

# CONTRACTS OF AFFREIGHTMENT

by

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## **Introduction:**

There can be no effective international trade without carriage of goods by sea.

An agreement to give effect to such business activities is the contract of affreightment. It is usually the ship-owner or the carrier who enters into such a contract with the shipper for payment of a sum of money commonly called freight.

The ship can be employed in many ways. The two principal ways are contained in and evidenced by a bill of lading or contained in a charter-party. If it is employed as a general ship, then the contract of affreightment is contained in and evidenced by a bill of lading. Often, the vessel is the subject of a charter-party and then the contract of affreightment is contained in the charter-party. A charter-party comes into effect when a ship owner leases the entire cargo carrying space in the vessel to another party called the charterer either for a specific period or voyage. Sometimes, the charterer becomes the general carrier and can also issue his own bills of lading.

Cargoes for carriage by sea are varied. They include commodities, minerals, manufactured goods, refrigerated food and oil and gas. Cargoes can be bulk and they are shipped on tramp ships. Such ships do not operate on a regular and fixed time-table. General cargoes are shipped on vessels under a liner service, which has a fixed schedule. Goods carried packed into boxes known as containers form the vast majority of the shipped goods in today's international trade.

Ships for carrying the goods are just as varied. The traditional general ships are multi-purpose in nature as they have stowage facilities for all kinds of goods. Containers come in two standardized sizes, 20 foot or 40 foot ones and they are known in the shipping industry as TEUs. The rest of the ships include tankers for the carriage of oil and chemicals, refrigerated vessels, bulk carriers for carriage of mainly grains and minerals, ro-ro ships or vehicle carriers and others.

## **Parties to contracts of affreightment:**

The major parties include the customers of the shipping companies and the rest include the major players in the shipping trade.

*Sellers and buyers:* They are parties to other agreements in addition to the contract of affreightment.. They enter into contracts relating to international sale of goods and financing. The two main groups are f.o.b and c.i.f. In a f.o.b. sales contract, the primary

obligation of the seller is simply to load the goods on board the ship. In a c.i.f sales contract, the seller must ship the goods from a port of loading to a named port of discharge and he has to arrange the insurance and is named on the bill of lading as the shipper. In fact, the seller is the shipper and he is responsible for ocean transit till discharge and is liable to the buyer for any breach of the sales contract. Some of the legal principles governing international sale of goods may be found in common law or INCOTERMS 2000.

*Freight forwarders:* They act as the intermediaries between the shipper and the ship-owner or the carrier. The freight forwarders or forwarding agents will attend to all the shipping formalities required for the shipment of the goods from one port to another. Their usual duties include booking spaces on a ship on behalf of shippers, attend to the bill of lading procedure, insurance and customs clearance. A freight forwarder in *Geofizika DD v MMB International Ltd* was found to be negligent for shipment of vehicles under deck when they were stowed on deck.<sup>1</sup> They may also cover other duties relating to packaging, warehousing and insurance of the goods. Sometimes, varied cargoes of different shippers are consolidated into one container and the freight forwarders issue a house bill of lading. This is different from the bill of lading which will be issued to the freight forwarder by the ship-owner who will name the freight forwarder as both the shipper as well as the consignee.

*Ship-owners:* They have registered, beneficial and legal ownership of the vessels. It is quite a common practice for a shipping company to register one ship under one limited liability company. This is to avert the arrest of a sister ship. An equitable ship-owner has beneficial ownership, but has no registered or legal ownership.

*Carriers:* In a liner shipping service, the contract of affreightment is between the ship-owner and the shipper. The shipowner will be the carrier. In a time charter-party situation, the carrier may be the charterer if the bill of lading is issued by the charterer and he is named as the disponent owner. The charterer can protect himself with a demise clause or identity of the carrier clause in the bill of lading which specifically names the ship-owner as the carrier. Prof Girvin was doubtful about the usefulness of such a demise clause considering the time bar period for any court proceedings to be confined to 12 months, but he quoted the succinct words of Lord Brandon, the then admiralty judge in *The Bershire*:<sup>2</sup>

*All the demise clause does is to spell out in unequivocal terms that the bill of lading is intended to be a ship-owners' bill of lading.*

*Master:* The master is the agent of the ship-owner and he has to sign the bills of lading upon presentation to him at the port of loading. He is responsible for the stowage of the goods and the safe navigation of the vessel. A master, especially one on board a vessel, is often given the description of "captain".

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<sup>1</sup> [2010] All ER (D)214 (Apr)

<sup>2</sup> Prof Stephen Girvin on *Carriage of Goods by Sea*, p.145, [1974] 1 Lloyd's Rep 185.

*Consignors and consignees:* The consignor is the often the shipper of the goods and his responsibility is to deliver the goods for loading on board. On the bill of lading, he is often named as the shipper. The consignee named on the bill of lading together with the wording “to the order” is the person to whom the goods are consigned and the consignee is the receiver as well at the port of loading.

*Charterers:* They can be time, voyage or demise charterers. Shipping companies have to be profitable and they need to generate freight. Most of the major ship-owners in the world have to charter their ships to generate revenue.

*Stevedores:* They are independent contracts employed for the purpose of loading, stowage and unloading of cargos at the ports. They are also known as longshoremen or dockets. They may be entitled to the same limitation of liabilities conferred on the carrier if the contract of affreightment contained in a bill of lading identify them in a carefully worded clause called Himalayan clause. The latest issue of *Scrutton* states:

*...a Himalaya clause in a bill of lading may be rendered straightforwardly enforceable by an expressly identified third party without the need to rely on the complex reasoning used at common law, for example, The Eurymedon.*<sup>3</sup>

### **Carriage of goods in a general ship:**

When a ship is employed as a general ship for a particular voyage, she has to carry cargoes of any shipper destined for that voyage.

After the goods are shipped on board, a bill of lading is issued by the ship-owner to the shipper. This document serves as a receipt for the goods shipped and at the same time, it is evidence of a contract of affreightment between the carrier and the shipper. When the bill of lading is subsequently endorsed, it will serve as a contract of affreightment between the carrier and the indorsee.

Under Article 14 of the Carriage of Goods by Sea Act 1924, the lawful holder of the bill of lading acquired all rights of suit and may become subject to all the liabilities under the contract of carriage as he had been a party to that contract.<sup>4</sup> Sometimes for shorter voyages, a carrier may issue non-negotiable documents called sea waybills. In a delivery under a sea waybill, delivery can be made without its production and this is a major difference between a sea waybill and a bill of lading. Also, it is non negotiable and it is not a document of title like a bill of lading.

When a straight bill of lading has the words “to order” specifically deleted and with the name of the consignee inserted, then it is a non-negotiable document. Delivery can only be made to the named consignee

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<sup>3</sup> *Scrutton on Charterparties* (21<sup>st</sup> edition) (2008) p.35, [1975] A.C. 154.

<sup>4</sup> See *Scrutton on Charter parties* (21<sup>st</sup> edition) (2008) p.3.

A delivery order is another shipping document, which is used when there is a splitting of the bulk cargoes into several parts for different parties. The carrier can only deliver the specific part to the party named on the delivery order. The bill of lading holder obtains delivery orders for specified quantities of a bulk cargo against surrender of the bill of lading at the port of discharge.<sup>5</sup>

Sometimes, a bill of lading may be issued by a liner shipping company to cover inland, air and river sectors of a door-to-door delivery. Such a document is called a through bill of lading and it is doubtful as to whether it has all the legal characteristics of a bill of lading.<sup>6</sup>

### **Charter-parties:**

When a ship is employed fully for one entity for a designated voyage or for a specific duration of time, the contract of affreightment is contained in a charter-party. The contract will involve the ship owner and the charterer. In effect, charter-parties are simply shipping leases and they are often fixed by ship-brokers. Most of them will come under the category of tramp as they are available where and when the shippers can charter them.

A charterer can also enter into a subsequent sub-charter-party with another party.

Sometimes, the ship-owner may also issue bills of lading to charterers shipping their own goods in a chartered ship as such documents served as acknowledgement of the goods received. In such situations, the terms and conditions of the charter-party supersede that of the terms on the bills of lading.

Time charters do provide the charterers the right to issue their own bills of lading. The charterers are considered the disponent owners and they give the bills of lading for execution by the vessel's master. The time charterers have to provide an indemnity to the ship-owners for any legal liabilities arising from the master's signature on the bills of lading issued by them.<sup>7</sup> Between the shippers and the carrier, the terms of the charter-party will not be applicable unless they are specifically incorporated into the bills of lading. The Hague or the Hague-Visby Rules will govern the contract of carriage between the shippers and the carrier.

Charter-parties can be voyage if they are concluded with the ship-owners for a specific voyage. Time charter-parties are concluded for specific time periods. There can also be a mixed time and voyage charter-party.

In a voyage or time charter-party, the master and crew remain under the employment of the ship-owner. However, if the ship-owner charters his vessel to a party for a specific period of time and the master and crew remain under the employment of the charterer,

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<sup>5</sup> Scrutton on *Charterparties* (21<sup>st</sup> edition) 2008 at p.2.

<sup>6</sup> *Ibid*, p. 382.

<sup>7</sup> John Wilson on *Carriage of Goods by Sea* (6<sup>th</sup> edition) (2008), p.7

then it is known as a demise or bare-boat charter-party. A typical instance of the use of a voyage charter-party involves the c.i.f. seller in international sale of goods. He has to employ the ship to carry the goods to a port of discharge and delivered them to the buyer.

Payment for the time charter is called hire and the ship-owner takes care of the manning of the vessel, fuel, insurance and entry in a protection and indemnity association, whereas the commercial employment of the ship is left to the charterer. The time charterer can ship his own cargoes or that of other shippers. He can also sub-charter the vessel on another time charter-party or enter into a voyage charter-party with another party. There are standard time charter-party forms and the most popular ones are Baltime and NYPE.

In a voyage charter-party, the ship-owner provides the vessel with her master and nautical crew, insurance and entry into a protection and indemnity association. The vessel is used to carry the cargoes of the charterer from one designated port of loading to a port of discharge. Payment for this voyage charter-party is called freight. The usual form for voyage charter-party is the time-tested Gencon. A popular form for carriage of grains is the Centrocon.

Apart from the commercial employment of the vessel, the responsibilities of a time charterer include the following:

*....expenditure directly resulting from compliance with his instructions, such as fuel costs, port charges and the cost of loading and discharging the cargo. He also undertakes to indemnify the ship-owner against liabilities arising from bills of lading issued under his instructions.*<sup>8</sup>

As for the voyage charterer, his primary responsibility is to procure and ship his cargoes from a port of loading to a port of discharge. He may be liable to pay for any extra cost of loading or discharging his cargoes in excess of specific lay days. This extra cost is known in the shipping industry as demurrage.

There can also be a hybrid version of the two, combining time charter with a cargo voyage and this is sometimes called trip charter-party. There is also a slot charter-party which is actually a charter for a specific part of a vessel. It can be a voyage charter-party itself or a part of a voyage charter-party.

When possession and control are given to the charterer for a specific period of time, then the charter-party is called either demise or bare-boat. The charterer also takes care of the management and commercial employment of the vessel.<sup>9</sup> Demise charter-party can also be part of debt financing for a shipping company. The financial institution can be the registered owner and the corporate borrower can be the demise charterer who is also given the option of buying back the vessel at the expiry of a specific time period.

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<sup>8</sup> John Wilson on *Carriage of Goods by Sea* (6<sup>th</sup> edition)(2008)

<sup>9</sup> [1998] 1 Lloyd's Rep.136 (CA), at p.156 as per Lord Justice Evans.

A charter-party can be further qualified to be either a berth charter-party or a port charter-party. Notice of readiness ought to be tendered by the charter upon arrival either at the port or after she is berthed. The wording of the charter-party has to be precise as this will result in a claim for demurrage by the ship-owner if the lay days period has been exceeded.<sup>10</sup>

## Printed Forms

Sometimes, a contract of affreightment contains printed terms as well as terms that are hand-written, typed or stamped. In the event of a contradiction, greater weight has to be given to the non-printed ones. The rationale is given by Lord Bingham in *The Starsin*:

*Greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations*<sup>11</sup>

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<sup>10</sup> *Novologistics SARL v Five Ocean Corporation* [2009] All.E.R (D) 314.

<sup>11</sup> [2003] 1 Lloyd's Rep.571. Also see *Scrutton v. Childs* (1877) 36 L.T.212.