

UNCTAD training course on implications of the COVID-19 pandemic for commercial contracts

Bills of Lading and Covid 19

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¹ The views expressed are those of the author and do not necessarily reflect the view of the United Nations.

1 Bills of Lading and Covid-19

1.1 Introduction

A bill of lading is one type of shipping document issued by the carrier, the person that undertakes to carry the goods to destination, to the shipper, the person that presents the goods to the carrier for shipment. The legal identity of the carrier and identity of the shipper may not be a straightforward issue as the parties to the bill of lading may be represented by agents. The bill of lading is normally issued after the completion of shipment and usually in a set of three originals. The bill of lading has three functions, namely, it is a receipt for the goods shipped, it is a document entitling its holder to the delivery of the goods at the port of discharge and it is also evidence of the contract of carriage. These three functions are explained below.

1.1.1 The bill of lading as a receipt

The bill of lading will normally have on its front a description of the goods, their apparent condition any identification marks, information on the shipment (this includes: the name of the ship on which the goods have been shipped, the date and the port of shipment as well as the date and the place where the bills of lading were issued), information on the port of discharge and the delivery of the goods, including the name of the consignee and the address for notification. Because the bill of lading is signed by the carrier, normally on information provided by the shipper, in the hands of the shipper the bill of lading is only prima facie of what has been shipped.² The significance of this is that the carrier can dispute the information of the bill of lading by providing appropriate evidence if a claim on cargo damage is advanced by the shipper.

However, after the bill of lading has been transferred to a third party buyer it becomes conclusive evidence and gives rise to an estoppel.³ This means that any additional information regarding the goods which may have been known to the shipper cannot be imputed to the bill of lading holder and the carrier is taken to have guaranteed the description of the goods as it appears on the bills of lading. In practice, carriers protect themselves by including in all standard forms of bills of lading statement signifying to the bill of lading holder that the description of the goods is provided by the shipper and it is unknown to the carrier.⁴ Normally only the “apparent order and condition” of the goods is commented upon.⁵ This

² *J Aron & Co (Inc) v Comptoir Wegimont* [1921] 3 KB 435.

³ *Hughes v. Metropolitan Railway Co.* (1877) 2 App.Cas. 439. However, in cases where it can be proven that the receiver of the goods was aware that the statements in the bill of lading were false, he may not be able to rely on the estoppel, see *Evans v James Webster Bros Ld* (1928) 34 Com Cas 172.

⁴ In *New Chinese Antimony Co Ltd v Ocean Steamship Co Ltd* [1917] 2 KB 664 a bill of lading stating that 937 tons of ore have been shipped, including a marginal notice saying a quantity said to be 937 tons” and including the (standard to many bills of lading) statement that “weight, measurement, contents and value (except for the purpose of estimating freight) unknown” was not even prima facie evidence for the shipment of 937 tons.

⁵ See *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamship Co Ltd* [1947] A.C. 46 where the bills of lading were issued stating “received in good order and condition” and “subject to the terms of the mate’s receipt”. The mate’s receipt stated that “many bags stained, torn or sewn”. This bill of lading was held not to be

function of the bill of lading is unlikely to be affected much by Covid-19 measures except where a survey is contractually required but cannot happen due to quarantine restrictions.

1.1.2 The bill of lading as a document of title

All shipping documents including bills of lading include information on the identity of the consignee. A name may be included, in which case the bill is considered a “straight” bill of lading. The more common arrangement is to include the word “order” after the name of the consignee or the inclusion. In other cases, the word “bearer” is inserted instead of a name for the consignee. In the latter two cases, the bills are transferable. Thus, the final recipient is, for such documents, subject to change and therefore the shipowner cannot rely on the name of the consignee in order to deliver the goods. Instead, the shipowner relies upon the presentation of the bill of lading (at least one, if a set of three originals has been issued) in order to ensure it delivers the goods in accordance with the contract and is thus not exposed to claims for conversion or misdelivery.⁶

This second function of the bill of lading, enabling the bill of lading holder to exclusively demand delivery of the goods from the carrier at the port of discharge, is described by saying that the bill of lading is a document of title. This does not mean that the holder of the bill of lading is necessarily the owner of the goods but only that, from the point of view of the carrier, and to the extent the carrier does not receive any contradictory information from the shipper, its duties with respect to the delivery of the goods can (only) be fully discharged by giving the goods to the holder of the bill of lading. After this is done, any additional original bills that may have been issued in a set of three lose their function as documents of title. A parenthesis must be made here to note that it has been held that bills of lading which are made out to a named consignee, without the words “or order”, and which therefore cannot be transferred (straight bills of lading), still require to be presented to the carrier in order to obtain delivery.⁷ Thus, these straight bills of lading are not negotiable (transferable), but they are still considered as a document of title that needs to be presented and therefore provides its holder with the exclusive right to demand delivery from the carrier. Presentation of the bills of lading can of course be disrupted by Covid-19 either by delays in the physical sending of the bills from the seller to the buyer or by disruption of the agents at the port of discharge who normally collect the bills. Such delays may give rise to the detention of the ship and damages. In cases where the bill of lading is not available and the carrier delivers the goods against a Letter of Indemnity instead, he remains liable to the lawful holder of the bill of lading. The problem of delayed bills of lading can be avoided if electronic alternatives are used instead.

1.1.3 The contractual character of the bill of lading

Bills of lading used in the liner trade include the carrier’s terms on their back side. Therefore, they are self-contained and do not incorporate the terms of another contract. By contrast, bills of lading issued under

conclusive evidence of the condition of the goods. The bill of lading holder was getting notice by the reference to the mate’s receipt.

⁶ *Glyn Mills Currie & Co. v. East and West India Dock Co.* (1882) 7 App. Cas. 591.

⁷ *The Rafaela S* [2005] 1 Lloyd’s Rep 347.

a charterparty normally incorporate the charterparty's terms. This arrangement can transfer obligations and rights from the charterparty to the bill of lading. Normally the charterparty is not available to the bill of lading holder who obtains the bills without having complete knowledge of what the contract of carriage entails. In the context of Covid-19, a major concern for bill of lading holders may be the incorporation into the contract of carriage of Covid-19 charterparty clauses, some of which, as has been discussed, provide a wide liberty to the shipowner with regard to where the goods will be delivered and also impose the costs of such liberty to the charterer. This means that the bill of lading holder may be informed that the goods are delivered at another port and, in a worst-case scenario, be obliged to pay for the expenses of discharging them there and shipping them to the port of delivery. If it tries to sue the carrier for breach of contract it may find that the Covid-19 clause incorporated deems the carrier's actions as contractual. This, however, will depend on the wording of any incorporation clause and on whether courts consider that a general incorporation clause effectively incorporates pandemics clauses too, or whether express words to this effect are required.

The front of the bill of lading also includes information on whether freight is "prepaid" or whether freight and in some cases, demurrage is "payable as per charterparty" with a reference to the date of the charterparty. The latter statement makes the bill of lading holder aware that it may have to pay freight and demurrage in accordance with the charterparty terms. Other terms of the charterparty may also be incorporated and this may create additional risks for the bill of lading holder. Where, for example, the charterparty provides for an option to deliver the goods at another port where the port of discharge becomes difficult to access then, incorporating such a clause into the bill of lading may have the effect that the of discharge at this other port, the transshipment costs and any damages may be for the consignee's account. This is especially relevant for some of the Covid-19 clauses available.

For charterparty bills of lading, the back of the bill of lading will have a term incorporating part or whole of the charterparty terms this will be discussed further below, as well as a term incorporating the Hague or Hague-Visby Rules (the so-called clause paramount), potentially an applicable law and dispute resolution clause and a few other selected clauses to which the holder of the bill of lading thus becomes aware of.

These terms are included directly in the bill of lading document or incorporated from the charterparty together with any special agreements the shipper may have made with the carrier form the terms of the contract for the carriage of the goods. If the bill of lading is transferred then the terms in the bill of lading document alone, that means those printed in the bill of lading as well as those incorporated from the charterparty but excluding any additional arrangement the shipper and the carrier may have made, evidence the terms of the contract between the bill of lading holder and the carrier.

A bill of lading holder, who is not the original shipper and has never negotiated any terms with the carrier, obtains contractual rights against the carrier when the document is transferred it, in accordance with the provisions of the Carriage of Goods by Sea Act 1999; transfer of the document leads to transfer of the contractual rights of the original party to the lawful holder of the bill of lading and removes them from the original party. Notably, this transfer of contractual rights is only needed where the bill of lading itself can be transferred. Thus, the treatment of straight bills of lading under COGSA 1992 is similar to seawaybills, a category of shipping documents in which the consignee is fixed and cannot change and, in addition, the shipping document does not need to be presented for the collection of the goods but instead the identity of the consignee must be verified for the goods to be delivered. An important point to note

here is that contractual rights are transferred separate from obligations. While rights are transferred by the delivery of the bills of lading to the lawful holder, contractual obligations of the shipper are only transferred under COGSA 1992 when some positive act by the bill of lading holder with respect to the goods is undertaken.⁸ Such an act could be demanding the delivery of the goods or making a claim against the carrier for damage or loss of the goods. A second observation is that other rights and obligations, for example in negligence or in bailment are not transferred by COGSA 1992 and this means that claims can, in some circumstances be brought for breach of such rights by entities other than the bill of lading holder.

The relevance of the bills of lading to the terms of the contract of carriage is, however, paramount for bringing cargo claims against the carrier. An important point to note in this context concerns bills of lading in the hands of the charterer. If the bills of lading are held by the charterer, then the charterparty is the contract of carriage and the bills of lading terms do not have any *contractual* relevance.⁹ Any related claims between would be on the terms of the charterparty. Where however bills of lading relating to goods on board a chartered vessel have been transferred by the charterer to another party (for example under a sale contract), then the bills of lading are considered to contain the terms contract of carriage in the context of any cargo claim by the third party consignee, and these terms are typically subject to the mandatory application of the Hague or Hague-Visby Rules. This arrangement avoids the possibility of conflicts between the terms of the charterparty and those of the bills of lading and serves to protect the final consignee.

1.1.4 Incorporation of charterparty terms in a bill of lading

Where a bill of lading purports to incorporate the terms of a charterparty then the words of incorporation must give enough information to the third party in relation to the type of terms that are incorporated. Thus, the terms which are actually incorporated depend on the wording used in the incorporating clause which can be found on the back side of charterparty bills.

There is authority for the proposition that when a shipper knows (or ought to have known) that the ship is under charter he is not entitled to refuse a bill of lading incorporating the charterparty terms.¹⁰ However only if there are express words of incorporation in the bill of lading will the shipper or consignee be bound by the charterparty terms.¹¹

What is incorporated is a matter of the construction of the bill of lading. A statement that “all conditions” of the charterparty are incorporated does not incorporate the exceptions clause.¹² A statement that “all terms, conditions and exceptions of the charterparty ... are incorporated” will only incorporate terms ‘germane to the shipment, carriage and delivery of the goods and the payment of freight’. Incorporation of a charterparty arbitration clause, for instance, requires express wording to this effect in the incorporation clause.¹³

⁸ *The Berge Sisar* [2001] 1 Lloyd’s Rep. 663.

⁹ *Rodocanachi v Milburn* (1886) 18 Q.B.D. 67 at 75, 78; *The President of India v. Metcalf* [1969] 3 All E.R. 1549.

¹⁰ *Ralli v. Paddington SS.Co, 1900*, 5 Com. Cas. 124.

¹¹ *The Okehampton* [1913] P.173.

¹² *Serraino & Sons v. Cambell, [1891]* 1 Q.B. 283.

¹³ *Thomas v Portsea SS.Co. [1912]* 1 AC 1 –where the arbitration clause was not incorporated by such wording.

Note though that even where the wording of the incorporation clause includes a clause in the charterparty this does not automatically mean that the clause also operates. Its wording must make sense and must refer to the parties to the bill of lading. For example, in *The Miramar*,¹⁴ the incorporation of the demurrage clause in the bill of lading did not actually result in liability for payment of the consignee as the liability was expressed in the clause to be for the 'charterers'. This was confirmed by the existence in the charterparty of other clauses which referred to the 'consignees'. The construction of the contract may differ if all the charterparty terms refer only expressly to 'charterers' in which case courts may decide that verbal manipulation may be needed for the incorporation to be effective. In cases of inconsistency, an express clause in a bill of lading overrides any conflicting charterparty clause incorporated into the bill of lading.¹⁵

1.1.5 Incorporation of Charterparty Covid-19 clauses into bills of lading

The main question is whether the Covid-19 clauses are within the category of clauses germane to the shipment, carriage and delivery of the goods or the payment of freight. If they are, then they would be incorporated into the bill of lading. If they are not then they must be separately mentioned in the incorporation clause in order to become part of the contract of carriage evidenced by the bill of lading and thus bind the bill of lading holder.

Several standard form clauses for infectious diseases and Covid-19 have been developed and were discussed earlier in the course. Perhaps it is worth noting that the shipowner-friendly clauses all require that the charterer ensures that the clause is incorporated in all sub-charters and in all bills of lading issued under the charterparty. By contrast the charterer-friendly terms do not mention incorporation. They would nevertheless be incorporated if there are general terms of incorporation and the incorporated obligations are germane to the carriage of the goods.

Standard charterparty forms are of variable length and include several types of clauses some of which grant liberties to the shipowners which resemble the liberties granted by the Covid-19 clauses and some of which operate to alter the performance by the carrier when specific conditions are met. For example, the delivery of cargo in a port other than the port of destination was considered as contractual under a clause which operated when there were strikes in the declared port.¹⁶ On that basis it is reasonable to suggest that the delivery of the goods is germane to their carriage. Thus, terms which provide for alternative ports of delivery when Covid-19 prohibits delivery at the declared discharge port are likely to be considered contractual and germane to the contract. It is however arguable that such an alternative form of performance, triggered when Covid-19 poses significant problems to the delivery of the cargo at the discharge port, would be more acceptable in the contract of carriage when the contract was concluded after Covid-19 became a general risk to shipping. Liability for costs and delays involved are also likely, it is submitted, to be considered as incorporated.

Other aspects of the Covid-19 Clauses, for example, costs arising from a failure by the charterer to declare an alternative voyage under the BIMCO Infectious clause for Time charterparties, which entitles the

¹⁴[1984] A.C. 676.

¹⁵ see for example *Gardner v. Trechmann* [1884] 15 QBD 154.

¹⁶ *The Caspiana*, [1956] 2 LL. Rep. 379 (HL).

shipowner to discharge the cargo at any port or place and claim for the costs of doing so, would be less arguable to be incorporated and, at any rate, rather difficult to transfer liability to the holder of the bill of lading for the omission of the charterer. Similarly, the parts of the shipowner friendly clauses which provide for indemnification of the shipowner for delays and losses arising after the redelivery of the vessel and which were caused because of a visit to an affected area during the charterparty are arguably not germane to the carriage of the cargo but to the use of the ship and would most likely be for charterer's account only. The bill of lading holder will not know anything about the redelivery date and such potential liability would not be within its contemplation.

Incorporated clauses, as well as express clauses in the bill of lading, will only operate if they do not lessen the liability of the carrier below the limits permitted under the Hague Visby Rules (HVR) Art. III r.8, in all cases where the HVR are applicable to the bill of lading under Art X.

1.1.6 The Hague-Visby Rules

While charterparties are typically negotiated between parties of potentially equal bargaining power, the situation is different where goods are carried under bills of lading. In these cases, the standard terms of contract, set out in the bill of lading are unilaterally determined by the carrier, often one of few global liner carrying companies in a highly concentrated industry. Historically, carriers have sought to maximize their profits by contractually excluding their liability for loss or damage to the goods or by limiting their liability to very small amounts. While an original shipper (depending on its bargaining power) could, at least in principle, negotiate or ship the goods on another ship, the situation for third party bill of lading holders was dire, in that the goods may have been damaged during the carriage by sea but their contractual rights against the carrier were worthless, because of the exclusion and limitation clauses inserted in the contract of carriage. A number of internationally agreed conventions have attempted to remedy this situation, by establishing mandatory minimum levels of carrier liability, thus providing protection against unfair contract terms of the carrier to any third party consignee. The Hague, Hague-Visby, and Hamburg Rules (as well as the Rotterdam Rules, which have not entered into force) are all efforts to harmonize the minimum obligations carriers by sea owe to bill of lading holders. The UK has adopted the Hague-Visby Rules (HVR) under the Carriage of Goods by Sea Act 1971 (COGSA 1971). The imposition of statutory standards means that the freedom of contract is restricted when bills of lading are used and are covered by COGSA 1971. The application of the HVR depends on whether the contract of carriage is evidenced by "a bill of lading or other similar document of title", thus making the requirement of presentation one of the triggers for protecting the bill of lading holder. Thus, all shipping documents which require that they are presented for the goods to be delivered, including straight bills of lading, are controlled by the HVR statutory provisions.

1.1.7 The application of Hague-Visby Rules

Under English law, the HVR have the force of law so that in cases where their application is triggered, they apply compulsorily and cannot be excluded by contract.¹⁷

For the HVR to apply, the requirements of Art. X must be satisfied. Thus, the HVR apply mandatorily to bills of lading issued in a contracting state, or where the carriage is from a port in a contracting state. The information on whether either of these conditions is satisfied is readily ascertained by inspecting the bill of lading and confirming whether the relevant state is a contracting state by checking the relevant official status of ratification information maintained by the depository. There is, however, a third possibility which extends the operation of the HVR to bills of lading not linked in the aforementioned ways with a contracting state. The third possibility requires that the contract contained in or evidenced by the bill of lading “provides that these Rules or the legislation of any State giving effect to them, are to govern the contract”. This enables the parties to the bill of lading to extend the operation of the HVR to trade with other States, in cases where their application is not otherwise mandatory (i.e. in cases where there is no shipment from/issue of the bill of lading in a Contracting State). General reference to English law would not satisfy this requirement.¹⁸

The clause paramount, normally inserted into bills of lading issued under a charterparty has this objective. Notably the clause paramount was made necessary (and named as *paramount*) by the original Hague Rules the operation of which could not be triggered otherwise.¹⁹ In the context of the Hague-Visby Rules the insertion of a clause paramount may or may not be crucial for the operation of the Rules depending on whether the port of shipment or the place of issuance of the bills of lading are in a Contracting State or not.²⁰

1.1.8 The obligations of the carrier under the HVR

The carrier has three obligations under the HVR. The first (art. III r.1) concerns the non-delegable, obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage.²¹ This obligation includes physical seaworthiness of the vessel, cargoworthiness, and crewing requirements as well as documentary compliance necessary for the ship to be allowed to trade. The only deficiencies in seaworthiness before and at the beginning of the voyage which are not considered a breach of the shipowner are those which cannot be avoided by due diligence. This includes, in terms of physical seaworthiness, a latent defect²² and, arguably, with respect to crewing, debilitating diseases which are not discoverable with ordinary health checks. The breach of this obligation imposed by art. III r.1 prohibits the

¹⁷*The Morviken* [1983] 1 Lloyd's Rep 1; *The Benarty* [1984] 2 Lloyd's Rep 50; *The Antares* [1987] 1 Lloyd's Rep 424

¹⁸see *The Komninos S* [1991] 1 Lloyd's Rep 370.

¹⁹*Vita Food Products Inc. v. Unus Shipping Co. Ltd.* [1939] AC 277.

²⁰ For construction of the clause paramount and complications see *The MSC Amsterdam* ([2007] 2 Lloyd's Rep 622; *The BBC Greenland*) [2012] 1 Lloyd's Rep 230; *The Superior Pescadores* Lloyd's Law Reports Plus [2016] Lloyd's Rep. Plus 27.

²¹ *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589.

²² *The Amstelslot* [1963] 2 Lloyd's Rep 223.

carrier from relying upon any of the exceptions to liability contained in the HVR.²³ The carrier will be liable for loss of or damage to the cargo caused by the unseaworthiness, subject to a monetary cap (see below). Important to note, however, that the carrier is not obliged to maintain the vessel in a seaworthy state throughout the voyage.

The second obligation of the carrier (HVR art. III r.2) concerns its duty to perform its contractual obligations with respect to the loading, carriage and discharge of the goods in a proper and careful manner, and in accordance with the contractual arrangement.²⁴ This is a strict (not a due diligence) obligation but the liability only arises where the carrier actually does the work and not when a particular task has been outsourced to another entity whether this concerns loading and discharge operations or to transshipment.²⁵

A third obligation of the carrier (art. III r.3) concerns the issuance of bills of lading with minimum information when this is demanded by the shipper after the shipment of the goods. This is of little relevance to Covid-19 and will not be discussed further.

The incorporation of charterparty terms into the bill of lading cannot lessen the obligations of the carrier as the HVR (and all similar regimes) make “null and void and of no effect” any reduction of the carrier’s liability.²⁶

1.1.9 Obligations of the carrier not covered by the HVR

The carrier is obliged, unless the contract provides otherwise, to perform the contractual duties with reasonable despatch,²⁷ to go directly from the port of loading to the port of discharge without deviation.²⁸ The HVR permit deviations for saving life or property at sea as well as any other reasonable deviation. Whether a deviation dictated by the Covid-19 situation would be covered by the exception or not would depend on a number of facts. If it relates to health risks developing onboard the ship there is little doubt it would be for the purpose of saving life and thus justifiable. If such an option is provided under one of the relevant clauses this would make it an acceptable contractual performance of the contract and thus not a deviation in the legal sense. If, however, this is decided by the master for the purpose of avoiding the commercial risks introduced by Covid-19 at the port of discharge and without any other contractual basis whether it is reasonable or not it could well depend on the severity of the situation at the port of discharge and the risks not only for the shipowner but the whole adventure.

²³ *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589; *Sunlight Mercantile Pte Ltd and Another v Ever Lucky Shipping Company Ltd* [2004] 2 Lloyd’s Rep 174 (Singapore) (CA).

²⁴ *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd’s Rep 53; *Volcafe Ltd and Others v Compania Sud Americana de Vapores SA* [2015] EWHC 516 (Comm).

²⁵ *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft mbH & Co KG* [2006] EWHC 483 (Comm)

²⁶ see Art. III. r.8, *The Morviken*. [1983] 1 Lloyd’s Rep 1.

²⁷ *The Heron II* [1969] 1 AC 350.

²⁸ *Reardon Smith Ltd v Black Sea and Baltic General Insurance C.* (1939) 64 Ll L Rep 229 (241); *Scaramaga v Stamp* (1879-80) LR 5 CPD 295; *Stag Line v Foscolo Mango* [1932] AC 328; *The Al-Taha* [1990] 2 Lloyd’s Rep 117).

Delivery is to be made in accordance with the contract of carriage, thus where transferable documents are issued the carrier is only protected if it delivers against genuine bills of lading.²⁹

The incorporation of charterparty terms into the bill of lading may change or remove these obligations of the carrier and limit its liability. As these obligations are not regulated by the HVR the changes may be unfavourable for the bill of lading holder.

1.1.10 The protection of the carrier under the HVR

The carrier is protected from liability with respect to the seaworthiness obligation under art. III r.1 only where there is no negligence involved³⁰ or where the breach of this obligation is not causative.³¹

With respect to the performance of the carriage under art. III r.2, the carrier's is exempt from liability in cases where the loss was due to one of a list of seventeen exceptions (art. IV r.2). Thus, the carrier is generally not liable where it can prove that neither it nor its servants and agents have been at fault with respect to cargo damage.³² However the vicarious liability of the carrier with respect to the negligence in the navigation or management of the ship³³ or with respect to fire damage is also exempted.³⁴ The reliance on these exemptions is conditioned upon the exercise of due diligence in making the vessel seaworthy before and at the beginning of the voyage under art. III r.1. Failure to comply with art III r.1 precludes the carrier from relying upon the exceptions in art. IV r.2 and renders the carrier liable for any resulting damage to or loss of the cargo unless, and to the extent that the breach of art. III r.1 is not causative for the damage or loss.³⁵

With respect to damage caused by the shipment of dangerous goods, the carrier is entitled to an indemnity if the goods have been shipped without the shipper informing the master of the dangerous character of the goods (art. IV r. 6).³⁶

The carrier is further protected by limited liability (Art. IV r.5)³⁷ and by a one-year time bar (art. III r.3)³⁸ Servants and agents of the carrier are subject to the same protection (art. V bis). The protection under the Hague Visby Rules concerns claims in tort and in contract as well as claims *in rem*. (art. V bis). The carrier is also entitled to an indemnity by the shipper with respect to inaccurate statements on the bills of lading (art. III r.5)

²⁹ *The Stettin* (1889) LR 14 P.D. 142.

³⁰ *The Amstelslot* [1963] 2 Lloyd's Rep 223.

³¹ *The Yamatogawa* [1990] 2 Lloyd's Rep 39.

³² *Leesh River Tea Co v British India Steam Navigation Co* [1966] 2 Lloyd's Rep 193.

³³ *The Torepo* [2002] 2 Lloyd's Rep 535; *Gosse Miller Ltd v Canadian Government Merchant Marine Ltd* (1928) 32 LI Rep 91 (98); [1929] AC 223 (241).

³⁴ *The Clipper Sao Luis* [2000] 1 All.E.R. (Comm) 920.

³⁵ *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255. The burden of proof in this respect is on the carrier.

³⁶ *The Giannis NK* [1998] 1 Lloyd's Rep 377.

³⁷ *The Happy Ranger* [2002] EWCA Civ 694.

³⁸ *The Aries* [1977] 1 Lloyd's Rep 334; *The Captain Gregos* [1990] 1 Lloyd's Rep 310.

1.2 The effect of Covid-19 on contracts of carriage covered by bills of lading

The complications arising from Covid-19 may alter the performance of the contract of carriage by potentially affecting the crew, by introducing delays or, in extreme cases, by forcing delivery in another port with various consequences for the bill of lading holder.

Delays in the delivery date may cause economic losses to receivers as they may then fail to fulfil other contracts. Delays may also cause cargo damage due to the prolonged storage in the holds of the ship.

In these cases, the question arises of whether the carrier's contractual liability covers such damage. The position of the bill of lading holder will depend on whether the damage to the cargo has been caused by a breach of the obligation to care for the cargo in accordance with the contract, which would, in general, be easier to prove where the HVR apply.

1.2.1 Economic losses

Contracts for the carriage of goods by sea do not normally provide for a fixed delivery date and the duty of performing the contract is described by the no-deviation and the due despatch obligations only. The HVR also do not cover losses for delay in delivery. Where a breach of the due despatch or the no-deviation obligations can be proved and this has caused loss to the bill of lading holder, compensation for losses at the market value of the goods may be awarded. Thus, in *The Heron II*³⁹, damages were awarded for loss of market in a breach of the due despatch obligation (this was a charterparty case).

In a charterparty context, economic losses arising from the inability to perform sub-contracts are unlikely to be recoverable in general as they are not considered to be within the contemplation of the parties to the contract.⁴⁰ However, when transferable documents are involved, and the final receiver is unknown to the carrier it cannot be argued that any such losses were not within the contemplation of the contracting parties.

1.2.2 Deficiencies in crewing and cargo damage

Where deficiencies in the crewing of the ship have been causative of the damage suffered their existence at the beginning of the voyage would be of importance for the strength of the cargo claim. If they did so exist "before and at the beginning of the voyage" then the carrier would not be in the position to rely on any of the exceptions.⁴¹

In such a case, damages to the goods arising from crew deficiencies could be recoverable to the applicable limits of liability. This is, however, a rather unlikely scenario. Art. III r.1 imposes a due diligence obligation and thus a failure of the carrier or its delegates in ensuring that the crew is sufficient and in an appropriate

³⁹ [1969] 1 AC 350.

⁴⁰ *The Achilles* [2008] UKHL 48. This is also a charterparty case.

⁴¹ *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255.

physical and mental health condition to perform the voyage would have to be shown. A mere infection with Covid-19 is, if submitted, would not be sufficient to make the ship deficient in crewing terms.⁴²

Even a mere infection, could, however, raise an issue of compliance with Art. III r.1 in cases of known restrictions in force at the port of loading or the port of discharge which apply where a crew member tests positive for the virus. Ensuring prior to the beginning of the voyage that the crew tests negative and, where vaccination requirements are imposed, that the crew is vaccinated, and in addition that the ship complies with WHO guidelines would arguably be sufficient to ensure the required due diligence under Art. III r.1.

1.2.3 Delays and cargo damage

Delays caused by governmental restrictions regarding Covid-19 even where these include the closure of the port or the exclusion of the ship are unlikely to be considered as breaches of the due despatch obligation or the duty not to deviate provided, they have not been caused by the fault of the carrier.

Furthermore, cargo damage arising from delays caused by governmental orders is not expected to be recoverable against the carrier in the absence of a breach of art. III r.1 obligation because the carrier could rely on the exceptions of art. IV r.(2)(g) of “Arrest or restraint of princes, rulers or people, or seizure under legal process” and/or on the exception of art. IV r.(2)(h) “quarantine restrictions”. These two exceptions are discussed in more detail.

A first observation is that the two exceptions may overlap in that a quarantine restriction may also involve a restraint of princes. However, the “quarantine” exception will not apply unless it involves “a real isolation of the cargo, or any part of it, or of the vessel or its crew.”⁴³

1.2.3.1 “Arrest or restraint of princes, rulers or people, or seizure under legal process”

This very broad exception includes all types of governmental and judicial interference in the performance of the contract of carriage. It includes:

- general orders applicable to all ships (for example a general requirement to quarantine), or
- orders only applicable to ships registered in a specific state (for example a prohibition of all ships flying the flag of state X), or,
- orders applicable to the particular ship (for example because it has visited a Covid-19 infected port), or
- orders constraining the carrier, who may be under the jurisdiction of the ordering state, even if the ship is not.

The carrier has to prove that the exception applies to the cargo damage suffered. This he/she cannot do where he/she was aware of the restriction at the beginning of the voyage and it was clear that the restrictions would not be avoidable for the ship. In *Ciampa And Others V. British India Steam Navigation*

⁴² see *The Apollo*, [1978] 1 Lloyd's Rep. 200.

⁴³*The Santa Isabella*, [2020] 1 Lloyd's Rep. 603.

Company, Limited,⁴⁴ the cargo was damaged by the spraying of sulphur gases in the holds which were necessary to kill any rats onboard the ship. This was a compulsory process for ships which have visited plague-infected ports and were imposed by the government of an intermediate port. The court held that the exception did not protect the carrier. The ship was held to be unseaworthy as it was expected that this process would have been imposed on the ship because of its previous schedule. Therefore, restrictions which are imposed after the voyage has started may fall under this exception while for pre-existing restrictions the knowledge of the parties as well as the possibility of affecting the adventure in question would be relevant. Furthermore, the carrier cannot rely upon the exception where its negligence brought the adventure under the restrictions.

At the beginning of the Covid-19 epidemic, the threshold each state chose to impose restrictions was uncertain and differed. Thus, at that stage, the exception would have the highest probability to be relied upon by the carrier. Where, however, the Covid-19 restrictions whether in the form of quarantine or any other form, became part of the contractual matrix it is less likely that the exception could be invoked successfully.

1.2.4 Quarantine restrictions

Quarantine restrictions fall under the category of governmental orders and are linked with processes protecting public health and operating by delaying or prohibiting ships from performing their contracts of carriage by not allowing them to berth or undertake cargo operations, unless some conditions are satisfied. Most of the Covid-19 measures concern quarantine restrictions. The only possible differentiation between quarantine restrictions and restraint of princess, etc. discussed earlier is that quarantine restrictions may not be as closely guarded by force as other governmental orders. However, they follow the same rules and pre-requisites as the more general exception.

1.3 Contractual clauses for Covid-19 and liabilities for the bill of lading holder

There are no specialised clauses developed to deal with issues arising from bill of lading claims. The Infectious diseases/ Covid-19 standard form clauses which have been developed so far deal with time-charter and voyage charter issues. However, they require incorporation in any bills of lading issued under the charterparty in order to protect the carriers from claims under the bills of lading which would not be permissible under the charterparty. As a consequence, the bill of lading holders expecting delivery in affected areas may find themselves liable for increased demurrage or may have to pay transshipment costs where the charterparty permits discharge of the goods in other ports. The exact extent of liability will depend on:

- a) whether the incorporating clause in the bill of lading is broad enough to bring the Covid-19 clause of the charterparty into the contract of carriage;
- b) whether the clause is not in conflict with any express clause in the bill of lading;

⁴⁴ [1915] 2 K.B. 774. Missing case name.

c) whether the incorporated clause imposes any liabilities on the bill of lading holder, a matter of construction of the wording of the clauses within the charterparty's context; and finally,

d) whether the incorporated clause is permitted under Art. III r.8 of the Hague Visby Rules or other equivalent compulsorily applicable cargo liability regime.

As discussed above the shipowner-friendly clauses require incorporation into the charterparty. The charterer-friendly (or friendlier) clauses do not insist on such incorporation. In addition, it has been noted above that the Covid-19 clauses involve a number of aspects some of which are directly linked with the performance of the contract of carriage and thus likely to be incorporated in the bill of lading but also some which relate to the charterparty and which will either not be incorporated by general words of incorporation or, even where such words have been included in the bill of lading it is unlikely that they will create liability for the bill of lading holder as they would not make sense in the contract of carriage. These are all issues that will unavoidably have to be tested in practice.

In the container trade, where the containers are provided by the carrier, these must be returned within an agreed free time otherwise liability for demurrage may be incurred. Delays due to Covid-19 may thus increase the demurrage owed to the carrier. Such liability is on the shipper but can be acquired by the bill of lading holder if it exercises the rights transferred to it with respect to the goods. This liability is not infinite in the sense that after a period of time it would be reasonable to assume that the owners of the containers would be prepared to accept a payment representing the value of the containers as a settlement for the non-delivery.