Deck Cargo - A Summary of English and US Law

GENERAL PRINCIPLE Normally a carrier will not be authorised to stow goods on deck unless there is a custom of the trade or port of loading to stow the specific goods on deck for the voyage in question,1 or unless there is an express agreement with the shipper of the goods to stow them on deck. Otherwise deck stowage will be "unauthorised" and the carrier will be liable for loss of or damage to the goods resulting from the deck stowage. Under English law it is a matter of construction whether the exception clauses in the bill of lading or charterparty will protect the carrier in the case of loss of or damage to unauthorised deck cargo.2 Under US law unauthorised deck cargo has been held to constitute an unlawful deviation.

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THE HAGUE AND HAGUE-VISBY RULES

England is a party to the Hague-Visby Rules. The law applicable to carriage of goods by sea in the US is based on the Hague Rules. It is generally said that the Hague and Hague-Visby Rules do not apply to deck cargo. However, in order to avoid the operation of the Hague and Hague-Visby Rules two requirements must be satisfied: (1) the cargo must be stowed on deck and (2) the deck stowage must be clearly stated on the bill of lading.

CLEARLY STATED ON THE BILL OF LADING

Although it is easy to establish whether a specific cargo has in fact been carried on deck or not, for that is a question of fact, it is not so easy to satisfy the requirement that a clear statement should appear on the bill of lading. The crucial question appears to be whether a third party transferee of the bill of lading would be able to ascertain from the terms of the bill of lading whether the goods were stowed on or under deck. Under English law a general liberty to carry goods on deck is not sufficient,[4] since the transferee would not be able to ascertain whether the liberty had been exercised or not. Similarly, under US law a clause providing that the carrier is entitled to carry the cargo on deck unless the shipper objects is also not sufficient,[5] since the transferee would not be able to ascertain whether or not the shipper had raised an objection. Further, under US law a simple notation on the face of the bill may also not be sufficient and it may be a requirement that the shipper "knowingly assented" to carriage on deck. [6] The fact that in certain trades it is customary for specific cargoes to be carried on deck is irrelevant to the question of application of the Hague and Hague-Visby Rules. Unless the bill of lading expressly states that the goods are carried on deck the Rules will apply.

LIBERTY CLAUSES

Whenever cargo is (or may be) carried on deck the Association recommends the following clause be inserted in bills of lading: "*Liberty to Stow on Deck Carrier has liberty to carry goods on deck without notice to the merchant and without stating the on deck carriage on the bill of lading*." Although not having the same effect for the purpose of avoiding application of the Hague or Hague-Visby Rules as a clause expressly stating that the goods are shipped on deck, this clause may be useful, since it authorises deck carriage. Where arguments of reckless conduct or fundamental breach are raised by claimants the clause may afford important protection to the carrier. The same protection is afforded by the liberty clause where an exemption clause might be removed on the basis of construction.

WHERE THE HAGUE OR HAGUE-VISBY RULES DO NOT APPLY

Provided deck cargo is successfully excluded from the operation of the Rules, the parties are free to agree on any terms of carriage. This is because third parties to whom the bill of lading may be transferred are aware of the deck carriage and the fact that the Rules do not apply. In these cases it is possible for the carrier to exclude liability for loss of or damage to deck cargo. Under English law liability may be excluded through a clause on the face of the bill of lading stating: "Carried on deck at shipper s risk without liability for loss and/or damage howsoever caused." This is because under English law it is possible to contract out of liability for negligence if it is done in clear and unambiguous terms.[7] However, the same clause will not be effective under US law, since the US courts will not allow the carrier to escape from liability for loss or damage arising from his own negligence, so that any provision to that effect in a bill of lading will be against public policy and therefore void.[8] Furthermore, in respect of shipments to or from the USA the Harter Act applies. This Act makes it unlawful to insert any clause in a bill of lading relieving the carrier from liability for his own negligence, fault or failure in proper stowage (in respect of both, on-deck and under-deck cargo). Any contractual provision in that respect will be null and void and of no effect. Accordingly, when an "on-deck" bill of lading is

used for the carriage of cargo to or from the United States, insertion of the following clause on the face of the bill of lading is recommended[9]: "CARRIED ON DECK. Risk of loss or damage inherent to on deck carriage is born by the shipper/consignee but in all other respects risk of loss or damage is governed by the provisions of the Carriage of Goods by Sea Act of the United States, 1936 ("COGSA") (notwithstanding Section 1(c) of COGSA) and, to the extent not inconsistent with such provisions of COGSA, by the terms of this bill of lading." Finally, it should be remembered that if the Hague or Hague-Visby Rules do not apply to deck carriage, then in principle the carrier would not be able to rely on the defences and limitations contained in the Rules, which form the basis for P&I cover.[10] In such cases it will be necessary to incorporate terms in the contract at least as favourable to the carrier as those laid down in the Rules, to serve as protection in case the clause attempting to exempt all liability for deck cargo is not upheld. Failure to do so would prejudice P&I cover.

Footnotes

1. For instance, carriage of enclosed containers on decks of purpose-built container ships is almost universally regarded as a customary method of carriage. Similarly, the carriage of logs on deck of purpose-built log-carrying vessels is also accepted as customary.

2. *THE ANTARES* (1987) 1 Lloyd's Rep. 424.

3. *St. John s Corp. v. Companhia Geral, etc.*, 263 US 119 (1923).

4. *Svenska Tractor v. Maritime Agencies* (1953) 2 Q.B. 295.

5. *The Hong Kong Producer* (1969) 2 Lloyd's Rep. 536 (2nd Cir.).

6. See *Ingersoll Milling v. Bodena* (1988) AMC 223.

7. *Nelson Line v. Nelson* (1908) A.C.16,19.

8. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 US 397, 438-463 (1889).

9. An alternative arrangement is to have pre-printed "On Deck Cargo" clause on the reverse side of the bill of lading dealing with liability/time limitation/package limitation provisions (which in this case may be in terms more favourable to the carrier that those laid down in COGSA), with a stamped clause on the face of the bill of lading stating "On Deck Carriage" and directing one's attention to the provisions for on deck carriage on the reverse side of the bill of lading.

10. Rule 34.1.ii of Gard's Statutes and Rules 1996.