



► **LEGAL COSTS COVER (LCC) -
GUIDE TO THE INCORPORATION OF
THE CHARTERPARTY TERMS INTO
BILLS OF LADING**

INCORPORATION OF THE CHARTERPARTY TERMS INTO BILLS OF LADING

In the commodity trade, when goods are carried on a chartered vessel it is common practice to include a clause in the bills of lading incorporating some or all of the terms of the charterparty. It should be borne in mind that a bill of lading remains a separate contract from the charterparty, the terms of which are incorporated and so the question 'whether a cargo claim is subject to bill of lading or charterparty terms' often arises. Due to its significance, the construction of the clause incorporating those terms into bills of lading has given rise to extensive judicial consideration. Whilst the position can vary from jurisdiction to jurisdiction, the following principles govern the construction of the relevant incorporation clauses under English law and are set out below for guidance purposes.

More specifically, considering that bills of lading as documents of title are transferred from the carrier (shipowner/charterer) to the receiver through endorsement, when the transfer is made to a non-charterer, a reference to a charterparty is one of the main challenges the latter can face. The bill of lading notifies the third-party transferee that charterparty terms are incorporated but those may be unknown to the transferee who was not a party to the charterparty, thus had no access to it and played no part in negotiating the terms¹. To ensure fairness, and to protect third party transferees from being bound by unseen contractual terms, the charterparty terms

only become relevant and applicable to the particular bill of lading if they are expressly incorporated therein. Law and jurisdiction clauses may also be incorporated, which is of particular importance as this will determine the law and jurisdiction governing the contract of carriage and thus where any cargo claims should be brought. Therefore, it is paramount to clarify whether, how and when charterparty clauses are incorporated into bills of lading and the following tests and methodology have been developed by English courts in this regard.

The identification of the Charterparty

Members should exercise particular caution when referring to charterparties in bills of lading to ensure that the relevant charterparty is identified by date and that specific, clear and correct words are used to incorporate specific terms of the relevant charterparty in order for such terms to be successfully relied upon:

- If the bill of lading refers to the terms of a charterparty, that charterparty must have been in existence, concluded and put in writing before the bill is issued. In the *Epsilon Rosa*², a recap telex evidencing the charterparty terms was found to be sufficient despite the fact that there was no signed charterparty in existence, which demonstrates the flexibility with which English courts are adapting to business practice. The position would have been different if the charterparty had not been evidenced in writing at all.
- When the incorporating provision refers

¹ Professor Yvonne Baatz, *Maritime Law* (5th Edition 2020), ch.5, page 219

² [2002] EWHC 762 (Comm); [2003] 2 Lloyd's Rep 509

INCORPORATION OF THE CHARTERPARTY TERMS INTO BILLS OF LADING

to, but fails to identify the charterparty it is presumed that the reference is to any charterparty under which the goods are being carried. If only one charterparty exists, if the bill of lading fails to clearly identify the relevant charterparty and assuming there is a chain of charterparties, the head charter will be incorporated (as this is the contract to which the shipowner issuing the bill of lading is a party) provided that it is a voyage charter. If there is a time charter and a sub charterer, the sub charterparty will be incorporated³. If there is both a time and a voyage charterparty, the voyage charter party will be incorporated⁴.

- If there is an inconsistency between the printed terms of the bill of lading and the incorporated terms of the charterparty, the bill of lading terms will prevail. Similarly, a paramount clause of a bill of lading would prevail over a relevant clause contained in the charterparty.

The effect of the relevant incorporation clauses

The precise wording and particularly the width of the incorporation clause of the bill of lading plays a fundamental role as to what terms are incorporated. If the intention is to incorporate all terms of the charterparty, use of some standard form bills such as the Congenbill 2007 may be appropriate.

This form is designed to include reference to terms, conditions, liberties, exceptions but also expressly refers to applicable law and jurisdiction.

The position differs when general incorporation clauses are used (e.g. *"incorporating all terms as per charterparty dated..."*) as only those terms that are directly relevant to the actual carriage of the goods as the subject matter of a bill of lading (i.e. the shipment, carriage, delivery of the cargo or the payment of freight) will be incorporated. While stowage, time bar and limitation clauses would travel into the bill of lading from the charterparty, a bunkering clause or a safe port warranty would not⁵. A charterparty choice of law clause will also be incorporated under this clause in the absence of an express choice of law clause in the bill of lading. The above-mentioned clauses will not be sufficient, however, to incorporate the dispute resolution clause contained in the charterparty unless expressly incorporated or unless the charterparty jurisdiction clause expressly refers to disputes under the bill of lading⁶. Incorporation by specific reference to a charterparty in the bill of lading is normally sufficient for a valid incorporation provided that there is consistency between the terms of the charterparty and the bill of lading and that the term to be incorporated makes sense in the context of the bill of lading.

Further, when it comes to construing the relevant law and jurisdiction clauses, it is noteworthy that English Courts are willing to consider the wording of incorporation on the bill of lading as a whole in context taking into account the relevant commercial background instead of merely focusing on the language.

³ Simon Baughen, *Shipping Law* (7th Edition, 2019) ch. 4 page 78

⁴ THE NANFRI [1978] 1 Lloyd's Rep.287

⁵ Professor Yvonne Baatz, *Maritime Law* (5th Edition 2020) ch. 5, page 219

⁶ Simon Baughen, *Shipping Law* (7th Edition 2019) ch. 4, page 79

INCORPORATION OF THE CHARTERPARTY TERMS INTO BILLS OF LADING

In fact, in “*The Channel Ranger*”⁷ a bill of lading specifically incorporated an English ‘law and arbitration clause’ of a charterparty identified therein, but the latter actually included an English law and High Court jurisdiction clause instead of arbitration. Despite the reference to ‘arbitration’ in the bill of lading, the Court was satisfied that the wording was incorrect as this should be read as a ‘law and High Court jurisdiction clause’.

Conclusion

In order to best protect their interests when drafting incorporation clauses Members are advised to ensure that (i) the applicable charterparty is expressly identified on the face of the bill of lading and (ii) that the wording of the incorporation clause is clear, precise, and appropriate. In particular, it is highly recommended that Members ensure that the specific wording of incorporation in the bills of lading is aligned and consistent with the dispute resolution clause in the relevant charterparty and expressly refers to the ‘law and arbitration clause / dispute resolution clause’ of the same charterparty.

To conclude, it should be borne in mind that each case will depend on its own facts and is jurisdiction dependent. The above should be considered as a general guide only. Parties to bill of lading contracts need to be mindful that the incorporation wording used in each particular bill of lading shall be scrutinised to avoid future uncertainty and that they may need to refer to terms included in other documents as the words printed on the bill may not provide the whole picture regarding the precise terms of the contract of carriage.

If you have any further questions about LCC, please contact the LCC Managers.

London

Georgia Maltezou
LCC Manager - London

D +44 207 423 3415
E georgia.maltezou@shipownersclub.com
M +44 7392 081 230
T +44 207 488 0911

Singapore

Maggie-Jo McGregor
Head of Claims - Singapore

D +65 6593 0665
E maggie.jo@shipownersclub.com
M +65 9099 8601
T +65 6593 0443

Surani De Mel

Head of Claims - Singapore

D +65 6593 0421
E surani.dharmaratne@shipownersclub.com
M +65 8666 8440
T +65 6593 0443

If you are interested in purchasing this cover please liaise with:

London

Mark Harrington
Commercial Director - London

D +44 207 423 7107
E mark.harrington@shipownersclub.com
M +44 7876 252 359
T +44 207 488 0911

Singapore

Jeremy Slater

Head of Underwriting - Singapore

D +65 6593 0428

E jeremy.slater@shipownersclub.com

M +65 8366 0768

T +65 6593 0420

Who, in conjunction with your broker, will be pleased to provide you with a quote.



London

White Chapel Building, 2nd floor
10 Whitechapel High Street
London E1 EQS

T +44 207 488 0911

F +44 207 480 5806

E info@shipownersclub.com

The Shipowners' Mutual Protection and Indemnity Association
(Luxembourg) | 16, Rue Notre-Dame |
L-2240 Luxembourg | Incorporated in Luxembourg |
RC Luxembourg B14228

Singapore

9 Temasek Boulevard
#22-02 Suntec Tower Two
Singapore 038989

T +65 6593 0420

F +65 6593 0449

E info@shipowners.com.sg

The Shipowners' Mutual Protection and Indemnity
Association (Luxembourg) | Singapore Branch |
Company No. T08FC7268A