

CHAPTER 1

THE COMMERCIAL BACKGROUND

A shipowner's business principally consists of satisfying the demands made by parties to contracts of sale who are located in different countries. The structure of these international sale contracts has had a profound influence on the contracts of carriage made by sellers and buyers to fulfil their commitments towards each other. Therefore, it is helpful to examine this underlying sales structure before going on to consider the nature of the carriage contracts that it generates.

INTERNATIONAL SALES OF GOODS

International sales of goods differ from domestic sales in two important respects.¹ Firstly, there is the inconvenience of having payment on delivery when buyer and seller are in different countries. Secondly, there is a commercial need to be able to sell and resell certain types of cargo while in transit. Some oil cargoes, for example, may be sold and resold over 100 times while in transit.

The two most common types of international sales contract are the fob and the cif contract. Under the fob (free on board) contract, the buyer pays for and arranges carriage and the seller's duty is to load the goods onto a vessel nominated by the buyer. In contrast, under a cif (cost, insurance, freight) contract, it is the seller who pays for and arranges carriage, as well as takes out a policy of insurance on the goods, which will be assigned to the buyer. There are a number of variants,² but these are the two most significant contractual forms.

Both contracts' forms display two distinctive characteristics.

Payment against documents

With a sale against documents, the parties contract that payment will be made by the seller tendering various documents to the buyer in return for the contract price. These will include the invoice for the goods and, with a cif contract, the insurance policy covering the goods. However, the most important document that must be tendered under a fob or a cif contract is the bill of lading. This is a multipurpose document, which serves as a receipt, a document conferring constructive possession in the sale goods during the period of their carriage, a document of title and a potentially transferable contract of carriage. These functions will shortly be examined in more detail.

As will be explained below, possession of the bill of lading will confer on its holder constructive possession of the goods during their carriage. This is because the shipowner, who has actual possession, will only deliver the goods to a party presenting a bill of lading that covers them. Therefore, the seller knows that, by retaining the bill of lading, it will also retain control over the sale goods until the buyer pays the

1 For further details, see Atiyah, P, *The Sale of Goods*, 9th edn, 1995, London: Pitman.

2 Such as the c & f contract, which is a cif contract without the insurance element.

contract price. In turn, the buyer will feel secure in paying against this document, because possession of the bill of lading will enable it to take delivery of the goods described therein. If the buyer wishes to resell the goods while they are afloat, it can do so by making a sub-sale, which also provides for payment against transfer of documents relating to the goods, as opposed to payment against actual delivery of the goods. Under these types of contract, the seller will owe a dual obligation to the buyer. The first obligation relates to delivery of the goods themselves; the second relates to transfer to the buyer of documentation relating to the goods.

The financing role of banks

Cif and fob sales are usually mediated through banks that finance the sales under 'letters of credit'. The buyer will instruct its bank to open a letter of credit in favour of the seller. This will usually be on the terms of UCP 600, a purely voluntary set of rules, which are generally used by banks when opening a letter of credit.³ The seller will tender the documents specified by the letter of credit to the buyer's bank, which will pay the price in exchange for the documents on being satisfied that the documents conform with the description set out in the terms of the letter of credit. Alternatively, the buyer's bank, 'the issuing bank', may arrange for payment to be made by another bank in the seller's country, 'the correspondent bank'. The seller will then present the documents to the 'correspondent' bank, which will, in turn, pass the documents on to, and receive payment from, the 'issuing' bank.

The buyer's bank will be entitled to retain the documents until the buyer makes reimbursement of the sale price, which has been advanced by the bank. If the buyer needs the bill of lading to resell the goods, the bank may release it in return for a 'trust receipt' under which the buyer declares itself as trustee of the goods for the bank. On sale of the goods, the buyer will hold the proceeds of sale on trust for the buyer. This proprietary remedy remains available to the bank so long as the sale proceeds remain traceable in equity. Although the indorsement of the bill of lading to the buyer's bank may transfer property in the goods to the buyer, the bank, as pledgee of those goods, will have the possession of the bill of lading and consequently constructive possession in the goods that it represents. If the buyer defaults, the bank will be able to realise its security by taking delivery of the goods and selling them.

Transfer of risk on loading

The seller's obligation to deliver goods of the contract specifications will crystallise not when the goods are actually delivered to the buyer, but when they are loaded onto the carrying vessel. Thereafter, the 'risk' in the goods will be with the buyer, even though constructive possession of, and property in, the goods will very probably remain with the seller pending payment by the buyer.⁴ The transfer of risk on loading means that, vis-à-vis the seller, the buyer accepts the risk of loss or damage to the

3 For a detailed examination of the types of shipping document acceptable to the banks under the previous version of UCP, UCP 500, see De Battista, C, 'Banks and the carriage of goods by sea: secure transport documents and the UCP 500' (1994) 9 *Butterworths Journal of International Banking and Finance Law* 329.

4 Under fob and cif contracts, the parties intend that risk should pass on loading, and this intention will displace the presumption in s 20 of the Sale of Goods Act 1979 that risk passes with property.

goods while in transit. So long as the goods match the contract description at the time of loading, the seller will be entitled to its price and will not be liable to the buyer if the goods are damaged between loading and their eventual physical delivery to the buyer. The contract description will specify not only the type, quantity and condition of goods being sold, but also a period of time within which they must be loaded.

For a buyer or a bank financing the purchase through a letter of credit, the transfer of risk on loading will only be acceptable if two conditions are met. Firstly, there must exist some reliable documentary evidence to show that the seller has met its delivery obligations by loading goods of the contract description on board the vessel. Secondly, there must exist a reliable mechanism for recovering loss or damage sustained during transit from the carrier, in the absence of any recourse against the seller. As we shall see, the bill of lading satisfies both of these requirements.

THE FOUR FUNCTIONS OF THE BILL OF LADING

We shall now examine in more detail how the four functions of the bill of lading interrelate to satisfy the expectations of buyers and sellers in sales where risk passes on loading and payment is made against delivery of documents rather than delivery of the goods themselves.

Receipt

The bill of lading will state the condition and quantity of the goods when they are transferred into the custody of the carrier. It will also state the date on which they were loaded, and will identify the carrying vessel as well as the ports of loading and discharge. It will usually be prepared by the consignor, the party who is the current owner of the goods to be loaded onto the vessel. In doing so, it will rely on the 'mate's receipts', which are the ship's records of the cargo loaded and presented to an agent of the carrier, such as the captain of the vessel (the ship's 'master'), for signature. It is common for bills of lading to be issued in sets of three originals. Once the bills of lading have been signed, they will be issued to the party handing over custody of the goods to the carrier. This party is usually the current owner of the goods in question and is referred to as the 'shipper' or the 'consignor'. The carrier will usually be the shipowner, but this is not always the case. The carrier may, in fact, have chartered or subchartered the vessel.

The sale contract and, where applicable, the letter of credit will usually require that the bills of lading tendered for payment to the buyer or the bank constitute what are called 'shipped', 'clean' bills of lading.

Where the goods are transferred into the custody of the carrier when loaded onto the vessel, the bill of lading will be a 'shipped' bill of lading. A 'shipped' bill will enable a buyer to whom risk passes on loading to check whether the goods at the time of loading match up to the description in the contract of sale. In contrast, where the goods are transferred into the carrier's custody at an earlier stage – for example, on delivery to the carrier's warehouse at the port of loading – the bill of lading will be a 'received for shipment' bill of lading. Such a bill can be turned into a 'shipped' bill if it is subsequently marked by the carrier or its agent to that effect.

A 'clean' bill of lading is one that contains an acknowledgment by the person on whose behalf the bills were signed that the goods described therein were loaded

in 'apparent good order and condition'. If the bill of lading contains adverse comments as regards the condition of the goods on loading, it is called a 'claused' bill of lading.

Document transferring constructive possession

The bill of lading will have on its face a space identifying the party to whom delivery of the goods is to be made when the vessel reaches its port of discharge. This party is known as the 'consignee', although it obtains no contractual rights to take delivery merely by reason of being designated as such.⁵ The consignor, as the original contracting party, retains the right to give new delivery instructions to the carrier, so long as it is still in possession of the bill of lading.⁶ Furthermore, a bill of lading will not simply identify a party as the consignee. If X is the named consignee, the bill of lading will not instruct the shipowner simply to deliver to X, but rather to make delivery to 'the order of X or assigns' (an 'order' bill). Alternatively, the delivery instructions may be left blank without naming a consignee, or may simply state 'to order' or 'to order or assigns' (a 'bearer' bill).

Such wording constitutes an undertaking by the carrier to the consignor that the cargo will be delivered to the person presenting an original bill of lading, whether that person be the named consignee or a subsequent holder of the bill of lading.⁷ The unique characteristic of the bill of lading is that this initial delivery undertaking is transferable to subsequent holders of the document without the need for any further involvement of the carrier, so transferring constructive possession to the new holder of the document. Where a 'bearer' bill is involved, constructive possession can be transferred by simple physical transfer. However, where an 'order' bill is involved, something more is required. It must also be 'indorsed' by the named consignee signing the reverse of the bill. Two types of indorsement are possible: a special indorsement, which identifies the indorsee; and an indorsement in blank, which does not. After an indorsement in blank, the bill of lading can subsequently be transferred in the same manner as a bearer bill. In contrast, where any other type of document is involved, constructive possession can be transferred only if the party who gave the delivery undertaking expressly acknowledges that it will now honour that undertaking in favour of a third party. This process is known as 'attornment'. The bill of lading is, however, the only document under which, at common law, constructive possession can be transferred without an attornment.⁸ The transfer of constructive possession will occur automatically on transfer of the bill of lading provided that such is the intention of the transferor. However, a bill of lading that only designates a consignee and lacks the additional wording 'to order' or 'to order or assigns' is known

5 However, a party named as consignee may obtain possessory rights over the goods specified in the bill of lading if the consignor designated it as consignee with the intention of completing a sale or a pledge to it. See *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC.

6 *Mitchell v Ede* (1840) 11 Ad & El 888.

7 In addition, the carrier must also take reasonable steps to verify the identity of the consignee or indorsee who is presenting the bill to claim delivery. See Gaskell, Asariotis and Baatz in *Bills of Lading: Law and Practice*, 2000, London: LLP, at 14.22.

8 *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC, 59. Indorsement of a bill of lading will therefore satisfy the requirements of s 29(4) of the Sale of Goods Act 1979 regarding the seller's delivery obligations when the goods are in the hands of a third party at the time of sale. However, 'attornment' is still required for establishing title to sue in bailment where the bill of lading holder is not the original bailor. This is discussed in more detail below: Chapter 2, pp 54–55.

as a 'straight' bill. Such a bill can be used to effect only a single transfer of possession, from the consignor to the consignee.⁹

Constructive possession will entitle the holder of the bill of lading to claim the goods from the carrier, as bailee, at the port of discharge and to sue the carrier in conversion if the goods have been delivered to someone else. Such a misdelivery claim can also be made in contract, provided that, as will generally be the case, the bill of lading constitutes a contract between its holder and the carrier. The carrier who delivers to a party who cannot produce an original bill of lading runs the risk of being sued for misdelivery, even if s/he delivers to the named consignee¹⁰ or to the owner of the goods.¹¹ In both situations, a bill of lading may well have been pledged to a bank by way of security for an advance and the bank will have constructive possession by virtue of holding an original bill of lading. Possessory rights, therefore, prevail over proprietary ones.

Given that bills of lading are frequently issued in sets of three or more originals, the carrier can never be sure that the person presenting the bill of lading actually possesses the best right to possess the goods. However, if that risk materialises, the carrier will have a good defence to a misdelivery claim, whether in conversion or in contract, by virtue of having made delivery against production of an original bill of lading, provided that it had no notice of any want of title in the party presenting that bill.¹² A bill of lading is 'spent' once its transfer can no longer transfer constructive possession in the goods to which it refers.¹³ This will happen when the party entitled to possession of the goods takes delivery of them on discharge prior to receiving an original bill of lading.

Document of title

Since *Lickbarrow v Mason*¹⁴ in 1791, the courts have recognised the custom of merchants that the indorsement of a bill of lading could transfer not only possessory rights, but also rights of ownership in the goods described therein, if that was the intention of the parties when indorsing the bill of lading. The seller is not obliged to transfer property in the goods when they are delivered either to the buyer or to a carrier for delivery to the buyer. By s 19(1) of the Sale of Goods Act 1979, the seller is entitled to contract on the basis that it reserves a right of disposal over the goods in these situations until some condition, usually payment of the price, is satisfied. Where the bill of lading makes the goods deliverable to the order of the seller or its agent, s 19(2) provides a presumption that such a right of disposal has been reserved. If the bill of lading makes the goods deliverable to the order of the buyer, the statutory presumption does not apply. Nonetheless, the fact that the parties contract on the basis of a payment against documents will show their intent that the seller should still have this right of disposal.

9 *The Rafaela S* [2005] UKHL 11; [2005] 2 AC 423; affirming [2002] EWCA Civ 694; [2003] 2 Lloyd's Rep 113, CA.

10 *The Stettin* (1889) 14 PD 142.

11 As in *The Jag Shakti* [1986] AC 337.

12 *Glyn Mills Currie & Co v The East and West India Dock Co* (1882) 7 App Cas 591, HL.

13 *East West Corp v DKBS 1912* [2003] EWCA Civ 174; [2003] 1 Lloyd's Rep 239, applying *dicta* of Willes J in *Barber v Meyerstein* (1866) LR 2 CP 38, 53.

14 [1794] 5 TR 683.

The bill of lading is the only document of title recognised at common law.¹⁵ However, it is not a fully negotiable document, in that the indorser cannot pass by indorsement any rights in the goods greater than those that s/he already has.¹⁶

A potentially transferable carriage contract

The bill of lading also serves a contractual function. It frequently evidences the terms of the initial contract of carriage. The Carriage of Goods by Sea Act 1992, replacing the Bills of Lading Act 1855, provides a statutory exception to the doctrine of privity of contract, allowing this initial contract to be passed down the chain of sellers, banks and buyers that may come into existence before the ultimate discharge of the goods. In most instances, the effect of the Act will be to ensure that contractual rights of suit are vested in the person with possessory rights over the goods described in the bill of lading.

The parties to this initial contract will be the 'carrier', usually the shipowner, and the 'shipper'. The meaning of the latter term depends upon the context in which it arises. When the courts have considered the parties to the initial contract, they have used the term to refer to the party who contracts with the carrier. That party will often be a different person from the 'consignor', to whom the bill of lading must be issued on completion of loading. However, in other contexts, the term 'shipper' has been used to mean 'consignor'.¹⁷ The contracts of carriage made on or before loading will now be examined in more detail.

CONTRACTS OF CARRIAGE

The two main types of contract in use for the carriage of goods by sea are the bill of lading and the charterparty.

The bill of lading

The bill of lading not only provides information as to the goods loaded; it also contains contractual terms. These are usually to be found on the reverse of the document. Sometimes, the bill of lading may expressly incorporate terms from another document, a charterparty, by the use of words of incorporation on its front. Charterparty terms will form no part of the bill of lading contract in the absence of such words of incorporation. The charterparty and the bill of lading remain two distinct contracts. This is equally true when the terms of a charterparty are expressly incorporated into the bill of lading.

If the shipper wishes to use only a part of the vessel, it will usually contract on the basis of the contractual terms contained in the *bill of lading*. The actual contract will be made informally when the shipper books space on the vessel. The initial contract may

15 *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC.

16 Subject to the exceptions provided by s 24 of the Sale of Goods Act 1979 and by the Factors Act 1889 relating to dispositions by a mercantile agent (s 2), a seller in possession (s 8) and a buyer in possession (s 9).

17 The context of the discussion in Chapter 3 of the evidential effects of the bill of lading requires 'shipper' to refer to the consignor.

be made purely orally or may be committed to a short document, a 'booking note'. Unlike a charterparty, this initial contract is not definitive of the contractual terms. These will be fleshed out by the terms of the carrier's usual bill of lading, which will be issued when the goods are eventually loaded. This may happen expressly, as in *Armour & Co Ltd v Walford*,¹⁸ or impliedly, as in *Pyrene Co Ltd v Scindia Navigation Co Ltd*.¹⁹ The terms of the expected bill of lading will form part of the contract from its inception, even if no bill of lading is ever issued.

Bill of lading contracts with the shipper are subject to statutory intervention in three respects. Firstly, the Carriage of Goods by Sea Act 1971 provides that an international Convention, the Hague-Visby Rules, shall have the force of law as regards such terms of these contracts as concern the carriage of the goods, depending, inter alia, on the country in which the bill of lading is issued.²⁰ All bills of lading issued in the UK are subject to the Hague-Visby Rules. Secondly, the Carriage of Goods by Sea Act 1992²¹ effects a statutory transfer of this initial contract to a party who subsequently becomes a 'lawful holder' of the bill of lading. Thirdly, both the Carriage of Goods by Sea Act 1971 and the Carriage of Goods by Sea Act 1992 entitle third-party holders of the bill of lading to rely on the truth of certain evidential statements contained in the bill of lading, notwithstanding that the carrier may possess the evidence necessary to refute them.

The voyage charterparty

If the whole or a substantial part of the vessel is to be used, as would be the case with bulk cargoes, then a *charterparty* is more likely to be used. This is a formal written contract, definitive of the terms of the contract between the parties. Where the vessel is required for just a single voyage, a *voyage charter* will generally be used. The charterer will pay *freight* to the carrier as its carrying charge. It will also undertake to load and discharge the vessel within a set period of time. This is known as *laytime*. If it exceeds this period, it will become liable to pay liquidated damages to the shipowner. This is known as *demurrage*. Voyage charters generally involve the use of the whole vessel, but can involve the use of only part of its cargo carrying capacity. A variant of the voyage charter is the 'slot charter' of dry cargo ships adapted for the carriage of container boxes in twenty foot or equivalent units (TEUs) in 'slots' or 'cells'. Instead of chartering the whole or part of a specific vessel, a container operator will book a set number of TEUs on sailings by ships of a particular operator.

Charterparties are subject to none of the statutory provisions that affect bills of lading. A bill of lading will still be issued, but in the hands of the charterer, it will generally have no contractual significance. This is so whether or not the charterer receives the bill of lading when it is issued²² or subsequently, on indorsement.²³

18 [1921] 3 KB 473.

19 [1954] 2 QB 402.

20 Many countries are still signatories to an earlier convention, the Hague Rules. The differences between the two conventions are discussed in detail in Chapter 5. A new convention, on international carriage of goods wholly or partly by sea, has recently been concluded by UNCITRAL and will be open for signing from September 2009. It will be known as 'The Rotterdam Rules' and is discussed in Chapter 6.

21 Replacing the Bills of Lading Act 1855.

22 *Rodoconachi, Sons and Co v Milburn Bros* (1886) 18 QBD 67, CA.

23 *The President of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1970] 1 QB 289, CA.

However, in the hands of parties other than the charterer, the bill of lading is likely to constitute a contract with the carrier by virtue of the statutory assignment effected by the Carriage of Goods by Sea Act 1992. The Act will still operate even if the bill of lading temporarily loses its contractual status when it passes through the hands of a charterer. Therefore, whether or not the shipper initially contracts on the basis of a charterparty, the buyer at the end of the sale chain who actually takes delivery of the goods will generally obtain a statutory right of action against the carrier for transit loss or damage. Such an action will be contractual on the terms of the bill of lading and will probably be subject to the provisions of the Hague-Visby Rules.

Contracts for the use of the vessel – time charters

Charterparties may also be defined not by relation to a particular voyage but by relation to a particular period of time. Such charters are called *time charters*, and *hire* rather than *freight* will be paid to the shipowner. Delays during the charter will be governed by an *off-hire* clause rather than by *laytime* and *demurrage* provisions. An important commercial feature of most time charters is that it will be the time charterer, and not the shipowner, who makes the express contracts with the shippers²⁴ whose goods are to be carried on the ship. Time charters have traditionally been regarded as contracts for the use of a vessel rather than contracts for the carriage of goods. This reflects the wider choice that such contracts extend to the charterer in relation to the cargoes that may be carried and the available voyage destinations. To a limited extent, the distinction is reflected in the law. For example, bills of lading and voyage charters, but not time charters, are excluded from the operation of the Law Reform (Frustrated Contracts) Act 1943. However, in many other areas, such as the operation of the Carriage of Goods by Sea Acts 1971 and 1992, the key division is between bills of lading and charterparties, whether voyage or time. The conceptual divide between the two types of charterparty has been further eroded by the emergence of a hybrid, the 'trip' charter, which is essentially a voyage charter, but one that adapts the contractual format of the time charter.

In both voyage and time charters, the crew will generally be employed by the shipowner. However, a time charterer may sometimes contract on the basis that it provides its own crew. Such a charter is known as a *demise charter*. Unlike an ordinary charterer, the demise charterer obtains a possessory interest in the chartered vessel.

MODIFICATIONS TO THE TRADITIONAL CARRIAGE CONTRACT MODEL

The traditional view of the initial carriage contract is that it is an express contract between the shipper and the carrier for sea carriage and that a bill of lading will be issued in respect of the goods carried. This view needs to be modified in the following respects to take in developments in commercial practice over the years.

²⁴ Such parties will be shippers-vis-à-vis the time charterer and consignors vis-à-vis the shipowner.

Use of documents other than the bill of lading

With changing patterns of international trade, other documents have emerged to duplicate many of the functions of the bill of lading.

The sea waybill

In many trades, such as the container trade, it is not expected that the goods will be resold while afloat. The use of the bill of lading can cause problems if the goods reach the port of discharge before the bill of lading comes into the hands of the buyer. It will only be able to persuade the shipowner to deliver if it provides a suitable guarantee to indemnify the shipowner against any misdelivery claims. Apart from the inconvenience caused by arranging such guarantees, there will also be some cost involved for the buyer if the shipowner insists on a bank providing the guarantee.

These problems can be avoided by using a sea waybill. This is a non-negotiable form of bill of lading where delivery is to be made to the named consignee without any need for production of the original waybill. Although the sea waybill is or evidences a contract between the carrier and the consignor, the Carriage of Goods by Sea Act 1992 now gives the named consignee in a waybill a right to sue the carrier in contract on the terms contained in the waybill. The sea waybill therefore has a contractual and an evidential effect, but is not capable of transferring either title or constructive possession to the goods described therein. For these reasons, the sea waybill is not well adapted to use in letters of credit. If a bank is named as consignee, it takes the risk that the carrier may accept instructions from the consignor to deliver to a new consignee. This can be avoided if the bank is named as consignor, but in doing so, it exposes itself to any liabilities to the shipowner that may be outstanding under the contract of carriage evidenced by the waybill. Notwithstanding these problems, the use of the sea waybills in letters of credit is recognised by Art 24 of UCP 500.

However, the position is different where a similar document, the straight bill of lading, is issued. The carrier must now deliver against production of the document by the consignee. This is the result of the House of Lords' reasoning in *The Rafaela S*,²⁵ which led it to conclude that such a document amounts to a 'bill of lading' for the purposes of the Hague-Visby Rules. The difference in delivery obligations makes critical the correct classification of a document as a bill of lading or a sea waybill. The principal way of distinguishing between the two types of document is by reference to the way in which the document is titled.

The delivery order

Where bulk cargo is sold, the seller may wish to divide a consignment among several buyers. As there is only one consignment, only one bill of lading can be issued. A new document needs to be generated to replicate the possessory function of the bill of lading. That document is the delivery order, an instruction by the shipper to the shipowner to deliver so many tons out of the whole bill of lading consignment to a named consignee or to the holder of the delivery order. Once the shipowner agrees to carry out the instructions and 'attorns' to the delivery order through its signature

25 [2005] UKHL 11; [2005] 2 AC 423; [2002] EWCA Civ 694; [2003] 2 Lloyd's Rep 113.

or that of its agent, such as the master, the delivery order becomes a 'ship's delivery order'. The 'attornment' constitutes an undertaking by the shipowner to the holder of the delivery order that it will deliver to it the goods covered by the delivery order against presentation of that document. This undertaking will replace the prior undertaking given on issue of the bill of lading to deliver against presentation of that document. Without such attornment, the delivery order is no more than a 'merchant's delivery order', which gives the holder no right to claim delivery from the shipowner.²⁶

Only a 'ship's delivery order' can transfer constructive possession to the holder. For this reason, only ship's delivery orders are an acceptable substitute for bills of lading where part of a bulk cargo is sold under a contract of sale that provides for payment against documents. By virtue of the Carriage of Goods by Sea Act 1992, the holder of a ship's delivery order will have a contractual right to sue the carrier on the terms of the original bill of lading contract in respect of loss or damage to the goods covered by the delivery order.

Combined transport bills of lading

This type of bill of lading is used in contracts of carriage on a combined transport basis – that is, carriage from an inland point in one country to an inland point in another country. Such a contract will be multimodal, in that it will involve not only carriage by sea, but also carriage by at least one other form of transport, usually road. The bill of lading will usually be a 'received for shipment' bill of lading rather than a 'shipped' bill of lading.

If a combined transport bill of lading is issued by a non-vehicle-owning carrier (NVO), such as a freight forwarder,²⁷ there is some doubt as to whether such a document can transfer either ownership in or constructive possession of the goods described therein. Such a bill of lading would therefore be akin to a 'straight' bill of lading – that is, a non-negotiable document that, unlike a waybill, must still be presented to obtain delivery from the carrier. A holder of such a bill of lading who is not the original shipper probably obtains a contractual right of action against the carrier by virtue of the provisions of the Carriage of Goods by Sea Act 1992 concerning sea waybills.

Implied contracts

The traditional model of carriage contracts assumes direct contractual dealings between shippers and shipowners. Yet, in the following situations, there are no such direct dealings. The first is where the shipowner has time chartered its vessel for a period of, say, 12 months. During that period, it will be the time charterer and not the shipowner who enters into direct contractual relations with the consignors whose goods are to be carried on the ship. The second is where there is a fob contract, under which the buyer makes the contract of carriage. The shippers in the first instance and

26 Moreover, such a document will not satisfy the requirements of s 29(4) of the Sale of Goods Act 1979, which deals with the seller's delivery obligations when a third party is in possession of the goods at the time of the sale.

27 Freight forwarders usually act solely as agents in arranging contracts of carriage, rather like travel agents.

the seller in the second are both tacitly assumed to be contractually linked with the shipowner on the terms of the bill of lading, despite the absence of any direct contract between them. Such contracts, therefore, must be implied contracts.

Expansion of the contractual service from pure sea carriage

The law of carriage of goods by sea developed at a time when the relevant contract of carriage would involve a single sea voyage, with the carrier undertaking responsibility for the goods from the moment at which they were loaded onto its vessel to the moment of their discharge.²⁸ This is known as the 'tackle to tackle' or 'alongside' rule: it is also the period covered by the Hague and Hague-Visby Rules. However, even under traditional ocean bills of lading, the carrier's period of responsibility usually extends beyond these termini, in that the cargo owner will usually take delivery at the port of discharge after the completion of discharge. For example, after discharge, the goods may be stored in the warehouse of a terminal operator or customs agent appointed by the carrier. The receiver will then obtain delivery of the goods from that party on presentation of the bill of lading. The carrier's responsibility as bailee will continue until this point, notwithstanding that the goods are no longer on the vessel but have been transferred into the custody of an independent contractor engaged by the carrier.

The carrier's responsibility as bailee will also start before the start of the 'tackle to tackle' period if the carrier, or its agent, receives the goods prior to the commencement of loading. Bills of lading invariably contain 'period of responsibility' or 'before and after' clauses determining the extent of the carrier's responsibility, if any, for the goods during these periods. Article VII of the Hague and Hague-Visby Rules specifically preserves the carrier's right to rely on such clauses.

It is now, also, quite common for the period of contractual responsibility to extend beyond one sea voyage. One example is where the initial sea carrier can complete only part of the contractual voyage and needs to trans-ship the goods onto the vessel of another carrier, which will take the goods on to the port of discharge. Another example is where the carrier takes over the goods at an inland depot and contracts to deliver the goods at another point inland in the country of destination. Such a contract will necessarily involve a mode of transport other than sea transport and is 'multimodal'.

These expanded carriage contracts are of two basic types. Under the first type, the initial carrier undertakes to act as principal as regards that part of the contract that it will perform personally and will contract with the other carriers as the shipper's agent. Under such contracts, a 'through' bill of lading will be issued, which will contain a clause permitting trans-shipment and will provide that the carrier's liability shall cease once the goods are no longer in its custody.

In contrast, under the second type of contract, the carrier contracts as principal as regards the entire contractual service, even though it may, in fact, use subcontractors to perform parts of the contract. Such subcontractors will have a contract only with the carrier and not with the shipper. The bill of lading issued in this case will be a 'combined transport' bill of lading. It may be issued by a person, such as a freight forwarder, who is neither the owner nor the charterer of a vessel, in which case, it will

28 Bills of lading issued for such a voyage are termed 'ocean' bills of lading.

be a 'received for shipment' bill of lading. This will not affect its contractual status, but may rob the document of any proprietary or possessory status.²⁹ Such documents may have achieved negotiable status by virtue of a trade custom or usage, as was held to be the case with mate's receipts in Singapore in *Kum v Wah Tat Bank Ltd.*³⁰ The matter is still uncertain, given the decision in *Diamond Alkali Export Corp v Fl Bourgeois*³¹ that 'received for shipment' bills of lading are not good tender under a cif contract.³² However, the fact that such bills have, to some extent, become acceptable documents under a letter of credit subject to UCP 500 is likely to be cogent evidence that they have achieved negotiable status by virtue of a trade custom or usage.

Containerisation

The expansion of contracts of carriage beyond the geographical limits of the traditional ocean bill of lading has gone hand in hand with the use of containers for the carriage of most non-bulk cargoes. The containers used may be those of the shipper, but are more likely to be supplied by the carrier. If the shipper can fill an entire container, the carrier will deliver one to its premises. The shipper will then pack, or 'stuff', the container, which will then be taken to the container depot by either the shipper or the carrier, ready for loading onto the carrying vessel. A contract on this basis is known as 'full container load' (FCL). The equivalent operation at the end of the carriage will involve delivery of the full container to the consignee. Such a contract will be FCL/FCL. If the shipper can use only part of a container, it will take its goods to the container terminal, where they will be packed by the carrier into a container along with goods dispatched by other shippers in a similar position. A contract on this basis is known as 'less than container load' (LCL). The equivalent operation at the end of the carriage will involve the consignee taking delivery of its goods after they have been unpacked from the container. Such a contract will be LCL/LCL. The arrangements for unpacking the container may, however, differ from those governing its stuffing. For example, where the shipper packs a single container for goods to be delivered to more than one consignee, the contract will be FCL/LCL.

The contract will also need to specify the movement of the container – that is, the place of its receipt by and delivery from the carrier. Where these operations take place at the premises of the shipper and consignee, respectively, the contract will be on 'house to house', or 'door to door', terms: this is the form usually adopted when the contract is on an FCL/FCL basis. However, where the contract provides for pure sea carriage, it will be on 'pier to pier', or 'port to port', terms. A further variant is where the contract provides for receipt or delivery at a container depot. These options may be combined with FCL and LCL terms to meet the contractual needs of the parties to the contract of carriage.

Most contracts of carriage involving containers will involve some element of

29 A further problem is that, under classic cif law, a bill of lading is unacceptable if it fails to provide the necessary 'continuous documentary cover'. See *Hamsson v Hamel and Horley* [1922] 2 AC 36, HL.

30 [1971] 1 Lloyd's Rep 439.

31 [1921] 3 KB 443.

32 In contrast, in *The Marlborough Hill* [1921] AC 444, PC, a 'received for shipment' bill of lading was held to amount to a 'bill of lading' for the purposes of s 6 of the Admiralty Court Act 1861.

combined transport. Most use the sea waybill as the contractual document. However, some still use the bill of lading, although it is extremely rare for containerised goods to be sold and resold while in transit.

The use of containers causes considerable evidential problems to cargo claimants in proving that the goods packed inside the container were damaged during the custody of the carrier. If the shipper loads them into the container, which is then sealed, the carrier will have no means of verifying what is inside the container. Accordingly, when it issues the bill of lading or sea waybill, it will protect itself by qualifying any statement as to the contents of the container with words such as 'said to contain'. The effect of these words is to oblige the cargo claimant to prove by independent evidence exactly what was in the container at the time that the carrier took it over and the condition in which it then was. In many cases, this will prove to be an insurmountable evidential burden.

THE CARGO CLAIM ENQUIRY

Having sketched in the general background, we can now move on to consider in detail the subject of the first part of this book: the process of recovering from carriers for loss or damage to goods, which occurred during their custody. In assessing the merits of such a claim, the following questions have to be answered.

Does the claimant have title to sue the defendant?

'Title to sue' means the claimant's right to sue the defendant in respect of what it has lost by reason of the defaults of the carrier or its subcontractors during the carriage of the goods. The claimant will generally be the buyer taking delivery at the end of a chain of sale contracts under which risk passes on shipment. However, the claimant might also be the original shipper or a bank that has made a payment in respect of the goods under a letter of credit. The principal types of loss will be: damage to cargo; non-delivery of cargo; misdelivery of cargo; and late delivery of cargo. If the claimant has insured the goods and has been indemnified by its insurer, then the action may be brought in its name by the insurers under the process of subrogation. The shipowner's liability in respect of cargo claims will generally be covered by liability insurance, known as 'P&I' (protection and indemnity) insurance. Shipowners will not be covered in respect of claims arising out of deviation, misdelivery and the issuing of a 'clean' bill of lading for goods that were damaged prior to loading.

Claims may be brought contractually or non-contractually in negligence, bailment, conversion or deceit. It will generally be preferable for any action to be brought in contract for the following reasons. Firstly, the position as regards jurisdiction and choice of law is likely to be simplified as the result of express contractual clauses. Secondly, there are no restrictions on recovery of economic loss in contract of the type that have limited the scope of the action in negligence. The defendant will usually be the shipowner because of the possibility of obtaining security for the claim by way of the arrest procedure. Arrest is a form of judicial detention available against the carrying vessel or a sister ship in most jurisdictions throughout the world. Once a vessel is arrested, it will be unable to leave the port until security for the claim has been provided, failing which, it will be subject to judicial sale. The defendant

may also be a charterer or a freight forwarder who has contracted as a carrier or a subcontractor, such as a firm of stevedores that has been engaged by the carrier to load or discharge the vessel. If an inaccurate bill of lading is signed, the defendant could also be the party who actually signed the bill of lading.

There may, indeed, be an advantage to the claimant directing its claim at the carrier's subcontractors, rather than at the carrier itself. The claim will be non-contractual and therefore outside the scope of the Hague or Hague-Visby Rules. This means that a claim involving physical harm to cargo will be recoverable in full. The subcontractor will be unable to rely on provisions of the Rules, such as package limitation, that would have been available to the carrier had the claim been directed at it under the bill of lading. Such non-contractual actions tend to undermine the aim of the Rules in providing a uniform framework for the treatment of cargo claims. This has, in response, prompted a remarkable degree of judicial ingenuity and creativity directed at reining back such claims into the ambit of the Rules. This will be examined in detail at the end of Chapter 2.

In the event of the claimant obtaining a judgment against a shipowner, which it is unable to satisfy due to its insolvency, the Third Parties (Rights against Insurers) Act 1930 allows the claimant to assume the rights of the shipowner as against its liability insurer. However, any direct action against the insurer will be frustrated by the fact that the rules of all of the P&I Clubs make it a precondition of any indemnity that the assured shall have first settled the claim or satisfied any judgment itself. Obviously, an insolvent assured is in no position to do so and in *Firma C-Trade v Newcastle P&I Association (The Fanti and The Padre Island)*,³³ the House of Lords held that the third party had no right against the P&I Club under the Act, as its rights could be no greater than those enjoyed by the assured under the terms of the liability insurance. To avoid these problems, the claimant should seek, at the earliest opportunity, to obtain security for its claim by use of the arrest procedure.

The P&I Clubs also offer legal expenses cover, 'defence' or 'F, D & D' (freight, defence and demurrage) cover. Both types of insurance are often taken out by charterers as well. The vessel itself will be insured against loss or damage, so-called 'hull and machinery' insurance. If the vessel is trading in an area subject to hostilities, this cover will cease and a separate 'war risks' policy will need to be obtained.

If the claimant does have title to sue, can it bring an action against the defendant in the English courts?

English lawyers will become involved with cargo claims when the substantive dispute is heard in the English courts or in English arbitration. Additionally, recourse will be had to the English courts to obtain security where the substantive dispute is proceeding in a foreign court or by way of arbitration. The jurisdictional and procedural rules involved will be considered in detail in Part III of this book. These issues are as important as the merits of the claim itself. It is no good having an excellent claim if one's client is ultimately unable to turn that claim into an enforceable judgment.

33 [1991] 2 AC 1.

Has the loss or damage occurred during the period for which the carrier was responsible for the goods?

The claimant will need to prove when the defendant's period of responsibility for the goods began and what was the condition of the goods at that time. It will then need to prove when the defendant's period of responsibility ceased and what was the condition of the goods at that time. This is largely a question of fact, but where a claim in contract is made, it will also involve questions of construction as to the period of the defendant's responsibility for the goods. Unlike an action in tort, this period will not necessarily coincide with the period in which the goods are in the physical custody of the defendant. This is the case with combined transport bills of lading.

If loss is established during the relevant period, what is the defendant's responsibility for it?

If the action is brought in tort, this will be a pure question of fact revolving around whether or not the defendant took reasonable care of the goods while they were in its custody. If the action is brought in contract, the terms of the contract of carriage need to be considered, as these may afford a defence to the defendant. These terms may be express, implied or statutory.

If the defendant is responsible for the loss, how will damages be assessed?

The answer to this question involves the application of the principles relating to remoteness of damage, which are discussed in Chapter 13. Different rules apply depending on whether the claim is made in tort or in contract. In addition, contractual claims may be reduced by virtue of limitation provisions in the contract.