Bills of Lading 5 - Cargo Claimants' Rights and Liabilities

Disputes may occur at the discharge port between owners and cargo interests.

Cargo interests will often claim against the owners under the bills of lading, as the contract of carriage. The intention of this note is to provide owner Members with some general guidance on the key issues to consider when such claims are presented. Such issues include what obligations cargo interests may have with regards to the cargo, and what recourse owners may have against cargo interests or Charterers, if cargo interests behave unreasonably with respect to delivery of the cargo.

If a claim is asserted against owners as the carrier under a bill of lading, owners should consider the standing of the parties involved, whether the bill of lading is indeed the correct document to determine the contractual relationship between the owners and the party making the claim.

What is the contract of carriage?

Owners should check which documents comprise the terms and conditions of the contract of carriage, and ensure they have all the documents containing such terms to hand. Is the bill of lading the contract of carriage or are the terms contained in another document?

In order to check what the contract of carriage is, consideration should be given to the relationship of the parties involved.

(i) Relationship between Cargo Receiver and Carrier:

A transferrable bill of lading may be transferred from a person with title, to a person without title i.e. from a consignee named in the bill of lading to a consignee not named in a bill of lading. This allows trading of the goods on the voyage.

A transferable bill of lading will be the **contract of carriage** as between a carrier and a cargo receiver, to whom the original bill of lading has been lawfully transferred.

Owners should ensure they obtain a complete copy of the original bill of lading (both front and back pages) to check the terms, and any incorporated documents, such as the applicable charter party, including the applicable law and jurisdiction provisions or any agreement for arbitration.

(ii) Applicable terms referenced in a bill of lading:

Owners should check whether any charter party terms are said to be incorporated into the bill of lading: is a specific charter party referenced (usually by date) in the incorporation clause? If not, owners need to consider which charter party applies as a matter of construction, and if they do not have this already, obtain a full copy of it. The answer may not be straightforward if there are multiple charter parties.

Under English law, there is a presumption that if the parties to a bill of lading neglect to insert the date of the applicable charter party, or insert an incorrect reference (i.e. to a charter party that does not exist) the head time charter party will apply and be incorporated, because this is the charter party to which the owner is a party (unless the vessel is demise chartered).

This presumption is displaced if there is a sub voyage charter party, in which case the sub voyage charter party is the applicable charter, because this is more closely connected with the carriage of the goods and the particular voyage performed under the bill of lading. Owners should seek to obtain a copy of the sub voyage charter to check the terms as soon as possible. The presumption is also displaced if the bill of lading is a charterers' bill, in which case the charterer is the carrier.

Owners should also consider the wording of the incorporation clause in the bills of lading. General words of incorporation (i.e. "*all terms, conditions…*") are only capable of incorporating the germane terms of a charter party, such as those relating to loading, carrying, discharge and payment of freight. Terms which have no connection to the carriage of the cargo, or onerous terms, such as demurrage obligations and liens, are not likely to be incorporated. Ancillary clauses, such as entire agreement clauses, will generally not be incorporated into a bill of lading unless specifically mentioned. There must also be specific express wording to incorporate a jurisdiction clause or an arbitration agreement; a statement that all terms are incorporated is not sufficient to incorporate these provisions.

(iii) Relationship between a shipper and a carrier:

In the case of the contractual relationship between a shipper and a carrier, the bill of lading will generally only be evidence of the contract of carriage. This is because the contract of

carriage will have been arranged prior to the issue of the bill of lading, and other documents, such as a booking note or fixture note may be relevant to determine the terms agreed between a shipper and carrier.

Where the shipper is also the charterer, the contract of carriage will be the charter party and the bill of lading itself has no contractual effect. However the bill of lading will still serve as evidence of receipt of the goods, and will still function as a document of title, if transferable.

Once the terms of the contract of carriage are identified, Members should check:

(a) Whether the claim is being made against the contractual carrier;

(b) Whether the cargo interests have a right to sue under the contract of carriage.

Who is the carrier?

It is important to check the contract of carriage to see whether cargo interests have claimed against the right party.

The contractual carrier may not necessarily be the owner, because the bills of lading may name the charterers or another party as the carrier. This is a question of analysing the wording in the bill of lading and applying the rules of construction. Under English law the form of the bill of lading is not necessarily conclusive. Where the bill of lading is signed by the master, the carrier will usually be held to be the registered owner. Where the vessel is demise chartered, the master's signature is likely to bind the demise charterer.

Pursuant to the Hague and Hague-Visby Rules the carrier will be a named party in the contract of carriage and this could be the owners or charterers; the carrier is not necessarily the physical carrier. The distinction may not be so important in some jurisdictions where the receiver may pursue a claim against the owner as the physical carrier as well as the named carrier under the bills of lading. The Hamburg Rules impose a joint and several liability on the named carrier and the actual physical carrier. However the determination of the applicable law and jurisdiction for a cargo claim, in each case, will be fact specific, the scope of which is not covered in this article.

Do the claimants have title to sue?

The contract of carriage will assist with identifying whether the claimants have title to sue. Where the bill of lading is the contract of carriage, only the lawful holder of a bill of lading is the party to the contract of carriage with the carrier, and has title to sue the carrier.

Under English law, section 5(2) of the Carriage of Goods by Sea Act 1992 defines a lawful holder of a bill of lading, and states the following:

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

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

Often a party who brings a claim against the carrier and may even arrest the ship is not the lawful holder of the bill of lading, and may be, for example, the buyer of the cargo under a sale contract, who has not received by way of transfer or indorsement a right to assert a claim under the bill of lading.

The fact that the claimant is a party to a sale contract does not necessarily mean he is the lawful holder of the bill of lading.

The distinction is important. The sale contract determines title to the goods, but this is immaterial to the transfer of contractual rights under a bill of lading. "Title" in the context of bills of lading means the right to receive possession of the goods from the carrier. The lawful holder of a bill of lading is entitled to take delivery of the goods upon surrender of the original bill of lading, and the carrier has no obligations to deliver the cargo at the discharge port to anyone else.

A party to a sale contract, who is not the lawful holder of the bill of lading, may have recourse against their counterparty to the sale contract for any alleged losses, but will have no right to sue the carrier under the bill of lading.

Owners should demand the surrender by the cargo claimants of the original bill of lading for verification. If there are disputes under the financing arrangement (such as under a letter of credit) one of the banks involved may still be in possession of the bills of lading at the time the goods reach the discharge port. In such a case, the lawful holder of the bill of lading will most likely be the bank (even if it is only acting as an agent). Accordingly, the ultimate cargo interest demanding delivery may not have possession of the original bill of lading.

Careful attention must be paid when checking original negotiable bills of lading, such as "to order" or "bearer" bills, to ensure that the final endorsee or bearer is the same as the party asserting a claim against the carrier.

It is also important to check that the sale of the goods to the person bringing a claim, did not take place after the goods were delivered at the discharge port, or in the case of a casualty, after the cargo has been lost or declared a

constructive total loss. In these situations, the bill of lading ceases to give a right to possession upon delivery. The claimant may, however, acquire residual rights under the bill of lading - i.e. to claim damages for misdelivery claims.

In the case of negotiable bills of lading, the contractual rights of each lawful holder will be extinguished each time the bills of lading are transferred to the next lawful holder by delivery or by indorsement. This may be different to other shipping documents, such as a sea waybill, where the transfer of the document is without prejudice to the rights of the original party to the contract. The obligation under a sea waybill is to deliver to the named consignee or to the shipper's nominated recipient of the goods, provided that person is the named consignee or nominated recipient. Under a "straight" bill of lading, which names a consignee and cannot be transferred, delivery must still be made against the original bill of lading.

It should also be remembered that a person becomes the "lawful holder" of a bill of lading under The Carriage of Goods by Sea Act (COGSA) 1992, if he becomes such a holder in good faith. This will not cover persons who become the endorsee on a set of bills by fraudulent means.

Once the parties to a contract of carriage have been established, owners should consider whether they could assert any claims against the cargo claimants under the bills of lading.

Potential liabilities of cargo claimants under bills of lading

Cargo claimants may assume liabilities under the contract of carriage if they seek to take the benefit of the contractual rights assigned to them under the bills of lading.

For example, the lawful holder of the bill of lading may assume certain liabilities if he (COGSA 1992 s. 3):

1) Takes or formally demands to take physical possession from the carrier of any goods to which the bill of lading relates;

2) Makes a formal claim against the carrier by way of court or arbitration proceedings, such as arresting the ship. (This does not include a situation where the cargo claimants have not instigated legal proceedings but have simply made a demand against the threat of arrest and received a P&I Club letter of undertaking).

Such liabilities of cargo interests may include losses arising from the shipment of any dangerous cargo, as well as a duty to take delivery of the cargo. The shipper is liable, regardless of the operation of COGSA, though not as regards the obligation to take delivery, if the bill has been transferred.

Cargo claimants may be held liable to owners for the costs of storing the cargo after physical discharge from the vessel, but pending delivery, even if the costs of doing so outweigh the value of the cargo (*The "Bao Yue"* [2015] EWHC 944).

However the recovery of such sums may be costly and difficult if the cargo claimants are based in a jurisdiction where enforcement of foreign judgments or arbitration awards is difficult, or where the cargo claimants do not have sufficient assets for the purposes of securing or enforcing owners' claim against them. The practical difficulties as regards enforcement of storage charges may be mitigated by any local rights to sell the cargo.

Other considerations: challenge to jurisdiction by owners

Cargo claimants can sometimes commence a suit under the bill of lading in the country of discharge, in direct conflict with the law and jurisdiction clause in the bill of lading if it provides for the dispute to be determined elsewhere.

In such cases, depending on the value of the claim and whether or not it would be more advantageous to defend the claim in the jurisdiction or arbitral forum named in the bill of lading, owners may wish to consider whether an anti-suit injunction can be obtained, restraining the cargo claimants from proceeding with their action in the local courts of the country of delivery. In such circumstances assistance from the Club should be sought.

Other considerations: recovery from charterers

Owners should consider the terms of the charter party and whether they are able to seek recourse against the charterers to recover any losses arising from the cargo interests.

Owners may be able to claim against charterers pursuant to an implied right of indemnity under the charter against Charterers for the consequences of complying with charterers' orders and delivering the cargo (*The "Island Archon"* (CA) [1994] 2 Lloyd's Rep 227). They will probably not have this right if the cause of the cargo claim was the vessel's

unseaworthiness or other actions of the vessel / owner or breach of charterparty by owner.

Charterers may be held liable to owners for the actions of "charterers' agents", a definition which might be extended to include sub charterers, shippers and consignees. However, whether or not such actions by the charterers' agents are attributable to charterers will depend on the specific provisions in the charter party and the relationship between the charterers and cargo interests. In *The "Global Santosh"* [2016] 1 Lloyd's Rep 629, head charterers won in the English Supreme Court, reversing previous Court's findings, that a vessel arrested by a sub-sub-charterer in relation to a sale contract demurrage dispute fell within an off hire proviso or exclusion. The Supreme Court found that the arrested vessel **was** contractually off-hire and head charterers were not obliged to pay charter hire. The arbitrators' original majority decision in head charterers' favour was restored. *The Supreme Court recognised the difficulty of the issue, but ultimately preferred the reasoning and conclusions of the original London arbitrators that a mistaken arrest of the vessel could not be regarded as having been occasioned by the time charterer's agents in the sense the wording was used in the off-hire clause.*

Charterers bear responsibility to owners for discharging the cargo, and may be liable to owners for damages in detention or demurrage for delay at the discharge port, subject to any express exceptions to laytime and / or demurrage. The conduct of cargo interests (reasonable or otherwise) will usually not provide the charterers with a defence to such claims, if under the charter, the obligation for charterers to discharge is non-delegable (see *The "Andra"* [2012] 2 Lloyd's Rep 587).

What damages and losses are recoverable from charterers would also depend on the factual matrix of the dispute, and would be subject to the usual English law rules of causation and remoteness.

Cargo claims made up the charterparty chain

Although this Guide primarily considers cargo claims made under bills of lading, owners should note that cargo claims may also be made by cargo interests, who are sub-charterers, against their disponent owners, and any liability may be passed up the charter party chain to head owners. Accordingly, Members should check the terms of their charter party to see if the Hague or Hague-Visby Rules are incorporated, and/or whether the parties have agreed for cargo claims to be determined under the Inter-Club Agreement, which provides for an automatic allocation of liabilities between owners and charterers, depending on the type and cause of the claim.

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