Selected issues on Charterparties and Bills of Lading

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Selected issues on Charterparties

[a] The contracts

1. **Different types of Charterparties**
2. **Relationship between "standard" forms and riders**
3. **Identifying the parties to the contract: the effects of signature**

[b] The vessel

4. **The description of the vessel: condition, warranty or innominate term?**
5. **Specific contractual terms:**
   a) ***Classification***
   b) ***Speed and performance***

[c] The service: laytime, demurrage and safe ports

6. **Laytime and demurrage: commercial and legal significance**
7. **When does laytime start running?**
   a) ***The arrival of the ship: berth and port charters***
   b) ***The Notice of Readiness (NOR)***
8. **Safe port warranty in time and voyage charters**
   a) ***When must the port be safe?***
   b) ***Which parts of the port must be safe?***

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[a] The contract

1. Different types of charterparties

Charterparties come in many different shapes and forms:

a) Bareboat (or demise) charters
b) Time charters
c) Voyage charters
d) Slot charters
e) Contracts of affreightment

a) Bareboat (or demise) charters (BBCP)

BBCPs may be defined as ship leases. Under a BBCP, **possession** and **full control** of the vessel passes from the owners to the bareboat charterer (BBCR).

The Giuseppe di Vittorio [1998] 1 Lloyd's Rep 136 (CA); at [156]

> *"What then is the demise charter? Its hallmarks, as it seems to me, are that the legal owner gives the charterer sufficient of the rights of possession and control which enable the transaction to be regarded as a letting - a lease, or demise, in real property terms - of the ship. Closely allied to this is the fact that the charterer becomes the employer of the master and crew. Both aspects are combined in the common description of a "bareboat" lease or hire arrangement".*

See BARECON 2001, lines 169-173 (available on line at www.bimco.org)

> *"During the Charter Period the Vessel shall be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect".*

And again BARECON 2001, lines 219-230

> *"The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and, whenever required, repair the Vessel during the Charter Period and they shall pay all charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter, including annual flag State fees and any foreign general municipality and/or state taxes. The Master, officers and crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners".*

R: M. Davis, *Bareboat Charters*, 2nd edn (London, 2005).

b) Time charters (TCP)

In TCPs the owner (or the BBCR as the case may be) charters the vessel to the TCR for an agreed period of time in exchange for money consideration called ***hire***.

TCP forms in common use are, among the others:

"BALTIME 2001" (in your materials)
"SHELLTIME 4" (in your materials)
"NYPE 93"

R: Y. M. Baatz (Ed), *Maritime Law*, 4th ed. (London, 2018), at [69]ff.

c) Voyage charters (VCP)

In VCPs the owner (or the TCR as the case may be) charters the vessel to the VCR for an agreed voyage in exchange for money consideration called ***freight***.

VCP forms in common use are, among the others:

"GENCON 1994"
"SHELLVOY 6" (in your materials)

R: Y. M. Baatz (Ed), *Maritime Law*, at [72]ff.

d) Slot charters (SCP)

In SCPs the owner (or the VCR/TCR as the case may be) lets a certain number of slots (i.e. the space on board to accommodate a TEU) on a voyage basis for an agreed period of time. They may be considered themselves as a sort of COA.

However see

The Tychy (No. 1) [1999] 2 Lloyd's Rep 11 (CA); at [21]

where the CA defines the SCP "as a voyage charter of a part of a ship".

For an example of SCP see BIMCO's "SLOTHIRE" (available on line at www.bimco.org)

e) Contracts of affreightment (COA)

In COA the owner (or the TCR as the case may be) agrees to let space on board one or more of his/her vessels for the carriage of a specified quantity of cargo(es) for an agreed period of time.

For examples of COAs see "VOLCOA" and "INTERCOA 80" (available on line at www.bimco.org)

But which are the terms on which the contract is actually agreed?

2. The relationship between "standard" forms and rider clauses.

The clean, standard form of a charterparty will look quite different once the deal has been fixed and drawn up. In the standard form itself, boxes and blank spaces will have been filled in, standard clauses will have been amended or even deleted.

Even more significantly, the standard form itself will represent only a part – often a very small part – of the contract actually concluded.

This is because of the addition of **rider clauses**, some of which will be of general application in-house, some of which will have been drafted *ad hoc* for the particular fixture. In this *melee* of clauses, the parties will be scrambling for a clause which suits their purpose or trying to exclude one which does not.

For an example of this sort of scramble, see

The Petr Schmidt [1995] 1 Lloyd's Rep 202 (QB).

Three points need to be made:

- The rider clauses to be incorporated need to be ***clearly identified***;

- Rider clauses are part of the same contract as the charterparty and should therefore be ***agreed at the same time*** as the charterparty;

- Care should be taken to ensure that riders are ***consistent with any standard clauses*** which have not been deleted on the standard form.

  See *The Leonidas* [2001] 1 Lloyd's Rep. 533 (QB): where there is a discrepancy between the standard form and a special rider, the courts will try to reconcile any conflict, failing which **the rider will prevail**.

3. Identifying the parties to the contract: the effects of signature

R: M. Wilford, T. Coghlin, J.D. Kimball, *Time Charters*, 7th edn (London, 2016) (Hereinafter "*Wilford*"), ch. 2.

Who are the parties to the contract contained in the charter?

CPs contain clauses describing one party as "Owners" and the other party as "Charterers". Moreover charterparties contain a signature box which often tries to make clear who is who in the contract.

When an agent is signing, three situations need to be distinguished:

a) When an authorized agent discloses the name of the principal:

e.g. "X & Co, as agents for the Charterers Y Inc."

→ the principal

Universal Steam Navigation v. *James McKelvie & Co* [1923] AC 492 (HL)

However, if the agent fails to make the name of the principal in the contract, it may be that the agent is liable together with or in place of the principal.

The Frost Express [1996] 2 Lloyd's Rep. 375 (CA)

b) When an authorized agent does not disclose the name of the principal:

→ both the agent and the principal

Teheran-Europe v. *Belton (Tractors)* [1968] 2 Lloyd's Rep 37 (CA); at [41]

c) When an unauthorized agent signs on behalf of an alleged principal:

→ The principal if

- he/she ratified the actions of his/her agent (*ratification*), or
- he/she represents that his/her agent has the appropriate authority (*apparent or ostensible authority*)

  British Bank of the Middle East v. *Sun Life Assurance Co. of Canada* [1983] 2 Lloyd's Rep 9 (HL)

However the agent may be liable for breach of the implied warranty that he had the authority he claimed.

[b] The vessel

The charterer's most crucial interest in the charterparty is the vessel which is to be provided under the contract:

Am I getting the ship I was promised, and am I getting a ship which is up to the journey(s) I have in mind?

The purpose of this part of the lecture is to examine the effect of the terms describing the ship in the charterparty.

R: *Wilford*, paras. 3.2 – 3.82.

4. The description of the vessel: condition, warranty or innominate term?

Vessels can be described in charterparties both in the standard form and in the riders.

The first issue which arises is whether these representations are simply representations of fact or whether they are terms of the contract and if so, whether they are "conditions", "warranties" or "innominate terms".

Money turns on this issue because the legal nature of the description of the vessel will dictate the **remedy** available to the charterer if the vessel does not match up to its description in the charter.

We shall cover the question in three short steps:

- The charterer's position is clearer and safer if care is taken to ensure that all statements describing the vessel are actually included as part of the charterparty, whether in the standard form or in the riders.

  This places the description solidly within the contract, giving the charterer remedies for breach if the vessel fails to tally with the contractual description of the vessel in the charter.

- This still leaves the question as to whether the description is a condition, a warranty or an innominate term.

  The test to be applied here may be summarised with Chitty on Contracts as approved by Waller L.J. in *The Seaflower* [2001] 1 Lloyd's Rep. 341 (CA); at [348] as follows:

  "…a term of a contract will be held to be a condition:

  (i) If it is expressly so provided ***by statute***;
  (ii) If it has been so categorised as the result of ***previous judicial decision*** (although it has been said that some of the decisions on this matter are excessively technical and are open to re-examination by the House of Lords);
  (iii) If it is so designated ***in the contract*** or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or
  (iv) If the nature of the contract of the subject-matter or the circumstances of the case lead to the conclusion that ***the parties must, by necessary implication, have intended that the innocent***

> ***party would be discharged*** from further performance of his obligations in the event that the term was not fully and precisely complied with.

This may be called "***the Waller test***".

→ If a particular feature of the vessel is of crucial commercial importance to the charterer, then he **ought to draft it as a condition**, by stipulating clearly that he is entitled to **cancel** the charter if the vessel does not comply with the stipulated feature.

The option to cancel will lie with the charterer, and whichever way he jumps, he will also be entitled to damages, e.g. if he terminates the contract and the freight or hire market has risen in the meantime.

- So, in general terms, failing such a clear stipulation spelling out the option to terminate, the charterer will ***only be entitled to damages*** representing the loss caused by the failure of the vessel to comply with the description, e.g. additional loading costs.

  There will be no right to termination unless – and this is a fairly hefty burden – he can prove that the effects of the breach "went to the root of the contract".

These consequences result from the fact that under English law, the description of the vessel has repeatedly been held to be an "***innominate term***" of the charterparty. The important point to recall is that the charterer can, at the negotiation stage, make any part of the description a "***condition***". Once the fixture is made, it will be difficult to argue that the description is a condition.

The Apollonius [1986] 2 Lloyd's Rep 405 (QB)

5. Specific contractual terms

We will now try to apply "The Waller test" to the following specific clauses:

a) Classification of the vessel
b) Speed and performance

a) Vessel's class

See: "SHELLTIME 4" cl. 1(A)

Three issues arise here, namely

- What remedy does the charterer have if the vessel delivered is not as per class?

  → Class is a condition of the contract:

  Routh v. *MacMillan* (1863) 2 H. & C. 750

  "The Waller Test" (ii) is fulfilled.

- Must the class be maintained for the duration of the charter?

  There is no **implied** term that the owner will ensure that the vessel will maintain class throughout the charter. The owner is under a duty simply to ensure that the vessel carries the stipulated class at

the time of the charter, not necessarily at the time of the commencement of the voyage or the delivery date under a time charter.

Note, however, that there is an implied duty to do nothing which would cause the withdrawal of class:

Isaacs v. *McAllum* (1921) 6 LI. L. Rep. 289 (KB).

The duty to maintain class, however, is often expressed in the CP:

See: "SHELLTIME 4" cl. 3.

- Are class societies liable for issuing inaccurate certificates?

Since the decision of the House of Lords in *The Nicholas H* [1995] 3 All E.R. 307, the only [regrettable] thing there is to say about this liability is that there is none.

Contrast the position of an inspector of an aircraft:

Perrett v. *Collins* [1998] 2 Lloyd's Rep. 255; at [262].

b) Speed and performance

See: "SHELLTIME 4" ll. 303-4 and 310-1.

A statement in a TCP of the ship's speed amounts to a promise that the ship, at the time of her delivery under the charter, will be capable of that speed.

However that undertaking is not a condition of the contract but an ***innominate term***, unless a contrary intention is clearly indicated in the charter.

The Apollonius [1986] 2 Lloyd's Rep 405 (QB)

[c] The service: laytime, demurrage and safe ports

Where freight is payable on the basis of a voyage or of a series of voyages, it is in the owner's interest that the voyage or voyages be completed as expeditiously as possible without compromising the safety of the ship.

The owner persuades the charterer to act as quickly as possible by including in the charter a number of clauses which are peculiar to voyage charters, namely *laytime* and *demurrage* clauses; that the vessel is not exposed to physical or political danger is ensured by clauses according to which the ship can only be used between safe ports.

We will deal with the two issues in turn.

6. Laytime and demurrage: commercial and legal significance

Laydays may be fixed either by giving a set number of days, beyond which demurrage is due; or by reference to a particular loading or discharging rate, beyond which again demurrage is due.

Two points need to be made at the outset:

- Demurrage is considered by English law to constitute liquidated damages.

  This is important because if demurrage was to be considered a penalty, the clause would be struck down, penalty clauses being illegal under the English general law of contract.

  Suisse Atlantique v. *N.V. Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529 (HL)

- The demurrage payable under the clause fixes the amount for which the charterer is liable.

  The purpose of the clause is to avoid any disputes about the real result of the delay, and with the exception of so-called damages for detention, the owner can recover no more (and no less) than the amount of demurrage due.

7. When does laytime start running?

R: J. Cooke and Others, *Voyage Charters*, 3rd edn (London 2015) (Hereinafter "*Cooke*", ch. 15
J. Schofield, *Laytime and demurrage*, 5th edn (London, 2005) (hereinafter "*Schofield*")
D. Davies, *Commencement of laytime*, 4rd edn (London, 2006)

The laytime and demurrage clause imports into a voyage charter an element from time charters, i.e. once the clause is triggered, the mere passage of time earns money for the owner.

It is in the interests of

the owner that the clause is triggered ***as early as possible***; and of

the charterer that the clause is triggered ***as late as possible***.

It is not surprising that there has been much litigation identifying when the demurrage clock starts ticking in particular charters.

We shall cover the ground in two stages:

a) The ship must have arrived: we shall see here that the law distinguishes between port and berth charters; and
b) The owner must give the charterer a valid NOR.

a) The arrival of the vessel

The law distinguishes between ***port charters*** and ***berth/dock charters***.

Berth CPs

→ The vessel is arrived when it is at berth.

Before that moment, the vessel is not arrived and laytime cannot start.

Thus if there is congestion within or outside the port, the owner bears the cost of delay caused by that congestion.

Port CPs

→ The laytime clock starts ticking so soon as the vessel has arrived at the port.

The cost of congestion at the port preventing the ship from doing something useful falling squarely on the shoulders of the charterer.

Given the effects of classifying the charter as belonging to one or the other type, two issues become very important:

i) How do we tell whether a voyage charter is a berth or a port charter? And
ii) If the answer to the above question is "port charter" then when can the vessel be said to have arrived?

i) How do we tell whether a voyage charter is a berth or a port charter?

The place to look at is ***the boxes or blank spaces giving the termini of the voyage***.

What about "GENCON 1994"? See clause 6(c)

Care should be taken not to confuse two quite separate questions:

- Where have the parties agreed that the vessel should be "arrived" for the purposes of laytime?
- Has the charterer undertaken obligations under a safe berth warranty?

ii) In a port charter, when has the vessel arrived?

After long and protracted litigation, English law determined the answer to this question in *The Johanna Oldendorff* [1973] 2 Lloyd's Rep. 285 (HL); at [291]

The test (so called "*Reid Test*") runs as follows:

- Is the vessel in the geographical and legal area of the port as commonly interpreted by its users?

  → If she is not, she has not arrived!

  The Maratha Envoy [1977] 2 Lloyd's Rep. 301; at [308] (HL)

- Is the vessel at the effective disposition of the charterer, in the sense that it is able to proceed to berth as soon as one is available?

NB. The vessel will be assumed to be at the charterer's effective disposition if it lies at a usual waiting place within the port, saving proof to the contrary by the charterer.

b) A valid NOR

The commercial interests of the parties regarding the NOR are hopelessly at odds. The owner wants laytime to start as early as possible and will frequently shoot a NOR from the ship. The charterer

wants laytime to start as late as possible and will therefore seek to attack the validity of the NOR either on formal or on substantive grounds.

Three issues will be covered:

i) How ready must the vessel be for the NOR to be valid?
ii) Does an invalid NOR need to be followed by a valid one for laytime to start running?
iii) Does acceptance of an NOR by the charterer waive his/her right to object to its validity?

i) How ready must the vessel be for the NOR to be valid?

It is clear that for the NOR to be valid, the vessel must be "ready in every respect to receive cargo".

But how ready is ready? Would an NOR given when there is still half a day's work to be done on the holds be valid? What about half an hour's work?

The debate here is whether an NOR given when a "minimal" amount of work needs to be carried out before the ship is truly ready to receive the cargo is valid. It is sometimes said that a small amount of work coming within a *de minimis* margin will not taint the validity of the NOR.

However, the decided authorities show that where a vessel is not ready, the validity of the NOR depends not on the duration of the state of non-readiness but **on its cause**. The question which needs answering is not *"*For how long was the vessel unready after the NOR was given?" but *"*Why was the vessel not ready after the notice of readiness was given?"

e.g. Fumigation

The Tres Flores [1973] 2 Lloyd's Rep 247 (CA)

e.g. Ability to discharge only part of the cargo under "GENCON"

The Virginia M [1989] 1 Lloyd's Rep 603 (QB)

For an interesting case where an arbitral tribunal held valid a NOR shot by a vessel under arrest see: London Arb. 4/05 in LMLN [2005] 659, 3.

ii) Does an invalid NOR need to be followed by a valid one for laytime to start running?

Or, in other words, what is the effect of an invalid NOR? For laytime to start running, must the owner start the meter, as it were, by giving an accurate NOR, or does the inaccurate NOR "become" valid as soon as the ship is really ready?

If a valid NOR is a necessary precondition to the start of laytime, then in the absence of a valid NOR, laytime cannot have started and demurrage would therefore never have fallen due.

Diplock J. in *The Massalia* [1960] 2 Lloyd's Rep. 352 (QB) took the view that so soon as the ship becomes ready, the originally invalid NOR becomes valid and time starts from the moment at which the vessel is actually ready.

However, Diplock J.' s view on this question was strongly disapproved of by Mustill L.J. in the *Mexico 1* [1990] 1 Lloyd's Rep. 507 (CA); at [512] Where laytime is agreed in the charterparty to

start at a certain hour after the giving of a NOR, then laytime can only start after the giving of a valid NOR.

> *"I find it impossible to say that the taking of this wrong step [an invalid NOR] is somehow to be deemed as the taking of the right step"* at [513].

However, more recently see *The Happy Day* [2002] 2 Lloyd's Rep 487 (CA)

Where Potter L.J. held at [510]

> *"Laytime can commence under a voyage charterparty requiring service of a notice of readiness when no valid notice of readiness has been served in circumstances where*
>
> *a) a notice of readiness valid in form is served upon the charterers or receivers as required under the charterparty prior to the arrival of the vessel;*
> *b) the vessel thereafter arrives and is, or is accepted to be, ready to discharge to the knowledge of the charterers;*
> *c) discharge thereafter commences to the order of the charterers or receivers without either having given any intimation of rejection or reservation in respect of the notice of readiness previously served or any indication that further notice of readiness is required before laytime commences.*
>
> *In such circumstances, the charterers may be deemed to have waived reliance upon the invalidity of the original notice as from the time of commencement of discharge and laytime will commence in accordance with the regime provided for in the charter- party as if a valid notice of readiness had been served at that time".*

R: Y.M. Baatz, "Happy day? Not for shipowners" [2001] Shipping and Transport Lawyer, vol 3, no. 1, 10-13 (on the decision in the first instance)

Express terms in the charter may have a bearing on which of the two views would be applicable in the context of a particular charter:

see *The Linardos* [1994] 1 Lloyd's Rep. 28 (QB)
The Jay Ganesh [1994] 2 Lloyd's Rep. 358 (QB).

Can the shooting of an ineffective NOR constitute in itself a breach of contract? The answer appears to be in the negative, at least after:

The Nikmary [2004] 1 Lloyd's Rep 55 (CA); at [66]

iii) Does acceptance of an NOR by the charterer waive his/her right to object to its validity?

The charterer may find himself in a difficult situation where a NOR is given the validity of which he is in no position to verify. Pressed by shipment dates under his contract of sale and an expiry date under his letter of credit, the charterer may well need to load the goods by a given date and delay in accepting the NOR may well put him in breach of his delivery obligations under the contract of sale.

Would acceptance of the NOR then deprive the charterer from his/her right to object to the running of lay time under the charterparty?

Three situations need to be considered:

- where the NOR has been accepted by the charterer without qualification, the charterer cannot then deny the validity of the NOR, unless the acceptance was induced by the negligent misrepresentation by the owner that the vessel was in fact ready

  The Helle Skou [1976] 2 Lloyd's Rep. 205 (QB)

- where the NOR has been accepted by the charterer subject to reservation of his rights, then the owner cannot prevent the charterer from later objecting to the validity of the NOR.

  The Nikmary [2004] 1 Lloyd's Rep 55 (CA)

- where the charterer accepts an NOR which was clearly fraudulent when it was made, then even if the charterer had accepted the NOR, the owner is liable to the charterer for damages in deceit and demurrage earned under the contract by the owner should be recoverable by the charterer from the owner in the tort of deceit.

8. Safe port warranty in time and voyage charter

R: *Wilford,* ch. 10
Cooke, para 5.32-5.113

Both time and voyage charters typically impose a duty on the charterer to nominate only safe ports and/or berths through an express clause in the charter.

However there is no rule imposing the obligation upon the charterer.

→ the charter can <u>explicitly</u> exclude liability for breach of the duty. This is usually done in charters favoring the charterer more commonly through the device of a stipulation that the owners have acknowledged the safety of ports mentioned in the charter.

Alternatively see "SHELLVOY 6" ll. 74-76

Two matters need to be discussed here:

1. When must the port be safe?
2. Which parts of the port must be safe?

Each matter will be dealt with in turn.

<u>a) When must the port be safe?</u>

The issue here is whether the port must be safe at the time of nomination, at the time of the arrival of the vessel at the nominated port or at both and in between.

Until *The Evia* [1982] 2 Lloyd's Rep. 307 (HL), the rule was that the charterer was under an obligation to ensure that the port nominated was actually safe at all those times, with the exception of situations where the port was unsafe only through temporary or abnormal circumstances.

Since the decision in *The Evia*, however, it is now clear that the port only has to be ***<u>prospectively safe</u>***:

→ at the time of nomination, the charterer is under a primary duty to nominate a port which is likely to be safe by the time of arrival.

If, during the voyage, the nominated port ceases to be prospectively safe, or if it ceases to be actually safe at the time of arrival, the charterer is under a ***secondary obligation to re-nominate a safe port***.

If the vessel is trapped in a port which was prospectively safe at the time of nomination and actually safe at the time of arrival, the charterer is under no secondary duty to re-nominate a port.

b) Which parts of the port must be safe?

The port must be such as to allow the vessel to reach, use and leave the port, with the exercise of competent navigation and seamanship.

For a recent case where the fact that channel buoys were misplaced rendered the port prospectively unsafe at the time of nomination see:

The Count [2006] EWHC 3222 (QB)

Cargo Claims
Under bills of lading

1. The commercial background.

2. Where are the terms of the contract of carriage between carrier, shipper and buyer?

3. The law applicable to cargo claims

4. The carrier's main duties under the Hague-Visby Rules

5. Rights and liabilities for cargo claims

6. Can cargo interests secure their claims arresting the owner's vessel?

7. Is the Owner covered by its P&I Club?

8. Do cargo interests have a maritime lien on the vessel?

9. The future?

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1. The commercial background

Almost invariably cargo claims are brought by aggrieved buyers (or unpaid sellers), receivers of goods carried by sea, who find them damaged on discharge.

International sales tend to be different from domestic sales in that they are commonly concluded ***on shipment*** rather than arrival terms:

:. the content of the seller's promise is to ***ship*** goods of the contract description; not that they will actually *arrive* at the port of destination in good order and condition

→ the seller will therefore discharge his duty to deliver the goods by delivering them to a carrier, not to his buyer (s. 32(1) SOGA).

The most immediate consequence of this is that the ***risk of transit loss passes*** from seller to buyer ***on or as from shipment***. In other words, if the goods are damaged or lost in transit, the buyer/receiver will normally have no action against his seller.

His only option is to knock on the carrier's door and seek to recover his loss from it. In order to be entitled to sue the carrier in contract he will need to be a party to a contract of carriage with such carrier.

R: F. Lorenzon, in Y. Baatz (Ed), *Maritime Law*, 4th ed (London, 2018), at [125]ff.
C. Debattista, in Y. Baatz (Ed), *Maritime Law*, at [93]ff.

2. Where are the terms of the contract of carriage between carrier, shipper and buyer?

Two situations must be distinguished: (a) goods carried into liners and (b) goods carried into chartered vessels. We will deal with the two alternatives in turn.

(a) Liner carriage

In liner carriage, a shipping company operates a regular service between different ports, similar to a bus or ferry company. The terms of contract are, therefore, not individually negotiated between the parties, but are essentially determined by the carrier, who undertakes to carry any cargo subject to its standard terms, usually evidenced in the back of the carrier's own bills of lading.

One of the three functions of a bill of lading is that of a contract. Accordingly, the bill of lading, together with any applicable mandatory provisions contained in international Conventions will be relevant in a cargo claim:

- as between the original shipper and the carrier, the bill of lading will be best evidence of the terms of the contract, but evidence of other terms agreed orally or in a booking note will be admissible

  The Ardennes [1951] KB 55 (KB).

- as between a third party endorsee, e.g. a c.i.f. or c.& f. buyer, and the carrier, the contract has been reduced into writing and the terms of the bill of lading will provide sole evidence of the contract

  Leduc v Ward (1888) 2 QBD 475 (CA).
  Evryalos Maritime Ltd. v. China Pacific Insurance Co. Ltd.(The Michael S) [2002] LMLN 579

The lawful holder in possession of such bill will be a party to that contract and will have title to sue the carrier herein identified (COGSA 1992 s. 2(1))

(b) Goods carried in a chartered vessel

In cases where the carrying vessel operates under a time-and/or voyage charterparty, a number of different contractual documents exist and matters are much more complex than in cases of liner carriage.

Two situations need to be distinguished here: (i) where the cargo claimant is the charterer, and (ii) when the cargo claimant is not the charterer

(i) Where the cargo claimant is the charterer (c.i.f./c. & f. seller or f.o.b. buyer)

The cargo-claim is governed by the charterparty rather than the bill of lading.

Rodocanachi v Milburn (1886) 18 QBD 67 (CA)
President of India v Metcalfe [1970] 1 QB 289 (f.o.b. buyer)

What if the charterer has not shipped any goods but buys them, during transit, from the original shipper?

Calcutta Steamship v. Andrew Weir & Co. [1910] 1 KB 759 (KB)

If the charterparty contains the terms of contract, does this mean that the bill of lading is completely irrelevant to the claimant's position?

No: the charterer/cargo claimant may well find the bill of lading crucial in establishing his rights

- to obtain delivery of the goods from the carrier (document of title);
- to establish that they were damaged between shipment and discharge (receipt);
- to transfer the right to delivery of the goods to others, i.e. to sell goods during transit (document of title).

As concerns *the contractual terms relevant to the claim*, though, both the claimant and the carrier are bound by the terms contained in the charterparty.

Therefore, the proper jurisdiction in which to bring a claim, as well as the applicable law and the question of whether the Hague or Hague-Visby Rules are effectively incorporated into the contract will also depend on the charterparty rather than the bill of lading.

(ii) Where the cargo claimant is not the charterer (f.o.b. seller or c.i.f./c.&f. buyer)

The cargo-claim is governed by the bill of lading because that is the only contract, which the claimant has with the carrier.

Hain v Tate & Lyle [1936] 2 All ER 597 (HL)

Here again, the holder of the bill will have title to sue in contract pursuant to s. 2(1) of GOGSA 1992.

The charterparty *may* however be relevant to the cargo-claim where the bill of lading incorporates terms from the charterparty into the bill of lading.

For a recent case in which it was held that a bill of lading holder was bound by a FIOST clause in the charterparty, see

The Jordan II [2004] UKHL 49; [2005] 1 Lloyd's Rep 57 (HL).

3. The law applicable to cargo claims

We have now identified the commercial and contractual background of a cargo claim in which a carrier may be involved. But what is the law governing cargo claims?

Under English law the relevant statute is COGSA 1971 and the annex thereto: the Hague Visby Rules (HVR) (in your materials).

See: COGSA 1971 s. 1(2) and 1(6) and HVR art X.

4. The carrier's main duties under the Hague Visby Rules

The HVR intended to represent a compromise between the interests of cargo owners on one hand and shipowners on the other. However the wording of the convention delivers often much less protection than it should.

→ Among the most relevant ***pro cargo provisions*** have to be mentioned:

Art. III r. 1 – Seaworthiness

However, the duty is just one of "due diligence to be exercised before and at the beginning of the voyage"

Art. III r. 2 – loading, caring, carrying and discharging the goods

Again here the duty is one of due diligence. Moreover see

Renton v Palmyra [1957] AC 1449 (HL)
The Jordan II [2004] UKHL 49; [2005] 1 Lloyd's Rep 57 (HL)

Art. III r. 3 and 4 – re the content of bills of lading and their evidentiary value

However note the words "apparent" in III r. 3 (c) and the effects of words like "said to be" and "weight, quantity and condition unknown".

The Atlas [1996] 1 Lloyd's Rep 642 (QB)
The Mata K [1998] 2 Lloyd's Rep 614 (QB)

Art. III r.8 – which safeguards all the above

But see again

Renton v Palmyra [1957] AC 1449 (HL)
The Jordan II [2004] UKHL 49; [2005] 1 Lloyd's Rep 57 (HL)

R: F. Lorenzon, J. Graham Wilson, "The Jordan II: a foregone conclusion or a missed opportunity?" S.T.L. 2005, 5(1), 1

→ Among the most relevant ***pro vessel provisions***:

Art. III r. 6 – 1 year time bar

However note that if the rules do not apply the time bar could be shorter

SHELLVOY6, cl. 6(3)

Art. IV r. 2 – excepted perils

Art IV r. 5 – limitation of liability

Which will apply indeed "in any event".

The Kapitan Petko Voivoda [2003] EWCA Civ 451; [2003] 2 Lloyd's Rep. 1

5. Rights and liabilities for cargo claims

In order to file a claim and try to recover its losses, the claimant must (a) have title to sue under the contract of carriage and (b) identify correctly the promisor of the duty to carry: the carrier.

(a) Under English law, title to sue in contract under shipping documents is regulated by the Carriage of Goods by Sea Act 1992 (hereinafter "COGSA 1992).

Read COGSA 1992 (in your materials). Active discussion will take place in class.

(b) Up to this point we have been referring to the defendant of a cargo claim as the carrier, i.e. the person contractually obliged with the claimant to carry goods from a place to another.

We have seen that, in order to be responsible for loss of or damage to the goods, the defendant must be identified as the carrier of such goods. But is the owner of a vessel always to be considered as "the carrier"?

HVR Art. I(a)

> "'Carrier' includes the owner or the charterer who *enters into a contract of carriage* with a shipper" (emphasis added)

:. If the owner is identified as the contractual carrier in a bill of lading tendered to a third party endorsee, then the owner is 'the carrier' and shall be liable as such.

The Starsin [2003] UKHL 12; [2004] 1 A.C. 715 (HL)

:. On the other hand, since the HVR do not apply to charterparties (Art. VI), if the owner charters the vessel, it will try to avoid all liabilities imposed by the rules while trying to get all the benefits out of them through partial incorporation.

In any event owners try to exclude or limit their liability for cargo claims.

See GENCON 1994, Cl. 2

For examples of such clauses in Time charters see

BALTIME 2001, cl 12

Under English law, these defences would work only if the cargo claim is not brought by a third party consignee of the bill of lading or, at any rate, when the bill does not identify the owner as the carrier.

HVR Art. III. r 8

However, even if the owner does not manage to escape liability for damages resulting from breach of any of the duties arising under the HVR regime, he will be able to:

- Try to exclude liability proving that the loss or damage occurred as a consequence of one of the excepted perils listed under Art. IV r. 2 of the Rules;

- In any event limit his liability to the figures given in Art. IV r. 5 of the Rules;

- Use the global limitation set by the 1976 Limitation Convention (LLMC) according to which:

Shipowners, charterers, managers or operators of a seagoing ship may limit their liability for:
- claims in respect of loss or damage to property occurring on board the ship and consequential loss resulting therefrom; and
- claims in respect of loss resulting from delay in the carriage by sea of cargo.

See Art. 1 and 2.1 (a) and (b) LLMC

6. Can cargo interests secure their claims arresting the owner's vessel?

R: M. Tsimplis, in Y. Baatz (Ed), *Maritime Law*, at [356]ff.

The simple answer here is: yes.

In England under the 1981 Supreme Court Act

s. 20(2)

(g) Any claim for loss of or damage to goods carried in a ship

together with s. 21(4)

Under the 1952 Arrest Convention

Art. 2

> "A ship flying the flag of one of the contracting States may be arrested in the jurisdiction of any of the contracting States in respect of any maritime claims"

Art. 1 (1) of the Convention defines as "maritime" a claim arising out of:

(e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise
(f) loss or damage to goods … carried in a ship

Similar rights would arise under the 1999 Arrest Convention (not yet in force).

Art. 1 of the 1999 Convention

(g) any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;

7. Is the Owner covered by its P&I Club?

R: R. Merkin, R. Shaw, R. Pilley and J. Hjalmarsson, in Y. Baatz (Ed), *Maritime Law*, at [337]ff.

The liability for loss, shortage or damages to cargo is usually covered by P&I Clubs. The extent and limits to such cover are clearly listed in the updated version of the Rulebook of the relevant P&I Club.

The most notable exceptions to P&I cover are damages arising from:

- Deviation
- Fraudulent/incorrect bills of lading
- Misdelivery of cargo

In these cases Owners will not be indemnified.

8. Do cargo interests have a maritime lien on the vessel?

The simple answer here is no.

9. The future?

All this may soon change if the new Rotterdam Rules are to be ratified by the UK or the EU.

The new Rules are available on line on the UNCITRAL website.

R: Y. Baatz, C. Debattista, F. Lorenzon, A. Serdy, H. Staniland, M. Tsimplis, *The Rotterdam Rules: a practical annotation* (London, 2009).

Charterparties and bills of lading
A consolidation case study

We will now try to put the law in context

Please consider the following scenarios:

You are **the holder** of the three bills of lading you have been given just now.

For each bill of lading you should try and answer the following questions:

(1) Does this document contain and/or evidences **all** the terms of your contract for the carriage of the goods therein described? If yes, why? If not, why not and where else should you look for them?

(2) Have you got title to sue the carrier? If yes why? If not why not?

(3) In cases where you answered questions 1 and 2 in the affirmative: who is your contracting carrier? Why?

(4) Do the Hague-Visby Rules apply to your claim?

(5) Can you arrest the vessel?

Annexes

Statutes

Carriage of Goods by Sea 1971 (HVR)
Carriage of Goods by Sea 1992

Charterparty forms

Gencon
Baltime 2001
SHELLVOY 6
SHELLTIME 4

Bill of Lading forms

As per consolidation case study

