MARINE, CARGO & LOGISTICS

24 October 2023

WESTLINK LOGISTICS PTY LTD
Guidance on Charterer's Liability Claims & Insurance

Marsh

Marsh Client Commitment

We commit to delivering quality service and advice to you at all times. We will:

- BE AVAILABLE
- LISTEN AND NOT FORM ASSUMPTIONS
- GET THE BASICS RIGHT
- BE PROACTIVE IN OUR SERVICE DELIVERY
- CHALLENGE THE NORM
- ACT AS A TRUSTED COLLEAGUE, NOT JUST AN ADVISOR
- PROVIDE REGULAR AND RELEVANT COMMUNICATION
- DELIVER ON PROMISES
- BRING THE BEST OF MARSH TO YOU
- PROVIDE TIMELY, ACCURATE AND CONCISE RESPONSES AND DOCUMENTATION

In addition, we commit to:

- UNDERSTAND YOUR BUSINESS
- UNDERSTAND YOUR DRIVERS, MOTIVATIONS AND ASPIRATIONS
- UNDERSTAND YOUR LONG TERM VISION
- DRIVE THE RISK INSURANCE AGENDA
- BUILD A CLOSE AND PRODUCTIVE RELATIONSHIP

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CLAIMS PROCEDURE

1. Upon the occurrence of any casualty, Event or matter liable to give rise to a claim by the Assured against the Insurer, it should be the duty of the Assured and his agents to take and continue to take all such steps as may be reasonable for the purpose of averting or minimising any expense or liability in respect of which he may be insured by the Insurer. If the Assured commits any breach of this obligation the Insurer may reject any claim by him.

2. If the Assured makes any request for payment under this Policy of Insurance knowing it to be fraudulent or false in any respect (or in circumstances where it ought reasonably to be known to be so) or where the Assured colludes with a third party with a view to making a fraudulent claim under this Policy of Insurance, the Insurer may reject this request for payment.

3. If the Assured becomes insolvent during the course of any claim to which the Insurer has given support, the Insurer shall thereupon reserve the right to withdraw that support forthwith.

4. It is a condition precedent to Insurer's liability hereunder that the Assured shall give prompt notice in writing to the Insurer of any claim, dispute, matter or Event, which has arisen or has occurred and which is liable to give rise to a claim under this Policy of Insurance and give the Insurer all relevant facts of which the Assured has knowledge at the time of any notification.

5. The Assured must at all times promptly provide the Insurer of any documents, reports, evidence or other information relevant to any claim, dispute, matter or Event which has led or which is liable to lead to a claim under this Policy of Insurance, and which are in the possession or power of the Assured or his agents or otherwise within his knowledge.

6. When so requested by the Insurer, the Assured shall promptly produce, or cause his agents promptly to produce all such documents or information of whatsoever nature which are or may be relevant to the Assured's claim or intended claim.

7. The Assured shall permit the Insurer or his appointed agent or servant to interview any servant or agent or other person who may have been working for the Assured at the material time or at any time thereafter or whom the Insurer considers likely to have any direct or indirect knowledge of the matter giving rise to a claim under this Policy of Insurance.

8. If the Assured fails in any of the obligations mentioned in Sections 5 – 7, the Insurer shall be entitled in its discretion to reject any claim arising out of the casualty.

9. Any lawyer, surveyor or other expert or adviser shall be selected by the Insurer. The Insurer may, at its sole discretion, approve or decline any suggestions of the Assured in this regard. A lawyer, surveyor, expert or other adviser so selected shall be appointed and employed solely on the basis:

   9.1 That they are employed by the Assured who shall be deemed their principal.

9.2 That they have standing instructions from the Assured at all times to give advice and report to the Insurer directly without prior reference to the Assured and shall produce to the Insurer any and all relevant documents or information obtained by them whether from the Assured or howsoever and whether or not such advice, reports, documents or information would otherwise be the subject of legal or any form of privilege as if they had been appointed to act at all times and had at all times been acting on behalf of the Insurer and the Insurer may at any time whatsoever rely upon such advice, reports and documentation or information as it in its absolute discretion deems fit, including but not limited to, the provision of further support and on coverage under the Policy of Insurance.

9.3 That notwithstanding Section 9.2 above, any reports or advices given pursuant to this Section shall not bind the Insurer to any course of action.

9.4 That they shall provide costs and disbursement estimates to the Insurer at the Insurer's request. If so advised by the Insurer in writing, no legal costs and expenses shall be incurred by them without the Insurer's express prior approval.

10. Where legal steps or other proceedings are undertaken by lawyers or other parties appointed by the Assured or its agents, the Insurer has the discretion to decline to pay for such legal services. The Insurer furthermore has the right to control or direct the conduct of handling of any case or legal and other proceedings relating to any matter in respect whereof legal and other costs are covered and to require the Assured to settle, compromise or otherwise dispose of the case or legal and other proceedings in such manner and upon such terms as the Insurer deems necessary. The Insurer shall be under no liability to reimburse an Assured for costs incurred before the Insurer has been notified of a claim under the cover.

11. The Insurer is under no obligation to provide bail or other security on behalf of the Assured, but from time to time the Insurer may in its sole discretion decide to provide bail or other security on such terms as the Insurer may consider appropriate.

12. The provision by the Insurer of bail or other security, or otherwise acting on behalf of the Assured, shall not constitute an admission of liability by the Insurer for the claim in respect of which the bail or other security is given.

13. The provision by the Insurer of bail or other security is always subject to payment to the Insurer of the applicable Deductible(s) and all outstanding premiums.

14. It is a condition precedent to the Assured's right of recovery under this Policy of Insurance with regard to any claim by the Assured in respect of any loss, expense or liability, that the Assured shall first have discharged any loss, expense or liability.

15. Where the Insurer has indemnified the Assured for any claim under this Policy of Insurance, the Insurer shall be entitled to any recovery from a third party in respect of that claim and the Assured shall, upon first request of the Insurer, provide all documents to enable the Insurer to exercise the Assured's rights of recovery.

16. Where the Assured as a consequence of an Event which is covered by the Insurer obtains extra revenue, saves expenses or avoids liability or loss which otherwise would have been incurred and which would not have been covered by the Insurer, the Insurer shall be entitled to recover from the Assured or retain from any sum which would otherwise be payable to the Assured, an amount equivalent to the benefit obtained by the Assured.

17. Where an Assured or Co-Assured is entitled to limit any liability covered by the Insurer, there shall be no recovery in respect of such liability for more than the amount to which liability could have been limited.

Notification and time limit

Without prejudice to the duty of prompt notification in respect of Cargo Liability cover, the Assured's claim against the Insurer shall be extinguished and the Insurer shall be under no further liability in respect thereof if an Assured:

1. fails to notify the Insurer of any casualty, Event or claim referred to under Cargo Liability cover within one year after he has knowledge thereof or ought to have had knowledge thereof; or

2. fails to submit a claim to the Insurer for reimbursement of any liabilities, costs and expenses within one year after discharging the same.

Admission and settlement

The Assured shall make no admission of liability nor settle any claim or dispute or proceedings instituted by or against it without prior written approval of the Insurer. If the Assured admits liability or settles the claim or dispute without such prior written approval or refuses to settle the claim, notwithstanding that the Insurer shall have required it to do so, the Insurer shall not be liable to indemnify the Assured and the Assured will be liable to refund the Insurer all or part of any costs paid by the Insurer either to the Assured or to lawyers, surveyors or other Persons.

Deductibles

1. Any claim recoverable under this Policy of Insurance shall be limited to the excess of the Deductibles specified in the Certificate of Insurance.

2. The Assured shall pay the Deductible on or before the date specified by the Insurer.

3. Where an Assured has failed to pay, either in whole or in part, any amount due from the Assured to the Insurer, the Insurer shall have the right to serve a notice upon the Assured requiring him to pay such amount by any date specified in such notice, not being less than seven (7) days from the date on which notice is given. If the Assured fails to make such payment in full on or before the date so specified, the insurance of the Assured shall be cancelled forthwith without further notice or formality. Notwithstanding that the insurance has been cancelled by virtue of this clause, the Assured shall be liable for all or any amounts which have fallen due under this Policy of Insurance prior to such cancellation.

4. The Insurer shall be entitled, once Deductibles have become due and payable, to commence an action against the Assured or any other Person liable to recover any such unpaid Deductible.

Double insurance

1. There shall be no recovery from the Insurer of any claim in respect of liabilities or expenses which are recoverable under any other insurance effected by the Assured.

2. The Insurer shall not be liable for any franchise, deductible or deduction of a similar nature borne by the Assured under such other insurance.

Subrogation

1. The Insurer shall be subrogated to all the rights which the Assured may have against any other Person or entity, in respect of any payment or promise of payment made in accordance with this Policy of Insurance, to the extent of such payment or that promise of payment, and the Assured shall, upon the request of the Insurer, execute all documents necessary to secure to the Insurer such rights.

2. The Insurer shall have the right to sue in the name of the Assured, and the Assured shall execute all papers and documents in connection therewith, as requested by the Insurer, and shall lend all assistance to the prosecution of any suit. The balance of any amount recovered after full reimbursement of the Insurer for its loss and all expenses incurred shall be paid to the Assured. Compliance with this requirement may, in the Insurer's discretion, be made a condition of the payment of a loss.

Law and jurisdiction

1. This Policy of Insurance shall be governed by and construed in accordance with English Law.

2. The High Court in London shall have exclusive jurisdiction to hear and determine any claim or dispute under this Policy of Insurance.

3. The insurance provided by the Insurer shall not nor is intended to confer any right or benefit on any third party under the Contracts (Rights of Third Parties) Act 1999 or any similar provision, enactment or principle of law contained in the laws of any State which purports to do so.

CHARTERPARTY CLAIMS

Introduction

Ships are generally used by parties other than shipowners in order to perform commercial contracts that they have entered into with third parties. Typically, a seller or buyer of goods may need the use of a vessel in order to satisfy the terms of the international contract of sale. Such contracts will necessarily be negotiated some time before the goods are actually loaded on to the ship and may be supplemented in due course by other documents which record the fact that the goods have subsequently been shipped. Therefore, there are generally two different types of relevant contracts:

1. contracts for the use of the whole (or, at least, a substantial part) of the ship, i.e. charterparties; and

2. contracts evidencing the shipment of cargo and recording the terms under which the cargo is to be carried, i.e. bills of lading or sea waybills.

In the case of bulk cargoes it will generally be necessary to have both types of contracts as the size of the cargo will necessitate the use of the whole or, at least, a substantial part, of the ship. However, since the charterparty does not evidence the actual shipment of the cargo it will also be necessary to issue a bill of lading or sea waybill when the cargo is subsequently shipped. On the other hand, if the cargo is a small consignment, then there may be no need for a charterparty and the goods can be carried simply under a bill of lading or sea waybill.

A fundamental difference between the two types of contract is that a charterparty is not normally transferable whereas the most common form of contract evidencing the shipment of the cargo (i.e. a bill of lading) is transferable. Therefore, the charterparty does not normally play any major role in relation to the trading of the cargo whereas a bill of lading has a major role to play in that regard since, by transferring the contract from seller to buyer, the right to take possession of the cargo from the ship is thereby transferred from seller to buyer. Indeed, the bill of lading contract may be transferred a number of times during the course of the voyage depending upon how often the cargo has been sold. However, the charterparty will continue to govern the relationship between the shipowner and the charterer notwithstanding the transfer of the bill of lading.

Another important difference between charterparties and contracts evidencing the shipment of cargo such as bills of lading is that, whereas the terms of bills of lading are heavily regulated by international conventions such as the Hague, Hague-Visby or Hamburg Rules, charterparties are not subject to any such regulation. In other words, in the case of charterparties, the principle of freedom of contract applies.

Types of Charterparties

There are two basic types of charterparty:

1. A bareboat (or demise) charter, i.e. a contract which give the charterer full control of the ship for an agreed period in exchange for the payment of hire. The contract is similar to a time charter (see below) but with the important difference that it obliges the charterer to provide his own crew and to incur responsibility as ‘owner’ for liabilities arising during the operation of the ship; and

2. other forms of charter, i.e. contracts which oblige the owner of the ship to provide the crew and to remain responsible as 'owner' for liabilities arising during the operation of the ship.

A useful analogy is the distinction that can be drawn between the hire of a car from a hire car company when the hirer is given the use of the vehicle but has to drive it himself and the hire of a taxi when the hirer is given the use of the vehicle and the driver. A bareboat charter is the equivalent of the contract with the hire car company whereas other charters are the equivalent of the contract with the owner of the taxi.

Bareboat Charterparties

It is normally the bareboat charterer who is responsible for the maintenance and insurance of the ship during the charter period and for operating costs such as crewing, bunkering, port costs etc. Since the master and crew members are employees not of the shipowner but of the bareboat charterer it is the bareboat charterer who is responsible for the acts, neglect or omissions of the crew. Therefore, in general terms, it is the bareboat charterer rather than the shipowner who will be liable for claims arising out of the operation of the vessel. For example, it is the bareboat charterer rather than the shipowner who is responsible for collisions and other tortious acts committed by the crew. Similarly, bills of lading signed by the master will normally make the bareboat charterer and not the shipowner liable as carrier under those contracts.

Bareboat charters are created not so much with a view to the carriage of goods but more as part of a complicated financing arrangement, often with the intention that the charterer should become the owner of the ship in due course. Thus, a contract for the purchase of a ship by instalments will often incorporate a bareboat charter into the contract. A variant of this would be for investors to lend the funds required to buy the ship, the bank then acquiring the ownership of the ship, but bareboat chartering it to the borrower for the period of the loan. In this way the bank can obtain the necessary security but is able at the same time to avoid not only the operating costs but also the liabilities which it would otherwise have to bear in relation to the operation of the ship under a mortgage. Bareboat charters are also concluded between two associated companies for tax or employment reasons.

Charterparties other than Bareboat Charterparties

Such charters normally fall into one of two basic categories:

1. Time charters, i.e. contracts for the use of the ship and her crew for a specified period of time within agreed trading limits as directed by the time charterer in consideration for the payment of hire; and

2. Voyage charters, i.e. contracts for the use of the ship and her crew to carry an agreed cargo on an agreed voyage regardless of time in consideration for the payment of freight (and, possibly, other remuneration such as demurrage if the loading/discharging is delayed beyond the time agreed for such operations.)

However, it is becoming increasingly common to see charters which combine some of the aspects of both time and voyage charters. The following are examples:

- trip charters, i.e. contracts obliging the charterer to pay *hire* for the time taken by the ship to complete a specified voyage, e.g. a 'round Atlantic' voyage; or

- consecutive voyage charters, e.g. four consecutive voyages between A and B within a specified period; or

- slot charters or 'space sharing agreements', i.e. agreements which enable liner operators to utilise empty space on their ships by allowing other operators to use some of the (empty) carrying capacity in their vessels in exchange for the right to use an equivalent amount of space on the ships of such other operators. This form of arrangement is common in the container trade and remuneration is a complicated equation often calculated with regard to the net profit earned over a period by all the operators who are part of the arrangement.

Basic Differences between Time and Voyage Charterparties

Although it is important to appreciate that the terms of a particular charterparty may make fundamental changes to the customary rights and obligations of shipowners and charterers, time and voyage charterparties normally have the following differences:

- Under a voyage charter the shipowner is normally obliged, in consideration for the payment of the freight by the charterer, to pay for all the operating costs of the ship. However, under a time charter the cost allocation is more balanced – whereas the shipowner pays for the crew and the cost of insuring the ship, the charterer normally pays for bunkers, port and stevedoring costs, agencies, pilotages and 'all other usual expenses'.

- Since a voyage charter is a contract for a particular voyage most of the relevant factors (e.g. the freight, cargo, loading and discharging ports etc.) will have already been agreed during the pre-fixture negotiations and become terms of the contract. Consequently, there is limited need for the voyage charterer to play an active part in the subsequent operation of the vessel when performing the charter. However, a time charter is a contract which gives the charterer the ability to control the commercial operation of the vessel during the duration of the charter. Therefore, the parties will not normally have agreed in advance where the vessel is to trade and which cargoes she will carry during the charter period. Consequently, the time charterer will normally play an active role in the operation of the vessel during the charter period as it will be necessary for the charterer to give orders and directions to the ship and crew as to how and where the vessel is to trade.

- The nature of a time charter is that the shipowner receives remuneration (hire) in return for making the ship available to the time charterer for an agreed period of time. Therefore, so long as the ship is made available, the shipowner is entitled to receive the hire even if no cargo is in fact carried. Consequently, the commercial risk of finding the necessary cargoes in order to make the venture profitable is borne by the time charterer not the shipowner. However, in the case of a voyage charter, the shipowner receives remuneration (freight) for the carriage of goods on an agreed voyage. Therefore, unless cargo is carried, the shipowner receives no remuneration. Consequently, in the case of a voyage charter, the commercial risk of finding the cargoes to carry in order to gain remuneration is borne by the shipowner and not the charterer.

- Under a time charter, hire is paid continuously, in full and in advance provided that the ship is made available for use by the shipowners. Therefore, if the contractually agreed performance of the ship is delayed or prevented by events which cannot be attributed to the shipowners' fault or to an agreed off-hire clause (e.g. heavy weather, port strikes etc.), hire continues to be payable. Consequently, the risk of delay in time charters usually falls on the time charterer. However, in the case of a voyage charter, the freight that the shipowner receives is not calculated according to time but is a fixed agreed amount for carrying goods from an agreed loadport to an agreed discharge port. Therefore, if the voyage takes longer than originally estimated by events which cannot be attributed to the charterers' fault the shipowner does not receive additional freight but is nevertheless obliged to bear any extra voyage costs which may be incurred as a result of the delay. Consequently, the risk of delay in voyage charters falls predominantly on the shipowner.

The Terms of the Charterparty

It is not possible to comment in detail on the importance that is attached to different terms under different systems of law. However, it is important to appreciate that, depending on the governing law, the breach of different terms can provide the innocent party with different remedies. Therefore, legal advice should always be sought before any attempt is made to terminate a contract.

There are very many printed forms of time and voyage charters which reflect the intended trade of the vessel. Some forms (such as the Baltime and Gencon forms) are intended for general non-specific trading whilst other forms (such as the Asbatankvoy, CoalOrevoy, Sugarcharter, BPTime 3 and ShellLNGTime forms) are intended for the carriage of specific cargoes. The meaning of particular terms is often affected by such factors. For example, the question of what constitutes a seaworthy ship for the purposes of 'ordinary cargo service' will often be different to what constitutes a seaworthy ship for the purposes of the carriage of refrigerated products.

Furthermore, whilst these printed forms are frequently used, parties will often supplement these forms with a large number of ’special’ clauses which in many instances include a trader’s standard terms. Since such ’special’ clauses are usually considered to represent the parties’ true intentions whilst the printed terms are merely terms of a contract which the parties have chosen to use as a general framework, the law of most countries will afford more weight to the ’special’ clauses than to the printed terms of the standard contract. Therefore, if there is a conflict between the printed terms and the ’special’ clauses, the latter will normally prevail.

Furthermore, it must not be assumed that the only relevant terms are those which are expressly stated in the contract. Even when the charter is silent on a particular issue, the law may imply a term if it is necessary to do so to give business efficacy to the contract. Common examples include the following:

- The ship must be seaworthy;
- The ship must proceed with reasonable dispatch;
- The charterer will not ship dangerous cargo;
- The charterer will not nominate unsafe ports or places.

Subject to the fact that rights and obligations may be varied by the particular terms of the charterparty, the various rights and duties that are normally imposed on parties to charterparties (whether time or voyage) can be summarised as follows.

a) The shipowners have the duty:

    - to provide a seaworthy ship which complies with the charterparty description;
    - to properly and carefully load, handle, stow, carry, keep, care for, discharge and deliver the cargo;
    - to comply with charterers’ legitimate employment instructions;
    - to prosecute voyages with reasonable dispatch.

b) The charterers have the duty:

    - to pay remuneration to the shipowner;
    - to give legitimate employment instructions;
    - to ensure that dangerous goods are not loaded without giving notice;
    - to ensure that the vessel is directed by them only to safe ports;
    - to perform their duties without delay.

The law recognises that performance cannot always be perfect. Therefore, unless the contract provides otherwise, if a breach is ’so trivial as to be negligible’ according to the opinions and expectations of reasonable men engaged in that type of trade, there will not be considered to be an actionable breach at law. Furthermore, parties often provide expressly that strict reliance on a particular term will be softened by addition of the word ’about’, e.g. “the vessel will load ‘about’ 2,600 tons”.

The question of what degree of flexibility is given by use of the word ’about’ is a question of fact in each case but it is doubtful that an allowance of more than five per cent more or less would be contemplated.

In recent years, parties have also started to modify terms of description by adding the phrase ’without guarantee’, e.g. ’a time charter trip of three months without guarantee’. The use of such a phrase has been held to substantially dilute the effect of the estimate, and the party making the estimate is liable only if it can be proved that the estimate was not given in good faith, i.e. it does not seem to be necessary for that party to prove in addition that the estimate was given on reasonable grounds.

The Shipowner’s Duties

The Shipowner’s Duty to provide a Seaworthy Ship

The charterparty will normally describe the ship in some detail and will go on to provide that the ship is to be seaworthy’ or ’tight, staunch, and strong and in every way fitted for the voyage’ or words to similar effect. Such words constitute an express promise of the vessel’s seaworthiness. However, even if the charter does not include such words, it is in any event normally an implied term that the ship will be seaworthy for the contemplated employment.

What is Seaworthiness?

’Seaworthiness’ means that the ship, her equipment and crew must be fit to withstand the perils which can foreseeably be encountered on the contemplated voyage. The classic test is the following:

“The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it (the defect) should be made good before sending his ship to sea, had he known of it?”

If the answer is ’Yes’ then the vessel is unseaworthy.

The standard of seaworthiness required depends upon the nature and age of the ship, the kind of voyage envisaged, the nature of the cargo and a host of other actors. The most obvious instances of unseaworthiness are where the vessel has some physical defect or inadequate or insufficient equipment. However, unseaworthiness is a broader concept and includes the following:

- The absence of updated charts for the voyage;
- An incompetent crew;
- A crew which is insufficiently instructed or insufficient in numbers;
- Insufficient bunkers for the voyage;
- The absence of the legal documents that may be required for the satisfactory prosecution of the contemplated voyage, e.g. SMS and ISPS compliance certificates.

The vessel may also be unseaworthy if her holds or tanks are not reasonably fit and safe for the reception, carriage and preservation of the contemplated cargo on the contemplated voyage.

At common law, the carrier is under a strict duty to provide a seaworthy ship and is in breach if the ship is not seaworthy even if the defect is a latent defect which it is not possible to discover. However, in the majority of cases, the charterparty will incorporate either the Hague or Hague-Visby Rules by agreement. Such Rules specify that such strict liability is replaced by a duty on the part of the carrier to *“exercise due diligence”* before and at the beginning of the voyage to make the ship seaworthy. Although such wording suggests a lesser degree of responsibility the duty to exercise due diligence is strictly construed and any negligence on the part of any of the servants, agents and even independent contractors acting for the carrier is likely to constitute a breach of that duty.

When is Seaworthiness Relevant?

Whilst the issue of seaworthiness is generally relevant in order to determine the cause of any particular incident, the issue may also arise in a secondary context if the ship has suffered a breakdown during the charter. The issue which then arises is whether the shipowner has a continuing duty to repair the vessel in order to perform the charterparty.

When there is no express seaworthiness obligation in the charter the implied duty placed on the carrier obliges him to provide a vessel which is merely seaworthy at the commencement of the voyage. However, if the contract contains an express clause obliging the carrier to provide a seaworthy ship then the relevant time will depend upon the construction of that particular clause. It may be:

- the date of the charter; or
- the time of delivery into service under the charter; or
- the commencement of loading; or
- throughout the charter.

If the duty is to provide a ship that is seaworthy at the date of the charter or at the date of delivery into the charter or at the commencement of loading, then this will not normally impose any further duty on the shipowner to repair the vessel if she subsequently becomes unseaworthy as a result of an incident which occurs during the voyage. However, if the duty is to maintain the ship in a seaworthy condition throughout the charter then the shipowner has the duty to take whatever steps that are reasonably necessary to repair the ship within a reasonable time. Indeed, some charterparties contain a guarantee that the vessel will continue to be maintained in the same condition as on delivery and will remain fully in class and able to carry all permissible cargoes.

The Shipowner's Duty to prosecute Voyages with reasonable Dispatch

The shipowner's duty to prosecute voyages with reasonable dispatch is important both for time and voyage charterers. It is important for time charterers since they are obliged to pay hire continuously and therefore, the longer that it takes to perform voyages the more hire the time charterers have to pay. Similarly, it is normally important to voyage charterers since the underlying cargo sale contract may require prompt carriage and delivery and may impose penalties if carriage is delayed. Therefore, the warranted speed of the ship is a factor that influences the financial worth of the vessel to the charterers and the amount of remuneration that they are prepared to pay the shipowners.

Time Charterparties

In the case of time charters, the shipowner generally has the duty throughout the charter period to perform the commercial services required by the time charterers promptly and to *"prosecute his voyages with the utmost dispatch".* Therefore, if the shipowner or the master fails without good and sufficient reason to comply with legitimate employment instructions given by the time charterer, the charterers may have the following remedies:

- They may place the vessel off-hire; and/or
- They may claim damages for losses incurred by them as a result of such delay.

Claims for Damages for failure to prosecute Voyages with dispatch

Even if the vessel is not off-hire, the time charterer may nevertheless be entitled to bring a claim for damages against the shipowner for the value of the hire which has been paid in advance but which has not been earned and for any other losses which he has incurred as a result of the failure of the vessel to *"prosecute ... voyages with the utmost dispatch."* For example, in one case charterers directed a master to proceed from the Pacific North West of North America to northern China. The charterers wished the master to take the quickest route which was the Great Circle route. However, the master proceeded by the more southerly – and longer – Rhumb Line route since he believed (unreasonably) that the Great Circle route was more dangerous. It was held that the master had not prosecuted his voyages with the utmost dispatch.

The precise wording of charters may differ in this respect. Some charters use the phrase *'utmost dispatch'*, some the phrase *'due dispatch'* and some the phrase *'reasonable dispatch'*. However, the words normally have the same meaning – the ship is not obliged to proceed at top speed in all circumstances but as quickly as sea, weather, political etc., conditions safely allow. If the vessel does not proceed with the utmost dispatch, the time charterers are entitled to claim damages for the losses that they have incurred as a result. Such losses will normally include the additional hire or bunkers that the charterers have been obliged to pay because of the delay.

In most cases, if the time charterers are not satisfied with the performance of the vessel then claims are submitted on a number of grounds including off-hire, failure to proceed with due dispatch and breach of description.

Claims for Damages for breach of Description

Most time charters have provisions which describe the speed and fuel consumption of the vessel. For example:

"*Vessel when fully loaded capable of steaming about 14.5 knots in good weather and smooth water on a consumption of about 38 tons of oil fuel.*"

Therefore, if the performance of the vessel appears to fall short of such description, claims for damages may be brought by the charterers for losses suffered by them as a result. The calculation of the damages which the charterer is entitled to claim as a result of a breach by the owners of the vessel's performance obligations is notoriously complicated. The basic approach is to make a comparison between the performance (both in terms of speed and consumption of bunkers) which the vessel should have achieved in the weather conditions which she encountered and the performance which she actually achieved and the extra cost is then deducted from the hire calculation. However, some charters provide that the comparison is to be made at the end of each voyage whereas others require a calculation at the end of the charter or at the end of specific periods (e.g. every six months).

Voyage Charterparties

In the case of voyage charters, the shipowner normally has the duty to proceed with reasonable dispatch in relation to two separate stages of the charter, i.e. in relation to the:

- Approach voyage to the loading port; and
- The laden voyage to the discharge port.

The approach Voyage to the loading Port

It is rare for a vessel to be 'ready to load' at the loading port at the time that a voyage charter is fixed. More usually the vessel will need to undertake a preliminary voyage in order to reach the load port. However, the charterers may, nevertheless, face some deadline for loading the cargo under the terms of a sale contract. It is, therefore, usual for voyage charters to include a cancelling clause which provides that if the vessel is not ready to load at the agreed location by an agreed time and date, then the charterer shall have the option of cancelling the charterparty. Such clauses are strictly construed. If the ship is not ready to load by the cancelling time and date, then the charterers are entitled to cancel the charter irrespective of the cause of the delayed arrival and irrespective of whether the delay is outside the control of the shipowner, e.g. delay caused by heavy weather en route to the load port.

However, the charterers may also have incurred losses as a result of the delayed arrival (e.g. extra cargo storage charges) and may wish to claim such losses from the shipowners. Whilst the fact that the ship has not arrived before the agreed cancelling time and date may entitle the charterers to cancel the charter, that does not of itself entitle them to claim damages from the shipowner since the reason for the delay may not be attributable to default on the part of the shipowners. Therefore, in order to substantiate a claim for damages the charterers must establish that the delayed arrival has been caused by a breach by the shipowners of one of the following terms of the charter:

- The duty to provide an 'estimated ready to load' date in good faith and on reasonable grounds during the fixture negotiations; and/or
- The duty to proceed to the load port with due dispatch.

The laden Voyage to the discharge Port

If the carrier intentionally proceeds to the discharge port other than by the usual and customary route or without reasonable dispatch then he may be committing a deviation. Traditionally, deviation has had a dramatic impact on the rights and defences that are available to a carrier of goods. In a nutshell, the carrier may lose the right to rely on any exception clauses in the contract and may consequently lose the benefit of his P&I cover for any liabilities that arise as a result of the deviation.

The Charterer's Duties

The Charterer's Duty to pay Remuneration to the Shipowner

Cash flow is vital to enable a shipowner to maintain good service under a charterparty. Accordingly, the laws of most countries protect the rights of shipowners to receive remuneration in full without deduction unless the terms of the charter or public policy dictate otherwise. Such principles apply to both time and voyage charters.

The Duty to Pay Hire under Time Charterparties

Time charters invariably provide that hire is payable:

- Continuously;
- In full; and
- In advance.

In some cases the charter will provide expressly that deductions can be made from hire. The most common examples are the following two:

Cash Advances to the Master

Most time charters provide that if the charterers have made cash advancements to the master or paid on behalf of the shipowners for disbursements which are strictly for shipowners' account, such payments *"shall be deducted from the hire"*. Some charters provide expressly that deduction is allowed only if the charterers have provided invoices and other satisfactory evidence of the payment.

Off-Hire

Since the shipowner is entitled to receive hire in advance throughout the charter period, the time charterer will normally pay in advance for services which will be provided by the ship in due course. If the contemplated service is not in fact provided by the ship in due course, the charterer will not have received the benefit of the hire that has been paid in full in advance, Therefore, the aim of off-hire is to enable the time charterer to deduct from subsequent hire payments the amount of hire that has been paid, but not earned, in the preceding period. For example, if hire is paid monthly in advance on the first day of the month, then on 1 December the charterers will be obliged to pay 31 days of hire. However, if the vessel breaks down for 15 days in December, the charterers have in effect paid in advance for 15 days on which they have received no service. Consequently, when the next hire installment falls due on 1 January, the off-hire clause may entitle the charterers to deduct from the 31 days hire that should normally have been paid on that day the 15 days of hire that they had in fact over-paid on 1 December.

It is a basic principle that hire is to be paid in full in advance and therefore, if the charterers wish to deduct hire under an off-hire clause there is a heavy onus on them to prove that they are entitled to do so. If they make such a deduction when they are not entitled to do so they run the risks that are described in Chapter 4.6.1 below.

Many off-hire clauses provide that the ship may be placed off-hire by events which are not within the control of the shipowners, e.g. grounding, fire, crew illness etc. Therefore, so long as the particular event falls within the ambit of the off-hire clause, it is not necessary for the charterers to prove that the particular event which has caused delay has been caused by a breach of contract on the part of the shipowners.

The wording of off-hire clauses can vary dramatically from charter to charter, but a charterer would normally be entitled to place the vessel off-hire if all of the following conditions are satisfied:

- The ship has not provided the service required by the charterers;
- That failure has been caused by an event which falls clearly within the ambit of the off-hire clause;
- That failure cannot be attributed to the act or omission of the charterers themselves;
- Time has been lost as a result of such failure.

Equitable Set-off

Since it is the public policy of most countries to maximise the cash income of shipowners for the reasons explained above, the scope for time charterers to make deductions from hire in circumstances where the charter does not expressly allow such right, is extremely limited. Under the common law, a time charterer cannot set-off (i.e. deduct) all cross-claims from hire but merely those cross-claims *"which go directly to impeach the plaintiff's demands"* and "*are so closely connected with his demands that it would be manifestly unjust to allow him to enforce them without taking into account the cross-claim."* The precise meaning of these phrases is notoriously unclear but perhaps the easiest way to understand them is to say that a cross-claim may be deducted only if it is essentially 'of the same nature' as the shipowner's claim. Therefore, a cargo claim cannot be deducted from hire since a claim for hire and a claim for cargo damage are fundamentally different in nature. However, a claim for deficient speed performance might, depending on the particular circumstances, be deductible since the claim is in essence a claim for overpaid hire and is therefore, of the same nature as the shipowner's claim for hire.

The Shipowner's Remedies for Non-Payment of Hire

If the time charterers wish to stop paying hire, or to pay less than the full hire, the onus is on them to prove that they have the right to do so. If they fail to do so they run the following risks:

- Under older forms of time charter (e.g. the NYPE 1946 form) shipowners have the right to withdraw the vessel from the charterers' service and thereby terminate the charterparty irrespective of whether the failure to pay was deliberate or accidental or the result of an oversight.
- Under more modern forms of time charter (e.g. NYPE93, BPTime 3 etc.), the shipowners may not withdraw the vessel from the charterers' service and thereby terminate the charter unless and until they have firstly given the charterers notice to rectify the failure to pay (an anti-technicality clause notice) and the charterers fail to rectify within the notice period (the grace period).
- Under more modern forms of time charter (e.g. NYPE93, BPTime 3 etc.), the shipowner is also given the additional right (without prejudice to the right to withdraw the vessel), to suspend the performance of the services that the shipowner must normally provide under the time charter whilst hire remains unpaid. Such suspension of services does not terminate the charter and hire continues to accrue due whilst services are suspended. Such rights are also usually dependent on the giving of an anti-technicality clause notice before services can be suspended.
- The shipowner may exercise a lien on any sub-freights that are payable to the time charterer under a sub-charter.

However, a shipowner should ensure that he takes legal advice before adopting any of these remedies since the remedies are extremely technical in nature and courts will normally require proof that the shipowner has complied strictly with all of the necessary formalities. A failure by the shipowner to comply with such formalities may mean that the shipowner is in danger of having repudiated the charter and incurring substantial liability to the charterers.

Voyage Charterparties

The Duty to Pay Freight

The charterers have the duty to pay freight to the shipowner for carrying the cargo from the load port to the discharge port. It is up to the parties to decide the basis upon which freight is to be charged. The basis of calculation is usually determined by the nature of the cargo and can be calculated in accordance with quantity, weight or volume but may also be determined with reference to published scales or even as a lump sum. The parties will also decide whether the calculation applies to the received or delivered weight. The latter decision is important in the case of cargoes such as crude oil or gases which lose weight naturally during the course of the voyage.

The following are common examples:

- Freight on delivered quantity, e.g. '£3 per ton, net weight delivered.'
- Freight on received quantity, e.g. '£3 per ton computed on received quantity.'
- Lump sum freight, e.g. 'freight to be £11,250 lump sum.'
- Published scales of freight, e.g. 'Worldscale' or 'Intascale'.

If the freight is calculated in accordance with the quantity or weight of the cargo that is to be shipped but the charterer does not provide the vessel with the total quantity of agreed cargo, the owner will lose the ability to earn freight on the quantity shortshipped. He will, therefore, be entitled to claim such loss (called 'deadfreight') either as damages or sometimes as a result of an express clause in the charter.

When is Freight Earned?

Unless the charter provides otherwise, no freight is earned unless and until the goods are delivered at the port of discharge. Therefore, if the vessel performs 95 per cent of the voyage but then is unable to complete the rest of the contemplated voyage, the shipowner is not entitled to any freight since there is no entitlement to pro rata freight. Consequently, the risk of earning freight lies on the owner until he successfully completes the voyage and should the vessel require salvage services during the course of the voyage, that proportion of any salvage award that is payable in respect of unearned freight must be paid by the owner.

However, since the carrier will frequently require funds to enable him to defray the expenses which he must pay in order to perform the voyage the traditional rule is often modified (particularly in the case of dry cargo charters) and it is now common to see clauses which provide, for example, that:

"freight deemed earned on shipment, ship or cargo lost or not lost, 90 per cent payable within three days of signing and releasing bills of lading and the balance on rue and complete delivery of the cargo."

In such circumstances, the shipowner becomes entitled to the freight once he has loaded the cargo and the risk of freight is passed from the owner to the charterer.

This has the following results:

- if the ship and/or cargo is lost before the freight is paid through no fault of the shipowner, the charterer is still obliged to pay the freight on the agreed date;
- if the freight has been paid and the ship and/or cargo is subsequently lost through no fault of the shipowner, the charterer is not entitled to recover the freight;
- should the vessel require salvage services during the course of the voyage, that proportion of any salvage award which is payable in respect of unearned freight must be paid by the owner.

The Rule Against Set-off (i.e. Deductions from Freight)

For the public policy reasons explained above in Chapter 4.5.1, it is not normally permissible to deduct or to set off claims for damages for breach of contract against the owner's claim for freight unless there is a clear clause allowing such deductions or set-off in the contract. The freight must be paid in full and the charterer must bring his cross-claim in separate proceedings. Consequently, such cross claims will be subject to whatever exception, limitation or time limit clauses that are applicable under the charter and the result may be that the shipowner receives his full freight whilst the charterer's claim fails.

Because of such restrictions, it has become common in the case of tanker charters to include clauses which expressly allow charterers to deduct from freight the value of any cargo which remains unpumpable or in liquid form on the vessel on completion of discharge:

"If there is a difference of more than 0.5 per cent between bill of lading figures and delivered cargo as ascertained by Customs Authorities at discharge port, charterers have the right to deduct from freight the CIF value of the short delivered cargo. Owners have the right to appoint an independent surveyor in order to check the cargo figures in conjunction with Customs Authorities."

However, it must be emphasized that the terms of these clauses can vary substantially and that if the meaning of the clause is uncertain, courts and arbitrators normally construe them in favour of shipowners consistent with the basic rule at common law.

The Duty to Pay Demurrage

A voyage charter normally involves four distinct stages:

- The approach voyage;
- The loading;
- The laden voyage;
- The discharging.

Whilst the shipowner is the party who is best able to be in control of the two voyage stages, it is the voyage charterers who are best placed to control the loading and the discharging stages since it is they who have to make the cargo available for shipment and to take delivery of the cargo. This poses a problem for the shipowner since he will have calculated the freight which makes the voyage commercially viable after having estimated the time required for performing the four stages and the consequent voyage costs based on that time estimate. Therefore, anything which interrupts the loading or discharging operations or causes them to take longer than was originally foreseen will cost the shipowner money and may well result in an overall loss on the voyage. Consequently, the shipowner is normally entitled to additional remuneration in the form of agreed damages (demurrage) for any additional time taken by the charterers to load and/or discharge the cargo over and above the time granted to them for that purpose in the contract (the laytime).

Liens

Most voyage charters will provide expressly that the shipowner is to have a lien on cargo for freight and demurrage. However, even if the charter is silent in that regard, there is normally an implied right at common law to exercise a lien for freight (but not for demurrage) that is payable on delivery of the cargo.

The Charterer's Duty to Give Legitimate Employment Instructions

In general, a time charterer has greater powers to exercise commercial control than a voyage charterer since the fundamental basis of a time charter is that the charterer has the ship to use (subject to the terms of the charter) as and where he pleases during the term of the charter, whilst in the case of the voyage charter, the charterer cannot use the vessel to perform any employment which is outside the ambit of the agreed voyage. However, the more modern forms of voyage charters (particularly tanker charters) do allow the charterers more flexibility than has traditionally been allowed in that they entitle the charterers to amend or vary voyage orders usually in exchange for providing the shipowner with an indemnity against any losses and/or liabilities that the shipowner may incur as a result of complying with such revised orders.

Most time charters have clauses in which the right of the time charterer to give employment instructions is expressly outlined. The charterer is entitled to give, and the owner is obliged to comply with, employment instructions given by the
charterer, in consideration for which, the charterer agrees to indemnify the owner, sometimes expressly and sometimes impliedly, for most (but not all) losses and liabilities incurred by the owners as a direct result of so doing. The wide extent of the charterers' rights in that regard have been described as follows:

"Clause 8 of the present charterparty, providing that the master (although appointed by the owners) shall be under the orders and directions of the charterers, gives the charterer his key right under the contract: to decide where the vessel shall go and what she shall carry, how (in short) she shall be used, always subject to the terms of the charterparty. The language used is general and the power correspondingly wide."

However, the owner is not obliged to comply with every order given by the charterer and the owner is not always protected by an indemnity if he complies with an employment instruction.

Restrictions on the Charterers' Right to Give Employment Instructions

The charterer is not entitled to give and the shipowner has *a duty* to refuse to comply with orders which:

- Subject the vessel or her crew to danger; or
- Oblige the vessel or crew to commit illegal acts; or
- Oblige the vessel or crew to commit fraudulent acts.

In such circumstances, the shipowner must refuse to comply with the order and if he fails to do so, he cannot claim an indemnity from the charterers for any liability, loss or damage that he suffers as a right of complying with the order since the cause of such liability etc., is not the charterer's order but the shipowner's own fault in doing something that he had a duty not to do.

Furthermore, the charterer is not entitled to give and the shipowner has *a right* to refuse to comply with orders which require the shipowner to do something which (although not illegal or fraudulent) falls outside that ambit of the services which he has agreed to perform under the charter, e.g. to proceed outside the agreed trading limits or to load an excluded cargo or to issue bills of lading otherwise than in the form agreed in the charter.

In such circumstances the shipowner can either:

- agree to comply with the order and rely upon an implied right to indemnification at common law; or
- refuse to comply with the order; or
- agree to perform only if the charterers agree to additional terms which are not included in the time charter.

Typically, a shipowner can be expected to demand additional remuneration, and/or indemnification for additional expenses incurred and/or a more secure indemnity (possibly in the form of a bank guarantee) for any liabilities which he incurs to third parties as a result of complying with the order.

Finally, the shipowners are not obliged to comply with the charterers' employment orders immediately in all circumstances. It may not always be completely clear at the time when an employment order is given whether the order is indeed a legitimate order and, consequently, the shipowners are normally given a reasonable time within which to make enquiries to ascertain the facts, to evaluate the legitimacy of the order given and the potential ramifications for owners before they are obliged to comply with the order. It follows that the ship remains on hire during such periods of enquiry.

Restrictions on the Shipowner's Right to be indemnified by the Charterers

If shipowners comply with the charterers' employment instruction they will normally be entitled to an indemnity either as a result of an express provision in the charterparty (an express indemnity) or as a result of the implication of law (an implied indemnity). However, even when the owner is entitled in *principle* to an indemnity it does not follow that he will secure an indemnity in all circumstances or in respect of all losses. It must be proved that the charterers' order was the direct cause of the liability, loss or damage incurred by the shipowner. Therefore, there may be no right to an indemnity if the liability, loss or damage is not caused by the employment order but by some other intervening event such as the negligent manner in which the crew have carried out the charterers' employment order. Similarly, the shipowner would not normally be entitled to claim an indemnity for costs and expenses which would have been incurred in any event even if the vessel was not engaged in performing the services ordered by charterers.

The Charterer's Duty to perform their Duties without Delay

Voyage Charters

The freight which the charterer pays entitles him to use the vessel not only for the carriage of the cargo but also for the time which is taken to load and discharge the cargo. In calculating the freight, the owner makes an estimation of the time which the loading and discharge is likely to take and the charterer is allowed to use this time (called 'laytime') as he wishes without further payment. However, once this time has been used, the freight becomes less valuable to the owner as the delay causes him to incur greater expense. Accordingly, the charter usually provides that once the laytime has expired, the charterer becomes liable to pay liquidated (i.e. agreed) damages for the delay. Such payment is usually calculated on a daily basis and is called 'demurrage'.

The voyage charter usually has detailed provisions relating to laytime and demurrage and it is often a complex issue to calculate the running of laytime and demurrage. The key questions are normally the following:

- How is laytime calculated?
- When does time start to run?
- What suspends the running of time?
- When does time finally stop running?

The time spent before laytime has been used up is normally referred to as the running of the laytime clock. However, once the agreed laytime has been used up the vessel will immediately go on to demurrage and thereafter reference is normally made to the running of the demurrage clock. For the purposes of this discussion, reference to the running of 'time' is intended to refer to either laytime or demurrage (whichever clock is then running) except where specific reference is made to either laytime or demurrage.

The moment when time commences to run at the load port or discharge port is an important moment since that is the time when the risk of delay is passed from the shipowner to the charterer and the moment when laytime finally stops running is also an important moment since that is the time when the risk of delay is passed back from the charterer to the shipowner. For example, if a ship is delayed getting into port the risk of delay falls on the shipowner but if the ship is delayed after it has completed the voyage the risk of delay falls on the charterer. Similarly, if the vessel cannot leave port after the loading or discharging has been completed, the risk of that delay normally falls on the shipowner.

Normally, time does not start to run until all the following conditions have been satisfied:

- The vessel must have reached the agreed destination (whether port, berth, anchorage etc.); *and*
- She must be ready in all material respects to load or discharge; *and*
- A valid Notice of Readiness (NOR) confirming (1) and (2) must have been given to the persons nominated in the charterparty to receive it.

Once time has started to run it runs continuously and will be suspended only if the delay has been caused by either:

- Default on the part of the shipowner; or by

- An incident which clearly falls within a clause of the charter specifying that time is to be suspended in such circumstances. In this connection, a clause specifying that 'laytime' is to be suspended is not sufficient to suspend the running of the demurrage clock if the vessel is already on demurrage at the time of the incident. To suspend the running of the demurrage clock the clause must refer expressly to demurrage and not merely to laytime.

Demurrage is intended to be agreed compensation for a breach by the charterers of their duty to complete cargo operations within the laytime. Therefore, unless the charterparty provides otherwise, it is not normally possible for shipowners to recover other losses in addition to demurrage if the cause of those losses is a breach by the charterers of their duty to complete cargo operations within the laytime.

Normally, time finally stops running not when the vessel leaves the port of loading or discharging but when loading or discharging has been completed. However, it has become common in some industries to extend the running of time. For example, it is common in the tanker trade for time to continue to run until hoses are disconnected or until certain specified documents (e.g. bills of lading) have been delivered on board.

Time Charters

The duration of the charter period is important to both owners and charterers for the following reasons:

- It is important to shipowners since firstly, they wish to know what their overall income will be for the charter period and since secondly they need to know when the vessel is likely to be redelivered to them in order to plan future employment;
- It is important to time charterers since they cannot properly plan sub-fixtures unless they know that they have the use of the vessel for a specified period.

Therefore, any event that subsequently affects the duration of the period may have important repercussions for both parties. If the vessel is redelivered before the agreed redelivery date (i.e. underlap) and charterers refuse to pay hire for the underlap period the shipowners will have lost the income that was contemplated for the underlap period. Similarly, if the charterers have entered into a sub-charter with a third party to perform a voyage which is likely to result in redelivery of the vessel under the head time charter after the agreed redelivery date (i.e. overlap), they may find themselves unable to carry that cargo whilst shipowners, should they allow the vessel to be used for such a purpose, may find themselves unable to deliver the vessel before the cancelling date specified in her next fixture.

Underlap

Since the charterers have promised to pay hire for the agreed charter duration a failure by them to do so otherwise than as a result of redelivery forced by shipowners' default is a breach of contract. In such circumstances, shipowners are normally entitled to damages equivalent to the hire which they should have received for the underlap period at the charter rate together with sums which charterers were obliged to pay under the charter (e.g. bunkers etc.), less any savings made as a result of early redelivery.

Overlap

In the absence of any contrary terms, the contract defines the period for which the time charterers are entitled to exploit the vessel commercially and the shipowner is entitled to re-assume control of his vessel on the expiry of that period. If the vessel is not redelivered at the agreed location by the end of the charter period the time charterer is in breach of contract and is obliged to recompense the shipowner in damages for the overlap period. Normally, the damages that are recoverable by shipowners will reflect the opportunity lost by the shipowners as a result of the delayed redelivery and will be the difference between the charterparty rate of hire and the market rate of hire for the vessel (if higher) for the overlap period.

Alternatively, and again in the absence of any contrary terms, if it appears at the time that the charterers order the vessel to proceed on her last voyage under the charter that the voyage, if performed, is likely to result in redelivery after the agreed redelivery date, the shipowners are entitled to refuse to comply with the order. In such circumstances, the charterers are likely to experience difficulty since they may be committed to sub voyage charterers to complete the contemplated voyage but are not able to secure the use of the vessel in order to perform that voyage. The shipowners have the right to refuse the charterer's order in such circumstances even though it had originally been perfectly feasible to perform the sub voyage in time and circumstances have subsequently changed through no fault of their own, e.g. because another ship has run aground and blocked traffic in and out of the contemplated loading port for the cargo.

These principles underline the basic principle that in the context of a time charter:

"*… the risk of delay is primarily on the Charterer.*"

Protective Clauses

There is nothing in principle to prevent time charterers from introducing provisions which are designed either to balance the risk of delay or to transfer the risk of delay to the shipowners. Historically, a balance has been achieved by ensuring that the charter duration is made subject to a tolerance. For example, if the charter duration is described as *"3 months 15 days more or less charterers' option,"* so long as the vessel is redelivered at any time within 15 days before or 15 days after the three months, there is no overlap and no underlap and no breach of contract on the part of the charterers. Even the addition of the word 'about' (e.g. 'about three months') entitles the charterers to some tolerance albeit that the extent of the tolerance has not been expressly stated.

In the tanker industry it has become common for the time charter forms developed by the oil majors to introduce clauses ('last voyage clauses') which are designed to provide the charterers with whatever extra time that may be needed to ensure that they have the use of the ship to complete any sub-fixtures which remain to be performed at the expiry of the originally agreed redelivery date. The effect of such clauses is to transfer the risk of delay from the charterers to the shipowners. For example, if the shipowner has negotiated his next fixture on the basis that the vessel will be redelivered under the current charter on or about the agreed redelivery date, he runs the risk that the current time charterers may exercise their rights under the last voyage clause with the result that the vessel may not be delivered to her 'next' charterers by the cancellation date in that charter. Should the 'next' charterers exercise the option to cancel that charter the shipowner has no remedy against the current time charterers.

Finally, it has become common, particularly in the case of time charter trips, to qualify the charter duration with the words 'without guarantee', e.g. *"one round Atlantic voyage 3 months without guarantee."* It appears that so long as the time charterers have estimated the likely duration in good faith then they are not in breach of contract even if that estimate appears to reasonable men to be completely inaccurate. The effect of such words is again to transfer the risk of delay from the charterers to the shipowners.

Law and Jurisdiction

Charterparties will normally include a law and jurisdiction clause which will establish the agreed system of law that is to be applied for dispute resolution and the country and/or city where claims are to be pursued. In the majority of cases, such clauses will provide for arbitration in one of the major arbitration centres around the world. The choice of law and jurisdiction will often have a major impact on the merits of a claim or defence and on the ability to enforce an award or judgment in another country. Therefore, this is not a choice that should be taken lightly. Traditionally, parties have tended to choose English law as the governing law since English law has over the centuries developed well-established and balanced rules for regulating charterparty disputes.

Insurance

A distinction needs to be drawn between:

- The claims which are made under charterparties; and
- The costs incurred in litigating such claims.

All kinds of claims may be made under charterparties and such claims may or may not be the subject of insurance. For example, claims for loss of or damage to cargo are usually covered by P&I insurance whereas claims for liabilities arising as a result of the delivery of cargo without surrender to the carrier of the original bills of lading are not.30 In each case it is necessary to consider the nature of the claim and the cover afforded by the various types of insurance that are available. However, it must be appreciated that in many instances, insurance cover may not be available.

The costs that may be incurred in pursuing or defending charterparty claims may be high. Such claims include not only legal fees but the costs of surveyors, consultants, technical experts etc. Should the claim that is being litigated be the subject of insurance then the costs incurred in pursuing or defending such claims are usually covered by the same insurance. However, even if the claim is not subject to insurance, it is possible to insure the litigation and other related costs that may be incurred in pursuing or defending such claims. The International Group of P&I Clubs offer such insurance under a separate class of insurance which is normally referred to as Defence Cover or FD&D cover.31 Similar insurance is also offered by market insurers on a fixed premium basis.

CARGO LIABILITY CLAIMS

Introduction

It is inevitable that ships will face cargo claims at some point in time. The most common types of claim relate to the following:

- Damage to the cargo;
- The loss of part or all of the cargo;
- The delivery of the cargo to the wrong recipient;
- Delay to the cargo;
- The extra costs of discharging and/or storing damaged cargo;
- The costs of the disposal, on-shipment or transhipment of cargo;
- Cargo's proportion of salvage or general average.

Cargo claims may also be brought even when the cargo is not in fact lost or damaged or delayed. This usually occurs when the documents evidencing the shipment of the cargo misdescribe some aspect of the cargo (e.g. the quantity, weight or apparent order and condition of the cargo) and the cargo that is received differs from that description even though there has in fact been no event during the carriage to which damage or loss can be attributed. In such circumstances, the misdescription may be held to be a misrepresentation by the carrier and the claim relates to the financial loss suffered by the receiver of the cargo as a result (e.g. where the receiver as buyer has relied on the accuracy of the cargo description made by the carrier and has paid the seller for more cargo than that which has actually been shipped). This is a notoriously common problem in the case of bulk cargoes since some degree of measurement difference is often inevitable and many claims are made based on the allegation that the discrepancy is greater than that which is considered normal and customary in the trade.

Finally, claims are sometimes brought wrongly when the quantity of cargo which is delivered by the ship is less than the quantity shipped, but the apparent 'loss' is not due to any fault or negligence on the part of the carrier but due to the inherent nature of the cargo. Some cargo loss inevitably occurs during the carriage of certain cargoes, for example evaporation loss from some oil cargoes. In such circumstances, the carrier is not liable but has a defence under the common law or the Hague, Hague-Visby or Hamburg Rules, whichever is applicable to the particular carriage. Furthermore, such claims are not normally covered under the standard cargo insurance policies since the losses are inevitable and not caused by a fortuitous peril. Claims are normally made only against the ship which has carried the relevant cargo but can also be made against another ship if the loss or damage can be attributed to the negligence of that other ship (for example, in the event of a collision, when the cargo on ship A has been damaged by the negligence of ship B.) In the event that claims are made against the carrying ship the claim is normally brought under a contract for the carriage of the cargo. However, if the shipowner is not the carrier under that contract of carriage (for example, where the contractual carrier is the charterer or some other non vessel owning carrier (NVOC)) the claim can be brought in contract against whoever is the carrier under the contract of carriage and/or against the shipowner in tort (i.e. negligence). However, in the event that claims are brought against the non-carrying ship, those claims can only be brought in tort since there will be no contract of carriage between the non-carrying ship and the damaged cargo.

It is normally very important to establish whether the claim is brought under a contract or in tort since a claim brought in contract may be subject to certain contractual and/or statutory defences that apply to the contract (e.g. exclusion clauses, time bars or package limits of liability). If the claim is brought in tort, the carrier may not have the benefit of any contractual defences unless the carrier is able to rely on the protection that is given by special clauses such as the Himalaya Clause or the Circular Indemnity Clause or the doctrine of bailment on terms (See Chapter 3.3.1 below).

Contractual Liability

Cargo claims can arise under many forms of contract that are regularly used in the shipping industry. However, contractual liability can arise either directly between a carrier and a cargo claimant (for example, as between a carrier and a cargo receiver under a bill of lading) or by way of indemnity as between a carrier who has settled such a claim and another party under another contract (for example, as between the carrier and the other party to whatever charterparty contract2 there may be between them.) The commentary below considers this issue in relation to the most common forms of contract that are used in the shipping industry.

Time Charters

It is extremely unlikely that cargo claims will be made by time charterers against shipowners since time charterers are not usually the owners of the cargo. Nevertheless, the issue may arise under a time charter on an indemnity basis. Cargo claims will normally be made initially by third party cargo owners under contracts of carriage such as bills of lading against whoever is the carrier under that contract. Depending on whether the carrier is the shipowner or the time charterer either party may then wish to claim an indemnity *inter se* under the terms of the time charter.

Voyage Charters

In the case of a voyage charter, it is possible that the receiver of the cargo may be the voyage charterer (e.g. where the cargo is bought on FOB (free on board) terms) in which case the duty of chartering the vessel to carry the goods lies on the buyer and the governing contract of carriage between the shipowners and the receivers would be the voyage charter not the bill of lading. Consequently, the cargo claim would be brought under the terms of the voyage charter not the bills of lading, which would be mere receipts for the goods, and would be determined in accordance with the terms of the voyage charter. Therefore, no question of indemnity can subsequently arise as between the shipowners and the voyage charterers.

However, where the receiver of the cargo is not the voyage charterer (e.g. where the cargo is bought on CIF (Cost, Insurance, Freight) terms) the duty of chartering the vessel to carry the goods lies on the seller and the governing contract of carriage between the shipowners and the receivers would be the bill of lading not the voyage charter. Therefore, the likelihood is that the cargo claim will be made in the first instance under the bills of lading and the question of indemnity will arise thereafter between the shipowners and the voyage charterers. However, it is extremely unlikely that the voyage charterers would be a carrier under the bill of lading and accordingly, any subsequent indemnity claim would normally be made by the shipowners against the voyage charterers and not vice-versa.

Booking Notes

A booking note can take many forms. However, it is usually a contract which records the agreement of parties to reserve space on a vessel for the future carriage of a cargo which does not need the whole or most of the carriage capacity of the vessel. It will usually set out the terms of the agreement and will usually provide that the carriage will be subject to the terms of the carrier's standard bill of lading terms. Finally, it will also usually provide that the booking note will be superseded (i.e. replaced) by the terms of an agreed form of bill of lading once the cargo has in fact been shipped in due course. Therefore, cargo claims are likely to be pursued under the bill of lading form that has superseded the booking note. However, if the parties to the booking note and bill of lading are different complications can arise and claims could be made under both contracts.

Bills of Lading

The majority of cargo claims are pursued under bills of lading although some are made under sea waybills.

There are two different types of bills of lading:

- Bills of lading which are normally described as 'negotiable' or 'to order' (These terms mean the same but the term 'to order' bill will be used for the sake of convenience in this commentary); and
- Straight bills of lading.

The fundamental difference between the two types of bills of lading is that the 'to order' bill qualifies the identity of the receiver of the cargo by adding the words 'to order', e.g. 'to order of the shipper' or 'to order of X' or 'to X, to their order' or simply 'to order' whereas a straight bill of lading identifies the receiver without using the words 'to order', e.g. 'to X'. The absence of the words 'to order' imposes an important restriction on the transferable nature of the bill of lading.

A 'to order' bill of lading is a far more complex document than a charterparty. It is:

- a receipt for the goods;12 and
- good evidence of a transferable contract of carriage; and
- a negotiable document of title in the sense that the transfer of it enables the holder of it to obtain delivery of the cargo from the ship.

It is this combination of features which has made the 'to order' bill of lading the fulcrum of international trade. Most international contracts for the sale of goods provide that as the goods are sold from seller to buyer the bill of lading (as a transferable contract of carriage) is also transferred from seller to buyer thereby creating a contract between the carrier and each successive lawful holder of the bill as the bill is passed from holder to holder. The right to sue the carrier is transferred from holder to holder in the sense that the transferor loses and the transferee gains that right with the transfer of the bill. It also means that the holder has the right to sue the carrier under the bill for loss or damage that has occurred at any time during the transit and not only for loss or damage that has occurred after he has become a holder. Therefore, if the goods have been lost or damaged during the carriage then, although the ultimate receiver of the goods will normally be obliged to pay the seller of the goods pursuant to the terms of the contract of sale for the full shipped quantity of cargo, he is given the right as the lawful holder of the bill of lading to bring a claim against the carrier for any loss or damage that may have occurred at any time during the voyage since it is then the receiver who has in fact suffered the loss caused by any breach by the carrier of the contract of carriage.

When the bill of lading is made to the order of a named party (e.g. 'to order of X') the bill may be transferred from X to Y and thereafter from Y to Z etc., by the endorsement of the bill by X in favour of Y and by Y in favour of Z etc., together with the physical delivery of the bill from X to Y and from Y to Z etc. However, where the bill is simply made out 'to order' without any named party (i.e. a 'bearer bill'), transfer is effected simply by physical delivery of the bill from X to Y and from Y to Z etc., without any endorsement.

A bill that is made out 'to order of X' can be converted into a bearer bill if X endorses the bill with the words 'to order' rather than 'to order of Y'. Thereafter, the bill is transferable as a bearer bill in the manner described above. Similarly, a bearer bill can be converted into a bill that is made to the order of a named party if the holder endorses the bill in favour of a specific party (e.g. 'to order of Y'). Thereafter the bill is transferable from Y to Z etc., in the manner described above.

When considering the pursuit of cargo claims under bills of lading it is normally necessary initially to consider three issues:

- Who is the carrier under the bill of lading;
- What are the terms of the bill of lading; and
- Who has the right to sue the carrier?

Who is the Carrier under the Bill of Lading?

For the reasons given above in Chapter 3.1 it is important to establish who is the carrier under the bill of lading since this will determine whether a claim is to be made in contract or in tort.

The fact that goods are carried on a particular ship does not necessarily mean that the shipowner is the carrier under any bills of lading that may have been issued for that cargo. Ships are often chartered either in full or in part to other parties who will then use the carrying capacity that they have thereby acquired to carry cargoes on that ship for their own customers. Such charterers may for commercial reasons wish to act as carriers under any bills of lading that may have been issued for such cargoes. This can occur in most trades but is particularly prevalent in the case of the container trade where container operators charter space on each other's ships but issue their own bills of lading for any cargoes that may be carried on a ship owned by another operator.

Where the bill of lading names the carrier expressly then that party is usually to be treated as the carrier for the purposes of any cargo claims that may be brought under that bill of lading. However, difficulties can often arise in the case of chartered ships when the particular form of bill of lading that is used does not expressly identify the carrier and it is unclear from the rest of the bill whether the carrier is to be the shipowner or the charterer. This can be so even if the form of the bill of lading that is used is the charterers' own house form. In the final analysis, the question is one of fact based on all the relevant circumstances. However, in the first instance, the question must be answered simply by a consideration of the provisions of the bill of lading without consideration of surrounding factors such as the terms of any charterparty pursuant to which the bill has been issued. Reference is made to surrounding factors only if the identity of the carrier is not clear from the provisions of the bill itself.

When considering the terms of the bill of lading the following presumptions will normally apply:

- The carrier is not necessarily the party which actually signs the bill but the party on whose behalf the signature was made;
- Bills of lading signed by the Master personally or by someone else (even the charterers or their agents) with authority to sign on behalf of the Master bind the shipowners (or where the ship is bareboat chartered, the bareboat charterers) as carriers;
- Bills of lading signed by the charterers personally or by someone else for or on behalf of the charterers which make it clear that the signature is not intended to bind the Master, bind the charterers as carrier.

However, the issue may be further complicated by clauses (usually on the back of the bill of lading) which are intended to clarify the issue but often succeed in complicating it. Such clauses (normally called 'Identity of Carrier' clauses) may provide as follows:

"The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said shipowner only shall be liable for any damage or loss due to any breach or nonperformance of … the contract of carriage."

The complication may arise when that clause clashes with other indications of the bill of lading (e.g. the bill is on the charterers' own form or includes the charterers' logo or appears to be signed for or on behalf of the charterers) which suggest that the carrier is someone other than the shipowners. However, in such circumstances, priority is to be given to the signature on the face of the bill and the typed or stamped words next to it. If these words make the identity of the carrier clear that conclusion is not to be overridden by printed terms on the back of the bill.

Despite these rules and presumptions the question of who is the carrier under the bill of lading can be a notoriously difficult one and legal advice should be taken at an early stage since the answer to the question may well determine the future strategy that should be followed in handling the claim.

What are the Terms of the Bill of Lading?

Under the common law a contract of carriage is concluded once the parties have agreed the terms of carriage. Therefore, a contract can be an oral contract and is perfectly enforceable subject to proving the terms of the agreement. However, proof can be difficult to establish in such circumstances and consequently, parties will invariably record the terms of the contract in writing. In such circumstances, the written document does not *per se* have the status of *the contract* but is in reality merely evidence of the terms of the earlier oral agreement. In most cases, that distinction is merely academic, but it can become relevant if one party alleges that the written contract has not properly recorded the terms that have actually been agreed and applies for rectification of the contract.

A carrier and a cargo interest will usually have agreed the terms of carriage before commencement of loading and the bill of lading (which will not be issued normally until after loading is complete) is in effect merely evidence of that earlier contract. However, since a bill of lading is a contract that is intended to be transferred to a third party (i.e. a consignee or endorsee) who will not be aware of the precise terms agreed before loading by the carrier and the shipper, the common law provides that whilst the bill of lading is merely *prima facie* evidence of the contract of carriage whilst it remains in the hands of the shipper, and can be rectified if needs be, it becomes conclusive evidence of the terms of carriage once it has been transferred to a third party who has relied on the written terms, and cannot thereafter be rectified. In other words, once the bill of lading has been transferred, it is then considered to be *the contract*.

Whilst there are many different forms of bill of lading they tend to fall into one of two basic types:

- 'Long' form bills which include all the relevant terms in the one document; and
- 'Short' form bills which purport to incorporate the terms of another document.

An example of a 'long form' bill is the Conlinebill which sets out all the relevant terms of carriage on the front and reverse of the same document whereas an example of a 'short form' bill is the Congenbill which is intended to incorporate the terms of the charterparty pursuant to which it has been issued and which provides that:

"… All terms and conditions, liberties and exceptions of the charter … including the Law and Arbitration Clause are herewith incorporated."

The aim of the incorporation clause is to make the liability of the carrier under the bill commensurate with his liability under the pre-existing charterparty, thereby ensuring that the shipowner does not become subject to any additional liability under the bill of lading. However, this aim is often defeated by one or both of two separate difficulties:

- the use of insufficiently precise words of incorporation; and/or
- the effect of the Hague or Hague-Visby Rules.

The incorporation difficulty is a notorious one in that different countries follow different rules. The usual rule under the common law is that unless the incorporation clause in the bill of lading refers expressly to a particular clause in the charterparty, a general reference (e.g. to 'all clauses of the charter') will not succeed in incorporating a clause which requires the words of the clause to be changed in order to make sense in the context of the bill of lading. Therefore, a general reference will not successfully incorporate into the bill of lading a clause of the charterparty which provides that a payment is to be made by 'charterers' since, in order to make sense in the bill of lading, it would be necessary to change 'charterers' to 'receivers'. However, if the incorporation clause refers expressly to a particular clause (e.g. to 'all clauses of the charterparty including the law and arbitration clause'), the arbitration clause in the charter may be successfully incorporated into the bill of lading despite the fact that in order to do so, it may be necessary to change the reference in the arbitration clause from 'charterers' to 'receivers'.

However, whilst this is the approach adopted by common law countries, other countries may be more reluctant to countenance any form of incorporation if the claim is brought by anyone other than the shipper or charterer on the grounds that a third party transferee was probably unaware of the terms of the charter and therefore, had not agreed to that particular arbitration or jurisdiction clause. This can result in difficult jurisdictional arguments when a claim is made.

Secondly, whilst charterparties are subject to unfettered freedom of contract principles, the terms of bills of lading are normally severely regulated by a regime of various compulsory international conventions. Therefore, a clause which is perfectly effective in the context of a charterparty may be void in the context of the bill of lading due to the compulsory application to such bills of lading of the Hague or Hague-Visby Rules. For example, Clause 2 of the Gencon charter provides that the owner is liable only if *"… loss, damage or delay has been caused by personal want of due diligence on the part of the carrier…"* There is "*personal want of due diligence*" only if there has been negligence on the part of the higher management of the carrying company. Such a clause is perfectly effective in the context of the charterparty. However, if such a clause is incorporated into a bill of lading it will come into conflict with the Hague or Hague-Visby Rules which provide that the carrier is liable if there is want of due diligence on the part of *any* of the carrier's servants or agents or independent contractors. Consequently, Clause 2 of the Gencon charter will be rendered void in the context of the bill of lading by Article III Rule 8 of the Rules.

However, even though these various international conventions do not apply compulsorily to charterparties, most charterparties will nevertheless incorporate one or other of such conventions by agreement through the medium of a Paramount Clause, in which case the liability of the carrier under the bills of lading and the shipowner under the charterparty may in fact be commensurate.

Who has the Right to sue the Carrier?

This issue is relevant since bills of lading are transferable contracts and may be transferred many times during the course of a voyage. For example, the shipper may transfer the bill to A on Monday, the cargo may be damaged on Tuesday, and A may transfer the bill to B on Wednesday who then transfers it to C on Thursday and the cargo is finally delivered to C on Friday. The original party to the bill of lading contract was the shipper, whilst A was the party to the contract on Tuesday when the cargo was damaged and C was the contractual party when it was finally delivered on
Friday. Therefore, who has the right to sue the carrier – is it the shipper, or A, or C?

Most countries adopt a pragmatic approach to the question and the party that has the right to sue the carrier is normally the party that has suffered a financial loss as a result of the carrier's breach of contract. Therefore, in the example given above, it is likely to be C who has the right to sue since although A was party to the bill of lading on Tuesday when the cargo was damaged, it is likely that A has subsequently been paid in full for the cargo under the sale contract to B who has likewise been paid in full by C who is, consequently, the party that has suffered the loss. The fact that C was not a party to the bill of lading contract on Tuesday is not relevant since he has subsequently become a party to it on Thursday and has acquired the right under the bill to sue the carrier for any breach of contract that has occurred at any time during the carriage even if that was before C became a party to the contract.

The precise basis for this pragmatic approach differs from country to country. Some countries such as the United Kingdom have adopted a statutory approach in the form of the Carriage of Goods by Sea Act 1992 (COGSA 1992) whereby the right to sue the carrier is transferred from one bill of lading holder to the next as and when the bill of lading is transferred whereas other countries follow more traditional common law principles. However, notwithstanding the pragmatism of the approach, there are still technical problems which can affect the right of a claimant to sue the carrier and it is always necessary to consider, and if necessary, take legal advice as to whether a particular claimant does indeed have the right to bring the claim.

Straight Bills of Lading

A straight bill of lading is similar to an 'to order' bill of lading in that it is also:

- a receipt for the goods; and
- good evidence of the contract of carriage of the goods; and
- a document of title in the sense that it enables the holder of it to obtain delivery of the cargo from the ship.

However, it differs from a 'to order' bill of lading in that it can only be transferred once from the shipper to the named receiver and cannot be transferred by the named receiver to anyone else. Therefore, if cargo is made deliverable 'to X', the shipper can transfer the bill to X but X cannot transfer the bill on to any other party. However, since the bill can be transferable once it must be produced to the carrier before delivery of the cargo in order to prove title to the goods. Accordingly, a straight bill of lading is considered in most countries to be a document of title and many standard forms of bills of lading make this clear by printed words that emphasise that delivery of the cargo must be made against production of the original straight bill.

Electronic Bills

Whilst the traditional form of bill of lading has been very successful over many centuries in formulating and facilitating international trade and the international carriage of goods, stresses are being experienced today because of the paper nature of the bill. Recent cases have demonstrated the relative ease with which forged or counterfeit bills can be produced. However, the most serious disadvantage arises from the legal need to surrender the original paper bill to the carrier in order to obtain delivery of the cargo at the port of discharge or to produce the original paper bill to satisfy customs or other authorities. In many cases, the need to convey the bills from seller to the buyer's bank and then on to the buyer can be very time consuming, particularly if there is a chain of cargo sales during the voyage. Conversely, the operational speed of ships has increased with the result that the ship often arrives before the documents. This results in substantial cost either in the form of hire or demurrage whilst the ship is kept waiting for the documents or by use of courier services or by provision of letters of indemnity or other securities to persuade the carrier to deliver the cargo without surrender of the bill. Therefore, the industry has endeavoured for many years to see how it can replace the paper bill of lading with an electronic alternative which it is hoped will save substantial cost to the various stakeholders.

It is now technologically possible to produce electronic bills that have substantial security safeguards and the sufficiency of electronic signatures as alternatives to manual signatures has been accepted by the laws of many countries. However, there are currently no international conventions or laws which regulate the use of electronic bills.22 Accordingly, the industry has been hesitant to embrace the concept fully since there is no guarantee of any recourse if difficulties arise. However, there are a few commercial organisations which provide a service to the industry that enables its members to trade with electronic bills on payment of a fee. However, these schemes can work only if every party involved in the carriage is a member of the organisation since the regulation of the trade is effected by contractual agreement rather than by external governmental control through conventions and laws. Each member must agree to abide by the rules of the organisation which will regulate each member's rights and obligations. Consequently, if it is not known in advance whether all parties will be members of the scheme, it may be difficult to use it.

Because of the uncertainties that currently exist, the International Group of P&I Clubs was originally hesitant to provide cover for liabilities, losses, costs and expenses that arise from the use of an electronic trading system. However, such clubs have now agreed that liabilities arising in respect of the carriage of cargo under such systems can be covered subject to the restrictions that apply to traditional paper-based trading activities provided that the relevant system has first been approved by the International Group. The two systems that are currently approved by the Group are those administered by Electronic Shipping Solutions (the ESS system – version DSUA v. 2009.3) and that administered by Bolero International Ltd (the Bolero system – Rulebook/Operating Procedures September 1999).

The Rotterdam Rules, if adopted by the industry, will allow electronic bills (or 'electronic transport documents' as they are called under the Rules) to be used and to have the same effect as traditional paper bills. Article 8 of the Rules provides that:

"Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport document, provided that the issuance and subsequent use of an electronic transport document is with the consent of the carrier and the shipper; and
(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document."

Sea Waybills

Sea waybills are similar to bills of lading but with one important difference – they are not transferable contracts. A sea waybill is:

- a receipt for the goods; and

- good evidence of the contract of carriage of the goods; but is
- not a document of title since it is not transferable and need not therefore, be produced to the carrier before delivery of the cargo in order to prove title to the goods.

Therefore, during the currency of the voyage the sea waybill remains a contract between the carrier and the shipper and the carrier must comply only with instructions given by the shipper. However, the waybill will normally specify the name of the party to whom the cargo is to be delivered and therefore, unless the shipper subsequently declares otherwise, the carrier will be entitled to deliver the cargo to that party without requiring that party to surrender the waybill to him since by doing so, the carrier is in effect complying with the delivery instructions given by the shipper.25 Most standard forms of sea waybills have express provisions to this effect.

However, the duty of the carrier to comply only with the instructions of the shipper restricts the usefulness of the sea waybill as a trading document and accordingly, the Comité Maritime International (CMI) sought to redress these difficulties in 1990 in the form of the *CMI Rules for Sea Waybills* which are not compulsorily applicable but which can be incorporated into sea waybills by agreement (See for example, the BIMCO Genwaybill). These Rules provide that the shipper has the option to transfer to the consignee named in the sea waybill the right to nominate the party to whom delivery is to be made. However, this option is exercisable no later than the time that the goods are received by the carrier. The receiver of cargo will often have paid the shipper for the shipment of a full cargo in apparent good order and condition, but may find when the cargo is delivered to him that loss or damage has occurred during the transit by sea. In such circumstances, the receiver faces a potential difficulty since the waybill evidences a contract between the carrier and the shipper and therefore, there is no contract of carriage between the carrier and the receiver. Under the laws of some countries such as the UK a solution has been found by providing the receiver with a statutory right to sue the carrier, but if such a solution is not possible, the receiver may have to rely on the goodwill of the shipper to bring a claim against the carrier on his behalf. This problem was also recognised by the CMI and the *CMI Rules for Sea Waybills* provides that the shipper enters into the sea waybill contract *'not only on his own behalf but also as agent for and on behalf of the consignee'* thereby purporting to enable the consignee to bring an action against the carrier in his own name if necessary. However, it is uncertain to what extent this provision is enforceable in all jurisdictions.

The Hague and Hague-Visby Rules themselves do not apply compulsorily to sea waybills but some countries such as the UK have extended the applicability of the Rules to sea waybills under the local statute which gives force to the Rules under the local law. Furthermore, most standard forms of sea waybills provide expressly by means of a Paramount Clause that the Rules are to apply to the sea waybill by agreement as though the sea waybill were a bill of lading.

The Hamburg Rules do apply compulsorily to sea waybills since such a document is a *"contract of carriage by sea"* for the purposes of the Rules in that it is a *"contract whereby the carrier undertakes against payment of freight to carry goods from one port to another"* but is not a charterparty.

Delivery Orders

A delivery order is a mechanism which enables an owner of goods to 'split' the total quantity under a bill of lading, e.g.1,000 tons, into smaller units, e.g. 10 delivery orders for 100 tons each. This normally occurs when a bill of lading holder has bought the total quantity of cargo in one lot under one bill of lading but subsequently sells the cargo in smaller lots to different buyers. In such circumstances, the bill of lading holder cannot transfer the bill of lading for the total quantity to any one of the new buyers and will, therefore, require alternative documents from the carrier equal to the tonnage sold to each new buyer. Therefore, the holder of the bill of lading will normally surrender that bill to the carrier before or at the end of the voyage and request the carrier to produce substitute delivery orders for each buyer, and to then deliver the cargo to the different buyers under the individual delivery orders. The rules relating to the surrender of bills of lading are considered below.

Each delivery order is usually made subject to the terms of the bill of lading which has been surrendered to the carrier. Therefore, theoretically, the liability of the carrier to each holder of the delivery orders is no different to the liability that the carrier had to the seller under the bill of lading. However, the situation is not always that simple. For example, if a cargo of 1,000 tons had originally been shipped under one bill of lading, the carrier would have no liability to the holder of the bill if a total of 1,000 tons was in fact delivered. However, if that bill of lading were to be replaced by ten delivery orders for 100 tons each, then even if the carrier were still to deliver a total of 1,000 tons, the carrier may nevertheless be liable to the holder of the final delivery order if he has in fact delivered 102 tons not 100 tons under one of the other delivery orders. In such circumstances, only 98 tons would be available for delivery to the holder of the final delivery order who can then be expected to bring a claim for short delivery.

This form of delivery order should be distinguished from another form of document which is sometimes also called a 'delivery order' but which is in fact nothing more than the order which is given by the carrier to a port authority or terminal to deliver cargo to a party that has demonstrated its entitlement to receive the cargo by presentation of the original bill of lading to the carrier or the carrier's agent.

The Relevance of Compulsory International Conventions

There are three international conventions which are currently in force and which establish the minimum degree of liability that is to be borne by carriers. However, these conventions are intended to apply only to contractual claims and not to claims in tort. Whilst Article 4 bis 1 of the Hague-Visby Rules provides that "*the defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort*", the English Court of Appeal has held in the case of *The Captain Gregos*28 that the Rules can only apply when there is a contract of carriage between the claimant and the carrier, which means, in effect, that if there is a contract between the cargo claimant and the carrier, a claim against the carrier must be brought in contract and that the reference to claims in tort is of little if any relevance.

The conventions provide that if a carrier tries to secure more protection than that which is allowed by the conventions then any clause in the contract of carriage which purports to have that effect will be *"null and void and of no effect*".

The international conventions which are currently in force are the following:

- The Hague Rules;
- The Hague-Visby Rules; and
- The Hamburg Rules.

These Rules are not uniformly applied by all countries. Some countries are parties to the Hague Rules, some to the Hague-Visby Rules and a small number to the Hamburg Rules, whilst some countries are not parties to any of these conventions. Furthermore, even when countries have adopted a particular convention, they may have done so in a piecemeal and non-uniform manner. Therefore, the degree of protection that is available to a carrier is variable and it is always necessary to consider which, if any, of the Rules apply and in what manner.

In general terms, the liability that the carrier bears under the Hague and Hague-Visby Rules differs from the liability that the carrier bears under the Hamburg Rules in the following manner:

- Under the Hague and Hague-Visby Rules the carrier is not liable unless the cargo claimant proves that the carrier is in breach of specified duties, in which case the carrier can rely on specified rights of protection;
- Under the Hamburg Rules the carrier is deemed to be liable for loss/damage to cargo which occurs whilst the goods are in his charge unless he proves that he has taken "*all measures that could reasonably be required*" to care for them.

Nevertheless, there are also some important differences between the Hague Rules and the Hague-Visby Rules particularly in relation to the availability and quantum of package limitation rights.

The Extent of the Regulation

It is important to establish whether the Rules are to apply in any particular situation since if they do not apply, the relationship between the carrier and the cargo interest is subject to freedom of contract principles, whereas if the

Rules do apply, some provisions of the contract may be deemed null and void. For example, Article III Rule 8 of the Hague and Hague-Visby Rules provides as follows:

"Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods arising from the negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

There is also a similar provision in Article 23 of the Hamburg Rules.

The Hague and Hague-Visby Rules

The Hague and Hague-Visby Rules do not apply compulsorily in all circumstances.

For example, they do not apply compulsorily to:

- Contracts other than 'to order' or straight bills of lading;
- The responsibility of the carrier before loading and after discharging;
- Carriage from a country which is not a party to the Rules or to bills of lading which have been issued in a country which is not a party to the Rules;
- The carriage of live animals;
- The carriage of deck cargo which has been recorded on the bill of lading.

It is also debatable in some countries whether the Rules apply to claims for delay where there is no physical loss or damage.

However, parties will frequently extend the application of the Rules in such circumstances by agreement through the medium of a Paramount Clause. For example, the Rules are commonly applied by agreement to charterparties.

Nevertheless, the Rules do not apply at all to the following issues:

- Who is the carrier?
- Who can sue for cargo loss or damage?
- What is the relevant jurisdiction and law?
- The effect of a bill of lading as a document of title.

Since such issues are not regulated by the Rules, they are regulated by the law of the country that governs the relevant contract of carriage.

The Hamburg Rules

By contrast the compulsory ambit of the Hamburg Rule is much wider. The Hamburg Rules apply compulsorily to:

- All contracts (other than charterparties) under which freight is payable;
- The responsibility of the carrier from the time that the goods are delivered into his custody at the loading port until he delivers them into the custody of the receiver at the port of discharge;
- Carriage from or to a country which is a party to the Rules;
- The carriage of live animals and deck cargo;
- Claims for delay.

The Hamburg Rules also have compulsory provisions that regulate the jurisdiction where claims may be brought.

Furthermore, the Hamburg Rules place compulsory responsibility on both the carrier (who is defined as the party who enters into the contract of carriage with the shipper) and the actual carrier (if this is a different party to the carrier as defined). Such parties have joint and several liability for cargo claims.

The Carrier's Obligations

The Hague and Hague-Visby Rules

The carrier has the following major duties under the Hague and Hague-Visby Rules:

Under Article III Rule 1:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
a) Make the ship seaworthy.
b) Properly man, equip and supply the ship.
c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

The following factors are relevant in relation to this provision:

- The reference to *"the carrier"* includes all the carrier's servants, agents and independent contractors. They must all exercise due diligence;
- The reference to "*before and at the beginning of the voyage"* means that the carrier must prove that he has engaged in the practise of due diligence at all times that the ship has been in the carrier's control up to and including the commencement of the voyage;
- The exercise of due diligence means that there must be no negligence.

Under Article III Rule 2:

"Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

The following factors are relevant in relation to this provision:

- The reference to *"the carrier"* includes all the carrier's servants, agents and independent contractors. They must all "*properly and carefully load etc."*;
- The carrier's duty under this provision is a continuing one throughout the time that he has the cargo in his care.

Under the common law (but possibly not under the law of all countries) the carrier and the cargo interests are allowed to decide *inter se* which of them is to perform the various cargo operations specified in the article and the carrier has the
responsibility to perform "*properly and carefully"* only those operations that he has agreed to perform. For example, if the parties have agreed that the *cost and risk* of cargo operations is to be borne by the cargo owners on 'Free in and out' (FIOS) terms, the carrier may have the duty merely to "*properly and carefully ... carry, keep, care for, ... the goods carried"* since responsibility for the loading, handling, stowing and discharging of the goods has been transferred to the cargo interests. However, the mere transfer of *the cost* of such operations to the cargo owner is probably not sufficient to transfer the risk and clear terms will usually be necessary to absolve the carrier from his wider duties under Article III Rule 2.

The Hamburg Rules

The carrier's liability under the Hamburg Rules is very different from the liability that he has under the Hague or Hague-Visby Rules. The carriage of live animals and deck cargo is subject to special rules but otherwise, the responsibility of the carrier and/or actual carrier is encapsulated in Article 5.1 which provides as follows:

"The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place whilst the goods were in his charge as defined in

Article 4 unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

Therefore, once the cargo claimant proves that the cargo has been lost, damaged or delayed whilst it was in the carrier's charge, the carrier is deemed to be liable and there is no need for the cargo claimant to prove how the cargo was lost, damaged or delayed or that it was due to the negligence of the carrier or his servants or agents.

The Delivery of the Cargo

The carrier has a duty to ensure that the cargo is delivered at the end of the voyage to the party that is entitled to take delivery. If the Hamburg Rules apply such duty is probably regulated by those Rules since the Rules govern the carriage from the time that the carrier has taken over the goods from the shipper until *"the time that he has delivered the goods by handing over the goods to the consignee."*

However, the Hague or Hague-Visby Rules make no express mention of the duty to deliver the goods and apply only *"from the time when the goods are loaded on to the time they are discharged from the ship"* (i.e. from tackle to tackle). The distinction is important since cargo may be 'discharged' when it is placed on the quay but may not be 'delivered' until it is subsequently handed over into the custody of the consignee. In the case of some trades (e.g. the tanker trade) there is no material distinction since the cargo is often both discharged and delivered at the moment that it passes from the ship through the manifold to the shore line. However, in the case of the container trade, the container may be discharged from the ship into the container receiving yard in the port area but may not be delivered for some days until the consignee comes to collect it. In any event, even if the Rules do not apply, there is a long-standing rule of the common law which is now applied in most countries around the world and which provides that a carrier should not deliver cargo which has been shipped under a 'to order' or straight bill of lading unless and until the original bills of lading have been surrendered to him. The reason for the rule is that whilst the carrier has the duty to deliver the cargo to the party that is entitled to take delivery of the cargo, the carrier may have no idea who that is since the bill of lading may have been traded and passed from holder to holder a number of times during the voyage unbeknown to the carrier. Even if the bill of lading is a straight bill of lading, the carrier may not know whether delivery should be made to the shipper or to the named consignee as he will not know whether payment for the goods has been made in exchange for such bills. Therefore, since the bill of lading operates as a document of title, the carrier is entitled to deliver the cargo to the party who produces the original document of title to him. If the carrier delivers the cargo without requiring the surrender of the original bills of lading he 'does so at his peril' since, if he has in fact delivered to the wrong party:

- He will be liable to the true owner for the full value of the cargo that has been misdelivered; and
- He will not normally be entitled to rely on the protection of any of the exclusion clauses in the bill of lading; and
- He may prejudice his right to limit his liability; and
- He will normally have lost his P&I cover for liabilities arising as a result of the misdelivery.

Notwithstanding such rule, it is often the case that original bills of lading are not available at the time of delivery and, in order to prevent delay to the ship, carriers will often consider that they have no alternative for commercial reasons but to deliver cargoes without surrender of the original bills of lading against the offer of a letter of indemnity (LOI) from charterers or the party requiring delivery. In recognition of this reality, the International Group P&I Clubs have co-operated to produce a form of LOI which their members may consider using in such circumstances. However, it must be clearly understood that the clubs have done so purely as a service to their members. There is no obligation to use such forms; indeed, it must be emphasized that even if these forms are used, the member will still normally have lost his P&I cover for liabilities arising as a result of the misdelivery.

The obligation to deliver cargo against the surrender of the original bills of lading arises simply because it is a document of title and creates for the carrier the difficulty described above. Therefore, if the goods are carried under a sea waybill, there is no need for the carrier to demand surrender of the original waybill before tendering delivery of the cargo since the sea waybill is not a document of title. Therefore, the carrier is entitled to deliver in accordance with instructions received from the shipper without requiring proof of the shipper's entitlement to give such instructions. However, since a straight bill of lading may be transferred once from the shipper to the named consignee, the carrier cannot safely deliver to the named consignee without surrender by the consignee of the original bills of lading since, without surrender of such document, the carrier has no other means of knowing whether delivery should be made to the shipper or to the named consignee.

Difficulties can arise since bills of lading have traditionally been produced in sets of three originals each one of which is in effect a document of title. Therefore, the carrier runs a possible risk if he delivers the cargo against the surrender of less than the full set of original bills since a party other than the one to whom the cargo has been delivered could produce another original bill at a later date and demand delivery of the cargo. However, courts have tended to take the view that any party who pays for cargo other than against receipt of the full set of original bills runs a risk and that the carrier is entitled to deliver the cargo to whoever produces one original bill (in which case the other originals are considered to be 'accomplished', i.e. to cease to have the ability to operate as documents of title.) Most forms of bill of lading provide expressly that delivery can be made against production of one original bill of lading and this protects the carrier unless he is put on notice at the time that delivery is requested that another party is holding one or more of the other original bills. Nevertheless, because bills of lading frauds have become more common in recent years, carriers are expected to be wary in such circumstances and to ask the party demanding delivery to explain why less than the full set of bills are being surrendered and run the risk if they do not do so that a court may conclude that delivery has not been made to the legitimate receiver.

The Carrier's Rights

The Hague and Hague-Visby Rules

Under the Hague and Hague-Visby Rules the carrier is entitled to rely on any one out of a long list of possible defences. Most of the defences are *force majeure* in nature, e.g. Act of God, perils of the sea, inherent vice etc. However, there are two controversial defences which provide the carrier with a defence even when the loss or damage has been caused by the carrier's own negligence. These are in Article IV Rule 2 which reads as follows:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –
a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or the management of the ship.
b) Fire, unless caused by the actual fault or privity of the carrier."

Therefore, if the cargo has been damaged as a result of a collision which has been caused by the negligence of the master in the navigation of the ship, the carrier is not liable. However, the defence is not as comprehensive as might first appear to be the case since the carrier is not entitled to rely on any of the defences in Article IV Rule 2 unless and until he has proved that there is no causative breach of his overriding duty to exercise due diligence under Article III Rule 1.

The Hamburg Rules

There is no long list of possible defences under the Hamburg Rules. The carrier has a defence only if he is able to prove pursuant to Article 5.1 that:

"... he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

Package Limitation

The carrier's first line of defence to any cargo claim is to prove that he is entitled to rely on a relevant exception clause. If he is able to prove such a right the claim will proceed no further. However, if the carrier has no right to rely on a relevant exception clause he may still be entitled to limit his liability for the claim to a sum which is less than the actual loss. There are two different kinds of limitation:

- Package limitation, i.e. the limitation of individual cargo claims in accordance with the number of packages or units or weight that has been lost or damaged; and

- Global limitation, i.e. the limitation of all qualifying claims (including cargo claims) arising out of any one incident in accordance with either the tonnage or value of the ship against which the claims are brought.

The carrier is entitled to rely on both types of limitation if needs be.31 The carrier will normally apply the relevant package limitation to each individual claim and then, if the total of such claims (after application of the package limits) and all other qualifying claims of different types exceed the limits specified under the relevant tonnage limitation convention, the individual cargo claims may be further reduced pursuant to the provisions of the relevant tonnage limitation convention on a pro rata basis.32 However, unless there are many other claims arising out of a major incident (e.g. damage to another ship and/or cargo, personal injury, damage to harbour works etc.), or the cargo claim is of a very high value, package limitation will normally be the carrier's sole limitation remedy in the event of cargo claims.

The Hague, Hague-Visby and Hamburg Rules all specify that whilst the carrier is entitled to increase the limitation threshold, they are not entitled to reduce it below the figures specified in the Rules.

NB! There is no right to package limitation if the value of the goods is recorded on the bill of lading (an *ad valorem* bill of lading). Consequently, there is no standard P&I cover for liabilities arising under such bills, and should a carrier agree to provide such a bill of lading, he will normally charge an enhanced freight.

The Hague Rules

Article IV provides that:

"5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currencies ..."

Those countries that are still parties to the Hague Rules have replaced the reference to '£100' with a sum quantified in their own currency. However, to the extent that the unamended Hague Rules may be applicable in any particular situation, the reference to '£100' is in fact a reference to the gold value of £100 which is very substantially higher.

The words of the Hague Rules give rise to certain difficulties. For example, the right to package limitation is applicable only where the cargo can be fairly described as 'packages' or 'units' (which has been construed as a physical unit such as a truck.) Therefore, if the cargo is a bulk cargo, there may be no right to limitation. Similarly, it is debatable in the context of containerised cargo whether the relevant 'package' or 'unit' is the container itself (i.e. one unit) or the 'packages' or 'units' stuffed in the container (i.e. many units). The English court takes the view that provided
that the cargo that has been stuffed inside the container can truly be said to be packages or units then the relevant package or unit is the cargo package or unit rather than the container.34 However, the US courts have tended to be guided by the manner in which the bill of lading describes the cargo.35 Therefore, a bill of lading recording the shipment of 'one container said to contain 99 bales of leather' was treated as recording the shipment of 99 bales whereas a bill of lading evidencing the shipment of 'one container said to contain machinery' was treated as a bill of lading recording the shipment of a single package although, in fact, it contained 350 individual cartons.

The Hague-Visby Rules seeks to cure these ambiguities.

Whilst limitation has traditionally been considered to be a privilege which can be lost if the carrier is guilty of reprehensible conduct, the words *'in any event'* have been construed in some jurisdictions as indicating that it is extremely difficult for the carrier to lose the right of limitation under the Hague Rules.

The Hague-Visby Rules

The Hague-Visby Rules differs from the Hague Rules in the following manner:

- The package limitation is increased significantly and there is an alternative limitation based on the weight of the cargo which is intended to ensure that limitation is available in the case of bulk cargoes;

- The relevant limitation in the case of containerised cargo is based on *"the number of packages or units enumerated in the bill of lading as packed in such"* container;
- The right to limitation may be lost if *"the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result"*.36

The Hamburg Rules

The Hamburg Rules mirror the Hague-Visby Rules to a large extent but differ in the following manner:

- The limitation sums are increased by approximately 25 per cent;
- There is a special limitation for delay claims which is quantified in accordance with the freight that is payable.

Time Limits

It is the public policy of practically all countries to provide that claims must be brought within a specified period of time failing which the claims will thereafter be unenforceable. The relevant time limit will vary depending on the particular country. However, most cargo claims will be subject to the time limit provisions of the Hague, Hague-Visby or Hamburg Rules.

The Hague and Hague-Visby Rules

The Hague and Hague-Visby Rules provide that claims must be brought against the carrier within one year of the delivery of the cargo or, in cases where the goods are never delivered, within one year of the date when they should have been delivered. Claims are not brought for these purposes unless and until court or arbitration proceedings have been commenced. Therefore, the mere notification of a claim does not suspend the time limit. Consequently, it is common for cargo claimants to request the carrier to grant a time extension, i.e. for additional time within which to commence legal proceedings. Carriers are not obliged to grant such requests, but may wish to do so if they believe that the claim may be settled without the need to incur the costs of legal proceedings.

It must be emphasised that the time limit specified in the Rules is a 'one-way' time limit. It applies merely to claims *against* the carrier and not to claims by the carrier. The Rules do not regulate the time limit for claims that may be brought by the carrier and consequently, the time limit for such claims depends on the law that governs the contract. For example, if the bill of lading is subject to English law, a cargo claim against the carrier will be subject to the one year time limit specified in the Rules whereas a claim by the carrier against the cargo interests (e.g. for freight) will be subject to a time limit of six years.

The Hamburg Rules

The provisions of the Hamburg Rules differ from those of the Hague and Hague-Visby Rules in the following respects:

- The relevant time limit is two years, not one year; and
- The time limit applies to claims both against and by the carrier, i.e. it is a 'two-way' time limit.

Multimodal and Through Transport

The traditional form of shipment in which the whole of the transportation is performed merely from port to port by one carrier is no longer the norm. The development of the container has had a dramatic impact on traditional shipping systems and it is now possible for cargo to be carried in the one container from an inland location in one country to another inland location in another country by various means of transport without any disturbance to the contents of the container.

Although these terms are often used interchangeably, a distinction should strictly be drawn between multimodal transport and through transport. Multimodal transport is where the carrier assumes responsibility for the whole of the carriage from door to door but the goods are delivered by a combination of different transport modes (e.g. by road/rail/sea etc.). Through transport is where goods are carried solely by sea but the carriage involves transhipment at one or more points during the transit and the carrier (although he may collect freight for the whole of the carriage from door to door) assumes responsibility as carrier only for the first leg of the transit (usually carriage on his own vessel) and merely acts as agent for the cargo owner in arranging onward carriage on another ship as from the transhipment point. Therefore, in the case of multimodal transport, a claim may be brought against the carrier should loss or damage occur at any point during the carriage door to door whereas in the case of through transport, a claim for loss or damage can be brought against the carrier only if the loss or damage occurs whilst the goods are being carried on his own vessel, and claims for loss or damage that occurs after transhipment can normally be brought only against the transhipment vessel.

It is a fundamental characteristic of multimodal transport that whilst one contractual carrier may assume contractual responsibility for the whole of the carriage of the cargo from one inland location to another inland location by land, sea or air, responsibility for various sectors of the overall transportation will often be delegated to other parties. Therefore, in a substantial number of such cases, the contractual carrier is a non vessel owning carrier (NVOC) who will then delegate the sea carriage to the shipowner.

Such form of transport is subject to the following difficulties:

- There is currently no international convention in force which regulates the whole of the carriage whether by land, sea or air;
- Different sectors of the overall transport are regulated by separate international conventions (unimodal conventions) which have different terms (e.g. the Hague or Hague-Visby or Hamburg Rules for sea carriage, the Warsaw/Montreal
- Conventions for air carriage, CMR for land carriage and CIM/COTIF for rail carriage);
- Some sectors of the overall transport are not regulated by any international conventions but by national laws or local carriage terms which can differ substantially;
- The fact that the container remains sealed for the whole of the carriage often makes it difficult to establish where the loss or damage occurred and therefore, which international convention, local laws or carriage terms are to apply;
- Sub-contractors are vulnerable to claims in tort.

In order to counter such difficulties most multimodal bills of lading adopt the ‘network system’ which operates as follows:

- If it can be established that the loss or damage occurred during carriage by any particular transport mode, and that such carriage is regulated by a compulsory unimodal international regime, then that regime will apply;
- However, if it cannot be established that the loss or damage occurred during carriage by any particular transport mode, the liability will be determined in accordance with specific terms of the bill of lading which are to apply in such circumstances.

Finally, most bills of lading protect the interests of sub-contractors by the inclusion of special clauses.

The Rotterdam Rules

The current system of regulation for the international carriage of goods suffers from the following deficiencies:

- There is no consistency in the form of regulation that is implemented by different countries for the carriage of goods by sea since different countries apply three different conventions in an inconsistent manner;
- The different legs of multimodal transport are regulated either by separate unimodal conventions or by no conventions with the consequence that liability differs depending on whether loss or damage occurred during the sea, land, rail or air leg of the carriage.

Consequently, efforts have been made to replace the current system with one convention which is intended to apply a uniform form of regulation for all modes of international carriage of goods provided that at least one leg of the overall transport is by sea. The result of these efforts is the UN Convention on Contracts for the carriage of

Goods Wholly or Partly by Sea (The Rotterdam Rules). This convention is not yet in force but will, if adopted, introduce substantial changes. The new convention has 96 Articles and it is not possible to comment on each and every change. However, the most important changes are as follows:

- The Hague, Hague-Visby and Hamburg Rules will be repealed and replaced by the Rotterdam Rules;
- A carrier of goods by sea must exercise due diligence to keep the ship seaworthy throughout the voyage;
- The defence of negligent navigation will no longer be available;
- The Rules will apply uniformly to all legs of multimodal carriage unless, in the case of carriage other than by sea, that leg is subject to one of the compulsory international unimodal conventions;
- The contractual carrier is responsible for the acts and omissions of all of his sub-contractors;
- A sub-contractor who performs services either in the port of loading or during the voyage or at the port of discharge (i.e. a maritime performing party) will be jointly and severally liable to cargo claimants together with the contractual carrier. However, the Rules do not make sub-contractors who do not perform services at such stages of the transit (e.g. an inland road carrier), directly liable to cargo claimants (although such carriers might still have personal liability under the local law of the country where the transit took place);
- The use of electronic contracts of carriage will be recognised and regulated;
- The package limits of liability are increased; and
- The time limit for claims is increased to two years and the time limit applies not only to claims against carriers but also to claims by carriers.

It is possible to avoid many of the provisions of the Rotterdam Rules if the relevant contract of carriage falls within the definition of a 'volume contract', i.e. *"a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time."*

The Rotterdam Rules also introduce detailed compulsory jurisdictional regulations which will have the effect of limiting the effectiveness of traditional contractual jurisdictional clauses. However, this is one part of the Rotterdam Rules that countries who wish to adopt the Rules can exclude should they so wish.

Liability in Tort

The fact that there may be no contractual link between the owner of the cargo and the person who causes damage or loss to them does not mean that the person who causes damage or loss has no liability for the damage or loss. It is a fundamental principle of the law system of most countries that each person has a duty to take care not to cause damage or loss to the property of another person. Accordingly, if the owner of the cargo can prove that the damage or loss has been caused by the negligence of someone who is not the contractual carrier then he may be entitled to bring a claim against that party in tort. Furthermore, since that party is not a party to the contract of carriage between the owner of the goods and the carrier that party may not be able to rely on any exception clause in that contract even if that clause was intended to benefit him.

Liability in tort normally arises in two situations:

- Where the contractual carrier is not the shipowner (e.g. a charterer or freight forwarder) and the carriage is delegated to a shipowner who causes loss or damage to the cargo during the carriage; or
- Where loss or damage to the cargo is caused by a sub-contractor of the carrier (e.g. a stevedore).

Claims in tort may prove an attractive remedy to a cargo claimant where the carrier under the bill of lading is the charterer or NVOC and it is proved that the loss or damage has been caused by the shipowner during the carriage. In such circumstances, the cargo claimant may prefer not to sue the carrier but to sue the shipowner and to arrest the ship for security for the claim. Such a strategy may prove to be even more attractive if there are doubts about the financial health of the contractual carrier.

However, a claim in tort can be brought only by the party who was entitled to possession of the cargo at the time when the negligence occurred. Therefore, a claim in tort may not be possible in all circumstances. For example, if cargo is shipped on Monday by A, is damaged on Wednesday, and sold by A to B on Thursday, B cannot bring a claim in tort against the shipowner if he finds on taking delivery of the cargo on Saturday that the cargo is damaged.

A, as the party entitled to possession on Wednesday, would be entitled to bring such a claim. However, A may well have been paid by B in full on Thursday and will, therefore, have no interest in bringing such a claim. Consequently, B's only remedy will be the contractual claim against the carrier under the bill of lading.

The Protection of Third Parties

The traditional form of port-to-port shipment involved merely two parties – the carrier and the cargo owner – and the whole of the transportation was performed by one carrier. However, modern systems are far more complex and involve a substantial degree of sub-delegation. For example, shipowners no longer load or discharge cargoes themselves but engage specialist stevedores to do the work for them. Furthermore, it is a fundamental characteristic of multimodal transport that whilst a carrier assumes contractual responsibility for the carriage of the cargo from one inland location to another inland location by land, sea or air, responsibility for various sectors of the overall transportation will be delegated to other parties. Therefore, it may well be that the cargo is lost or damaged whilst it is in the custody of the sub-contractor and such a sub-contractor may be vulnerable to a claim in tort from the cargo owner.

There is a general recognition in the industry that such third parties need protection. However, no international convention that is currently in force provides such protection. The domestic law of some countries does provide such protection (e.g. the Contracts (Rights of Third Parties) Act 1999 of the UK). However, such laws are relevant only if the dispute is subject to the law of that country. Consequently, the industry has developed its own form of protection by the development of standard clauses for inclusion in bills of lading. The classic clauses are the following:

- The Himalaya Clause which specifies that the contractual carrier enters into the bill of lading not only for his own account but also as agent for sub-contractors, thereby creating a contractual relationship between the cargo owner and the subcontractor and enabling the sub-contractor to rely on various defences in the bill of lading;43
- The Circular Indemnity Clause in which the cargo owner promises not to bring a claim against anyone other than the contractual carrier and to indemnify the carrier if that promise is broken.

Finally, there has in recent years been a development whereby a third party may be able to rely either on the terms of contracts between the contractual carrier and the cargo owner or on his own standard terms of business for protection pursuant to the doctrine of bailment.45 Bailment is a common law doctrine whereby a person who voluntarily takes possession of the property of another (the bailee) has the responsibility to take care of the property regardless of whether there is a contract between them, and to return it to its owner (the bailor) on request in the same good order and condition. However, the bailee is entitled, before taking possession of the property, to notify the bailor that he will do so subject to terms that may protect him against liability. Therefore, if the bailor subsequently delivers the property into the possession of the bailee, he is deemed to have accepted that the bailment will be subject to such terms and that the bailee can rely on the protection of such terms should the property be lost or damaged whilst in his possession.

Therefore, a bailment is created when goods are voluntarily accepted by a subcontractor pursuant to a contract between the carrier and the goods owner. However, if the contract between the carrier and the goods owner gives notice that the goods may in fact be carried by a third party on different terms, the goods owner may be deemed to have accepted such terms if he subsequently allows his goods to be carried pursuant to such arrangements. In such circumstances, the cargo owner will have been put on notice that a third party who will be involved in the carriage will be relying on such terms for protection and has accepted that eventuality. However, bailment is an extremely complicated concept and requires parties to take legal advice for further clarification.

Indemnity Claims under Charterparties

If claims are brought under bills of lading which are issued pursuant to a charterparty then the carriers under the bills of lading (whether they be the shipowners or the charterers) may wish, if they are held liable to the cargo claimant, to claim an indemnity from the other party to the charterparty. The merits of such an indemnity claim will depend on the terms of the charter and the cause of the cargo damage/loss. However, in the majority of cases, if the liability that the carrier has under the bills of lading is greater than the liability that he would have if the same claim had been brought under the charterparty, the carrier is entitled to an indemnity from his contracting partner under the charterparty for the 'extra' liability that he has incurred under the bill of lading.

If the cargo claim arises because of the unseaworthy nature of the carrying ship then in the majority of cases, the shipowner, if he is the carrier under the bills of lading, will have no right to claim an indemnity from the charterers, whilst the charterers, if they are the carriers under the bills of lading, will have the right to claim an indemnity from the shipowners.

However, if the cargo claim arises because of the failure to care for the cargo the matter is more complicated. A failure to care for the cargo during the transit can normally be attributed to the negligence of the crew (and therefore, to the negligence of the shipowner) in which case, the situation is similar to that just explained in relation to unseaworthiness. However, if the cargo claim relates to loss or damage caused during the loading or stowage or discharging of the cargo the responsibilities of the shipowners and charterers *inter se* depends on the terms which have been agreed for these cargo operations. For example, if the parties have agreed FIOS terms, the responsibility for such operations will be assumed by the charterers. Therefore, if the shipowner is liable as carrier under the bills of lading for such claims, the shipowner may be entitled to claim an indemnity from the charterers whilst the charterers, if they are the carriers under the bills of lading, will have no right to claim an indemnity from the shipowners.

The rights of shipowners and charterers to claim indemnities *inter se* under dry cargo time charters for loss or damage caused by cargo handling is notoriously complicated. Consequently, the industry has developed a special system to regulate such claims under the New York Produce Exchange 1946 and 93 forms of time charter. The system, called the Inter-Club New York Produce Exchange Agreement (ICA), is a 'rough and ready' allocation of responsibility between shipowners and time charterers for various types of claims.

Originally, the ICA was simply an agreement between P&I clubs to recommend to their members that indemnity claims would be settled on the terms of the Agreement. However, it has now become common for the ICA to be included in dry cargo time charters as a term which is directly binding on the parties themselves.

The ICA has been repeatedly amended over the years and the current version is that of 1996 as further amended in September 2011. The agreement is detailed and provides in a 'rough and ready' manner that, unless there are 'material amendments' to the printed provisions of the charter, cargo claims are to be apportioned as follows:

a) Claims caused by the unseaworthiness of the vessel and/or by error or fault in the navigation or management of the vessel are to be borne 100 per cent by shipowners unless the shipowners prove that the unseaworthiness was caused by the loading, stowage, lashing, discharge or other handling of the cargo, in which case the claim shall be apportioned under sub-clause (b).
b) Claims caused by the loading, stowage, lashing, discharge, storage or other handling of cargo are to be borne 100 per cent by charterers unless the words *'and responsibility'* are added to Clause 8 of the NYPE forms of charters or there is a similar amendment making the master responsible for cargo handling, in which case the apportionment is to be borne 50 per cent by charterers and 50 per cent by shipowners unless the charterers prove that the failure to properly load, stow, lash, discharge or handle the cargo was caused by the unseaworthiness of the vessel, in which case, liability is borne 100 per cent by shipowners.
c) Subject to (a) and (b) above, claims for shortage or overcarriage are to be borne 50 per cent by charterers and 50 per cent by shipowners unless there is clear and irrefutable evidence that the claim arose as a result of pilferage or the act or neglect of one or the other {including their servants or sub-contractors), in which case that party shall then bear 100 per cent of the claim.
d) All other cargo claims whatsoever (including claims for delay to cargo) are to be borne 50 per cent by charterers and 50 per cent by shipowners unless there is clear and irrefutable evidence that the claim arose as a result of the act or neglect of the one or the other (including their servants or sub-contractors), in which case that party shall then bear 100 per cent of the claim.

The September 2011 amendments to the ICA 1996 also introduced a new provision which enables a party that has been obliged to provide security for a cargo claim that has been brought by a third party claimant to demand security in an acceptable form from his contracting partner under the charterparty provided that the requesting party is prepared to reciprocate by providing security in an acceptable form and for an equivalent amount to that other party.

The Importance of Evidence

It is normally difficult to pursue a claim without supporting evidence since without evidence the cause of the loss or damage cannot be established. The mere fact that cargo has been lost or damaged during transit does not automatically mean that the cargo owner is entitled to make a recovery from someone else. In some instances the loss may lie where it falls, i.e. the cargo claimant may have to bear his own loss. Therefore, if the cargo claimant wishes to establish the liability of some other party, it is necessary firstly to establish the cause of the loss or damage and secondly, to prove that he is entitled to be indemnified by someone else for loss or damage so caused.

A claimant will normally wish to establish the cause of the loss or damage for the purposes of the following contracts:

- The contract of sale;
- The contract of carriage; and/or
- The contract of insurance.

The terms upon which these contracts entitle the claimant to a recovery differ. Therefore, evidence is necessary to establish which contract (if any) will entitle the claimant to indemnification. For example:

- if the cargo has been damaged by inherent vice, there will normally be no right to recover under the contract of carriage or the contract of cargo insurance, but there may be a right of recovery under the contract of sale;
- if the cargo has been damaged by the unseaworthiness of the ship, there will normally be no right to recover under the contract of sale, but there will be a right of recovery under the contract of insurance and/or the contract of carriage;
- if the cargo has been damaged by a collision, there will normally be no right to recover under the contract of sale or the contract of carriage, but there will be a right of recovery under the contract of insurance;
- if the cargo has not been damaged at all but is found to be of inferior quality, there will normally be no right to recover under the contract of carriage or the contract of insurance, but there may be a right of recovery under the contract of sale.

The need for evidence is important both for the claimant and for the respondent. It is important for the claimant in order to prove that the loss or damage has been caused by an event for which the respondent is responsible. It is equally important for the respondent either to disprove such an allegation and/or because he may wish to rely on the terms of the contract or the various international conventions to protect him against liability. Therefore, evidence is all important and care must be taken to monitor and record the carriage from the moment that the cargo leaves its original location until it is delivered to its final location. A failure to do so may seriously affect the merits of a claim or a defence to a claim.

There will usually be three sources of evidence:

- Carrier source evidence;
- Cargo source evidence;
- Survey evidence.

Carrier Source Evidence

The evidence that may be obtained from carriers relates to both the cargo and the ship.

Evidence of Cargo

A carrier will normally check both the quantity and apparent order and condition of the cargo at the time that it is received by the carrier. Such information is normally recorded in documents such as the mate's receipt or the cargo manifest. When loading is complete, the information so recorded is transferred onto the formal documents that are used in order to record the carriage, i.e. the bill of lading, sea waybill etc. These documents constitute a formal receipt that is intended to be for the benefit not only of the shipper, but also for the benefit of subsequent transferees of the documents who were not present in person to witness the actual shipment of the goods and who will, consequently, be relying on the truth of the receipt provided by the carrier.

A bill of lading or sea waybill will normally record the following data:

- The apparent order and condition of the goods;
- The quantity or weight of the goods;
- The date and place of shipment.

The apparent Order and Condition of the Goods

It is important to understand that the bill of lading or sea waybill records:

- The condition not the quality of the goods; and
- Only that condition which is apparent, i.e. visible.

The quality of the goods is a description of the inherent or natural state of the goods when produced. However, the condition of the goods is a description of whether or not the goods have been damaged after production. The distinction may sometimes be difficult to establish but is nevertheless important since the quality of the goods is not relevant as between the carrier and the cargo owner under the contract of carriage, or as between the cargo owner and the cargo insurer, but is relevant as between the seller and buyer of the cargo under the contract of sale.

Since the bill of lading or sea waybill is no evidence of the quality of the goods, contracts for the sale of goods will normally provide that payment is to be made not only against a bill of lading or sea waybill but also against provision of a certificate of quality proving that the goods are of the right quality.

The bill of lading or sea waybill merely records the apparent (i.e. visible) condition of the goods at the time of shipment. Therefore, if the goods are presented for carriage in a packed condition, the document will not record the condition of the goods within the packaging but merely the visible condition of the exterior packaging. Therefore, in trades such as the container trade, the bill of lading or sea waybill does not constitute meaningful evidence of the condition of the goods.

Furthermore, the ship's crew are not expected to be scientists or experts in any particular trade and therefore, their obligation is merely to take note of any visible features and to exercise their judgement as reasonable seafarers as to whether or not the goods are damaged. If the exercise of such judgement leads to the conclusion that the goods are damaged then the carrier has the duty to include a clause to that effect on the face of the bill in order to give notice to any subsequent transferee of the bill that the goods were already damaged prior to shipment and thereby protect the carrier's interests in the event of any future claim that such damage was caused by the carrier during the carriage. If the carrier does not do so then he may have no defence to a claim brought by a subsequent transferee of the bill and will have no right of recourse against the shipper since the Hague, Hague-Visby and Hamburg Rules give no right of indemnity in such circumstances. Furthermore, the carrier may have no P&I cover for liabilities incurred in such circumstances.

Nevertheless, the carrier must exercise caution when clausing the bill in this way since a bill of lading which includes such a clause is not a 'clean bill of lading' and may therefore frustrate the ability of the shipper to obtain payment for the goods under the contract of sale or accompanying letter of credit. For example, Article 27 of the ICC Uniform Customs and Practice for Documentary Credits (UCP 600) which govern the acceptability of documents including bills of lading for the purposes of letters of credit defines a 'clean transport document' as follows:

"A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation declaring a defective condition of the goods or their packaging. The word 'clean' need not appear on a transport document, even if a credit has a requirement for that document to be 'clean on board'."

The Quantity or Weight of the Goods

In some instances, usually involving the shipment of bulk cargo, it is not possible to establish categorically exactly how much cargo has in fact been shipped. In such circumstances, Article III Rule 3 of the Hague and Hague-Visby Rules entitle (but do not oblige) the carrier to sign bills of lading for the quantity or weight that has *"been furnished in writing by the shipper."* The shipper is deemed to have guaranteed the accuracy of the quantity or weight furnished by him and Article III Rule 5 of the Hague and Hague-Visby Rules obliges the shipper to indemnify the carrier in such circumstances. However, if the carrier, although doubting the accuracy of the figures provided by the shipper, nevertheless agrees to issue the bill in accordance with those figures, he may have to settle a claim brought by a transferee of the bill before seeking an indemnity from the shipper. Indeed, if the carrier agrees to issue the bill in accordance with figures provided by the shipper which the carrier *knows* to be inaccurate, he will probably lose his P&I cover for the claim that may be brought by the transferee of the bill.

Therefore, if the carrier believes that the figures provided by the shipper may be inaccurate, the following alternatives are normally available to him:

1. He may issue the bill in accordance with the shippers' figures and claim an indemnity from the shippers if he is subsequently obliged to settle a shortage claim brought by the transferee of the bill. It is also sensible in such circumstances to issue a note of protest when releasing the bill of lading or sea waybill notifying the shipper that the carrier is not convinced by the shipper's figures. However, the issue of a protest is unlikely to prevent the carrier from incurring liability to a receiver. Furthermore, if the carrier *knew* that the figures were inaccurate, he may not only lose his P&I cover but also any right to claim an indemnity from the shippers or from the charterers (if they have presented the bills to the carriers for signing.)
2. He may clause the bill by recording the ship's figures next to the shipper's figures thereby notifying a transferee of the bill that the carrier does not accept the shipper's figures. This is the safest course of action for the carrier, but also the most difficult since shippers will be reluctant to accept claused bills of lading in case they are rejected by the buyer under the contract of sale or by a bank under the letter of credit.
3. He may refuse to sign the bill pursuant to Article III Rule 3 of the Hague and Hague-Visby Rules if *"he has reasonable grounds for suspecting* (that the bill does) *not accurately ... represent the goods actually received"* or if "*he has had no reasonable means of checking."* However, since the cargo has been loaded, a bill of lading will have to be issued at some point in time and therefore, this remedy is normally helpful merely to enable the carrier and/or shippers to have some additional time to double-check the figures before issuing the bill.
4. He may seek to rely on a general printed protective clause such as 'weight unknown' or 'quantity unknown' which is normally found in most bill of lading forms. This is considered further in the following section.

However, if the carriage is subject to The Hamburg Rules it does not seem that the carrier can make use of alternatives 3 and 4 above.

The Evidential Value of the Documents

If it is proved that goods have been shipped in apparent good order and condition but have been delivered in a damaged condition, or that less cargo has been delivered than the quantity or weight recorded on the bills of lading or sea waybill, there is a presumption that the goods have be-en damaged or lost as a result of a ship board incident. The onus is then on the carrier to prove the cause of the loss or damage and to prove that he is entitled to a defence in such circumstances. Therefore, the bills of lading and sea waybills have an important evidential value. Whilst these documents remain in the hands of the shipper, the bill of lading or sea waybill is not conclusive evidence of the accuracy of the order, condition, quantity or weight of the goods. Therefore, in the event that a claim is brought by the shipper, the carrier is entitled to refer to other sources of evidence such as the mate's receipts to prove that such data is inaccurate. However, once a bill of lading has been transferred by the shipper to another holder, the bill of lading is considered to be conclusive evidence of the accuracy of such data and the carrier is not entitled to refer to other sources of evidence to disprove the accuracy of that data. For these reasons, it is important that the data in it is as accurate as it reasonably can be.

For example, if the bill of lading states that the quantity shipped is greater than the actual quantity shipped, then even if the ship delivers all the cargo that was actually shipped, it is still possible for a receiver to claim from the carrier the value of the cargo which was apparently short-delivered but which was not in fact ever loaded on board the ship (i.e. a 'paper shortage'). However, if the carrier is liable to the receiver for a 'paper shortage' the carrier will usually be entitled to claim an indemnity from the shippers (or charterers if they have presented the bills) since the shippers/charterers are deemed to have guaranteed the accuracy of the quantity or weight furnished by them. The merits of such an indemnity claim may be strengthened if the carrier has issued a notice of protest at the time of the release of the bill of lading.

However, where the bill of lading or sea waybill includes the words 'weight unknown' or 'quantity unknown' it has been accepted in some common law countries that the bill of lading is in fact no evidence of the quantity or weight shipped, in which case, the claimant must refer to other sources of evidence (e.g. the mate's receipt or shore tallies) to evidence the quantity or weight shipped. However, not all countries follow the same rule and in many countries the inclusion of such words does not undermine the evidential worth of the bill of lading or sea waybill.

Evidence of Ship

In the majority of cases the investigation of the cause of loss or damage will include an investigation of the physical condition of the ship or other vehicle in which the goods have been carried and of the conduct of the crew or other servants of the carrier. Such investigation will necessitate inspection of records kept by the carrier. In many cases the onus is on the carrier to establish the cause of the loss or damage and to prove that he is entitled to a defence in such circumstances. Consequently, evidence relating to the ship and the conduct of the crew will be vital.

It should be noted in this respect that the following documents are required to be kept on board ships by a variety of international conventions:

- Deck and engine logbooks;
- Oil record books;
- Pump-room log book;
- Tank cleaning record book;
- Loading plans;
- Stability calculations;
- Fire equipment records;
- SMS check lists.

In particular the ISM Code calls for the implem-entation of a safety management system (SMS) and for paper records to be kept on ship and ashore in order to audit and review compliance with the requirements of the Code, and also for the appointment of a 'designated person' who has access to the highest management of the company and who has the authority to rectify any deficiencies. For example, Articles 9 and 10 of the ISM Code provide that:

- all non-conformities are to be reported to the designated person; and that
- records of these non-conformities and of all corrective action be kept; and that
- these records and procedures be audited.

If such records are not kept this is in itself likely to be seen to be evidence of a failure by the company to exercise due diligence.

Similarly, employers need to keep personnel records relating to the qualifications and periodic assessments of the crew and other servants or agents.

Whilst road and rail carriers may not be subject to similar formal requirements, they do nevertheless need to keep such records to prove that they have exercised the necessary degree of due diligence.

Cargo Source Evidence

Most international sales of cargo will require the seller to produce a number of documents relating to the quantity, quality and provenance of the cargo. Such documents are normally produced by independent cargo inspectors and include
inter alia:

- Certificates of Quality;
- Certificates of Origin;
- Certificates of Quantity or Weight.

It is also common to take samples of bulk cargo before, during and after loading and for sampling certificates to be provided evidencing the sampling and the sealing of the samples. This is particularly important in the liquid bulk trade since it is not uncommon for it to be alleged that vegetable, chemical and petroleum products are 'off-specification' at the time of discharge in which case it will be necessary to identify the cause of the problem. For example, the flash point specification of a gasoil cargo may be affected by events either in the shore terminal or on the ship. Therefore, samples should be taken by the crew at the ship's manifold both at the time of loading and at the time of discharge since it could well be difficult otherwise to challenge any pre-loading samples that may have been taken by the cargo owners showing the cargo to be 'on-spec.' Samples should always be properly taken, sealed and retained by the vessel and should not be disposed of until it is clear that they are no longer required. In this connection it should be appreciated that cargo claims may take a year or even longer to materialise.

Survey Evidence

The documents and records to which reference is made in Chapters 3.5.2 and 3.5.3 relate to the condition, quantity etc., of the goods on shipment. However, in the event that loss or damage is caused by a subsequent event, evidence is also needed to prove the nature, cause and extent of the loss or damage. It may therefore be necessary to appoint surveyors, naval architects, cargo quality inspectors, accountants or other experts to comment on these matters since it must be assumed that each and every fact or assertion may need to be proved if the claim or defence is to succeed.

The Disclosure of Evidence

The laws of most countries require parties to any litigation to make available all documents and records that may be relevant to the dispute. The degree to which disclosure must be made varies between countries and therefore, guidance must be sought in each case from legal advisers in the country where the claim is being litigated.

Although parties are normally reluctant to disclose evidence which is detrimental to their case the laws of many countries require such documents to be disclosed together with any documents which support the claim. For example, the Rules of the Supreme Court (RSC) of the UK require a litigant to disclose *inter alia*:

"(a) the documents on which he relies; and
(b) the documents which –

(i) adversely affect his own case;
(ii) adversely affect another party's case; or
(iii) support another party's case."

However, an exception may be made in the case of survey reports and other documents which have been commissioned by or on behalf of the legal advisers of the party in question and which are intended to assist those legal advisers to prosecute or defend the claim. Such documents may be subject to legal privilege and need not be disclosed. Therefore, survey reports which have been commissioned by or on behalf of lawyers after a claim has been made will usually fall within this category, but all other documents, survey reports, samples and records which are made in the course of normal carriage and trading, and not for the purpose of prosecuting or defending a claim, must be disclosed.

The laws of most countries enable the court or arbitration tribunal dealing with the claim to make orders demanding the production of samples and witnesses if this is necessary to consider the merits of the claim. If necessary, a witness can be compelled to attend by subpoena and any failure to attend constitutes a contempt of court which is punishable by a fine or even imprisonment in serious cases.

Law and Jurisdiction

If the claim is compulsorily subject to the Hamburg Rules then those Rules provide the claimant with the option of bringing the claim in one of five different countries including the country where the cargo has been discharged. The claimant has an unfettered choice between the five locations even if the bill of lading purports to impose an exclusive jurisdiction clause. Therefore, such a choice provides the claimant with a valuable litigation advantage and this advantage is maintained under the Rotterdam Rules, if and when these Rules come into force, provided that the law and jurisdiction provisions of the Rules are ratified by the relevant country.

The Hague and the Hague-Visby Rules have no provisions relating to jurisdiction, but those Rules are applied by a substantial number of seaboard countries around the world. Nevertheless, the governing law and jurisdiction provisions of the contract of carriage are very important since these conventions are not implemented in a uniform manner in all countries. Therefore, the governing law and jurisdiction can have a major influence on the merits of the cargo claim.

It must also be appreciated that even though a contract of carriage may have an express law and jurisdiction clause, the law of many countries may allow the courts of those countries to retain jurisdiction even in the face of a contradictory jurisdiction clause. Furthermore, the laws of most seaboard countries allow the arrest of ships that are within the territorial limits of those countries for the purposes of obtaining security. Therefore, a ship may be arrested in country A for security in respect of a claim which is to be litigated in country B. If security is provided the courts of country A may then stay further proceedings in that country to allow the merits of the claim to be adjudicated in country B.

Insurance

A cargo claimant is likely in the first instance to make a claim under the relevant cargo insurance. In the majority of cases, the cargo insurance is likely to provide cover for physical loss of and/or damage to the cargo (but not for losses caused solely by the delay of the cargo) and for cargo's proportion of salvage or general average, in which case the cargo insurers will be subrogated to whatever rights the assured has to bring a claim in contract or in tort against the carrier or the party that has caused the loss or damage. Therefore, in the majority of cases, the claim against the carrier or the party that has caused the loss or damage will be brought by cargo insurers. Depending on the country where the claim is brought such claim may be brought either in the insurers' own name or in the name of the assured.

Normally, the liability of the carrier or the party that has caused the loss or damage will be covered by the standard P&I cover provided on a mutual basis by the International Group P&I clubs or by other market insurers on a fixed premium basis. However, in both cases, cover is subject to many detailed exclusions. For example, the clubs do not provide standard P&I cover for liabilities arising as a result of the delivery of the cargo without surrender of the original bills of lading and cover for claims arising under *ad valorem* bills of lading is limited to a sum of USD 2,500 per unit, package or piece. Furthermore, since it is perceived that the carrier may incur more liability under the Hamburg Rules or Rotterdam Rules than under the Hague or Hague-Visby Rules, the member clubs of the International Group of P&I Clubs provide cover for liabilities arising under the Hamburg Rules or Rotterdam Rules where such Rules apply compulsorily but not where the Rules are voluntarily adopted by the carrier. Therefore, it is important that shipowners have a firm grasp of the extent of cover that is available in such circumstances. In the event of an actual or suspected claim, the shipowners should notify their liability insurers promptly and should work closely with them to defend the claim. Any failure to do so may prejudice the shipowners' right to be indemnified by their insurers for any sums that they may be obliged to pay to the cargo claimant in due course.

It must be appreciated that a cargo claimant is not normally entitled to bring a claim directly against a liability insurer. The cover provided by the member clubs of the International Group of P&I Clubs is on a 'pay to be paid' basis, i.e. the shipowner must pay the claim first and then seek indemnification from the club. It must also be appreciated that, even if cover is available, the club is not obliged to offer security to prevent the arrest of a ship or to release a ship from arrest. If the club were to exercise its discretion to provide such security it would do so purely as a service to its member and subject to terms to be agreed.

BUNKER CLAIMS

Most time charters oblige the charterers to provide and pay for bunkers during the charter period as and when the ship has need for such bunkers.

Time charterers' liability for damage that may be caused to machinery by the supply of bunkers may also be covered by charterers' liability insurers depending on the extent of cover that has been taken. Charterers' liability insurers will also normally cover the assured's liability for any delay that may have been caused to the ship as a result of the bunker supply. However, if the charter provides that the ship should remain on hire during this period, the charterer's liability insurance does not provide cover and the shipowner's remedy is to claim the hire from the charterers and to claim the legal and other costs in doing so under the Defence Cover.

The liability of the charterers for pollution caused by the discharge or escape of bunkers pursuant to the Bunker Convention is normally covered by the charterers' P&I liability insurers. However, if charterers incur liability for bunker pollution under laws other than the Bunker Convention in their capacity as owner of the polluting substance (rather than in their capacity as charterer) they may not be covered under a standard P&I policy but may be covered if they have taken out extended cover.

a) **Quality Claims**

Because of the importance of ensuring that the ship is provided with the correct grade and quality of bunkers many time and bareboat charters will now include detailed provisions such as the following:

"Charterers guarantee that the bunkers that they will supply to the vessel will be of minimum standard RME25 for IFO 180 cst."

Furthermore, in view of the enhanced requirements of Regulations 14 and 18 of Annex VI of MARPOL and other regulations relating to fuel sulphur content emission limits, BIMCO has issued a Revised Bunker Fuel Sulphur Content Clause 2005 for use in time charters which is intended to provide a clearly worded and balanced provision to help owners and charterers comply with these requirements. The clause obliges charterers to provide the vessel with fuels of the necessary Sulphur content to allow the vessel to trade within the emission control zones ordered by the charterers and to use bunker suppliers that operate in accordance with the regulations.

If the charterparty includes such provisions, the charterers will be liable if the bunkers that are provided do not meet the contractual description and damage is caused to the ship's machinery or the trading area that is available to the ship is restricted. It also follows that the charterers cannot place the vessel off-hire if the supply of such bunkers results in delay to the ship.

Even if the charter does not contain such an express provision the time or bareboat charterers are under an absolute obligation to ensure that the bunkers that they supply must be of reasonable quality and suitable for the type of machinery that is fitted to the particular ship. However, if the ship's machinery has some special feature or characteristic which is not communicated to the time or bareboat charterers then the latter will not normally be liable for any damage that may be caused to the ship's machinery by the supply of bunkers which are not fit for use in that particular machinery.

Because of the protective clauses which are normally incorporated in the standard trading conditions of most bunker suppliers, shipowners will normally find it easier to bring claims against the time or bareboat charterer under the terms of the charter than against the supplier under the bunker supply contract. Consequently, should the charterer be found liable to the shipowner for such a claim the charterer may have a difficult task in seeking redress from the supplier since it is very unlikely that the terms of the charter and the bunker supply contract will contain back-to-back terms.

b) **Quantity Claims**

Time and bareboat charters normally include clauses such as the following which provide that the charterers will redeliver the vessel with the same quantity as had originally been on board on delivery to the charterers:

"The Charterers on delivery, and the Owners on redelivery, shall take over and pay for all bunkers remaining on board the vessel. On delivery quantity of bunkers on board shall be abt 300/100 RME180/DMB respectively. The vessel to be redelivered with about the same quantities of bunkers, however its quantity shall be sufficient to reach major bunkering port …"

Consequently, the charter will frequently provide that there should be a bunker survey on delivery and redelivery and if it is found that the vessel has been redelivered with less than the correct quantity of bunkers, the charterers are obliged to compensate the shipowners for the deficiency either at the agreed bunker price (if this is expressly stated in the charter) or at the market price at (or at the nearest bunkering port to) the redelivery port.

Where there is a clause in the charter which provides that an agreed quantity of bunkers are to be delivered and redelivered at agreed prices, charterers may be tempted in the event that the agreed price proves to be substantially higher than the actual market price on redelivery, to redeliver the vessel with a substantially greater quantity of bunkers than was on board on delivery in order to profit from the difference in price. However, the shipowners are not bound to accept delivery of such a greater amount and are not bound to pay the agreed higher price for the excess amount.

c) **Safe Bunkering Locations**

Time charterers will normally provide that the time charterers must employ the ship *'between safe ports'*. This duty includes the duty to ensure that any bunkering location to which the ship is sent to bunker (whether at a berth or alongside a bunker barge) will be safe for the ship. Therefore, the principles that apply to the use of safe ports generally also apply to the safety of bunkering locations.

Claims Management

Claims management concerns can encompass a number of different issues falling under the following headings:

- Contract terms;
- Operational safeguards; and
- Evidence.

Contract Terms

It will be clear from the commentary above that the terms and conditions that can normally be found in contracts with bunker suppliers are very onerous insofar as the purchaser is concerned. Therefore, reference should be made to the BIMCO Standard Bunker Contract which is a far more balanced contract and which purchasers should consider using whenever possible.

It is also important that clauses are included in bunker supply contracts and charterparties to ensure that any bunkers that may be supplied will comply with the low sulphur requirements of MARPOL. In particular, parties are referred to the BIMCO Bunker Fuel Sulphur Content Clause for Time Charter Parties 2005 which is intended to provide a balanced framework for the relationship of shipowners and time charterers in this regard.

In many cases the readiness of insurers to assist may be affected by whether or not the assured has taken reasonable steps to ensure protection by the use of such clauses.