Insight Article

A charterer's involvement in cargo claims

Introduction

A time or voyage charterer's involvement in cargo claims can arise in two different ways: either directly or indirectly. By directly we mean that the charterer incurs the liability directly to the cargo owner, receiver or insurer. By indirectly we mean that the charterer incurs liability to another party, often the shipowner, who has first incurred liability, under a separate contract, to the cargo owner, receiver or insurer. Just because the claim has not been made against the charterer in the first place does not necessarily mean that the time or voyage charterer will not face a claim. Nor does it mean that the charterer will be free from any or all ultimate liability.

Published 06 October 2009

Direct liability

Direct liability will normally arise when a charterer is the carrier under the contract of carriage. In such circumstances, a claim for loss of or damage to the cargo can be brought directly against the charterer by the cargo owner or those acting on his behalf. In many cases, the contract of carriage is evidenced by a bill of lading. Whether this bill of lading evidences a contract with a charterer or with the shipowner depends on a number of factors. These factors will vary, depending on the law which is applied in the jurisdiction in which the claim is brought. Among the most important factors are:

• Who issued the bill of lading and on whose form?

• By whom or on whose behalf has it been signed?

• Does it include a demise or identity of carrier clause on the back?

The courts of different countries interpret such matters differently. For example, many jurisdictions no longer recognise the validity of the demise clause. In these jurisdictions, such a clause will not help a charterer seeking to argue that a bill of lading evidences a contract with the shipowner and not with him. Others approach the question on the slightly simplistic basis that whoever issued the bill must be the carrier. 1

Some jurisdictions have developed the concept of the actual carrier and the contractual carrier, that is, that there are (or can be) two separate carriers. As the term implies, the actual carrier is often the party actually performing the carriage. In virtually every case, this is the shipowner. The contractual carrier is the party with whom the contract of carriage has been made. Often, it is the party whose name appears on the front of the carriage document (normally a bill of lading). In many cases, this will be the charterer. In some liner trades, it may well be a slot charterer. Sometimes, it may be a freight forwarder, who has agreed with the shipper to arrange the entire carriage, even though the actual carriage is delegated by the freight forwarder to another party. Liability may be joint and several insofar as both the actual and the contractual carrier are concerned. If it is, the question of who (owner or charterer) deals with and perhaps pays the claim in the first instance is likely to depend on the relationship (both contractual and generally) between these two parties, and whether one party has been obliged to give security to cargo interests, thus making enforcement against that party much easier for the claimant.

There may also be circumstances where the contract of carriage is a charterparty. 2 In most cases, this will be a voyage charter, rather than a time charter. The cargo claimant will also be the charterer. His contracting party may be the shipowner himself or a time charterer - and in this case the cargo claimant will see the time charterer as the "shipowner" under the charterparty. Where the contract is a charterparty, any bills of lading issued pursuant to it will be mere receipts for the goods as far as the parties to the charterparty are concerned. The charterparty is the contract of carriage and the claim will fall under that document. Where the real shipowner is not a party to the charterparty contract with the cargo claimant, the bill of lading may also function as a contract between the shipowner and the cargo claimant. Thus, if the cargo claimant is the bill of lading holder as well as the charterer, he may have the choice of bringing a claim against the shipowner under

irrespective of whether it is sourced from Gard AS, its shareholders, correspondents, or other contributors.

the bill of lading, or the (time) charterer under the charterparty.

1 See article "Whose bill of lading is it anyway?" in Gard News issue No. 162.

2 See article "Identification of the contract of carriage and cargo cover" in Gard News issue No. 144.

3 See Rodocanachi v. Milburn (1866)18 QBD 67 and Hain v. Tate and Lyle (1936)2 All ER 597.

Indirect liability

In many cases, a charterer may wish to ensure that the bill of lading evidences a contract with the shipowner. In cases where it does, the latter will be in the front line when it comes to dealing with any cargo claim. Despite his initial responsibility towards cargo interests, the shipowner may be entitled to recover part or all of any amount he may pay to cargo interests from the charterer, pursuant to the terms of the charterparty. This is what is called an indemnity claim.

A common example is where the shipowner incurs liability towards cargo interests for loss of or damage to cargo caused by stevedores' negligence, where the stevedores are the servants of the charterers. Under the terms of the charterparty such liability rests, ultimately, with the charterer. Therefore the shipowner brings a claim for indemnity in respect of the amount he has paid to cargo interests. First and foremost, the shipowner will have to show the charterer that he has the ultimate responsibility under the terms of the charterparty. Additionally, the shipowner will need to show that the claim was properly settled in the first instance, in accordance with his legal liability under the bill of lading.

The position may of course be reversed. The charterer may be obliged to deal with the claim by cargo interests, but may consider that he has a claim for indemnity against the shipowner, under the terms of the head charterparty. In this case charterers will have direct liability under the bill of lading, but may be able to recover amounts paid from the shipowner.

In practice, co-operation between the shipowner and charterer is often the best way of ensuring that the party defending the claim has access to the information and documentation needed from the other party to handle the claim. Such co-operation should also ensure that the party seeking the indemnity keeps the party from whom he will be seeking the indemnity informed about the claim. Copies of the claim papers should be sent at the earliest opportunity.

The terms of the charterparty

Clearly, the terms of the charterparty are vitally important in deciding who will bear the ultimate liability. Many arbitrations have been decided on a particular word, phrase or sentence in a clause in the contract. For a charterer and a shipowner, the terms of the charterparty are therefore at least as important as the terms of the bill of lading. Unfortunately, some of the charterparties which Gard Services see contain clauses purporting to deal with liability for cargo claims which appear, at best, to have been taken verbatim from another form of charterparty, to which they were better fitted, or at worst, are in complete contradiction with another part of the contract.

The Inter-Club Agreement (ICA) attempts to resolve such conflicts and disputes arising under the New York Produce Exchange (NYPE) form of charterparty by outlining a formula under which liability is mechanically apportioned to either the shipowner or the charterer, or sometimes to both. 4 As with all such formulae, the ICA is general and it can be difficult to apply it to every single cargo claim for indemnity. However, it has been regularly updated to try to keep up to date with developments in shipping and, despite its faults, it does, if applied fairly and in the spirit in which it was intended, provide a good basis for settling such claims quickly and without recourse to arbitration.

As mentioned, the ICA is designed to be used in connection with the NYPE form of charterparty. Unfortunately, perhaps because of its widespread acceptance and use, the ICA is written into other forms of charterparty for which it was not designed. This can create more problems than it solves and careful attention at the drafting stage needs to be paid to the other clause(s) in the charterparty which may affect the operation of the ICA. 5

4 See article "Inter-Club Agreement - Comparison between 1984 and 1996 forms" in Gard News issue No. 143.

5 Liability, either under the ICA or generally, for loss of or damage to deck cargo remains a continuing problem. The ICA does not explicitly cover deck cargo. Instead, it outlines who, shipowner or charterer, will be responsible for a particular cause of loss or damage. To find out who is ultimately responsible, it is necessary to decide the (main) cause of any loss of or damage to deck cargo. Factually, this can be difficult. It is often a choice between bad stowage (for which the charterer is normally responsible) and unseaworthiness (which would normally be the shipowner's responsibility). In reality, there may be elements of both causes.

Practical problems

Whatever the contract may say, the reality can be different. Moreover, it is not always easy to establish who is the carrier, or the actual carrier or contractual carrier. A bill of lading is often signed by a charterer or his agent, purportedly on behalf of the master. The bill may be issued on the charterer's form, with his name and details on the front. In some countries this may be enough to make the bill evidence of a contract with the charterer, not the shipowner. In other countries, depending on the precise words used in the signature box and the clauses on the back, the bill may still be evidence of a contract with the shipowner and not the charterer.

Yet other jurisdictions may find that both the shipowner and the charterer are a carrier. A common sense approach by all parties will be needed if the claim is not to be passed backwards and forwards between the shipowner and the charterer like a hot potato, leaving a frustrated claimant not knowing when or by whom his claim will be handled.

The deep pocket syndrome

Sometimes, there are attempts made by the claimant to bring a claim in tort or bailment, (i.e., outside the contract), regardless of the existence of a contract. This may be to try to avoid what is perceived to be an unfavourable term of the contract. It may also be an attempt by the claimant to bring a claim against the party who is seen as being the more or most reputable and financially solid, irrespective of whether they are the correct party against whom the claim should be made. This large and (relatively) rich company may also have the best (i.e., the highest) insurance cover and possibly the highest public profile. They are therefore the easy target. The result is often that the list of defendants includes almost anybody who may have had even a remote connection to the alleged incident. In addition, excessive amounts of time and money are often spent, particularly on lawyers' bills, by all parties involved: - by the claimants, in trying to bring the claim against their preferred target; - by the target, in trying, firstly, to avoid the claim and secondly, to bring into the action the party(ies) against whom they consider the claim correctly lies; - by the latter, in

trying to avoid being brought into the action.

The result may be that a large and financially solid charterer may be the preferred target in circumstances where the contractual claim may lie against an elderly vessel, owned or operated by a one-ship-company based in a jurisdiction where pursuing or enforcing a claim is likely to be difficult and expensive. A charterer should therefore carry out thorough checks on the vessel and her owners and the level and strength of owners' liability insurance before entering into a fixture. It may be tempting to take the lowest rate, but unfortunately, experience suggests that there is often a relationship between price and quality.

"The best laid plans of mice and men..."

Sometimes, however, things do not go according to plan and a combination of circumstances means that even a careful charterer can end up facing a substantial liability that should have fallen on another party. The following case serves as an illustration.

The bulk division of a very well known shipowner and operator time chartered a large ore-oiler to carry a cargo of iron ore from Southern Africa to Western Europe. The vessel was owned by a company in the Far East. It foundered during the voyage in severe but not exceptional weather. All the cargo was lost with the vessel. The total loss of a vessel often raises issues as to her seaworthiness and this case was no different. All the indications were that this was a matter which was most appropriately handled by the shipowners directly with the claimants.

The shipowners were entered with one of the International Group clubs based in London. Unfortunately, according to the club in question, the owners had not bought cover for cargo liabilities. In fact, owners had no such insurance. The time charterers were entered with Assuranceforeningen Gard, from whom they had bought cargo liability cover.

Although the bills of lading evidenced a contract with the shipowners, the time charterers were exposed to a claim by the cargo owners under contracts of affreightment. Somewhat disappointingly, but in accordance with their clients' contractual rights, the lawyers acting for cargo interests decided to bring the claim, which was for several million dollars, against the time charterers, rather than the shipowners, and in order to enforce their security demand they threatened to arrest one of the time charterers' own vessels. Faced with this threat, Gard provided a letter of undertaking by way of security.

Naturally, attempts were made to obtain counter-security from the shipowners. Since security was not given voluntarily, a sister-ship was arrested in South Wales. Unfortunately, the shipowners were in financial trouble and the arrest of this sister-ship was, we were informed, the final straw which forced them into bankruptcy. At the instigation of Gard, the sister-ship was sold. Unfortunately, after the mortgagees had taken their share, there was nothing left of the sale proceeds. The time charterers' indemnity claim was therefore unsecured and there were no prospects of obtaining alternative security. Further, because the shipowners were no longer in existence, the time charterers were unable to obtain from them the information and documentation relevant to the maintenance of the vessel and the seaworthiness issue generally. However, time charterers were exposed to the claim by cargo owners, which they were ultimately obliged to settle out of court for a significant proportion

of the amount claimed.

Because the shipowners were no longer in existence, no indemnity claim was possible, even though the total loss of a vessel would normally be something falling within the issue of seaworthiness and would therefore be a matter for the shipowners to handle. Here, however, a combination of circumstances left the time charterers and Gard having to handle and pay the claim.

A few general guidelines

- Know what you want to achieve before entering into a contract. - Make sure the contract accurately reflects what has been agreed. - If you are in the middle of a chain of charterparties, try to ensure that any liability which comes up the line can be passed down the line and vice-versa. - Check the strength and financial standing of your potential contracting party before entering into the contract.

If in doubt, consult Gard Services.

Gard News is published quarterly by Gard Services AS, Arendal, Norway.