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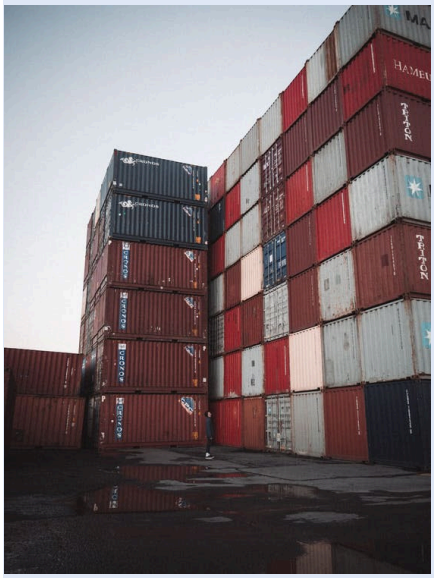
If the containers fit, they ship?

*The unprecedented demand for container slots fuelled by an increase in consumer spending and port congestion has caused containership rates to rocket in 2021. With the industry resorting to alternatives to satisfy global demand, **Ian Short**, Director, and **Cecilie Rezutka**, Associate in CJC's shipping dispute resolution department, consider key legal issues arising from the carriage of containers on bulk carriers.*

Background

There is more demand in the market for containers to be moved than there are containerships. The industry has responded to this imbalance by employing alternatives for the shipment of containers and especially more reasonably priced bulk carriers.



The carriage of containers on bulk carriers is of itself not new as containers can be and are from time to time carried on a variety of non-cellular vessels including general cargo, multi-purpose ships and ro-ro vessels. Bulk carriers are a particularly attractive option, where commonly empty ballast return voyages can be monetised if containers are loaded.

Unlike container ships, non-cellular vessels do not have strong vertical metal frames into which the containers are easily stowed. Leaving technical considerations[1] aside, however, the carriage of containers on bulk carriers brings with it several important legal considerations which we discuss in this article.

Contractual considerations

Charterers wishing to carry containers on non-cellular vessels need to satisfy themselves that the carriage of containers is not expressly excluded under the time charter or is permitted under the terms of a voyage charter. Breach of such a provision might entitle the carrier to refuse to load containers and/or claim damages for breach of contract.

Conversely, where the carriage of containers is intended, the carrier may want to insist on the inclusion of terms which put the responsibility for the loading and stowing of the containers on to the charterers, including ensuring that the vessel is properly fitted to stow containers. The parties also need to consider whether containers are to be stowed on or below deck. Carrying deck cargo on bulkers is often prohibited under the terms of the contract, just as it can be under insurance policies, and the parties will

[1] Bureau Veritas for instance has issued some helpful guidance on the technical side: https://www.iims.org.uk/wp-content/uploads/2021/09/BV_guidelines-loading-containers-bulk-carrier.pdf and many Clubs have issued circulars in relation to P&I cover.

need to ensure that they are adequately protected if indeed it is the intention to stow containers on deck at any stage. A carrier may also want to ensure that charterers are expressly responsible for the shipment of dangerous goods – contents of containers can be misdescribed and contain hazardous goods. Unlike bulk cargoes where the Master usually has an opportunity to carry out a visual inspection of the cargo, there is usually no such opportunity for containerised cargo. Whilst a term can be implied into charterparties that charterers have an absolute obligation not to ship dangerous goods, an express term will put this beyond doubt and can, if necessary, expressly refer to the carriage of containerised cargo.

In terms of passing on cargo claims arising out of the carriage of containerised cargo, there is no reason why the Inter Club Agreement (the **"ICA"**) should not apply where applicable. However, an apportionment is only available under the ICA where the cargo claim was made under a contract of carriage that was authorised under the terms of the charterparty and, as such, if the bills of lading refer to containerised and/or deck cargo, it ought to have been permitted under the terms of the charterparty for bills of lading to be issued allowing for the carriage of cargo in this way.

Seaworthiness

The carrier must ensure that the vessel is seaworthy, that it is reasonably fit for the intended purpose – in this case for the carriage of containers. At common law this obligation is absolute and non-delegable. If the Hague-(Visby-)Rules or equivalent (the **"Rules"**) apply, then the obligation is reduced to one of due diligence and the carrier will need to show that they took reasonable steps before or at the commencement of the voyage to ensure the vessel's seaworthiness. Likewise, whilst a carrier can contract out of responsibility for cargo operations such as loading and stowing as discussed below, if a Clause Paramount is incorporated into to the charterparty incorporating the Rules, a carrier will be unable to contract out of its overriding seaworthiness obligations.

When carrying containers on a bulk carrier, this task is more onerous for the carrier. They will be under an obligation to show that the bulk carrier was seaworthy for the intended voyage carrying containerised and/or deck cargo. Where they have not contracted out such requirements, the carrier and owner will have to ensure that the ship is suitable to load, handle, stow, carry, keep, care for and discharge containers. Technical alterations to the bulker such as the installation of container securing arrangements as well as obtaining relevant consents including from the Flag State, Class, H&M and P&I etc will be necessary. The crew should be suitably trained for handling containers.

Responsibility for stowage of containers

Given their non-standardised nature, stowage and lashing obligations can be more extensive in the carriage of containers on bulk carriers. As discussed above, the default position is that the carrier or owner is responsible for cargo operations unless the contract contains an express provision to the contrary.

Under a **time charterparty**, it is not uncommon for charterers to take on the risk and expense of the cargo handling operations under the supervision of the Master – see clause 8 of the NYPE 1993 as an example. Similarly, clause 7 of the NYPE provides that *"the Charterers shall provide and pay for necessary dunnage and also any extra fittings requisite for a special trade or unusual cargo..."* and the carriage of containers on board a bulker may fall into this category. Nevertheless, should it be the parties' intention that charterers are to take responsibility for the loading and stowing of containerised cargo, including the appropriate lashings, securing arrangements and dunnaging, it would be prudent for the parties to expressly agree this if the prospect of carrying containerised cargo is contemplated. Disputes can arise, for example, as to which party is responsible for the technical adaptations to the bulk carrier for the carriage of containers. As above, it would also be prudent to agree that bills of lading are authorised in connection with containerised and/or deck cargo.

Under a **voyage charterparty**, it is also common to find that charterers have taken on risk, liability and expense of the cargo operations and that owners have contracted out of such responsibility – see, for example, clause 5 of Gencon 1994. The Gencon also provides that the shipment of deck cargo is to be at charterers' risk and responsibility (clause 1). If it is the intention that the owners are not to be

responsible for the loading and stowing of containers, these clauses cover the position but again there is no harm in agreeing a bespoke clause dealing with the parties' intention when the vessel carries containerised or deck cargoes.

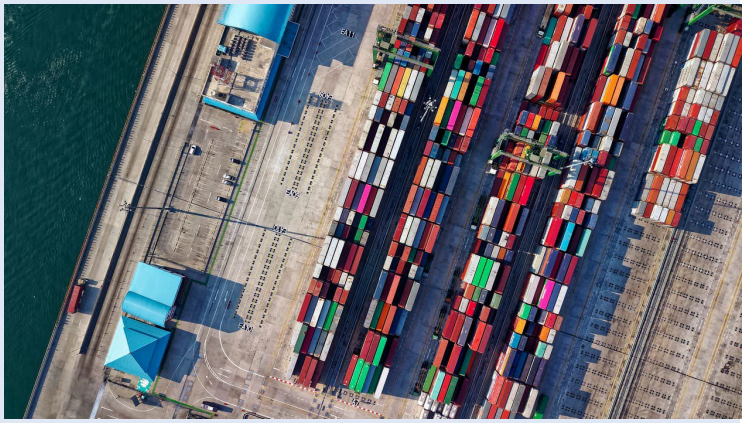
Under bills of lading that incorporate the terms of a voyage charter, such as the one described above, in circumstances where the carrier is contracting themselves out of the loading, stowing and discharging operations, the responsibility for such cargo handling contractually falls on the shippers and receivers as the case may be[2]. However, not all jurisdictions would look to incorporate the terms of the charterparty and cargo claims can be dealt with in local jurisdictions which in practice exposes the carrier to claims for damage to containerised cargoes even if under English law the carrier may be afforded defences. From the carrier's perspective, it is important that it has adequate recourse actions against charterers under the charterparty discussed above.

Carriage of containers above deck

The carrier's considerations

From an insurance perspective, it is not uncommon for owners' P&I policy to exclude cover for deck cargo. It is therefore important for an owner of bulk carriers who anticipates shipping containers above deck to discuss this with their P&I Clubs. Otherwise, an owner can essentially be left uninsured in respect of cargo and third party liabilities occurring as a result of shipping containerised cargo above deck if the carrier has not suitably protected itself against such claims.

As discussed above, it is equally important for an owner to ensure that carriage of deck cargo is permitted under the terms of the charterparty and, from its point of view, that as much responsibility for such carriage can be passed to the charterers. Likewise, it is important that bills of lading are authorised for deck cargo carriage such that bills of lading are issued which specifically set out the cargo that is to be carried on deck.



The Rules will apply to the carriage of a container on deck unless (i) the B/L states that the container is going to be carried on deck, and (ii) it is in fact carried on deck[3]. Only if these two criteria are fulfilled can the carrier contractually reduce its obligation to care for the cargo to a lesser duty than that which is provided by the Rules or exclude its liability for damage or loss to deck cargo altogether. Otherwise they would breach Article III.8 of the Rules. Therefore, there is an opportunity for a carrier/owner to exclude liability for deck cargo provided that the contract of carriage (bill of lading or charterparty) provides for the carriage of cargo on deck and the cargo is so carried.

As a result of this, depending on whether containers are carried below or above deck, different standards of care and liability might apply in respect of the cargo.

Since cargo carried on deck is more prone to damage arising from an exposure to the elements such as bad weather, swell or loss at sea, carriers commonly seek to exclude their liability. B/Ls used in the dry bulk trade (e.g. the Congenbill) will therefore need to be amended to state clearly what or how much or that all cargo is to be carried on deck to ensure that the carriage falls outside the Rules and the carrier can set its own standards. Such cargo will then also need to be actually carried above deck as otherwise the Rules will apply.

Where the Rules do not apply, it becomes key for the carrier to ensure that liability for deck cargo is fully excluded. The best way to do this in relation to defeating underlying cargo claims is that the appropriate exclusion is incorporated into the bills of lading issued for deck cargo. It may be more difficult for a

[2] See e.g. the decisions in *Eems Solar* [2013] 2 Lloyds Rep 487 and *The Jordan II* [2003] 2 Lloyd's Rep 87.
[3] See Rule 1(c) of the HR/HVR.

carrier to have direct control over what clauses are incorporated into a sub-voyage charter that in turn may be deemed to be incorporated into the bill of lading terms and, as above, not all jurisdictions where cargo claims are brought recognise the concept of incorporating charter terms into the bill of lading. The best way to protect the carrier's position therefore is to have clear wording on the face of the bill of lading that the carrier's liability for deck cargo is excluded.

In the recent High Court case *The Elin*[4] the scope of a deck cargo exclusion clause came before the Court which related to deck cargo *"loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage howsoever arising"*. Fortunately for the owners the Court held the clause to be sufficiently clear as to exclude any claim, including any loss or damage caused by the vessel's unseaworthiness or the carrier's negligence.

From a bulk carrier owners' perspective if the carriage of containerised above deck cargo is contemplated, it would be prudent to agree a term in the charterparty with charterers that any bills of lading that are authorised to be issued must contain suitable wording on their face clearly excluding liability for the carriage on deck cargo.

Cargo interests' considerations

Cargo interests should be aware of how a deck cargo exclusion clause affects any potential claims for loss or damage to containerised cargo. Where a deck cargo exclusion clause is properly incorporated into a bill of lading, a cargo interest may lose any right to recover from the carrier for loss and damage to the cargo so carried. Depending on how widely the exclusion clause is worded, it might not only exclude the carrier's liability for any damage or loss that might naturally occur from the carriage of cargo on deck but also that which is caused by the carrier's negligence or its failure to exercise due diligence to make the vessel seaworthy.

It is for cargo interests to bring themselves outside the scope of the exclusion clause which, if widely worded, cargo interests might struggle to do. Cargo interests ought to ensure that adequate insurance is in place that would cover cargo losses in such circumstances.

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[4] *Aprile SpA & Ors v Elin Maritime Ltd* [2019] EWHC 1001 (Comm).