Bills of lading as the contract of carriage – guiding principles as to the incorporation of charterparty terms

The bill of lading is often described as evidence of the contract of carriage. Identifying the precise terms of the contract can, however, be a complicated task as bills often incorporate terms by reference to other documents.

Bills of lading can be split into two main categories:

a) charterparty (short form) bills of lading, used primarily in the tramp market (eg the Congenbill form)

b) liner (long form) bills of lading (eg the Conlinebill form) used in the liner trade.

A practical distinction between the two types is that the longer form bill of lading stands on its own and contains (on the reverse) a considerable number of clauses setting out the contractual relationship between the carrier, shipper and the lawful holder of the bill of lading. Charterparty bills of lading, however, are not free standing, but are used in conjunction with charterparties to ‘fill in the gaps’ of the contractual terms and obligations between parties to the contract of carriage. When it comes to the short form bills, therefore, it becomes necessary to identify and obtain the incorporated charterparty in order to find out the full terms of the contract of carriage which apply.

Mechanism of incorporation
General words of incorporation on a bill such as ‘all terms, conditions, liberties and exceptions of the charterparty dated as overleaf are incorporated herein’ will incorporate only those provisions of the charterparty which are directly germane (ie relevant and necessary) to the shipment, carriage and delivery of the goods and the payment of freight.

Where a bill of lading is said to incorporate only the ‘conditions’ of the charterparty, it has been held that this only refers to conditions to be performed by the consignee, or which relate to the delivery and discharge of the cargo. It does not extend to the exception clauses of the charterparty which potentially relieve or limit the owner/carerrier’s liability.

If the words on the bill of lading are, on the face of it, wide enough to incorporate the charterparty clause in question then, as to incorporation, the charterparty clause must be examined to see whether it makes sense in the bill of lading context. The correct approach is to treat the charterparty clause as if set out in full in the bill of lading, but to reject it if it makes no sense, is commercially repugnant or is obviously inconsistent with the bill of lading contract.

Which charterparty is incorporated?
Where a charterparty is expressly identified on the bill, or where there is only one possible charterparty to choose from however, as indeed is often the case, and the bill of lading fails to identify which charterparty is to be incorporated, the presumption is that the head charterparty is incorporated since that is the one to which the owner/carerrier is a party. The above presumption is then displaced where the head charter is a time charter and there is a relevant voyage charter further down the chain. Here the voyage charterparty terms will usually be the terms so incorporated.

The general principle appears to be that where the courts have to choose between two or more charterparties, they will be inclined to favour the incorporation of the terms of the charter that they find more (or the most) appropriate to regulate the legal relationship between the parties to the bill of lading. Given that many time charterparties contain clauses inapplicable to the bill of lading context, it makes sense that voyage charter terms be preferred to those of a time charter.

Where there is a long charterparty chain, as a general rule of thumb, if the charterparty date on the applicable bill is left blank then the terms of the head voyage charterparty will be so incorporated, or the time-trip charter for the voyage in question.

1 The Miramar [1984] AC 676; and for a more recent judgment on this issue see EEMS SOLAR [2013] Lloyd’s Rep. 487
3 The Heidberg [1994] 2 Lloyd’s Rep. 287

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Incorporation of law and jurisdiction clauses

The English Supreme Court held in *The Mirimar* that general words of incorporation such as ‘all terms, conditions and exceptions of the charterparty … are incorporated herein’ will incorporate only the provisions of the charterparty which are directly germane to the shipment, carriage and delivery of the goods or the payment of freight. In this case, the court explicitly excluded the charterparty English law and London arbitration clause from being incorporated by such general words, on the basis that an arbitration clause is not one which governs the shipment, carriage or delivery.

The English courts have held ever since that a law and jurisdiction clause in a charterparty will not be incorporated into a bill of lading without specific words of incorporation, and only then if the wording of such a clause makes sense in the context of the bill of lading and does not conflict with other provisions within the bill.

Most standard short form bills (e.g. the Congenbill 2007 form), however, now specifically incorporate the charterparty’s dispute resolution clause, so this is not normally an issue any more.

In *The Channel Ranger* the bill of lading stated that it incorporated the ‘law and arbitration clause’ from a charterparty identified on the bill. However, that charterparty actually had an English law and High Court jurisdiction clause – not arbitration. The court here was willing to stretch the language to give effect to the incorporation of the charterparty law and High Court jurisdiction clause.

Conclusion

The conclusion to be drawn from the issues above is the need for clarity and precision when drafting incorporation clauses in a bill of lading. An inadequate, or poorly drafted clause, not only results in uncertainty but could lead to the imposition of heavy liabilities on a party who never intended to contractually agree to such a burden.

If no charterparty is referred to specifically on a bill there is a real risk in some other jurisdictions that no charterparty terms will be incorporated at all. This can result in a ‘jurisdictional race’ and additional expense. If the intention is to have the terms of a charterparty and, in particular, a certain law and jurisdiction clause incorporated into a bill of lading, it is highly recommended that this charterparty is clearly identified on the face of the bill of lading and the wording expressly mentions the ‘law and arbitration clause/dispute resolution clause’ of the same said charter.

Where a short form bill of lading does not specifically refer to a charterparty, the English courts have established the following guiding rules to establish which charterparty is to be incorporated into the contract of carriage:

- If only one charterparty exists in the entire contractual chain, that should be incorporated into the short form bill of lading, even if the charterparty date on the bill is left blank.

- If there is a chain of charterparties, the head charterparty will be incorporated unless it is a time charter and, in these circumstances, it is the head voyage charterparty in the chain which will be incorporated into the contract of carriage.

This article intends to provide general guidance on the issues arising. It is not intended to provide legal advice in relation to any specific query. The law is also not static. If in doubt, The Standard Club is always on hand to assist.