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Some Maritime Terms Explained — Part 1

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Certain words and phrases are commonly found in marine insurance policies and maritime contracts, but may not be found in everyday parlance. Some have a long maritime history and others have arisen more recently as the result of court decisions in maritime cases. This multi-part series provides the background and meaning for some of those words and phrases.

Barratry

Barratry is a wrongful act willfully committed by a vessel's master or crew to the prejudice of the vessel's owner or charterer. It can be 1) an act committed by the master or crew involving a deliberate disobedience of the vessel owner's instructions; 2) an act committed by the master or crew for a dishonest or unlawful purpose; or 3) a violation of the duty of the master or crew to the vessel owner arising from gross negligence.

Barratry is a covered peril under a vessel's hull policy and the policy is not voided if, while committing barratry, the master or crew violates policy warranties. In *U.S. Fire Ins. Co. v. Cavanaugh* 732 F.2d 832 (11th Cir. 1984) Cavanaugh chartered his shrimp trawler to Ballard. Cavanaugh instructed Ballard about the 150-mile navigational limits in the vessel's hull policy. Ballard intentionally took the vessel 400 miles beyond the navigational limits where it ran aground and burned. The Eleventh Circuit affirmed the trial court's holding that 1) Ballard's decision to operate the vessel beyond the 150-mile navigational limit amounted to barratry and 2) the resulting loss was covered under the hull policy. It rejected the insurer's argument that the policy was void because of Ballard's breach of the navigational limits.

The term "barratry" is used in another legal, but not maritime, context. It is also defined as the practice of bringing repeated legal actions to harass someone.

Bills of Lading

Bills of lading are documents issued by a carrier or someone acting as a carrier in connection with the transportation of cargo. Bills of lading can serve three roles: as a receipt for the cargo, as a document of title, and as a contract of carriage. Bills of lading are either negotiable (also known as "order" bills of lading) or non-negotiable (also known as "straight" bills of lading).

Bills of lading may be issued for different types of carriage including ocean, air, rail, and truck. A bill of lading may cover more than one type of carriage for a particular shipment and when it does, it is an "intermodal" bill of lading. A bill of lading covering the entire transportation of a shipment from the point of origin to the final destination and applying to all carriers of the shipment even if they are not named in the bill of lading, is a "through" bill of lading.

A bill of lading may be described as "clean," which means there are no exceptions noted on it as to the condition or quantity of the cargo, or to the manner of packing or stowage. A "clean" bill of lading is prima facie evidence of the apparent good order and condition of the cargo when received by the carrier. When cargo is in a container or enclosed in another type of shipping unit such as a crate, a "clean" bill of lading is prima facie evidence only of the apparent good order and condition of the container or crate, not of the cargo itself.

A bill of lading may be described as "false" when it does not accurately state the facts about a shipment. For example, a bill of lading is "false" when it states a shipment has been laden on board a vessel but the shipment is still on the dock, or when it states a shipment is on board a particular vessel and it is not on that vessel. A bill of lading is also "false" when it does not contain any exceptions to the condition of the shipment and the shipment was damaged or



short when delivered to the carrier. When a carrier issues a "false" bill of lading that is relied upon by the cargo owner, the carrier may lose its defenses, including the ability to limit its liability.

Bills of lading serving as contracts of carriage by vessel to or from the United States in foreign trade, are mandatorily subject to COGSA, described below.

COGSA

The United States Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note, is most commonly known by its acronym, COGSA. COGSA was enacted by Congress in 1936 to govern the rights and duties of carriers and shippers of goods. It was based on an international convention regarding bills of lading known as the Hague Rules of 1924. Both COGSA and the Hague Rules addressed the efforts of carriers to exculpate themselves from cargo loss or damage, and attempted to strike a balance between the cargo owner and carrier interests. Most of the trading nations in the world have national legislation adopting the Hague Rules in some form.

By its terms, COGSA applies as a matter of law to contracts for the carriage of cargo to or from the United States in foreign trade. It does not apply to live animals, or cargo carried on deck and stated on the bill of lading to be carried on deck. By its terms, COGSA applies from the time the cargo is loaded to the vessel to the time it is discharged, otherwise known as "tackle to tackle". The shipper and carrier may agree to extend the application of COGSA to deck cargo and live animals. They may agree that COGSA applies while the cargo is in the carrier's custody but before it is loaded to the vessel and after it is discharged from the vessel. They may also agree COGSA will govern the liability of parties other than the carrier who are involved in the transportation of the cargo, such as stevedores and terminal operators.

COGSA sets forth the rights and duties of the cargo owner and carrier. Any term in a bill of lading that attempts to lessen the carrier's obligations below the standards set forth in COGSA, is void. Under COGSA, a carrier has a duty to exercise due diligence to make the carrying vessel seaworthy. It must also properly load, stow, carry, and discharge the cargo. COGSA exempts a carrier from liability for cargo loss or damage caused by sixteen enumerated perils and a "catch-all" peril of all other causes without the carrier's fault or privity or that of its agents or servants.

Under COGSA a carrier may limit its liability for cargo loss and damage to a minimum of \$500 per package or if the goods are not shipped in packages, to \$500 per customary freight unit, which is the unit actually used to calculate the freight. COGSA does not define the term "package". The absence of such definition has given rise to much litigation.

Demurrage

Demurrage is a late penalty. It is assessed when a voyage charterer delays in loading or discharging a vessel beyond the "laytime" or the time allotted for such operations. It compensates the vessel owner for operating expenses incurred during the delay and the potential loss of revenue due to its inability to charter the vessel while delayed. It also refers to the daily charge assessed when a shipping container is not returned to the carrier in a timely fashion, that is, before the expiration of the "free time".

Deviation

A deviation is a variation in the conduct of a vessel that exposes the cargo to greater risk of loss or damage. Historically, deviations were geographically based. They occurred when a vessel left the contracted for or customary voyage to stop at another port of call to discharge



the cargo, or to take another route to the destination, or to save lives or property at sea.

The concept of deviation has, over the years, been expanded to include any variation in the performance of a contract of carriage whereby the risk of loss or damage to the cargo may be increased. It can involve handling of the cargo in a way that is not specified in the contract but exposes the cargo to greater risk of loss or damage. For example, the stowage of cargo on deck when a "clean" bill of lading has been issued is a deviation.

A deviation may be reasonable or unreasonable. When a vessel leaves its intended route to aid another vessel in distress, the deviation is usually held reasonable. When cargo is stowed on deck without the shipper's approval and in the absence of a port custom for stowing such cargo on deck, the deviation is usually held unreasonable. An unreasonable deviation causes the carrier to lose its contractual defenses including COGSA defenses, and the carrier becomes an insurer of the goods. An unreasonable deviation also precludes the carrier from limiting its liability for loss of or damage to the cargo.

The next part of this series will continue the look at some words and phrases routinely found in the maritime context.

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