



Incorporation of Charter Party Terms into Bills of Lading

Many bills of lading seek to incorporate the bulk of their governing terms by way of express reference to a particular charter party. One reason for incorporation is to give certainty to the question of what law and jurisdiction will apply between the carrier and the consignee.

As a matter of English law the extent to which the incorporation is effective will depend upon the wording of the incorporation clause. Some standard form bills, like Congen 2007, are designed to incorporate all terms including the law and jurisdiction of the referenced charter party. Congen 2007 reads:

“(1) All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated.”

Other bills of lading simply state “all terms as per cp dated...”. Though similar, these two different wordings can have drastically different results as to what terms are incorporated into the bill of lading contract. The following Claims Guide sets out the position under English law but the caution as to the applicability of these principles when English law does not apply contained in the conclusion should be carefully noted.

What is incorporated?

Under English law, the extent to which terms from the charter party will be incorporated into the bill of lading depend upon several factors including;

- Whether or not terms that are said to be incorporated actually exist at the time the incorporation is said to take place;
- Whether the clause to be incorporated is consistent with other terms in the bill of lading; and
- Whether the bill of lading describes the clause it seeks to incorporate

There must be a charter party or clause in existence before its terms can be incorporated into a bill of lading. If the charter party does not exist prior to issue of the bill of lading, there can be no incorporation of its terms into the bill of lading. There is extensive case law on what ‘existence’ means, resulting in the general rule that if terms are not reduced to writing before issue of the bill of lading, they cannot be incorporated. If some terms, but not all, have been put in writing and are said to be incorporated in the bill of lading only those which were in writing at the time the bill is issued can be incorporated.

It is important to note that where terms in the charter party are inconsistent with those in the bill of lading, the bill of lading terms will prevail.

Finally, to determine what clauses from the charter party are incorporated, one should look at the exact wording of the incorporation clause. With only general wording like “all terms as per cp dated...” the entirety of the law and jurisdiction and dispute resolution provisions of the charter party will not be incorporated. Whilst the choice of law in the governing charter may be incorporated by use of general wording, jurisdiction can only be incorporated by express reference. Some standard forms, like Congen 2007, include reference to terms, conditions, liberties and exceptions and also expressly refer to law, jurisdiction and dispute resolution. This wording has developed as a result of a string of case law and should be included where the intention is to incorporate all terms of the charter party insofar as possible.

Other Charter Party Terms Incorporated into the Bill of Lading

Successful incorporation does not mean that consignees will necessarily become liable for all obligations of the charterer to the owner. The terms that will apply will be those relevant to shipment, carriage, discharge of cargo and payment of freight. As an example, the consignee could be responsible for the cargo stowage if the charter party stowage clause

making the charterer responsible for it is incorporated into the bill of lading -see EEMS SOLAR [2013] 2 Lloyd's Rep. 487, where the bill of lading incorporated a Gencon charter party which provided 'The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the charterers, free of any risk, liability and expense whatsoever to the owners.' The English High Court found "The parties must have intended responsibility for stowage to be transferred to the shippers/ cargo receivers. That was the natural consequence of the agreement that the owners would not be responsible".

Additionally, a charter party provision giving ship owners a right to lien a cargo that does not belong to charterers will depend upon whether that right to lien is incorporated into the bill of lading. Please see the Claims Guide 'Liens on Cargo in a Nutshell' for further information on exercising a right to lien.

Law and Jurisdiction Clauses

Law and jurisdiction clauses from a charter party must be expressly referred to in the bill of lading to be incorporated. This has been the subject of recent case law.

In the CHANNEL RANGER [2014] EWCA Civ. 1366 a bill of lading stated that it incorporated a 'law and arbitration clause' from a charter party identified on the bill. However, that charter party actually had an English law and High Court jurisdiction clause -not arbitration. The Court held

that this was a mistake and could be rectified to give effect to the parties' intentions. The incorporation in the bill of lading therefore meant 'law and Court jurisdiction clause' despite clearly stating arbitration.

In general, the Courts appear to show a willingness to stretch language to give effect to the incorporation of law and jurisdiction clauses in accordance with the modern contextual approach of interpretation of commercial contracts that is adopted by the English Courts.

Failure to refer to a specific charter party in the bill of lading

It is always advisable to expressly identify the charter party that is to be incorporated, for sake of clarity. Where a bill of lading states that it incorporates the terms of a charter party, but then does not refer to that charter party by date or any other means, English Courts will generally apply the following methodology:

- If only one charter party exists that could be incorporated, those terms are incorporated;
- If there is a chain of charter parties, the head charter party will be incorporated unless one of the following applies;
- If a sub charterer is the bill of lading carrier, the sub charter party will be incorporated; or
- If there is both a time charter party and a voyage charter party, the voyage charter party terms will usually be incorporated (see THE NANFRI [1978] 1 Lloyd's Rep. 287)



Conclusion

Under English law, each circumstance and wording will be considered on an individual basis and the above should be considered as a general guide only. Additionally, such methodology does not apply in all jurisdictions. If English law does not apply and a charter party is not referred to specifically, there is a real risk in some jurisdictions that no charter party terms would be incorporated at all. This can result in a "jurisdiction race" and additional expense. If the intention is to have the terms of a charter party and in particular the full effect of the law and jurisdiction clause incorporated into a bill of lading, it is highly recommended that the charter party is clearly identified (eg by stating the date of the charter party) on the bill of lading and wording such as that provided in the Congen 2007 bill of lading is used.

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This article was written by Erin Walton in the Club's London office with additional input from Thomas Cooper LLP.

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