Bills of lading and cargo claims
In the era of Covid-19

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Outline

Part I

The functions of Bills of Lading
Legal implications

Part II

Specially designed C/P clauses for Covid-19
The effect on Bill of Lading claims
The Bill of Lading

...
Contemporary bills

Charterparty bill of lading

Conditions of Carriage

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

(2) General Paramount Clause

Save as is otherwise provided in this Bill of Lading, the Carrier shall be liable for loss or damage occurring during Carriage to the extent set out in this clause (2).

The International Maritime Organization (IMO) has amended the International Chamber of Commerce (ICC) Rules for the Uniform Deviation of Carriage by Sea (the "Bills of Lading") as amended by the Protocol signed at Brussels on 25 August 1924 (the "Hague Rules") as amended by the Protocol signed at Brussels on 23 February 1955 (the "Hague-Visby Rules") and as enacted in the country of shipment shall apply to this Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding conventions of the country of destination shall apply. Irrespective of whether such legislation may rule out or curtail, any subsequent claim shall be filed.

When there is no enactment of the Hague-Visby Rules in either the country of departure or the country of destination, the Hague-Visby Rules shall apply to this Contract save where the Hague Rules as enacted in the country of shipment or of no such enactment is in place, the Hague Rules as enacted in the country of destination shall apply accordingly to this Contract.

The Protocol signed at Brussels on 21 December 1970 ("the SDR Protocol 1970") shall apply where the Hague-Visby Rules apply, whether voluntarily or by Contract. The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharge, or while the cargo is in the charge of another carrier, or with respect to deck cargo and live animals.

(3) General Average

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994 in London unless another place is agreed in the Charter Party. Cargoes contribution to General Average shall be paid to the Carrier on or before such average is the result of a fault, neglect or error of the Master, Pilot or Crew.

(4) War Clause

In the event of loss, damage or misfortune to the Goods and to the Vessel, whether due to negligence or not, for which, or on the consequence of which, the Carrier shall be responsible, by statute, contract or otherwise, the cargo, shippers, consignees or the owners of the cargo shall contribute with the Carrier in General Average to the payment of all losses, charges or expenses of a General Average nature that shall be made, incurred or paid by the Carrier in respect of the cargo. If a saving vessel is notified or operated by the Carrier, general average shall be paid for as fully as if the saving vessel was of its own accord. Such deposit as the Carrier, or its agent, may deem sufficient to secure the compensation shall be paid. If required, be made by the cargo, shippers, consignees, owners of the goods to the Carrier before delivery.

(5) Birth-Or-Discharge Collision Clause

If the Vessel collides with another vessel as a result of the negligence of the other vessel and any act, neglect or default of the Master, Pilot or the servants of the Carrier in the navigation or in the management of the Vessel, then the owners of the cargo carried hereunder shall indemnify the Carrier against all loss or liability to the cargo or non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatever of the owners of said cargo, paid or payable by the other or non-carrying vessel or her owners to their owners or to their insurers or by the other or non-carrying vessel or her owners as part of their claim against the saving vessel or the Carrier. The foregoing provisions shall apply where the owners, operators or those in charge of any vessel and vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

(6) Time bar

Subject to any provisions of this Bill of Lading to the contrary, the Carrier shall be discharged of all liability under this Bill of Lading unless it shall be brought and maintained within the Carrier within nine months after delivery of the Goods or the date when the Goods should have been delivered.

For particulars of cargo, freight, destination, etc. see overleaf
The functions of a typical bill of lading

• Receipt of the goods shipped
• Document of title
  • entitlement to delivery at the port of discharge
• Evidence of the terms of the contract of carriage
The functions of the bill of lading-shipment

Contractual Shipper (who is also the charterer)

Contractual Carrier

Bill of Lading

Receipt: Prima facie evidence of what was shipped

Document of title
The functions of the bill of lading-shipment

Contractual Shipper (who is not a charterer e.g. liner carriage)

Contractual Carrier

Cargo

Bill of Lading

Receipt: Prima facie evidence of what was shipped

Document of title

Prima facie evidence of the contract of carriage
The functions of the bill of lading

- **Hague Visby Rules**
- **Charterparty terms will be incorporated in C/P Bills of lading**

**Contractual Shipper**

**Bill of Lading**

**Contractual Carrier**

**Cargo**

**Bill of lading holder**

**Receipt: Conclusive evidence of what was shipped**

**Document of title**

**Evidence of the contract of carriage**
The functions of the bill of lading-delivery

- Bill of lading holder
- Bill of Lading
- Cargo
- Contractual Carrier

Receipt: Conclusive evidence of what was shipped
Evidence of the contract of carriage
The parties to the contract of carriage

Contractual Shipper (who is not the charterer)

On shipment

Contract

Bailment(?)

Tort(?)

Contractual Carrier

Bill of lading holder

On transfer of the bill of lading

Contractual rights only

Contractual Carrier

Bill of lading holder

On presenting the bill of lading

Contract

Contractual Carrier

COGSA 1992

UN CTAD
Incorporation of charterparty clauses into bills of lading

- Clauses germane to the carriage of goods can be incorporated by general words of incorporation: “e.g. all terms and conditions”
- Other clauses require notification of the bill of lading holder so express wording must be included: “e.g. all terms and conditions including the applicable law and dispute resolution clause”
- Incorporated terms may be made null and void if the reduce the carrier’s liability below the Hague-Visby Rules’ standards

If the clause refers only to “charterers” then it is a question whether the charterparty differentiates between charterers/consignees or not

If the clause refers to “charterers/consignees” then obligations are most likely transferred

Incorporated terms may not transfer obligations on the bill of lading holder

Would Covid-19/Infectious disease clauses:
- be incorporated by general words of incorporation?
- be null and void under HVR Art. III r.8?
Would Covid-19/Infectious disease clauses be incorporated by general words of incorporation?

- The clauses have several parts:
  - Liberty for the carrier to perform the contract in a different way if the clause is triggered
    - An expressly included clause in Caspiana was not found in breach of the Hague Rules.
    - Not unlikely to be considered incorporated as it does provide for performance when there are risks for the adventure
    - More so if it is introduced after the Covid-19 has become part of the contractual matrix.
  - Owner’s costs and expenditure for the alternative performance on the Charterer
    - The wording is too broad to permit an argument of transferring all such expenditure on the Bill of Lading holder
    - An argument of costs and expenditure with respect to cargo handling, storage and transhipment may be more likely to succeed
  - Indemnity owed by the charterer the shipowner for claims etc. including against bill of lading claims- even after the end of the charterparty.
    - This is unlikely to be incorporated, an issue not germane to the cargo carriage and does not make sense in a bill of lading context
    - Likely to be in violation of the HVR standards
**Carrier’s Obligations**

- Bill of Lading statements
- Care of Cargo
- Seaworthiness

**Carrier’s protection**

- Protection or crew and contractors
- Indemnities (dangerous cargo, false statements)
- Limitations (quantum and time)
- 17 Exceptions

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**The Hague - Visby Rules**

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Due despatch
No deviation

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UNITED NATIONS
UNCTAD
Covid-19 Risks

- Delays in cargo operations
- Delays in port operations
- Redirection

- Cargo damage
- Economic loss to cargo interests
- Increased demurrage

Crew infection risks
Economic losses to cargo interests

• Loss arising from breach of the b/l contract
  • due despatch
  • deviation
• Loss arising from inability to fulfil other contract
  • Not recoverable in general
• Covid-19 clauses (if incorporated) deem changes in the port as contractual performance and remove the basis of any such claim.
Breach of Art. III r. 1 causing cargo damage

• Due diligence obligation
  • Limited in time
  • Non-delegable

• Crew illness (Covid-19) affects ship’s seaworthiness:
  • Crew numbers
  • Compliance of ship with Covid-19 measures

• IF causative

• THEN it could lead to liability
  • Hague-Visby Rules standard (Art. III r. 1)
  • What would the due diligence standard be?

Covid-19 clauses do not affect this duty directly
RIO TINTO COMPANY, LTD. v. THE
SEED SHIPPING COMPANY, LTD,
Mr. Justice Roche

"I ask myself, as I asked one of the doctors, assuming that the state of this man's health as regards indigestion had been more adequately appreciated by him, or by the doctor, what they would have done; and I reply, as the doctor replied, that he would have been told to take some medicine and to carry on with his work. That is to say, no one of ordinary knowledge and of ordinary diligence in these matters, and with ordinary care, would have thought it necessary to stop the master from going as master on this voyage in command of this ship; and while attaching some importance to his indigestion I do not attach supreme importance to it; I do not attach any more importance to it than I do to the fact that he had had a disturbed night the night before."
Breach of Art. III r. 2 causing cargo damage

• Strict obligation
  • can be delegated
  • subject to exceptions
  • exceptions can not operate if there is a breach of Art. III r.1

• Exceptions
  • “restraint of princes …”
  • “quarantine”

Covid-19 clauses (if incorporated) can be viewed as providing alternative performance of Art. III r.2

Carriage of Goods by Sea
Act 1971

CHAPTER 19

ARTICLE III

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—
   (a) Make the ship seaworthy.
   (b) Properly man, equip and supply the ship.
   (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

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.
COGSA 1971

• Art IV r(2)(g) Arrest or restraint of princes, rulers or people, or seizure under legal process.

• Art IV r(2)(h) Quarantine restrictions.

- orders applicable to all ships (i.e. 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.

What if the orders are a permanent feature? What if they existed at the beginning of the voyage?
Ciampa And Others V. British India Steam Navigation Company, Limited. [1915]

- Cargo of lemons shipped in Naples
- Compulsory spraying of sulphur gases in the holds in Genoa in order to kill the rats onboard the ship
  - Ship had been to Mombassa which was plague infected
- Cargo discharged in England and found damaged due to the use of sulphur gases
- Process compulsory for ships which have visited plague infected ports
- Held:
  - the ship was unseaworthy as it was expected that this process would have been imposed on the ship because of its previous schedule
  - exception did not apply
Charterparty risks for the bill of lading holder

- Bills of Lading frequently incorporate a charterparty
- Covid-19 clauses:
  - permit alternative performance by the shipowner
  - transfer risk and costs on charterers
  - Provide indemnity to shipowners
- Charterers have to incorporate the clause into shipping documents
  - possible transfer of payment liabilities, in particular freight and demurrage to Bill of Lading holders
  - possible transfer of carrier’s entitlement to perform the contract differently with costs on charterer

Conditions of Carriage
(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.

- BIMCO Infectious or Contagious Diseases Clause for Voyage Charter Parties 2015
  - (f) If, notwithstanding Sub-clauses (b) to (e), the Vessel does proceed to or continue to or remain at an Affected Area:
    - (i) The Owners shall notify the Charterers of their decision but the Owners shall not be deemed to have waived any of their rights under this Charter Party.
    - (ii) The Owners shall endeavour to take such reasonable measures in relation to the Disease as may from time to time be recommended by the World Health Organisation.
    - (iii) Any additional costs, expenses or liabilities whatsoever arising out of the Vessel visiting or having visited an Affected Area, including but not limited to screening, cleaning, fumigating and/or quarantining the Vessel and its crew, shall be for the Charterers’ account and any time lost shall count as laytime or time on demurrage.
  - (g)...
  - (h) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of this Charter Party, this Clause shall prevail to the extent of such conflict, but no further.
  - (i)...
  - (j) The Charterers shall procure that this Clause shall be incorporated into all bills of lading, waybills or other documents evidencing contracts of carriage issued pursuant to this Charter Party.

The carrier would arguably have an obligation to take the cargo back if port becomes impossible. But the clause moves this right earlier in time.
Do liner bills need additional clauses?

https://www.msc.com/zh/carrier-terms

9. METHODS AND ROUTES OF CARRIAGE

9.1 The Carrier may at any time and without notice to the Merchant:

(a) use any means of transport or storage whatsoever;

(b) transfer the Goods from one conveyance to another including transhipping or carrying the Goods on a Vessel other than the Vessel named on the front hereof or by any other means of transport whatsoever, even though transhipment or forwarding of the Goods by such means may not have been contemplated or provided for herein;

(c) sail without pilots, proceed via any route (whether or not the nearest or most direct or customary or advertised route) at any speed and proceed to, return to, and stay at any port or place whatsoever (including the Port of Loading herein provided) once or more often, and in any order in or out of the route or in a contrary direction to or beyond the Port of Discharge once or more often;

(d) load and unload the Goods at any place or port (whether or not any such port is named on the front hereof as the Port of Loading or Port of Discharge) and store the Goods at any such port or place, including but not limited to the use of off-dock storage at any port;

(e) comply with any orders or recommendations given by any government or authority or any Person or body purporting to act as or on behalf of such government or authority or having under the terms of the insurance on any conveyance employed by the Carrier the right to give orders or directions.

9.2 The liberties set out in clause 9.1 may be invoked by the Carrier for any purpose whatsoever whether or not connected with the carriage of the Goods, including but not limited to loading or unloading other goods, bunkering or embarking or disembarking any Person(s), undergoing repairs and/or drydocking, towing or being towed, assisting other vessels, making trial trips and adjusting instruments. Anything done or not done in accordance with clause 9.1 or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation.
Do liner bills need additional clauses?

19. MATTERS ADVERSELY AFFECTING CARRIER’S PERFORMANCE

19.1 If at any time the carriage is or is likely to be affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the Carrier by the exercise of reasonable endeavours, (even though the circumstances giving rise to such hindrance, risk, danger, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for the carriage) the Carrier may at its sole discretion and without notice to the Merchant and whether or not the carriage is commenced either:

(a) carry the Goods to the contracted Port of Discharge or Place of Delivery, whichever is applicable, by an alternative route to that indicated in this Bill of Lading or that which is usual for Goods consigned to that Port of Discharge or Place of Delivery; or

(b) suspend the carriage of the Goods and store them ashore or afloat upon the terms and conditions of this Bill of Lading and endeavour to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of suspension; or

(c) abandon the carriage of the Goods and place them at the Merchant’s disposal at any place or port which the Carrier may deem safe and convenient, or from which the Carrier is unable by the exercise of reasonable endeavours to continue the carriage, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for the carriage, and the Merchant shall pay any additional costs incurred by reason of the abandonment of the Goods. If the Carrier elects to use an alternative route under clause 19.1 (a) or to suspend the carriage under clause 19.1 (b) this shall not prejudice its right subsequently to abandon the carriage.

19.2 If the Carrier elects to invoke the terms of this clause 19, then notwithstanding the provisions of clause 9, the Carrier shall be entitled to such additional Freight and costs as the Carrier may determine.
Container demurrage

- Containers provided by the carrier are to be returned within an agreed “free time”
- After that liability for demurrage arises
- Delays due to Covid-19 increase the demurrage
- Such liability is normally on the shipper but can be acquired by the bill of lading holder
- Limited in time by frustration
  - MSC MEDITERRANEAN SHIPPING CO SA V COTTONEX ANSTALT [2016] EWCA Civ 789
Conclusions

- Covid-19 infections and protective measures can cause delays in the performance of the carriage of goods under bills of lading.
- The exact cause of the delays will determine whether they may be considered as breaches of the carrier’s obligations.
- Deficiency in the crew before and at the beginning of the voyage due, for example, to illness making one or more crew members unable to work and this is causative to cargo damage or to a breach of the due despatch obligation then this could be recoverable by the bill of lading holder.
- The same outcome is suggested if Covid-19 infections make the ship vulnerable to physical or administrative procedures in the various ports of call which may affect the condition of the cargo.
- In the absence of a breach of HVR Art. III r.1, liability for cargo damage due to Covid-19 caused by delays from restrictions imposed by authorities is likely to be exempted under Art. IV r.2(2).
- For bills of lading issued under a charterparty the inclusion of clauses for Covid-19 or infectious diseases put all expenses and delays (except for crew changes) on the charterer and may transfer them to the bill of lading holder who may find itself liable for such delays and have its cargo detained under the contractual lien.
- The effects of the incorporation of Covid-19 clauses into a bill of lading are difficult to predict and will depend on the specifics of the issues.
- The strict nature of demurrage payment for containers is likely to lead to increased liability for shippers and bills of lading holders.