



Practice of Maritime Business: Sharing Experience

Key Elements in Cargo Claims

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KEY ELEMENTS IN CARGO CLAIMS

By

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1 **BILLS OF LADING**

(a) **Bills of Lading – Legal summary**

- **The bill of lading as a receipt**

One of the functions of the bill of lading is as a receipt. It will be of vital importance to the carrier, shipper and the receiver that the information contained in the bill of lading is accurate particularly as to quantity and description of goods.

The starting point in examining the bill of lading as a receipt is to set out precisely why a shipper can demand certain terms on a bill of lading. Virtually all bills of lading will be subject to the Hague-Visby Rules either by statute or by contract. Article III provides:-

“3. After receiving the goods into his charge, the carrier or the master or the agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing amongst other things

(a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) the apparent order and condition of the goods;

(c) either the number of packages or pieces or the quantity or weight as the case may be as furnished in writing by the shipper:

Provided that no carrier, master or agent shall be bound to state or show in bill of lading any marks, number, quantity or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a)(b) and (c).

However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party in good faith.”

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

As a receipt, the bill of lading contains certain information detailing the quantity and grades of the cargo. Bills of lading would also usually contain a representation that the cargo is shipped in “apparent good order and condition”. What is the effect of these representations?

- **Quantity/grades**

The bill of lading is a representation as to the quantity and weight of the cargo shipped.

Once the bill of lading has been transferred to a third party the carrier cannot dispute that on the face of the documents he has shipped the quantity of weight stipulated in the bill (see Article III Rule 4 of the Hague-Visby Rules). The onus is then on the shipowner to prove any shortage did not occur whilst the goods were in his custody.

Disputes often arise as to the quantity of cargo actually shipped on board a vessel and the master may in such circumstances refuse to sign a bill with figures which he considers to be incorrect. In this regard, it should be remembered that the master has the right under the proviso to Article III, Rule 3 of the Hague-Visby Rules to refuse to sign a bill of lading with figures which he has no reasonable means of checking or which he has reasonable grounds for suspecting not actually to represent the goods actually received.

This problem is usually avoided by the insertion of the words on the face of the bill “the stated weights and/or quantities and grades are supplied by the shipper and these weights and/or quantities and grades are unknown to the master”. (See for example the CONLINEBILL 2000). Such clauses are recognised under English Law.

- **The condition of the goods in shipment**

A bill of lading indicating goods shipped “*clean on board*” will state that the cargo was loaded on board in apparent good order and condition and there will be no clauses (i.e. written qualifications added by the Master) on the bill to qualify that statement. Once that bill of lading is transferred to a third party acting in good faith then the carrier is bound by that representation even if, in

fact, the goods were not in apparent good order and condition on shipment. It should be stressed however that this representation by the carrier is limited to the condition (as opposed to the quality) of the goods and secondly, only to that condition which is apparent i.e. visible.

In the “*David Agmashenebeli*” Colman J described the Master's duty as follows:

"The approach which, in my judgment, properly reflects the master's duty is that the words used should have a range of meaning which reflects reasonably closely the actual apparent order and condition of the cargo and the extent of any defective condition which he, as a reasonably observant master, considers it to have.

Against this background, the shipowners' duty is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master."

- Practical Example: The “DAVID AGMASHENEBELI”¹

- **Letters of indemnity**

From the shipper's point of view in order to obtain payment under the letter of credit it is usually necessary to present a bill of lading stating the condition of the cargo which corresponds with the sales contract. It is imperative from a shipper's point of view that the bill of lading is clean stating that the particular quantity of cargo was shipped in apparent good order and condition by a certain date. There is therefore a huge incentive for the shippers to ensure that clean bills of lading are issued by the master. The shipper may offer the carrier a letter of indemnity to indemnify the carrier against any claims by the receiver for issuing clean bills of lading. As a general rule, however, the indemnity is unenforceable if the courts considered it manifestly unlawful (i.e. illegal contract). Letters of indemnity are very popular in commercial practice as they can appear to resolve certain practical problems. However, in law they can be very problematic and great care should be taken before giving or relying on an LOI.

- **The bill of lading as a document of title**

To describe a bill of lading as a document of title means that the bill of lading has a negotiable quality i.e. the bill of lading may be indorsed in favour of a third party thus transferring to the third party the right to demand possession of the goods represented by the bill of lading. Not all bills of lading are documents of title. The courts have accepted that documents called waybills which expressly stated that they were non-negotiable and named specific

¹ [2002] 2 All ER (Comm) 806

shippers and consignees were not negotiable documents. There was however a middle category of documents known as straight bills of lading which appeared to be bills of lading but instead of permitting the consignees to endorse the bill of lading stipulated a named consignee with no option to assign or make the bill over "to order". Recently, the English court in the "HAPPY RANGER"² bent over backwards to find a straight bill of lading was in fact a negotiable document. The matter has since been considered by the House of Lords in the "RAFAELA S"³ which endorsed this view: if it looks and smells like a bill of lading, it is a bill of lading.

- The effect in practice:

This is relevant for a number of reasons. Firstly, the Hague-Visby Rules which sets out the rights and obligations on a shipowner will only apply compulsorily to negotiable bills of lading. Secondly, there are obligations on a shipowner with regard to delivery of products where the bill of lading is negotiable which differ from waybills.

- Transfer of Property and title to sue?

It should also be noted that the fact that the bill of lading is a document of title does not necessarily mean the indorsee of a bill of lading obtains property in the goods named in the bill of lading. The contract of sale between the indorser and indorsee will often contain express provisions as to when property will pass.

Traditionally in England the position was that to sue under the bill of lading it had to be shown that this was the instrument by which property had passed to the holder. Also, the owner of the goods could not necessarily be regarded as a party to the contract of carriage for the purpose of suing under the contract. The problem has been addressed by the Carriage of Goods by Sea Act 1924. This Act has effectively removed most of the title to sue problems. Section 2(1) provides as follows:-

"Subject to the following provisions of this section, a person who becomes

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract;

or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order...

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him

² [2002] 2 Lloyd's Rep 357

³ [2005] 1 Lloyd's Rep. 347

all rights of suit under the contract of carriage as if he had been a party to that contract”.

The lawful holder includes a person with possession (in good faith) of the bill as a result of delivery of an indorsed bill i.e. the bank and subsequently the buyer. There is an exception to this general rule within Section 2(2) which provides that there is no transfer of rights if, when the person becomes a holder of the bill, the bill no longer gives a right as against the carrier to the possession of the goods which would be the case if the goods have already been discharged and delivered and are subsequently sold under an arrangement making use of the bill of lading to transfer title. As with any complicated legislation, there are exceptions to this exception covering transfers of the bill of lading under pre-existing contracts.

In summary, identifying who can sue under a bill of lading should no longer be a major issue. Provided a person becomes a lawful holder (i.e. no fraud) of the bill, then he can bring proceedings against the carrier.

- o Discussion

- **Issues concerning incorporation of charterparty terms**

Whether or not any particular provision of the charterparty is effectively incorporated into the bill of lading is, in the first instance, a matter of construction of the bill of lading. Once it has been determined that the words of the bill of lading are sufficient to incorporate a provision of the charterparty then that provision will be written into the contract of carriage.

Disputes as to whether charterparty terms are incorporated into bills of lading are most commonly found in battles over jurisdiction. The English courts have concluded that an arbitration clause in the charterparty will not be incorporated into the bill of lading without specific words of incorporation and only then if the wording of the arbitration clause is worded so as to make sense in the context of the bill of lading and does not conflict with other provisions under the bill. Alternatively, it is incorporated where there are general words of incorporation but the charterparty arbitration clause makes it clear that the arbitration clause is to govern bill of lading disputes.

Note however that if the charterparty says “English law and arbitration” then English law would be incorporated into the bill of lading in the absence of any contradictory terms and the English courts would be prepared to accept jurisdiction for this case on the basis that the parties have contractually agreed that it should be subject to English law. It is also important to note

that incorporation of a charterparty may, subject to the terms incorporated, affect the relevant time limits for the claim. In certain circumstances it may also be appropriate for a claim to be brought under the charterparty rather than the bill of lading.

2 Identifying the Carrier

For a cargo claimant, it is essential to identify who is the carrier under the contract of carriage because if he gets it wrong the claim will fail, it will probably be time barred against the correct carrier and in many jurisdictions you will have to pay the legal costs of the party you wrongly sued. Where the claimant is a charterer then the defendant (ie the contractual carrier) will be the other party named in the charterparty. Where the contract of carriage is the bill of lading then the position is not as simple. In either case the overriding concern of the claimant is not only to correctly identify who can be sued, but also to find a party who is actually capable of paying the claim if successful. There are a number of different scenarios:-

- **Where the carrier is named in the bill of lading**

This is the most straightforward scenario. Where the reverse of a bill states that "... in this bill of lading the carrier means ABC Ltd" then in the absence of any subsequent, overriding terms ABC Ltd will be the contractual carrier. Similarly where the bill contains on its face the words "signed by XYZ as agents for the carrier ABC Ltd ..." then it is likely that ABC Ltd will be the contractual carrier.

- **Where the carrier is not named in the bill of lading**

In this situation the bill of lading may still help by containing an identity of carrier or demise clause. If not then the claimant is left to work out the identity of the carrier by using general principles of interpreting bills of lading. We look at these scenarios below.

- Identity of Carrier Clauses

A good example of such a clause appears at clause 17 of Conline bill 1978 (a standard liner bill of lading):-

"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. If, despite the

foregoing, it is adjudged that any other is the Carrier and/or Bailee of the goods shipped hereunder, or limitations of and exonerations from, liability provided for by this Bill of Lading shall be available to such other. It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier nor Bailee of the goods”.

As a matter of English law, these identity of carrier clauses are valid.

- Demise clauses

A typical demise clause would be as follows:-

“If the Ship is not owned or chartered by demise to the Company or Line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appears to the contrary) the Bill of Lading shall take effect as a contract with the Owner or demise charterer as the case may be as principal made through the agency of the said Company or Line who act as agents only and shall be under no personal liability whatsoever in respect thereof”.

A note of caution however: although English law recognises identity of carrier and demise clauses many jurisdictions do not (for example, the USA and many continental civil jurisdictions). This can lead to difficult practical problems, not least where the governing law is based on the identity of carrier clause.

Where a bill of lading gives no clear statement as to who is the contractual carrier, then a cargo claimant will need to rely upon the following general rules:

- (A) A bill of lading signed by the master or his agent (including the charterer) evidences a contract with the employer of the master. i.e. the owners, unless the vessel is demise chartered (in which case the contract is with the demise charterer). This is the case even where the master or agent has no express authority to sign bills because the courts deem the master to have apparent authority vis-à-vis third parties.

So for example, if a bill states:-

“... IN WITNESS whereof, the master or agent of the said vessel has signed the number of Bills of Lading indicated below ...”

Prima facie, therefore, the carrier on this would be the vessel owners (or demise charterers).

- (B) Written/type written amendments take precedence over standard printed clauses.
- (C) A court will try to give effect to and to make sense of all relevant terms in the bill of lading.
 - o Discussion of identity of carrier issues.

3 Important provisions of a bill of lading contract

In the final part of this paper, I touch upon the payment of freight under a bill of lading contract and discuss two important provisions in bills of lading: the clause paramount and law and jurisdiction clauses.

- *“Freight pre-paid”*

It is very common to see bills of lading containing the phrase “freight pre-paid” on their face. The effect of marking the bill of lading “freight pre-paid” is to stop the owner from claiming freight against any indorsee of the bill of lading either by action or by the exercise of a lien. If in fact the owner has not received freight from the charterer of the vessel under the charterparty then he will of course have a direct action against the charterer. He cannot however interfere with the cargo when the indorsee of the bill of lading attends at the discharge port and presents a bill of lading to collect the cargo.

- Paramount clauses

The dictionary definition of the word “paramount” is “above all others in rank, supreme”. The definition applies to the paramount clause in a bill of lading and it overrides all other clauses in the bill and in the event of a conflict between its terms and those contained in the rest of the bill its terms take precedence. The paramount clause is frequently labelled as such in the bill – see for example clause 2 of the Conline bill which provides as follows:-

“2. General Paramount Clause.

The Hague Rules contained in the International Convention for the unification of certain rules relating to bills of lading dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this contract. When no such enactment is enforced in the country of shipment the corresponding legislation of the country of destination shall apply, but in respect of the shipments to which no such enactments are compulsorily applicable the terms of the said Convention shall apply.

Trades where Hague-Visby Rules apply.

In trades where the International Brussels Convention 1924 is amended by the Protocol signed at Brussels on February 23rd 1968 the Hague-Visby Rules applied compulsorily the provisions of the respective legislation shall be considered incorporated in this bill of lading. The carrier takes all reservations possible under such applicable legislation relating to the period before loading and after discharging and while the goods are in the charge of another carrier and to deck cargo and live animals.”

The general paramount clause in the Conline bill is fairly detailed. It makes it clear what form of the Hague Rules will apply to the particular contract of carriage and further makes it clear that if the Hague-Visby Rules apply compulsorily then such rules are by contract incorporated into the contract of carriage. The Congen bill is similarly detailed in its incorporation of the general paramount clause.

Many other bills of lading are not quite so clear and simply state that a paramount clause is to be incorporated. In *Seabridge Shipping AB v AC Orsleff's Eff's A/S*⁴ it was held that the term “clause paramount” clearly meant that the contract incorporated the Hague Rules. Therefore, if the parties to a contract wanted to bring in the Hague-Visby Rules then they had to use alternative wording such as “general clause paramount”. As a final point, particular care should be taken to consider the paramount clause in the context of time limits. This is because the effect of the paramount clause is often to import a one year time limit in a way that is not necessarily clear or straightforward.

The above provides a very brief summary of some very complex issues. The answer in any given situation will depend on the facts and law applicable to that particular case and legal advice should be sought wherever necessary. Care should also be taken to ensure that in appropriate cases advice is obtained promptly, particularly in those cases where the time limit may be uncertain.

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⁴ [1999] 2 Lloyd's Rep 685