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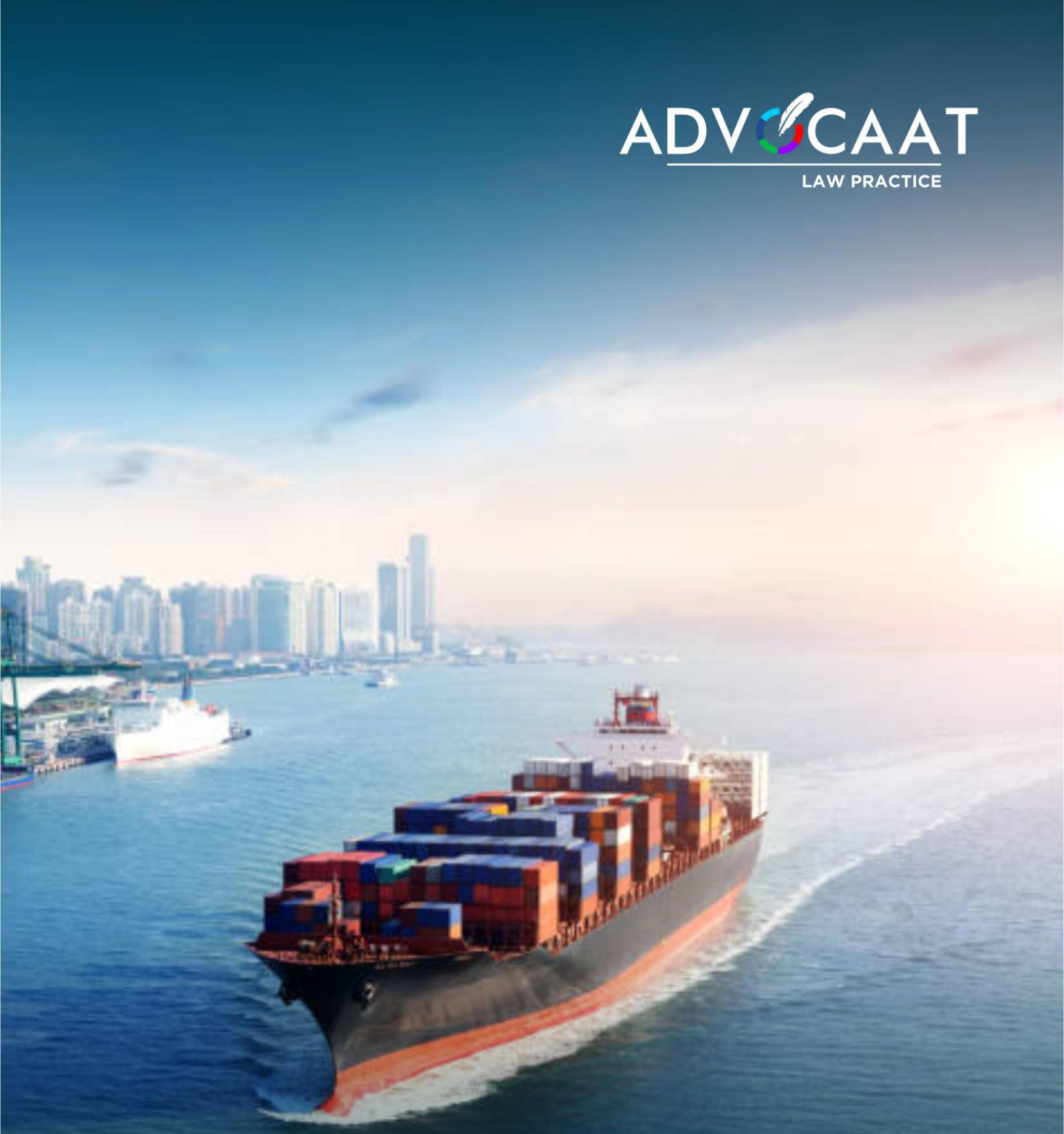

WHEN YOUR CARGO IS NOT YOUR OWN:

Liens, Incorporation of Terms, and the Limits of Title in Maritime Trade

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Imagine you are an importer who has paid for goods in full, whose vessel has duly arrived, and whose documentation is entirely in order, only to find your cargo detained at the port because of a debt owed by the charterer, a party with whom you have no contractual relationship whatsoever. This is not a rare occurrence. It is a foreseeable consequence of how shipping contracts work, and it can happen to any cargo owner who has not carefully examined the fine print on their shipping documents.

A consignee who has paid in full, holds the bill of lading, and has good title to the goods can still have their cargo detained for a debt they did not incur. This article explains the doctrine of privity, how the doctrine of incorporation can bind a consignee to terms they never agreed to, why the documents a cargo owner relies on for protection offer less security than they appear to, and what importers, exporters, traders, and their financiers can do to close that gap before it becomes a problem at the port.

PRIVITY OF CONTRACT: THE DOCTRINE AND ITS EXCEPTIONS

The doctrine of privity of contract provides that a contract binds only those who are party to it. Nigerian courts have consistently upheld this principle, while recognising its established exceptions: agency, assignment, and in certain circumstances, equity where a contract is created for the benefit of a third party.

In maritime trade, the courts have recognised an important exception to this principle. A consignee or endorsee to whom property in the goods passes upon or by reason of such consignment or endorsement has all rights of suit transferred and vested in them, as if the contract in the bill of lading had been made with them directly. However, this right is not automatic as the court will look beyond the formal endorsement and satisfy itself, by examining evidence (such as the contractual provisions and related facts), that property has actually passed as a matter of mixed fact and law.

THE CHARTERPARTY, THE BILL OF LADING, AND THE DOCTRINE OF INCORPORATION

A typical shipping transaction involves three main players. The shipowner owns and operates the vessel. The charterer hires the vessel under an agreement called a charterparty, which sets out the terms of hire: freight rates, how long loading and discharge will take, penalties for delays, and which country's courts or arbitration panels will handle disputes. The consignee is the person at the receiving end, usually the buyer, who holds the bill of lading.

The bill of lading is a critical document. It is a receipt from the shipowner confirming the goods are on board. It is evidence of the contract of carriage. And it is a document of title, meaning that whoever holds it is entitled to take delivery of the goods. In Nigeria, admiralty matters fall under the exclusive jurisdiction of the Federal High Court by virtue of section 251(1)(g) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), with the Admiralty Jurisdiction Act, 1991 providing the substantive legal framework and the Admiralty Jurisdiction Procedure Rules, 2023 governing how cases are conducted.

The consignee, though not a party to the charterparty and having played no role in negotiating its terms, may nonetheless find itself bound by those very terms where they have been incorporated into the bill of lading. This is the doctrine of incorporation, and it is where the real commercial risk lies.

Incorporation is the process by which the terms of the charterparty are imported into the bill of lading through an incorporation clause, usually printed in small text on the reverse of the document. A common version reads:

> *"All terms and conditions, liberties and exceptions of the Charter Party dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."*

This clause is often overlooked during the review of shipping documentation, making it essential that it is identified and understood before the bill of lading is accepted. Where incorporation is effective, those charterparty terms become part of the bill of lading contract. The consignee who accepts the bill of lading is taken to have accepted those terms as if they had personally agreed to them, even if they never saw the charterparty and had no idea what it contained.

Nigerian courts have confirmed this position: effective incorporation binds the consignee, and actual knowledge of the charterparty terms is not required. Where a clause is particularly onerous, such as an arbitration clause that sends disputes to a foreign country, courts require that it be clearly and specifically referenced before treating it as incorporated.

Once incorporated, the consequences can be significant. An incorporated lien clause entitles the shipowner to detain the cargo until debts under the charterparty are paid. What makes this particularly serious is that the shipowner's lien operates against the goods themselves, not against whoever owns them. It is a right that arises from physical possession, not from ownership. Payment, title, and clean documentation provide no protection against a validly exercised lien. The lien asks not who owns the cargo, but who physically possesses it. The debt may be owed entirely by the charterer, but it is the consignee's goods that are held as security for it.

Where the goods were purchased on CIF (cost, insurance and freight) terms, the consignee's exposure is compounded further. Under a CIF contract, the seller arranges and pays for the cost of the goods, insurance, and freight to the named destination, but risk in the goods passes to the buyer upon shipment. This means that by the time the vessel is detained, the buyer bears the risk of loss or damage to the cargo, holds title, has paid in full, and yet cannot obtain delivery because of a debt they did not incur. It is for this reason that the sale contract, rather than the bill of lading, is the more important instrument of protection.

Demurrage, meaning daily penalty charges for delays in loading or discharging the vessel, can also attach to the consignee even where the delay was caused entirely by the charterer, and these charges can accumulate to sums that exceed the value of the goods themselves.

An incorporated arbitration clause may further direct all disputes to a foreign jurisdiction under a foreign body of law. This is not without limits. Section 20 of the Admiralty Jurisdiction Act, 1991 renders void any agreement that purports to oust the jurisdiction of the Federal High Court in a range

of circumstances, including where the place of performance or delivery is in Nigeria, where any of the parties resides or has resided in Nigeria, or where the cargo is destined for Nigeria. Under the Arbitration and Mediation Act 2023, the court retains supervisory jurisdiction and may refer parties to arbitration where a valid agreement exists, suspending rather than extinguishing its jurisdiction. Even so, an incorporated foreign framework can complicate the consignee's legal position considerably.

Not every charterparty clause that is purportedly incorporated will be treated as binding on the consignee. Only clauses that are clearly worded and directly relevant to the shipment, carriage, and delivery of the goods will be given effect, and where an incorporated term conflicts with an express term in the bill of lading, the bill of lading term prevails. A consignee faced with a claim under an incorporated clause should therefore examine carefully whether that clause was incorporated at all, whether it was clearly worded, whether it is directly relevant to the carriage of the goods, and whether adequate notice was given. The courts will not give effect to onerous obligations imposed on a consignee without adequate notice, and where any of those conditions is not met, the clause will not bind.

PROTECTIVE MEASURES FOR CARGO INTERESTS

The risks described in this article are real, but they are manageable if addressed at the right stage. The sale contract is the earliest and most effective point of intervention because title and payment provide no protection against a possessory lien once it is exercised. A consignee should negotiate warranties from the seller confirming that the vessel is free from liens that could affect delivery and that the charterparty contains no terms materially prejudicial to the consignee's interests. These warranties are necessary precisely because the consignee's own documentation will not protect them once a lien attaches and the only way to address that vulnerability is to make the seller contractually responsible for ensuring it does not arise. The sale contract should also include an indemnity from the seller against any loss arising from charterparty disputes to which the consignee is not a party, and where there is a direct relationship with the charterer, a corresponding indemnity should be obtained from them as well.

At the point of accepting the bill of lading, the conditions of carriage, usually printed on the reverse, should be read carefully. Where an incorporation clause exists, the consignee should obtain and review the charterparty before accepting the bill, paying particular attention to demurrage provisions, lien clauses, and any arbitration or governing law clauses. Where the charterparty is unavailable, the consignee should at minimum, seek written confirmation from the seller that the charterparty contains no lien or demurrage provisions capable of affecting delivery before accepting the bill of lading.

Where cargo has already been detained, prompt action is essential. A careful legal analysis of the incorporation clause may reveal that it is defective or does not extend to the specific claim being made, and where that is established, the shipowner may face liability for wrongful detention. Under Order 7 Rule 8 (1) of the Admiralty Jurisdiction Procedure Rules, 2023, a consignee may apply for a warrant of arrest without commencing a substantive action before the Federal High Court, where the

claim has already been commenced before a foreign court or by arbitration proceedings within or outside Nigeria.

It is also worth noting that not every arrest that ultimately fails will expose the arresting party to a damages claim. The threshold for wrongful arrest liability has been the subject of judicial and regulatory development and the position is not entirely settled. Under section 13(1) of the Admiralty Jurisdiction Act 1991, liability for wrongful arrest arises only where the arresting party acted unreasonably and without good cause in obtaining the arrest. Taken together, a consignee who arrests in good faith, on reasonable grounds, with good cause, lawfully, and without negligence will therefore be substantially protected from a counterclaim for damages, regardless of which formulation a court ultimately prefers.

CONCLUSION

A bill of lading is not just a receipt. It is a contract with real obligations attached, some of which may have been agreed between other parties before the document ever reached the consignee. An incorporation clause is not standard boilerplate to be ignored. It is a mechanism that can expose the consignee to demurrage charges, cargo detention for debts, and proceedings in foreign courts it did not choose.

Payment, title, and clean documentation are the things a cargo owner naturally relies on for protection. In a maritime transaction, none of them are enough. The shipowner's lien attaches to the goods, not to the person who owns them, and by the time cargo is detained at the port, the window for effective intervention has already passed. Protection in maritime trade is not built at the port. It is built at the negotiating table, in the sale contract, before the vessel is loaded and before there is anything for a lien to attach to.

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