

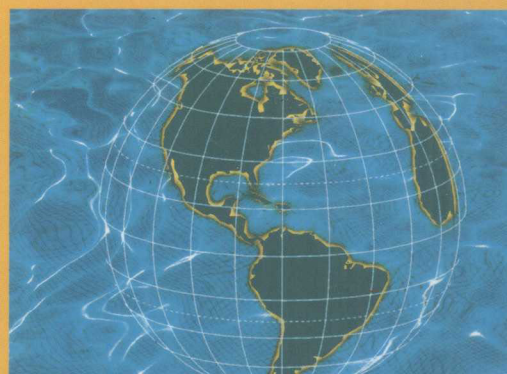


ICS

INSTITUTE OF CHARTERED
SHIPBROKERS

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Legal Principles in Shipping Business



LEGAL PRINCIPLES IN SHIPPING BUSINESS



TutorShip

**The Distance Learning Programme
of
The Institute of Chartered Shipbrokers**



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Published by

Witherby Seamanship International Ltd

4 Dunlop Square, Livingston,
Edinburgh, EH54 8SB,
Scotland, UK

Tel No: +44(0)1506 463 227

Fax No: +44(0)1506 468 999

Email: info@emailws.com

Web: www.witherbyseamanship.com

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LEGAL PRINCIPLES IN SHIPPING BUSINESS

SYLLABUS

GENERAL PRINCIPLES

English Law is the most widely used law in shipping business. Nearly all practical documents of an international nature involved with shipping business are based on English Law, therefore, students must thoroughly understand concepts of common law, case law and precedent and how these contrast with statute law (knowledge of specific national statutes is not required).

Be aware of the fact that in many countries case law does not apply as all law is codified.

Thoroughly understand statutes of limitations and time bars and their impact in shipping business. Be aware of those time bars imposed by statutes or international conventions and those which are contractually agreed.

Be aware of the difference between civil and criminal courts and of their structure, methods of appeal and choice of forum.

Thoroughly understand the role of arbitration in dispute resolution.

Understand the different services provided by maritime arbitrators including short form arbitration and mediation.

Be aware of the main arbitration centres especially, London, New York and Paris and their respective maritime arbitration associations.

Thoroughly understand the advantages and disadvantages of arbitration v. litigation.

Be aware of the impact of European law and understand the potential for conflict with national law.

CONTRACT

Thoroughly understand the principles of the law of contract especially the essential ingredients of offer, acceptance, consideration and legality. Understand how and when a contract comes into existence.

Understand how a contract may be broken and the circumstances under which it may be voided and how *force majeure* may prevent its performance.

Understand how some breaches may frustrate a contract completely whereas others may require the contract to be fulfilled with compensation for the breach.

Understand how losses may be recovered.

AGENCY

Thoroughly understand general principles of law of agency and how an agency may be created.

Be aware of the difference between general agency, specific agency, and agents of necessity.

Understand the duties and rights of an agent or broker under each type of agency.

Understand the two different forms of authority; express and implied.

Understand the responsibilities of the principal to the agent. Understand the agent's right to remuneration and the procedures available to ensure payment.

Understand the authority of an agent in concluding contracts with third parties on behalf of the principal including the importance of ensuring that the agent's role is clearly defined.

Thoroughly understand the consequences of breach of warranty of authority.

Be aware of the procedures for terminating an agency.

TORT

Thoroughly understand the precise nature of tort.

Understand the specific situations related to shipping including failure of a duty of care; ie negligence and contributory negligence, misrepresentation and vicarious liability outside a contractual situation.

Understand the tort of conversion including delivery of cargo to the wrong party and the tort of defamation.

Be aware of the differences between libel and slander.

Understand the remedy against tortfeasors and the limitations of compensation that may be obtained.

LAW OF CARRIAGE

Thoroughly understand the need for an internationally agreed framework of law governing carriage of goods by sea.

Understand the differences between the law involved in private carriage ie charter parties and common carriage ie liner bill of lading.

Understand the essential legal difference between voyage charter including consequent voyages and contracts of affreightment, time charters and demise (bareboat) charters.

Thoroughly understand the importance of "time" in charters particularly including the "arrived ship" and laytime.

In time charter thoroughly understand speed and consumption and "off-hire".

Be aware of the possibility of disputes over final voyage under time charters.

Thoroughly understand the role and functions of bill of lading, namely as a receipt (quantity and condition), evidence of a contract (not the contract itself) and as a document of title.

Understand the principal customary clauses in bill of lading including identity of carrier, Himalayas, protection clauses and clause paramount incorporating one of the international conventions for cargo liability.

Be aware of the customary clauses in bill of lading in respect of carriers and merchants rights and responsibilities.

Thoroughly understand the legal differences between combined transport bill of lading, through bill of lading and port-to-port bill of lading and difference and role of waybills.

Be aware of electronic alternatives to paper bill of lading.

Thoroughly understand the role and function of international conventions relating to cargo liability.

Thoroughly understand the principle liabilities and exclusion of liability contained in Hague Rules, Hague/Visby Rules and Hamburg Rules and the differences between the three conventions.

Understand the impact of the principle clauses relating to seaworthiness and limitations of liability.

Be aware of other additional rules ie UNCTAD/ICC Combined Transport Rules.

Be aware of current discussion to revise or replace these conventions.

Thoroughly understand the role of bill of lading acts relating to the endorsement and negotiability of the bill of lading as a document of title eg in UK Carriage of Goods by Sea Act (COGSA) 1992.

Be aware of the main areas from which bill of lading disputes arise; title; clean and claused documents; negotiability and liability.

Be aware of bill of lading problems relating to multi-modal transport arising from differing liability regimes applying to individual modes of transport.

Understand the carriers right to be paid freight for the carriage of cargo and his liens for non-payment.

Understand the right of the owner to receive hire for his vessel and remedies in the event of non-payment.

GENERAL AVERAGE

Thoroughly understand the precise nature of General Average and the particular circumstances leading to the declaration of General Average.

Understand the voluntary nature of the actual sacrifice being fundamental to the declaration of General Average.

Understand the manner in which all parties involved are obliged to contribute to losses suffered by any of the parties.

INTERNATIONAL CONVENTIONS

Be aware how international conventions are agreed and the process of ratification, their coming into force and incorporation into national legal systems.

Understand that international maritime conventions have a major impact on day-to-day shipping business.

Be aware of the key elements of the following conventions:

SOLAS

- Safety construction
- Fire protection and prevention
- Safety equipment and Life-saving appliances
- Radio communication
- Safety of navigation
- Carriage of dangerous goods (IMDG Code)
- Safety management (ISM Code)
- International Ship and Port Facilities Security (ISPS) Code

MARPOL

- Prevention of operational pollution.
- Prevention of oil cargo pollution
- Limitation of pollution following an incident

STCW

Standards of Training, Certification and Watchkeeping

Port State Control Convention

International Convention of Arrest of Sea-going Vessels

- Thoroughly understand
 - Hague Rules**
 - Hague/Visby Rules**
 - Hamburg Rules**
- See under Law of Carriage

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BASIC PRINCIPLES OF ENGLISH LAW

1.1 INTRODUCTION

In any sphere of business activity it is necessary to understand the applicable legal rules in order to be able to minimise the risk of problems arising and to be aware of what the position is when any problem does actually arise. This is especially so as it may become apparent during or after negotiations intended to bring about a commercial relationship, that the ingredients which create a 'commercial obligation' may not necessarily create a legal obligation. Thus, when faced with a possibility of a court action the parties may find that their legal position is vastly different from that which they supposed would result from their commercial relationship.

The aim of this text is, therefore, to introduce the reader to the main principles of law and to give a clear insight into the basic legal terminology, liabilities and remedies in connection with commercial agreements for the carriage of goods by sea.

Although different jurisdictions may have different legal structures and principles, this course is based upon **English Law** on the basis that the working of any system of law will be comprehensible if a good grasp of English law is obtained.

Of course, much shipping law is based on International Conventions which aim to create uniformity in all 'maritime' nations. Such law is then incorporated into several jurisdictions and thus English law will have corresponding and equivalent foreign provisions.

1.1.1 What is Law?

At this stage it is appropriate to consider what is actually understood by the phrases 'The Law'; "according to the Law"; it is in fact one of the hardest questions for any lawyer to answer because there is no one easy meaning, in fact no single answer.

Everyone recognises that a society has 'rules' and that all societies have their own set of rules. We can call these rules the legal system or, 'the law'. These legal rules have the following main purposes:

1. Rules prohibiting or compelling certain behaviour.
2. Rules relating to the compensation by one person to another for injury caused.
3. Rules relating to certain procedural issues, e.g. making of wills, contracts, the transfer of land.
4. Guidelines relating to punishment for those who break certain rules.
5. Administrative rules for the running of the country.
6. Rules regulating the legislature – the law making body.

But the concept of law is much more than this. It is concerned with both obligatory and optional behaviour; with authority: with morality and justice. Thus further delving into the initial question would lead into the vast topic of jurisprudence which is, broadly speaking, the science or philosophy of the law.

This book is not, however, the place to deal with jurisprudence. The aim of this text is to provide a practical and comprehensive knowledge of the legal principles and requirements

and obligations as are encountered in everyday business life, especially in relation to contracts for the carriage of goods by sea. It is sufficient to say that any practitioner who must tackle the law should be aware of its greater depth and intellectual potential. There is no such thing as having 'done the law'.

1.1.2 English Law

English law is a **Common Law** system, that is to say, the main body of law is contained in a set of legal principles and rules that are not set down in a formal codified manner but are extrapolated from previously made judicial decisions; in other words, the law is 'unenacted'. This type of system must be contrasted with 'Civil Law' systems, such as, for example, the French legal system, where the entire body of legal principles is contained in an enacted, codified law system.

Although the majority of legal principles are found in Common Law, English law does of course also contain many enacted laws in the form of Acts of Parliament

1.1.3 Types of Law

1. **Public Law** This is any area of law which governs the relationship between individuals and the State. Thus, when a person/company does not comply with a legal rule, that person will be dealt with by the State, i.e. on behalf of other members of the State. Of the areas of law which come within the Public Law category, most obvious is Criminal Law. If a person commits a criminal offence he will be prosecuted by the State. Other areas of law within this category include administrative and constitutional law.
2. **Private Law** This is any area of law which governs the relationship between one individual and another. In English law this is referred to as 'Civil' law and is frequently contrasted with Criminal law. Non-compliance/breach of a civil law principle is a 'wrong' against the person/property injured. Any right of action against the wrongdoer is only at the suit of the injured party; there is no outside intervention.

Use of the Phrase 'Civil Law'

Note carefully that the English use of the phrase 'Civil Law' is meant in contrast with Criminal Law. In other jurisdictions the phrase 'Civil Law' may mean the entire codified law of the State which includes principles relating to both criminal and non-criminal law.

Criminal Law

For this publication it is sufficient to appreciate that the effect of the Criminal Law is to prohibit individuals from conducting themselves in such a way as to be harmful to the community as a whole. To achieve this, the Criminal Law imposes various sanctions or penalties ranging from fines imposed for less serious crimes, to imprisonment for more heinous crimes.

Depending upon the perspective of the observer, the purposes of these sanctions may be seen as deterrents or as retribution or as reform.

Civil Law

The Civil Law by contrast is concerned with regulating relations between individuals in the principle areas of human conduct. It works by imposing certain special types of rules/principles of conduct which act both as a standard of behaviour and also as a means of resolving disputes when they arise.

Civil Law imposes obligations which regulate and control:

1. Agreements between individuals, i.e. contract.
2. The actions which individuals might take which may effect or cause harm or damage to others which is known as tort (the law of civil wrongs).

3. The ownership and types of property including real property, namely land, and the various possessory interests in such property. Property other than land is known as 'chattels'.

There are more specialised areas of law, which are built upon these basic rules of business and commercial law, including the specific law covering **carriage of goods by sea**.

1.2 SOURCES OF LAW

1.2.1 Introduction

It is clearly necessary to know from where the law derives so that, when confronted with the question of 'what is the law?' in a particular situation, we know where to look.

In English law there are basically two derivative sources of law, namely Case Law (or Common Law) and Legislation. The tools to discover and interpret that law are different, depending on which of the two sources of law we are concerned.

1.2.2 Common Law and Case Law

The Common Law was originally the 'word of the King' which was applied to all the country by appointed judges. These were the King's Council or CURIA REGIS. These judges would decide cases according to the legal principles laid down by the King and historically these sources of modern English law can be traced back to around 1066, after the Norman Conquest.

During the reign of Henry II (1154 – 1189) a permanent Royal Court was established, sitting in London and consisting of learned judges: this was known as the '**King's Bench**'. Judges were also commissioned by the King to travel around the country hearing cases. Each region would have its own circuit, and these judges became known as circuit judges. Thus the same legal principles were applied throughout the land. These were not enacted, i.e. not set down in any formal code.

1.2.3 Precedent

It can be seen that the development of the Common Law has depended upon the legal decisions of judges. The basic premise of the application of legal principles was that judges should not 'make' the law, but should apply existing principles. Similar cases should be treated alike in order to provide consistency and certainty to the law. The court should be impartial in order to ensure fairness. Hence the maxim that judges should 'stand by what has been decided' or '**stare decisis**'. This is the basis of judicial precedent whereby previous decisions are binding upon present cases.

Each case will comprise a judgement which is the reasoning of each judge involved and showing the basis on which he arrived at his judgement. This judgement may be long or short, depending upon the complexity of the case, and in appeal cases will consist of the reasoning of several judges. Even those who arrive at similar decisions may have varying reasons for so doing and thus it is necessary to know exactly what part of the judgement is actually binding upon subsequent cases. The actual precedent is the legal rule on which a court bases its decision, known as the **ratio decidendi** i.e. the legal reason for the decision.

In contrast with the *ratio decidendi* is the '**obiter dictum**'. This is the judge's expression of opinion when giving judgement but not essential to the decision and therefore without binding authority, although it may be considered as persuasive in nature, by reference, in subsequent cases.

Of course, the facts of a case may not always fit exactly within the rule established by a binding precedent. In this situation the judge must consider the most similar past cases and will then draw from a selection of case law to find or extend principles to deal with the new