Clashing Bills of Lading by Incorporation of Survey Reports

An increasingly common practice in shipping is the endorsement of master’s receipts by attaching copies of a pre-loading survey or a summary of the findings of a pre-loading survey. This is particularly common in the carriage of steel cargoes, which have always presented problems of notation in respect of cargoes that are partly rusted. This article explores some of the possible ramifications of this practice.

If it is assumed that the bill of lading will be drawn up by a charterer, what are the charterer’s duties in such circumstances? Most charterers will oblige the charterer to present bills that are in conformity with master’s receipts. Will it be enough if the bill of lading merely refers to the survey report? Must it attach the report or must it repeat the relevant remarks on the face of the bill itself?

In order to answer these questions, and to consider whether a bill of lading issued in such a form will serve to protect the carrier, it is necessary to return to first principles and understand the significance and meaning of the relevant provisions of a bill of lading and how these can be affected by clashing or notations on the face of the bill of lading.

General Principles

The applicable principle under English Law is one of estoppel. The carrier under the bill of lading cannot deny the truth of the statements made in the bill. So the fundamental question is; what statements does the bill contain?

By way of illustration, the Congen standard form of bill of lading contains a description of the cargo in a space which is headed, on one side

“Shippers description of goods”

Then on the other side

“Gross weight”

And the box above the space for date and signature includes the following statements:

*SHIPPED at the Port of Loading in apparent good order and condition on board the Vessel ...

Weight, measure, quality, condition, contents and value unknown.*

On the assumption that (i) these standard parts are not amended, which they almost never are, (ii) a description of the cargo appears where indicated, and (iii) a statement of the bill of lading also appears where indicated, what are the consequences?

The general principle to be applied is as stated by Lord Wright in the Privy Council in Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] A.C. 46:

“...the true rule to be followed is that the bill of lading must be construed as a whole, like any other commercial document”.

The method of English Law when construing commercial documents is to determine meaning according to the words actually used, not words expected to be used, nor even words that ought to be used.

Shipper’s Description of Goods

What of the description of the goods? Using this methodology, it is clear that the carrier under the bill of lading will not be responsible for the description of the cargo. This is expressly a statement that the shipper has made, not the carrier.

Weight Unknown

And the weight? Without the words of qualification, there would be room for dispute whether the weight is stated by the carrier or merely records figures given by the shipper. But the phrase “Weight...unknown” indicates that this too has been provided by the shipper.

A series of cases, The “Heron” and “Askoel” [1986] 2 Lloyd’s Rep. 281, The “Atlas” [1996] 1 Lloyd’s Rep. 642 and The “Mata K” [1998] 2 Lloyd’s Rep. 614, each involving bills of lading on the Congen form, has established that the general qualification will protect the carrier. The “Heron” and “Askoel” was a case where the number of bags of cargo was in dispute. Since the bills of lading stated “...quantity unknown” they did not make any statement of the number of bags actually shipped. They merely recorded that the shipper had informed the carrier that this number had been shipped. (One of the bills was slightly different and is discussed below). The same applied to both weight and number of bundles in The “Atlas” and to weight in The “Mata K”.

Apparent Good Order and Condition

These words are the critical words and do not mean that the Congen bill says absolutely nothing about the cargo. If unamended, they clearly state that the cargo was in “apparent good order and condition” when shipped.

An older case, which predates the Congen bill but is directly analogous, is The “Tromp” [1921] P. 337. The cargo was bags of potatoes. The bill of lading stated “shipped in good order and condition” and also “quantity, condition unknown”. The judge held that, having stated in the bill that the cargo was in “good order” the carrier was fixed with that description. The qualifying words meant that there was no representation of the condition and quality of the potatoes themselves but did not affect the statement that the bags were in good order. The bags were in fact not in good order being obviously wet on shipment. Not having protected himself in this regard the carrier was liable to the holder of the bill of lading.

It will be noted that the word “condition” appears twice in the Congen bill. The bill records that the cargo was shipped “in apparent good ... condition” but then goes on to state “condition … unknown”. It seems that the intention is that the bill of lading records that the apparent condition of the cargo was good but makes no statement as to the actual condition, which is something other than its appearance. As Langton J said in The
...there is no question that there are many classes of goods as to which there may be a distinction when one is speaking of their apparent condition and of their real condition."

The American decision of Tokyo Marine & Fire v Nettles Shipping [1972] Lloyd’s Rep. 921 concerned a common standard clause on the face of the bill of lading which read as follows:

"THE TERM 'APARENT GOOD ORDER AND CONDITION' WHEN USED IN THIS BILL OF LADING WITH REFERENCE TO IRON, STEEL OR METAL PRODUCTS DOES NOT MEAN THAT THE GOODS, WHEN RECEIVED, WERE FREE OF VISIBLE RUST OR MOISTURE. IF THE SHIPPER SO REQUESTS A SUBSTITUTE BILL OF LADING WILL BE ISSUED OMITTING THE ABOVE DEFINITION AND SETTING FORTH ANY NOTATIONS AS TO RUST OR MOISTURE WHICH MAY APPEAR ON THE MATES' OR TALLY CLERKS' RECEIPTS."

It is worth pausing to note the wording of the clause, which seeks to avoid any suggestion that it is unduly restrictive by giving the shipper the right to demand a bill of lading with notations. The prospect of a shipper making such a request, in effect saying "Please clause my bill of lading and make it less valuable" must be remote.

Be that as it may, the United States Court of Appeals (Ninth Circuit) accepted that the clause meant that, reading the bill of lading as a whole, there was no representation that the pipes loaded were free of visible rust. It seems likely that the same conclusion would be reached by the English Courts. And to be fair, the clause deals with a genuine issue, which is that the meaning of the words "apparent good order and condition" must depend on the nature of the cargo. For some steel cargoes, the existence of surface rust, which is normal and will have no effect on the end use of the cargo, would not mean that the cargo was not in apparent good order and condition.

Special Notation

Care should be taken with any special notation. The "Herroe" and "Askoe", referred to above, is a good example of how the bill of lading needs to be construed as a whole in accordance with the ordinary principles of construction of commercial documents. That case concerned four bills of lading and the dispute was in relation to the number of bags of cargo loaded. As already discussed, on three of the bills of lading the normal Conen qualification "quantity ... unknown" was effective. However, the fourth bill of lading had been instilled by the master next to the record of the shipper's statement of quantity. The conclusion was that the master on this occasion was prepared to state positively that that number of bags had been shipped. This followed the general principle that a specially included term will override a standard clause that is inconsistent.

Notation by Reference

With these principles and precedents in mind the question of bills of lading that refer to pre-loading survey reports can be considered.

A bill of lading can incorporate terms and conditions whether from a charterparty or by reference to statutes or conventions such as the Hague and Hague-Visby Rules. Notations relevant to the cargo are not, strictly speaking, terms and conditions, they are treated as statements. Nevertheless, it seems likely that adequate reference to remarks contained in another document could be effective. But this conclusion is not the same as saying that, whenever there is a reference to a survey report, the carrier will be protected. One will always have to ask whether the reference to the other document is enough to mean that, construing the bill of lading as a whole, the statement of apparent good order and condition of the cargo has been qualified.

In the Canadian & Dominion Sugar case itself, the bill of lading contained the usual printed statement that the cargo had been "Received in apparent good order and condition" but had specially stamped on it "Signed under guarantee to produce ship's clean receipt".

The clear implication of the added words was that, but for the guarantee, the bill of lading would not have been clean. The endorsee of the bill of lading for value was therefore put on notice that the cargo was not in apparent good order and condition.

A possible notation might be:

"Vessel's remarks as per pre-loading survey results issued by [name of surveyor] dated ..."

Is it clear from this reference that the remarks in the pre-survey report will qualify the pro forma statement that the cargo has been shipped in apparent good order and condition? One difficulty is knowing what the remarks might be relevant to. If they were relevant only to the weight or number then they would add nothing to the "weight unknown" qualification. They would not detract from the statement that the goods were in apparent good order and condition. Indeed, following reasoning similar to that applied to the bill of lading with special notation in The "Herroe" and "Askoe", they might stand as an acknowledgment that a particular quantity of cargo had been shipped.

As seen, the clear tendency of the courts over the years has been to accept that words of qualification are effective. In line with this it can be argued that the reference to a pre-loading survey is intended to give notice to a receiver of the bill of lading that he cannot assume that the cargo was in apparent good order and condition. The argument would be that, although the actual apparent condition is not known (unless a copy of the survey report is handed), it is at least clear that there might be some damage or defect.

In The "Starson" [2003] 1 Lloyd’s Rep. 571, however, the House of Lords emphasised that certain fundamental matters should be readily ascertainable from the front of the bill of lading. The issue in that case was the identity of the carrier but Lord Millett indicated that he thought that the nature of the cargo shipped was similarly fundamental. Can it be said that a statement on the front of a bill of lading such as "shipped in apparent good order and condition" will therefore override statements to the contrary in a document incorporated only by reference?

The only safe conclusion is that attempting to protect the carrier by reference to a survey report rather than clear notation on the face of the bill carries a risk that is best avoided.

Letters of Credit

In The "Starson", the House of Lords placed a great deal of emphasis on the fact that bills of lading will in all likelihood be presented to banks who will apply the ICC Uniform Customs and Practice for Documentary Credits ("UCP") when deciding whether to accept or reject presentation of such documents.

From July of 2007 most letters of credit will incorporate UCP600. Article 27 provides as follows.

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

How would this apply to a bill of lading bearing a notation such as:

"Vessel's remarks as per pre-loading survey results issued by [name of surveyor] dated..."
At first glance it might be said that such a bill does not contain a notation expressly declaring defective condition. But if that were correct the bill would count as a clean bill of lading even if the relevant survey report contains a whole list of obvious and serious damage. That conclusion surely cannot be correct. It is probably more accurate that, for these purposes, the bill must be taken to include the text of the survey report. Thus it is likely that banks will reject such bills of lading. If the survey report is attached to the bill they can reject on the basis that the bill expressly records damage. If the survey report is not presented, banks will probably reject the bill on the basis that they are not required to accept a document that is not complete.

Conclusion

Clausing bills of lading by reference to a survey report without expressly repeating the relevant parts of the report runs the risk that the carrier under the bill of lading will not be protected. It is also likely that such a bill of lading would be rejected by any bank asked to accept it under a letter of credit.

With thanks to Dominic McAleer of MFB, Solicitors, for preparing this article.