REVUE HELLÉNIQUE

DE

DROIT INTERNATIONAL

49ème ANNÉE 1/1996

REVUE HELLÉNIQUE

DE

DROIT INTERNATIONAL

fondée par P. Vallindas

publiée par
L'INSTITUT HELLÉNIQUE
DE DROIT INTERNATIONAL ET ÉTRANGER

Sous la direction de
A.A. GASIS et K.D. KERAMEUS
Directeurs de l'Institut Hellénique
de Droit International et Étranger

EDITIONS ANT. N. SAKKOULAS

THE INTERRELATION OF THE CONTRACT OF SALE WITH THE CONTRACT OF CARRIAGE AND THE LETTER OF CREDIT IN INTERNATIONAL TRADE

CHRISTOS S. CHRISSANTHIS*

In modern commercial transactions it often appears that a series of contracts depend in some way one upon the other both legally and economically. This interrelation may appear in various forms; for example performance of a contract may require that one of the contracting parties enters into some other transaction with some third party, or the validity of a contract may depend on the existence and validity of a pre-existing one between the same or different parties, etc.

International trade was first acknowledged to be a separate field of law, served by its very own specialist lawyers, when the legal community became aware of the interrelations existing between the contract of sale, the contract of carriage, and the letter of credit, which all are destined to make possible the satisfactory delivery of the goods sold to their final destination.

The purpose of this essay is to highlight some of these interrelations in the context of *cif* sale contracts. The topic comes in four subjects, namely (I) what sort of shipping documents (negotiable or non-negotiable) are good tender under a *cif* sale, (II) what contractual clauses may these documents contain, (III) what happens when the stipulations of the contract of sale as to laytime and demurrage differ from those of the bill of lading or the charter-party, and (IV) what problems may delivery without production of the bill of lading cause to the bank that has financed an international sale by opening a letter of credit.

In discussing these subjects reference to Greek law and the juris-

* LL.B. (hons), LL.M. (Lond.); Attorney-at-law, Athens Bar.

prudence of the Greek courts, where available, is made. English law, which is customary in international trade has also been taken into account, when necessary.

I. WHAT SORT OF SHIPPING DOCUMENTS ARE GOOD TENDER (negotiable or non negotiable shipping documents)

1. Under the contract of sale

The traditional shipping document is the bill of lading which has the quality of a (negotiable) document of title. This means that it incorporates constructive possession in a way that its transfer, by endorsement and delivery, may also lead to transfer of property over the goods covered by it, provided the parties' underlying agreement is the transfer of such property (as opposed to the creation of a security interest -i.e. a pledge- only). In addition, due to its negotiable character, such transfer of property confers a better title to the endorsee[1]. In modern maritime trade a new shipping document, namely sea waybill, has appeared during the last decades. The characteristic feature of this document is that it is not a (negotiable) document of title.

The sea waybill is issued by the carrier to the shipper and evidences the former' s undertaking to the latter to deliver the goods to a named person. When the vessel reaches the port of discharge the consignee named in the sea waybill, in order to obtain delivery of the goods, does not need to present a copy of it to the carrier; it suffices that he proves his identity to him[2]. The main reasons for sea waybill' s increasing use is the need that the carrier be able to deliver the goods sold at the port of discharge without obtaining a bill of lading from the consignee[3] on the one hand, as well as the desire of the shipper to retain possession over the goods as long as possible, until actual delivery to the consignee[4].

Under Greek maritime law the sea waybill does not seem to qualify

---

[1] N. A. Deloukas, *Ναυτικό Δίκαιο* [=Maritime Law] (Athens 1979), 266; A. Kiantou-Pambouki, *Ναυτικό Δίκαιο* [=Maritime Law], (2nd ed., Thessaloniki 1993) 312; Ch. Debattista, *Sale of Goods carried by Sea* (Butterworths, London 1990) 22, 26-40; Scrutton, *On Charterparties and Bills of Lading* (19th ed., Sweet & Maxwell, London 1984) article 94, 186.

[2] Ch. Debattista, Sea waybills and the Carriage of Goods by Sea Act 1971, [1989] *Lloyd's Maritime & Commercial Law Quarterly* 403; The Law Commission Report (UK), *Rights of Suit in respect of Carriage of Goods by Sea* (No 196, HMSO 1991) 32.

[3] This is due to the fact that modern technology has made the duration of sea voyages shorter and, as a result, it is not unusual that the ship may call at the port of discharge before the consignee has received the bill of lading; see Debattista, *ibid.*, 188.

[4] This diminishes the possibility of maritime fraud in connection to shipping documents, see Debattista, *supra*, 189.

as a document of title. According to article 68 para. 2 of Legislative Decree dated 17-7/13-8/1923 a document becomes a document of title to the order of its holder only by the force of law. Article 76 of same Decree, which exclusively lists the documents of title to the order of their holders, includes bills of lading, but does not mention sea waybills. So, the latter qualify only as the writing of contractual agreements between the shipper and the carrier, which are not, however, transferable by endorsement and, if transferred by civil law assignment, such transfer confers the assignee rights of suit in contract, but not property of a better title.

The implementation of Hague-Visby Rules into Greek law (by virtue of Law 2107/29-12-1992) can not be said to have given any direct or indirect legal recognition to sea waybills, since the relevant implementing law does not include a provision similar to section 6(b) of the UK *Carriage of Goods by Sea Act* 1971[5].

Moreover, according to article 168 of Greek Code of Private Maritime Law the bill of lading can only be a "shipped" one. "Received for shipment" bills of lading do not qualify as documents of title. However, it is to be remembered that under article III para 7 of the Hague-Visby Rules after the goods have been actually loaded on board, a "received for shipment" bill of lading can be exchanged for a "shipped" one, should the shipper so insist. These considerations lead, I believe, to the conclusion that a "received for shipment" bill of lading is not good tender under the contract of sale, unless this latter contract provides otherwise.

It is self-evident that under a contract of sale the seller must furnish the documents specified in such contract. Accordingly, should the contract of sale provide for a bill of lading, a bill of lading must be tendered and a sea waybill will not suffice. This is because there are important qualitative differences between a bill of lading on the one part and a sea waybill on the other, such as[6]:

- under a sea waybill the shipper may freely alter delivery instruction at any time during transit, until delivery occurs (in case of a sea waybill); under these circumstances it can not be assumed that the contract of carriage between the shipper and the carrier covered un-

---

[5] Article 1 para. 6(b) of such Act reads: "Without prejudice to art X (c) of the Rules, the Rules shall have the force of law in relation to (a)..., (b) any receipt which is a non-negotiable document marked as such if the contract contained in or evidenced by it is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading".

[6] It is a different matter that, under the UK *Carriage of Goods by Sea Act* 1992, the holder of a sea waybill or a ship' s delivery order may have rights of suit in contract against the carrier. The Act does not equates the holder of a bill of lading with the holder of a sea waybill/ship's delivery order in any other respect, save for rights of suit in contract.

der a sea waybill is a contract in favour of a third party, namely the consignee,

- sea waybills, not being documents of title and not being tendered to the buyer at an early stage, do not enable the buyer to transfer property over the goods in transit or to raise finance on the basis of a bank pledge.

INCOTERMS 1990 refer to sea waybills in dealing with the *cif* term (article A.8). They seem to qualify the non negotiable sea waybill as a "usual transport document" with which the seller must provide the buyer.[7] However, they also make clear that such "usual transport document" must "...enable the buyer to claim the goods from the carrier at destination..." and unless otherwise agreed, "...enable the buyer to sell the goods in transit ... by notification to the carrier".

As to the first function, that is entitlement to delivery at the port of discharge, the sea waybill does not seem to operate in the same way as the bill of lading. This is mainly because under a sea waybill the shipper may at any time before discharge alter his delivery instructions to the buyer. This means that under a sea waybill there is no engagement on behalf of the carrier to the consignee that he will be the one to whom the goods will be finally delivered. Moreover, the consignee is at any time before delivery exposed to a potential breach on behalf of the shipper, who may male fide vary delivery instructions. Such risks do not appear in case of a bill of lading and this is one of the more important differences between the two documents, when one concentrates on their function within the contract of sale.

As to the second function, that is entitlement to sell the goods in transit it is obvious, I believe, that the sea waybill differs, again, substantially from the bill of lading, since it is neither transferable, nor negotiable and above all, it is to the shipper's and not the consignee's order.

These considerations lead, in my opinion, to the conclusion that it was not wise on behalf of INCOTERMS 1990 to qualify the sea waybill as a "usual transport document" constituting good tender under the contract of sale, unless otherwise agreed. In my opinion, when the seller and buyer have not reached an agreement with regard to a specific transport document, the traditional negotiable bill of lading is the only "usual transport document" constituting good tender. However, the opposite seems to apply when *cif* INCOTERMS 1990 are properly incorporated, by virtue of article A.8 of *cif* term.

Ships' delivery orders are not specifically mentioned in article A.8 of *cif* INCOTERM 1990. The considerations expounded above in connec-

---

[7] Article A(8) reads: "The seller must... provide the buyer... with the *usual* transport document... (for example a bill of lading, a non-negotiable sea waybill..."

tion to sea waybills apply *mutatis mutandis* to ships' delivery orders as well. So, again, a ship's delivery order should not qualify as a "usual transport document" and should not constitute good tender, unless expressly agreed for.

2. Under the letter of credit

The new ICC-UCP 500 rules seem to draw a clear distinction between bills of lading and sea waybills, since they refer to these terms in two separate articles, namely articles 23 and 24. So, a sea waybill can not substitute for a bill of lading under the letter of credit. In both cases, only a "shipped" bill of lading/sea waybill will be good tender (articles 23 A II and 24 A II), unless otherwise specified in the letter of credit.

It is peculiar, however, that UCP 500 does not describe the bill of lading with reference to negotiability. Article 23 A reads: "If a credit calls for a bill of lading ... banks will, unless otherwise stipulated in the credit, accept a document, *however named*, which: ..."and goes on by listing several requirements (not including the name of the consignee, or his right to transfer better title over the goods by endorsement and delivery of the document) which are likely to exist in any shipping document, such as a sea waybill, a ship's delivery order, a mate's receipt, etc. The question therefore arises: Should a non negotiable document titled "Sea Waybill" constitute, however named, good tender under a letter of credit stipulating for a bill of lading merely because it has the qualifications listed in article 23 UCP 500? I believe it is evident that the new rules fail to draw the legal distinction between the bill of lading and the sea waybill by referring to their qualitative differences in law. So, articles 23 and 24 UCP 500 should not be interpreted in the sense that they define what a bill of lading or a sea waybill is in law, this being a legal qualification to be made by municipal laws in the case of each particular document.

As to the bank's security it is to be noted that, since the sea waybill is not a document of title, a bank pledge over the goods can not be constituted by possession of the sea waybill. For this reason, it has been suggested that it is wise to have the bank named both as consignor (so that it can alter delivery instructions and enforce its security by selling the cargo to a new buyer) and as consignee (so that it can obtain delivery itself). However, in such a case, it will be the bank who will be party to the contract of carriage and will, accordingly, undertake obligations, i.e. for freight, etc., towards the carrier[8].

[8] See Debattista, *supra*, 208 and note 85 therein.

II. Clauses rendering shipping documents bad tender

1. Liberty to deviate

a. Under the sale contract

According to article 126 of the Greek Code of Private Maritime Law the carrier is obliged to follow the contractual or the usual route, without being able to deviate, save for deviation for the purpose to save life or property at sea, or deviation dictated by any other reasonable cause. Deviation clauses are in principle valid, but they are strictly construed against the carrier and applied in a *bona fide* and not inequitable way[9]. Articles IV(4) and III(8) of the Hague-Visby rules seem to take the same approach[10].

Should the contract of sale provide for "direct shipment" or contain any term to the same effect, it is obvious that a deviation clause in the shipping documents would render them bad tender under the contract of sale, although it seems that there is no jurisprudence on the matter by the Greek courts.

It is not certain that the position would be the same under a "prompt shipment" term. In a case decided by the Arbitration Court of the Piraeus Stock Exchange[11] a Greek buyer had purchased coffee from Brazil. The sale contract included the term: "prompt shipment within 21 days". The seller shipped the cargo within that period on board a vessel which did not sail directly to Europe, but made a round trip around South America first where it received more cargo and then followed its way to Europe and Piraeus[12]. The buyer rejected the goods on the ground that shipment on that ship constituted a breach under the sale contract, since the term "prompt shipment" obligated the seller to take all reasonable measures so that the buyer receive the cargo the soonest possible. The First Instance Arbitration court held that the buyer was entitled to reject the goods on these grounds, but its judgment was reversed by the Second Instance Arbitration court, which held that, since the parties had not expressly agreed for

---

[9] *Multimember First Instance Court of Piraeus 829/1969, Επιθεώρηση Εμπορικού Δικαίου* (Epitheorisi Emporikou Dikaiou - EEmpD) 1970, 117; *Appeal Court of Corfu 32/1976, Επιθεώρηση Ναυτιλιακού Δικαίου* (Epithrorissi Naftikou Dikaiou - END) 1977, 461; *Άρειος Πάγος 659/1973*, 24 *EED* 394; *Appeal Court of Athens 3634/1972* (unreported); *Άρειος Πάγος 74/1978*, 29 *EED* 455.

[10] See also J. Ch. Korotzis, *Το Δίκαιο της Θαλασσίας Φορτωτικής* [=The law relating to bills of lading] (Athens, 1996) 115-116.

[11] *Judgment 2/1955*, *EED* 1956, 67.

[12] This case is similar to the English case of *Bergerco USA v. Vegoil* [1984] 1 *Lloyd's Reports* 440.

"direct shipment" and shipment was effected within the agreed period, there was no breach on the part of the seller. This is, however, a case which did not deal directly with a deviation clause, it referred to rejection of goods and not documents and the judgment of the Second Instance Arbitration court was strongly criticised.

What if the contract of sale does not contain any "direct/prompt shipment" term, but is silent on the matter? There seems to be no jurisprudence by the Greek courts. Under English law two dissenting opinions have been expressed. The first[13] seems to suggest that the buyer can reject where the deviation clause is "so wide that the ship might have called anywhere she liked"[14]. The second suggests that "the law of carriage of goods by sea gives the buyer adequate protection against the unjustified use of liberty clauses by buyers... had the buyer wished for a bill of lading ruling out any deviation, then he could have stipulated such a term expressly in the contract of sale"[15]. I believe that the same dispute will arise under Greek law, too, should a case of this type be brought to litigation, but the outcome of such litigation is not predictable. It is to be remembered, though, that article A.3 of the *cif* INCOTERM 1990 provides for a contract of carriage on "usual terms"; it therefore seems that deviation clauses on shipping documents are quite usual in shipping practice and also serve legitimate needs of maritime trade.

b. Under the letter of credit

The new ICC rules on letters of credit (UCP 500) do not expressly deal with deviation clauses in shipping documents[16]. The requirement of paras. A(iii) of arts 23 and 24 and of article 25A(v) as to the indication of the ports of loading and discharge deals with a different issue. It is usual banking practice in Greece and it is also alluded to in legal literature[17] that banks do not check the clauses on the back page of a bill of lading or similar document, unless the credit itself calls for a certain clause. So, it seems that deviation clauses can not render a shipping document bad tender under the letter of credit, unless there exists a specific stipulation as to deviation on the credit itself.

---

[13] Benjamin's, *Sale of Goods* (3rd ed. 1987) at para 1638.

[14] *Shipton, Anderson & Co v. John Weston & Co*, (1922) 10 *Lloyd' s Law Reports* 762, 763.

[15] Debattista, *Sale of Goods on Shipment Terms* (1990) 144.

[16] See UCP 500, articles 23-26.

[17] See Chr. Chrissanthis, Η έκταση του ελέγχου στα έγγραφα της τραπεζικής ενέγγυας πίστωσης [=Legal responsibilities of banks in respect to the examination of the letter of credit documents] *EEmpD* 1995, 190 *et seq.*, 206.

2. Deck stowage clauses

a. Under the contract of sale

According to article 114 of the Greek Code of Private Maritime Law the carrier is obliged to carry the cargo under deck. Article 143 para. 2 of same Code provides that if the shipper and the carrier have agreed that the cargo be carried on deck, and is actually so carried, then any limitation of carrier's liability clauses are valid, even if they contradict the provisions of the law on carrier's liability (these provisions are articles 107-148 of the Greek Code of Private Maritime Law, which establish a legal regime similar to that established by the Hague-Visby rules)[18]. The same system as to deck cargo exists under articles 30 and 22 of French law 66-402/18-6-1966 (which, however, deals with domestic transports only) and under article 663 I of the German Commercial Code.

On this point Greek maritime law differs from the Hague-Visby rules. Article I(c) of these rules provides that "goods" includes goods "except ... cargo which by the contract of carriage is stated as being carried on deck and is so carried". So, in case of deck cargo, the whole legal regime of Hague-Visby rules, including limitations of carrier's liability, fails. This system is followed by France (with regard to international transports) and by common law countries as well[19]. As was mentioned, the Hague-Visby rules have also been implemented into Greek law, by virtue of Law 2107/1992. So, when these rules apply, deck cargo would probably cause the failure of the limitation of liability clauses, while when the Code of Private Maritime Law applies, deck cargo would not affect such clauses, provided the requirements of article 143 para. 2 of same code are fulfilled. This, however, is an interesting matter which has recently arisen from the coexistence under Greek law of the two legal regimes as to carrier's liability (the first regime being that of the Code and the second that of the Hague-Visby rules) and has not yet been dealt with by jurisprudence.

Returning to article 143 para. 2, it is suggested that the agreement for deck cargo needs to be in writing[20], but this is a much disputed is-

---

[18] For an analysis relating to the legal problems of art 143 (2) of the Greek Code of Private Maritime Law see Ch. Chrissanthis, Η ρήτρα φόρτωσης επί του καταστρώματος και η επίδρασή της στις συμβάσεις της ναύλωσης της πώλησης και της ενέγγυας πίστωσης. Σχόλιο στην *ΑΠ 622/1994* [=Deck cargo clauses and their impact on the contracts of sale, carriage and the letter of credit - note on *Άρειος Πάγος 622/1994*] *EEmpD* 1996, 365.

[19] A. Kiantou-Pambouki, *supra*, 316.

[20] *Άρειος Πάγος 238/1968*, 16 *Νομικό Βήμα* [=Nomiko Vima - NoB] 738; *Piraeus Multi-member First Instance Court 5743/1967*, 18 *EEmpD* 111.

sue[21]. It is, however, beyond any doubt that such an agreement between the seller, as shipper, and the carrier is binding on the buyer, as bill of lading holder, only if it is listed on the bill of lading[22]. This is due to the fact that the bill of lading is a negotiable instrument. It is not clear what the position would be in case that a non negotiable sea waybill be issued.

On the basis of these observations we may proceed with evaluating the impact of "deck stowage" clauses in the bill of lading on the contract of sale. It is obvious that when this latter contract expressly allows deck stowage, there will be no particular problem. No particular problem seems to arise also when the contract of sale expressly prohibits deck stowage and the seller tenders a shipping document stating that cargo is or may be carried on deck.

But what if the contract of sale is silent on the matter? According to article A.3 of the *cif* INCOTERM 1990, the seller must provide a contract of carriage on "usual terms"[23]. Whether deck stowage is a usual term or not is to be determined in view of the particular nature of each cargo and its packing. Deck stowage is, I believe, in principle an inappropriate method of transport for all sort of cargoes, save for containerised goods, which are usually carried on deck. So, a shipping document stating that cargo is actually, or may be, carried on deck will be bad tender, if deck stowage is not usual for that particular cargo. However, should a shipping document does not expressly allow carriage on deck, and the carrier, in breach of his contract, carries cargo on deck, this, I believe, does not give the buyer any action against the seller, but merely an action against the carrier[24]. The seller has performed his contractual obligations under the contract of sale by providing a contract of carriage on usual terms. Should the carrier be found in breach of the terms of this contract, this should not affect the seller, who has committed no breach himself, neither has he guaranteed the obligations of the carrier. Moreover, given the ade-

---

[21] I.e. *Patras First Instance Court 1395/1964*, *EEmpD* 1965, 386, which takes the opposite view; the opposite view is also taken by at least one legal commentator, namely Deloukas, *supra*, 343.

[22] *Piraeus First Instance Court 921/1965*, *EEmpD* 1965, 365; *Patras First Instance Court 4845/1962*, *EEmpD* 1963, 232; *Piraeus First Instance Court 5745/1967*, *EEmpD* 1968, 254. This seems also to be the view under article 22 para 1 of French Law 66-402/18-6-1966.

[23] This is the position under Greek law also, even if the parties have not incorporated INCOTERMS into their agreement, see G. Simitis, *Η αγοραπωλησία τσιφ* [=The contract of sale on *cif* terms] (Athens 1927) 33-34; under English law see Sasson, *Cif & Fob Contracts* (3rd ed., 1984, Stevens & Sons, London) para 93; Debattista, *supra*, 140.

[24] The opposite view seems to prevail under English law, see Benjamin's, *supra*, para. 1537; however see also Debattista, *supra*, 149, who criticizes the view adopted by the editors of Benjamin.

quate protection granted by the law in case of deck stowage, it seems that the seller has provided the buyer with continuous documentary coverage by tendering a document not allowing deck stowage[25].

b. Under the letter of credit

The new ICC rules on letters of credit (UCP 500) expressly deal with "deck stowage" clauses in article 31. According to this article, only shipping documents which indicate that cargo is or will actually be carried on deck are bad tender (unless the credit expressly permits such clauses), while clauses granting liberty to carry on deck are acceptable.

Should our observation made above (that is, that a shipping document granting liberty to stow on deck constitutes bad tender under the contract of sale, when it is not usual for the particular cargo, to which such a document relates, to be stowed on deck) be correct, then it seems that there exists a controversy between the contract of sale and the letter of credit as to whether a shipping document authorising deck stowage is good or bad tender (bad tender under the contract of sale, but good tender under the letter of credit). This means that, should the buyer wishes to safeguard that the seller will not obtain payment under the letter of credit by tendering a shipping document that constitutes bad tender under the contract of sale in that it grants liberty to stow on deck, he should not rely on UCP alone, but, instead, he should expressly agree with the issuing bank that the documents to be tendered should not grant such liberty[26].

3. Transshipment clauses

a. Under the sale contract

According to article 113 of the Greek Code of Private Maritime Law the carrier is obliged to effect the carriage with the agreed ship and is not allowed to transship the goods, unless transshipment is made necessary by some inevitable cause. When transshipment is to take place, "through bills of lading" are usually used in the Greek shipping mar-

---

[25] See Ch. Chrissanthis, *supra* note 18.

[26] *Ibid*. It has also been proposed that when the credit expressly prohibits carriage on deck, the documents to be tendered under the credit should clearly state that cargo is being carried under deck; according to this opinion, the absence of a clause granting liberty to stow on deck does not suffice to render the documents good tender, see R. Jack, *Documentary Credits* (1991, Butterworths, London) 177; Gutteridge & Megrah, *The law of bankers commercial credits* (7th ed.) 156. This opinion, however, seems to be quite extreme.

ket. The Greek Code, however, does not deal with such bills of lading. In Greek legal literature[27] it has been strongly supported that the carrier who issues a "through bill of lading" undertakes responsibility for the entire voyage, including the parts of transport not performed by him. The liability of the carrier may be limited to the part of transport performed by him, only if the bill of lading identifies on its face all the carriers involved, as well as the specific part of the voyage that each carrier undertakes. So, it seems that, under Greek law, in case of transshipment, a bill of lading identifying the final destination of the cargo is a "through" one and renders the carrier who issued it liable for the whole part of the voyage, while a tackle to tackle bill of lading needs to identify all the carriers involved and the particular part of transport for which each one is responsible[28].

On this basis, one may argue that tender of a "through bill of lading" stating that goods will or may be transshipped raises no problems under the contract of sale, since it provides the buyer with continuous documentary coverage under private maritime law, unless of course the contract of sale expressly prohibits transshipment. Tender of a "tackle-to-tackle bill of lading", however, stating that the goods will be transshipped, or granting such a liberty, will only be good tender if the contract of sale expressly allows transshipment without tendering a "through bill of lading". When the sale contract allows transshipment without any further specification as to the bill of lading, only a "through bill of lading" should constitute good tender, since only such a document provides continuous documentary coverage.

b. Under the letter of credit

The ICC rules on letters of credit adopt a favourable attitude towards transshipment clauses. However, there seems to be some inconsistency in the relevant provisions of UCP 500. This inconsistency is due to the fact that the rules do not seem to fully take into account the distinction between "through" and "tackle-to-tackle bills of lading" and the resulting differentiation of the documentary coverage granted to the buyer. According to article 23 para. C of UCP 500, when the credit does not expressly prohibits transshipment (this case seems to include the possibilities that the credit either allows transshipment, or is silent on this matter) a "through bill of lading" is a good tender. How-

---

[27] D.I. Markianos Σχόλιο στην απόφαση του Χανσεατικού Εφετείου του Αμβούργου της 5-3-1957 [=Note on the judgment of Hamburg Appeal Court dated 5-3-1957], *EEmpD* 1957, 433. It should be noted, however, that, surprisingly, there seems to exist no jurisprudence by the Greek courts on "through" and "tackle to tackle" bills of lading.

[28] See Korotzis, *supra*, 112-113; Ch. Stilianeas, Περί ειδικών ρητρών της φορτωτικής [=Bill of Lading Clauses], *HellDni* 1996, 974, 996.

ever, according to para D(ii) of same article, when the credit prohibits transshipment, a bill of lading granting liberty to transship is a good tender, even if not "through", in this case. I believe that this inconsistency should be overcome by proper interpretation of these provisions to the effect that a through bill of lading be required in the latter case also. This view is further reinforced by article 26B which deals with transshipment in case of a multimodal transport document. The same applies mutatis mutandis in connection to UCP 500 article 24 para. B, C, which deal with transshipment clause in sea waybills.

4. Freight collected at the port of discharge and other similar terms (i.e. fios, free out, cesser clauses)

a. Under the contract of sale

Under a *cif* sale contract the seller is responsible to conclude the contract of carriage at his expenses. Accordingly, a bill of lading containing a clause according to which freight is payable at the port of discharge, or a cesser clause is bad tender.

The Greek jurisprudence has dealt with in the past with some cases where the sale contract included the term "*cif* Piraeus - free out", or where the bill of lading tendered under a *cif* sale included the term "fios", or "free out".

Some judgments have held that terms like "fios" or "free out", either in the bill of lading or in the sale contract do not mean that the carrier is discharged from any liability for loss of or damage to cargo during unloading, but merely that unloading will be at the expenses of the consignee[29]. This seems to be the view adopted by the I.C.C. in the introductory note to INCOTERMS (Publication no. 460) which reads: "The mere fact that the seller might have procured a contract of carriage, e.g. under the charter party term "free out" whereby the carrier in the contract of carriage would be relieved from the discharging operations, does not necessarily mean that the risk and cost for such operations would fall upon the buyer under the contract of sale, since it might follow from the stipulations of the latter contract, or the custom of the port, that the contract of carriage procured by the seller should have included the discharging operations".

Some other judgments, however, have held that the coexistence in the same contract of terms like "fios" or "free out" with the term "cif" means that what the parties actually intended was to concluded a con-

---

[29] *Piraeus Multi-member First Instance Court 239/1980*, 9 *MLR* 117; *Piraeus Multimember First Instance Court 595/1980*, 9 *MLR* 119; *Piraeus Single-member First Instance Court 815/1991*, *EEmpD* 1992, 636; *Athens Court of Appeal 1292/1993* (unreported).

tract on arrival terms, rather than a contract whereby the seller would be relieved by delivering the cargo at the port of loading, particularly when these terms (i.e. "fios" or "free out") are followed by a specification as to the port of discharge[30]. Two of these judgments are of particular interest, since the Republic of Greece was the defendant. In both cases the Greek Republic had purchased yellow corn from the plaintiffs (Alfred Toepfer and Agro Company of Canada Limited). The contract of sale read as follows: "Cargo = Yellow Corn No. 2, Price = USA$ per cubic meter 177,54 c&f - free out, Port of Loading = East coast USA ports, or Mexican Gulf ports, or St. Lawrence river ports, Time of Loading = from 29-10-1980 until 9-11-1980, Place of Delivery = Piraeus, Greece, Quantity to be final at the port of discharge". The cargo arrived moulded and it seems that mouldiness was due to long delay during unloading, which resulted from congestion at the Piraeus port and lack of adequate means to discharge. The plaintiffs argued, *inter alia*, that these contracts were expressly stated to be sales on *cif* terms and that, accordingly, sellers were relieved from any liability as long as they had loaded cargo of the contractual quantity, quality and condition. The Republic of Greece replied that the term "free out" should prevail and that according to these terms the contracts were on arrival terms. Although the First Instance Court judgments were in favour of the defendants, the Appeal Court held that the contracts were meant to be on *cif* terms. The Appeal Court found that the term "free out" merely meant that the cost of discharging should fall on the buyer; since this term was not accompanied by a named port, it could not be taken into account so as to determine where and when the risk should pass to the buyer. Finally, the court held that the term "Place of Delivery = Piraeus" did not refer to the term "free out", but to the term immediately after it, that is to the term "Quantity to be final at the port of discharge". These two terms meant that the final quantity on which the total purchase price should be estimated would be the quantity actually delivered at the port of discharge.

b. Under the letter of credit

According to article 33(A) of UCP 500 "Unless otherwise stipulated on the Credit, or inconsistent with any of the documents presented under the Credit, banks will accept transport documents stating that freight or transportation charges have still to be paid". It is not clear, however, whether a bill of lading containing a clause according to which freight, or part thereof, is still to be paid at the port of dis-

[30] *Piraeus Multi-member First Instance Court 912/1973*, *EEmpD* 1974, 354; *Athens Multi-member First Instance Court 3026/1979*, 9 *MLR* 351; *Athens Court of Appeal 7894/1991* (unreported).

charge is inconsistent with a commercial invoice listing the purchase price on *cif* terms, that is including carriage's costs. This is probably the meaning of the phrase "unless ... inconsistent with any of the documents presented under the credit...".

5. Transport documents with port of loading / discharge other than the port of loading / discharge agreed in the sale contract

a. Under the contract of sale

It is certain that, when the parties have entered into a specific agreement as to the port of loading in the sale contract, a transport document indicating a different port is bad tender (*cif* INCOTERM 1990, article A.8). In such a case the buyer may reject not only the documents, but the goods also, since the port of loading seems to be part of the description of the purchased goods. The same applies *mutatis mutandis* as to the port of discharge[31].

b. Under the letter of credit

According to para. A(iii) of articles 23, 24, 25 and 26 of UCP 500, the transport document needs to indicate the actual ports of loading and discharge as stipulated in the credit. The failure of the buyer to open a letter of credit corresponding to the terms of the sale contract constitutes a breach under this latter agreement.

In a case currently pending before the Multimember First Instance Court of Athens a Greek bank has accepted a CMR transport document indicating the place of shipment stipulated in the credit (Rome, Italy). However, the carrier' s invoice, which was also presented to the bank, clearly states that actual shipment took place in Como and charges additional fares for change of place of shipment. The buyer, inter alia, claims that the bank was liable in knowingly accepting a transport document with false indications as to the place of shipment[32].

6. Incorporation of charter-party terms

According to article A(8) of the *cif* INCOTERM 1990, when a transport document incorporates charter-party terms, a copy of the charter-party must also be passed to the buyer. This seems to mean that ten-

---

[31] See the English case of *SIAT di dal Ferro v. Tradax Overseas SA*, [1980] 1 *Lloyd's Reports* 53.

[32] *Athens Multi-member First Instance Court 3248 / 1994* and memorandum submitted by K. Deloukas, counsel for the plaintiffs (unreported).

der of a bill of lading incorporating charter-party terms is good tender so long as the charter-party itself is also tendered, unless, of course, the contract of sale expressly prohibits tender of such a bill of lading.

However, according to UCP 500, article 23A(iv), a bill of lading under charter-party is bad tender, unless the credit expressly allows tender of such a document. Even in this latter case, though, it seems that according to UCP 500 article 25B, banks will not examine whether the terms of the charter-party to which the bill of lading refers correspond to the terms of the credit. One could further derive from this article that, when the credit calls for a bill of lading under charter-party, a copy of this charter-party need not to be presented to the banks at all. So, it is obvious that the position adopted by the UCP as to bills of lading under charter-parties do not tally with that of the *cif* INCOTERM 1990.

III. Demurrage clauses

According to the introductory note to INCOTERMS 1990 "Charter-party terms are usually more specific with respect to costs of loading and discharge and the time available for these operations (so called "demurrage" provisions). Parties to contracts of sale are advised to consider this problem by specific stipulations in their contracts of sale, so that it is made clear as exactly as possible how much time would be available for the seller to load the goods on a ship or other means of conveyance provided by the buyer and for the buyer to receive the goods from the carrier at destination and further to specify to which extent the seller would have to bear the risk and cost of loading operations under the "F" terms and discharging operations under the "C" terms"[33].

This latter issue was discussed in a recent judgment of the Appeal Court of Athens in the case of *Agro Company of Canada Limited v. The Republic of Greece*[34]. In this case stipulation on laytime and demurrage differed in the *cif* contract of sale and the charter-party entered into between sellers, as charters, and shipowners. More specifically the charter-party provided for unloading rate of 1,500 L/T per day, while the sale contract provided for a rate of 1,500 M/T per day (1 M/T = 1,000 kgr. - 1 L/T = 2,240 libber, or 1,016 kgr.). Further, the charter-party provided that lighterage time will be deducted from unloading time, while the sale contract was interpreted to provided that laytime will not begin to count, unless lighterage has been fully completed. The dispute between sellers, as charterers, and shipowners

[33] INCOTERMS 1990, ICC Publication no. 460, at 32.

[34] *Athens Court of Court 1292/1993* (unreported).

as to demurrage was referred to London arbitration. The Arbitrator found that laytime began to count on the 7th of November and that demurrage began to count on the 10th of December. The Appeal Court of Athens, however, dealing with the dispute as to demurrage between sellers and buyers, decided that on the basis of the stipulations of the contract of sale laytime begun to count on the 28th of November and that demurrage begun to count on the 29th of December. This resulted to an amount of about US$ 200.000 that the sellers paid to shipowners as demurrage money under the charter-party, but were unable to reimburse against the buyers under the contract of sale. One should conclude from this judgment that demurrage clauses in contracts of sale should better be drafted in the form of an indemnity, rather than in the form of autonomous and independent from the contract of carriage agreements.

IV. Delivery of Cargo without production of Bill of Lading

Delivery of cargo without production of bill of lading, on the basis of a letter of indemnity to the carrier, may cause serious problems to the bank that has opened a letter of credit to finance the purchase of that cargo.

A case of this type was dealt with by the Piraeus courts in 1989. A cargo of crude oil was purchased by *Veba Oil GmbH* (Veba) from *OMV of Libya Ltd* (OMV). This cargo was subsequently sold in transit to *Delta Oil Overseas Inc.* (Delta). This latter purchase was financed by a letter of credit opened by *Banque Compafina* in favour of *Veba*. The cargo was loaded on board the vessel ALPHA SEA owed by *Millport Maritime Ltd* and chartered by *Delta*. The bill of lading was issued to the order of *OMV* and was subsequently endorsed in transit to *Veba* and then to *Banque Compafina*. While the vessel was travelling to Genoa where it was scheduled to deliver the cargo to *Delta*, *Delta* being the charterer of the vessel instructed the master to deliver the cargo to *Gat Oil Suisse SA* on the basis of a letter of indemnity to the shipowners and without production of bill of lading (which by that time was in the hands of the bank). This was not to the knowledge of *Banque Compafina* that had opened the letter of credit and relied on its pledge over the bill of lading as security for the credit it had advanced to *Delta*. As a result the pledge of the bank was rendered worthless.

Banque Compafina applied for provisional arrest of vessel ALPHA SEA on the basis that delivery of the cargo without production of a bill of lading and on the basis of a letter if indemnity only was contrary to article 173 of the Greek Code of Private Maritime Law, according to which the carrier is obliged to deliver the cargo only on the production

of a bill of lading.

Shipowners of vessel ALPHA SEA argued first that the bank had no title to sue, since it had not acquired full property over the cargo, but only a security interest, and second that delivery on the basis of a letter of indemnity is common maritime practice nowadays, particularly when the goods arrive to the port of discharge before the bill of lading.

The court[35] found in favour of the bank and rejected both arguments of the shipowners. As to the first argument it held that, although the bank did not acquire full property over the cargo, it became a pledgee from the moment it paid to the beneficiary the proceeds of the letter of credit and it had title to sue in this capacity. As to the second argument the court implied that the practice of delivering the cargo on the basis of a letter of indemnity is used at the risk of the shipowners and that, even if the cargo arrives to the destination port before the bill of lading, the carrier is obliged under article 131 of the Greek Code of Private Maritime Law to discharge and deposit the cargo with a safe warehouse[36].

This case did not go beyond summary proceedings, since it was finally settled extrajudicially. It is an interesting point, however, that after the judgment allowing provisional arrest of vessel ALPHA SEA had been issued, it somehow became apparent that, when the bill of lading was endorsed to the bank, the cargo had already been discharged and delivered to *Gat Oil Suisse SA*. This point was not brought to the attention of the court and could possibly have a great impact on its judgment, since, after delivery of the goods to the person entitled to obtain them (as opposed to discharge of the goods alone), the bill of lading ceases to be a document of title[37].

V. Conclusion

Shipping documents and contractual clauses therein, demurrage clauses and the feature of the bill of lading as a document of title enti-

---

[35] *Piraeus Single-member First Instance Court 138/1989, EEmpD* 1990, 695.

[36] For a similar case under English law see *Sze Hai Tong Bank v. Rambler Cycle* (The Glengarry), [1959] AC 577, PC and *Enichem Anic SpA v. Ampelos Shipping Co Ltd* (The Delphini) [1988] 2 *Lloyd's Reports* 599, affirmed by the Court of Appeals (1989) *Times*, 11 August 1989.

[37] Under English law this rule has been lead down by the case of *Enichem Anic SpA v. Ampelos Shipping Co Ltd* (The Delphini), *supra*; for some older cases on this matter see *Barclays Bank v. Customs & Excise* [1963] 1 *Lloyd's Reports*, 81, by Lord Justice Diplock, quoting the case of *Barber v. Meyerstein* (1870) LR, 4 HL 317; J.F. Wilson, *Carriage of Goods by Sea* (Pitman, London 1988) 145; the position is the same under Greek law too. So, transfer of property or creation of a security interest over the goods by reason of endorsement and delivery is not possible after such goods have already been discharged at destination port and delivered to the right person.

tling its holder to demand delivery of the cargo are the corner points of the contract of sale, the contract of carriage and the letter of credit in international trade.

As to shipping documents themselves, one should conclude that, under the current status of the law and international trade usages, such documents need to be in the form of a negotiable instrument. With regard to recent developments of English law which, by virtue of the *Carriage of Goods by Sea Act* 1992, grants rights of suit in contract to holders of non-negotiable documents, one should point out that this development does not by itself change the situation; for negotiability, in addition to rights of suit in contract, allows the buyer to acquire property of better title, to raise finance by constituting a pledge, or to resell the goods in transit by endorsement and delivery of the bill of lading.

As to contractual clauses contained in shipping documents, one should conclude that UCP 500 establish a more favourable legal regime for such clause than INCOTERMS 1990 and the law of the contract of sale. This inconsistency calls for the attention of contracting parties, who should make additional contractual stipulations, especially in the context of the letter of credit.

As to demurrage clauses, the current international practice, according to which the seller and the buyer enter into independent agreements as to demurrage in the contract of sale does not prove to provide adequate protection. Such clauses should better be drafted in the form of an indemnity, so that they take account of the relevant arrangements in the contract of carriage.

As to delivery of cargo without production of the bill of lading, one should conclude that this increasingly expanding practice put banks financing international trade in an unsafe position and threatens to cause destruction to the very traditional basis of international trade finance. Accordingly, efforts should be made towards obliteration of such practice.