Legal Eagles...

Do you have a burning legal question for the HFW *Shipping Network* team? Email legaleagles@ics.org.uk for them to answer your question in the next issue of the *Shipping Network*. Questions should be of a general nature and not specific to a particular live issue.

Holman Fenwick Willan's crack team of specialist shipping lawyers answer your legal questions

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Q Under a combined transport bill of lading, where the shipping line is responsible for delivery to the named destination, should the shipper or any party named as consignee or notify party be responsible for any charges if the container is delivered within the demurrage-free period shown in the bill of lading, but where the UK port of discharge only allows the shipping line a shorter period free for quay rent?

A Ascertaining the rights of various parties under a bill of lading is a question of interpretation and construction of the carrier's terms and conditions. The rights (and responsibilities) will be subject to the terms and conditions on the reverse of the individual bill itself. As we have not seen, and will not assume, the terms and conditions in this case, we comment generally.

As a starting point, you should assume that the terms and conditions of any bill of lading are likely to be heavily in favour of the carrier. This is (usually) because the carrier has drafted those terms and conditions. Avoiding any charges that the carrier may seek to claim will therefore usually be a difficult task.

Most bills of lading allow the carrier to recover a variety of charges from parties to the contract of carriage. A typical bill of lading may provide for a very wide definition of freight, along the lines of:

"Freight: shall be the freight and all charges, costs, duties and expenses whatsoever, payable to the carrier, or incurred by the carrier in carriage of the goods in accordance with the applicable tariff and this bill of lading, including storage, per diem and demurrage."

A freight definition of this type arguably includes any charges incurred by the carrier as a result of the contract of carriage. There may be an argument that 'expected' charges are not included as they should have been provided for in the original quotation, but charges that arise out of a delay to the carriage or otherwise arise from an event outside of the normal carriage of goods will almost certainly be included.

The question focuses on the interaction between the demurrage-free period shown in the bill of lading and the period offered by the UK port for quay rent. It may be that there is an important distinction here between 'demurrage' in the sense of quay rent and demurrage in the sense of 'container rent'. It is often the latter that carriers offer rent-free periods on, rather than quay rent (because quay rent is viewed as a real cost to the line, as opposed to container demurrage, which is not).

Who pays?

As to whom the carrier may recover such charges from, one again must look to the terms of the relevant bill of lading, but typically the carrier will have a clause in its bill of lading similar to the following: "Every person defined as 'merchant' shall be jointly and severally liable to the carrier for payment of all freight. Any person engaged by the merchant to perform forwarding services with respect to the goods shall be considered to be exclusively

Bill of lading terms and conditions are usually drafted in favour of the carrier

"These [bill of lading] clauses allow the carrier to recover freight and any other charges included within the definition of freight from almost any person with an interest in the goods"

the merchant's agent for all purposes, and any payment of freight to such person shall not be considered payment to the carrier in any event whatsoever. Failure of such third parties to pay any part of the freight to the carrier shall be considered a default by the merchant in the payment of freight."

The merchant under a bill of lading is typically defined as including the shipper, consignee, holder of the bill of lading, the receiver of goods and any person owed, entitled to or claiming possession of the goods or of the bill of lading or anyone acting on behalf of such a person.

Together these clauses allow the carrier to recover freight and any other charges included within the definition of freight from almost any person with an interest in the goods. This is because the carrier wants to maximise the potential for having a party with deep pockets to claim any unpaid freight and charges from. Such a clause also potentially puts the merchant in the invidious position where they have paid their freight forwarding agent the charges due to the carrier but then, through no fault of their own, find that the freight forwarding agent has not paid the carrier, so they may well have to pay out a second time.

Should any of the parties named above be responsible for additional charges for cancellation of haulage in respect of pre-arranged haulage for delivery to the final inland destination where the vessel is delayed arriving at the UK port due to bad weather?

Again, this will very much depend on the terms and conditions in the bill of lading itself, and also how the movement of the goods has been arranged and paid for. Generally, it is rare to see cancellation of haulage charges unless the booking is cancelled less than 24-48 hours before the planned collection. Given that most shipping lines will be aware of delays in advance of this, the carrier may well be able to avoid these charges and therefore will not need to seek to pass them on to the customer. ***SN***

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I'm a shipowner looking to build up my business in a very different market, but I'm concerned about how cultural differences and different corporate structures might affect my business. How can I protect myself in this foreign investment?

Shipowners are often put off investing in unfamiliar markets due to uncertainty, real or perceived, and a lack of understanding of how business is conducted locally. Some non-familiar markets may appear impenetrable to the foreign investor, not least when they will be competing with local shipowners.

But the fact is that many economies that were focused inwards just a decade or so ago have become more market-oriented. Investment approval is increasingly being either given directly to the applicant investor or delegated to local authorities, removing layers of bureaucracy. In growing numbers of these countries, foreign investment is now encouraged (within bounds).

There are risks with any investment. The majority of issues can be understood and hopefully mitigated by seeking informed advice at the outset, in order to plan the appropriate means and scope of investment.

A shipowner wishing to establish a presence in any country must be realistic about his objectives. What is the existing competition from local businesses and other foreign investors? Factors such as the business scope, shareholding and tax will be heavily affected by the particular forms of business available to foreign investors. The shipowner will also need to consider the tax implications of repatriating any profits from the new business to the shareholders in selecting the most tax-efficient vehicle. There may be restrictions or limits to fleet operation, and it may be necessary to establish a presence as a wholly foreign-owned enterprise (WFOE). In addition, while representative offices may be allowed, they may not have legal status and therefore could not engage in direct profit-making activities on behalf of a home office.

"A shipowner should be cautious of setting up a local company with local directors and shareholders"

In this case, a shipowner will often consider setting up a co-operative or joint venture with a domestic enterprise. While a shipowner may have to relinquish part control of the new business and adhere to strict registered capital regulations, he will in certain countries be rewarded with more lenient tax implications and potentially easier access to the domestic market. Of course, it is essential to select any local partner wisely. A shipowner should be cautious of setting up a local company with local directors and shareholders, for while start-up and capitalisation costs could be low, the fact that foreign entities are unable to be either directors or shareholders (or nominees) of foreign companies could lead to the loss of the investment should the relationship break down.

Research counts

It is essential, therefore, that a shipowner conducts a thorough due diligence process, whether pursuing a physical presence or simply seeking to secure further contracts or voyages in any country. In particular, he should know his respective partner or counterparty. A starting point is to acquire the proposed partner company's business licence or equivalent documentation which provides information on their legal status, registered capital and business scope. This can be checked through the official companies register (assuming one is in place). The shipowner may engage a reputable private consultancy to conduct an analysis of the company's accounts – although accounts in some countries are subject to a lower standard of auditing than those in Europe.

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Starting up a business in a different country can be subject to a host of cultural differences

Also, setting up business in a new jurisdiction may expose a shipowner to increased, or at least different, regulatory requirements.

Regulatory compliance is a growing burden for the shipping industry. Sanctions regimes are constantly changing and the shipowner should be aware of the current UN and, as applicable, US and EU prohibitions. The shipowner should understand potential bribery and corruption risks in the new market, with both counterparties and authorities, as well as his obligations under applicable national legislation. The UK's Bribery Act, for example, will extend to the acts of UK companies and individuals outside the UK, whether those acts were direct or indirect; ie there may be liability for the corrupt acts of agents and contracting counterparties for example.

Care should also be taken to understand local employer liability in relation to any employees taken on in the new jurisdiction.

The difference in business culture between various parts of the world should be taken into account when seeking contracts or even negotiating. Put simply, a shipowner is likely to have to change his approach. Personal relationships may be key to business dealings and face-to-face contact can be important. The process may be slow, but on a positive note these events may act as a period for each party to evaluate each other and to build trust.

A shipowner should also bear in mind that many foreign local authorities, including port authorities, possess some judicial and legislative powers.

An effective communications and marketing strategy will also be of enormous benefit. A reliable local agent may be useful, and marketing the business taking into account local customs would be wise. Taking into account the experiences of others who have already ventured into the new market can be invaluable.

There are attractive opportunities for shipowners seeking to develop business in other parts of the world but failure to seek the right advice and plan the development carefully could lead to significant exposure and subsequent headaches down the line. ***SN***

While every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. The articles were written by Matthew Wilmshurst, Thomas Morgan and Guy Main. All three work in the Shipping and Transport group in HFW's London office. Guy is the senior Admiralty manager and a Fellow of the ICS. Before joining HFW Guy spent 18 years as a shipbroker. Matthew is an associate and Thomas is a trainee solicitor. Contact HFW on + 44 (0) 20 7264 8000, or go to www.hfw.com