

Clause paramounts revisited



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As club managers, we often receive queries from our members as to whether a clause paramount should be included in the subject voyage or time charter. Our general answer is 'yes'. This article aims to explain why.

What is a clause paramount?

A clause paramount is essentially a clause that incorporates a cargo liability regime, usually the Hague or Hague-Visby Rules (the Rules), into the subject charter. Such clauses are necessary as, under English law at least, the Rules are not compulsorily applicable to charterparties. So, where the Rules do not apply compulsorily, sufficiently clear words of incorporation are needed. See, for example, Clause 24 of the NYPE 1946 form, which reads as follows:

'It is further subject to the following clauses... the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein...'

What is the effect of a clause paramount?

Defence of claims outside of cargo loss or damage

Where the Rules are successfully incorporated and apply to a charterparty, their application will not be limited to cargo claims alone. An owner may also benefit from the defences provided for by the Rules in respect of other claims.

For example, the leading treatise *'Time Charters'*¹ suggests that the effect of the incorporation of United States COGSA, in Clause 24 of the NYPE form, is that the 'absolute' obligation

of seaworthiness at the beginning of the charter period is reduced to an obligation to exercise due diligence to make the ship seaworthy before and at the beginning of each voyage under the subject time charter.

This was demonstrated in *The Saxon Star*² where there was a consecutive voyage charter which included a clause paramount. Delays occurred on the voyages, including ballast, due to breakdowns of machinery caused by the incompetence of the engine room staff, making the ship unseaworthy. They were incompetent despite the fact that the owner had exercised due diligence in their selection. It was held by the House of Lords that the Rules applied to all voyages, whether these were in ballast or with cargo, and the immunity given in respect of 'loss or damage' extended beyond physical loss or damage to cargo and also covered the financial loss to the charterer from the reduction in the number of voyages performed.

Time limit

The incorporation of the Rules will also give an owner the benefit of the one-year time limit in respect of claims in relation to goods loaded or to be loaded under the charter. This covers proceedings by a charterer against an owner. It does not, however, cover proceedings by the owner against the charterer.

¹ *Time Charters*, Authors: Terence Coghlin, Andrew Baker, Julian Kenny, John Kimball and Thomas H. Belknap Jr; Edition: 7th Edition, 2014.

² *Adamastos Shipping v Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd's Rep. 73 (H.L.)

The words 'loss or damage' in the Rules are not necessarily restricted to physical loss of or damage to goods, but can be extended to loss or damage related to goods – such as extra tank cleaning costs, pumping costs, standby lifting equipment and/or substitute cargo costs. The question of whether there is a sufficiently close relationship between 'loss or damage' claimed and the 'goods' in question to enable the owner to invoke the one-year time limit is one of fact in each case and upon construction of the particular clause paramount in the subject charter.

For example, there is a difference between the NYPE form compared with the Shelltime standard form. The English courts have typically held that the former contains wider and more expansive incorporation of clauses than the latter. This should be of no real surprise given that the Shelltime forms are generally more 'charterer friendly'.

Some of the differences between the Hague and the Hague-Visby Rules, such as the applicable time limit for bringing indemnity actions and package limitation, can often make it important to distinguish whether precisely the Hague or the Hague-Visby Rules will apply to the relevant contract of carriage.

Words of incorporation

Charterparties may contain a clause paramount, but it does not necessarily mean that the Rules are incorporated. For instance, wordings such as 'The following clause shall be included in all bills of lading issued pursuant to this Charter' (Cl. 37, ShellVoy 6 Form) or 'Charterers shall procure that all bills of lading issued under this charter shall contain the following' (Cl. 38, Shelltime 4 Form) are not sufficient to incorporate the clause paramount into the subject charter.

However, the following wording is sufficient to incorporate the clause paramount into the subject charter: 'This Charter Party is subject to the following clauses all of which are also to be included in all bills of lading or waybills issued hereunder' (Cl.31, NYPE 1993 Form).

Once incorporated, the clause paramount may conflict with other clauses in the contract and, in these circumstances, it is especially important that attention be paid to the precise wording of the clauses at issue. As a general principle of construction, the preamble of the clause will usually identify which clause overrides another. For instance, if the incorporation commences with the words 'Notwithstanding anything which may otherwise be stated in the charter...', the clause paramount is likely to prevail over the other clause. The converse is true if it is the other clause that has such a preamble wording³.

The effect of incorporation

If the clause paramount is successfully incorporated into the subject charter, it will often override any other conflicting clause by virtue of Article III Rule 8 of the Rules. For example, clause 2 of the standard GENCON charterparty holds the owner liable for loss, damage or delay caused only by the personal want of due diligence and excludes the owner's liability for (mere) negligence of the master or crew. Such a clause would be null and void if a paramount clause were incorporated into this charter.

However, Article III Rule 8 doesn't prevent the parties to a charterparty from transferring obligations and liabilities for, say, loading, stowage and/or discharge of cargo from an owner to a charterer⁴.

³ *The Tasman Discoverer* [2004] 2 Lloyd's Rep. 647

⁴ *The EEMS SOLAR QBD*, Admiralty Court, Admiralty Register, 5 June 2013

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Which rules are incorporated?

It has historically been held by the English courts that a general reference to a clause paramount will give effect to the Hague Rules (not the Hague-Visby Rules). However, in *The Superior Pescadores*⁵, the bill of lading provided for 'The Hague Rules contained in the International Convention of the Unification of certain rules relating to Bills of Lading, dated Brussels 25 August 1924 as enacted in the country of shipment' and the Court of Appeal held that this wording in the clause paramount contractually incorporated the Hague-Visby Rules.

The Court of Appeal dismissed the argument that if the parties wanted the Hague-Visby Rules to apply they would have made an express reference to it, going against earlier decisions on the point given that the relevant bill of lading did not make specific reference to the Hague-Visby Rules (only the Hague Rules).

The main differences between the Hague and the Hague-Visby Rules

There are two significant differences between the Hague and the Hague-Visby Rules that an owner and charterer should consider when deciding which clause paramount to agree to:

1. Indemnity claims

Where the Hague Rules apply and a party has settled a cargo claim under the bill of lading, the time limit to bring an indemnity claim remains 12 months from the cargo delivery. Therefore, by the time the indemnity action arises, it may well already be timebarred.

However, where the Hague-Visby Rules apply, the time limit is three months after the claim has been settled or the person has been

served with process in the action, provided that English law applies. This is particularly important where there is a charterparty chain and claims are to be passed up or down the line.

2. Package limitation

Another difference is package limitation. The Hague Rules contain a limitation of '£100 per package or unit', regardless of whether the bulk cargo is dry or wet.

Conversely, the Hague-Visby Rules provide for 'the equivalent of 666.67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher'.

Conclusion

Whether or not a clause paramount is included in a charterparty is a matter of commercial risk and negotiation. Furthermore, whilst it is not a prerequisite for P&I cover that all charterparties are to contain a clause paramount (and thus incorporate the Rules), there could be P&I cover implications if, as a result, an owner member is held liable for a cargo claim liability over and above that which would have been incurred had the contract of carriage been subject to the Rules.

It is nearly always beneficial for an owner to have a clause paramount incorporated into a charterparty. If such a clause is not to be included then the owner should consider the implications carefully and weigh up the 'pros and cons'. Parties should then know exactly the nature of the bargain they are entering into.

⁵ *The Superior Pescadores* [2016] 1 Lloyd's Rep. 27