THE SHIPPING LAW REVIEW

EIGHTH EDITION

Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

THE LAWREVIEWS

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This article was first published in June 2021
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Editors
Andrew Chamberlain, Holly Colaço and Richard Neylon

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-828-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

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CONTENTS

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 6

PORTS AND TERMINALS

Matthew Wilmshurst[1]

I INTRODUCTION

i Historical and economic context

The United Kingdom was once a manufacturing powerhouse, exporting goods across the globe. The advent of containerisation in the middle of the past century led to a significant change in the UK economy, and the United Kingdom has become a net importer of manufactured products, bringing in US$427.5 billion of physical goods annually.[2]

Being an island nation, terminals are a vital cog in the UK's economy – 95 per cent of UK imports and exports arrive and depart by sea. In 2019, UK ports handled 486.1 million tonnes of cargo, of which approximately 65 per cent was inbound traffic,[3] a significant proportion of which would have been manufactured goods destined for the shelves of UK retail outlets.

As the manufacturing base has changed and the economy developed, so too has the ownership and operational structure of UK ports and terminals. During the past 25 years, UK ports have gone from being largely state-owned enterprises to adopting the privatisation model of port and terminal operation, with transfer of the ports' regular functions to private enterprise and wholesale disposal of physical assets. Most of the UK's largest ports are now in private sector ownership.

The change in the ownership and operational structure in the United Kingdom has been mirrored across the world, with most developed and developing nations recognising that terminals are an important driver of national economies and looking to the private sector to provide funds for infrastructure development to facilitate cross-border trade; whether through the full privatisation model adopted by the United Kingdom, or the Landlord Port Authority model under which states retain control of waterways and grant concessions to international operators to run and develop the terminals. This has led to the globalisation of terminals, with a small number of big players; in 2018–2019, the 21 main global terminal operators had an 80 per cent share of global capacity and throughput.[4]

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1 Matthew Wilmshurst is a partner at HFW.

2 Department for International Trade, 'UK Trade in Numbers', February 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964119/210225_Pocketbook_UK_Trade_in_Numbers_2021_Web_Accessible.pdf.

3 Department for Transport, 'UK Port Freight Statistics: 2019', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908558/port-freight-statistics-2019.pdf.

4 Source: Drewry (2019), Global Container Terminal Operators Annual Review and Forecast 2019 – see https://unctad.org/system/files/official-document/rmt2019_en.pdf, p. 69 and Table 2.14.

ii Terminal operators' liability

The globalisation of terminal operators has led to an increase in the standardisation of the terms on which cargo is handled at ports – international operators will seek to have consistent liability regimes across the globe for reasons of risk and insurance management.

There is no international convention that governs the liability of terminal operators, which can allow some flexibility when it comes to how their liability is determined. Parties contracting under English law – which is not always possible – can, to some extent, provide for their own defences and limits of liability. On a global scale, however, the lack of an overarching international convention and the impact of local law and regulations can cause difficulties for the large international terminal operators as this can prevent them from being able to adopt one-size-fits-all standard terms and conditions across all their terminals.

The nature of their business can also make it difficult for terminal operators to manage their liability effectively. Terminals come into contact with a large number of parties, many of whom will not have a contractual relationship with a terminal. This means that, in addition to facing claims from their customers for breach of contract, terminal operators will often face claims in tort and bailment from third parties – it is perhaps these claims that can cause the most difficulties.

II CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

UK terminal operators will commonly seek to impose their terms and conditions on the users of their terminals, and there are a number of ways in which they seek to do this. Regular users of a terminal are likely to be asked to sign up to a terminal service agreement (TSA), which will contain the commercial terms between the parties (services provided, tariffs, key performance indicators, etc) but will also include provisions designed to protect the terminal operator. Terminal operators will normally seek to incorporate similar terms in their dealings with ad hoc users of their terminals by reference to published standard trading conditions (STCs).

TSAs and STCs will typically include defences to, and limits of, the liability of the terminal for cargo claims, such as loss or damage, misdirection and delay. In addition to the provisions to protect against incoming claims, TSAs will often include provisions to benefit a terminal operator that wishes to pursue a damages claim against its own customer, for example, relating to dangerous or prohibited cargoes.

English law restricts the extent to which a party can exclude or limit its liability under its written standard terms of business – clauses seeking to do so will be subject to the test of reasonableness contained in the Unfair Contract Terms Act 1977. Failure to comply with this legislation can result in the entirety of an exclusion or limitation clause being struck out by the court. Terminal operators therefore usually include in their TSAs and STCs defences and limits of liability that are similar to those found in international shipping conventions or other industry-standard conditions, which have previously been held to be reasonable by the English courts.

III NON-CONTRACTUAL CLAIMS AGAINST TERMINAL OPERATORS

Terminal operators commonly face claims from cargo interests with whom they do not have a direct contractual relationship. These claims can be brought in tort or in bailment but are often pursued as both. Non-contractual claims against a terminal operator can be attractive to a cargo interest because they often offer an opportunity to recover more against a carrier than

may be possible under the terms provided for in its standard trading conditions or a bill of lading (although note that there is no recovery for pure economic loss when bringing a claim in tort, whereas in contract, loss of the bargain or the expectation interest can be recoverable).

i Claims in tort (negligence)

A cargo interest bringing its claim in negligence must show that (1) it was owed a duty of care by the terminal operator, (2) there was a failure on the part of the terminal operator to exercise that duty of care, and (3) the terminal operator's breach of that duty of care caused the loss complained of.[5] The burden of proof is on the cargo claimant to demonstrate that it has fulfilled these requirements (and the existence of at least a duty of care is normally fairly easy to establish in the context of loss or damage occasioned by a terminal operator). Of more difficulty to the cargo interest bringing a claim in negligence is the requirement that it either owned the goods at the time of the breach or had possessory title to them.[6]

ii Bailment

Bailment arises when possession of goods is entrusted by one party (the bailor) to another (the bailee). When a bailment is created, the bailee has a duty to take proper care of the goods. A sub-bailment arises whenever a bailee of goods transfers possession to a third party (the sub-bailee). A sub-bailee will owe the same duty of care to both the original bailee and the principal bailee. A terminal operator will often be a bailee or a sub-bailee.

In contrast to the requirements to establish negligence, a bailor must only establish receipt by the carrier of goods in good order and condition and subsequent damage to the goods on delivery by the carrier so as to establish the basis for a claim in bailment.

iii Defeating non-contractual claims through contract

Although the enterprising cargo claimant may be able to bring a non-contractual claim against a terminal operator in the hope of avoiding defences, exclusions and limits of liability, a terminal operator facing such claims may find assistance in the terms of its contract with its contractual counterparty. There are three clauses that are commonly used by a terminal operator to defeat or limit non-contractual claims: the *Himalaya* clause, the liberty to subcontract clause and the circular indemnity clause.

Himalaya clause

A *Himalaya* clause allows a subcontracted terminal operator to rely on the defences, limitations and exclusions in a carrier's bill of lading,[7] despite the fact that the terminal operator is not a party to that bill of lading contract.

For a *Himalaya* clause to be enforceable, it must satisfy the four-part test laid down by Lord Reid in *Midland Silicones*,[8] in that it must be clear that (1) the subcontractor is intended

5 For a detailed analysis of the tort of negligence, see M Jones, *Clerk & Lindsell on Torts* (Sweet & Maxwell, 21st Edition, 2014), Chapter 8.

6 See *The 'Aliakmon'* [1986] AC 785, in which the claimant had acquired risk but not the property in the goods and its action in negligence failed.

7 Typically in the form of a 'network liability regime' – see further P Bugden and S Lamont-Black, *Goods in Transit* (Sweet & Maxwell, 3rd Edition, 2013), Paragraph 17-048.

8 *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446.

to be protected by the clause, (2) the carrier contracted as agent for the subcontractor, (3) the carrier has authority from the subcontractor to enter into the *Himalaya* clause (although later ratification would suffice) and (4) difficulties regarding consideration moving from the stevedore must be overcome. A *Himalaya* clause typically reads:

> *every such person [subcontractor] or vessel shall have the benefit of every right, defence, limitation and liberty of whatsoever nature . . . as if such provisions were expressly for his own benefit and in entering into this contract, the carrier . . . does so not only on his own behalf but also as agent . . . for such person or vessel.*

A *Himalaya* clause will not necessarily offer complete protection to the terminal operator acting as the subcontractor of a bill of lading issuing carrier. If the services provided by the terminal operator were not contemplated by the bill of lading, then the *Himalaya* clause will not come into operation. This issue was considered in *The 'Rigoletto'*,[9] in which the defendant stevedoring company sought to rely on a clause in a carrier's bill of lading providing that the 'carrier or its agents shall not be liable for loss of or damage to the goods during the period before loading or after discharge howsoever such loss or damage arises'. At first instance, Judge Hallgarten found that the carrier would not have been able to rely on the exclusion clause because the services provided were outside the scope of the bill of lading, and therefore the stevedoring company was similarly unable to obtain the benefit of the exclusion by virtue of the *Himalaya* clause.[10]

Liberty to subcontract clause

When a sub-bailee receives goods from a bailee pursuant to a contract between those two parties, it is in certain circumstances entitled to rely on the terms of that contract when facing a claim in bailment from the original bailor of the goods, through the doctrine of sub-bailment on terms. The leading case on sub-bailment on terms is often cited as The *'KH Enterprise'*,[11] in which the Privy Council held that a subcontracted carrier could rely on the terms and conditions in its own bill of lading in a claim for bailment because, through a liberty to subcontract clause in the contract of carriage between the owner of lost goods and the first carrier, the owner of the goods had consented to subcontracting on any terms.[12] The clause typically reads: 'The carrier shall be entitled to subcontract on any terms the whole or any part of the . . . carriage.'

Although the liberty to subcontract clause gives useful protection, it is not always required for a terminal operator to argue that its sub-bailment was on those terms – authority to subcontract can be implied as well as express.[13]

9 *Lotus Cars Limited v. Southampton Cargo Handling Plc* [2000] 2 All ER (Comm) 705.

10 See also *Raymond Burke Motors v. Mersey Docks & Harbour Co* [1986] 1 Lloyd's Rep 155.

11 [1994] 2 AC 324 (aka *The 'Pioneer Container' or Owners of Cargo Lately Laden on Board the 'KH Enterprise' v. Owners of the 'Pioneer Container'*).

12 The *'KH Enterprise'* did not create the doctrine of sub-bailment on terms. See, for example, *Morris v. CW Martin & Sons Ltd* [1966] 1 QB 716.

13 See *Singer Co (UK) Ltd v. Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 and *Sonicare International Ltd v. East Anglia Freight Terminals Ltd* [1997] 2 Lloyd's Rep 48.

Circular indemnity clause

A circular indemnity clause prevents cargo claimants from bringing a claim against a bill of lading issuing a carrier's subcontractors for more than would be recoverable from the carrier itself. The clause typically reads:

> *The merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the carriage is performed . . . other than the carrier . . . and if any such claim or allegation should nevertheless be made, the merchant will indemnify the carrier against all the consequences thereof.*

The circular indemnity clause works by providing that the cargo claimant (the merchant, which is typically defined very widely to cover all parties that may have a right to make a claim in respect of goods) is not entitled to sue anyone other than the carrier, thus preventing a claim from being made against its subcontractors. If the cargo claimant does so, it will be in breach of this undertaking and the carrier can sue him or her in damages for losses flowing from the breach. The clause then provides that if the carrier ends up paying more in respect of a loss than its limitation regime provides, the cargo claimant will have to indemnify the carrier for any such amounts. Providing that the terminal operator, as the carrier's subcontractor, has included provisions in its contract with the carrier limiting its own liability, it can sue the carrier for an indemnity under that subcontract, which the carrier will then pass on to the cargo claimant under the circular indemnity.

Election of terms

It will commonly occur that a terminal operator may have been given the benefit of defences and limits in a carrier's bill of lading through the existence of a *Himalaya* clause but may also have the benefit of its own terms and conditions through the doctrine of sub-bailment on terms. Following *The 'KH Enterprise'*, it could have been argued that a terminal operator could choose between its own terms or those of its instructing carrier. In that case, Lord Goff of Chieveley, in response to an argument by the claimants that the existence of a *Himalaya* clause gave adequate effect to the intentions of the parties and that allowing a sub-bailee to rely on its own terms was unnecessary and would have created potential inconsistency, said that:

> *[T]he mere fact that such a [Himalaya] clause is applicable cannot, in their Lordships' opinion, be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods. If it should transpire that there are in consequence two alternative regimes which the sub-bailee may invoke, it does not necessarily follow that they will be inconsistent; nor does it follow, if they are inconsistent, that the sub-bailee should not be entitled to choose to rely upon one or other of them as against the owner of the goods: see Mr AP Bell's 'Sub-Bailment on Terms', ch. 6, pp. 178–180, of Palmer and McKendrick, Interest in Goods (1993). Their Lordships are therefore satisfied that the mere fact that a Himalaya clause is applicable does not of itself defeat the shipowners' argument on this point.*

However, this was considered by Lord Justice Rix in *The 'Rigoletto'*, in which the defendant stevedoring company had accepted goods against a receipt note that read: 'To the receiving authority – Please receive for shipment the goods described below subject to your published regulations and conditions (including those as to liability).' Lord Justice Rix stated that if a sub-bailee seeks to speak for itself by setting out the terms on which it wishes to conduct

business, it will be taken to have made a choice between those terms and 'any inconsistency within another regime brought about indirectly through a contract primarily made between other parties' from which the terminal operator could benefit by way of a *Himalaya* clause.

IV CLAIMS IN OTHER JURISDICTIONS

Freedom of contract is by no means unique to English law. However, as implied above, there are many jurisdictions where it is not possible to include contractual provisions that determine a terminal operator's liability or provide for disputes to be governed by English law. Codified legal systems will often have provisions dealing with the liability of a terminal operator or warehouse keeper, from which it is not possible to derogate, and often provide for a form of strict liability.

Appendix 1

ABOUT THE AUTHORS

MATTHEW WILMSHURST

HFW

Matthew Wilmshurst is a partner in HFW's London shipping department. He works with shipowners, non-vessel operating common carriers and transport operators, cargo interests and insurers on logistics and supply chain-related disputes and projects. Matthew's dispute resolution and litigation practice includes claims arising out of the carriage of goods, which encompasses defence work, cargo recovery, and salvage and general average claims; representing ports and terminal operators on third-party liability, property damage and business interruption claims; and marine insurance policy and commercial disputes. Matthew also provides advisory services to transport operators on standard terms and conditions and contracts of carriage, and to insurers on products and policy wordings.

Matthew was ranked in *Chambers UK* (2014, 2015 and 2016) as an 'associate to watch'. He 'attracts a great deal of praise for his work in salvage claims'. Clients say that 'he knows the industry and the way it works'.

HFW

Friary Court
65 Crutched Friars
London EC3N 2AE
United Kingdom
Tel: +44 20 7264 8000
Fax: +44 20 7264 8888
matthew.wilmshurst@hfw.com
www.hfw.com

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ISBN 978-1-83862-828-4