150 YEARS 1872-2022
The Swedish Club

BILLS OF LADING

Sea waybills

Executive summary

- Sea waybills are transportation documents containing or evidencing a contract for the carriage of goods by sea.
- Sea waybills are not documents of title and the Hague and Hague-Visby Rules do not normally apply to them.
- Delivery of the goods can generally be made to the person named as the consignee or receiver without requiring presentation of the waybill.
- Sea waybills cannot generally be used by carriers as substitutes for bills of lading without explicit agreement from the shipper.
- Carriers should ensure that they have robust systems for checking the identity of receivers when claiming delivery of their goods.

A. Who is this article intended for?
This article is written with the member, in-house claims teams or legal counsel in mind and anyone else involved in sea waybills.

For the more practical aspects we refer to the Club's publication *'Practical Guide: Sea waybills'* and recommend that the two be read and considered together.

B. What is a sea waybill?
A sea waybill is a form of transportation document issued by a carrier, which contains or evidences a contract for the carriage of goods by sea.

That contract consists of an undertaking given by the carrier in favour of a shipper, to deliver the cargo to the person specified as the named consignee.

Sea waybills are typically used as a substitute for issuing bills of lading for a range of practical and commercial reasons. However, although sea waybills and bills of lading share common characteristics, they also differ in certain key respects, such that a sea waybill cannot be viewed as a direct replacement.

It is important to be aware that a carrier cannot impose the issue of a sea waybill on a shipper where the shipper's contractual expectation is that a bill of lading will be issued in respect of the carriage of his goods.

A carrier's printed form may look very similar to a bill of lading, but it will generally have distinguishing features – most often the phrase 'sea waybill' rather than 'bill of lading'.

Written in collaboration with Ince – with a special thanks to Joanna Steele, Partner, Paul Griffiths, Partner and Joshua Thomson, Associate

Frequently the sea waybill will also contain terms on its face making it clear that delivery of the goods covered by the waybill will be made to the named consignee on production of proper proof of identity but without any requirement to produce an original or copy of the sea waybill. A term to this effect is acceptable from the point of view of the P&I cover.

C. A receipt for goods

In a similar manner to a bill of lading, a waybill acts as a receipt for the goods shipped, and may be issued as 'clean', or appropriately 'claused', in the same way a bill of lading may be.

Indeed, a Master's duty to clause a waybill - should the cargo not appear in apparent good order and condition - is likely to be similar to the duty under a traditional bill of lading.

Waybills are frequently issued on a 'received for shipment' basis.

D. A sea waybill is not a document of title

One of the fundamental differences between bills of lading and sea waybills is that the sea waybill is not intended to act as or regarded as a document of title. A sea waybill is non-transferable in the sense that it cannot be endorsed to a third party and is thus non-negotiable.

Unlike bills of lading, sea waybills do not perform a role in the buying and selling of goods in international trade and are not suitable for use in transactions which require the use of Letters of Credit.

Yet, the shipper under a sea waybill is entitled to redirect the goods by ordering the carrier to deliver them to someone other than the named consignee - although the particular terms of the waybill may exclude or restrict this right.

Generally speaking, therefore - and unlike bills of lading - waybills are not issued in sets of three. This is because they are not intended to be negotiated or transferred.

It is not necessary for the named consignee to produce the original waybill at the discharge port in order to take delivery of the cargo. Rather, all that is required by the carrier is sufficient proof of the receiver's identity.

E. Legal consequences of a waybill

Neither the Hague nor Hague-Visby Rules (the 'Rules') are considered to apply to waybills in the strict sense[1]. This follows from the fact that sea waybills are not generally deemed to constitute a document of title, so they do not fall within the definition of a 'bill of lading or any similar document of title' under Article 1(1)(b) of the Rules. On this basis, a sea waybill would not constitute a document to which the Rules applies compulsorily by virtue of Article X.

The Carriage of Goods by Sea Act 1971 - which gives the Hague-Visby Rules the force of law in the UK - is similarly restrictive, although the effect of section 1(6)(b) is to allow for the possibility that a waybill might provide for the Hague-Visby Rules to apply 'as if it were a bill of lading'. In that case, they would be given the force of law, but even then, the Act specifically disapplies the 'conclusive evidence' provision found in Article III rule 4 of the Hague-Visby Rules.

Whilst this particular device may not be seen very often, nevertheless, carriers' waybill terms commonly refer to and incorporate some or all of the Rules. More often than not, therefore, claims under waybills will be governed by the Rules as a matter of contract, but it will be important to check whether and to what extent any particular provisions of the Rules form part of the contract.

Carriage of Goods by Sea Act 1992

By contrast, a sea waybill is a shipping document to which much of the Carriage of Goods by Sea Act 1992 ('COGSA 92') applies by virtue of s.1(1)(b), and as more specifically defined by s.1(3).

COGSA 92 provides a statutory mechanism for the transfer of the rights between the original contracting parties – shipper and carrier – to the consignee. Sections 2(1) and 2(4) apply to waybills in terms of the vesting of rights of suit as against the carrier in favour of the receiver of the goods.

However, unlike the position in relation to bills of lading - which provides for the rights of suit of the original shipper to be extinguished when the bill is transferred - Section 2(5) preserves the rights of the original shipper. This gives effect to the principle that the shipper retains a right to redirect the goods.

Similarly, COGSA 92 provides for the transfer of liabilities by virtue of s.3(1): once the consignee takes or demands delivery of the goods or makes a claim under the waybill they shall become subject to the same liabilities under the waybill as if they had been a party to that waybill.

It should be noted that the statutory presumption of the shipment or receipt for shipment of goods introduced by s.4 of COGSA 92 does not apply to waybills.

[1] Bills of Lading, 3rd Edition, by Sir Richard Aikens, Richard Lord QC, Michael Bools QC, Michael Bolding, Kian Sing Toh SC, (Informa Law, 2020)

F. Practical considerations in relation to sea waybills

- Waybills avoid the inconvenience to the consignee of having to wait for the bill of lading to be physically transmitted into their charge before enabling them to take delivery of the cargo at the discharge port. This is of particular value in the short sea trades.

- The shipper/consignor has the right to vary their delivery instructions to the carrier under the waybill at any time whilst the goods are in transit. On the other hand, it may be more difficult to resolve confusion at the discharge port if there is a difficulty in identifying the consignee or if there is uncertainty in relation to any instructions given to the carrier to redirect delivery.

- Carriers should have in place suitable systems for ascertaining the identity of the receiver of cargoes carried under waybills and should also ensure that their waybill terms provide a system for responding to any request from the shipper for the redirection of the goods to someone other than the named consignee.

- A sea waybill cannot be negotiated or endorsed to a third party. This means that it is not a transport document which can be used to facilitate the traditional usage of a Letter of Credit in a commercial sale contract. A waybill may be all that is required where the document is not required as part of a commercial sale contract conducted at 'arms length'. Examples are where the cargo shipped may simply be consigned to the shipper's associated company or foreign branch, or the cargo will not be changing hands during the course of the voyage.

    1. The contractual terms of carriage may be free from the statutory control of the Hague-Visby Rules, giving the parties wider autonomy to agree upon the scope of their respective rights and obligations.
    2. Cargo interests may find themselves bound by terms less favourable than those which might otherwise have been applicable by virtue of the Rules should a bill of lading have been issued/agreed.

G. P&I cover - sea waybills

The terms of standard P&I cover have the effect of restricting the carrier's freedom of contract as it is a condition of cover that carriage terms agreed should not impose a higher liability on the member than would follow from the Rules. There is nothing, however, that prevents the member from seeking to contract on less onerous terms than the Rules provide. One example we have seen is the application of lower package or weight limitation provisions than those provided for in the Hague or Hague-Visby rules. How or whether this may be achieved is beyond the scope of this article.