC's new rules on documentary credits are now in force and could give rise to some confusion and complications for carriers.¹

Introduction

The financing of the international sale of goods is largely based on letters of credit, which are issued by a bank and are an undertaking to make a specified payment to a beneficiary provided that the terms of the letter of credit are complied with. The benefit of a letter of credit sale is that, via the banks, the seller secures his money after parting with the goods (by handing them to the carrier) and the buyer secures rights to the goods before parting with his money, with all this being done on the basis of an exchange of compliant documents. Since the banks themselves are financially exposed, they will exercise great care in ensuring that the sale documents, including the bill of lading, comply with the letter of credit. Many letters of credit are governed by the Uniform Customs and Practice for Documentary Credits² (UCP), a set of standard rules and practices on the issuance and use of letters of credit, which will often be voluntarily incorporated into the sales contract and which will largely determine whether sale documents, including the bill of lading, comply with the letter of credit. A new version of the rules, UCP 600, was approved in October 2006 and came into force on 1st July 2007.³

The importance of UCP can be demonstrated by the comments of Lord Hoffman in the STARSIN, a recent and relevant case in the House of Lords.⁴ He said:
"Since it is common general knowledge that banks almost invariably issue letters of credit on the terms of UCP 500, those terms will be part of the background available to the reasonable reader seeking to ascertain the meaning of the bill of lading. He will know that a

bank, one of the potential addressees which anyone issuing a bill of lading must have in mind, would accept it as meaning that the person named on the front as the carrier was indeed the carrier. And the reasonable reader will not think that the bill of lading could have been intended to have one meaning to a bank and another to a consignee or assignee."

The most relevant UCP articles to those involved in the transportation of goods are the ones dealing with transport documents and it is important to be aware of the provisions. We will briefly consider here the main aspects and changes involving those articles most relevant to transportation by sea. It is apparent that the new articles could give rise to confusion as to the identity of the contractual carrier and complications for carriage of cargo on deck.

Bills of lading - General

UCP continues to differentiate between what might be regarded as liner bills, charterparty bills and multimodal bills.⁵

In the case of liner and charterparty bills of lading it remains a requirement for both types to indicate that the goods have been shipped on board a named vessel on a given date and at the port of loading stated in the credit. The date of issuance of the bill will be deemed to be the date of shipment unless the bill contains an on-board notation indicating the date of shipment, in which case the date stated in that notation will be deemed the date of shipment. In the case of multimodal bills, similar requirements remain in place as for other types of bill, but the relevant date is (as it was under UCP 500) the date the goods have been dispatched, taken in charge or shipped on board at a place stated in the credit. It also remains the case with UCP 600 that shipment to the port of discharge, or in the case of multimodal/combined

transport bills, the place of final destination (as stated in the credit) must also be indicated in the bill of lading.⁶

For the three types of bill of lading, authentication of the bill, required by the previous UCP 500, is now removed, as Article 3 of UCP 600 provides that a document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other method of mechanical or electronic authentication.

Liner bills of lading

Article 20 is of great relevance to liner bills which will often cover containerised or unitised goods. It still requires:

- an indication of the name of the carrier; and
- signature by the carrier or a named agent for or on behalf of the carrier; or
- signature by the master or a named agent for or on behalf of the master.

Under UCP 600 the master's name need no longer appear on the bill. There does, however, remain a requirement that any signature by the carrier, master or agent be identified as that of the carrier, master or agent and that any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.

The position concerning transshipment (unloading from one vessel and reloading to another vessel during the carriage) does not appear to have changed much from UCP 500. Liberty clauses, which give a carrier the right to tranship, continue to be disregarded⁷ by the banks (this is now explicit under UCP 600). Like UCP 500 did, UCP 600 will allow a bill indicating that the goods will or may be transhipped, provided the entire carriage is covered by one and the same bill. A bill indicating that transshipment will or may take place is also acceptable under UCP 600, even if

1 See article "UCP 600" in Gard News issue No. 186.

2 Published by the International Chamber of Commerce (ICC).

3 Copies of UCP 600 are available from the various ICC book shops or from www.iccbookshop.com/details.php?id=189.

4 The STARSIN [2003] 2 W.L.R. 711 HL.

5 For non-negotiable sea waybills see further below.

6 There are finer details with these provisions, e.g., where intended ports or places are indicated or, in the case of a charterparty bill, where a range of discharge ports is indicated, but it is not proposed to go into those details here.

the credit prohibits transshipment, but only if the goods have been shipped in a container, trailer or lash barge as evidenced by the bill.

Multimodal bills of lading

Article 19 applies to multimodal or combined transport documents, however named.⁸ It replaces Article 26 of UCP 500. The reference in Article 26 of UCP 500 to “multimodal transport operator” is now replaced simply with “carrier”. The signature provisions therefore read the same as those for bills of lading under Article 20. The position regarding transshipment is also similar to Article 20, with logical differences to cover different modes of transport.

Comment

If the bill identifies as carrier somebody other than the vessel owner or demise charterer, potential confusion could arise in some jurisdictions as to the identity of the contractual carrier if the master signs the bill or an agent signs for the master. Would the contractual carrier be deemed to be the named carrier or, by virtue of the master’s signature, the vessel owner/demise charterer?⁹ To avoid such confusion it would be preferable that the carrier signed the bill as carrier or an agent did so on behalf of the carrier.

As for transshipment, it remains a little unclear whether banks will accept a transshipment bill covering goods which are not in a container, trailer or lash barge, where transshipment is prohibited under the credit.

Charterparty bills of lading

Article 22 deals with charterparty bills, which often cover bulk cargoes. As in UCP 500, the significant difference between this article and Article 20 is that charterparty bills are not required to name the carrier. UCP 600 will require:

- signature by the master or a named agent for or on behalf of the master; or
- signature by the owner or a named agent for or on behalf of the owner; or
- signature by the charterer or a named agent for or on behalf of the charterer.

The significant change from UCP 500 is found in the last bullet point, which is a new provision. There is also a requirement that any signature by the master, owner, charterer or agent be identified as that of the master, owner, charterer or agent and that any signature by an agent on behalf of the owner or charterer must indicate the name of the owner or charterer. The other notable change from UCP 500 is that the port of discharge may now be shown as a range of ports or a geographical range, as stated in the credit.

Comment

Article 20 may increase the scope for confusion over the identity of the contractual carrier. UCP 600 now permits signature by or for/on behalf of the charterer. For example, if in accordance with UCP 600 a typical form of bill of lading (to be used with a charterparty) were signed by or for the charterer without naming the carrier, who would be identified by that bill as the contractual carrier? Under English law the bill as a whole would be considered, not just the signature, so in the example given, how would one reconcile the signature with the printed words so often seen in the attestation clause of a typical form of bill of lading (to be used with a charterparty) which read “in witness whereof the master has signed...”? Arguably, those printed words could be said to be irrelevant in the example given, because the master has not signed – the charterer has signed and has done so on his own behalf. There is English case law which suggests that an owner’s form of bill which contains nothing to suggest that the charterers signed as agents for the master or owners makes that bill a charterers’ bill.¹⁰ There is also English case law which suggests that if the charterer signs a bill containing the words “signed for the master” then the bill would be an owners’ bill.¹¹

The English courts will give effect to an express statement identifying the carrier providing it is clear and unambiguous.¹² Therefore, if in the example given above the typical form of bill of lading (to be used with a charterparty) were signed “for the charterer Bulk Chartering Ltd – the carrier” that would, under English law, be taken to be a clear and unambiguous identification of Bulk Chartering Ltd as the contractual carrier regardless of pre-printed terms and conditions.

If the contractual carrier is not made clear in the bill of lading¹³ and the owner is found not to be the contractual carrier, that could result in him being exposed to a claim in tort, possibly with no contractual defences or limitations. Under English law owners may be able to rely on the terms of the bill as bailees. However, the same may not be the case in other jurisdictions where a ship may be targeted. Many typical forms of bill of lading (to be used with a charterparty) and the relevant charterparties themselves do not contain a Himalaya clause giving owners the benefit of the bill of lading terms and conditions and/or protection from claims in tort by third parties.

If the identity of the carrier is unclear and the charterer has signed the bill,

complications could also arise with demands for security for a claim against the charterer in addition to the owner.

The law of the United States is quite different. According to United States law, the vessel in rem, the owner in personam, and the charterer in personam would probably all be considered carriers regardless of who has signed the bill. The vessel would be deemed to have ratified the bill of lading when she sailed with the bill of lading cargo on board. The vessel in rem would also be bound by a signature on behalf of the master in the bill of lading. The owner would be deemed to be the carrier if it issued the bill of lading or if it authorised the charterer to issue a bill of lading. The charterer would be liable if it issued the bill of lading. There are certain exceptions to these general rules, but a shipowner and charterer would be wise to assume that the vessel, the owner and the charterer would all be considered carriers. If the claimant were to name the wrong entity as the carrier, United States courts would freely grant leave to amend a complaint to include the correct carrier. If the correct carrier would not be prejudiced by the amendment, the amendment would relate back to the time the original complaint was filed, thus preventing a time bar argument.

Given the scope for confusion it is recommended that:

- Although for charterparty bills UCP 600 does not require the carrier to be identified for documentary credit purposes, conflicting provisions in the bill as to the identity of the carrier should be avoided. If the owners and charterers agree that the charterers are to be the contractual carrier, then in addition to signature by or for the charterers, a clear and unambiguous identification of charterers as the carrier is recommended.
- That owners only permit charterers to issue bills in their own name or as carrier if the bill contains a clear and unambiguous identification of charterers as carrier and incorporates a suitably drafted Himalaya clause giving owners the benefit of the bill of lading terms and conditions and/or protection from claims in tort by third parties.
- That charterers take care to avoid themselves being identified as carrier under a bill which they may not intend to be. Simple signature by or for the charterers on a typical form of bill of lading (to be used with a charterparty) which does not contain a clear and unambiguous identification of the carrier could be interpreted in some jurisdictions to be a charterers’ bill or indeed a bill under which both owners

and charterers are deemed contractual carriers.

– That owners and charterers seek to expressly agree in the charterparty how bills are to be issued, following up with clear instructions to the master/agents to check that bills are being issued correctly once signed.

Non-negotiable sea waybill

As in UCP 500, UCP 600 has a separate article (Article 21) dealing with non-negotiable sea waybills. This is now similarly worded to the new bill of lading article (Article 20) insofar as concerns signature and indication that the goods have been shipped on board a named vessel on a given date and at a port of loading stated in the credit. There is no longer a transhipment provision for sea waybills.

“On deck”, “Shipper’s load and count”

It remains the case with UCP 600 (Article 26) that a transport document must not indicate that the goods are or will be loaded on deck. A clause stating that the goods may be loaded on deck remains acceptable. However, the words “unless otherwise stipulated in the Credit”, which appeared in UCP 500, have been omitted from UCP 600, which suggests that under UCP 600 the parties may not agree in their letter of credit that bills of lading are to expressly state that the cargo is to be carried on deck. The same article also reconfirms that a transport document bearing a clause such as “shipper’s load and count” and “said by the shipper to contain” is acceptable.

Comment

The removal of the words “unless otherwise stipulated in the Credit” with regard to the acceptance of “on deck” bills would appear to create a problem if the letter of credit is subject to UCP

600 and the bills are claused “on deck”, even if the parties have agreed to “on deck” bills in their letter of credit. However, there are provisions in Articles 1 and 2 of UCP 600 which suggest that the parties to the letter of credit do have scope to agree terms that differ from the UCP rules and that the terms of the credit will take precedence over those rules. If the bank is unsure as to the position, this may result in pressure on carriers to issue bills which do not indicate that the goods are carried on deck when in fact the goods are carried on deck. If carriers agree to this, they may prejudice their P&I cover. This is because the absence of a statement in the bill that the goods are shipped on deck risks a finding that the deck carriage has been unauthorised. The potential consequences of such a finding are the loss of the carrier’s defences and limitations of liability, which would prejudice P&I cover. Under English law a general liberty to carry goods on deck (which is acceptable under UCP 600) is simply that – a liberty, or an option (available to the carrier) – and on its own is insufficient to “authorise” deck carriage,¹⁴ since a third party transferee of the bill of lading would not be able to ascertain whether the liberty had been exercised or not.¹⁵ Unless there is an established custom of the trade, it is recommended that the carrier strongly resists any pressure to issue bills which do not expressly state that the goods are carried on deck when in fact they are carried on deck.

Clean transport document

It remains the case with UCP 600 (Article 27) that a bank will only accept a clean transport document, which is defined as one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The same article now makes

it clearer that the word “clean” need not appear on a transport document, even if a credit has a requirement for the transport document to be “clean on board”.

Freight

Under UCP 600 there is no equivalent of Article 33 under UCP 500, which provided that banks would accept transport documents stating that freight has still to be paid. This implies that the banks will no longer bother with provisions regarding freight.¹⁶

Conclusion

At the time of going to press the new edition of the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP) was published. The ISBP is the companion document to UCP and may well assist in clarifying how the banks will interpret the changes under UCP 600.

It is somewhat ironic that the House of Lords in the STARSIN used UCP 500 to help them clarify the identity of the carrier in a case concerning a liner bill and that UCP 600 has the potential to make matters unclear as far as charterparty bills are concerned. A further comment from Lord Hobhouse in the STARSIN suggests that UCP 600 has a lot to live up to: “the current version of the code (UCP 500) has made significant changes to the previous versions and among other things, requires that the actual identity of the carrier should be disclosed and particularized by naming it or him on the face of the bill of lading...All this is a worthy aspiration”.

We are grateful to Professor Charles Debattista, of Stone Chambers in Gray’s Inn and of the University of Southampton, for his assistance in the preparation of this article.

7 In other words, the presence of a liberty clause will not make the bill a non-compliant document under UCP even if transhipment is prohibited by the letter of credit.

8 The fact that this article is now the first transport article under UCP indicates that the banks are seeing many more bills covering such transport.

9 See for example the articles “Whose bill of lading is it anyway?” Gard News issue No. 162 and “Identity of the carrier – The House of Lords decides” in Gard News issue No. 170.

10 THE OKEHAMPTON [1913] P. 173 at p. 180, in which the judge commented “The Court must of course construe the whole instrument before it in its factual context, and cannot ignore the terms of the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen. If an obviously inappropriate form is used, its language must be adapted to apply to the particular case.”

11 The REWIA [1991] 2 Lloyd’s Rep. 325, in which the judge commented “that a bill of lading signed for the master cannot be a charterers’ bill unless the contract was made with the charterers alone, and the person signing has the authority to sign, and does sign, on behalf of the charterers and not the owners”.

12 The STARSIN [2003] 2 W.L.R. 711 H.L.

13 In which case a claimant may have other, although less certain, avenues of claim: against the owner in contract and/or tort/bailment and/or against the charterer in contract.

14 See Svenska Tractor v. Maritime Agencies (1953) 2 Q.B. 295 and the article “Deck Cargo – A Summary of English and US Law” in Gard News issue No. 145.

15 However, the absence of a statement in the bill that the goods are shipped on deck should not matter where there is a custom of the trade or port of loading to stow the specific goods on deck for the voyage in question. For instance, carriage of enclosed containers on decks of purpose-built container ships is almost universally regarded as a customary method of carriage. Belgium, however, is an exception – see the article “Belgium – Carriage of containers on deck” in Gard News issue No. 162. Similarly, the carriage of logs on deck of purpose-built log-carrying vessels is also accepted as customary.

16 Article 26 of UCP 600 states that a transport document may bear a reference to charges additional to the freight.

Identity of carrier and jurisdiction clauses in Germany

Gard News 186,
May/July 2007

The German Supreme Court has recently held an identity of carrier clause invalid.

The facts

A German-owned vessel was chartered to an English company which in turn contracted with another English company for the carriage of 560 steel tubes from the UK to Sweden. The receiver of the tubes under the bill of lading claimed that 114 of the tubes arrived in damaged condition. The bill of lading, which was signed by the master, named the English charterers as carriers and contained the following printed clauses:

"3. Jurisdiction

Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein ..."

"17. Identity of Carrier

The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage whether or not relating to the vessel's seaworthiness ..."

Suit was filed against the shipowners before the German courts. Both the courts of first and second instance found that the German courts had no jurisdiction to hear the case. The Supreme Court left this question to be answered by the court of second instance by referring the matter back to that court. However, in doing so the German Supreme Court set out a number of considerations which are of wider interest.

Legal considerations

The German Supreme Court's decision sets out from the premise that, based on EU Council Regulation 44/2001 on jurisdiction and the recognition and

enforcement of judgments in civil and commercial matters (the Regulation), the German courts would have jurisdiction, as the defendant's seat is within Germany, unless the parties had derogated from this general rule in accordance with article 23 paragraph 1 of the Regulation. The question thus to be considered was whether the clauses in the bill of lading constituted such an agreement.

The first question was which law was to be applied to the case. Difficulties arose from the combination of the jurisdiction clause and the identity of carrier clause. The question of the applicable law turned on the validity of the identity of carrier clause. And in the view of the court the validity of this clause had to be judged by the law which applied according to the jurisdiction clause. In order to solve this circle, the court resorted to the principle of German conflict of law rules according to which the applicable law would be that which would apply if the identity of carrier clause were indeed valid. If the clause were valid, the German owner would be treated as the carrier and therefore German law would be applied regarding the validity of the identity of carrier clause.

The court then found that the written additions to the bill of lading, namely that the English charterers were named as the carrier, conflicted with the identity of carrier clause. Since the printed clauses of a bill of lading are deemed under German law to be general terms and conditions, the individual agreement regarding the identity of the carrier would prevail over the general (printed) terms. The court held that naming the charterers as carrier on the face of the bill of lading was an individual agreement. As a consequence, the identity of carrier clause was held to be invalid and the carrier was held to be the charterers with their seat in England. In this regard the court referred to the judgement of the House of Lords in *The STARSIN*.¹ It followed that if the identity of carrier clause was invalid the jurisdiction clause

meant that the English courts had jurisdiction and that English law would apply to the case.

In order, however, to decide on the jurisdiction of the German courts despite article 2 of the Regulation, it had to be further ascertained whether or not the jurisdiction agreement in clause 3 of the bill of lading was binding on the parties. This question was to be decided in autonomous interpretation of article 23 paragraph 1, 3rd sentence of the Regulation. For all questions not ruled by the Regulation, English law was to be applied.

The court then held that the existence of choice of law and choice of jurisdiction clauses in a bill of lading was a widely known custom of the trade in international maritime trade and that therefore the formal requirements of article 23 of the Regulation were fulfilled.

The court then held that the receiver of the goods claiming under the terms of the bill of lading accepts the choice of jurisdiction based on this trade usage (custom of the trade). Consequently, the claimant was bound by the jurisdiction clause.

Nevertheless, the court found that, based on the findings of the lower courts, it could not be said that the shipowner had accepted the clause in the same way. The owner neither succeeded to rights under the bill of lading nor did he consent to its terms after the bill of lading was issued. However, the question now to be decided and ascertained by the court of second instance was whether the defendant owner was, maybe by a custom of the trade, involved in the underlying agreement.

Since this question could not be determined based on the findings of the lower courts, it was referred back to the appeal court.

Comments

With this decision the German

1 [2003] 1 Lloyds Report 571.

Supreme Court has extended its line of judgments holding identity of carrier clauses invalid in cases where the bill of lading clearly names a charterer as carrier on its face.

The finding that a custom of the trade exists regarding the inclusion

of jurisdiction clauses into bills of lading is new and conforms with the understanding of learned scholars.

The question of whether or not the defendant is bound by the jurisdiction clause will have to be considered by the appellate court based on the principles

of English law, which, according to the findings of the Supreme Court, rule any aspects left open by the Regulation.

We thank Dr. Tobias Eckardt, of Ahlers & Vogel, Hamburg, for the above information.

Chinese court applies US law in straight bill of lading case

**Gard News 182,
May/July 2006**

Chinese court finds that US law applies to case by force of contract and that as a result cargo can be delivered without production of an original straight bill of lading.

An article in Gard News issue No. 176¹ drew readers' attention to a decision of the Chinese judiciary that in future cases where the Maritime Code of the People's Republic of China (PRC) was applicable, the Chinese courts should adopt the principle that cargo carried under bills of lading, including straight bills, should only be delivered against production of the original bill. That decision, however, is relevant to cases where Chinese law applies, and in a recent case the Chinese courts held that US law applied, which resulted in the carrier avoiding liability for delivering cargo without production of a straight bill.

The subject case, before the Guangzhou Maritime Court, involved

a Chinese shipper, who had not been paid for the goods by the consignee.

The shipper sought to recover his loss by claiming in tort against the carrier who had delivered the cargo to the consignee in Canada without production of the original bill. The bill expressly provided for US law to apply and the court held (upheld on appeal) as follows:

- The claim in respect of delivery of cargo without production of the original bill was a contractual one and could not be advanced in tort.
- The shipper and carrier had voluntarily agreed to apply US law and such an agreement was lawful and effective – it did not violate public interest of the PRC.
- Proof of the relevant US law had been ascertained in previous civil judgments of the Chinese courts.

With regard to the last point, US law permits the carrier to deliver goods covered by a non-negotiable (straight)

bill of lading to the named consignee without surrender of the original bill, unless he has notice from the shipper or another party claiming to have title to the goods demanding that the goods not be delivered to the named consignee.²

This recent decision of the Chinese courts is a welcome one for carriers, not just because the carrier avoided liability, but because the court was willing to apply the contractually agreed law. Unfortunately, a carrier can not be certain that will always be the case and where straight bills, as opposed to waybills, are used the carrier would be advised to exercise extreme caution before delivering cargo without production of the original bill.³

We are grateful to Messrs Wang Jing & Co., Law Firm, Guangzhou, for reporting the above case.

¹ "Delivery of cargo carried under straight bills of lading – Developments in China".

² See article "Straight bills of lading – Not so straightforward" in Gard News issue No. 169.

³ See article "Rules apply to straight bills – House of Lords decides RAFAELA S" in Gard News issue No. 178.

Hong Kong law - Straight bills of lading

Gard News 185,
February/April 2007

The Hong Kong Commercial Court has recently had to consider the nature of straight bills of lading.

Straight bills

A straight bill of lading is a bill of lading which bears the name of the consignee, as opposed to the so-called "to order" bill of lading.

An article in Gard News issue No. 178 reviewed the position of straight bill of lading under English law in light of the House of Lords' decision in the RAFAELA S case.¹

It is typical for a bill of lading to contain an attestation clause:

"In witness whereof, the carrier by its agents has signed three (3) original Bills of Lading all of this tenor and date, one of which being accomplished the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order."

This was the case with the RAFAELA S. In Gard News 178, readers were warned of the potential risk in delivering goods without presentation of a "straight" bill containing such an attestation.

Hong Kong

The issue of straight bills of lading has recently come up in two related actions decided by the Commercial Court in Hong Kong.²

The facts in the two Hong Kong cases are slightly different from those in the RAFAELA S, while being identical to each other in the following aspects. The bills of lading in both actions incorporated only the first limb of the full attestation clause ("In witness whereof, the carrier by its agents has signed three (3) original Bills of Lading all of this tenor and date, one of which being accomplished the others to stand void") but did not mention that one of the bills must be surrendered in exchange for the goods. In each action the defendant carrier argued

that such a clause did not impose upon the carrier the contractual obligation to deliver the goods upon production of an original bill of lading and that the usual presentation rule in "to order" bills of lading should not apply to straight bills.

The decision

The Hong Kong Court (Stone J) disagreed and relied on the previous English authority of the RAFAELA S and the Singapore Court of Appeal decision in *Voss v APL*.³ The court thought there should not be one rule for "order" bills and one rule for "straight" bills, and emphatically declined the proposition that straight bills should be treated as akin to sea waybills. The Singapore Court in the *Voss* case had also indicated that the rule requiring presentation of a straight bill as a pre-requisite for obtaining delivery had the advantage of simplicity of application and certainty, and would prevent confusion and avoid shipowners and their agents having to decide whether a bill of lading is a straight bill or an order bill.

It remains to be tested if clearer wording in the contract indicating that the original bill of lading is not required to be presented before delivery of goods will have a different effect to invalidate the usual presentation rule.

However, the defendant carrier succeeded in his defence on a different ground. He was able to rely on an exemption clause on the bill of lading to exclude liabilities after discharge of the goods.

Appeal

These two Hong Kong cases are now under appeal. If the higher court reaches a different decision on the main issues then Gard News will let readers know. Any readers who are interested can refer to the Hong Kong judgments in full at the Hong Kong Department of Justice website: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=53439&QS=%28%24carewins%29&TP=JU.

Straight bills under Chinese law

Readers will recall that the article "Delivery of cargo carried under straight bills of lading – Developments in China" in Gard News issue No. 176 reported on a decision of the Chinese judiciary that in cases where the Maritime Code of the People's Republic of China (PRC) was applicable, the Chinese courts should adopt the principle that cargo carried under bills of lading, including straight bills, should only be delivered against production of the original bill. That decision, however, is relevant to cases where Chinese law applies, and in a recent case the Chinese courts held that US law applied, which resulted in the carrier avoiding liability for delivering cargo without production of a straight bill. For further details see article "Chinese court applies US law in straight bill of lading case" in Gard News issue No. 182.

¹ *MacWilliam Co Inc v The Mediterranean Shipping Co SA* [2005] 1 Lloyd's Rep 347.

² *Carewins Development (China) Limited v Bright Fortune Shipping Ltd and Carewins Development (China) Limited v Hecny Shipping Limited*, HCCL 49 & 50/2004, 27th July 2006.

³ [2002] 2 Lloyd's Rep 707. See article "Straight bills of lading – Not so straightforward" in Gard News issue No. 169.

Early departure procedure via e-mail

Gard News 181,
February/April 2006



A shipowner member has recently brought to Gard's attention the practice of early departure procedure via e-mail.

Early departure procedure (EDP) itself is not new. An article in Gard News issue No. 150¹ explained the hazards of the practice, which often involves issuing signed but otherwise blank bill of lading forms. Interestingly, the practice which is the subject of the article in Gard News issue No. 150 appears to be an improvement on the pure EDP that has been witnessed before, in that the master is, apparently, given the opportunity to approve/correct the bill of lading contents before authorising signature. However, it is suspected that agreeing any corrections is far from easy in reality.

There has been an increase in the general use of e-mail in the issuing of bills of lading and it is perhaps

unsurprising that, at some stage, somebody would think to combine EDP and e-mail, particularly given that speed is common to both.

The master of a vessel insured by Gard has recently received an e-mail with attached copies of original bills of lading, which except for signature were completed in all respects, together with a request from the agents to sign the bills on his behalf.

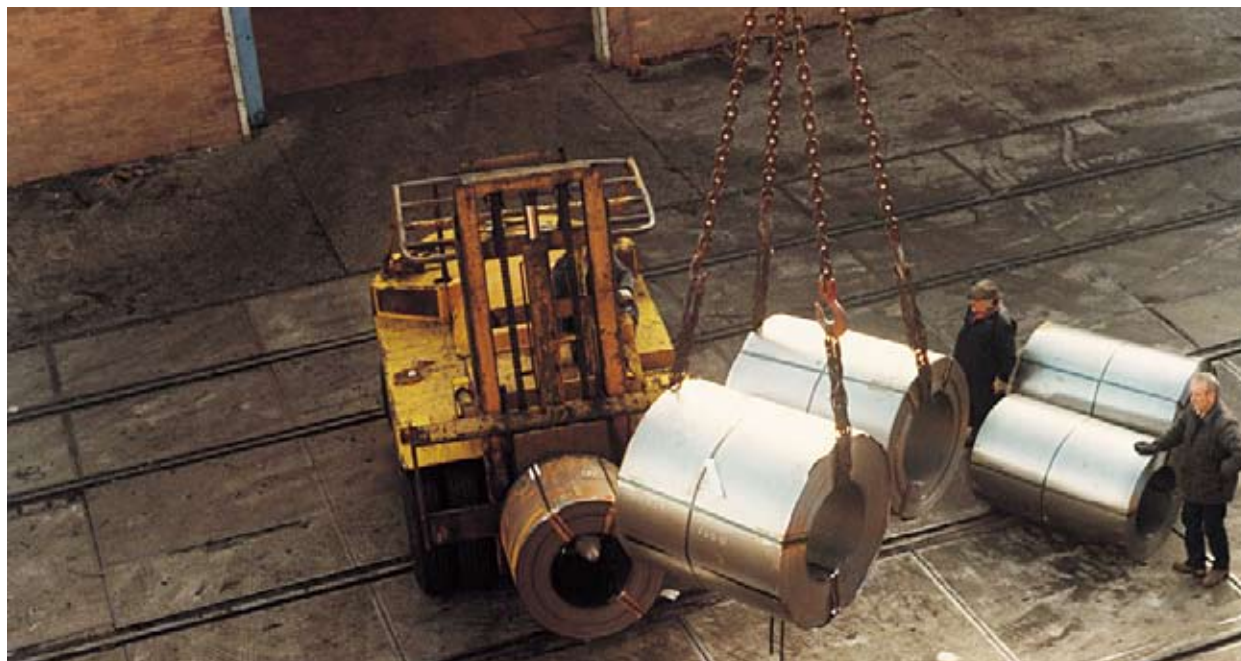
The practice of sending any form of original bill of lading by e-mail can be extremely dangerous given today's sophistication in fraud. Such a practice is not, however, confined to EDP. Indeed, Gard is aware of the development of "electronic bill of lading systems", one of which involves made-up original bills of lading available via the web for shippers to print off at their offices, adding

their own signature as authorised on behalf of the carrier. However, these systems will usually incorporate security arrangements and the point here is that, with the EDP practice described, such arrangements are likely to be "loose" to say the least. Hence, owners would be advised to refuse to participate in the practice. It would be much more preferable to only circulate the information to be entered on the original bill of lading form. If charterers insist on the practice, owners could offer to appoint their own agents at the same loading port, so that e-mailing bills would not be necessary.

¹ Entitled "Early departure procedure and bills of lading".

When can a master refuse to load damaged cargo?

Gard News 180,
November 2005/January 2006



Following a recent decision of the English High Court, very clear terms must be set out in the charterparty if the parties wish to give the master the right to reject damaged cargo before it is loaded.

Introduction

The question of whether a cargo, often a cargo of steel products, is in "apparent good order and condition" and the resulting disagreement as to whether the bill of lading should be claused (and if so, in what terms) arises regularly. Disagreement may arise because there is a genuine factual dispute as to the true condition of the goods. Alternatively (or sometimes additionally), for letter of credit reasons, a shipper will want a clean bill of lading, whereas a master has the right and the duty to protect both the shipowner and the future bill of lading holder(s) and to place remarks on the bill which in his reasonably-held opinion accurately reflect the condition of the goods.

Any disagreement is usually resolved by discussion between the parties. Either a wording for insertion into the bill by the master is agreed, or a clean bill is issued against the provision to the

shipowners by the charterers of a letter of indemnity (LOI). The first solution is the one preferred and recommended by Gard. The second is likely to leave an owner without P&I cover (see Rule 34 1 ix of Gard's 2005 Statutes and Rules) and with little or no defence to a claim by an "innocent third party" for damage which should have been noted on the bill.

In Gard's experience, it is relatively rare for a master to refuse to load damaged cargo. This usually happens when there is a clause in the charterparty which requires the master to sign clean bills of lading, but which allows him to reject cargo which is in such a condition that a clean bill could not be issued. Nevertheless, this does happen from time to time and a recent decision of the English High Court¹ provides useful guidance on the points which masters, owners and charterers should have in mind when faced with such a situation. Interestingly, this was an appeal by owners Sea Success Maritime (SSM) from an award in favour of charterers African Maritime Carriers (AMC) by a tribunal of London arbitrators. Under English law, it is very difficult to obtain leave to appeal against an arbitration

award. The fact that leave to appeal was granted suggests that the judge who heard the application thought there were important issues which should be heard by the High Court.

The facts

SSM were the owners and AMC the charterers of the SEA SUCCESS. The vessel was chartered on the well-known New York Produce Exchange form. There were several other charterparties "down the line" to various sub-charterers, essentially on identical terms. The same arbitrators were appointed under each charterparty and the disputes were dealt with concurrently.

In September 2004, the vessel was ordered to load a cargo of steel pipes at Constanza, Romania. Having inspected them before loading, the master found the pipes to be damaged. He refused to load them. The dispute was resolved by the issue to owners of an LOI. The vessel then sailed to Novorossiysk. There, she was instructed to load a cargo of hot rolled steel coils. The same situation arose. The master considered the coils to be damaged (which in Gard's

¹ Sea Success Maritime Inc. v. African Maritime Carriers Ltd. [2005] EWHC 1542 (Comm); 15th July 2005.



experience is not uncommon with such cargo) and refused to load them. This time, rather than an LOI being issued, the parties entered into a “without prejudice” agreement which resolved the immediate problem. The cargo was then loaded.

The basis on which the master refused to load the cargo

In support of his decision to refuse to load the cargo in question, the master (and SSM) referred to clause 52 of the charterparty with AMC. This clause read:

“The vessel to use Charterers’ Bills of Lading or Bills of Lading approved by Charterers and/or sub-Charterers which to include ... Clause Paramount General, USA or Canadian, as applicable, ... during the period of this Charter. Master to authorise, time by time, in writing Charterers or their appointed Agents to sign Bills of Lading on behalf of Master in accordance with Mate’s Receipts. Master has the right and must reject any cargo that are [sic] subject to clausing of the BS/L.”

SSM relied on the last sentence of this clause which, they argued, meant that the master could and should refuse to load cargo which was in such a condition that, if it was loaded, the bills of lading would have to be claused. Effectively they were arguing that only cargo which was in “apparent good order and condition” could be loaded.

There seems to have been no dispute between SSM and AMC as to the actual condition of the cargo at both Constanza and Novorossiysk. So far as the Novorossiysk cargo was concerned, AMC agreed and confirmed that the bills of lading would contain the description of the cargo and its condition as set out in the pre-loading survey report prepared on owners’ behalf. On this basis, AMC said that the master would not need to clause the bills of lading (because they already contained the surveyor’s remarks) and thus that he had no good reason to refuse to load the cargo.

The arbitration

The dispute went to arbitration. It was heard by three well-known London arbitrators. Essentially, they had to decide two questions:

1. In what circumstances, on the true construction of clause 52 of the charterparty, is the master entitled and obliged to reject the cargo presented for shipment/tendered for loading?
2. Did those circumstances exist at Novorossiysk?

In answer to the first question, the tribunal decided that the master could/should reject the cargo “... if the cargo, once loaded (emphasis added) would be properly described in the bill of lading in a way which would qualify the statement of apparent good order and condition ... proposed to be stated in the bill of lading by the shipper”.

In answer to the second question, the tribunal’s answer was “no”, on the basis that there was no dispute as to the condition of the cargo, nor the description of it that would be inserted in the bills of lading. The tribunal was no doubt influenced by the fact that SSM and AMC were essentially in agreement as to the proper condition of the cargo. SSM sought leave to appeal against these findings and obtained it. The appeal was heard by the High Court in early July 2005.

The High Court’s findings

The judge upheld the tribunal’s decision and thus found in favour of AMC.

Broadly, he approved of the tribunal’s reasoning. He made the particular point that clause 52 (and presumably similar clauses) was not intended to be used if there was no dispute between SSM and AMC as to the condition of the cargo. The judge accepted that the clause would operate if the master (correctly) intended to clause the bill in relation to the condition of the cargo, but the shipper did not agree.

The judge also dealt with what he called the “timing point”. This concerned SSM’s argument that it was impractical for a master to try to reject cargo once it had been loaded, an argument with which many readers will have sympathy. Nevertheless, the judge rejected this argument. He concluded that, after the initial inspection of the cargo (whether by the master or by the

pre-loading surveyor), the charterers/shippers have the opportunity to change their intended description of the cargo in the bill of lading. Thus, he felt, it would be premature for the master to reject the cargo at that time. If charterers/shippers agreed to the bill being worded in terms acceptable to the master, there is no dispute and clause 52 does not operate (see above). In the judge's view, it was only if the charterers/shippers declined to change their description of the cargo in the bill of lading (i.e., refused to allow the bill to be claused as required by the master) that clause 52 operated and the master was then allowed and required to reject the cargo.

Because it did not arise here, the judge said nothing as to the master's position if the charterers/shippers do not reply to his request that they agree to the bill(s) of lading being worded in terms acceptable to him. Under English law, silence is not agreement. Thus it would seem that, if faced with a clause in the charterparty worded similarly to clause 52, the master would probably have to continue loading, but would have the right and obligation to clause the bill(s) himself, just as he would have if the charterers/shippers had refused his request.

Comment

It must be said that clause 52 is not clearly worded. Although the intention appears to be that the master "has the right and must reject" damaged cargo prior to loading, the last sentence has been interpreted by a tribunal of London arbitrators and a High Court judge as meaning something different, especially as to when the master can exercise his right and obligation to

reject. If owners, or indeed charterers, wish to give the master the right to reject damaged cargo before it is loaded, this will have to be set out in very clear terms in the charterparty.

We have mentioned above the position where a clause in the charterparty requires the master or his agent to sign only clean bills of lading, but also gives him the right to reject cargo for which clean bills can not be issued. Based on this case, it seems that such a right to reject may arise only once the cargo has been loaded. It is therefore suggested that owners who are asked to accept such a clause stipulate in clear terms that the master is entitled to refuse to load (not merely "reject") cargo for which in his opinion a clean bill could not be issued.

It is also worth stressing that both the tribunal and the judge appear to have been strongly influenced by the fact that SSM and AMC were in agreement as to the condition of the cargo, especially the Novorossiysk cargo. It is apparent that AMC were willing to allow SSM's surveyor's remarks to be inserted into the Novorossiysk bills. Had this been done, it would have been difficult for SSM to have argued that the bills did not accurately state the condition of the cargo at the time it was received by the vessel. If there had been no agreement between SSM and AMC and had AMC insisted on clean bills being issued, it seems the position would have been very different. The judge found that clause 52 would have operated in such circumstances, although he does not seem to have considered how, in practice, the vessel would have discharged the steel coils already loaded.

Lastly, the judge re-stated what almost all practitioners would recognise as being the correct state of affairs in such matters. To paraphrase the judge, he said that if the master (or often a surveyor acting for owners) inspects the cargo and reasonably considers it to be in such a condition that the bill of lading should be claused, the parties have a choice. Either the charterers/shippers agree to the bill of lading being so claused, in which case the master can sign it, or give authority for it to be signed on his behalf, because he is satisfied that it accurately reflects the condition of the cargo, or the charterers/shippers refuse to themselves clause the bill, in which event the master must do so himself.

In so saying, the judge repeated the well-known position under English law that a master has to take what he called a "... reasonable, non-expert view of the cargo ... as he sees it."

A master will often seek a second opinion from a surveyor and in the case of cargoes of steel products, it is common for pre-loading surveys to be carried out, as happened here. What is uncommon is that the master and SSM refused to allow the cargo to be loaded, even though AMC confirmed that the surveyor's remarks would be inserted into the bills of lading.

Both the arbitrators and the judge found that clause 52 of the charterparty did not allow SSM to refuse to load the cargo. It remains to be seen whether, having lost on two occasions, SSM wish to appeal to the Court of Appeal. We shall keep readers informed.

Short measures – Value your bills of lading as much as your pints of beer

Gard News 167,
August/October 2002

Your pint of beer - Short measure?

The British have long since loved their pints of beer. A pint now costs around two pounds, depending on where and what quality one chooses to drink. The beer drinker is not only concerned with price and quality, however. When being poured into the glass most beers produce a froth or head. The size of this head varies enormously, and according to some campaigners it is often larger than it should be. Essentially this means that the customer gets less liquid beer than the pint he paid for and the supplier (the pub) makes more profit because it is paid for a pint, whereas the actual liquid quantity supplied is less. According to campaigners, research carried out by UK Trading Standards Officers shows that eight out of ten pints served are less than 100 per cent liquid, that the average liquid served is less than 95 per cent, and that short measures cost consumers over GBP 1 million a day.

Bulk liquid cargo shortage claims - The concern - The short measure?

Whilst Gard Services itself can not comment on these reported results, it does have its own experience of what could be termed short measures as far as the carriage of bulk liquid cargoes is concerned. Gard Services sees a number of bulk liquid cargo shortage claims and many are the result of paper differences. In some cases, however, it is worrying that an element of the shortage may be attributable to the issuing of a bill of lading for a quantity of cargo that, according to ship's figures, has not been shipped on board. So what has all this got to do with short measures and pints of beer, the reader may ask? Well, think of the ship as the pint-sized beer glass, the cargo as beer, the shore terminal as the pub and the master as the customer (he is not the drinker of course, he is the custodian, looking after the beer and delivering it safely to the consumer). Instead of the froth or head disguising the quantity actually received, the shore tank figures (which are greater than the ship's figures) will commonly be used to try and persuade the master what quantity has been received on board. If the master relents to pressure and

issues a bill of lading showing the shore figures, without qualification, that is akin (as explained further below) to the customer paying the pub for his pint of beer. Furthermore, if the ship, as with the pint-sized beer glass with a large head, has actually received less cargo on board than the shore terminal figures would suggest, that is also akin to a short measure. For the terminal that could mean being paid (usually on the basis of the bill of lading figures) for a quantity of cargo never supplied.

The legal position

So why is the issuing of a bill of lading akin to the customer paying for his pint? Well, one of the functions of the bill is a receipt for the goods loaded and if the quantity stated in the bill is inaccurate, that can be held against the carrier (usually the owner in the tanker trade), on whose behalf the master is signing the bill. Most bills of lading issued for bulk liquid cargoes are negotiable, that is, they can be transferred (usually by endorsement) from one party to another. In the bulk liquid trade, bills may be transferred numerous times, so that the receiver entitled to possession of the cargo at the discharge port may be at the end of a long chain. Because that receiver is not likely to have had a representative at the load port to confirm that the quantity stated in the bill of lading is the quantity actually shipped, he is entitled to place some reliance on the quantity stated in the bill. This entitlement is recognised by international and national laws applicable to carriage of goods by sea, such as the Hague or Hague-Visby Rules. Under the Hague-Visby Rules,¹ the quantity stated in the bill of lading will, when relied on by an innocent third party, be held to be conclusive evidence of the quantity shipped on board. In other words, the carrier can not dispute the quantity, even if there is evidence that the ship has received a short measure. If the quantity in the bill is overstated, the carrier is at risk of being liable for a claim to make good any short measure.

Of course, most bills contain the words "condition, weight, measure, marks, numbers, quality, contents and value

unknown", and this general reservation may well be sufficient to protect the carrier. However, it may be insufficient when the shore figures exceed the ship's by an amount beyond a normal and/or customary difference. Whilst the shore figures may be unknown to the extent that the master has not been able to take his own measurements/do his own calculations with regard to the shore tanks, the size of the difference between the ship and shore figures alone may give rise to suspicion that the shore figures are inaccurate. Under the Hague and Hague-Visby Rules² the master is not bound to state a quantity which he has reasonable grounds for suspecting does not accurately reflect the goods actually received. If the master nevertheless states such a quantity in the bill, the carrier may be unable to dispute the short measure, even if there is evidence to the contrary.

But what is a normal and/or customary difference? Well, it depends on the circumstances and the means of measurement used to determine the ship's figures. For tankers, the accuracy of tank calibrations, measuring methods and equipment will need to be considered in relation to the prevailing circumstances and conditions (e.g., swell). In very general terms, if the shipper's (terminal) figures exceed the ship's figures by more than 0.25 per cent, Gard Services suggests that the bill of lading be claused. A smaller percentage, however, may be relevant, and in this regard, when a full cargo is loaded, reference should be made to the Vessel Experience Factor (VEF).

The VEF is a ratio calculated by a comparison between the ship and shipper's volume figures. Many tankers will have a record of these from previous shipments. Particular attention should be paid to previously calculated VEFs that are very similar for a particular cargo and place of loading. These VEFs may be considered as the normal and customary difference. However, caution must be exercised when using VEFs, e.g., a calculated VEF can only be considered reliable if it is calculated in accordance with industry guidelines. For further information on the VEF see Gard's publication *Towards Safer Ships and Cleaner Seas*.

¹ Article III (4).

Short measure - What to do?

So what should the master do if presented with a bill showing shore terminal figures that exceed the quantity on board according to the ship's figures? This is where it gets difficult – unlike with a pint of beer, it is often simply not practical to demand a top-up. If the difference is normal and/or customary, the master need only ensure that he reserves the carrier's right to challenge the shore terminal's figures, should that be necessary at a later date. This is achieved by ensuring that the bill contains a general reservation, such as "condition, weight, measure, marks, numbers, quality, contents and value unknown". Remarks such as "clean on board" or "shipped on board" should be avoided, as they may be interpreted as giving more support to the shore terminal figures and may lessen the carrier's ability to rely on the general reservation.

If the shore terminal's figures exceed the ship's figures by an amount beyond a normal and/or customary difference, it may be appropriate (time permitting) for both ship and shore to re-calculate their figures. Mistakes may have been made, e.g., the amount of cargo left in the line between the shore tank and the ship may not have been deducted from the amount delivered to the vessel according to the shore tank figures. Unless and until recalculation shows the difference to be normal and customary, the master should request the shippers to omit/delete their respective figures from the bill of lading. The master is not obliged to issue a bill of lading showing the shipper's quantity or weight in such circumstances.³ If the shippers insist that a quantity or weight be shown in the bill, the ship's figures should be used. If this is unacceptable, the master should clause the bill of lading with the ship's figures, e.g., "ship's figures: 12,500 barrels" or some other appropriate wording. If this is refused, the master should issue a written protest to the terminal/shipper as well as the charterer and call for the assistance of the local correspondent before the bill is signed.

At least as far as English law (which will govern a large number charterparties) is concerned, there is authority on which the owners (assuming they are the carrier under the bill), and therefore the master, can rely in support of their right not to sign inaccurate bills. The case in question⁴ is more fully reported in Gard News issue No. 150, but a summary is helpful here. The ship's figures were 5,078 barrels (0.94 per cent) less than the shippers' and quite rightly the master refused to sign the bill of



lading without clausing it with the ship's figures. As a result, the vessel sailed after a delay of 24 hours. The owners claimed damages from the charterers as a result of the delay. The charterers contended that the master acted unreasonably, but the English High Court disagreed and the owners' claim succeeded. Owners can rely on this case to apply pressure on charterers, whether they be voyage or time charterers (the latter carrying the risk of delay in the first instance anyway), who may in turn be able to exert some pressure on the shippers/terminal to be more reasonable.

Readers may well ask – what about letters of indemnity from the shippers or charterers in return for issuing bills showing shore figures in excess of the ship's? The simple answer is that, where the difference is beyond what might be considered to be normal and customary, courts will probably take the view that such letters of indemnity facilitate a fraud, i.e., it is a deliberate act of inserting into the bill of lading information known to be inaccurate. Such letters of indemnity are not legally binding, and therefore offer the carrier no protection if the shipper or charterer goes back on his promise.

Care should also be taken when agents are authorised to sign bills of lading on the master's behalf in circumstances outlined above. The authorisation should clearly be conditional on the bill of lading being issued/claused with the ship's figures. If sufficient reliance can not be placed on charterers' agents to do this, owners would be best advised to instruct protecting agents.

The cost of getting it wrong

So what is the cost of failing to clause bills of lading in respect of short measures? Well, a one per cent shortage on a 45,000 MT deadweight product tanker, with a clean product value of USD 225 per MT would be in excess of USD 100,000. The cost is even greater to the member, because Club cover may not be available. Rule 34.1 (cargo liability) of Assuranceforeningen Gard's current Statutes and Rules excludes cover for costs and expenses arising out of the issue of a bill of lading or other document known by the member or the master to contain an incorrect description of the cargo or its quantity (our emphasis) or its condition.

Summary and conclusion

Next time you are buying a pint for a friend in the pub remember that if he is not happy with a short measure you should get a top-up. Spare a thought, however, for the master who can not do the same. When dealing with other people's cargoes, the carrier is counting on the master to get it right. If he does not, the consequences will be more serious than a disgruntled friend.

Gard's Guidance on Bills of Lading - New edition

For further advice on bills of lading, particularly dealing with pressure to sign bills, see Gard's Guidance on Bills of Lading. This publication has been re-printed, including the new International Group wordings concerning letters of indemnity for delivery without production of original bills of lading – another problem on which the Guidance on Bills of Lading gives important advice. The Guidance can also be found on the Gard website at www.gard.no.

² Article III (3).

³ Hague and Hague-Visby Rules Article III (3).

⁴ The Boukadoura (1989) 1 Lloyd's Rep. 393.

Clausing bills of lading correctly - Standard of reasonable care affirmed



Introduction

Gard Services regularly receives questions and approaches from members about clausings bills of lading. Often, decisions have to be made quickly. The vessel is about to load the cargo, or has already loaded part cargo. The owners are often under pressure from the shippers or charterers, or both, to issue or agree to the issue of clean bills, although the master is not satisfied that the cargo is indeed in "apparent good order and condition".

Full and detailed advice on this problem is contained in the Gard Guidance on Bills of Lading. Nevertheless, Gard Services is always happy to deal with individual enquiries.

A recent case which was heard by the English Admiralty Court shows how difficult it can be for the master to clause the bill of lading in circumstances where he is under pressure from all

sides and explains the test with which a master must comply when considering when and how to clause a bill. The vessel in question was the DAVID AGMASHENEBELI. Judgment was given in July this year.¹

The facts

The vessel, a 1987-built bulk carrier, was chartered by her owners under the well-known New York Produce Exchange (NYPE) form of time charter. Clause 8 said that the charterers were to: "load, stow and trim and discharge the cargo at their expense under the supervision and responsibility of the Captain, who is to sign, if required to do so by charterers, Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."

In April 1995, a Singapore-based company bought a quantity of urea in bulk at Kotka, Finland. The supplier was named as a Russian company, so it is perhaps logical to assume that

the urea originated in Russia. The specification of the cargo described it as "white colour, free flowing, free from contamination, prilled form, treated against caking, free from harmful substances".

A few days later, the Singapore company re-sold the cargo to a Hong Kong company. Under the terms of the re-sale, the cargo was to be delivered to a port in Southern China. The letter of credit required that, amongst other documents, a full set of "clean on board" bills of lading were to be presented. The Singapore company also arranged for the vessel to be sub-chartered, on a voyage charter basis, to a company in Riga. Interestingly, the voyage charter contained the following clause, which was not in the head (time) charter:

"Under supervision of independent surveyor together with Master/Officers' assistance no damaged cargo to be

¹ The David Agmashenebeli - QBD (Admlty Ct) (Colman J) - 31st May 2002. LMLN 591 of 11th July 2002.

loaded into the holds. If such fact will take place Master has the right to stop loading but Charterers and Shippers to be immediately informed to arrange removing of any contaminations for Charterers' expenses/time."

Finally and later that month, the Hong Kong company re-sold the cargo to a Chinese company.

The dispute

The vessel was instructed to load the urea at Kotka, where she arrived towards the end of April 1995. Before loading started, there was a dispute as to whether the holds were clean enough to receive the cargo after the previous cargo of coal. This was resolved by the owners agreeing that the master would issue clean mate's receipts and bills of lading, plus a letter of indemnity to the Singapore company in relation to loss or damage which they might sustain as a result of the cargo being loaded into "unclean" holds. In fact, the master did not issue such a letter. Nevertheless, loading started. However, the problems had only just begun. Within a few hours of the start of loading, the master informed all parties that the cargo contained rust, plastic and other contaminants and was "of a dirty colour". A letter of protest was issued and sent to the time charterers and the Singapore company. Some two weeks later, the shipowners' local agents issued a mate's receipt claused as follows: "cargo discoloured also foreign materials eg plastic, rust, rubber, stone, black particles found in cargo".

The day after, the Singapore company, to whose order the cargo was consigned in the mate's receipt, informed the shipowners, time charterers and voyage charterers that no freight would be paid unless a clean mate's receipt was issued. Nevertheless, in mid-June, the bills of lading were signed by the shipowners on behalf of the master. They were claused in the same terms as the mate's receipt.

Needless to say, the claused bills presented problems to those involved in the sale and purchase of the cargo, but all concerned managed to agree a solution whereby the cargo was discharged at the end of June. The market price of urea had fallen during the voyage and the Chinese receivers were prepared to accept the cargo only if a reduced price was agreed. It was.

Although discharge had started towards the end of June, it was not completed for another two months. A few days before the completion of discharge, the receivers alleged that the cargo was water-damaged and contaminated by coal dust and rust. In

contrast, an inspection report prepared a few days after discharge indicated that the cargo was in normal condition, free-flowing and white in colour and suggested that the contamination and discolouration had been caused by the unclean condition of the vessel's holds. Some 280 MT, or about 8 per cent of the total cargo, was considered to be damaged. This report said that the inspector found "no evidence of foreign materials such as plastic, rubber and stone as mentioned in the master's remarks in the bill of lading".

The arguments

The Singapore company brought a claim against the shipowners for their losses. At the heart of the dispute was the question of the duty in law resting on a master when clausing a bill of lading. The claimants argued that, pursuant to Article III Rule 3 of the Hague-Visby Rules (which both sides agreed applied), the duty stipulated in that Rule on the master to show the apparent order and condition of the cargo was unqualified or absolute. In other words, the master had to take more than "reasonable care" in clausing the bill. They further argued that there was an implied contractual term, or a duty of care in tort, to exercise reasonable care that the bills of lading accurately reflected the apparent order and condition of the cargo.

The shipowners disagreed. In their view, the master's responsibility was to honestly and reasonably state the apparent order and condition of the cargo as it seemed to him, based on a reasonable inspection and bearing in mind that the master is not an expert in that particular cargo.

The judge seems to have favoured the shipowners' point of view on this question. He decided that, although there was a contractual duty of care on the master to issue or approve of the issue of a bill of lading showing the apparent order and condition of the cargo, based on his reasonable opinion of such apparent order and condition, the contract did not guarantee the absolute accuracy of the master's statement. The judge further decided that no separate duty of care in tort existed, although he also observed that, if the master was in doubt as to the apparent order and condition, he could call in outside help, usually in the form of a surveyor. The judge then looked at the facts as he saw them. The shippers had appointed a surveyor, who said that, at the time of loading, the cargo was discoloured, but only to a very minor extent. His figure was 0.2 per cent. He considered that this did not affect the otherwise apparent good condition of the cargo. The master

had died some years before the trial, but had given a statement, which was submitted by the shipowners. The statement said that about 30 per cent of the cargo was discoloured.

The judge's findings

Faced with such conflicting evidence, the judge decided that the level of pre-shipment contaminants was around 0.01 per cent and that the level of discolouration at the time of loading was about 1 per cent. It is unclear how the judge reached this figure, but his decision may have been influenced by the fact that he had not had the chance to hear the master give his evidence before the court. Nevertheless, it might be said that, although the shipper's surveyor may have wished to ensure that his clients obtain a clean bill of lading, the master is unlikely to have had any such consideration in his mind in reaching his decision to clause the bill. Whatever the true position, the judge found that the master was wrong to have claused the bill in relation to pre-shipment contamination. So far as discolouration of the cargo was concerned, he decided that the master was right to take the view that the bill should be claused so as to show that a very small part of the cargo was affected, but that his (the master's) figure of 30 per cent was excessive. In the judge's view, the master did not act reasonably in clausing the bill in the way that he did. Therefore, he decided that the shipowners had breached their contractual duty under Article III, Rule 3 of the Hague-Visby Rules to issue a bill of lading showing the reasonably apparent order and condition of the cargo. But this was not the end of the story.

Were the shipowners liable?

Based on the above, most people would probably answer "yes". In fact, the answer was "no". Why? The reason was that the judge decided that the master was entitled to clause the bill of lading in relation to the very small amount of discolouration which he (the judge) considered was in evidence at the time of loading (the judge's figure of 1 per cent mentioned above). Following on from this, the judge decided that, because the master would have been entitled to clause the bill in relation to this small amount of discolouration and would in fact have done so, the same result would have been obtained. Because the bill would, in any event, have been claused, the claimants would have been unable to present a clean bill of lading in exchange for payment by the receivers. Thus the claimants did not suffer any loss as a result of the master's failure to properly and accurately clause the bill. The claim therefore failed.

Comment

The judge declined to accept the claimant's argument that the master's duty to issue and/or sign a bill of lading showing the apparent order and condition of the cargo was "unqualified" or "absolute". Instead, he reaffirmed that the master had to reasonably assess the condition of the cargo, using the skill and ability expected of someone in his position. It was emphasised that the master was not expected to be an expert in the particular cargo. Equally, however, it was emphasised that the master could (and perhaps should) have called in outside assistance when the dispute over the clausing of the bill of lading first arose. In our experience, a surveyor is often called in when such a dispute arises. It is unclear why the master did not do so and unfortunately, he was not able to explain his reasoning.

Masters in such situation are under considerable and often conflicting pressure. However, there appears to be no reason to think that, in clausing the bill in the way he did, the master was doing anything other than acting in the way he thought best to protect the interests of both the shipowners and the third party cargo buyers. Unfortunately, the master was unable to explain his actions in court. This may be why the judge, looking at the matter in hindsight, seems to have preferred the shippers' surveyor's opinion, although as mentioned, the surveyor is unlikely to have forgotten that a clean bill of lading was vital for his clients.

The good news for shipowners and masters is that the judge underlined the fact that, in deciding how and when to clause a bill, the master is required to use reasonable care. The standard is

not absolute or unqualified. The master is not expected to be an expert in the particular cargo in question - although it is always possible that a master who has, say, 20 years experience of carrying forest products would be regarded as more expert in that type of cargo than a master who had no such experience. What the master must do is to clause reasonably and accurately, using his best judgment and experience. Last but not least, the shipowners achieved the right result, despite the judge's criticism of the master, because the judge found that the bills of lading would have been claused in any event.

However, the case is likely to be appealed to the Court of Appeal, so there may be more news to report in due course. Gard News will keep readers informed.

Bills of Lading: Is the shipper's stowage request always compulsory?

Loss Prevention Circular
No. 05-01, July 2001

Introduction

Bills of lading in a wording which may seem harmless until a claim arises can create problems for shipowners on wording. This circular outlines one such case where the bill of lading was claused to include a particular request for stowage of containers. For further information, please refer to the Gard Guidance on Bills of Lading which can be found on the Gard Services website at www.gard.no.

Course of events

At the port of New York, 9 containers said to contain (s.t.c.) 18 coils of aluminum sheet (2 coils per container), were loaded on board a containership for carriage to Santos, Brazil. The bill of lading was worded such that, in the event of having to determine the carrier's liability for damage or loss of the cargo, each coil was considered a package.

The shippers of the cargo requested that the containers be stowed below deck and a clause stating "below deck stowage requested" was inserted on the face of the bill of lading. After

the stowage arrangements were finalised, it turned out that 4 of the containers stuffed with aluminum coils were loaded on deck. The vessel encountered bad weather on route to Brazil. As a consequence, 2 of the containers carried on deck as well as the coils inside the containers, suffered extensive damage. After surveying the aluminum coils the cargo receivers rejected them in full, arguing that the aluminum was not useful for the intended purpose. A few months after the rejection of the cargo by the receivers, the shipowner received a claim from the cargo underwriters in the amount of USD 184,000.

The cargo underwriters argued that they were entitled to 100 per cent of the amount they had paid to their assured. They stated that the carrier had not complied with the terms of the relevant bill of lading as the cargo had not been carried under deck as requested by the shippers, and therefore would not be entitled to limit his liability. The cargo underwriters threatened to start legal proceedings in the United States as the shipment originated in New York. At

some stage, cargo underwriters offered to settle the claim at the level of 70 per cent of the USD 184,000 claimed.

The shipowner had a potentially difficult case, as he had not stowed the cargo below deck as requested by the shippers. The affected containers were effectively loaded on deck. The shipowner continued searching for the best solution to the claim. As he was faced with the cargo underwriters looking to commence proceedings in the United States, he considered pieces of legislation which may help him resolve the matter.

The shipowner discovered a decision made in a prior case *Insurance Company of North America v. Blue Star (North America) Ltd.*, where a similar situation had arisen. In the BLUE STAR case, a forty-foot container was loaded on the deck of a containership pursuant to a bill of lading stating "below deck stowage requested". The case was heard at the Southern District of New York and the court concluded that the "stowage on deck of a containership is not an unreasonable deviation". This





decision of the court meant that the carrier was entitled to all the exceptions and limitations provided by U.S. Carriage of Goods by Sea Act, 1936 (COGSA). US COGSA applies to all inbound and outbound cargoes to and from the United States. Furthermore, the court went on to analyse the meaning of the clause "below deck stowage requested" and concluded that the "bill of lading did not require below-deck stowage", as the word "request" had been used in the bill of lading, and "request" was interpreted to mean "asking or petition". There was no contract as only a petition had been made and "in order for there to be a contract, there must be mutual assent".

A copy of this decision of the Southern District of New York was forwarded to the cargo underwriters with an offer to settle the claim based on the package limitation according to US COGSA, i.e. USD 500/package. Since the bill of lading stated that the packages were the individual coils (2 lost per container), an offer of USD 2,000 was put forward. After consideration, the cargo underwriters accepted the shipowner's offer and the case was amicably settled for USD 2,000.

Recommendations

1. Shipper's instructions regarding the stowage of cargo on board should be followed. However, if for any reason the carrier cannot follow the instructions, he should ensure that the bill of lading is properly claused to protect his position.
2. The wording of the clause stamped on the face of the bill of lading benefited the shipowner. By using the word "request" as opposed to "mandatory", "compulsorily", "required" etc., the shipowner's liability was significantly reduced. This reinforces the need to exercise considerable care when clausing a bill of lading even though the "request" of the shippers is the same.
3. The shipowner's bill of lading had a clause on the reverse side giving the carrier the liberty to carry the containers on or below deck by saying:

"Goods, whether or not carried in containers, may be carried on deck or under deck without notice to the Merchant or any annotation on the face hereof ..."

The shipowner should ensure that any bill of lading used by

containerships in the liner trade includes this clause or similar wording.

4. All preventive recommendations should be adhered to as a precautionary measure. The Insurance Company of North America v. Blue Star (North America) Ltd. case was of assistance to the shipowner in this instance. However, it was a lower court decision. The possibility of higher court decisions in the future may lead to a different result that doesn't favour the shipowner.

Early departure procedure and bills of lading

Gard News 150,
June 1998

BACKGROUND

The extremely hazardous practice of issuing signed, but otherwise blank bill of lading forms, was mentioned in Gard News Edition 99¹, and on that occasion involved the loading of cargo at West African ports. Comment was also made in Gard News Edition 102², and reference then was made to a procedure, known as "Early Departure Procedure" (EDP), being used at many loading terminals including some in the North Sea. A common feature of EDP is the issuing of bills as mentioned above.

Investigation surrounding a recent case, involving the loading of crude oil at a terminal in the United Arab Emirates (UAE), revealed that EDP was being used including the practice of the signing of blank bills. It is suspected that this is not confined to the UAE, and given the grave dangers involved for vessel owners who permit, or fail to take the necessary measures to prevent, the said practices, an opportunity arises to serve a reminder.

Whilst EDP is said to be at the option of the visiting ship there is heavy pressure on owners to comply. Terminals are keen to have maximum use of their facilities and minimum delay to waiting vessels, charterers are frequently worried about the effect of delay on future part-loading and discharge schedules, as well as complications with regard to laytime and demurrage. It is known that EDP is a feature of pre-fixture negotiations, and that charterers seek to use their commercial bargaining power with a view to the inclusion of express charterparty provisions stating owners' acceptance of EDP and the deduction from laytime of time resulting from owners' non compliance with it.

In the case concerned, it is understood that blank bills were presented to the master by the pilot/loading master before completion of loading thus

leaving the vessel free to leave the loading facility without delay. The terminal concerned in fact asserts that a delay of up to 12 hours will result if EDP is not accepted and blank bills not signed. This delay, which is said to arise because of the time taken to have shore loading figures properly documented and forwarded to the ship, will also cost the owner USD 500, a charge imposed by the terminal for the extra expense involved. This extra expense is probably in respect of the boat fees involved in delivering documents to the ship at anchor (where the ship would proceed immediately after loading if EDP is not accepted or bill of lading amounts are disputed). The possible delay could be further extended should re-calculation or re-dipping of tanks be required and/or if difficulties are encountered with regard to the clausing of the bills. It may come as no surprise that the terminal concerned was understood to be extremely reluctant to permit any alterations to the bill of lading form or any qualification of the details it had inserted thereon³.

It goes without saying that, with a blank but signed bill in their hands, the shippers seek to insert the highest figures. In this case, such figures happened to be shore tank figures and these were duly inserted in the bill, without the application of any relevant Vessel Experience Factor (VEF). The difference between shore and ship figures can of course be large and the figure inserted in one bill in this case was around one per cent greater than the ship's figure (the one per cent difference was confirmed at subsequent independent surveys). An additional concern in this instance was that this bill contained no qualifying words or clausing (even in print) to the effect "weight, quantity etc. unknown".

Upon learning of the shore figures at the time of departure from the loading facility, the vessel issued a protest to

the shipper/terminal and charterers outlining the difference between the figures.

THE DANGERS EXPLAINED

The issuing of blank but signed bills of lading is a dangerous practice, particularly if shore figures are inserted without any qualification, e.g. "weight, quantity etc. unknown". The bills in the case concerned were "to order" bills and under the Hague Visby and Hamburg Rules, as well as many national law hybrid versions thereof, bills transferred to third parties acting in good faith can be held as conclusive evidence of the receipt by the Carrier of the weight and quantity stated within the bill. Even when words such as "weight, quantity etc. unknown" or "as per shore/shippers figure" are used, the Carrier may not be fully protected. Whilst under English law such qualifying clauses usually prevail⁴ it is possible that entitlement to rely on the same may be removed. This could happen where there is a considerable difference (probably in excess of 0.5 per cent) between the bill of lading and ship's figures; the grounds for this proposition would be that the difference would have been obvious to the master.⁵ Many other jurisdictions may not of course follow the reasoned approach of the English courts and qualifying clauses are often ignored completely.⁶

It may be thought that the issuing of a letter of protest, puts the onus on the shipper or charterer to attach it to the bill of lading, and if he does not attach it, he is exposed to possible "bad publicity" or potentially "fraudulent behaviour". Whilst the Association is not convinced that such an onus exists, the legal effect of such a protest is very questionable, particularly against a third party bill of lading holder (even if the protest were to be attached to the bill - which is unlikely).

1 October 1985, page 7 "Signing bills of lading at West African ports".

2 July 1986, page 18 "Crude oil trading and supply".

3 Here lies another advantage of EDP for charterers/shippers - a clean bill of lading.

4 In the case of the "ATLAS" [1996] 1 Lloyd's Rep. 642 the judge found that the prima facie presumption of the Hague or Hague Visby Rules could not apply where the words "weight unknown" were inserted in the bill. There is no reason to believe that this would not equally apply to bills which would otherwise qualify for conclusive evidentiary effect.

As to the possibility of recourse against the charterers, the decision in the case of the "NOGAR MARIN"⁷ is indicative of the general approach of the English courts. The court stated⁸ that, if the master fails to correct a bill of lading inaccuracy of which he was reasonably aware, and even where the charterers knew of such inaccuracy, a contractual or implied indemnity to which the owners may otherwise be entitled, could not be upheld against the charterers in respect of the carrier's settlement of a third party claim under the bill of lading. Many other jurisdictions could be expected to follow a similar approach.

For owners caught out by these dangerous practices, and faced with a shortage claim by cargo interests, there is also the cold reality that they will probably be standing alone. Rule 34(1)(b)(ix) of the Association's Statutes and Rules excludes cover for liabilities, costs and expenses arising out of the issue of a bill of lading known by the master to contain an incorrect description of the cargo quantity. Cover is also excluded for ante-dated or post-dated bills⁹ and this may result where blank but signed bills are issued.

For those thinking that a letter of indemnity (LOI) is the answer, it will no doubt be appreciated that when such documents are given or accepted in unlawful circumstances (such as where the master/owners knew that an innocent party would rely on the incorrect statements) this is tantamount to fraud. Such documents would be legally unenforceable and effectively of no value.

SOME ADVICE

Despite the pressures of terminals and charterers EDP should be resisted.

The costs of taking precautionary measures and of possible delays can be far outweighed by the liability exposure. Commercial relationships are of course important but charterers are well aware of the risks they are trying to force owners to take. Charterers would probably not take such similar risks themselves (and do not by issuing a LOI as LOIs are legally unenforceable), and there must be many more important reasons why a charterer uses a particular owner on more than one occasion.

Owners willing to take a stance can take heart from the decision of the English Courts in the case of the "BOUKADOURA"¹⁰. In that case it was held that even where the charterparty provided that bills of lading were to be signed as presented, there was an implied requirement that the bills as presented actually related to the cargo and did not contain a misdescription which was known to be incorrect. The owners were therefore entitled to recover their loss (mostly the costs of the delayed sailing) from the charterers not only under the particular express indemnity contained in the charterparty but also in damages, arising from the charterers' breach of the implied warranty in presenting an inaccurate bill of lading and subsequent refusal to accept the master's signature if it was qualified with regard to the shore figure.

With the above in mind, the following points of advice should be considered:

(1) Owners should seek to include an express provision in the charterparty stating that EDP is not accepted. This should be brought to the attention of masters in order that they can resist further pressure from charterers and their representatives.

(2) Bills of lading are not to be signed until the accuracy of their contents has been verified and, if necessary, appropriately qualified by the master or the authorised agent of the master.

(3) The use of vessel's agents is perhaps one way of avoiding the EDP problem and the pressures involved, although it is appreciated that, with isolated terminals, this will probably be difficult and costly. This must however be compared to the risk exposure. If agents can be used, bills should only be signed by agents on the master's or owner's behalf when the master or owner has checked that point 2 has been complied with.

(4) If an owner is caught out and reasonably suspects that the figure inserted in the bill of lading is greater than the amount of cargo shipped on board, attempts should be made to identify the consignee or notify party on the bill of lading in order to give notice to him of the ship's figure. The ship's interests should then issue protests to everyone they can think of, shippers, charterers, charterers' agents, and if possible, the consignee or notify party. The shippers should also be requested to attach a copy of the protest to the bill and to forward a copy of the protest to the buyers. As outlined above, such measures will probably not avoid liability but may avoid a claim, for what will usually be a paper loss.

⁵ Article III, Rule 3 of the Hague and Hague Visby Rules states 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 ground for suspecting not accurately to represent the goods actually received or which he has more reasonable means of checking.

⁶ Spain is a good example of how other jurisdictions treat qualifying clauses. Under Spanish law, such clauses can only be effective if certain conditions are satisfied, one of which requires the owners to prove that the reason for the inclusion of such clauses must be justified, as their effect is subject to the master's "real and effective impossibility to check the particulars of the cargo". This is obviously a very difficult burden to discharge.

⁷ [1998] LLRep 412. See also Gard News Edition 111 October 1988, page 5.

⁸ Exact words not used.

⁹ Rule 34 (1) (b) (viii).

¹⁰ [1989] 1 Lloyd's Rep. 393.

US Customs regulations relating to cargo declarations

By Paul Keane, Cichanowicz, Callan, Keane, Vengrow & Textor, L.L.P., New York

Gard News 168,
November 2002/January 2003

Carriers trading with the United States will be faced with extensive new rules and regulations mandated by the United States government through US Customs as a direct result of the 11th September 2001 attacks on the United States.¹

Said to contain

Even before new proposed regulations and laws were passed by the US Congress, US Customs, especially in Puerto Rico, was insisting that carriers could not insert the words "said to contain" on their bills of lading. The regulations upon which Customs was relying² were already in existence prior to 11th September 2001. However, these provisions only related to filing of a Customs Form 1302, which is commonly called a Cargo Declaration. There was no specific requirement that a bill of lading could not contain the words "said to contain". Nevertheless, the regulations relating to cargo declarations are being interpreted by certain US Customs districts to include the issuance of bills of lading. Interestingly enough, the regulations do allow the use of the words "shipper's load and count" and provide that the following statement may be placed on the cargo declaration:³ "The information appearing on the declaration relating to the quantity and description of the cargo is, in each instance, based on the shipper's load and count. I have no knowledge or information which would lead me to believe or to suspect that the information furnished by the shipper is incomplete, inaccurate, or false in any way".

Although the above language is currently only mandated for cargo declarations, it appears that, based on recent comments by a US Customs representative⁴ all US Customs districts are going to apply the above regulations to bills of

lading. Consequently, it would seem that carriers trading with the United States are no longer able to use such language in their bills of lading. Carriers may therefore need to ensure that they use the term "shipper's load and count" or "shipper's load, stow, and count" rather than the more commonly used expression "said to contain".

As a final note, certain carriers, including some Gard members, were threatened with penalties by US Customs if they continued to use the term "said to contain" on their bills of lading.

The Trade Act of 2002

Subsequent to the problems raised with the use of the term "said to contain", on 6th August the US enacted the Trade Act of 2002. While most of the Act deals with trade issues, a small part of it designated as the "Customs Border Security Act of 2002" deals with Customs issues, particularly in regard to ocean shipping. Of particular note for ocean carriers trading to the United States is §343A, which concerns documentation of water-borne cargo. According to this provision, no shipper of cargo, including ocean transport intermediaries, i.e., NVOCCs,⁵ can tender or cause to be tendered to a vessel carrier cargo for loading on a vessel in a United States port unless such cargo is properly documented. "Properly documented cargo" is defined as follows: "...cargo shall be considered properly documented if the shipper submits to the vessel carrier or its agent a complete set of shipping documents no later than 24 hours after the cargo is delivered to the marine terminal operator, but under no circumstances later than 24 hours prior to departure of the vessel".

The Trade Act also provides that no marine terminal operator is allowed to load any cargo subject to the provisions

of the Act on a vessel unless instructed by the vessel operator that such cargo has been properly documented. Where there are slot charters involved, the booking carrier (slot charterer) is obligated to notify the operator of the vessel that the cargo has been properly documented, and upon receiving such notification the operator may rely on such notification in releasing the cargo for loading aboard the vessel.

Any US export cargoes that remain in the marine terminal for more than 48 hours after being delivered, and which are not properly documented, obligate the vessel carrier to notify the US Customs Service. Once again, if slot charters or vessel sharing arrangements are involved, the carrier accepting the booking is obligated to report undocumented cargo regardless of whether it operates the vessel or not.

Failure to abide by the above regulations shall subject the party violating the regulations to civil penalties in a monetary amount up to the value of the cargo or the actual cost of the transportation, whichever is greater. In addition, any cargoes remaining in the terminal for more than 48 hours without proper documentation shall be subject to search, seizure and forfeiture. The Act also provides that the shipper of any such undocumented cargo is liable to the marine terminal operator and the ocean carrier for demurrage and any other applicable charges, and that the marine terminal operator and the ocean carrier shall have a lien on the cargo for the amount of demurrage and any other charges assessed as a result of the Customs seizure.

Finally, section 343A provides for the establishment of a joint task force to evaluate and certify secure systems of transportation. That task force shall

1 See also article "Immigration and customs - Post-11th September reporting and regulatory compliance for vessels trading in US ports" in the last issue of Gard News.

2 19 CFR section 4.7c(1) and (3)(i), (ii), and (iii).

3 46 CFR section 4.7c(3)(i).

4 The deputy commissioner of US Customs, Douglas Browning, has stated recently that the decision of US Customs not to accept the words "said to contain" on bills of lading is non-negotiable.

5 Non-vessel operating common carriers.

establish a programme to evaluate and certify secure systems of international intermodal transport no later than one year after the date of the enactment of the Act. The programme established by the task force shall:

- establish standards and a process for screening and evaluating cargo prior to import into or export from the United States;
- establish standards and a process for system of securing cargo and monitoring it while in transit;
- establish standards and a process for allowing the United States government to ensure and validate compliance with the programme elements; and
- include any other elements that the task force deems necessary to ensure security and integrity of international intermodal transport movements.

Container Security Bill

At approximately the same time that the Trade Act of 2002 was enacted, a bill was introduced into the United States Senate by Senator Feinstein of California which was designated the "Comprehensive Seaport and Container Security Bill of 2002". Of interest in this bill is section 104, which transfers the responsibility to license and revoke or suspend a licence of an ocean transport intermediary from the Federal Maritime Commission to the Commissioner of Customs, so that the ocean transport intermediaries (freight forwarders and NVOCCs) can assist the Commissioner of Customs in collecting data that can be used to prevent terrorist attacks in the United States.

Also of interest to carriers is section 202, which requires the pilot, master, operator, or owner (or an authorised agent thereof) of every vessel carrying cargo to the United States not later than 24 hours prior to departing from any foreign port or place to transmit electronically the cargo manifest information required by the bill. The information required to be provided to Customs includes 23 separate items which must appear on the cargo manifest, such as:

- shipper's name and address;
- consignee's name and address;
- discrepancies between actual boarded quantities and bill of lading quantities (except that a carrier is not required to verify boarding quantities of cargo in sealed containers);
- location of the warehouse or other facility where the cargo was stored while under the control of the carrier;
- name, address and identification number of the carrier's customer, including the forwarder, non-vessel operating common carrier, and consolidator;
- country of origin and ultimate destination;

- shipper's commercial invoice number and purchase order number;
- hazardous material information;
- certification of any empty containers.

The proposed regulations have created a storm of protest by carriers trading to the United States, especially container liner operators. The 24-hour notice period has been the focus of much of the complaint, since container carriers are often unaware of what is contained in NVOCC cargoes and do not receive that information until after the vessel has sailed. The problem is that any intentional mistakes in the manifest, according to section 203 of the bill, will result in a penalty of USD 50,000 and a term of imprisonment for one year, or both, and a civil penalty of USD 25,000 for the first violation and USD 50,000 for each subsequent violation where the error is not intentional.

Adding to the burden of ocean carriers is section 204 of the bill, which provides for a shipment profiling plan requiring common carriers, shippers, and ocean transportation intermediaries to provide appropriate information regarding each shipment of merchandise. In that regard, there are certain requirements for bills of lading that include the following:

- weight of the cargo;
- value of the cargo;
- vessel name;
- voyage number;
- description of each container;
- description of the nature, type, and contents of the shipment;
- code number from the harmonised tariff schedule;
- port of destination;
- final destination of the cargo;
- means of conveyance of the cargo;
- origin of the cargo;
- name of the pre-carriage deliverer or agent;
- port at which the cargo was loaded;
- name of the "formatting" agent;
- bill of lading number;
- name of the shipper ;
- name of the consignee ;
- universal transaction number or carrier code assigned to the shipper by the Commissioner of Customs.

The purpose of the profile is to assist Customs in locating containers and shipments that can pose a threat to the security of the United States, and to create a profile of every container and every shipment within the container that will enter the United States.

The bill also provides for security at seaports in the United States including a requirement for identity cards and the determination of whether an individual seeking to work at a seaport poses a terrorism risk. It also provides for

limiting private vehicle access to United States seaports and will allow Customs Service offices to utilise personal radiation detection pagers to increase the ability of the Customs Service to accurately detect radioactive materials.

A final provision of the bill sets minimum standards for high security container seals and provides that each seal is required to have a unique identification number and contain an electronic tag that can be read electronically at the seaport. Under this provision, vessels can be denied entry into the United States if containers carried by the vessel are not sealed with the high security seal in conformity with the bill.

As of the time this article was written, the bill was still under discussion and had not become law.

Customs rulemaking in regard to the presentation of cargo manifests

Immediately after the introduction of Senator Feinstein's bill, United States Customs proposed new regulations which mirror the provisions of the proposed Comprehensive Seaport and Container Security Bill of 2002 discussed above. According to these proposed regulations, the vessel's cargo manifest must be received from the carrier 24 hours before the cargo is laden aboard the vessel at the foreign port of loading. According to US Customs, the analysis of such manifest information will allow it to identify high-risk containers and will allegedly ensure prompt processing of lower-risk containers.

While the regulations for supplying a manifest 24 hours in advance of leaving the load port might not cause problems to carriers involved in the bulk trades, it certainly has caused an uproar among container liner operators trading to the US. Various organisations such as the World Shipping Council are preparing to file comments in regard to this proposed rulemaking and many other affected parties will likewise try to persuade US Customs that the regulations are unnecessarily burdensome. However, in the climate presently existing in the US as a result of the 11th September attacks, finding a sympathetic ear will be difficult.

The proposed regulations also will:

- Require NVOCCs to be considered as manifesting parties and would obligate NVOCCs to transmit their cargo information to Customs in an accurate and timely manner. If an NVOCC fails to do so then he would be subject to liquidated damages.
- Require cargo declarations separately

listing all foreign-to-foreign cargo not destined for US ports that remain on board the vessel, as well as any empty containers that are on the vessel. Once again, this will increase the burdens on those liner operators trading with the US as well as other countries, especially those carriers who have "pendulum", transshipment, and around-the-world services.

- Confirm the prior Customs regulations that descriptions such as "FAK" (freight all kinds) and "STC" (said to contain) will not be acceptable.

- Provide that failure to present accurate manifest information 24 hours prior to the loading of the cargo or the transmission of any false, forged, or altered documents will result in the assessment of monetary penalties under the provisions of 19 USC section 1436(b). These penalties will apply not only to carriers but to NVOCCs. In addition to the assessment of civil monetary penalties, Customs may delay issuance of a permit to unload the entire vessel until all required information is received. Customs may also decline to issue a permit to unload the specific cargo for which a declaration is not received 24 hours before loading at the foreign port.

Customs initiates foreign-to-foreign container inspections

If the above were not enough to give container liner operators in the US trades a massive headache, recent practices by US Customs regarding foreign-to-foreign cargoes on vessels calling at US ports could give carriers pause to consider whether trading with the United States is even worth their cost. In the last several weeks, US Customs at various ports in the United States has been requiring container liner operators to remove foreign-to-foreign containers not destined for US ports for inspection by US Customs. The containers that are being inspected are selected at random and in certain instances up to 30 or more container moves are required to get access to the container which Customs wants to inspect. The cost of these moves is for the carrier's account, although US Customs seems to feel that the carriers can pass this cost along to the consignee of the container being inspected.

Needless to say, the costs of removing such containers for inspection, shifting cargoes to allow the removal, and then shifting other cargoes in order to

put the container back on the vessel are prohibitive. More importantly, it is doubtful whether the carrier can ever recover these costs from the final consignees since the action of US Customs will not necessarily justify an increase in the charges assessed against the consignee of the cargo, especially when such consignee is not subject to US law. While carriers trading to the United States are up in arms concerning such inspections, as of the time of the writing of this article, Customs is still obligating carriers to remove such foreign-to-foreign cargoes for inspection. Only time will tell whether carrier trade and discussion groups, such as the World Shipping Council, BIMCO, the Box Club and other such organisations, will be able to persuade Customs to change their policies. If liner operatives do not make their feelings known in regard to the proposed regulations and legislation, then they could be in for a financial and operational nightmare should the regulations and legislation be enacted.

The problems caused by ante-dating bills of lading

Gard News 101,
March 1986



In our October edition of Gard News (No. 99) we warned against ante-dating bills of lading. The reason such bills are issued is often due to pressure applied by the shipper, who requires the insertion of a particular date in a bill of lading to meet the requirements of his contract with the buyer of the cargo and often to meet as well the requirements of the letter of credit by the means of which the seller, usually the shipper, is paid. Therefore instead of inserting as the date in the bill of lading, the date when the loading of cargo was completed, the shipper persuades the shipowner to insert a different date. As we have said before this can amount to a fraud. We are referring of course to "shipped on board" bills of lading.

A recent case in the English Admiralty Court, the "SAUDI CROWN" has

illustrated the problems that can arise when bills are ante-dated.

The plaintiffs were the buyers of a cargo shipped aboard the "SAUDI CROWN". Under their purchase contract the bills of lading were to be dated: "June 20 – July 15 without extension the bills of lading to be dated when the goods are actually on board. Date of bills of lading shall be accepted as proof of date on shipment in the absence of evidence to the contrary".

Loading of the goods in question was completed on 26 July. All bills were dated 15 July. The bills were "shipped on board" bills and were issued by shipowners' agents on behalf of the shipowners. Towards the end of July the buyers realised that the cargo would arrive too late to meet their mid-

August commitments and purchased extra goods. They stated that had they known the bills were wrongly dated they would have rejected them. As they did not know they took up the bills.

On discovering they were wrongly dated they brought a claim against the shipowners for loss of opportunity to reject the bills of lading by reason of fraudulent misrepresentation as to the date on which the cargo was shipped. They succeeded, the judge holding that there was a misrepresentation by the shipowners' agents in the course of their normal duties. This was a fraud. The buyers were awarded damages at an agreed sum for loss of opportunity to reject the bills.

Identity of the carrier - The House of Lords decides

Gard News 170,
May/July 2003

An article in Gard News issue No. 162¹ mentioned the decision of the English Court of Appeal in the STARSIN case² regarding the identity of the carrier in bill of lading contracts. Readers will be interested to know that the Court

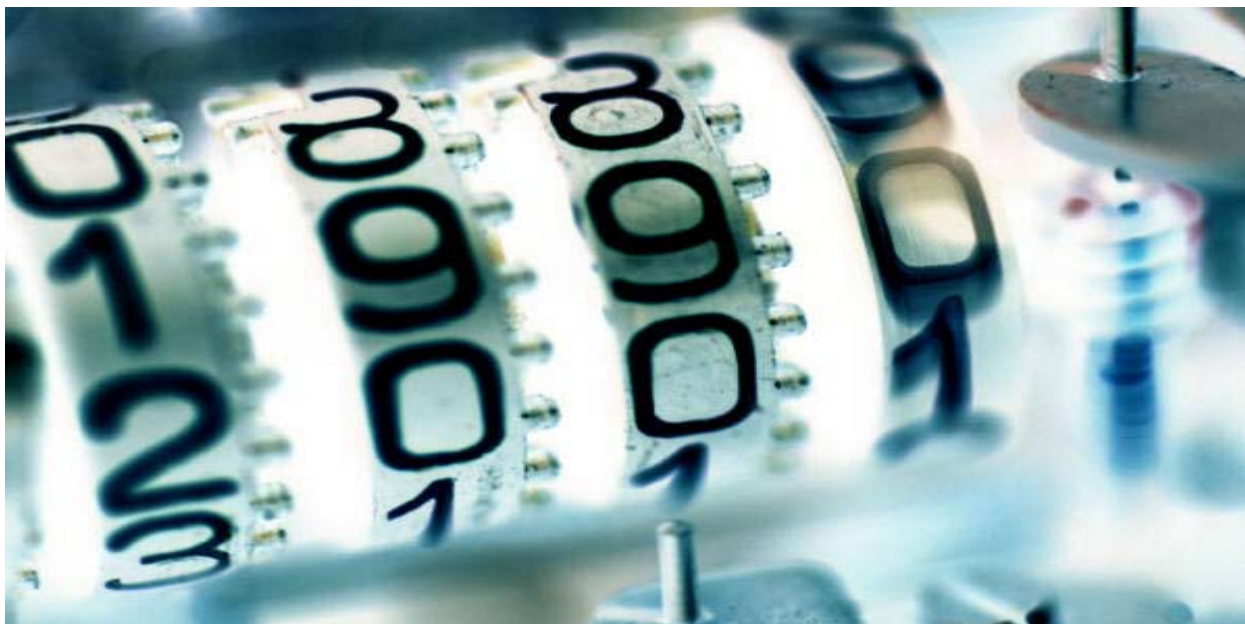
of Appeal decision has recently been overturned by the House of Lords, which has adopted the view and practice of the market whereby the identity of the contractual carrier is that identified in unambiguous terms on the face of the bill

of lading in preference to the conditions set out on the reverse of the bill, including the so-called demise clauses. A more detailed report on the House of Lords' decision will be published in the next issue of Gard News.

¹ "Whose bill of lading is it anyway?".
² [2000] 1 Lloyd's Rep. 85.

The date of the bill of lading

Gard News 151,
September/November 1998



The correct dating of the bill of lading is a matter of great importance. It is material in the context of the contract of carriage, the contract of sale and the documentary credit transaction if payment of the cargo is arranged through a letter of credit.

Under the contract of carriage the shipper is entitled to demand that the bill of lading be dated correctly. If the Master or another agent of the carrier negligently misdates the bill, the carrier as principal is liable in damages if the shipper has suffered a loss as a result of the misdating. There is an implied obligation to exercise due care in the dating of the bill.

The date of the bill of lading may also be relevant to the contract of sale. In most international sale contracts the tender of a wrongly dated bill of lading qualifies as breach of a condition and entitles the buyer to reject the bill and to treat the contract of sale as repudiated.

Where payment of the cargo is arranged through a letter of credit, the credit often states a date for shipment of the goods, so that the date of the bill

of lading is also relevant. A person who deliberately backdates a bill of lading in order to bring it within the shipment time in the credit acts fraudulently.

"Shipped"¹ and "Received for Shipment" Bills of Lading

Depending on the time when the carrier takes over the goods, a bill of lading may be a "shipped" or a "received for shipment" bill. The practical difference between the two forms is considerable. Where the carrier issues a "shipped" bill, he acknowledges that the goods are loaded on board ship. Where he issues a "received for shipment" bill, he confirms only that the goods are delivered into his custody; in this case the goods might be stored in a depot or warehouse under his control, or even at the quayside. Therefore the "shipped" bill is more valuable to a shipper than the "received for shipment" bill, because it confirms that the shipment has taken place.

A container bill of lading issued upon receipt of the cargo by the carrier at a loading depot is normally a "received for shipment" bill of lading. The correct date of a "received for shipment" bill is the date when the goods are taken into

the charge of the carrier. The correct date of a "shipped" bill, on the other hand, is the date when the goods are actually loaded on board. Where the loading extends over several days, the bill should be dated when the loading is completed.²

"Received" bill turned into "shipped" bill

Under the Hague, Hague-Visby and Hamburg Rules the shipper is entitled to demand from the carrier the issue of a bill of lading after the goods have been received into his charge.

Article III (3) of the Hague and Hague-Visby Rules provides:

"3. 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 (...)."

Article 14.1 of the Hamburg Rules reads:

"1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading."

¹ A "shipped" bill of lading is also referred to as an "on board" bill.

² Oetker v IFA (The Almak) (1985) 1 Lloyd's Rep. 557.

At this time the carrier is only obliged to issue a "received for shipment" bill, showing that he has received the goods into his charge. However, after the goods are loaded the shipper may demand the issue of a "shipped" bill. The Hague, Hague-Visby and Hamburg Rules also provide that where a bill of lading has been previously issued, e.g., a "received for shipment" bill, the carrier may notate the document at the port of shipment with the name of the ship upon which the goods are shipped and the date of shipment, stating that the goods are now on board, and when so notated the document shall have the same functions as a "shipped" bill.

Article III (7) of the Hague-Visby Rules reads:

"7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a "shipped" bill of lading."³

Article 15.2 of the Hamburg Rules contains a similar provision:

"2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a 'shipped' bill of lading which, in addition to the particulars required under para 1 of this Article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a 'shipped' bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a 'shipped' bill of lading if, as amended, such document includes all the information required to be contained in a 'shipped' bill of lading."

Where payment of the cargo is arranged through a letter of credit, the terms of the credit may provide

that the bills of lading to be tendered have to be "clean, on board, to order and blank endorsed". A "received for shipment" bill does not satisfy these terms because it is not an "on board" bill, but the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP), like the Hague, Hague-Visby and Hamburg Rules, equate a "received" bill which has been duly notated to a "shipped" bill. The UCP 500 provide in Article 23(a) (ii):

"Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment."

Accordingly, in cases where a "received for shipment" bill is notated "shipped", the date of shipment of the goods being acknowledged in the document is that of the notation, and not the original date, which simply indicates the time of the receipt of the goods by the carrier and not the time when they are actually loaded on board.

Ante-dated and post-dated bills of lading and P&I cover

Rule 34 of Gard's 1998 Statutes and Rules reads, inter alia:

"1. The Association shall cover the following liabilities when and to the extent that they relate to cargo (...): provided that (...) the cover (...) does not include:
viii) liabilities, costs and expenses arising out of the issue of an ante-dated or post-dated Bill of Lading, waybill or other document containing or evidencing the contract of carriage, that is to say a Bill of Lading, waybill or other document recording the loading or shipment or receipt for shipment on a date prior or subsequent to the date on which the cargo was in fact loaded, shipped or received as the case may be."

Post-dated bills of lading are not as common as ante-dated bills but in either case the Association does not cover liability arising out of the issue of

such bills of lading. It should be noted that the exclusion applies to ante or post-dating of both, "shipped" and "received for shipment" bills. Members should also be aware that cover is excluded in these cases even if the bill of lading was issued by the Member's agent without the Member's knowledge of its incorrect dating.

Since there are occasions when Members are unable to avoid liabilities or costs due to the issue of ante-dated, or occasionally post-dated bills of lading (for example due to errors by agents or masters and officers), the Association's Extended Cargo Cover and Comprehensive Carriers' Liability Cover are able to provide protection. There is, however, an exclusion for wilful misconduct as expressed in the Association's Rule 72, incorporated in the terms of cover.

³ Article III (7) of the Hague Rules contains a very similar provision, the only material difference being the omission of the words "if it shows the particulars mentioned in paragraph 3 of Article III".

English law

Is the demise clause now dead and buried?

Gard News 171,
August/October 2003

An article in Gard News issue No. 162¹ mentioned the decision of the English Court of Appeal in the STARSIN case regarding identity of the carrier clauses in bill of lading contracts. The Court of Appeal decision has been recently overturned by the House of Lords.

Introduction

In recent years, the English courts have heard a series of cases essentially revolving around a series of closely connected questions:

- Was the demise clause, or identity of carrier clause, valid?
- With whom did the bill of lading evidence a contract – the party named on its face and on whose behalf the bill was signed (who was normally the charterer), or the shipowner?
- If the bill was evidence of a contract with the charterer, could the cargo owner sue the shipowner in tort?
- If “yes”, could the shipowner rely on the “Himalaya” clause in the bill of lading and if so, to what extent?

The FLECHA, the HECTOR and the STARSIN at first instance

The article in Gard News issue No. 162 commented on the outcome of the three cases in question. It will be recalled that the three vessels concerned were the FLECHA,² HECTOR³ and STARSIN.⁴ It will also be recalled that there were conflicting decisions at first instance (i.e., in the High Court). The FLECHA and the HECTOR cases were not appealed, but the STARSIN case was taken to the Court of Appeal, which overturned the first instance decision.⁵ Whereas the judge at first instance decided that the (in his view) clear wording on the front of the bill showing that the charterer was the carrier was clear enough to override the printed demise clause on the back of the bill, the Court of Appeal, by a majority of two to one, overruled him and decided that the demise clause should prevail. On the basis of this decision, the bill was

deemed to be evidence of a contract with the shipowner, not the charterer.

Leave to appeal this decision to the House of Lords was given. Leave is not given automatically and the fact that leave was given suggests that the Lords considered the matter to be one of general and fundamental importance to the shipping industry. Judgment was handed down on 13th March 2003.⁶

The House of Lords' decision

The Lords considered the issues listed above. They decided as follows.

On the vital question of whether the bill of lading was evidence of a contract with the shipowners or the issuer (the charterer), the Lords overruled the Court of Appeal and decided that, in this case, the bill was evidence of a contract with the charterer. Essentially, the Lords adopted what might be called a pragmatic and realistic approach. They said that a printed demise clause (which is a standard feature in many bills of lading) should be overridden by specific provisions of a bill (e.g., the signature) which otherwise made it clear to the shipper that he was contracting with the charterer. The Lords made it clear that certainty was important and that a business sense would be given to a business document.

It followed from this that a claim in tort could be made against the shipowner, but who could bring this claim? The action had been brought in the name of the numerous buyers of the cargo. The Court of Appeal had decided that the act of negligence on the part of the shipowner which gave rise to the claim occurred at the latest on completion of loading. On this basis, the Court said that only the one claimant who had obtained title to the goods by that time could bring an action in tort. The other claimants could not. The Lords agreed.

The final issue was whether the shipowner could obtain any protection from the “Himalaya” clause in the bill and if so, to what extent. The “Himalaya” clause is a standard clause in many bills of lading, the purpose of which is generally to provide any servants or agents of the carrier or independent contractors with (at least) the same protection, rights, immunities, defences, etc., as the carrier himself has.

The Court of Appeal had decided that the shipowner fell within the definition of an “independent contractor” and the House of Lords agreed. The next question was what protection this clause gave the shipowner.

It is clear that there was a lot of legal argument and discussion on this point. The shipowner maintained that the clause gave him a blanket indemnity for “...any liability whatsoever...for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment...”.

The Court of Appeal rejected this argument. In essence, they decided that the protection given by this clause to third parties (the shipowner in this case) was the same (no more and no less) than the protection given to the carrier under the bill of lading. The House of Lords disagreed with the Court of Appeal on one issue of law, but on the main question, they agreed that the protection given to independent contractors was no more and no less than the protection given to the carrier under the bill of lading. In this case, they found that the general, very wide, exemption from liability provision which is quoted above was struck down by Article III, Rule 8 of the Hague Rules, which were incorporated into the bill of lading. It will be recalled that Article III, Rule 8 says that any

1 “Whose bill of lading is it anyway?”

2 [1999] 1 Lloyd's Rep. 612.

3 [1998] 2 Lloyd's Rep. 287.

4 Homburg Houtimport B.V.v. Agrosin Private Ltd. and others (The STARSIN) [2000] 1 Lloyd's Rep. 85.

5 [2001] 1 Lloyd's Rep. 437.

6 [2003] 1 Lloyd's Rep. 571.



clause in a contract which relieves the carrier or the ship from liability for loss or damage shall be null and void.

Four out of the five Law Lords who heard the case decided that the protection given to the shipowner was limited to the protection given to the charterer under the bill of lading: i.e., the Hague Rules as expressly incorporated into the bill. Thus if the charterer (the carrier under the bill of lading) had a defence to the claim under the Hague Rules, so would the shipowner. If the charterer did not have such a defence, nor would the shipowner. Based on the facts, the cargo damage was caused by negligent stowage, for which the charterer/ carrier (and therefore the shipowner) had no defence under the Hague Rules.

One of the Law Lords dissented from this decision and held that the exemption from liability provision remained valid to its full extent and gave the shipowner protection against any liability in tort.

Conclusion

The Uniform Customs and Practice for Documentary Credits (UCP 500) require that ocean bills of lading identify the carrier, the signatory and the capacity in which he signs. As a result, the signature box in bills of lading must contain clearly authenticated information, which makes it easier to identify the carrier by examining the face of the bill. In fact, litigation regarding the identity of the carrier has diminished radically since the introduction of UCP 500 in 1994, at least in cases where the bill of lading does not contain a demise clause. Where the bill does contain a demise clause there may still be conflict between the front and the reverse of the bill, as shown above.

The general effect of the UCP 500 on the signature box in bills of lading has been to let cargo interests know exactly who they are contracting with. The House of Lords' decision attempts to ensure that this clarity is not obscured by demise clauses on the reverse of

the bill. This decision may be regarded as a victory for common sense. Nevertheless, although it strikes a heavy blow to the demise clause, it does not necessarily kill it off and depending on the precise form and wording of a bill of lading, it appears that it may still be open to an English court to find that it is valid and that a bill is evidence of a contract with the shipowner and not with the charterer, even though the bill may have been issued on the charterer's form. Close consideration of the precise form and wording of a bill will probably still be required. ■

English law – Whose bill of lading is it anyway?

Gard News 162,
May/July 2001



In claims relating to carriage of goods by sea, a common argument between those representing cargo interests and those acting for the shipowners or charterers is whether the bill of lading evidences a contract with the shipowners or with another party, often a charterer, whose name may appear on the front of the bill. This is despite the fact that many bills of lading still include a "demise" or "identity of carrier" clause on the back. Such a clause has been struck down in many jurisdictions, but in England it was until recently generally regarded as valid and effective in making the bill evidence of a contract with the shipowners.

Why, then, should there be the argument mentioned above? Difficulties can arise when, leaving aside the demise clause, the bill otherwise suggests that it is evidence of a

contract with someone other than the shipowners. This can be done in several ways. Perhaps the most common is where the bill is actually issued on the charterers' form, with their company logo and/or name and address at the head of the bill. Often, this is coupled with the bill being signed by the charterers' agents, "on behalf of the carrier". Unfortunately, the signature rarely identifies the carrier by name. More investigation is therefore needed.

The back of the bill may help. Sometimes, this contains a clause which defines the carrier. Like the signature on the front, it is, unfortunately, rare to find such a clause which identifies the carrier by name. If there is such a clause, identifying the carrier should be fairly straightforward. More often, however, the clause says that "carrier means the party on whose behalf this bill of lading has been signed". But on whose behalf

has it been signed? The signature does not answer the question. You are now going round in circles.

Such wording would, by itself, be difficult enough, but as with many legal issues, what may appear simple at first sight is in fact more complex, at least under English law. A series of recent English court decisions has shown that not even all judges can agree on the law, even when faced with virtually identical bills of lading.

The first of what might be called a trilogy of cases was the HECTOR.¹ In this, as in the other cases mentioned, several other issues arose, but the essential issue in all three cases was whether the bill of lading was an owners' or charterers' bill. In the HECTOR the bill contained a standard demise clause and was signed "for and on behalf of the Master". This

1(1998) 2 Lloyd's Rep. 287.

2(1999) 1 Lloyd's Rep. 612.

3(2000) 1 Lloyd's Rep. 85.

indicated it should be an owners' bill. It also contained an express stipulation that the charterers were the carrier. This suggested that the bill was a charterers' bill. What did the court decide?

The judge decided that the express stipulation on the face of the bill which identified the carrier as the charterers should override the standard printed wording which indicated that it was an owners' bill. His reasoning seems to have been that, whereas the demise clause was common to all bills of lading issued on the form in question, the express stipulation was not, but was used in that case only. The charterers were therefore the contractual carrier.

The next case in the trilogy was the FLECHA.² The bills were issued on the form of the time charterers, but contained a demise clause in the usual wording. They contained the usual printed text providing for signature by or on behalf of the Master, but in fact, were all signed by the time charterers' agents. The signatures identified the time charterers as the carrier.

The judge decided that the bills were owners' bills. In particular, he said that the forms of signature did not go far enough to make it clear that the

parties intended that charterers and not the shipowners were entering into the contract evidenced by the bills. He decided that the demise clause on the back was valid and effective.

The last of the three cases was the STARSIN.³ It had many similarities to the FLECHA, not least of which was that the bill of lading at the centre of the case was on virtually the same form as the bill in that matter.

Although he made the point that the demise clause would be overridden only by clear words in the signature box which showed that the charterers were the carriers, the judge decided that the wording in question was clear enough to negate the demise clause. The bills were, therefore, charterers' bills. In reaching his decision, the judge evidently disagreed with the FLECHA decision.

Unfortunately, the STARSIN decision left many people confused as to how the same bill of lading form could be interpreted by different judges as being, firstly, an owners' bill and secondly, a charterers' bill. The owners of the STARSIN may have felt the same, since they appealed the first instance decision to the Court of Appeal, which

gave judgment at the end of January this year. Fortunately, for the time being at least, the Court of Appeal seems to have resolved the conflicting decisions. One of the three Appeal Court judges was Lord Justice Rix, the same judge who decided the HECTOR at first instance. He issued a judgment dissenting from his two colleagues. By a two to one majority, the Court of Appeal overruled the decision of the High Court and decided that the bills evidenced a contract with the shipowners, not the time charterers, giving the demise clause a new lease of life under English law.

However, the overriding message from all these cases is that, under English law, each bill will be considered on its own facts. The demise clause is, generally, still valid, but other factors – particularly the form of signature – will come into play and may override this clause.



Deck Cargo

A Summary of English and US Law

Gard News 145,
March 1997

GENERAL PRINCIPLE

Normally a carrier will not be authorised to stow goods on deck unless there is a custom of the trade or port of loading to stow the specific goods on deck for the voyage in question,¹ or unless there is an express agreement with the shipper of the goods to stow them on deck. Otherwise deck stowage will be "unauthorised" and the carrier will be liable for loss of or damage to the goods resulting from the deck stowage.

Under English law it is a matter of construction whether the exception clauses in the bill of lading or charterparty will protect the carrier in the case of loss of or damage to unauthorised deck cargo.² Under US law unauthorised deck cargo has been held to constitute an unlawful deviation.³

THE HAGUE AND HAGUE-VISBY RULES

England is a party to the Hague-Visby Rules. The law applicable to carriage of goods by sea in the US is based on the Hague Rules. It is generally said that the Hague and Hague-Visby Rules do not apply to deck cargo. However, in order to avoid the operation of the Hague and Hague-Visby Rules two requirements must be satisfied: (1) the cargo must be stowed on deck and (2) the deck stowage must be clearly stated on the bill of lading.

CLEARLY STATED ON THE BILL OF LADING

Although it is easy to establish whether a specific cargo has in fact been carried on deck or not, for that is a question of fact, it is not so easy to satisfy the requirement that a clear statement should appear on the bill of lading. The crucial question appears to be whether a third party transferee of the bill of lading would be able to ascertain from the terms of the bill of lading whether

the goods were stowed on or under deck.

Under English law a general liberty to carry goods on deck is not sufficient,⁴ since the transferee would not be able to ascertain whether the liberty had been exercised or not. Similarly, under US law a clause providing that the carrier is entitled to carry the cargo on deck unless the shipper objects is also not sufficient,⁵ since the transferee would not be able to ascertain whether or not the shipper had raised an objection. Further, under US law a simple notation on the face of the bill may also not be sufficient and it may be a requirement that the shipper "knowingly assented" to carriage on deck.⁶

The fact that in certain trades it is customary for specific cargoes to be carried on deck is irrelevant to the question of application of the Hague and Hague-Visby Rules. Unless the bill of lading expressly states that the goods are carried on deck the Rules will apply.

LIBERTY CLAUSES

Whenever cargo is (or may be) carried on deck the Association recommends the following clause be inserted in bills of lading:

"Liberty to Stow on Deck
Carrier has liberty to carry goods on deck without notice to the merchant and without stating the on deck carriage on the bill of lading."

Although not having the same effect for the purpose of avoiding application of the Hague or Hague-Visby Rules as a clause expressly stating that the goods are shipped on deck, this clause may be useful, since it authorises deck carriage. Where arguments of reckless conduct or fundamental breach are raised by claimants the clause may afford important protection to the carrier.

The same protection is afforded by the liberty clause where an exemption clause might be removed on the basis of construction.

WHERE THE HAGUE OR HAGUE-VISBY RULES DO NOT APPLY

Provided deck cargo is successfully excluded from the operation of the Rules, the parties are free to agree on any terms of carriage. This is because third parties to whom the bill of lading may be transferred are aware of the deck carriage and the fact that the Rules do not apply. In these cases it is possible for the carrier to exclude liability for loss of or damage to deck cargo.

Under English law liability may be excluded through a clause on the face of the bill of lading stating: "Carried on deck at shipper's risk without liability for loss and/or damage howsoever caused."

This is because under English law it is possible to contract out of liability for negligence if it is done in clear and unambiguous terms.⁷

However, the same clause will not be effective under US law, since the US courts will not allow the carrier to escape from liability for loss or damage arising from his own negligence, so that any provision to that effect in a bill of lading will be against public policy and therefore void.⁸ Furthermore, in respect of shipments to or from the USA the Harter Act applies. This Act makes it unlawful to insert any clause in a bill of lading relieving the carrier from liability for his own negligence, fault or failure in proper stowage (in respect of both, on-deck and under-deck cargo). Any contractual provision in that respect will be null and void and of no effect. Accordingly, when an "on-deck" bill of lading is used for the carriage of cargo to or from the

¹ For instance, carriage of enclosed containers on decks of purpose-built container ships is almost universally regarded as a customary method of carriage. Similarly, the carriage of logs on deck of purpose-built log-carrying vessels is also accepted as customary.

² THE ANTARES (1987) 1 Lloyd's Rep. 424.

³ St. John's Corp. v. Companhia Geral, etc., 263 US 119 (1923).

⁴ Svenska Tractor v. Maritime Agencies (1953) 2 Q.B. 295.

⁵ The Hong Kong Producer (1969) 2 Lloyd's Rep. 536 (2nd Cir.).

⁶ See Ingersoll Milling v. Bodena (1988) AMC 223.



United States, insertion of the following clause on the face of the bill of lading is recommended⁷: "CARRIED ON DECK. Risk of loss or damage inherent to on deck carriage is born by the shipper/ consignee but in all other respects risk of loss or damage is governed by the provisions of the Carriage of Goods by Sea Act of the United States, 1936 ("COGSA") (notwithstanding Section 1(c) of COGSA) and, to the extent not

inconsistent with such provisions of COGSA, by the terms of this bill of lading."

Finally, it should be remembered that if the Hague or Hague-Visby Rules do not apply to deck carriage, then in principle the carrier would not be able to rely on the defences and limitations contained in the Rules, which form the basis for P&I cover.¹⁰ In such cases it will be

necessary to incorporate terms in the contract at least as favourable to the carrier as those laid down in the Rules, to serve as protection in case the clause attempting to exempt all liability for deck cargo is not upheld. Failure to do so would prejudice P&I cover.

⁷ Nelson Line v. Nelson (1908) A.C.16,19.

⁸ Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 US 397, 438-463 (1889).

⁹ An alternative arrangement is to have pre-printed "On Deck Cargo" clause on the reverse side of the bill of lading dealing with liability/time limitation/ package limitation provisions (which in this case may be in terms more favourable to the carrier than those laid down in COGSA), with a stamped clause on the face of the bill of lading stating "On Deck Carriage" and directing one's attention to the provisions for on deck carriage on the reverse side of the bill of lading.

¹⁰ Rule 34.1.ii of Gard's Statutes and Rules 1996.

FIOS revisited

Gard News 169,
February/April 2003

It is well known that a carrier is bound to "properly and carefully load, handle, stow, carry, keep, care for and discharge" goods which he carries. This principle is laid down in the Hague and Hague-Visby Rules (Article III, Rule 2), and in the majority of all other legislation and conventions governing the obligations of a carrier in contracts for the carriage of goods by sea. Until 1954, at least as far as English law was concerned, it was considered that the carrier would have an absolute liability to ensure that these operations were carried out in a correct manner, and that the carrier would be liable to the cargo owners for any loss which resulted from these operations being carried out incorrectly or to a standard falling below that which could reasonably be expected of a competent and responsible carrier.

In 1954, the English High Court stated¹ that the carrier would bear responsibility for those parts of the carriage which he had actually contracted to undertake. The court accepted that as the contract for carriage could reasonably be broken down into several distinct operations - loading, stowing, securing, carrying and discharging - it was for the carrier and shipper to agree who would be responsible for each operation, but that if the carrier accepted responsibility for these operations, he would be bound to do so in accordance with the rules governing the contract of carriage (at that time, the Hague Rules).

Over the years, there have been several conflicting court decisions as to when the responsibility for loading and stowing cargo shifts to the shipper, and it is important to use clear and unambiguous words in the contract of carriage to ensure that the responsibility lies with the party intended to bear it. There are now several standard phrases which are used to dictate who will bear

responsibility for loading and stowage of cargo, some of which are as follows:

1. "The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners."²
2. "Cargo shall be loaded, spout-trimmed and/or stowed at the expense and risk of Shippers/Charterers..."³
3. "Other than Bulk Cargo - If loading other than bulk cargo, the cargo shall be loaded and stowed by the Charterers at their expense, but under the supervision of the Master..."⁴
4. "Shipper/Charterers/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel..."⁵

In the absence of any other terms governing the loading and stowage operations, responsibility for these operations would normally be considered to lie with the shippers/charterers in 1 and 2 above, but will remain with the vessel in 3 and 4, as the risk of such operations has not been expressly transferred to the charterers. However, this issue has now been revisited once more.

The dispute

The High Court in London has recently decided a case concerning the interpretation of the terms of a STEMMOR form of charterparty (4 above) and their incorporation into a bill of lading.⁶ The clauses under consideration by the court were as follows:

"3. Freight to be paid at and after the rate of US\$...per metric tonne FIOST lashed/secured/dunnaged..."

"17. Shipper/Charterers/Receivers to put the cargo on board, trim and

discharge cargo free of expense to the vessel. Trimming is understood to mean leveling off of the top of the pile and any additional trimming required by the Master is to be for Owners' account."

The cargo was steel coils to be shipped from India to Spain, although the form of charter used was actually intended for the carriage of ore cargoes. The claim was brought against the shipowners by charterers under the charterparty and by shippers and receivers under the bills of lading. There was no dispute that the damage had been caused by improper or defective loading, stowage, lashing, securing, dunnaging, separation and discharge.

Claims under the charterparty

Charterers contended that the effect of clause 3 of the charterparty acted only to transfer financial responsibility for these operations to them, risk and responsibility remaining with owners. However, the court examined clause 3 in conjunction with clause 17 and reached a different conclusion. As the cargo consisted of steel coils, the reference to trimming the pile in clause 17 was deemed to be of no effect, this phrase being appropriate to an ore cargo (for which the form of charter was intended), but not when considering the cargo in question. However, the remainder of the clause was appropriate to a cargo of steel coils, as this cargo still had to be placed on board and discharged, and clause 17 was clear that responsibility for these operations would lie with charterers. The court took the view that the reference to trimming of the cargo should be interpreted as a reference to the securing, lashing and dunnaging of the cargo, as referred to in clause 3. Consequently, the risk of these operations had been transferred to the charterers and their claim against owners failed.

1 In *Pyrene Co v. Scindia Navigation Co* [1954] 1 Lloyd's Rep. 321.

2 GENCON charterparty form, 1994 version, Clause 5.

3 SYNACOMEX 90 charterparty form, Clause 5.

4 WORLDFOOD 99 charterparty form, Clause 10.

5 STEMMOR charterparty form, Clause 17.

6 *Jindal Iron and Steel Co and Others v. Islamic Solidarity Shipping Co (Jordan) Inc and Another* - QBD - 25th June 2002; LMLN 595, dated 5th September 2002.

Claims under the bills of lading

The bills of lading were subject to the Hague-Visby Rules, and shippers and receivers argued that Article III, Rule 2 rendered the owners responsible for the defective loading operations. It was further argued that if clauses 3 and 17 of the charter were incorporated into the bills, they would act to relieve owners from liability arising from negligence, fault or failure in the duties provided under Article III, Rule 2, and consequently should be rendered invalid by Article III, Rule 8.⁷ The court examined the decision in *Pyrene v. Scindia*⁸ and in particular the comment that the object of the Rules "is to define not the scope of the contract service but the terms on which that service is to be performed". It was decided that the whole contract of carriage was subject to the Rules, but the carrier was free to contract on terms by which loading was not included in the contract, and for which his obligations would not be subject to the Rules. The court made further reference to a subsequent

decision of the House of Lords,⁹ which approved the comments in *Pyrene v. Scindia*.

Consequently, the receivers' claim in respect of damage at loading would fail on the basis that owners were not responsible for this operation, and could rely on Article IV, Rule 2(i) (act or omission of the shipper or owner of the goods, his agent or representative). Receivers' claim in respect of damage caused during discharge failed because by the terms of the charterparty, as incorporated in the bills, any damage occurring at discharge would be at their own risk.

The shippers were unable to prove their claim for damage occurring at loading as they were responsible for these operations, and were unsuccessful in their claim for damage caused during discharge due to Article IV, Rule 2(q) (any other cause arising without the actual fault or privity of the carrier).

Conclusion

The moral behind this case is that any charterparty which is to be entered into must be worded clearly in order to avoid confusion and potential disputes. If it is the intention of the owners and charterers to transfer the risk and responsibility for loading and discharge operations to the charterer, care must be taken to ensure that the terms of the charterparty actually do so. There must be no room for ambiguity or confusion in such clauses if costly disputes are to be avoided.



⁷ Article III, Rule 8 reads: "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 these Rules, shall be null and void and of no effect...".

⁸ *Supra*.

⁹ *Renton v. Palmyra* [1956] 2 Lloyd's Rep. 379

FIOS revisited (again)

Gard News 172,
November 2003/January 2004



The English Court of Appeal has recently confirmed that a carrier is only responsible for the safe loading and stowage of a cargo if he has contracted to perform those operations.

An article in Gard News issue No. 169¹ reported a decision of the English High Court² confirming that a shipowner or carrier is only responsible for the safe loading and stowage of a cargo if he has actually contracted to perform those operations. The facts of the case are reported in the earlier article. Following a successful defence, cargo interests have appealed the decision and the Court of Appeal has recently issued its decision, which largely upheld the lower court's decision.³

The appeal judges considered at length the arguments that had been raised earlier concerning the interpretation of the various charterparty terms and agreed wholeheartedly with the trial judge's decision that the contract should be read as a whole – the reference to trimming of cargo in one clause should be read as a

reference to the stowing and securing requirements that were noted in a separate clause. The result was that the trial judge's decision was correct, and despite the parties' poor choice of standard form contract and inappropriate amendments for the voyage in question, the charterers/shippers/receivers were responsible for the loading, stowage, securing and discharge of the cargo.

Interestingly, although the carrier interests had successfully defended the case, they issued a cross-appeal against one of the judge's findings. The trial judge had stated that in respect of claims under the bills of lading, the carrier's defences would of necessity be based on the defences available under the Hague or Hague-Visby Rules (the Rules), whichever may be applicable to the contract of carriage evidenced by the bills. The appeal judges agreed with carrier interests and stated that this interpretation was unnecessary and erroneous. The Court of Appeal held that although the Rules would apply to the contract of carriage, they

would only apply in respect of those operations which the carrier had undertaken to perform. As the carrier had not, in this case, agreed to load, stow, secure or discharge this cargo, the Rules would not apply to those operations. The carrier had not agreed to perform those operations and this was sufficient to provide a complete defence to the claims for damage occurring during the operations. The trial judge was wrong to consider the application of the Rules and the carrier's appeal in this respect would be allowed. This decision was expressed to be subject to carrier interests taking no part in the operations under consideration – if carriers had intervened in the operations which they had not contracted to undertake they may have been liable to cargo interests for any damage occurring as a result of their intervention.

Cargo interests have appealed further to the House of Lords and Gard News will report on the decision of that court as soon as it becomes available.

¹ "FIOS revisited".

² *Jindal Iron and Steel Co and Others v. Islamic Solidarity Shipping Co (Jordan) Inc and Another* – QBD – 25th June 2002; LMLN 595, dated 5th September 2002.

³ [2003]2 Lloyd's Rep 87.

Delivery of cargo in Chile – An English law perspective

Gard News 167,
August/October 2002

A recent decision of the English High Court¹ challenges the general perception of responsibility of the carrier in the process of delivery of cargo in Chile.

Two unpaid shippers in related actions in London brought claims against their respective ocean carriers for alleged delivery without production of bills of lading. In this particular case the consignments had been shipped from Hong Kong destined for Santiago in Chile. Liner bills of lading to the order of Chilean banks were issued for the two shipments, which arrived in Chile in late March 1999. Upon arrival in Chile, the goods were placed in a licensed customs warehouse,² in accordance with the provisions of local law. After the customs clearance took place, the cargo was delivered to its Chilean buyers, who had not paid part of the sale price to the shippers in Hong Kong, while the bills of lading remained with the banks. The court decided in favour of the unpaid shippers of the cargo.

Background

The procedure for delivery of cargo in Chile is peculiar, inasmuch as local law provides for the carrier to hand over the cargo to a customs warehouse for subsequent delivery to the final consignee.

An article about delivery of cargo in Chile appeared in Gard News issue No. 138. It explained that according to the system in Chile the cargo remains in deposit until customs has granted clearance for it to be delivered to the rightful owner or his servants or agent, which occurs once the customs authority is satisfied all the applicable requirements have been met. The general understanding at that time was that under Chilean law the carrier could not be reasonably held liable for wrongful delivery, because he had delivered the cargo to the person to

whom local law required him to deliver it, i.e., to the customs authority.

The reasoning of the English court

The three main questions addressed by the English court were the following:

- Whether the handing over of the cargo to the customs warehouse constituted delivery by the carrier and therefore the end of the carrier's responsibility.
- Whether the customs warehouse could demand from the customs agent³ the original bill of lading.
- Whether the carrier could ask the customs warehouse to demand an original bill of lading when delivering the cargo to the customs agent.

The conclusions of the court were the following:

- The handing over of the cargo to a customs warehouse does not constitute delivery by the carrier; it is merely an act by which the goods come within the jurisdiction of customs, but not into its possession.
- There is nothing preventing the customs warehouse to demand from the customs agent the original bill of lading, although it was accepted that this was unusual, as customs warehouses usually rely on the legalised import declaration to ascertain who the rightful receivers are.
- It is possible for the carriers to enter into contracts with the customs warehouses whereby the latter are instructed to insist on presentation of the original bill of lading for the delivery of cargo.

The court reached its decision based upon evidence and testimonies submitted by two eminent Chilean lawyers, who assisted the court in understanding how the delivery of cargo operates in Chile. The reasoning of the court is very logical and straightforward. However, reality may

not be as straightforward, and this may be the reason why several carriers have been faced with misdelivery claims in Chile. The number of misdelivery claims would suggest that there is a real problem for carriers in relation to the delivery practice in that country.

Logic versus reality

According to Chilean law, the carrier is obliged to hand over the cargo to customs warehouses within 24 hours of it being unloaded from a ship. The carrier can not demand an original bill of lading from the customs warehouse as this entity is not the final receiver of the goods, neither is it an agent of the receiver of the cargo. This entity acts on behalf of customs to ensure that duties are paid and all legal requirements are fulfilled. The first conclusion of the court was that an ocean carrier carrying goods to Chile is not obliged, as a matter of the customs law of Chile, to deliver goods to the physical possession of customs, but only to a customs warehouse licensed by customs and subject to the jurisdiction of customs. Customs does not deliver the goods. The cargo does not come into the possession of customs but only within its jurisdiction. The handing over of the cargo by the carrier to the customs warehouse does not constitute proper delivery of the cargo. It is not a delivery of the goods in the sense that this relinquishes the carrier's control over and responsibility for them. As customs never takes possession of the goods, they do not become responsible for the goods or for their correct delivery. Such responsibility remains with the warehouse operators. The court pointed out the distinction between the warehouse being within and subject to the jurisdiction of customs and the warehouse being treated as if they were part of customs. In performing their functions, the warehouse operators were not carrying out any delegated function of the state, save in relation to obligations owed to customs such as the collection of taxes.

¹ Utaniko Ltd. v. P&O Nedlloyd BV (2002) All ER (D) 84 Feb.

² Cargo entering Chile is placed in the custody of warehouses licensed by customs and remains there until customs has granted clearance for the cargo to be delivered.

³ A customs agent or broker is a person licensed as such by the customs authority, albeit independent from the latter, who represents the legitimate owner of the cargo and acts on his behalf before customs to obtain delivery of the goods.



As a result of the above conclusion, the following clause, contained in the bills of lading, did not protect the carrier against the misdelivery claim: "If the carrier is obliged to hand over the goods into the custody of a customs, port of other authority, such hand over shall constitute due delivery to the Merchant under the bill of lading."

The court's conclusion also implies that in the event of misdelivery by customs a claim against them by owners is likely to be unsuccessful.

The second conclusion of the court was that nothing prevented the customs warehouse from demanding the original bill of lading from the customs agent. Also, there was nothing in the status of a customs agent that obliged a customs warehouse operator to accept his entitlement to demand the goods without presentation of an original bill of lading. It is important to consider the question from the point of view of the carrier, as opposed to customs. Although the warehouse operator could not be given instructions that contradicted the public duty entitling the customs agent to withdraw the goods once the customs requirements were complied with, that only applied to the duties of the warehouse operator as regards customs. It did not affect obligations that arose under the contract of carriage and instructions could be given as regards obligations under the contract of carriage not inconsistent with that public duty. The court determined that there was nothing in Chilean law that made it inconsistent with the public duties of a customs warehouse operator for that operator to be required by private contract between him and the carrier to demand presentation of an original bill of lading before delivering the goods after they had been cleared through customs. The carrier's Latin American

representatives themselves gave evidence to the effect that, although the carrier's agents acted on the basis of the customs agent's statements, they could ask for the original bill of lading; the customs agent would in effect be bound to produce it, as otherwise he would be denounced to customs who would then check his file to see if it contained the original.

The third conclusion of the court was that, although cargo imported into Chile had to be delivered into customs warehouses, the carrier could choose the customs warehouse to which the goods were to be delivered and contract with that warehouse operator on terms that the goods should only be delivered against presentation of a bill of lading. A prudent carrier should do so to fulfil his obligations under the bill of lading to the lawful holder of that bill of lading to deliver only against presentation of an original bill of lading. In cases where the original bill of lading is not available, a non-negotiable copy certified by the bank (who will be the consignee) could possibly be used.

Another important conclusion of the court was that there was no custom of the ports of Chile that a carrier can discharge its delivery obligations as set out above by delivering cargo to customs warehouses or that they could be delivered without presentation of a bill of lading.

The obligation to deliver against the bill is clearly stated in Article 977 of the Chilean Code of Commerce, which reads: "The bill of lading is a document which establishes the existence of a contract of maritime transport and verifies that the carrier has taken charge of or has loaded the goods and has undertaken to deliver them against the presentation of that document to a determined

person to his order or to the bearer".

Substance and mode of performance

As a matter of English law, the obligation in bailment and contract upon the carriers is only to deliver against presentation of an original bill of lading. However, in the present case the carriers relied on the distinction under Article 10 of the Rome Convention between the substance of that obligation and the manner and mode of its performance. The court then ruled that to the extent that the law of Chile contained provisions specifying the manner in which cargo in Chile had to be delivered, it must be correct to have regard to the law of Chile. So for example, under Chilean law the original bills of lading have to be retained by the customs agent. They can only be presented to the carrier and have to be returned (marked if necessary to show delivery has been made); to that extent Chilean law modifies the obligations under the bill of lading. Citing a previous decision,⁴ the judge agreed that, if it were a requirement of the law of the place of performance (Chile) that the cargo must be delivered without presentation of an original bill of lading, the carriers would have performed their obligations under the contract of carriage. Any other conclusion would mean that the contract could not lawfully be performed, which could not have been intended by the parties. The same would apply if there were a custom. However, custom in this context means custom in its strict sense, and not mere practice. According to the court, the obligation under the bills of lading in English law contemplated the bill being surrendered to the carrier and kept by him, but the modification in the manner of the discharge of that obligation under Chilean law was not inconsistent with the basic obligation

under the bills of lading in English law to deliver against presentation of the bill of lading.

Conclusion

The case highlights the difference in view within Chile itself as to when proper delivery takes place in circumstances when the carrier is required to hand the cargo over to customs. There appears to be no judicial authority from Chile on this point. As a result, the English High Court heard expert legal views from Chilean lawyers. Having heard both views, it preferred the interpretation that the procedure of handing over cargo to the customs warehouse did not relieve the carrier of subsequently ensuring that delivery is made to the rightful owner of the cargo and, therefore, if the customs warehouse misdelivers the cargo, the carrier is ultimately responsible to the cargo claimant. This view appears to be

sensible and logical when examined in the light of Chilean law as to delivery of cargo. Moreover, under Chilean law, as under English law, a carrier is afforded protection against misdelivery claims if he delivers against the original bill of lading. The present procedure of handing cargo over to customs warehouses does not mean that the owner is thereby unable to avail himself of this protection. In fact, according to the legal advice from Chile, it is perfectly possible for the carrier to issue appropriate instructions to the warehouse operator in this respect.

From a Club cover point of view, the decision has added clarity at least from an English legal perspective as to whether such misdelivery claims are covered under the P&I policy. Club cover will be available for misdelivery claims unless the claim concerns a negotiable bill of lading and the claim arises from the carrier's failure to deliver

against production of that original bill of lading.⁵ Accordingly, members are advised to always ensure that the appropriate instructions are issued to the warehouse operators to only deliver against the original bill of lading and that such instructions are followed. It should be noted that, for the purpose of the Club Rules, the important point is that delivery is made against the original bill of lading by the member or his appointed agent and it will not be sufficient for the member to simply issue the instructions in this respect. Members are further advised to ensure that contracts with the warehouse operators provide a clear recourse action in the event that the instructions are not complied with, since the carrier will not be insured for any subsequent misdelivery claim.

⁴ The Sormovsky (1994) 2 Lloyd's Rep 266.

⁵ See Rule 34 (1)(i).

Delivery orders

Gard News 153,
March/May 1999



Often in the bulk cargo trade (and sometimes in other trades) delivery of cargo is made pursuant to a delivery order. The delivery order can for example reflect a part of a bulk consignment covered by a single bill of lading which has been sold to various buyers. As a bill of lading is not divisible, the delivery order allows parts of a cargo to be apportioned between various receivers who are entitled under the delivery order to claim delivery from a vessel. In this respect delivery orders share similar characteristics with bills of lading. Delivery orders also appear in cargo release procedures, whereby the consignee receives a delivery order in exchange for the original bill of lading after payment of all outstanding charges.

Ship's delivery orders and merchant's delivery orders

In discussing delivery orders, a distinction may be drawn between a ship's and a merchant's delivery order. Ship's delivery orders have been defined by the English Carriage of Goods by Sea Act 1992 (COGSA 1992) in section 1(4): "References in this Act

to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

"The essential characteristics of this provision are that in order to achieve legal recognition as a ship's delivery order a document must contain an undertaking from a carrier who is in possession of goods to deliver them to an identified party. The effect of the undertaking must, either expressly or impliedly, give the identified party the right to require delivery from the carrier of the goods mentioned in the document. Thus, for example, a document which authorises an agent to release goods to a third party is not a ship's delivery order as it does not give a right to the third party against the ship.

However, it often happens that a seller who has shipped goods will issue a "merchant's delivery order" addressed to the carrier instructing delivery of part, or all, of a consignment in the carrier's possession to a specific party. In cases where a merchant's delivery order is issued by a third party and presented to the ship, it is necessary that it is "attorned" by the carrier before it becomes binding on him. "Attornment" simply amounts to an acknowledgement by the carrier that he accepts the instructions contained in the delivery order. Until such time as attornment occurs, the merchant's delivery order is ineffective and unenforceable against the carrier.

Once a merchant's delivery order is attorned, it is identical in all respects to a ship's delivery order.

Where the carrier issues his own delivery order, attornment is, of course, unnecessary, as he is already bound by the terms of the document.

The legal and practical effects of the delivery order - risks involved

Under English law once a ship's delivery order is recognised as such by COGSA 1992, it transfers the rights against the carrier under the contract of carriage from the shipper to the person identified in the delivery order. This means that the holder of the delivery order can bring an action against the carrier on the terms of the contract of carriage as if he had been a party to that contract.¹ In this respect the delivery order is similar to a bill of lading as a vehicle for the transfer of rights against the carrier. Consequently, the carrier is bound by the terms of the contract evidenced by the delivery order (i.e., the contract under or for the purposes of which the undertaking contained in the order is given),² but will also have the benefit of any limitations of liability contained therein. A delivery order therefore shares many of the features of the bill of lading as it will operate as a receipt for the goods and as evidence of the terms of the contract of carriage.

¹ See Section 2 of COGSA 1992.

² See Section 5 of COGSA 1992.

What are the practical ramifications of the above for a shipowner?

The carrier must be aware that if a document presented to him contains an undertaking by him that delivery will be made, such a document places the bearer in substantially the same position as the holder of a bill of lading. A delivery order should therefore only be issued in exchange for all original bills of lading. If the original bills of lading are not returned it is easy to imagine that problems can arise if both a bill of lading and a delivery order covering the same cargo are presented to the carrier. As a delivery order is not a document of title, the holder of the bill

of lading would prima facie be entitled to delivery of the goods. However, the holder of the delivery order would be entitled to claim damages for his losses from the carrier. Thus when issuing or attorning to a delivery order carriers must ensure that all original bills of lading have been surrendered. Similarly, carriers must ensure that the quantities stated in single or multiple delivery orders accurately reflect the quantities stated in the bill of lading. In the event all original bills of lading have not been surrendered Gard would recommend that a delivery order is issued only against a letter of indemnity on acceptable terms and backed by sufficient financial security.

A delivery order should contain the same remarks in respect of the condition of the cargo at the time of loading as the underlying bill of lading.

It is recommended to adopt a prudent practice in connection with the issuance of delivery orders. Such documents are undoubtedly of legal and practical value and could create complications if not issued in strict conformity with, and in exchange for, the relevant bill of lading.

Delivery of cargo in Chile revisited

Gard News 171,
August/October 2003

A slight change to practice regarding delivery of cargo in Chile is expected to take effect shortly.

Readers may recall from previous articles in Gard News¹ that according to Chilean law the carrier must deliver cargo to a customs warehouse within 24 hours after being unloaded from the vessel. The cargo is kept in the warehouse until all customs formalities are dealt with and customs grants clearance to the consignee. At present, the customs agent may present the original bill to the carrier but the original bill must be returned to customs and kept in its files for five years.

However, there are plans to implement changes to this system whereby the

customs agent shall be obliged to surrender the original bill of lading to the carrier prior to delivery of cargo in exchange for an "authorised" copy.

The idea is that the submission of documents and data regarding each import and export operation be done on-line (although there is no mention of electronic bills of lading as yet). The new system promises to include the carrier (or his agent) in the delivery process as follows:

- the receiver (or his customs agent) must submit an original bill of lading to the carrier (or his agent), who should recognise it as authentic and verify its endorsements, etc.
- the carrier retains the original bill of lading and in its stead hands over an "authorised" copy which will serve "for all customs purposes" (instead of "all

legal purposes", as it is now).

- the carrier (or his agent) will signal electronically to customs that this step has been carried out and delivery will take place by customs, via the warehouse keeper acting on its behalf, to the (hopefully) rightful consignee.

The system, which has been named "Isidora", was not yet operational at the time of going to press. Gard News will inform readers as and when the change actually comes into force, so that operators may forewarn their masters/local agents.

We thank Cave & Cia, Valparaiso, for the above information.

¹ "Delivery of cargo in Chile" in issue No. 138 and "Delivery of cargo in Chile – An English law perspective" in issue No. 167.

A message to all shipowners who agree to deliver cargo against anything other than a true original bill of lading

Gard News 155,
September/November 1999

The case of *Motis Exports Ltd. v. Dampskibsselskabet AF 1912, A/S and another*,¹ decided earlier this year in the English High Court, should send a shiver down the spine of every shipowner who has even thought about delivering a cargo against anything other than the true original bill of lading, although the defendant shipowners in the *Motis* case may well regard themselves as much the victims as the plaintiff shippers.

The facts may be summarised as follows. The shippers sued the shipowners on the basis that the latter had misdelivered the goods (for which the shippers had presumably not been paid) without production of the original bills of lading. The shipowners seem to have conceded that they had done so, since their main defence was that they had delivered the goods against forged original bills, which they had no way of knowing were forged. On this basis, they said they had not deliberately misdelivered the goods and were therefore not at fault. As a second line of defence, they argued that a clause in the bills of lading which provided that the carrier had no liability for the goods after discharge should be effective.

The court found the shipowners liable. Firstly, the judge said that the fact that the carrier was unaware of the fraud (i.e., the forged bills of lading) was no defence to the claim. There was nothing in the contract which gave the shipowners such a defence and it was neither reasonable nor necessary to imply such a term. Reasons of public policy also dictated that, although both parties were innocent of the fraud, the shipowners had responsibility for the integrity of their bills of lading and for the proper delivery of the goods.

Further, the judge held, the shipowners were liable for conversion of the goods, conversion being a recognised tort under English law. The judge quoted with approval a 1968 case² which stated that, in circumstances such as these, the tort of conversion is one of strict liability

and the issue of fault does not arise. On this basis, delivery against a forged bill of lading was held to be "an intentional act inconsistent with the rights of the true owners". Finally, the judge found that the clause in the bill of lading relieving the carrier from liability for the goods after discharge did not cover a situation where the goods had been misdelivered. The shipowners were thus condemned on all counts.

The value of the goods was not stated in the judgment, but was presumably substantial. Interest and legal costs will have been in addition. It is probable that all these costs will be solely for the shipowners' account, as all the P&I Clubs within the International Group have Rules which exclude cover for liabilities, costs and expenses arising out of the delivery of goods without production of an original negotiable bill of lading. In this case, the shipowners were particularly unfortunate, in that they had no knowledge of the forged bills of lading and appear to have acted in a way consistent with normal commercial practice. Since they had no idea that the bills of lading were forged, it is assumed that they saw no need for and did not obtain a letter of indemnity, which is commonly obtained in situations where shipowners take the commercial decision to deliver goods

without the original negotiable bill of lading being tendered.

There is a further problem for shipowners. As stated above, the judge found that the shipowners had acted "intentionally" when delivering the goods against the forged bills of lading. The point does not seem to have arisen in this case, but one wonders what impact this finding would have had if the shipowners had tried to limit their liability under the 1976 Limitation Convention. It will be recalled that Article 4 of this Convention states that:

"A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result" (our emphasis).

Unfortunately for shipowners, there are no steps which will guarantee they are protected in such a situation. Even refusing to deliver goods other than against an original negotiable bill of lading will not avoid the problem which the shipowners faced in this case. Moreover, since the judge effectively found that liability was, to some extent, strict, any defence against a claim from the rightful owner of the goods seems



¹ (1999) 1 All ER 571.

² *Marfani & Co. Ltd. v Midland Bank Ltd.* (1968) 2 All ER 573.

doomed to fail. In these circumstances, owners' best hope of recovery probably lies in an indemnity claim against the charterers. The merits of such claim will depend largely on the terms of the particular charter party. One important area is the authority granted by owners for the charterers or their agents to issue and sign bills of lading on behalf of the Master. When a vessel is operating under a time charter, owners rarely have any idea of what bills of lading have been issued and signed on their behalf. Under English law, the right of charterers to sign bills of lading on behalf of the shipowners will normally be implied, at least into certain forms of charter party, such as the NYPE form, even if there is no formal letter of authority. Owners may therefore be able to obtain some protection by ensuring that a suitably worded letter

of authority is always given to charterers or their agents. The charterparty should also explicitly state that the authority given to charterers to issue and sign bills of lading is only as set out in the letter. The Association can assist with the wording of either a charterparty clause or a letter of authority, or both.

The circumstances of the *Motis* case are unusual. The forgery of bills of lading is not common. What is common is that, almost daily, shipowners take the commercial decision to deliver goods against something other than the original negotiable bill of lading. The legal principles which the *Motis* case has decided will apply to all matters which fall to be decided in accordance with English law. No doubt in 999 out of 1,000 cases, everything goes smoothly and the shipowners never hear

anything more. However, in the one in a thousand case where something does go wrong, the shipowners are left – with no defence to the claim by the rightful owner of the goods,
– with no P&I cover,
– with possible difficulties in limiting their liability,
– with little or no chance of obtaining an indemnity from anyone else.

It is not a comfortable position in which to be.

English law – Misdelivery in Chile – A follow-up

**Gard News 171,
August/October 2003**

As reported in an article in *Gard News* issue No. 167,¹ a recent decision of the English High Court² challenged the general perception of responsibility of the carrier in the process of delivery of cargo in Chile. The Court of Appeal has now confirmed that where a carrier parts with possession of the goods to third parties prior to delivery, he must ensure that the third parties deliver the goods only against presentation of an original bill of lading.

Two unpaid shippers brought claims against their respective ocean carriers for alleged delivery of cargo in Chile without production of original bills of lading. Upon arrival in Chile, the goods had been placed in a licensed customs warehouse, in accordance with the provisions of local law.³ After the customs clearance took place, the cargo was delivered by the warehouse

to the Chilean buyers, who had not paid part of the sale price to the shippers, while the bills of lading remained with the banks. The court decided that the handing over of the cargo to a customs warehouse did not constitute delivery by the carrier; it was merely an act by which the goods came within the jurisdiction of customs, but not into its possession. It was possible for the carriers to enter into contracts with the customs warehouses whereby the latter were instructed to insist on presentation of the original bill of lading for the delivery of cargo. Carriers were held responsible for misdeldelivery since they had failed to instruct the warehouse operators or the relevant entity empowered under Chilean law to issue a temporary import permit for containers (the container operator) to ensure that delivery was given only against an original bill of lading.

The judgment was appealed and although the points dealing with the Chilean delivery procedure were not re-considered, the Court of Appeal confirmed that the carriers were liable for misdeldelivery.⁴ They were in breach of their duty in bailment by virtue of their failure either to deliver the goods to a person entitled to them against presentation of an original bill of lading or, when they parted with possession of the goods to third parties before delivery, to arrange for the third parties to be under a similar obligation regarding delivery.

¹ "Delivery of cargo in Chile – An English law perspective".

² *Utaniko Ltd. v. P&O Nedlloyd BV* [2002] 2 Lloyd's Rep.182.

³ According to the system in Chile the cargo is handed by the carrier to customs warehouses and remains in deposit until customs has granted clearance for it to be delivered to the rightful owner or his servants or agent, which occurs once the customs authority is satisfied all the applicable requirements have been met. The general understanding was that under Chilean law the carrier could not be reasonably held liable for wrongful delivery, because he had delivered the cargo to the person to whom local law required him to deliver it, i.e., to the customs authority. However, readers should be aware that changes to the procedure currently followed in Chile may be implemented shortly. See article "Delivery of cargo in Chile revisited" in this issue of *Gard News*.

⁴ [2003] 1 Lloyd's Rep. 239.

English law – Straight bills of lading - One more piece in the puzzle

Gard News 171,
August/October 2003

The English Court of Appeal has recently held that a straight consigned bill of lading expressly requiring presentation for delivery is a "similar document of title" for the purposes of the Hague-Visby Rules.

The question of whether a "straight" bill of lading is a document of title is relevant not only in respect of applicability of the Hague-Visby Rules, but also in respect of the carrier's delivery obligation. An article in Gard News issue No. 169¹ commented on the English Commercial Court's decision in the case of the RAFAELA S,² in which the court had to consider whether a straight bill of lading was a "bill of lading or similar document of title" and therefore covered by Article I (b) of the Hague-Visby Rules, or whether it was not a document of title so that the UK Carriage of Goods by Sea Act 1971, which brings into effect the Hague-Visby Rules, did not apply. As the words "order of", or others of similar effect, did not appear in the bill's consignee box, the court decided that the bill was non-negotiable and as such fell outside the definition of a "bill of lading or similar document of title" and the Hague-Visby Rules did not apply.

Cargo interests lodged an appeal and in April 2003 the Court of Appeal held³ that a straight consigned bill of lading expressly requiring presentation for delivery was a "similar document of title" for the purpose of the Rules and was therefore covered by Article I (b)

of the Hague-Visby Rules. Although it is unclear whether the decision would have been the same had the bill of lading not expressly required presentation for delivery, Rix LJ made it clear that in his view this would have made little difference.

In a recent article⁴ Professor Charles Debattista rightly points out that following the Court of Appeal decision straight bills now sit somewhat uncomfortably across two English statutes relating to the carriage of goods by sea. COGSA 1992 considers straight consigned bills to be sea waybills. This means that the consignee has contractual rights under the contract of carriage, including a right to delivery at discharge without presenting the document, and does not enjoy the benefit of the estoppel granted by section 4 of COGSA 1992 binding the carrier to statements about the goods on the bill of lading. On the other hand, after the RAFAELA S a straight bill is to be considered as a bill of lading for the purposes of COGSA 1971, which means that, at any rate where the bill expressly requires presentation, the consignee must present the document for delivery – and, according to Rix LJ, this is likely to be the case even where the straight consigned bill does not expressly so require. In addition, the consignee now takes the benefit of the estoppel created by the second sentence of Article III (4) of the Hague-Visby Rules binding the carrier to statements about the goods on the bill of lading.

According to Professor Debattista, the problem does not lie with the judgment in the RAFAELA S, but first, with the decision to exclude straight bills from the definition of bills of lading in COGSA 1992 and then, bizarrely, to characterise as sea waybills documents calling themselves bills of lading; and secondly, with the decision to include section 4, dealing with the evidential force of bills of lading, in the 1992 Act, an Act focusing on another matter entirely, namely the buyer's title to sue the carrier in contract.

As explained in the article in Gard News issue No. 169, P&I cover does not include liabilities arising out of delivery of cargo under a negotiable bill of lading without production of that bill by the person to whom delivery is made. Accordingly, liability for misdelivery under a straight bill of lading is not automatically excluded from cover in those cases where straight bills are not treated as negotiable instruments.

A more in-depth legal analysis of the current state of English law applicable to straight bills of lading and the practical consequences to carriers will be published in the next issue of Gard News. In the meantime members are advised to proceed with caution and deliver cargo carried under straight bills of lading only against presentation of an original.

¹ "Straight bills of lading – Not so straightforward".

² [2002] 2 Lloyd's Rep. 403.

³ [2003] EWCA Civ 556, 16th April 2003; LMLN 0613 dated 15th May 2003.

⁴ "'Straight' bills come in from the cold – or do they?" in Lloyd's List, 23rd April 2003.

Straight bills of lading – Delivery – Do your bills use clear words?



Introduction

There have recently been a number of court cases questioning the status and functions of a straight bill of lading. A straight bill of lading is generally accepted to be one completed in such a way that delivery is to be made to the named consignee only. Accordingly, it is not a transferable or negotiable document of title, which can be used to transfer title (the right to possession) to the goods, covered by that document. Bills of lading that are made out "to order" are, by endorsement, negotiable documents of title. Bearer bills of lading are negotiable without endorsement.

The commonly held view is that, whilst delivery under a negotiable

bill of lading should only be against production of an original bill, such production is not necessary under a straight (non-negotiable) bill of lading, i.e., delivery need only be made to the properly identified named consignee. As mentioned in Gard's Guidance on Bills of Lading, however, and in light of recent case law, that view is oversimplistic and indeed dangerous. If care is not taken, the carrier risks facing claims for misdelivery.

The problem

In a recent case before the English courts, *THE HAPPY RANGER*¹, the bill of lading appeared to be a straight bill - the consignee box showed only a named consignee and did not contain

the words "to order" or others similar. However, the face of the bill contained, in another body of text, the printed words "consignee or to his or their assigns" and these were the only words on the face of the bill indicating negotiability or otherwise. Since those words are accepted to mean "to order", the court decided that made the bill negotiable.

Whilst this case did not concern a misdelivery claim, it nevertheless demonstrates that, if the intention is to issue a straight non-negotiable bill, clear words must be used (and other words should not conflict with them) to show that the bill is in fact a straight non-negotiable bill. If not, the bill will

1 [2001] 2 Lloyd's Rep. 530 and [2002] 2 Lloyd's Rep. 357.

2 [2002] 3 SLR 176 and Civil Appeal No. 18 of 2002.

3 It contained the printed words "(non-negotiable unless consigned to Order)" and the words "to order" did not appear in the bill that was issued, either next to the named consignee or elsewhere.

4 See for example the *RAFAELA S* [2002] 2 Lloyd's Rep. 403

probably be deemed to be negotiable and the carrier will be obliged to deliver the goods only against production of an original bill.

In another recent case, which did concern misdelivery, the carrier had delivered the cargo without production of an original bill. The shipper had retained the original bills (all three) because the buyer/consignee had not yet paid in full, and when he failed to do so, the shipper sued the carrier. The case, *Voss Peer v. APL Co Pte Ltd*², was brought before the Singapore courts.

The bill of lading form was, as is increasingly commonplace, designed for various circumstances including when the bill is to be negotiable and when it is to be non-negotiable. It was accepted that the bill was a straight bill³. Notably, the bill of lading contained printed words elsewhere on its face "Upon surrender to the Carrier of any one negotiable bill of lading, properly endorsed, all others to stand void". Under English law⁴ such words were recently interpreted to apply only when the bill was negotiable. By implication therefore, under a straight non-negotiable bill, the carrier was not prevented from delivering the goods without production of an original bill. The Singapore Courts disagreed and decided that "clear words were required" to reflect the intention of the parties to contract out of delivering the goods without production of an original bill.

As a result, the Singapore courts found the carrier liable for the misdelivery claim. Less recent English case law suggests that the requirement for clear words may be correct. Carriers should therefore ensure that, where the bill is a straight non-negotiable bill, it contains clear words permitting the carrier to deliver the goods without production of an original bill.

Recommendations

In consideration of the above recent court cases, Gard Services recommends Members and clients to:

- Check their standard form bills, particularly those designed for various circumstances including when the bill is to be negotiable and when it is to be non-negotiable.
- Ensure that printed words in the bill make it clear in what circumstances the bill will be a straight non-negotiable bill. For example, use of the words "(B/L not negotiable unless "order of")" in the consignee box.
- Ensure that other printed words, particularly on the face of the bill, such as those in THE HAPPY RANGER, do not conflict with a bill which is intended to be non-negotiable. If those words cannot be deleted, or others more appropriate used, it should be made clear that they only apply where the bill is negotiable.

- The document issued should of course properly reflect what has been agreed with the shipper. If a non-negotiable document is sufficient, a sea waybill will usually be most appropriate. If a sea waybill⁵ can not be issued, it is suggested that the straight bill should also contain words (handwritten or stamped to give preference over printed words) such as "where non transferable/negotiable, the carrier is entitled to deliver the goods to the named consignee without surrender of an original bill of lading, and is obliged to do so unless the shipper requests otherwise before delivery takes place".
- Where it is agreed that a non-negotiable document is to be issued, that, together with the carrier's delivery obligations thereunder, should preferably be reflected in booking confirmations.
- In case of doubt, cargo under straight bills should not be delivered without production of an original bill, unless and until written consent has been obtained from the shipper.

Gard will be happy to review Members' bills of lading and to provide guidance in light of the above.

A more in-depth commentary on the cases referred to in this loss prevention circular appears in Gard News 169 (February 2003).

⁵ Sea waybills expressly state they are non-negotiable and that delivery does not require production of an original sea waybill.

Straight bills of lading – Do your bills use clear words? (Part II)

Introduction

Since Gard's Loss Prevention Circular No. 13-02 was published in December 2002, the case referred to in footnote 4 of that circular – the RAFAELA S – has been appealed in the English Courts. The Court of Appeal's judgment¹ contains some very important and useful guidance on how the English courts have in the past, and will in the future view straight bills of lading under English law. The case also referred to the Voss Peer case mentioned in Circular No. 13-02 and to leading decisions in the courts of other countries, such as Germany and the Netherlands.

Although the RAFAELA S mostly dealt with the question of whether straight bills should be considered "documents of title" for the purposes of the Hague/Hague Visby Rules², the case clarifies how English law will in future view the carrier's delivery obligations under such bills. One can also detect from the Appeal a certain amount of criticism towards carriers for ambiguous wordings in their own bill of lading forms and for not using waybills instead of straight bills. It is particularly important to note the following:

Printed words requiring surrender of a bill of lading to take delivery

Reference was made in Circular No. 13-02 to the printed words commonly appearing on the face of most bills of lading, and which in the RAFAELA S case were:

"In witness whereof the number of Original Bills of Lading stated above [viz 3] all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order".

At first instance, these words were interpreted to apply only when the

bill was negotiable. The Court of Appeal, however, disagreed and were persuaded that the better view was that the words reflected a requirement by the carrier that any bill presented should apparently entitle the holder to claim delivery of the goods (as with a bearer bill). The leading judge in the Court of Appeal (Lord Justice Rix) went on to say:

"...I do not regard it as a happy matter that the omission of adding words "or order" in the consignee box in this case (or the omission to add a notify party in the form used in the CHITRAL³), either of which could have happened without deliberation at all, should have the effect of transforming a contractual document which in every respect looks and reads like a bill of lading into a sea waybill, when a sea waybill commonly takes a totally different form"

"If it had been intended that it [the printed paragraph containing the above words] should not apply when the bill was used in non-negotiable form, then it could very easily have said so. Against the background of common forms of sea waybills, it is truly remarkable that it does not say so"

"Everyone seems to be agreed that if a straight bill expressly provides, as it commonly does, that its surrender is required for delivery to take place, then it is a document of title"

Therefore, if words such as those mentioned above appear in a straight (and therefore non-negotiable) bill of lading they will be interpreted under English law as giving the bill the function of document of title and with that a requirement for the production of an original bill to take delivery.

The absence of printed words requiring surrender of a bill of lading to take delivery

Whilst it was not necessary to do so, Lord Justice Rix went on to give the view (obiter) that a straight bill of lading was, in principle, a document of title even in the absence of an express provision requiring its production to obtain delivery. Rix went on to say:

"A shipper needs the carrier to assist him policing his security in retention of the bill. He is entitled to redirect the consignment on notice to the carrier, and although notice is required, a rule of production of the bill is the only safe way, for the carrier as well as the shipper, to police such new instructions. In any event, if proof of identity is necessary, as in practice it is, what is wrong with the bill itself as a leading form of proof. This is of course an inconvenient rule where the carriage is very short ... and that is why sea waybills are used in such trades. But it is clear that straight bills are used in intercontinental carriage and therefore the inconvenience argument fails"

Therefore, regardless of whether words requiring production of a bill of lading to take delivery appear in a straight (and therefore non-negotiable) bill, such a bill is likely to be regarded, at least in principle under English law, to be a document of title and with that there will be a requirement for the production of an original bill to take delivery.

Words permitting delivery without the surrender of a bill of lading

It is somewhat disappointing that the Court of Appeal did not go as far as to consider the position when a straight (and therefore non-negotiable) bill does expressly provide that delivery can take place without the surrender of an original bill of lading, much in the same way as a waybill does. The Court of

¹ Case No. A3/2002/0909.

² If a straight bill was not deemed a document of title, the Hague/Hague Visby Rules would not apply under English law and the carrier would be free to contract on terms more favourably than such Rules. If the Hague/Hague-Visby Rules had not applied in the RAFAELA S the more liberal package limitation under the US Carriage of Goods by Sea Act would have applied.

Appeal only went so far as to say:

“... it seems to be common ground that a document which does not have to be presented to the carrier to obtain delivery of the goods cannot be called a document of title”

“... whatever may be the position as a matter of principle and in the absence of express agreement, [our emphasis] the practice appears to be that a straight bill of lading, unlike a mere sea waybill, is written in the form of an otherwise classic bill and requires production of the bill on delivery, and therefore transfer to a consignee to enable him to obtain delivery”

“If it had been intended that it [the printed paragraph containing the above words] should not apply when the bill was used in non-negotiable form, then it could very easily have said so. Against the background of common forms of sea waybills, it is truly remarkable that it does not say so”

There is nothing in the RAFAELA S case which suggests any intention on the part of the English Courts to deviate from properly constructing a contract as agreed between the parties (i.e. a carrier and a shipper). In another notable recent “package limitation”

case – The Kapetan Petko Voiveda⁴ – the Court of Appeal recognised that shippers have the option to negotiate acceptable carriage terms. There is no reason why this should not extend to any requirement for the production of an original bill of lading under a straight (and therefore non-negotiable) bill. Accordingly, the remark suggested in Circular No. 13-02 to be inserted in a straight (and therefore non-negotiable) bill of lading should minimise the risk, under English law, of a carrier being found liable for misdelivery by delivering cargo without the production of an original bill.

General

Lord Justice Rix concluded:

“I am not unhappy to come to these conclusions. It seems to me that the use of these hybrid forms of bill of lading is an unfortunate development and has spawned litigation over the years ... Carriers should not use bill of lading forms if what they want to invite shippers to do is to enter into sea waybill type contracts. It may be that ultimately it is up to the shipper to ensure that the boxes in these hybrid forms are filled up in the best way that best suits themselves, but in practice I suspect serendipity prevails. In any event, these forms invite error and litigation, which is best avoided by a simple rule”

Summary

Whilst the recommendations in Circular No. 13-02 are still valid, the judgment of the Court of Appeal in the RAFAELA S must be considered a stark warning to carriers delivering cargo under straight (and therefore non-negotiable) bills without production of an original bill of lading. An agreement between the carrier and shipper to do so will be required, along the lines suggested, in order to minimise the carrier's exposure to claims for misdelivery.

The case also supports a firm recommendation to carriers and shippers to use waybills instead of straight bills in circumstances where the functions of document of title (with the security that gives for the shipper) and negotiability are not needed.

According to Rule 34 of Gard's Statutes and Rules cover is excluded for “... liabilities, costs and expenses arising out of the delivery of cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made except where cargo has been carried on the Ship under the terms of a non-negotiable Bill of Lading, waybill or other non-negotiable document, and has been properly delivered as required by that document...”

³ [2000] 1 Lloyd's Rep 529.

⁴ Daewoo Heavy Industries and Another v. Klipriver Shipping Ltd & Navigation Maritime Bulgares (“Kapetan Petko Voiveda”) English Court of Appeal: Lords Justices Aldous, Judge and Longmore: [2003] EWCA Civ. 451: 3 April 2003.

Bills of lading - Delivery of cargo - The Republic of Korea and the People's Republic of China

Gard P&I member circular no.
3/2003, July 2003



Members will be aware that liability arising from delivery of cargo under a negotiable bill of lading without production of that bill of lading will not ordinarily be covered under the Rules of the Association, unless the Executive Committee of the Association in its sole discretion should decide otherwise. In February 2001, we issued a Circular to Members No.2/2001 recommending revised wordings of Standard Form Letters of Indemnity and Bank "Join In" agreements for use by Members in circumstances where they are requested to deliver cargo without production of a negotiable bill of lading. Since that time, a number of Clubs have noted that Members have experienced problems discharging and delivering cargo at ports in the Republic of Korea and the People's Republic of China, where, following discharge and pending collection by the receiver, the cargo is placed in a bonded warehouse or a Customs controlled holding area.

The purpose of this Circular is:

To remind Members of the following:

- (i) that they should not deliver cargo carried under a negotiable bill of lading without production of that bill of lading since any liability costs and expenses arising from such action will not ordinarily be covered under the Rules of the Association. If Members nevertheless choose to deliver cargo without production of the original negotiable bill of lading they are advised only to do so if they have received a Standard Form Letter of Indemnity and Bank Join In agreement as recommended in our February 2001 Circular (No. 2/2001). In that latter event, Members are reminded to ensure that they are fully satisfied with the financial standing and authority of those who are to issue and sign the required indemnities.

- (ii) It is not uncommon for Members to be requested by charterers to agree clauses in charter parties which expressly provide for the delivery of cargo without production of bills of lading against letters of indemnity. Members are strongly advised not to accept such clauses and it is recommended that Members seek advice from the Managers before responding to such requests.

- (iii) Members are advised not to accept any personal guarantees offered by a charterer or sub-charterer in exchange for allowing cargo to be delivered without production of the bill of lading and not to make delivery against copies of a negotiable bill of lading.

To provide additional guidance to protect Members discharging cargo at ports in the Republic of Korea and the People's Republic of China.

The Republic of Korea

At ports in the Republic of Korea, cargoes are often discharged from vessels and placed in a bonded warehouse pending collection by the cargo owner. The bonded warehouse may be owned either by the consignee, a so-called "self use" bonded warehouse, or by an independent company unrelated to the consignee. In either case, it is the responsibility of the carrier to be presented with an original negotiable bill of lading before delivering the cargo. Under Korean law, delivery takes place when control of the cargo is surrendered by the carrier or his agent to some other party, except in the case of CY/ CY (container yard/ container yard) cargo when delivery occurs when the cargo leaves the container yard. Accordingly, in the case of a "self use" bonded warehouse, since control of the cargo is effectively surrendered when the cargo leaves the carrier's custody, usually at the ship's side, delivery takes place at this point. In the case of an independent warehouse company, control of the cargo is not surrendered by the carrier until it leaves the warehouse, at which time delivery takes place.

In a number of cases, cargoes have been released from both independently owned and "self use" warehouses without production of the bill of lading. In certain of these cases, although the consignee has taken delivery of the cargo he has not been the bill of lading holder. Subsequently, the bill of lading holder, usually a bank, has claimed against the carrier when it has been unable either to obtain payment from the consignee or to recover the goods themselves.

There are a number of steps that a carrier can take to protect himself.

- (i) If the carrier is asked to surrender control of and, accordingly, deliver the cargo without production of the bill of lading, he should only do so subject to the provision of a Standard Form Letter of Indemnity and Bank "Join In" agreement as referred to above.
- (ii) A carrier is not obliged to discharge cargo to a "self use" warehouse. If there is an alternative, the carrier can insist that the cargo be discharged into an independently owned warehouse. Alternatively, the carrier may retain custody of the cargo until production of the bill of lading or until a Standard Form Letter of Indemnity and Bank "Join In" agreement security is provided
- (iii) Where the carrier discharges cargo into an independently owned warehouse, he is advised to contract with the independent warehouse owner on terms which provide that the warehouse owner shall not deliver the cargo without production of the bill of lading or without the carrier's consent and that the warehouse owner shall indemnify the carrier should cargo in fact be delivered without production of the bill of lading or the carrier's consent. However, if that indemnity is not enforceable in practice, the Member may have to

bear the loss, since P&I cover may already have been prejudiced.

Again, Members should be aware that ultimate enforcement of an indemnity depends upon a variety of factors, including the continued solvency of the party offering the indemnity.

Where a "notify" party is named in the bill of lading, often the cargo owner or a bank, that party should be consulted before the carrier surrenders control of the cargo.

Members are also warned not to deliver cargo at Korean ports against the presentation of a negotiable bill of lading without first having verified that it has been endorsed in favour of the holder. The Managers are aware that, in the past, Korean banks have been prepared to release an original bill of lading to the local receiver without endorsement in his favour in order to facilitate discharge and delivery, whilst at the same time providing extended credit terms. The Korean Courts have found such delivery by a carrier to be wrongful.

The People's Republic of China

At ports in the People's Republic of China, cargoes are often discharged from vessels to Customs controlled warehouses or holding areas pending collection by the cargo owner, against surrender of the bill of lading. In a number of cases, forged bills of lading have been used to obtain delivery of cargo, possibly with the knowledge of Customs officials, agents' clerks or employees of the terminal operators. In at least one case, a high level anti-corruption investigation was conducted resulting in a number of Customs officials being arrested.

Since effective control over the cargo in ports in the People's Republic of China may be difficult for a carrier to monitor following discharge, and rights of recourse against Customs officials, ships' agents and terminal operators may not be available, there are a

number of steps that a Carrier should take to protect himself:

- (i) If the carrier is requested to deliver the cargo without production of the original bill of lading, he should only do so subject to the provision of a Standard Form Letter of Indemnity and Bank "Join In" agreement as referred to above.
- (ii) A carrier is not obliged to deliver cargo without production of the bill of lading, and may retain custody of the cargo until it is produced or until a Standard Form Letter of Indemnity and Bank "Join In" agreement is provided. Furthermore, it may in certain circumstances be possible for the carrier to apply to the Courts for an appropriate order providing that cargo can only be released against production of the bill of lading.
- (iii) Alternatively, the Carrier may consider discharging cargo into the custody of the customs authority with a protective agent or legal representative being instructed, subject to the terms referred to in paragraph (B) 1.(iii) above. The Managers would also recommend that, where permitted, a lien be immediately placed on the cargo to ensure that delivery does not take place without the payment of storage charges incurred.

These recommendations apply equally to shipowners and charterers entered in the Association.

Yours faithfully,

GARD SERVICES AS
As agent only for Assuranceforeningen
Gard -gjensidig-

Claes Isacson
Chief Executive Officer

The missing bill of lading

Gard News 152,
December 1998/February 1999



Unfortunately for the shipowner, the bill in question, rather like the White Rabbit in Alice in Wonderland, is often late and sometimes never makes it to the party at all. This was confirmed by the Master in the case of the "SAGONA"¹, when he advised the court that in his 14 years of sailing as a Master, he had never seen a bill of lading! The case of the missing bill has led to various practices designed to enable the shipowner to deliver the cargo, all of which, for one reason or another, are largely unsatisfactory from the shipowner's point of view.

The background to this difficult and perennial problem is the pivotal role of the negotiable bill of lading in international trade arising from its use, developed by custom, as a document of title. In effect, possession of the negotiable bill of lading amounts to

constructive possession of the goods represented by that bill of lading, thereby enabling it to be used, *inter alia*, to sell the goods on (sometimes several times) while they are still in transit.

The negotiable bill of lading is therefore fundamental to international trade. The shipowner is under an obligation to deliver the cargo to the person entitled to it. In the face of the various endorsements (or even one endorsement) on a bill of lading, he is presented with a dilemma as to whether the party claiming delivery is, in fact, so entitled. Recognising the shipowner's problem, the English courts have devised principles designed to enable him to deliver the cargo safely. The most important of these is that, where a bill of lading has been issued, the shipowner is not obliged to surrender possession

of the goods to any person except on production of the bill of lading². The shipowner will therefore be afforded protection if he delivers to the person presenting the original bill of lading. Moreover, if a set of three bills of lading is issued, the shipowner is safe if he delivers against the first original of the set presented to him³.

The above rule is, however, subject to the overriding proviso that the owner or Master is not aware of any other competing claim of ownership of the cargo. If the shipowner is so aware, he should not deliver without first investigating the entitlement of the person presenting the bill of lading. If he has no notice of such claims and there is no other indication to him that the holder is not so entitled, he will be safe in delivering to the person presenting

1 [1984] 1 LLR 198.

2 See the "STETTIN" [1889] 14 PD 142

3 See Glyn Mills & Co. v. East and West India Dock Co. [1882] 7 A.C. 596.

the bill and will be protected from subsequent claims even when they are made by the true owner of the goods.

The sound commercial sense of this rule, and the protection thereby provided to the shipowner, is one reason why delivery without production of the negotiable bill of lading is excluded from the P&I cover provided by this Association and all the other P&I Clubs within the International Group. The exclusion of cover is contained in Rule 34.1.b(i) of the Association's Rules, which provides that the cover otherwise available under Rule 34.1 does not include:

"(i) liabilities, costs and expenses arising out of delivery of cargo under a negotiable bill of lading without production of that bill of lading by the person to whom delivery is made except where cargo has been carried on the Ship under the terms of a non-negotiable bill of lading, waybill or other non-negotiable document, and has been properly delivered as required by that document, notwithstanding that the Member may be liable under the terms of a negotiable bill of lading issued by or on behalf of a party other than the Member providing for carriage in part upon the Ship and in part upon another ship".

The conflict between theory and practice

The theory is that the rule devised by the courts should enable the owner to overcome the problem of the trading of the bill of lading without undue risk to him. In reality, however, the position is much more complicated due to the fact that the vessel often arrives at the discharge port before the bill of lading. This is particularly the case where the voyage takes only a few days. The consignee purporting to have entitlement to the goods then requests delivery of the goods even though he is unable to present the relevant bill of lading. The shipowner is often placed under considerable commercial pressure to deliver the cargo, even though the consequences of misdelivering the cargo, as described below, are very serious.

The consequences to shipowners of delivering cargo without production of the bill of lading

Under the terms of the contract contained in or evidenced by the bill of lading, the shipowner is obliged to deliver to the person entitled to possession thereunder, namely, the shipper himself or the named consignee, or, if the bill of lading is made to order, to the endorsee holder of the bill. By

delivering the goods to someone who does not have the bill of lading the owner will be exposed to a claim for breach of contract by whoever is entitled to possession of the cargo.

Where there is such a breach of contract resulting in misdelivery the courts may decide that, on a true construction of the terms in the bills of lading, the shipowner may not rely upon the exclusion clauses contained in that bill of lading. In addition, the carrier may also be sued separately for misdelivery under the tort of conversion, in which case, the shipowner may be unable to call upon any contractual exclusion clause which, under the bill of lading, would otherwise have protected him from liability.

Furthermore, and perhaps most importantly for the shipowner, if delivery is made without production of the bill of lading the shipowner will be deprived of his P&I cover for any claim arising as a consequence of the same by reason of the operation of the exclusion in Rule 34.1.b(i) described above.

In view of the serious consequences if he delivers the goods without production of the bill of lading, what is the shipowner to do in practice?

Options available to the shipowner when the bill is missing at the discharge port (a) The shipowner can wait for the bill of lading to arrive

This is the safest option for the shipowner. However, this is not usually practicable or economically viable. The shipowner will not know how long the ship may have to wait and it will be contrary to his business interests to have the ship tied up in this way, particularly if he is unable to claim that delay from the consignee or the charterer. The effect of delay on the shipowner is examined below, under a voyage charter first and secondly a time charter.

(i) The shipowner's position under a voyage charterparty. In the absence of a clear provision in the charterparty, under a voyage charterparty the shipowner is under no obligation to deliver the goods to a party who is unable to produce a bill of lading. However, if the shipowner decides to wait for the bill of lading, who bears the risk of the time lost to him in consequence? There is little authority on the subject, but it is suggested that laytime or demurrage will run continuously unless there is default on the shipowner's part which causes delay or unless the running of laytime or demurrage is prevented by a clearly worded exception clause. This interpretation follows, by analogy,

the cases relating to the shipowners' exercise of a lien for non-payment of freight⁴.

This construction is, however, subject to the overriding principle that a shipowner cannot delay his vessel unreasonably. If, therefore, when exercising the lien, the shipowner is able to discharge his cargo safely (such as into safe storage or even to the consignee but to his order and under his control) but retains control of the cargo pending delivery of the bill of lading, it is suggested that he should do so. If he unreasonably fails to do so, he may be precluded from claiming damages for any subsequent delay or demurrage⁵. If therefore, the same rules and principles apply when the shipowner delays discharge pending arrival of the ship, shipowners are advised to always consider whether the cargo can be safely discharged. If it can, and the shipowner unreasonably refuses to do so, he may not be able to recover any subsequent delay as damages or demurrage.

(ii) The shipowner's position under a time charter. Generally, hire is payable continuously during the period of the time charter, unless the charterers are able to either bring themselves within the off-hire clause or show that the delay resulted from a breach of contract on the part of the shipowner which has deprived them of the use of the vessel entitling them to claim their damages from the hire. In fact, it has been held by the Court of Appeal that a refusal on the part of a shipowner to deliver cargo without presentation of bills of lading was not a breach of contract and that hire was therefore payable in full during the period of delay⁶. Whether the shipowner is obliged to deliver against an indemnity if the bill of lading is not available is discussed in more detail in section (c) below, but the general position is that the shipowner is not obliged to deliver the cargo against an offer of a letter of indemnity. It should be remembered that while the practice of delivering cargoes against an indemnity has been developed (mainly by charterers/traders), this does not mean that the Master is obliged to follow this practice⁶.

If, however, the delay in waiting for the bill appears to be so unreasonable, especially in circumstances where it appears that the bill of lading has been lost rather than simply that the vessel arrives before it does, it may be unreasonable for hire to continue to be paid and in such circumstances, the shipowner should apply to the court for directions as to discharge and/or delivery.

⁴ See the "BORAL GAS" [1988] 1 LLR 342.

(b) Delivery against one original bill of lading retained on board

When it is anticipated that the vessel may arrive before the bill of lading, the practice has evolved whereby the bill of lading is issued in a set of three originals, and the shipowner agrees that one of the set is to be retained on board, for delivery to the consignee or notify party on arrival at the discharge port. The Master then delivers the document to that party and this is re-presented to him and delivery made against it. This option has been particularly prevalent in the oil trade. However, notwithstanding the common practice, it is strongly discouraged by the International Group of P&I Clubs, as the protection afforded to a shipowner by the common law principle that he may safely deliver to a bill of lading holder where he has no adverse notice of claims is seriously prejudiced where two of the three original negotiable bills in the set are in circulation. This is because there is a clear risk that the other originals may have been traded during the course of the voyage and the bill of lading which remains on board does not therefore reflect the true ownership of the cargo. Moreover, the fact that the Master has retained the bill of lading against which he will be making delivery must give rise to an inference that he is aware that the holder of that bill is not necessarily the true owner of the cargo. Having notice of possible competing claims, the shipowner or Master is then obliged to make enquiries to assure himself that the consignee does, in fact, have the right to take delivery.

These difficulties have led to guidelines being issued by the International Group of P&I Clubs to assist shipowners when they are asked to follow this practice. Reference is made to Gard Circular No. 2/90. This advises Members to resist requests to carry one of a set of original bills of lading on board. If, notwithstanding this recommendation, Members are under pressure to do so, the Association recommends that the following wording be endorsed on all of the original bills of lading: "One original bill of lading retained on board against which delivery of cargo may properly be made on instructions received from shippers/charterers."

It is believed that this endorsement will give notice to any party purchasing the cargo against an incomplete set of bills of lading that delivery may be made in exchange for one original bill of lading retained on board and, as such, should reduce the risks of the practice.

However, it should be remembered that a Member who agrees to follow this procedure will be in danger of prejudicing his P&I cover. It cannot be stressed too highly that the practice should therefore be resisted.

(c) Delivery against an indemnity

(i) Is the shipowner compelled to accept an indemnity? The primary point to note is that the shipowner is not, without very clear wording in the contract, compelled to deliver cargo against an indemnity for non production of the original negotiable bill of lading. Whilst certain trades (the oil trade in particular) have developed the practice of delivering without original bills against an indemnity this does not change the general position as set out above.

In the "HOUDA"⁶ the Court of Appeal had to consider whether a time charter was in any way different as regards delivery against an indemnity than a voyage charter or bill of lading. The charterers argued that the presence of an indemnity in a time charter (whether express or implied) together with their ability and indeed, entitlement, to give employment instructions, meant that a shipowner was compelled to follow their orders as to delivery without production of the negotiable bills. The Court of Appeal rejected this as a matter of general principle, affirming what had been generally understood to be the case prior to the first instance decision of Mr Justice Phillips, namely that the mere combination of the charterer's right to give orders as to employment and the shipowner's right to an indemnity did not, of itself, allow charterers to compel a shipowner to follow orders in this regard. This is on the basis that whilst the shipowner may have a right to an indemnity, he is not compelled to take it up. This is also on the basis that in common law, charterers, having given orders to issue a negotiable bill thereby giving rise to an obligation on the shipowner to deliver on production of that bill, and a liability on the shipowner to a third party, could not legitimately/lawfully change that order.

(ii) When is a shipowner compelled to deliver the cargo against an indemnity? The clearest case where the shipowner will be compelled to accept an indemnity is where the charterers obtain an order of a competent court to this effect, which will usually be in cases where the bills have been lost.

The shipowner may also be obliged to deliver the goods against an indemnity

where he has positively agreed to deliver the goods against the same in the contract with charterers. This must be a positive obligation however, rather than simply a right to an indemnity. The distinction between the two is illustrated in the following sample clauses:

"charterers hereby indemnify owners ...[for]...complying with their orders (including delivery of cargo without presentation of bills)..." gives the right to an indemnity⁶. "Should bills... not arrive...owners agree to release the entire cargo without presentation of original bills against delivery by charterers of...indemnity..." gives rise to an obligation on the shipowner to deliver the cargo in exchange for an indemnity⁷.

Even where there is positive agreement by the shipowner to accept an indemnity a word of caution should be sounded: if it is clear to the shipowner that the party to whom the charterers request the cargo be delivered is not the holder of the bill/the party entitled to delivery of the cargo, the shipowner is still not compelled to deliver the cargo and accept the indemnity. This appears to be on the basis that the agreement may be void for illegality at the time performance is required on the basis of a potential fraud⁸.

(iii) The position if an indemnity is accepted by the shipowner. Notwithstanding the dangers inherent to owners in agreeing to deliver cargo without production of the bill of lading against an indemnity, the fact remains that it is a widespread practice. What then can the shipowner do to minimise his risk? The practicalities of the procedure and the Association's guidelines were discussed in detail in Gard News No. 112. Therefore, we do not propose in this article to deal with the finer points of the indemnity to be given, other than to stress the following points (all of which are discussed in detail in Gard News 112):

1. an indemnity is only as good as the financial strength of the person giving the indemnity to meet his obligations under it;
2. the indemnity should cover the full potential liability which would include not only the value of the cargo but also cover interest and costs and any other damages as a result;
3. the indemnity must be drafted so as not to become time barred;
4. the indemnity should include a relevant law and jurisdiction clause in case the need arises to enforce it.

5 See *Carlberg v. Wemyss* [1950] S.C. 616 which confirms that a shipowner may be precluded from claiming demurrage/damages for delay when there are other means available to him to protect his position and discharge the cargo. See also Section 493 of the English Merchant Shipping Act 1894 which gives a shipowner a statutory right to discharge and warehouse the cargo into the United Kingdom after the expiration of 72 hours.

6 See the "HOUDA" [1994] 2 LLR 551.

In issue No. 112 of Gard News it was also pointed out that although the practice was to be resisted, if a letter of indemnity was to be given which was legally binding and which afforded the shipowner some protection, it should be in the wording recommended by the International Group of P&I Clubs. This wording joins both the consignee making the request and a bank in the undertaking. The joining of a bank in the undertaking is of great significance as the security is only as sound as the solvency of the party granting it. It is therefore vital to ensure that a first class bank should make a commitment in common with the party making the request for delivery.

An additional note of warning is also given in that, under English law, an indemnity which is given in perpetration of a fraud or an illegal or immoral act will be void and unenforceable for being contrary to public policy⁸. An example of this includes an indemnity given to the shipowner in exchange for his agreement to issue clean bills of lading notwithstanding his knowledge that the cargo represented by the bills of lading was, in fact, damaged. Although the letter of indemnity given for delivering cargo without production of the original bills of lading is in a different category and is unlikely to be regarded as an illegal act or contrary to public policy, there may still be consequences for the owner if he knowingly misdelivers the cargo in exchange for an indemnity. The indemnity will not be enforceable, even if it does have the rare distinction of being countersigned by a bank.

The above summarises the options available to a shipowner when faced with the problem of a consignee demanding delivery without production of the relevant bills of lading. While certain safeguards can be incorporated into the various options to maximise the protection for shipowners, none of these can be made failsafe. This is of course discouraging in the light of modern shipping practices and improved communications. It may be better therefore, rather than to react to the situation at the discharge port when the matter is already a problem for the shipowner, to consider carefully whether there is any need at all for a negotiable bill of lading to be issued. If it is not necessary, shipowners should consider whether other carriage documents (such as those described below) could be better utilised to avoid the potential problem identified above. Documents other than negotiable bills of lading (a) Use of a non negotiable bill of lading

It is generally considered that the potential problems identified above are reduced significantly when the bill of lading is made non-negotiable. The Association's Rule 34.1.b(i) does not exclude cover for claims arising from delivery of cargo without production of a non-negotiable bill of lading, provided delivery has been made to the person entitled to take delivery.

The obvious question then is, what is to be regarded as a non-negotiable bill of lading? This is not easy to answer as different jurisdictions apply different definitions. Generally, however, this can be described as any bill of lading which does not constitute a document of title, possession of which can be regarded as equivalent to possession of the goods.

It is generally considered that a waybill and a "straight" bill of lading, i.e., one which names the consignee and obliges the owner to deliver to that person, are also non-negotiable bills of lading. However, it should be noted that in some jurisdictions such documents are regarded in the same way as negotiable bills of lading. Moreover, under English law at least, even though a consignee has been named in the bill of lading, this may not necessarily be the shipper's final instructions to the shipowner. In fact, the shipper is entitled to alter his instructions to the shipowner with regard to delivery before the goods are delivered or decide instead to retain the bill of lading because, for example, he has not been paid⁹. However, once the bill of lading has been received by the named consignee, the shipper may not alter his instructions as his control over the possession of the goods is gone.

It should be stressed that where "straight" bills of lading or sea waybills are regarded as negotiable documents liability for misdelivery claims will be excluded under the Association's Rule 34.1.b(i). It can be seen therefore, that the best protection for the shipowner in these circumstances is for the delivery to take place only on presentation of the bill of lading.

In view of the above, Members are advised to always act with extreme caution and to seek the Club's/its local correspondents' advice if they are asked to deliver the goods without production of the bill of lading.

Electronic Data Interchange

Reference is made to early schemes such as the "Seadocs" project which, for various reasons, failed to get off the ground. Recently, however,

a new scheme called "Bolero" has been developed. This is intended to be a paperless scheme whereby the information usually recorded on a bill of lading is transmitted to a central registry by electronic transmission and notice is given to that registry whenever the bill of lading is negotiated. This information is acknowledged and the new electronic record is then held for the benefit of the buyer. At the moment, full details of the scheme have not been made generally available, although it is believed that a trial scheme will be coming on line shortly.

Delivery in ports where delivery is to the customs authority

Finally, we must comment on the situation in certain jurisdictions where according to the local law the carrier is required to deliver the cargo not to the bill of lading holder, but to a public authority, usually the customs authority or perhaps a bonded warehouse. Variations on this cargo delivery system exist in many jurisdictions, including Argentina, Brazil and Chile. Thus, in those jurisdictions, although the cargo is to be carried under a bill of lading, it is not necessary or even possible for the carrier to deliver against that bill of lading. Although the position is not always clear, most such jurisdictions provide that delivery of the goods takes place by handing them over to an authority to whom, by law, the cargo has to be delivered. We should advise, however, that as the cargo is being delivered without production of the bill of lading, the matter will fall within the exclusion of cover under Rule 34.1.b(i). Accordingly, the Member delivering cargo in those jurisdictions should always seek the advice of the Association or its local correspondents in order to avoid misdelivery claims.

Conclusion

It is hoped the above provides some useful information on the problems of delivering cargo without production of the original bill of lading. It is further hoped that it will enable Members to make an informed decision as to their options and what they can/cannot be obliged to do when presented with a demand to deliver goods without the original bill of lading being presented. However, as no two cases are the same, at the end of the day the best (and shortest) advice is, of course, to contact the Association whenever such a request is made (whether at the time of negotiating the contract of carriage or later, at the discharge port).

⁷ See the "DELFINI" [1990] 2 LLR 252

⁸ See *Brown Jenkinson v. Percy Dalton* [1957] 2 QB 621.

⁹ See *Mitchel v. Ede* [1840] 11 Ad. & El. 888

Cargo shipped on deck - The imperfect bill of lading

Gard News 160,
December 2000/February 2001



Most readers will probably find that the clear and unambiguous printed bill of lading clause quoted below leaves little room for argument insofar as liability for loss of deck cargo is concerned. The clause reads as follows:

"...Goods stowed on deck shall be at all times and in every respect at the risk of the Shipper/Consignee. The Carrier shall in no circumstances whatsoever be under any liability for loss of or damage to deck cargo, howsoever the same be caused..."

Additionally, in this particular case the face of the bill of lading had been claused "on deck at shipper's risk".

Somewhat surprisingly, the Federal Court of Appeal in Canada recently dismissed an appeal filed by a carrier, thus upholding the earlier decision of the lower court which itself was unfavourable to the carrier. Basically, the court found that the carrier was liable for the negligence of the Master because the clause quoted above did not contain the word "negligence".

It is quite interesting to note how the judge construed the clause so as to find liability on the carrier in this case. In

particular, the judge reasoned that the presence of the word "negligence" in two other clauses of the bill of lading was of significance.

Although the litigation involved several issues the main issue before the judge was whether the exemption language embodied in the printed deck stowage clause and the typed clause on the face of the bill of lading operated to release the carrier from liability for the negligent act of the Master.

The first instance judge reasoned that while the language of the deck stowage clause(s) was obviously wide enough to cover liability for negligence, it remained that the word "negligence" was left out. Furthermore, he went on to say that this omission, insignificant as it may seem in the face of words which were otherwise broad enough to exempt a carrier from liability arising from negligence, becomes significant where the word "negligence" is twice referred to as a relevant head of liability elsewhere in the contract (once in the "Both to blame" collision clause and once elsewhere).

It ought to be added that since the application of the Hague or Hague-

Visby Rules was excluded by virtue of the fact that the cargo was stated to be stowed on deck and was so carried, the decision effectively meant that the carrier was without any further contractual defences in this particular case.

The lesson to be learned seems to be that a careful review of the relevant bill of lading clauses is always warranted when carrying goods on deck, even if the bill of lading appears to have been properly claused to reflect that the carrier is not responsible for loss of or damage to the goods "whatsoever" and "howsoever" caused. It is possible that the judge might have come to a different result if the printed deck cargo clause had read "...howsoever caused, including negligence...." or something similar.

Who decides the form of the bill of lading? Owners or charterers?

By Richard Williams, Ince & Co., London

Gard News 156, December 1999/
February 2000

Shipowners and disponent owners often believe that when a ship is chartered (particularly if it is time chartered) they need not concern themselves about the form of the bill of lading since the owners are entitled to seek an indemnity from the charterers if the terms of the bill of lading expose the owners to greater liability than that which they would face if the claim were brought against them under the charter. However, it must not be assumed that owners are always entitled to such an indemnity and, in any event, the sufficiency of the indemnity is only as good as the creditworthiness of the charterers in question. The reality of the situation is that once cargo is shipped, the owners assume responsibility for the carriage and well being of the cargo and incur liability directly to the cargo owners. The owners, therefore, have a real interest in the form of the bill of lading which may be issued since this will establish the terms upon which they agree to carry the cargo and will establish whether they are liable to the goods owner or have a defence for any claim.

However, the form of the bill is relevant not only to the shipowners but also to the cargo owners who may require a bill in a particular form for the purposes of their purchase/sale contract or the terms of a letter of credit. The failure to obtain release of such a bill may often therefore mean that the shipper is not able to obtain payment for his goods. Therefore, the shipment of goods can often lead to a commercial tug of war which is acrimonious and time consuming. Whoever is in the wrong will probably have to pay for the delay to the ship and perhaps more importantly, delays to the movement of the cargo documents under letters of credit. Such claims can be expensive.

The traditional rule that a carrier is entitled to give, and the cargo owner obliged to accept, the carrier's usual form of bill of lading has long since disappeared (except, perhaps, in relation to liner trading), since the charter under which the vessel is operating will usually now establish who has the right to control the form of the bill which is to be used. There will, of course, be occasions when only one form of bill is available at a particular

loading port and in such circumstances an owner may have no choice but to accept the bill and rely on his right of indemnity. In all other circumstances the law should be able to decide who controls the form of bill of lading but, as we shall see later, unfortunately it does not.

Two problems usually arise in relation to this issue:

- (1) When, if an owner signs a bill of lading presented by the charterer, is he entitled to claim an indemnity from the charterer if he [the owner] incurs a liability under the bill? This is the easier issue.
- (2) The more difficult issue arises if a shipowner prefers not to have to rely on any such indemnity. When, therefore, is a Master entitled to refuse to sign a bill of lading presented by the charterer?

Both situations are considered below.

INDEMNITY FROM THE CHARTERERS

In the recent decision of the *Ikariada*,¹ Mr Justice Cresswell considered the very common situation in which charterers present to the Master for signature a bill of lading which purports to incorporate the terms of a charter which is to be identified by filling in the relevant date in a blank on the face of the bill, but which is, in fact, left empty. The charterparty in question provided by Clause 9 that: "Captain to sign bills of lading at such rate of freight as presented without prejudice to this charterparty ...".

The bill of lading which was presented was on the Congenbill Edition 1978 form and provided that: "All terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, are herewith incorporated."

However, the blank space on the front of the bill of lading, which should have contained the date of the charterparty, was not filled in.

Whilst coming alongside the consignees' discharging facility in Greece the vessel was negligently navigated and caused damage to a

discharging crane. The consignees brought a claim against the shipowner and the latter sought an indemnity from the charterers. The charter contained an exception clause which would, if applicable, give the owners a defence to the claim brought under the bill. However, it was feared that since the blank on the face of the bill had not been filled in, the charter was not identified and the owners would not be able to rely in the Greek proceedings on the exception clause to defeat the claim brought by the consignees.

The judge held that the question of whether the owners were entitled to claim an indemnity from the charterers depended upon whether the bill of lading which was presented for signature by the charterer was a contractual one (i.e., one which the charterers were entitled to present for signature pursuant to the charter). If the bill of lading was a contractual bill then there was no cause for complaint and no ground for claiming damages for breach of contract or an indemnity. In determining whether or not the bill of lading was a contractual one the judge laid down the following rules:

- (i) The question of whether or not the bill was a contractual one should be determined in accordance with the law which governed the charterparty pursuant to which it was issued.² The proper law of the charter in question was English and it was not, therefore, relevant to consider the position under Greek law which might govern the bill of lading claim in Greece.
- (ii) In determining whether or not the bill was a proper one, it was necessary to distinguish between charters which require the Master to sign bills of lading "as presented" and charters which provide that the Master shall sign bills of lading in a specified form.
- (iii) Where the charter provides that the Master shall, upon request, sign bills of lading in a specified form (e.g., Clause 20 of the *Asbatankvoy* form), a bill of lading will not be in that form if there are blanks on the form itself in which the charter date, etc., should be inserted but the relevant details are not in fact inserted.

¹ (1999) AER (Com Cas) 257.

(iv) Where the charter does not provide that the bills are to be presented in a particular form but requires the Master to sign bills of lading "as presented" the mere fact that the blanks on the face of the bill are not filled in does not itself render the bill an uncontractual one since, under English law, the effect is the same as if there were a reference to the charterparty governing the carriage.³

(v) A bill might, nevertheless, be uncontractual if it included terms which were either extraordinary terms, or terms which were manifestly inconsistent with the charter or terms which imposed more onerous terms on the owners than those accepted and agreed to be borne by him under the charter.

Since (a) the charter did not require a specific form of bill and since (b) the bill of lading effectively incorporated the terms of the charter and (c) did not have any terms of the type described in para (v) above, the judge held that, from the perspective of English law, the bill of lading presented by the charterers was a contractual one. It further followed that owners would not be entitled to claim an indemnity from charterers if they were found liable to the consignees in the Greek proceedings.

This was the main point in issue in the *Ikariada* and the judgment is, therefore, unsurprising, albeit welcome in clarifying the differences between a charter providing expressly for a particular type of bill of lading and a charter providing for the signature of bills "as presented".

REFUSAL TO SIGN A BILL OF LADING IN A PARTICULAR FORM

In the course of giving judgment the judge touched upon the more difficult problem of whether and when an owner can refuse to instruct the Master to sign a bill of lading in a particular form. The impression given in the judgment is that the relevant issues are settled by authority. However, such impression is misleading. The state of the authorities is far from satisfactory; they are, in fact, in conflict. English law is based upon the concept of precedent, that is to say a system where courts are bound by the decision of an earlier court on the same point and a lower court is bound by the decision of a higher court. In

general, the system works well to create certainty in the law but if courts (particularly if they are higher courts) disagree with each other, then certainty is replaced by confusion.

It appears to be settled that where the charter specifies exactly which form of bill is to be used (e.g., Clause 20 of the *Asbatankvoy* form) any attempt by the charterer to present a bill in a different form will amount to an illegitimate instruction which the owner can reject.⁴

However, the position is not clear where, as is more often the case, the charter does not specify a particular form but states that the Master is to sign a bill of lading "as presented". These words underline the power of the charterer to decide what form of bill is appropriate for their trade. However, the right of the charterer to determine the form of the bill is nevertheless subject to a number of restrictions. The difficulty which arises is because the question of which restrictions apply has been developed somewhat haphazardly by the English courts over the years.

It appears to be established that the Master is not obliged to sign bills of lading "as presented" if such bills contain terms which are either (a) extraordinary terms or (b) terms which are manifestly inconsistent with the charter.⁵ An example of a bill of lading term which would be manifestly inconsistent with the charter would be one which provided for the Hamburg Rules when the charter provided that any bill of lading should be subject to the Hague or Hague Visby Rules.⁶ Another example would be a bill of lading obliging the owners to carry goods to a geographical area excluded under the charter.⁷

It is more difficult to give an example of an "extraordinary" term. Whilst the courts have repeatedly stated that the Master would be entitled to refuse to sign a bill including such terms they have not been quick to give examples. A possible example might be a bill of lading which excluded the shipper's liability for the shipment of dangerous goods.

The law is not, however, clear when the bill does not contain terms which are extraordinary or manifestly inconsistent

with the charter but nevertheless contains terms which impose on the carrier greater liability than he has agreed to bear under the charter. There appear to be two strands of English authority moving in two completely different directions in relation to this issue.

On the face of it, there is one strand of authority applicable to voyage charters and one applicable to time charterers. This may be explainable by the fact that there is recurring judicial recognition that the purpose of time charters is to enable the charterer to exploit the commercial operation of the vessel for his own purposes. Perhaps, the clearest example of this is the dictum of Lord Wilberforce, speaking in the House of Lords:

"It is important in this connection to have in mind that the present charters are time charters, the nature and purpose of which is to enable the charterers to use the bills of lading during the period of the charters for trading in whatever manner they think fit. The issue of bills of lading in a particular form may be vital for the charterers' trade, and indeed in relation to this trade, which involves c.i.f. or c. & f. contracts, the issue of freight pre-paid bills of lading is essential if the trade is to be maintained. Furthermore, Clause 9 as is usual in time charters, contains an indemnity clause against all consequences or liabilities arising from the master signing bills of lading. This underlines the power of the charterers, in the course of exploiting the vessel, to decide what bills of lading are appropriate for their trade and to instruct the masters to issue such bills, the owners being protected by the indemnity clause."⁸

However, it has also been judicially recognised that, in many instances, there is no difference between the requirements of a voyage charter and a time charter and, indeed, many of the cases refer to time charter and voyage charter decisions interchangeably as authorities for various principles of law. The distinction between voyage and time charters may therefore be more apparent than real.

The "voyage charter" line of authority appears to say that, notwithstanding the words "as presented", a charterer is not

² *Paros* (1987)2 Lloyd's Rep. at 273.

³ *SLS Everest* (1981)2 Lloyd's Rep. 389.

⁴ *Garbis* (1982)2 Lloyd's Rep. 283.

⁵ *Kruger v. Moel Tryvan* (1907) AC 272; *Berkshire* (1975)1 Lloyd's Rep. 185.

⁶ By way of contrast, there would be no inconsistency where the charter provided that all claims under the charter were to be subject to English arbitration if a bill of lading issued pursuant to the charter provided that Norwegian jurisdiction would apply to a claim under the bill. See *Vikfrost* (1980)1 Lloyd's Rep. 560.

⁷ *Halcyon v. Continental* (1943)75 Lloyd's Rep. 80.

entitled to present for signature a bill of lading which imposes on the owners greater liability than those imposed by the charter itself.⁹ However, the “time charter” line of authority has, during the same period of time, repeatedly stated that the charterers are entitled in such circumstances to present a bill which imposes on the owners greater liability than that imposed on them by the charter and that the Master is obliged to sign such a bill¹⁰ - the owners’ remedy being to claim an indemnity from the charterers should they be found liable for claims made under the bill in circumstances in which they would not be liable if the claim had been made under the charter.¹¹

The words “as presented” are often accompanied by the additional words “without prejudice to the terms of this charter”. The “time charter” line of authority has repeatedly restated that this makes no difference to the Master’s obligation to sign bills of lading “as presented” since the additional words merely emphasise that the releasing of a bill of lading in different terms does not affect the rights and obligations of the owner and charterer inter se under the charter. This was emphasised by the House of Lords as long ago as 1894 in *Hanson v. Harrold*,¹² when Lord Esher M R said:

“... The meaning of the words ‘without prejudice to the charterparty’ has been settled by decisions which cannot be questioned. The meaning as settled by the cases of *Shand v. Sanderson* (1) and *Gledstones v. Allen* (2) is that it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered. Therefore, in this case the captain was bound to sign the bill of lading presented to him; but his doing so was to be ‘without prejudice to the charterparty’. These words do not limit the obligation under the charterparty to sign the bills of lading presented to him; but when he has done so it does

not affect the contract contained in the charterparty. If a shipowner puts up a ship as a general ship, he may insist on a bill of lading in any terms he pleases, or he may refuse to take the goods. Here the shipowner deprives himself of that right and agrees to sign bills of lading as presented; but that is not to affect the charterparty. Therefore, the captain was bound to sign the bill of lading which he did.”

This dictum was subsequently approved by the House of Lords in *Turner v. Haji Goolam*¹³ and in the *Nanfri*.¹³

However, and somewhat confusingly, the same higher courts have, throughout the same period of time, consistently repeated in the “voyage charter” line of authority that the purpose of the words “without prejudice to the charter” was to emphasise that the charterers were prevented from presenting for signature bills of lading in terms which differed from those of the charter.¹⁴ Indeed, this view seems to have been restated in recent years by Lord Justice Mustill in the *Nogar Marin*¹⁵ where he said:

“Where the master is expressly required to sign the bills as presented and where the contract stipulates that the act is to be without prejudice to the charter, the charterers’ right to issue bills to suit his own convenience is constrained by the need to make the terms of the new contract which he thus imposes on the shipowner more burdensome than those which the shipowner originally contracted to assume in exchange for the freight.”

This dictum has now been adopted by Cresswell J in the *Ikariada*,¹⁶ another voyage charter case, albeit at first instance level.

CONCLUSION

The lesson to be drawn from the currently confused state of the authorities is that whilst owners can

refuse to sign a bill of lading which is (a) not in a form expressly required by the charter, or which (b) does not contain extraordinary terms or (c) does not contain terms which are manifestly inconsistent with the charter, there is no guarantee that the Master is entitled to refuse to sign a bill of lading which merely imposes on his owners greater liability than that imposed on them by the charter. If the owners are not prepared to run the risk of refusing to sign a bill of lading of the latter type then their remedy is to seek an indemnity from charterers if they do incur liability under the bill in circumstances in which they would not be liable if the claim had been brought against them under the charter. Owners, therefore, need to be sure that their charterers either have sufficient charterers’ liability insurance or failing that, sufficient assets, to meet claims.

⁹ *Nanfri* (1979)1 Lloyd’s Rep. at 206.

⁹ *Kruger v. Moel Tryvan* (1907) AC 272; *Dawson v. Alder* (1932)1 KB 433; *Anwar Al Sabar* (1980)2 Lloyd’s Rep. 261; and *Nogar Marin* (1988)1 Lloyd’s Rep. 412.

¹⁰ *Hanson v. Harrold* (1894)1 QB 612; *Turner v. Haji Goolam* (1904) AC 826; *Nanfri* (1979)1 Lloyd’s Rep. 201.

¹¹ *Island Archon* (1994)2 Lloyd’s Rep. 227.

¹² (1894)1 QB at 619.

¹³ *Hanson v. Harrold* (1894)1 QB 612; *Turner v. Haji Goolam* (1904) AC 826; *Nanfri* (1979)1 Lloyd’s Rep. 201.

¹⁴ *Kruger v. Moel Tryvan* (1907) AC 272; *Dawson v. Alder* (1932)1 KB 433; *Anwar Al Sabar* (1980)2 Lloyd’s Rep. 261; and *Nogar Marin* (1988)1 Lloyd’s Rep. 412.

¹⁵ (1988)1 Lloyd’s Rep. at 421.

¹⁶ (1999) AER (Com.Cas) 257.

Forum selection clauses in bills of lading

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INTRODUCTION

The Norwegian Maritime Act of 1994 ("the 1994 Act") which entered into force on 1st October 1994 has been described as a hybrid of Hague-Visby Rules and Hamburg Rules legislation, insofar as concerns its rules on the carriage of goods by sea under bills of lading and similar documents of title.¹

The reason for the label "hybrid" is that, although the Hague-Visby Rules have not been denounced by Norway, the legislators have, as regards most aspects which fall outside the scope of those Rules, purposely enacted provisions which closely follow the Hamburg Rules model.

It is beyond the scope of this article to elaborate on all the changes introduced by the 1994 Act. Rather, it is intended to focus on the new rules governing jurisdiction and arbitration clauses ("forum selection clauses") in bills of lading and similar transport documents.

FORUM SELECTION CLAUSES

A forum selection clause in a bill of lading is a clause by which the parties to the contract of carriage agree that disputes arising under the contract shall be decided by a particular court or arbitration tribunal. In standard form bills of lading this will usually be a court or tribunal located at the carrier's principal place of business.

A forum selection clause must be distinguished from a "choice of law" clause. The latter is a clause by which the contract parties agree which law or international convention shall govern disputes arising under the contract, e.g. a requirement that the Hague-Visby Rules as enacted in the country of shipment shall be applied when resolving cargo disputes. A choice of law clause may in certain circumstances bind the nominated court or tribunal to apply foreign law to the dispute. It should be noted that, frequently, bills of lading contain a combined forum and choice of law clause.

An exclusive forum selection clause is a clause by which the contract parties have agreed that the selected forum shall have exclusive authority to resolve contract disputes. The intention is clearly to prohibit interference by other courts. Whether a court or tribunal (other than the contractually selected one) which is seized with the dispute will in fact give effect to the exclusive forum selection clause, depends largely on the domestic law concerning jurisdiction. However, it is fair to say that in most jurisdictions an exclusive forum selection clause is more likely to be upheld than a non-exclusive clause.

When the clause is upheld, cargo claimants may have to litigate their cargo claims before a forum which is quite remote from the area where the actual carriage of cargo was performed, or their domicile or principal place of business. This is particularly so in the liner trade. Such remoteness may in practice make it difficult to pursue the claim. In addition to increased costs, uncertainty may arise as to whether the forum will apply the law of the contract on the dispute, or domestic law which may differ substantially from the law of the contract.

NORWEGIAN MARITIME ACT 1994 ON FORUM SELECTION CLAUSES Purpose

When drafting the the 1994 Act the legislators decided to design provisions offering a higher level of protection to cargo claimants in respect of forum selection clauses than was offered in the previous act.

The provisions governing the validity of forum selection clauses in contracts concerning carriage of goods by sea are stated in Articles 310 (jurisdiction clauses) and 311 (arbitration clauses) of the 1994 Act. These Articles follow closely Articles 21 and 22 of the Hamburg Rules. The main purpose has been to secure the right of the cargo owner to pursue his claim, at his own option, before a forum in a state closely connected to the area of performance of the contract.

Arbitration clauses are not very common in bills of lading, but are sometimes incorporated by reference when bills are issued pursuant to charterparties. In the 1994 Act, arbitration and jurisdiction clauses are treated in the same way, as the legislators wished to prevent a shift from the latter to the former.

Articles 310 and 311 are dealt with in more detail below.

Scope of compulsory application - trade area

By virtue of the 1994 Act, Articles 252 and 254 the provisions contained in Articles 310 and 311 apply compulsorily to all contracts of carriage of goods by sea evidenced by a bill of lading or similar document of title²;

- (a) in domestic Norwegian trade
- (b) in trade between Norway, Denmark, Finland and Sweden ("the Nordic states")
- (c) in other foreign trade to or from any of the Nordic states

In other words, when determining its own jurisdiction to hear a cargo dispute which has arisen under a bill of lading, a Norwegian court is bound to apply the provisions contained in Articles 310 and 311 with respect to cargo shipments to or from any of the Nordic states. Furthermore, the court will set aside the contract forum selection clause to the extent that it is in conflict with those provisions. However, the court does not have authority to set aside such a clause if the contract of carriage is performed entirely outside the Nordic area.

Scope of compulsory application - transport documents

According to Article 253 of the 1994 Act, the provisions concerning carriage of goods by sea, including Articles 310 and 311 on forum selection, do not apply compulsorily to charterparties.

However, the provisions apply compulsorily to a bill of lading issued pursuant to a charterparty when the bill evidences the contract of carriage as between its holder and the carrier. Thus, a charterparty forum selection

¹ See Gard News 135.

² Reference is made to Articles 252 and 254 in Article 310 fifth paragraph and 311 third paragraph.

clause incorporated by reference into a bill of lading which has been properly endorsed to a third party, will only prevail if it has been expressly stated in the bill that the incorporation shall have binding effect on such third party endorsee³.

Validity of forum selection clauses under Norwegian law

The main rule⁴ is that any clause, covenant or agreement in a bill of lading which limits the right of the plaintiff to institute a court action in respect of a dispute arising out of the bill of lading contract, will be null and void to the extent that it limits the right of the plaintiff to institute such action, at his own option, at one of the following places:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant;
- (b) the place where the contract was made, provided that the defendant has there a place of business or agency through which the contract was made;
- (c) the place of delivery of the cargo into custody of the carrier, according to the contract of carriage; or
- (d) the agreed or actual place of delivery of the cargo from the custody of the carrier, according to the contract of carriage.

If the bill of lading contains a forum selection clause which is in conflict with the above provision, the plaintiff will nevertheless be entitled to institute his action at one of the places mentioned under (a) – (d)⁵. As will be noted, no distinction has been made for exclusive and non-exclusive forum selection clauses, which means that the wording of the clause is of little relevance when determining its validity under Norwegian law.

In other words, Norwegian courts will decide to exercise jurisdiction over disputes arising under the contract in circumstances where at least one of the criteria in (a) - (d) above is met. However, the parties' right to agree that the action shall be brought before a different forum, after the dispute has arisen, remains unchanged.

The forum selection options offered to plaintiffs

Clearly, the provisions offer quite a wide choice to plaintiffs as to where their action may be instituted.

Particularly important are sub-sections of Article 310 first section (c) and (d), which link the forum for dispute to the

places of performance of the contract. For example, for any cargo loaded or discharged at a Norwegian port, the plaintiff will be entitled to institute his action at that port, whatever the jurisdiction clause in the bill of lading. Moreover, under a multimodal contract of carriage which includes a stage of ocean carriage, the plaintiff will be entitled to institute his action in Norway against the multimodal transport operator, if the place of delivery to or from that operator is in Norway, notwithstanding the fact that the cargo may have been loaded or discharged in another state.

From sub-paragraphs (a) and (b) it is clear that defendant carriers having their principal place of business in Norway, or an agency through which the subject contract of carriage has been made, may now be sued in Norway whatever the forum selection clause inserted in their standard bill of lading.

Norwegian law does not interfere with the right of the contracting parties to agree that cargo disputes should be resolved by arbitration⁶. However, the statutory condition is that such agreements must not put constraints on the forum selection options of the plaintiff described above.

Options available to both cargo interests and the carrier as plaintiffs

Articles 310 and 311 are drafted to offer forum selection options and thereby offer protection to plaintiffs. Usually the plaintiff in a cargo dispute will be the cargo owner or his subrogated underwriter, but not always so.

The carrier may for instance wish to pursue claims for general average contribution against various cargo owners. It may certainly be of benefit to the carrier to institute a collective action against all defendant cargo owners at the place of loading or discharge rather than be bound to sue each and every one at their respective domiciles.

There is nothing in the provisions which prevents the plaintiff from instituting his action before the contractually agreed forum if he so decides⁷. Obviously, it might lead to obscure results if cargo plaintiffs were prevented from commencing suit before the contractually agreed forum in circumstances where this would be convenient. The question is, however, whether the carrier may institute an

action before the same forum on his own initiative and plead "not liable" in respect of an incident which he expects will give rise to claims against him at a later stage?

The plain words of the provision do not appear to prohibit such action by the carrier. In fact, the draftsmen have actually emphasised the fact that the option to commence suit may be exercised by the plaintiff whether this be the cargo owner or the carrier. Whether such "negative action" would succeed would of course depend on the attitude of the court or tribunal in the contractually agreed forum.

Forum selection clauses and arrest jurisdiction

A ship and/or its freight may be arrested in Norway as security for a "maritime claim", which includes, inter alia, a claim for loss of or damage to cargo. Such arrest action gives the plaintiff a right to institute future legal proceedings in respect of the cargo claim at the place of arrest⁸. The fact that arrest has been prevented or lifted due to the provision of security does not interfere with the forum option established by the arrest action.

In this context the question is whether an exclusive forum selection clause in the bill of lading will prevail over the arrest forum option. As the general principle of privity of contract is acknowledged under Norwegian law, contract forum selection clauses are legally valid⁹ unless prohibited by statute or regulations issued thereunder. It follows that an arrest action instituted to establish security for a cargo claim, and possibly arrest jurisdiction, does not by itself override the forum selection made in the contract.

It follows that; if the cargo carriage under claim was performed between ports outside the Nordic area and the relevant bill of lading contained a foreign forum selection clause, claimants may not obtain Norwegian jurisdiction for cargo claims simply by arresting the cargo carrying ship when it arrives in a Norwegian port at a later stage, nor any sister ship when it arrives in Norway.

The effect of the Lugano Convention

The incorporation into Norwegian law of the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial

³ Article 310 third paragraph.

⁴ Article 310 first paragraph.

⁵ Article 310 fourth paragraph.

matters, leads to an important modification of the plaintiff's forum options to contract of carriage disputes.

According to the 1994 Act Article 310 sections, the provisions concerning forum options only apply to the extent that they do not conflict with Rules of the Norwegian Lugano Convention legislation.

In this context, the crucial provision of the Lugano Convention is its Article 17, which in essence states that exclusive forum selection clauses in contracts are legally valid if:

- (a) one of the contract parties has its principal place of business in a Convention state, and;
- (b) the designated exclusive forum is in a Convention state.

Importantly, the Convention states may not pass domestic legislation in conflict with the Convention, the only exception being rules of other conventions which the state has ratified or acceded to and which provide special regulation on certain aspects of law¹⁰. Thus, Article 17 of the Lugano Convention will prevail over the 1994 Act, as the latter is based on the Hague-Visby Rules which contain no provisions on jurisdiction.

It should be noted that the Convention only applies to agreements whereby a court of a Convention state has been designated. Arbitration clauses fall outside the scope of the Convention.

In view of the above it appears that, in ocean trade between any of the Nordic States and any Lugano Convention state, a bill of lading clause affording exclusive jurisdiction to a court within a Lugano Convention state would have to be upheld by Norwegian courts, notwithstanding the provisions of Article 310 of the 1994 Act¹¹.

The states which have ratified or acceded to the Lugano Convention are¹²: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Switzerland, Sweden and the United Kingdom.

SUMMARY

(1) Rules concerning the validity of forum selection clauses in bill of lading contracts are to be found in the Norwegian Maritime Act of 1994, Articles 310 and 311, which entered into force on 1st October 1994.

(2) The forum rules apply compulsorily to bills of lading or similar documents of title, including bills issued pursuant to charterparties when endorsed over to a third party, when the contract of carriage takes place:

- (a) in domestic Norwegian trade
- (b) in trade between the Nordic states
- (c) in foreign trade to or from any one of the Nordic states

(3) Norwegian courts have authority to set aside a forum selection clause if it puts constraints on the plaintiff's right to opt to institute proceedings at any one of the places listed below:

- (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant;
- (b) the place where the contract was made, provided that the defendant has there a place of business or agency through which the contract was made;
- (c) the place of delivery of the cargo into custody of the carrier, according to the contract of carriage; or
- (d) the agreed or actual place of delivery of the cargo from the custody of the carrier, according to the contract of carriage.

(4) Norwegian courts have authority to exercise jurisdiction when forum selection clauses are set aside for reasons mentioned above.

(5) Norwegian courts do not have authority, by virtue of Articles 310 and 311, to set aside forum selection clauses in charterparties.

(6) Norwegian courts do not have authority, by virtue of Articles 310 and 311, to set aside forum selection clauses in bills of lading or similar documents of title concerning carriage to and from places outside the Nordic states, unless one of the criteria set out in Article 310 (1) (a) or (b) is met.

(7) The plaintiff may exercise his option to institute court proceedings before the contract forum. As the carrier may be the plaintiff "negative" actions before the contract forum may be allowed.

(8) Arbitration and jurisdiction clauses are treated similarly in order to prevent an adaptive shift toward exclusive arbitration clauses in bills of lading.

(9) The Lugano Convention as incorporated in the Norwegian legislation implies that an exclusive jurisdiction clause designating a court in a Lugano Convention state will be valid, notwithstanding domestic Norwegian law to the contrary. The Lugano Convention, however, does not apply to arbitration agreements.

6 Article 311 first paragraph.

7 Article 310 second paragraph and 311 second paragraph.

8 See Article 31 of the Norwegian Civil Procedure Act of 1915.

9 See Article 36 of Norwegian Civil Procedure Act of 1915.

10 The Hamburg Rules would have constituted such a convention, due to its Articles 21 and 22 governing the validity of contract forum selection clauses.

11 The only exception might be if litigating before the selected forum would effectively and substantially lessen or limit the liability of the carrier, and thereby lead to breach of Article III Rule 8 of the Hague-Visby Rules. This is so because an international convention which imposes rules which lead to breach of obligations of another convention should be interpreted restrictively.

12 As of July 1996.

Non-order bills fully in order after the RAFAELA S?

By Charles Debattista, Professor of Commercial Law, University of Southampton



It is some time since a case on bills of lading attracted as much immediate interest as the RAFAELA S, decided by the English Court of Appeal and reported at [2003] 2 Lloyd's Rep. 113.

The pages of Gard News have already carried notes on the RAFAELA S in issues No. 169 and 171¹ and the case has also occasioned much comment in both the trade and in legal journals. It is now well known in the trade that the decision applied the Hague-Visby Rules to straight bills of lading. The purpose of this note is to set out the precise limits of the decision, identifying settled questions untouched by it and highlighting others which it leaves unresolved.

Order/Non-order bills of lading

At the crux of the RAFAELA S lie some fundamental distinctions between different types of bills of lading. One of the traditional fault-lines against which bills of lading have been classified has been the distinction between "negotiable" and "non-negotiable" bills of lading, differentiating bills of lading according to whether their transfer, with or without endorsement, in full or in blank, can transmit from one trader to the other the right to ask the carrier for the goods. Given the purpose of this note, it might assist clarity if bills of lading, distinguished against this criterion, were actually referred to as "transferable" and

"non-transferable" bills of lading, the word "negotiability" rather ambivalently being used also to refer to a quite different concept, namely the ability of certain documents, including bills of lading, to rank one trader's ownership of goods above that of another where both have been the victim of fraud. The use of the phrase "negotiable bill of lading" for transferable bills and "non-negotiable bills of lading" for non-transferable ones has, however, stuck and the important thing here is to identify the non-transferable bills to be the bills to which the RAFAELA S refers.

A bill of lading declares itself to be transferable or non-transferable primarily, though not exclusively,² in the consignee box on the front of the bill. If the bill of lading states that the carrier will deliver the goods to the order of a consignee or simply to order, then that makes the bill of lading transferable; if it does not, then that makes the bill non-transferable or "straight". At the risk of burdening usage with yet more, but, it is suggested, more transparent labels, bills of lading come in two shapes: "order" bills, which are transferable, and "non-order" bills, which are not.

The facts

Given the significance for the trade of the issues the judgment raised, the facts in the RAFAELA S were relatively unremarkable. A cargo claim was brought against a demise charterer by the buyer of goods under a non-order bill of lading expressly requiring presentation for delivery, the goods having been originally shipped in Durban but then transhipped in Felixstowe and eventually discharged in a damaged state in Boston. These facts raised a number of important contractual issues which logically preceded the substance of the decision actually delivered: did the claimants have title to sue at all and, if they did, was there one contract or two and where was the port of shipment, Durban or Felixstowe? Both the parties and the court were, however, quite rightly alive to the fact that the real issue was whether, assuming the defendant was liable, that liability was subject to the package and unit limitation of the Hague-Visby Rules, implemented in the UK by the Carriage

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of Goods by Sea Act 1971. That issue in turn depended in large part on whether the goods were covered by "a bill of lading or any similar document of title" within article I(b) of the Hague-Visby Rules and it was that question in which most judicial effort was invested.

The decision

The claimants, hoping for the more generous Hague-Visby measure of limitation, argued that the non-order bill was covered by article I(b) of the Rules. The demise-charterer, keen to benefit from the lower limitation applicable under the counterpart US legislation which applied the Hague Rules, argued that the non-order bill was not a document of title for the purposes of the UK Act.

A strong arbitral panel and Langley J³ had held for the demise-charterer, following the traditional view that a non-order bill was not a document of title. A powerful Court of Appeal held unanimously for the claimants, deciding that a non-order bill of lading expressly requiring presentation for delivery was a "similar document of title" for the purposes of the Rules.

In the leading judgment, Rix LJ reviewed many authorities, judicial and otherwise, both English and foreign: declaring himself "not unhappy" to reach the conclusions he reached, Rix LJ saw "no reason why a document which has to be produced to obtain possession of the goods should not be regarded in an international convention as a document of title."

The effect of the judgment is that a bill of lading calling itself a bill of lading, made out to a named consignee without the words "to order" added to that name or elsewhere in the bill⁴, and which expressly requires the bill to be presented for delivery of the goods, is covered by the Hague-Visby Rules in any of the situations described in article X of those Rules, i.e., if the bill of lading is issued in a contracting state, if the carriage was from a port in a contracting state or if the bill of lading incorporates the Rules.

The decision itself, with respect, brings to an old question a refreshing air of

common sense, robustly fitting the law to commercial reality. A document which, as the judgment put it, “looks and smells” like a bill of lading should not be considered any the less a bill of lading for the purposes of the Hague-Visby Rules simply because, when issued, the shipper and the carrier know that one party – and one alone – will collect them on discharge. It seems curious that the more singularly identified the consignee, the less certain English law was before the decision in this case whether or not to apply an international convention intended to protect an unidentified body of consignees.

It is easy, however, wildly to draft wide headlines on the basis of the relatively small print of the judgment. There are a number of questions about non-order bills which were not touched upon in the *RAFAELA S* but which were and should remain fairly uncontroversial; and others, whether referred to or not in the judgment, which remain controversial.

Settled matters untouched by the decision

In the first class of questions fall the following. First, can the consignee named on a non-order bill of lading claim delivery of the goods from the carrier? The answer to that question is that he can, so long as he remains identified as the consignee on the bill.⁵ Whether in addition to being the consignee, he also needs to present the bill of lading for delivery of the goods is another matter to which we shall return later. Secondly, can the consignee named on a non-order bill of lading sue the carrier on the contractual terms contained in the bill of lading? The answer to that question is that he can for the same reason and on the basis of the same sources in the Carriage of Goods by Sea Act 1992.

Thirdly, can the named consignee transfer those rights by endorsing the bill of lading to an on-buyer? The answer to that is no, because this is the essence of the non-transferable nature of the document.⁶ Fourth, if a fraudulent seller were to sell the same goods twice, transferring a non-order bill to B for value, having already been paid for the goods by A, who had originally appeared as the consignee on the bill of lading, would B's title

to the ownership of the goods be defeated by A? In a dispute as to the ownership of the goods between A and B, B would prevail, the non-order bill being a “document used in the ordinary course of business as proof of the possession or control of the goods.”⁷ Fifthly, can a seller in a CIF contract or in an FOB contract requiring the tender of shipping documents tender for payment in a cash against documents sale a non-order bill of lading? The answer is that, despite the fact that the *RAFAELA S* has decided that a non-order bill of lading is a “document of title” for the purposes of the Carriage of Goods Act 1971, a seller can not tender such a document unless the sale contract expressly so provides. A documentary sale on shipment terms, such as a CIF or C&F contract, or an FOB contract where the seller is charged with the procurement and tender of shipping documents, is one which requires the seller to transfer control of the goods in such a manner as to allow the buyer to repeat the process by transfer or endorsement. Consequently, in the absence of an express term in the sale contract providing otherwise, tender of a non-order bill of lading would put the seller in breach.

Finally, can a non-order bill of lading be tendered for payment under a letter of credit? The answer is that it can, for one of two reasons: either because article 23 of the Uniform Customs and Practice for Documentary Credits (the UCP 500) does not provide in terms that a “marine/ocean bill of lading” tendered under that article need be made out to order; or because a straight bill of lading can be tendered in the same manner as can a non-negotiable sea waybill under article 24 of the UCP 500. The important point to make again, however, is that the fact the *RAFAELA S* has decided that a non-order bill of lading is a document of title for the purposes of the Carriage of Goods by Sea Act 1971 does not mean that such a bill secures, without more, the position of the bank against a defaulting customer, i.e., a receiver who has obtained delivery of the goods without presentation of the bill and without paying the issuing bank under the letter of credit. This is why carriers frequently find banks being named as consignees on non-order bills of lading or on sea waybills.

Matters left unresolved

The issues described so far were relatively clearly settled before the decision of the Court of Appeal in the *RAFAELA S*. Neither were they raised in the case nor should they be affected by it, given that the decision was limited in terms to the applicability of the Hague-Visby Rules to non-order bills of lading. The decision did, however, raise in discussion other issues not strictly necessary for decision.

Hague-Visby and presentation

The first was whether the Hague-Visby Rules would have applied had the bill of lading not expressly required presentation. It will be recalled that the bill of lading in the *RAFAELA S* expressly required presentation for delivery and the point remains moot whether the decision would have gone the same way had the bill of lading not expressly required presentation for delivery. Rix LJ clearly thought that, although on the facts of the case it was unnecessary to decide the point, the absence of the presentation clause would have made little difference to his decision that the Hague-Visby Rules applied.⁸

Delivery and presentation

There is, however, lurking slightly below the surface of this Hague-Visby question, a different and rather more troubling issue, namely the question of delivery and presentation: should a carrier require presentation of a non-order bill in the absence of a presentation clause? This question was at two removes from the dispute before the court: the question before the court was whether a non-order bill of lading expressly requiring presentation was covered by the Hague-Visby Rules. The issue being discussed here is whether a non-order bill not expressly requiring presentation needs to be presented to the carrier in order (a) to entitle the receiver to the goods and (b) to discharge the carrier's delivery obligations.

Prior to Rix LJ's judgment in the *RAFAELA S*, it seemed safe to suggest that if, as the English Law Commission indicated in Rights of Suit in Respect of Carriage of Goods by Sea,⁹ non-order bills were to be treated as being akin to sea waybills, then a consignee named as such on a non-order bill not expressly requiring presentation

1 See also Loss Prevention Circular No. 06-03.

2 See the *HAPPY RANGER* [2002] 2 Lloyd's Rep. 357 at 363 and 367.

3 [2002] 2 Lloyd's Rep. 403.

4 Or, which presumably would amount to the same thing, the printed words “to order” deleted.

5 See the Carriage of Goods by Sea Act 1992, ss. 2(1)(b), 1(3), 5(3) and Rights of Suit in Respect of Carriage of Goods by Sea, Law Com. No. 196, para 2.50: “Where a bill of lading is not transferable, it will undoubtedly fall within the definition of sea waybill to be found in clause 1(3) of the [Act].”

6 Should the consignee wish so to transfer, he would need the co-operation of the original shipper to alter the carrier's delivery instructions: see Debattista, *Sale of Goods Carried by Sea*, 2nd ed. (1998), para 3-09.

would be entitled to delivery without presentation. The Carriage of Goods by Sea Act 1992 would give the consignee rights of suit by virtue of his status as a consignee and the most important right that status would endow is the right to delivery – without presentation.¹⁰

After the RAFAELA S, however, this must be subject to doubt. Rix LJ clearly took the view that the carrier should insist on presentation for delivery whether or not the bill of lading expressly required it: “A shipper needs the carrier to assist him in policing his security in the retention of the bill... In any event, if proof of identity is necessary,...what is wrong with the bill itself as a leading form of proof?”¹¹ The difficulty is that if Rix LJ’s view is upheld, the bill itself becomes not only “a leading form of proof” but the only form of proof and it has to be asked whether this is what the market has in mind when the magical words “or order” are left out of the consignee box.

In the circumstances of the resulting uncertainty, the options left open to a carrier regarding presentation of a non-order bill are either to insist on presentation whether or not a bill of lading expressly requires it, or (if he prudently wants to avoid the legitimate complaints of a consignee seeking to enforce his delivery rights at a discharge port through the Carriage of Goods by Sea Act 1992) to stipulate in his bill of lading that delivery on proof of identity

is sufficient for delivery when the bill is used in non-transferable form.

Estoppel and non-order bills

Finally, the decision in the RAFAELA S raises an issue which was not referred to in the decision itself but which leaves non-order bills sitting somewhat uncomfortably across two English statutes relating to the carriage of goods by sea. As we have seen, the Carriage of Goods by Sea Act 1992 considers non-order bills to be akin to sea waybills. As a result, the consignee named on such a bill does not enjoy the benefit of the estoppel granted by section 4 of the Carriage of Goods by Sea Act 1992 to lawful holders of order bills of lading binding the carrier to statements about the goods on the bill of lading. After the RAFAELA S, on the other hand, a straight consigned bill of lading is to be considered as a bill of lading for the purposes of the Carriage of Goods by Sea Act 1971. Under this Act, the consignee takes the benefit of the estoppel created by the second sentence of Article III Rule 4 of the Hague-Visby Rules binding the carrier to statements about the goods on the bill of lading.¹² The result is that there is a direct conflict between the two Acts on the same issue.¹³ Which is it to be: is a straight consigned bill of lading to be regarded as a sea waybill, in which case the receiver has no estoppel under the 1992 Act, or simply as a bill of lading, in which case the receiver has an estoppel under the 1971 Act? The problem lies not with the judgment in the RAFAELA

S itself, but with two decisions taken when the Carriage of Goods by Sea Act 1992 was drafted: first, the decision to exclude straight consigned bills of lading from the definition of bills of lading in the 1992 Act and then, curiously, to characterise as sea waybills documents calling themselves bills of lading; and secondly, the decision to include section 4, dealing with the evidential force of bills of lading, in the 1992 Act, an Act focusing on another matter entirely, namely the buyer’s title to sue the carrier in contract.

A welcome decision raising urgent questions

The RAFAELA S is a welcome decision for a number of reasons. First, it answers the question posed by the question asked in the litigation clearly and robustly. Secondly, it provokes questions about some of the most fundamental questions regarding the legal classification of bills of lading. Some of those questions remain to be solved, either by appropriate clauses in bills of lading or by further guidance from the English courts.

7 Sale of Goods Act 1979, s 24 and Factors Act 1889, s 1(4). This would clearly be the case where, as in the RAFAELA S, the non-order bill of lading expressly required presentation for delivery. It is suggested that it would be the case even where it did not, given that the named consignee can prove his right to possession or control of the goods, at any rate while he retains that status.⁸ See [2003] 2 Lloyd’s Rep. 113 at 143, para 145.

9 See footnote 4 above.

10 Contrast the position in Singapore: *Voss v. APL* [2002] 2 Lloyd’s Rep. 707.

11 See [2003] 2 Lloyd’s Rep. 113 at 144, para 145.

12 At any rate unless a non-order bill of lading is regarded, rather oddly, as a non-negotiable receipt under s 1(6)(b) of the 1971 Act. Rix LJ, with respect quite rightly, found the assimilation of non-order bills of lading to non-negotiable receipts quite unconvincing: see [2003] 2 Lloyd’s Rep. 113 at 132, para 85.

13 In the context of another question, Rix LJ suggested that, as the Carriage of Goods by Sea Acts of 1971 and 1992 dealt with different matters, it counted little if non-order bills were treated differently in the two Acts: see [2003] 2 Lloyd’s Rep. 113 at 143, para 141. The estoppel point made here in the text, however, is a matter dealt with differently in both Acts and therefore, it is respectfully suggested, does require a reconciliation between the two Acts.

Rules apply to straight bills - House of Lords decides RAFAELA S

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The House of Lords has decided that a straight bill of lading comes within the class of documents to which Hague-Visby Rules are applicable in English law.

Introduction

There was once a bill of lading so cunning that it exercised the minds of many a lawyer, arbitrator, judge and academic. It has also been the subject of several Gard News articles.¹ Now the House of Lords² has sought to end a dispute that began in earnest with three arbitrators in 2001. On appeal a judge in the Commercial Court agreed with the arbitrators, but the Court of Appeal disagreed, deciding that a straight bill of lading expressly requiring presentation for delivery was a "bill of lading or similar document of title" for the purposes of the Hague-Visby Rules (the Rules). The House of Lords has now unanimously upheld this decision.

It was not disputed that the bill in this case was a straight bill of lading. A straight bill of lading is generally accepted to be one that makes the goods deliverable to a named consignee and either contains no words importing transferability or contains words negating transferability (such as "non-transferable").³ Accordingly, it is not a transferable or negotiable document of title, which can be used to transfer the right to possession of the goods covered by the document from one trader to another. Bills of lading that are made out "to order" are, by endorsement, negotiable documents of title. Bearer bills of lading are negotiable without endorsement.⁴

The sole issue on the appeal before the House of Lords was whether a straight bill of lading was a "bill of lading or any

similar document of title" within the meaning of article 1 (b) of the Hague-Visby Rules.⁵ If it was, the straight bill of lading was a contract of carriage to which the Rules applied compulsorily. The reason why this was important to the claimants, who were the buyers of the cargo and named consignees, was that the relatively generous package limitation under article 4 Rule 5 of the Rules would have been applicable, resulting in a claim of around USD 150,000. On the other hand, the carrier (who was appealing the Court of Appeal decision) contended that the straight bill of lading was akin to a sea waybill, which merely operates as a receipt. It was not therefore a contract of carriage within the meaning of article 1 (b) and the Rules did not apply. If the carrier was correct, the package limitation would have been governed by section 4(5) of the US Carriage of Goods by Sea Act 1936 (which applied contractually), restricting the claim to USD 2,000.

Construction of the document itself

The House of Lords first looked at the document itself. Lord Bingham identified a number of features of the bill which distinguished it from a mere receipt or sea waybill. For a start, the document called itself a bill of lading. It provided for the issue of more than one original and used language in the attestation clause⁶ which would have been meaningless in a sea waybill. The conditions on the reverse of the document also envisaged that the consignee and bill of lading holder might become a party to the contract of carriage.⁷ The carrier argued that the bill of lading form could be used as either a straight bill, and that if it was used as the latter some of the stated conditions (such as the attestation clause) were inapplicable. However, Lord Bingham

pointed out that even an order bill might not be "duly endorsed" in circumstances where the named consignee might require delivery as holder of the bill. Therefore, in Lord Bingham's mind it would be extraordinary to treat the detailed terms of a bill as inapplicable to a named consignee holding a straight bill, especially when the shipper did not wish to part with an original bill until the consignee or buyer had paid for the goods. In other words, requiring production of the bill to obtain delivery was the most effective way of ensuring that a consignee or buyer who had not paid could not obtain delivery. Therefore, the bill in this case was, as in the case of an order bill, a document of title, or "a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be".⁸

Lord Steyn also pointed out that, in practice, it is left to the shipper to choose the words to be inserted in the "consignee" box. Following the carrier's argument, therefore, the application of the Rules depended on a decision by the shipper, usually made after the contract of carriage was made, whether to insert the words "to order" in the "consignee" box. Lord Steyn also commented that, in any event, the issue of a set of three bills of lading, with the provision "one of which being accomplished, the others to stand void" necessarily implies that delivery will only be made against presentation of the bill of lading.

What the Hague and Hague-Visby Rules intended

Lord Bingham's conclusion on the issue of construction would have been sufficient to dispose of the appeal, but the correct

1 See articles "Straight bills of lading – Not so straightforward" in Gard News issue No. 169, "Straight bills of lading – One more piece in the puzzle" in Gard News issue No. 171 and "Non-order bills fully in order after the RAFAELA S?" in Gard News issue No. 173.

2 *J I MacWilliam Company Inc v. Mediterranean Shipping Company* [2005] HL 11, still unreported at the time of going to press.

3 The RAFAELA S bill of lading used the term "non-negotiable". Whilst the term "negotiable" is not strictly accurate when used in the context of transferability, it is commonly used in that sense. For an in-depth explanation see the article "Non-order bills fully in order after the RAFAELA S?" by Charles Debattista in Gard News issue No. 173.

4 As did Lord Bingham in the House of Lords judgment, this article will use the expression "order bill" to embrace a bill to order or assigns or bearer without distinguishing between these.

5 And hence within section 1(4) of the Carriage of Goods by Sea Act 1971.

6 "IN WITNESS whereof the number of Original Bills of Lading stated above all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order."

7 The first clause read: "This contract is between the Merchant and the Master, acting on behalf of the Carrier. Wherever the term 'Merchant' occurs in this Bill of Lading, (hereinafter 'B/L') it shall be deemed to include the Shipper, the Consignee, the holder of the B/L, the receiver and the owner of the goods."

8 *Sanders Brothers v. Maclean & Co* (1883) 11 QBD 327.

approach also required consideration of the international consensus of those who had drafted the Hague and Hague-Visby Rules.

Historical recognition of straight bills as bills of lading

The House of Lords recognised that the focus of discussion preceding final adoption of the Hague Rules was on order bills, but suggested that was probably because such bills were more common than straight bills and because endorsees were in need of greatest protection from “unfair” contract terms imposed by carriers. The House of Lords looked deeper into history and found that a straight bill was recognised by the major maritime countries of the early 1920s as a bill of lading and, in most cases, a document of title. The one notable exception to the latter was the United States where, under the Pomerene Bills of Lading Act 1916, carriers were to be justified in delivering to the consignee named in a straight bill without production of the bill.

As for the UK, Lord Rodger made reference to a uniform British form of bill of lading, originally with a supposed date of 1820, which did not include the words “order or assigns” and the commentary on that form accepted there could have been a valid bill of lading for delivery to a named consignee alone. Lord Rodger went on to comment that the mercantile community had been discussing whether the inclusion of the words “order or assigns” was necessary to make a bill of lading negotiable – not whether their inclusion was necessary for the document to function as a bill of lading.

The carrier tried to make something of the Preface to the UK’s own Bills of Lading Act of 1855,⁹ which only referred to bills of lading transferable by endorsement. However, the House of Lords pointed out that Section 1 of the same act provided that not only an endorsee but also “every consignee named in a bill of lading” was empowered to sue on it. If the carrier’s restrictive interpretation was accepted, there would have been a major gap in the act because a named consignee in a straight bill of lading would not have had rights of suit under the bill. Such an implausible interpretation was therefore rejected.

The House of Lords thus concluded that historically straight bills were recognised and were not ignored in the Hague Rules negotiations. Accordingly, the Rules ought to be interpreted as applying to straight bills unless there was either a good reason why they should

be excluded or the text of the Rules suggested an intention to exclude them.

Was there good reason to exclude straight bills from the Rules?

The House of Lords gave weight to the fact that a named consignee would not normally be involved in negotiating the terms of a bill of lading and on this basis it needed the same protection as an endorsee from “unfair” contract terms imposed by a carrier. Lord Steyn also pointed out that straight bills are sometimes preferred to order bills of lading on the basis that there is a lesser risk of fraud. In conclusion, therefore, the House of Lords could not find a good reason to exclude straight bills from the Rules.

Did the text of the Rules suggest an intention to exclude straight bills?

The House of Lords made reference to articles 1 (b) and 5 of the Hague and Hague-Visby Rules.¹⁰ In the Lords’ minds this explained the intention to apply the Rules to third parties. Reference was then made to Section 1(6) of the 1971 Carriage of Goods by Sea Act and to Article 6 of the Hague Rules. Lord Bingham helpfully summarised:

“Thus a carrier and shipper can in effect contract out of the Rules but only if (a) no bill of lading has been or is to be issued, (b) the agreed terms are embodied in a receipt, (c) the receipt is a non-negotiable document marked as such, (d) the shipments in question are not ordinary commercial shipments made in the ordinary course of trade, and (e) the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.”

Like the Court of Appeal, the House of Lords found that there was nothing in the travaux préparatoires of the Hague Rules which pointed to a clear resolution of the issue. Lords Steyn and Rodger in particular considered the French text to the Hague Rules which focused on the right to possession of the goods vesting in the holder of the document without reference to the concept of document of title. As Lord Rodger put it, the alternative document which the French text described was simply one that entitled the holder to have the goods carried by sea – and, obviously, to have them delivered to the appropriate person at the end of the voyage. The French text would therefore suggest that the words “document of title” in the English version should be read along with the qualifying words “in so far as such document relates to the carriage of goods by sea” and should be understood as applying to

any document that entitles the holder to have the goods carried by sea. That, in Lord Rodger’s mind, would give the words a broad but not inappropriate interpretation, since they are designed to prevent parties from circumventing the Rules by devising different forms of shipping document.

In conclusion, therefore, the House of Lords interpreted the Rules as intending to govern the great majority of ordinary commercial shipments. Those drafting the Hague Rules were concerned more with preventing circumvention of the Rules than restricting their scope. An expansive interpretation, rather than a restrictive one, to the expression “bill of lading or any similar document of title” was therefore deemed apt. The point was made that, had there been an intention to exclude straight bills from the Rules, then surely there would have been a special provision to that effect.

Recent decisions

The House of Lords went on to support their conclusions by recent decisions in other jurisdictions, including those of a Dutch court,¹¹ the Court of Appeal of Singapore¹² and the 2nd Division of the Court of Appeal of Rennes,¹³ all of which concerned straight bills.

Lord Rodger also rejected Justice Tomlinson’s suggestion (obiter) in the *HAPPY RANGER*¹⁴ that the term “bill of lading” in article 1 (b) should not be interpreted as including straight bills of lading.¹⁵

COGSA 1992

The complication caused by the Carriage of Goods by Sea Act 1992, namely that a straight bill of lading is not a bill of lading for the purposes of the Act (which mainly concerns rights of suit), was brushed aside by the House of Lords. Lord Bingham pointed out that a 1992 statute can not govern the meaning of Rules given statutory force in 1924 and 1971 and that the 1992 Act itself provides that it is to have effect without prejudice to the application of the Rules.¹⁶ Lord Bingham also stressed that the question before the House was not whether a straight bill was a document of title at common law, but whether it was a “bill of lading or any similar document of title” for the purposes of the Rules.

Academics and Practitioners

Lord Bingham regarded Lord Justice Rix’s conclusion (in the Court of Appeal) of his review of the leading academic and practitioner texts, as a fair assessment. Lord Justice Rix found the position complex and mixed. On the one hand some quarters held the view that the

⁹ Which primarily dealt with rights of suit and which was still in force at the time of events in this case.

¹⁰ Which provide that the Rules do not apply to charterparties and apply to bills of lading issued under charterparties only “from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same”.

surrender of an original bill of lading was unnecessary under a straight bill, but on the other hand uniformity favoured just the opposite.

Lord Steyn made the comment that the interpretation advanced by the carrier depended on fine and technical distinctions and arguments. Traders, bankers and insurers would be inclined to take a more commercial view of straight bills of lading. Lord Steyn noted that Professor Charles Debattista had welcomed the Court of Appeal's decision.¹⁷

What the House of Lords decision means The application of the Rules

In dismissing the carrier's appeal and upholding the Court of Appeal's decision that a straight bill of lading is a "bill of lading or any similar document of title" within the meaning of the Rules, the House of Lords has brought much needed clarification to the application of the Rules. Carriers issuing straight bills may now be unable to contract out of the Rules, notably with regard to package limitation. Article 3 Rule 4 of the Hague-Visby Rules binding the carrier to statements about the goods on the bill of lading will also probably apply in the case of straight bills.¹⁸ Whilst the House of Lords decision is limited to the position under English law, it will doubtless have some influence on the decisions made by courts of other nations.

The bill of lading in the *RAFAELA S* contained an express provision that delivery of the cargo was to be made only against presentation of an original. It appears that, at least in Lord Bingham and Lord Steyn's opinion, the absence of this clause would not preclude the bill from being a "bill of lading or any similar document of title" within the meaning of the Rules. However, it is not clear from the House of Lords decision whether the Rules would also apply (compulsorily) to a straight bill of lading which expressly provides that delivery is to be made without production of an original bill of lading. Whilst it is uncertain whether under English common law such a bill of lading is a document of title, there is commentary to be found in the House of Lords decision to suggest that the Rules should be applied regardless. Of

particular note, Lord Rodger said that negotiability or transferability of the bill of lading is irrelevant – as indeed is its status as a presentation document.

A question which follows is whether the House of Lords decision hints towards a call to apply the Rules (compulsorily) to waybills. The answer is far from straightforward. On the one hand, the House of Lords went to lengths to differentiate the straight bill from a waybill. Notably, Lord Steyn said that the comparison is plainly unrealistic and that a sea waybill is never a document of title. On the other hand, the Lords' commentary on the French text of the Hague Rules, as mentioned above, suggests that there ought to be a broad interpretation to the words "bill of lading or any similar document of title".

The carrier's delivery obligations

It is relatively clear from the House of Lords decision that under English law a carrier who delivers cargo carried under a straight bill of lading expressly requiring presentation of an original without production of the original does so at his own peril. As mentioned above there are indications in Lord Bingham and Lord Steyn's opinions that this may be the case, even if the straight bill of lading does not expressly provide that production of the bill is a necessary pre-condition of requiring delivery. But would production still be necessary if the bill contained an express provision that delivery is to be made without production of the original bill of lading? This question seems to remain unanswered for the time being, but whatever the answer may be, the safest policy for carriers would be to deliver goods only upon production of the original straight bill of lading in all cases.

Recommendation

The judgments of the Court of Appeal and the House of Lords in *RAFAELA S* suggest a dislike of bill of lading forms that are designed to fulfil different functions depending on the way in which the form is used and completed.

Gard's recommendation is that the carrier should seek to clarify with shippers what functionality they require from the carriage document. If a shipper does not

need a transferable¹⁹ document (because for example he does not intend to sell the goods to anyone other than a named consignee), a non-transferable document ought to be sufficient. If, in addition, a shipper does not need the security of a document which requires presentation of the original in order to obtain delivery of the goods (for example, the shipper and named consignee are part of the same company and there is no risk of the consignee not paying for the goods), a sea waybill will usually be most appropriate. It will then be important to ensure that the sea waybill calls itself a "sea waybill", is clearly marked "non-negotiable" and expressly provides that the goods are to be delivered without production of an original waybill, but on production of proof of identity by the named consignee.²⁰ A carrier should, however, also bear in mind the risk of fraud and in some countries that risk is greater than others. Equally, demanding the production of an original bill of lading will not always prevent fraud.²¹ Carriers may face difficulty persuading shippers to use waybills rather than bills of lading, due to a natural reluctance to change and general scepticism that change equates to a worse deal. The waybill is not intended to have all the functions of a bill of lading and it is precisely because some shippers did not need functions affording negotiability and security that the waybill was developed. It is a matter of education.

P&I cover

According to Rule 34 of Gard's 2005 Statutes and Rules, cover is excluded for "...liabilities, costs and expenses arising out of the delivery of cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made except where cargo has been carried on the Ship under the terms of a non-negotiable Bill of Lading, waybill or other non-negotiable document, and has been properly delivered as required by that document..." [our emphasis].

The word "properly" has been emphasised here and it will be apparent from this article that for P&I cover to be available much depends on the applicable law and the document itself.

11 The Duke of Yare (ARR-RechtB Rotterdam, 10th April 1997).

12 *Voss v. APL Co Pte Limited* [2002] 2 Lloyd's Rep 707. See article "Straight bills of lading – Not so straightforward" in Gard News issue No. 169.

13 On appeal from the Commercial Court of Le Havre in *The MSC MAGALLANES*.

14 [2001] 2 Lloyd's Rep 530, 539.

15 The Court of Appeal reserved their opinion on the point but expressed doubt about statements to a similar effect in some textbooks.

16 Section 5(5) of the 1992 Act. See also the article "Non-order bills fully in order after the *RAFAELA S*?" in Gard News issue No. 173.

17 In Lloyd's List of 23rd April 2003. See also Charles Debattista's article in Gard News issue No. 173.

18 See Charles Debattista's article in Gard News issue No. 173.

19 See footnote 3.

20 See for example the *BIMCO Liner Sea Waybill*.

21 See the article "The *MOTIS* revisited – The Court of Appeal turns down owners' appeal" in Gard News issue No. 158, concerning delivery made against a fraudulent bill.

FIOS revisited - The final chapter?

Gard News 177,
February/April 2005



Previous issues of Gard News¹ have reported on the High Court and Court of Appeal decisions in the JORDAN II case.² On 25th November 2004 the House of Lords gave their reasons for dismissing the appeal of cargo interests.

The facts

The charterparty provided that loading, stowing, lashing, securing, dunnaging and discharging operations were to be carried out by charterers/shippers/receivers. There was argument in the lower courts concerning the actual wording used in the charterparty, but that argument was not raised in the final appeal, cargo interests accepting that the terms of the charterparty were sufficient to transfer responsibility for these operations to them and away from the vessel owners. The bills of lading issued in respect of the cargo incorporated the terms of the charterparty and also incorporated the

standard clause paramount. The initial claim arose as a result of damage to the cargo. It was agreed that the damage had occurred at some point during the loading, stowing and securing operation, or during discharge. Both the High Court and Court of Appeal decided in vessel owner's favour.

The appeal

The main argument of cargo interests' appeal was that the FIOS terms as incorporated in the bills of lading fell foul of Article III (2) and (8) of the Hague-Visby Rules. These provide as follows:

"2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

"8. 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 these Rules, shall be null and void and of no effect."

Cargo interests argued that Article III (2) laid down certain non-delegable duties that the carrier must undertake, and any attempt to transfer responsibility for these operations to another party (in this case, the shippers/receivers) should fall foul of Article III (8) and be rendered of no effect. The stumbling block for cargo interests was that a wealth of cases has been decided in the English courts, notably *Pyrene v. Scindia*³ and *Renton v. Palmyra*,⁴ supporting the carriers' position that certain of the Article III (2) obligations could be transferred by agreement. Cargo interests argued that each of these cases had been based on an incorrect interpretation of Article III (2), and

should therefore be over-ruled in favour of a correct interpretation of the Rules.

Cargo interests referred to *Pyrene v. Scindia*, where Devlin J stated that Article III (2) was not a list of obligations that the carrier must carry out, but instead provided a minimum standard of skill and care for those operations which he did perform. Cargo interests suggested that the natural extrapolation of this argument was that, if the carrier could contract out of the loading operation, he could also contract out of the obligation to carry, keep and care for the cargo. Such an interpretation would render the whole scope of the Rules ineffectual.

In support of their contention, cargo interests referred to a number of US and South African decisions and to textbook commentary confirming the situation in France. All these suggested that a shipowner may not contract out of responsibility for improper stowage. By contrast, the English approach is adopted in Australia, New Zealand, Pakistan and India.

Cargo interests raised numerous other arguments in support of their case and referred to the history of the preparation of the Rules to suggest that the English interpretation was not in conformity with the intention of the Rules.

The House of Lords decision⁵

Ultimately, the House of Lords did not express any view on whether the interpretation in *Pyrene v. Scindia* and *Renton v. Palmyra* was correct or not. Their decision to dismiss cargo owners'

appeal was based more on questions of certainty than correctness. Lord Steyn referred to a 1774 statement of Lord Mansfield:⁶ "In all mercantile transactions the great object should be certainty; and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."

The House of Lords referred again to *Renton v. Palmyra* and stated that even if that decision was wrong, it should stand. That case had been decided nearly 50 years ago and there had been no serious attempt to correct any misinterpretation. The Hague-Visby Rules were discussed and agreed after *Renton v. Palmyra* was decided, and yet there was no discussion at the conference as to whether Article III (2) should be amended to make the stated operations the non-delegable responsibility of vessel owners.

The House of Lords was not convinced that the existing rule under *Pyrene v. Scindia* and *Renton v. Palmyra* caused any injustice or was unsatisfactory, as demonstrated by the numerous other jurisdictions that followed similar reasoning. Their Lordships felt that, even if the interpretation was wrong, the rule had been in effect for so long it was accepted commercially as being correct, and more injustice would be caused if existing FIOS contracts were to be rendered ineffective in relieving the carrier from responsibility for operations he did not perform (and there must be a great many such contracts currently in existence). Their Lordships felt that it was more appropriate for any change in such a

long-established rule of law to be laid down by Parliament, or by a convention drawn up by the shipping and trading community.

Lord Steyn referred in particular to the current United Nations Commission on International Trade Law (UNCITRAL) review of the rules governing carriage of goods. Such review would take into account representations of all interested parties, whether they be vessel owners, charterers, shippers or receivers of cargo and insurers. If, after their review, UNCITRAL believe that a change in the rules is appropriate, no doubt a revised convention would be drawn up to reflect the rules as UNCITRAL believe they should be framed.

However, for the time being, under English law it is now settled that a carrier can contract out of responsibility for loading, stowing, dunnaging, securing and discharging cargo. There can now be no doubt that FIOS clauses, provided they are suitably worded, are valid and have full effect. That is, at least until a revised convention is agreed and adopted.

1 See articles "FIOS revisited" in issue No. 169 and "FIOS revisited (again)" in issue No. 172.

2 *Jindal Iron and Steel Co Limited and others v. Islamic Solidarity Shipping Company Jordan Inc.* LMLN 595, dated 5th September 2002; [2003]2 Lloyd's Rep. 87.

3 *Pyrene Co. v. Scindia Navigation Co.* [1954]1 Lloyd's Rep. 321.

4 *G. H. Renton & Co. Ltd v. Palmyra Trading Corporation of Panama* [1956]2 Lloyd's Rep. 379.

5 [2004] UKHL 49, 25th November 2004.

6 *In Vallejo v. Wheeler* (1774) 1 Cowp 143 at p. 153.

US law - Himalaya clauses in multimodal transport

Gard News 177,
February/April 2005

In a recent decision involving multimodal transport the US Supreme Court reversed the Eleventh Circuit and held that Himalaya clauses in both a freight forwarder's bill of lading and in an ocean carrier's bill of lading extended the bill of lading COGSA package limitation or other limitation of liability to a land carrier, which was hired by an affiliate of the ocean carrier.

"[A] maritime case about a train wreck". With those opening words in a unanimous decision in *Norfolk Southern R. Co. v. James N. Kirby Pty Ltd*¹ on 9th November 2004 the highest appellate court in the US, the Supreme Court, signalled its recognition of the changing nature of international transportation: "the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water and land" which allows cargo owners to "contract for transportation across oceans and to inland destinations in a single transaction."

The facts

The case involved a set of facts which is commonplace in the shipping industry. The shipper, James N. Kirby, Pty Ltd, an Australian company, sold machinery to a General Motors plant located near Huntsville, Alabama and hired a freight forwarder, International Cargo Control (the forwarder) to arrange for transportation of the machinery in ten containers. The forwarder issued a through bill of lading (the forwarder bill) to the shipper naming Sydney, Australia as the load port, Savannah, Georgia as the discharge port and Huntsville as the final destination. The forwarder bill contained two separate limitation of liability provisions: the US Carriage of Goods by Sea Act (COGSA) USD 500 per package or customary freight unit limitation (the package limitation) for the sea portion of the transport, and a higher limitation for the land portion. The forwarder bill also contained a Himalaya clause providing that these limitations on liability would

apply to "whenever claims relating to the performance of the contract ... are made against any servant, agent or other person (including any independent contractor) whose services have been used to perform the contract". The shipper did not declare the full value of the machinery (so did not avoid these limitations) but instead separately insured the cargo for its full value.

The forwarder then arranged to have the cargo carried by Hamburg Süd, which issued its own through bill of lading (the ocean bill) to the forwarder incorporating (1) the COGSA package limitation, (2) extending application of COGSA beyond the ship's rail, and (3) a Himalaya clause extending the benefit of the COGSA limitation of liability to all agents, including inland carriers. Hamburg Süd arranged to have the cargo carried from the discharge port to Huntsville by Norfolk Southern Railroad (the railroad). The train derailed and the cargo was damaged, for which damage the shipper was reimbursed by its insurer, which joined the shipper in suing the railroad in Georgia. The shipper claimed damages in the amount of USD 1.5 million; but if the railroad could avail itself of the COGSA package limitation under the ocean bill then the railroad's liability would be limited to USD 5,000.² The railroad prevailed on this basis at the trial court but the trial court's decision was reversed by the Eleventh Circuit Court of Appeals,³ which ruled that the railroad could not limit its liability according to the limitation of liability provided under either the forwarder bill or the ocean bill. In other words, the shipper and its insurer could potentially recover the full amount of their loss (said to be USD 1.5 million) from the railroad.

The Supreme Court decision

In reversing the decision of the Eleventh Circuit Court of Appeals, half of the Supreme Court's opinion is devoted to a lengthy examination

of whether the bills of lading under consideration should be considered "maritime contracts" to which federal (as opposed to state) law should apply. This, despite the fact that the trial court, the Court of Appeals and the parties themselves (until the case reached the Supreme Court when the shipper objected to application of federal law), had assumed that federal law would govern. Rather than sidestepping the issue and proceeding on the basis of the assumed applicability of federal law, the Supreme Court instead took the opportunity to classify these multimodal bills of lading as maritime contracts and to emphasise the importance of applying a uniform (i.e., federal) standard for their interpretation and enforcement.

The Supreme Court noted that "while it may once have seemed natural to think that only contracts embodying commercial obligations between the 'tackles' (i.e., from port to port) have maritime objectives, the shore is now an artificial place to draw a line". The court rejected decisions by lower courts in other cases that unless the non-maritime portion was "merely incidental" the contract could not be considered maritime. Noting that in any multimodal transport situation it was not accurate to ever describe the land portion as "incidental" – because "each leg of the journey is essential to accomplishing the contract's purpose" – the Supreme Court stated that a bill of lading must be considered a maritime contract "so long as [it] requires substantial carriage of goods by sea".⁴

But classifying the bills of lading as maritime contracts was not sufficient – because there have been cases, such as a Supreme Court's 1955 decision involving a contract of marine insurance, where the Supreme Court found it appropriate to apply state law to a maritime contract. And so, the court's opinion goes on to reiterate why it is so important that these multimodal

¹ 543 2004 U.S. Lexis 7510 (U.S. 2004).

² Under the forwarder bill, if the limitation of liability could be used by the railroad, its liability would have been based upon the higher amount provided for the land portion of the transport.

³ 300 F. 3d 1300.

bills of lading be subject to a uniform body of law; and then ruling that the case before it must be determined under federal (rather than state) law.

Of course, that is precisely what the Court of Appeals thought it was doing – applying Supreme Court precedent that the Court of Appeals thought required it to rule against the railroad. Not so, according to the Supreme Court’s opinion. With respect to the forwarder’s bill, it did not matter that the forwarder had never contracted with the railroad or that the Himalaya clause did not specifically mention inland carriers (as did the ocean bill). It was sufficient that “the parties [i.e., shipper and forwarder] must have anticipated that a land carrier’s services would be necessary for the contract’s performance”. Similarly, with respect to the ocean bill, which the court readily acknowledged raised a “more difficult” question, the court was not concerned that it was unjust to limit the liability of the railroad to the COGSA package limitation when the shipper had agreed in its own contract with the forwarder that the land portion of the transport would be subject to the higher limitation. Instead, the court reasoned that Hamburg Süd (and its subcontractor, the railroad) justifiably relied upon the forwarder as the shipper’s agent, at least for the purpose of negotiating the terms of the limitation of liability.⁵ And, as the court noted, this produced an equitable result: if the forwarder failed to ensure that the contractual limitation of liability in the two bills were the same, then the shipper could have (and had) sued the forwarder for the difference.

Comments

One can not read the Supreme Court’s opinion without concluding that the court was prepared to ignore or to adjust traditional legal concepts, such as privity of contract and agency, because the court concluded that these concepts do not necessarily serve the needs or expectations of the players in the new world of multimodal transportation. As the court stated in justifying its “limited agency” rule for freight forwarders: “In intercontinental ocean shipping, carriers may not know if they are dealing with an intermediary, rather than with a cargo owner. Even if knowingly dealing with an intermediary, they may not know how many other intermediaries came before, or what obligations may be outstanding among them. If the Eleventh Circuit’s rule were the law, carriers would have to seek out more information before contracting, so as to assure themselves that their contractual liability limitations provide true protection. That task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation.”

While recognising that it is not the Supreme Court’s task “to structure the international shipping industry”, the court’s opinion nevertheless represents a conscious effort to provide parties with “greater predictability concerning the rules for which their contracts might compensate”. After the Kirby decision, freight forwarders need not find themselves in the position of the forwarder in this case if they ensure that the limitations of liability that

forwarders use in the bills of lading that they issue conform to the limitations in the bills issued by the ocean carrier. Ocean carriers (and their downstream carriers, such as the railroad in this case) need now concern themselves only with their own bills of lading, without concern that they may be bound by a higher limitation provision in a freight forwarder’s bill. Perhaps most significantly, all concerned in the sea-and-land multimodal enterprise should now be able to rely on their contracts being enforced in the US under a uniform body of law.

⁴ It is questionable whether the Supreme Court’s use of the word “substantial” to modify “carriage of goods by sea” will not result in the same type of problem that the court was ostensibly trying to rectify in rejecting a geographic or spatial approach in favour of a conceptual one when determining whether a multimodal bill of lading qualifies as a “maritime contract”.

⁵ Despite the court’s restrictive language in describing the forwarder’s limited agency role (“It only requires treating ICC as Kirby’s agent for a single, limited purpose: when ICC contracts with subsequent carriers for limitation on liability” [emphasis in original]), the court’s decision arguably leaves open the possibility that freight forwarders should also be considered shipper’s agents for other material terms of bills of lading, such as forum selection clauses. This very issue has been raised in another case now pending before the Supreme Court.

US Law - "Date alone" on CONGENBILL sufficient to incorporate a charterparty into a bill of lading

Gard News 173,
February/April 2004

A recent Second Circuit US Court of Appeals decision affirms a US District Court ruling that the appearance of the date of a charterparty alone on a CONGENBILL bill of lading is sufficient to evidence and incorporate that charterparty into a CONGENBILL bill of lading and thereby give effect to the arbitration clause contained therein.

In *Continental Insurance Co. v. Polish Steamship Co.*¹ the US District Court in New York had to determine whether bills of lading issued by the vessel owner effectively incorporated a time charterparty which was identified on the face of the bills of lading by date only. This subrogated action by the cargo insurer arose out of alleged damage to a cargo of steel coils carried from Thessaloniki, Greece to various US ports.

The suit and third party action

The cargo insurer brought suit against the vessel owner and its vessel, in rem, seeking recovery for damage under the US Carriage of Goods by Sea Act (COGSA).² The owner commenced a third party action against the time charterer of the vessel requesting that any judgment in favour of cargo be entered against the time charterer or, in the alternative, that the time charterer should be required to indemnify the owner for any judgment in favour of cargo against owner. The time charterer moved to dismiss cargo's action as time barred and to stay owner's third party claims against the time charterer pursuant to the arbitration clause in their charterparty. Owner then moved to dismiss cargo's entire action by operation of the London arbitration clause and, in the alternative, to stay the action pending arbitration.

The District Court's finding and the appeal

The District Court dismissed cargo's action finding that the bills of lading successfully incorporated the charterparty and, therefore, that the arbitration clause applied to cargo's

claim against owner and, as pleaded by owner, against the time charterer. On appeal, cargo challenged the District Court's finding that the bills of lading properly incorporated the charterparty. Cargo argued, in part, that there was insufficient reference to the charterparty in the bills of lading because the identity of the time charterer did not appear on its face. Furthermore, cargo contended that because the word "payable" in that section of the CONGENBILL stating "Freight payable as per charter-party" had been crossed out and replaced with the word "prepaid", that that language of the bill of lading was not relevant to charterparty incorporation.

The appeals court decision

The 2nd Circuit US Court of Appeals rejected cargo's argument and maintained the only issue was whether or not the bills of lading "specifically identified" the charterparty in question. Articulating its reasoning, the court noted that CONGENBILL bills of lading are purposefully used with charterparties and that the first clause of a CONGENBILL, "Conditions of Carriage," expressly provides "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, are herewith incorporated". The court observed that while it would have been preferable to identify the charterparty in more detail on the bills of lading (i.e., by mentioning the location and parties to the charterparty), the inclusion of the date of a charterparty together with references to a charterparty made on the bill's face and overleaf was "sufficient to identify the charterparty with specificity needed to give effect to the intended incorporation".

The appeals court was also not persuaded by cargo's argument that the insertion of the word "prepaid" rendered the reference to the charterparty on the face of the bill of lading a nullity for the purpose of incorporation. The court held that "whether or not the payment provision

has independent legal significance in relation to the charterparty, it certainly served to identify it which is all that we are supposing it to do". The court went further by citing an analogous case, *Steel Warehouse Co. v. Abalone Shipping Ltd. of Nicosai*,³ which held that a "sophisticated party" has constructive notice that the common, internationally recognised CONGENBILL form can incorporate a charterparty only by date, despite an absence of the identity of one of the parties to the charterparty on the bill of lading.

Conclusion

The decision is significant because an appellate court has reaffirmed existing US precedent. If a bill of lading contains language seeking to incorporate a charterparty and expects the issuer of the bill of lading to effect incorporation by inserting only the date of the charterparty, then incorporation of the charterparty and its arbitration clause is achieved by insertion of the charterparty date. It is well settled under US law that a party to a bill of lading (whether or not negotiated) into which a charterparty has been successfully incorporated has constructive notice of that charterparty arbitration clause and, thereby, will be bound to arbitrate a dispute if the terms of the clause apply to that party/dispute.

1 346 F.3d 281, 2nd Cir, (N.Y.), Oct 8, 2003.

2 46 U.S.C. §1300 et seq.

3 141 F.3d 234, 237 (5th Cir. 1998).

Appendix

Gard Guidance on Bills of

The following is an overview of the contents of the Gard Guidance on Bills of Lading publication.

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