

Terminology:

- Shipper
- Consignee / Endorsee
- Carrier
- Contractual Carrier
- Actual or performing Carrier

1

B/L in the hands of the Shipper

- At what point is the contract of carriage concluded?
 - Orally or in writing before the B/L is presented for signature
- The Ardennes (1951)
Owners attempted to rely on a 'liberty to deviate' clause in the B/L, whilst they had earlier assured the charterers that the vessel would proceed directly to discharge port.

2

The Ardennes (1951) per Goddard CJ

- It is I think, well settled that a bill of lading is not, in itself, the contract between the shipowner and the shipper of the goods, though it has been said to be excellent evidence of its terms...The contract has come into existence before the bill of lading is signed. The bill of lading is signed by one party only and handed by him to the shipper, usually after the goods have been put on board. No doubt if the shipper finds that it contains terms with which he is not content, or that it does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not in my opinion thereby prevented from giving evidence that there was a contract which was made before the bill of lading was signed and that it was different from that which is found in the document contained some additional term. He is not party to the preparation of the bill, nor does he sign it.

3

B/L in the hands of Endorsee

- Once the B/L is transferred for value to a third party, the B/L becomes the contract of carriage. *Leduc v Ward* (1888) 20 QBD 475
- ShipOwners relied against an endorsee on a term of contract concluded with the shipper which was not contained in the B/L.
- Lord Esher: "it may be true that the contract of carriage is made before the B/L is issued because it would generally be made before the goods are sent down to the ship. But when the goods are put on board and the captain has authority to reduce the contract into writing; and then the general doctrine of law is applicable by which, where the contract is reduced to writing, which is intended to constitute the contract, parole evidence to alter or qualify the effect of such writing is not admissible, and the writing is the only evidence of the contract (for the endorsee)".

4

continued

- COGSA 1992 s 4 "A bill of lading shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of receipt for shipment."

5

B/L in the hands of the **Charterer (Shipper)**

- The charter party does not exist in a vacuum. There is a tripartite relationship between the ShipOwner, Charterer and B/L holder.
- Under CIF contracts the Charterer is often also the Shipper
- As between the ShipOwner and the Charterer, the contract governing their respective rights and obligations is the Charter Party.
- Where the Charterer is the shipper, the B/L operates as a mere receipt of goods . It has no contractual effect until transferred to an endorsee.
- *Rodocanachi v Milburn* (1886) CA
Facts: Owners attempted to rely on exemption clause contained in the B/L but not in C/P.

6

B/L in the hands of the Charterer (Endorsee)

- The Charterer is the FOB Buyer of the goods
- *President of India v Metcalf* [1969]
- FOB Buyer of goods shipped was the Charterer and B/L holder by endorsement
- C/P contained arbitration clause. The arbitration clause was not properly incorporated in the B/L
- The Charterer claimed short delivery in arbitration proceedings
- Shipowners refused to submit to arbitration proceedings because the B/L did not contain arbitration clause.
- Held (by Lord Denning): Since the contract was the C/P, the arbitration clause was effective.

7

Charter party bills of lading

- Incorporation into bills of lading of charterparty terms
- A matter of construction
- General words of incorporation such as "all terms, conditions and exceptions of the c/p dated are incorporated herein"
- General words of incorporation not sufficient for arbitration clauses. However a skillfully drafted incorporation clause may assist:
- see incorporation clause of CONGEN Bill: "*All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated*".
- Identification of C/P. In absence of stipulation, incorporation is *presumed* to be the head charter party.

8

Charter party bills of lading

- Assuming the incorporation is wide enough, the terms in the c/p must "make sense" to the overall B/L contract
- Linguistics: does Charterer in c/p equate to Receiver?
- Consider the *Miramar* (1984) : Owners claimed consignee to be liable for demurrage pursuant to C/P clause providing "Charterers to pay demurrage": Held: obligation to pay demurrage could not be construed as having effect against the Consignee/Endorsee.
- The clause must relate to the receipt, carriage and delivery of the goods.

9

Charter party bills of lading

- **Conclusion on Incorporation**
- For the incorporation to be effective, the words of incorporation must be found in the B/L
- The words of incorporation must be specific and apt in describing the particular clauses to be incorporated.
- The terms incorporated must be consistent with the remaining terms of the B/L

10

Identity of the Carrier

- Identifies who is responsible to perform the contract of carriage:
- Two issues to consider
- 1. The identity of the carrier, and in particular whether the shipowner or the charterer is the carrier under the contract
- 2. The identity of the other party to the contract, and in particular whether the contractual rights and obligations of the original party (the shipper) have been transferred to a subsequent holder of the bill of lading (COGSA 1992)

11

Identity of the Carrier

- A matter of construction, the B/L is considered as a whole: the terms and the signature
- The Master is presumed to be the agent of the Ship Owners unless he signs as agents for the Charterers.
- Bills of lading naming / identifying the Charterers on the front of the Bill may be sufficient to displace the presumption.
- Demise clauses: Some bills of lading make it clear who is the carrier. Most used in liner trades when as result of transshipment goods are carried on ships owned or operated by the Line.

12

Identity of the Carrier - The Starsin (2003) HL

- The Starsin was time chartered by CPS Ltd. Cargo loaded wet and consignments were discharged in a damaged condition. Claimants were holders of bills of lading as required by COGSA 1992.
- The bills of lading were liner bills and were clearly marked with CPS (T/Charterer's) logo. The signature box on the face contained the words "As Agent for Continental Pacific Shipping (The Carrier)". It was accompanied by the rubber stamp of the CPS port agents in Malaysia.
- The reverse of the bill contained two pertinent clauses:
 - cl.1 provided that "carrier" meant the party on whose behalf the bill had been signed.
 - Cl. 33 (Identity) "*The contract evidenced by this bill of lading is between the merchant and the owners of the vessel named herein....and it is therefore agreed that said Shipowner only be liable for any damage or loss*"

13

The Starsin (continued)

- The identity of the carrier was relevant for the cargo interest suing the head owners - CPS became insolvent.
- The court will take a mercantile view. They will construe the B/L commercially, reading the document in a "business sense" as opposed to a "legal sense". The bills of lading must be read so as not to frustrate the reasonable expectation of businessmen.
- Words added on the front of the B/L, such as the signature, took precedence over the printed words on the back of the B/L
- Are the clauses at the back of the bills accessible to a reasonable reader as opposed to a lawyer? They need only to be construed in a business like manner. The legalistic approach taken in the *Flecha* (1999) was disapproved.

14

The Starsin (continued)

- Relevant to the decision, ICC Uniform Customs and Practice for Documentary Credits which was revised in 1993 (called UCP 500) includes
- Art 23 : If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which
 - appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.

15

Alternative claims

- Can we sue the ship owners in tort?
- **NEGLIGENCE**
- The general rule for an action in tort of negligence (negligence for which the shipowners are responsible, e.g. bad stowage, Master's and crew negligence)
- The shipowners owe a normal duty of care to the cargo owners on the grounds that it was foreseeable that their negligence would damage the goods. Alternatively the existence of the duty of care can be found in the bailment obligation. (See below)
- However, the person who sues for damage to goods must show that he had title to the goods at the time the damage occurred. See *The Aliakmon* [1986] AC 785
- This is a difficult issue for the claimants who may have acquired title in the goods only after the damage has occurred, in which case they would not have a cause of action in tort.

16

Alternative claims (continued)

- **BAILMENT**
- An action in bailment is based on the existence of a relationship of bailor and bailee, whereby the bailor hands over the goods into the custody of the bailee. The relationship is created by the voluntary assumption of possession by the bailee of another's goods.
- In the view of Lord Hobhouse (*The Starsin*), a contract of carriage is a contract of bailment. The wording on any bill of lading is familiar:
 - “*SHIPPED on board in apparent good order and condition....for the carriage to the port of discharge....to be delivered in the like good order and condition at the aforesaid port unto consignees or their assigns...*”
- There may be sub-bailment in case the B/L is a charterer's B/L whilst the goods are in possession of the shipowner during the voyage.

17

Bailment

- Terms of the Bailment: Usually a time charter contract will regulate the obligations of the shipowners in the contract of carriage. The cargo owner is deemed to have consented to the terms of the sub-bailment
- Consider the *Pioneer Container* [1994] 2 AC 324 (Privy Council)
- A bill of lading was issued for the carriage of goods from Taiwan to Hong Kong. The B/L gave liberty to the carrier to subcontract any part of the voyage to third parties. The cargo was duly loaded on a feeder vessel not operated by the contractual Carrier and thereafter was lost whilst in possession of the sub-bailees (feeder carrier).
- In relation to proceedings brought in Hong Kong against sub-bailees (feeders operators), sub-bailees argued that their B/L with the contractual carriers conferred exclusive jurisdiction on the Taiwanese courts.

18
