THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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PREFACE

The aim of the eighth edition of this book is to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

As with previous editions of *The Shipping Law Review*, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, offshore shipping, marine insurance, environmental issues, decommissioning and ship finance.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked the authors to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, security and counter-security requirements, and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their respective countries, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year. This year, we welcome Costa, Albino & Lasalvia Sociedade de Advogados as the new contributors of the chapter focusing on maritime law within Brazil. There are also two new jurisdictions in this edition – Israel (Harris & Co) and Mexico (Adame Gonzalez De Castilla Besil) – and Portugal makes a return, with Andrade Dias & Associados as the new contributors.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations Conference on Trade and Development (UNCTAD) estimating that the operation of merchant ships contributes about US$380 billion in freight rates within the global economy, amounting to about 5 per cent of global trade overall. Between 80 per cent and 90 per cent of the world's trade is still transported by sea (the percentage is even higher for most developing countries) and, as of 2019, the total value of annual world shipping

trade had reached more than US$14 trillion. Although the covid-19 pandemic has had a significant effect on the shipping industry and global maritime trade (which plunged by an estimated 4.1 per cent in 2020), swift recovery is anticipated. The pandemic truly brought to the fore the importance of the maritime industry and our dependence on ships to transport supplies. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

Finally, mention should be made of the environmental regulation of the shipping industry, which has been gathering pace this year. At the International Maritime Organization's (IMO) Marine Environment Protection Committee, 72nd session (MEPC 72) in April 2018, it was agreed that international shipping carbon emissions should be cut by 50 per cent (compared with 2008 levels) by 2050. This agreement will now lead to some of the most significant regulatory changes in the industry in recent years, as well as much greater investment in the development of low-carbon and zero-carbon dioxide fuels. The IMO's agreed target is intended to pave the way for phasing out carbon emissions from the sector entirely. The IMO Initial Strategy, and the stricter sulphur limit of 0.5 per cent mass/mass introduced in 2020, has generated significant increased interest in alternative fuels, alternative propulsion and green vessel technologies. Decarbonisation of the shipping industry is, and will remain, the most important and significant environmental challenge facing the industry in the coming years. Unprecedented investment and international cooperation will be required if the industry is to meet the IMO's targets on carbon emissions. The 'Shipping and the Environment' chapter delves further into these developments.

We would like to thank all the contributors for their assistance in producing this edition of *The Shipping Law Review*. We hope this volume will continue to provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Andrew Chamberlain, Holly Colaço and Richard Neylon
HFW
London
May 2021

Chapter 5

OCEAN LOGISTICS

Catherine Emsellem-Rope[1]

I INTRODUCTION

At its simplest, logistics is about getting the right goods to the right place at the right time and managing the information and documentation flow to facilitate this task. Whether a company is a supermarket moving goods in containers, a contractor building a new facility and moving materials and equipment to the project site, an energy company moving oil in bulk, or a trading house moving coal, some logistics will be involved in one form or another. In this chapter we focus on the carriage of goods by sea, but other modes of transportation (inland waterways, air, road, rail), multimodal transport, warehousing and storage, and value-added services (such as consolidation, co-packing and supply-chain management) that are ancillary to these activities are all encompassed by the term 'logistics'.

The transportation of goods by sea involves numerous different parties operating across the supply chain. This inevitably gives rise to a number of contractual arrangements and relationships. In broad terms, when goods are transported by sea, the transportation contract governing the carriage is known as a contract of affreightment. These contracts appear in several different forms, which are generally divided into two categories: the charter party and the bill of lading. We examine both, but our focus is on the latter.

II CHARTER PARTIES

In broad terms, a charter party is an agreement under which a shipowner agrees to make available the entire carrying capacity of his or her vessel for either a particular voyage (or voyages) or for a defined period. This arrangement is known as chartering and the person to whom the vessel is made available is known as the charterer.

There are several types of charter party, the most common of which are:

a the demise (or bareboat) charter party: this operates as a lease of the vessel itself for an agreed period in exchange for the payment of hire. With a demise charter, the charterer will usually provide the crew and operate the vessel technically and commercially;

b the time charter party: this is a contract for the use of the ship and her crew for a specified period in exchange for the payment of hire during the period of use. Hire is usually calculated daily or monthly, according to the vessel. It is not affected, therefore, by the number of voyages during the period of hire, or the amount of cargo transported. This type of charter party is often used by carriers seeking to increase their fleet for a certain period; and

1 Catherine Emsellem-Rope is a legal director at HFW.

c the voyage charter party: this is a contract for the use of the vessel and her crew to carry an agreed cargo on an agreed voyage in consideration of the payment of freight. Freight is calculated in accordance with the number of tonnes or cubic metres carried, or as a lump sum.

In addition to the foregoing, there are several hybrid forms of charter party, which are combinations of a voyage and a time charter party. One such hybrid is the trip charter, under which a vessel is time chartered for a specific cargo voyage. Another is the slot charter, according to which a fixed number of container spaces are chartered per voyage and a set price is payable per slot. Finally, under a consecutive voyage charter, a vessel may be chartered for a specific period, but the vessel is required to fulfil a number of voyages between fixed ports during the period of hire.

The key difference between a time charter party and a voyage charter party is that the former permits the charterer a certain degree of flexibility (subject to the terms of the charter party itself) to employ the vessel however he or she so chooses, whereas under the latter, the charterer is required to carry a specific cargo from a specific place at a specific time to a specific place. The time charterer therefore controls the commercial operation of the vessel and, as a result, usually bears the costs arising out of his or her employment of the vessel (the cost of fuel, port charges, the costs of loading and unloading the cargo, etc). The voyage charterer, in contrast, is much less involved in the commercial function of the vessel and, therefore, does not bear these costs. The voyage charterer's key responsibility is to ensure that the cargo is loaded and discharged at the agreed time. He or she may therefore be required to take responsibility for the cost of any time incurred in loading or discharging cargo that is outside the permitted number of days for doing so.

Over the years, a number of standard-form charter parties have been developed by various organisations and are commonly used throughout the shipping industry. In particular, BIMCO[2] has developed a number of well-known standard forms, such as the Standard Bareboat Charter (BARECON 2001 and 2017) for demise charter parties and the Standard Time Charter Party for Container Vessels (BOXTIME 2004). For voyage charter parties, the BIMCO Uniform Charter (1922, as revised in 1976 and 1994) (GENCON) is commonly used for all types of goods. There is also the New York Produce Exchange Time Charter (1946, as revised in 1993 and 2015) for time charter parties and the SHELLVOY (Shell's standard form tanker voyage charter party), which has also been adopted by the market.[3] BIMCO also created SLOTHIRE (1993) as a standard form to be used for slot chartering.

It is important to note that a long chain of different charter parties may develop. This will arise in circumstances where a shipowner charters his or her vessel to a charterer who in turn sub-charters the vessel to another charterer and so on. The terms of the charter parties running up and down the chain may be 'back-to-back' (i.e., materially the same), or they may be different. In the case of a charter party dispute, careful attention will need to be paid to the terms of the charter party and consideration will need to be given to the question as to whether it is possible to pass the claim up or down the contractual chain.

2 BIMCO (The Baltic and International Maritime Council) is a shipping association providing a wide range of services to its global membership of stakeholders who have vested interests in the shipping industry, including shipowners, operators, managers, brokers and agents.

3 This list is not exhaustive: there are many more different standard forms that have been developed by BIMCO and others.

III BILLS OF LADING AND WAYBILLS

i Overview

A bill of lading is the transport document issued in relation to liner shipping when the vessel is used to carry the goods of any person. It is an important commercial document and it is pivotal in international trade, as illustrated below. In broad terms, the bill of lading serves three functions within the context of international trade. First, it acts as evidence of the contract of carriage. The bill of lading is not the actual contract of carriage since the contract is usually made before the bill of lading is signed and delivered; however, it provides evidence of the terms of the contract of carriage. Second, the bill of lading acts as a receipt for the goods received or shipped. Bills of lading usually contain statements as to the description, quantity and nature of the goods received into the carrier's care and similar matters. By signing the bill of lading (which is often completed by the shipper), the carrier acknowledges receipt of the goods so described. It constitutes *prima facie*[4] evidence of the goods so described. Finally, the bill of lading acts as a document of title. This means that the bill may be made deliverable to a named person or to an order or 'to order'. Bills of lading making goods deliverable to order are negotiable[5] instruments. If a bill is negotiable, it will allow transfer of title, which will be effected by endorsement. Order bills will entitle any lawful holder of the bill to possession of the goods. Bills of lading that are not negotiable instruments are sometimes known as 'straight bills'. Although not negotiable, a straight bill of lading is, as a matter of English law, a document of title. Under a straight bill of lading, cargo is deliverable only to the named consignee. The fact that the bill of lading is a document of title differentiates it from other transport documents that may also be issued, such as waybills or forwarders' certificates of receipt, neither of which are documents of title, though they may appear to be so on their face.

The bill of lading will be issued when the cargo has been loaded on board the vessel. The front of the bill of lading includes all the relevant details regarding the shipment (such as the name of the shipper, carrier or owner, the consignee, the description of the cargo). The reverse of the bill contains the detailed terms and conditions governing the carriage. It is also important to note that the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (the Hague Rules) or the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (the Hague-Visby Rules) will often apply to contracts of carriage covered by a bill of lading, or any similar document of title. These rules provide the carrier under the bill of lading with a number of important defences and limitations when faced with a cargo claim under the bill. The Hague and Hague-Visby Rules are examined in more detail in other chapters of this book.

ii Different types of bills of lading

There are various types of bills of lading, the most important of which are those described below.

4 However, it is open for the carrier to adduce evidence that the goods shipped were not as described (except where the bill of lading has been transferred to a third party in good faith, in which case the bill of lading will be conclusive evidence that the goods shipped were as described).

5 The term 'negotiable' is used by most in the industry; however, the correct term is 'transferable'.

Liner bills and charter bills

Liner bills are issued by shipping lines and contain very detailed, densely typed terms and conditions on their reverse face. Charter bills (those issued in relation to goods on a chartered vessel, for example, the 'Congenbill' (1994 as revised in 2007 and 2016), which would be issued in relation to GENCON charter parties), contain only a small number of conditions, but should incorporate the terms of the charter party into the bill of lading.

Received bills of lading and shipped bills of lading

When goods have been received into the carrier's charge at the quay or in the warehouse and are not loaded, a document called a 'received for shipment bill' will be issued. Once the goods have been loaded on board the ship, the received bill may be exchanged[6] or converted into a shipped bill containing the same representations. To obtain documentary credit, banks will only accept shipped bills of lading (not received bills of lading).

Multimodal or combined transport bills of lading and port-to-port bills

Multimodal transport combines at least two types of transport, without the need for the transport unit to be changed (e.g., when goods are transported in containers first by road, then by sea, then by road). If the place of receipt and place of delivery boxes are completed on the front face of the bill, then it is a multimodal bill, of which there are two main types:

a the through-transport bill, in which the named carrier contracts as principal for the stage during which it is the performing carrier but as cargo interests' agent for the other legs. This will be expressly stated in the small print on the reverse of the bill of lading; and

b the combined-transport bill, in which the named carrier contracts as principal for all stages of the movement, regardless of whether it is the performing carrier. This inevitably leads to subcontracting.[7]

In the event that the goods are to be carried from one port to another, a direct bill of lading or port-to-port bill of lading will be issued. On the front face of such a bill, only the port of loading and the port of discharge boxes are completed.

A combined-transport bill needs to address the liability of the carrier in relation to the different modes of transport that will be used for the carriage of the goods covered by the bill of lading. This is because there is no single international convention applicable to multimodal transport. The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2009 (the Rotterdam Rules) was adopted in December 2008 by the UN General Assembly and was designed to regulate multimodal transport. However, very few countries have ratified the Rotterdam Rules and, therefore, they seem unlikely to enter into force internationally in the near future.[8]

In the absence of an international convention providing a liability regime for multimodal transport, the terms and conditions on the reverse side of a combined-transport

6 Against surrender of the received bill.

7 There are various definitions used within the industry to make this distinction.

8 As of March 2021, only four countries (Spain, Togo, the Congo and Cameroon) have ratified the Rotterdam Rules, and one country has acceded to the Rotterdam Rules (Benin). The Convention will not come into effect until at least 20 countries have ratified it.

bill of lading usually include very detailed and complicated cargo liability provisions (often referred to as network liability regimes). Network liability regimes set out how the liability of the carrier should be determined depending on where the loss or damage to cargo happened (i.e., whether it happened during the port-to-port element of the carriage or during any other part of the carriage not involving carriage of goods by sea). In addition, as multimodal carriage involves more than one mode of transportation, the terms and conditions will also include various provisions designed to protect the various subcontractors (e.g., stevedores or road hauliers). For example, there will usually be a clause that seeks to prevent the person entitled to make a claim against the carrier for loss or damage to cargo from making a claim against the subcontractors, and where a claim is nevertheless made, under the clause the subcontractors can usually avail themselves of the defences, exemption and limitations clauses contained in the terms and conditions (such a clause is referred to as a Himalaya clause).

iii Contracting directly with shipping lines

In certain circumstances, a company needing to move goods by sea (a shipper) may decide to contract directly with a shipping line.

In terms of contractual arrangements between shippers and shipping lines, traditionally there would be only the bill of lading issued by the shipping line in respect of each shipment. However, we continue to see an increasing use of framework agreements in relation to ocean freight services. Shippers who want to establish long-term relationships to secure services and rates enter into these master agreements, usually with a small number of shipping lines. In the event that a shipper and a shipping line enter into such an agreement, the relationship between them will potentially be governed by two sets of terms and conditions: those of the master agreement and, in relation to each shipment in respect of which a bill of lading is issued, the terms and conditions contained or evidenced in that bill of lading. It is always best to expressly clarify in the master agreement the relationship between the terms and conditions of the master agreement and those contained or evidenced in any bill of lading issued, and which should take precedence in the event of conflict.

It is also important to note that the shipping line may not own the vessel. It may charter the vessel from a shipowner (under a time charter party) or it may have agreed to share space with another shipping line (under a vessel-sharing agreement), which adds another layer of complexity when it comes to potential claims.

iv Buying from freight forwarders and non-vessel operating carriers

A shipper may decide that it wishes to use a freight forwarder when buying ocean freight.

The term freight forwarder has several meanings. In the traditional sense, a freight forwarder is someone employed by the shipper to enter into contracts of carriage with shipowners, but as agent only (i.e., on behalf of the shipper), without liability as a carrier. The role of the freight forwarder was limited to booking space on behalf of the shipper, preparing the bill of lading, arranging for the goods to be brought alongside and generally acting as a point of contact in relation to the goods.

The role has evolved and freight forwarders may now undertake additional activities (such as consolidation) or value-added services, or they may provide carriage services as a principal, taking responsibility as a carrier.

The concept of the non-vessel operating carrier (NVOC), which stems from the US concept of the non-vessel operating common carrier, is used in relation to freight

forwarders involved in sea carriage and acting as the contractual carrier with the shipper as carrier but who do not own the ship. Quite a few of the large freight forwarders have created their own NVOC businesses, which sometimes trade under different names.[9]

Freight forwarders, especially those who have established their own NVOC businesses, will often issue their own bills of lading, usually referred to as house bills of lading. In doing so, a freight forwarder almost certainly takes on the role of a principal with the greater liability that this entails, as explained below. However, the issuance of a house bill of lading by the freight forwarder will enable the forwarder to control the movement of the goods and the delivery of the goods (which will only be possible through itself or through its agent), which is one of the primary reasons freight forwarders issue house bills of lading.

Contractual capacity of freight forwarders

The issue of the contracting capacity of the freight forwarder (i.e., whether it is an agent or a principal) is an important one as it will affect the freight forwarder's liability in the event of loss or damage to cargo, or delay.

In general, in common law countries such as the United Kingdom, a freight forwarder acting as agent will have no liability to its customer for cargo loss or damage, or delay. However, a freight forwarder will still have obligations and potential liabilities; for instance, a freight forwarder acting as an agent has a duty to use reasonable care in employing the carrier, and may be liable for delay resulting from its negligence or for failing to pass on instructions concerning the goods to the carrier.

A freight forwarder acting as a principal will have much greater liability, as it will have the responsibility of a carrier, meaning that it will be liable for loss or damage to cargo, for misdelivery and for delay in delivery.

It is not always easy to determine whether a freight forwarder is acting as an agent or as principal. The contracting capacity of a freight forwarder will hinge on the construction of the contract with the shipper and the surrounding circumstances. Importantly, the mere fact that a freight forwarder describes itself as an agent will not mean that the freight forwarder cannot be treated in law as a principal with the liability of a carrier.

A key factor taken into consideration when determining the contractual capacity of the freight forwarder is the method of charging. The fact that a freight forwarder charges an all-in rate, rather than for the freight at cost plus a commission, can be evidence that the parties did not intend for the freight forwarder merely to be an agent. However, this is not conclusive evidence as it is possible, at least under English law, for the parties to agree that the agent should be remunerated on the basis of the profit the agent makes on the all-in rate (in practice, a lot of freight forwarders trade on this basis).

The fact that a freight forwarder issues a house bill of lading also points towards the freight forwarder being a principal. Further, if a freight forwarder names itself as shipper on the bill of lading issued by the shipping line (master bill of lading), this may be taken as a strong indication that the freight forwarder intends to subcontract the sea carriage (i.e., as principal), rather than making arrangements for the sea carriage as agent.

The naming of the freight forwarder on the master bill of lading is an important point, not only in relation to the contractual capacity of the freight forwarder, but also in relation

9 For example, Blue Anchor Line (Kuehne + Nagel's in-house NVOC), Danmar Lines Limited (DHL Global Forwarding's NVOC) and Pantainer Express Line (Panalpina's in-house NVOC).

to who may have title to sue the shipping line in the event of cargo loss or damage. In certain jurisdictions, only a party named on the master bill of lading will be able to sue the shipping line.

When a freight forwarder acts as an agent, the actual shipper should be named on the master bill of lading and no house bill of lading should be issued. This should avoid any issue regarding title to sue.

Standard terms used by freight forwarders

Most freight forwarders trade under standard terms of business (STCs), which very often will have been developed by trade associations representing the interests of freight forwarders.[10]

When a freight forwarder acting as a carrier or NVOC also issues a house bill of lading, there may again be two sets of terms and conditions that apply to the same shipment. Ideally, the STCs should make it clear which terms and conditions will prevail; the absence of an express statement to that effect will cause difficulties as the courts will need to decide on this matter.

IV CONCLUSION

Continued trade volume growth is likely to lead to further containerisation and an increased use of multimodal or combined transport. It is unlikely that the existing general structure of contractual relationships will dramatically change but there is likely to be increasing use of more sophisticated arrangements, such as framework agreements. As the participants in the supply chain move increasingly towards more formal types of contracts, it will be interesting to see what liability regimes are agreed. The majority of contracts will need to be revisited and rewritten in the event that the Rotterdam Rules are eventually ratified; however, whether this occurs in the near future remains less than certain.

10 UK-based freight forwarders generally trade on the British International Freight Association Standard Trading Conditions (2021 edition) or the Conditions For Use by Freight Forwarders, Series 400, developed by the Through Transport Club. Other examples are the Netherlands Association for Forwarding and Logistics Forwarding Conditions used by Dutch-based freight forwarders, the National Association of Freight and Logistics Standard Trading Conditions used by many UAE freight forwarders, the Singapore Logistics Association Standard Trading Conditions used by Singapore freight forwarders and the Hong Kong Association of Freight Forwarding and Logistics Trading Conditions 2008 used by Hong Kong-based freight forwarders.

Appendix 1

ABOUT THE AUTHORS

CATHERINE EMSELLEM-ROPE

HFW

Catherine Emsellem-Rope is a transactional lawyer who specialises in complex contractual arrangements in the logistics, ports and terminal and shipping sectors, with a focus on major projects and supply chain issues. She has a unique understanding of the logistics industry gained from many years working for leading logistics providers. Catherine advises on a broad range of commercial arrangements, including master agreements and general terms and conditions for use in her specialist sectors. She has extensive experience in contract drafting and negotiation on a national and international basis. Catherine also provides advisory services to all those involved in the supply chain, including logistics providers, freight forwarders, non-vessel operating common carriers and buyers of logistics services.

Before joining HFW, Catherine spent nine years in the logistics sector, where she led commercial negotiations with major blue chip customers.

Catherine is a qualified lawyer in England and Wales.

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