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‘The Role of The Demise Clause in identifying the Carrier under Bills of Lading’

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I dedicate this dissertation to the Lord of Glory Jesus Christ, for by His perfect redemptive work accomplished for me, He has enabled me to accomplish all I have.

ACKNOWLEDGMENTS

My Gracious Redeemer, eternal shall be my thankfulness to You for through your death and victorious resurrection, I have found eternal life - I have found my all.

To Selwyn, thank you for your unconditional love, fervent prayer and intense faith which is constant in all I do, you are my most treasured blessing. To my parents Norman and Judy, I thank you for your support, love and committed prayer in all things; I honour you. To Elton, Desh, my family and friends, thank you for encouraging me with the hope to always persevere. To Reverend Andrew Harris, I thank you for imparting to me a divine treasury established in the Word of God which is the foundation of all knowledge. Thank you to Church of the Eternal Truth whose sincere prayer has strengthened me in completing this dissertation. To Sevani, thank you for your willingness without any reservation to help at a most crucial stage in writing. And to my supervisor Dusty-Lee Donnelly whose professionalism and guidance has been my driving force in writing, I thank you.

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Chapter One: Introduction

1.1. Context to the problem of identifying the carrier under a bill of lading containing a demise clause and/or identity of carrier clause

Contracts of affreightment, in one form or another govern most maritime trade agreements. They are contracts by which a shipowner or an agent makes an undertaking either to carry goods by sea, or to provide a vessel for such a purpose. A contract of affreightment may take various forms; the most common of which are charterparties, and contracts evidenced by a bill of lading. There are three main types of charterparties: voyage charterparties, time charterparties and demise charterparties.

For the purposes of this paper, we will look at the time charterparty. The time charterparty is a contract between a charterer and a shipowner or demise charterer for the exclusive use of cargo carrying space on board a vessel for a fixed period of time.¹ Where a vessel is under time charter, it frequently occurs that a cargo interest will find difficulty in identifying the correct party as the carrier when instituting action for loss or damage to cargo.

For the purposes of determining the identity of the carrier, the bill of lading has traditionally been of first importance. The issue in identifying the carrier under a bill of lading occurs where there is a conflict in the indicators, namely the stamped or printed words added by parties at the time of issuing the bill of lading, the pre-printed terms on the standard form such as the demise clause on the reverse side of the bill and; the mode of signature.² A bill of lading not clearly stipulating who the carrier is, leads to uncertainty as to who must be sued as carrier under the contract of carriage.³ This uncertainty results in cargo interests being forced to sue both the shipowner and the charterer or any other party who may fit the role of carrier, resulting in a multiplicity of unnecessary litigation and additional expenses incurred.⁴

¹ Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 588.

² R Aikens... et al *Bills of Lading* 1 ed (2006) 140.

³ N Gaskell...et al *Bills of Lading: Law and Contracts* 1 ed (2000) 83.

⁴ Gaskell (note 3 above; 85).

1.2. The bill of lading issued pursuant to a time charterparty agreement

Where cargo has been loaded on a time-chartered vessel, a distinction must be made between the contract of carriage and the time charter.⁵ The time charter is the contract concluded between the charterer and the shipowner or demise charterer “for the use of carrying capacity on board the vessel for a specified period of time”,⁶ whereas the contract of carriage is a contract concluded between the shipper and carrier to carry the goods.⁷

Under a time charterparty, bills of lading may be signed on behalf of the shipowner or on behalf of the charterer.⁸ A vessel that is time chartered is under the control of both the shipowner and the charterer. The shipowner is responsible for the navigational control of the vessel⁹ while the charterer controls the commercial and earning exploits of the vessel.¹⁰ Here, the shipowner carries out the voyage pursuant to the time charterer’s orders.¹¹ This indicates that the voyage of the vessel is performed in keeping with the shipowner’s responsibility to the charterer pursuant to (a) the time charterparty agreement, and (b) the charterer’s responsibility to the shipper for the carriage of goods.¹² In addition, the terms of the charterparty between the shipowner and the time charterer will have no bearing on the relationship between the shipper and the carrier unless these terms have been expressly included in the bill of lading contract.¹³

1.3. Background to the problem of identifying the carrier under a bill of lading containing a demise clause

1.3.1. What is the demise clause?

The demise clause provides that the voyage charterer or time charterer having issued a bill of lading is not a party to the contract of carriage evidenced by such bill of lading, and therefore cannot be held as the carrier in terms of national or international legislation.¹⁴ The clause is

⁵ C Pejovic ‘The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law (2000) 31 *Journal of Maritime Law and Commerce* 379, at 380.

⁶ R Force ...et al *Admiralty and Maritime law* (2004) Federal Judicial Center 52.

⁷ Pejovic C (note 5 above; 380).

⁸ Ibid.

⁹ Force (note 6 above; 52).

¹⁰ *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd (The Hill Harmony)*, 2001 A.C.1 638 (2001).

¹¹ Pejovic C (note 5 above; 381).

¹² Ibid.

¹³ J F Wilson *Carriage of Goods by Sea* 7 ed (2010) 7.

¹⁴ W Tetley ‘The Demise of the Demise Clause’ (1998) 44 *McGill Law Journal* 807, at 810.

said to perform two functions: firstly “it is a positive attempt to fix the shipowner with liability under the contract; [and] secondly, it removes a potential liability of a charterer.”¹⁵

The demise clause is ordinarily phrased in the following terms:

“If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything which appears to the contrary) the bill of lading shall take effect as a contract with the owner or demise charterer, as the case may be, as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.”

1.3.2. Origin of the demise clause; purpose for its incorporation in bills of lading; whether the purpose continues to exist in contemporary shipping trade

The origin of the demise clause may be found in early 20th century English jurisprudence.¹⁶ Prior to the existence of the demise clause, under English law - section 503 of the unamended Merchant Shipping Act 1894 only a shipowner was permitted to limit liability,¹⁷ whilst charterers were effectively excluded from the limitation of liability under the Act.¹⁸ According to section 503 of the 1894 Act, where damage or loss had been caused to cargo on board a vessel, a claim against the shipowner might be reduced, whereas a claim against a charterer might succeed for the total amount of damages proved.¹⁹ This principle was illustrated in the 1922 case of *Paterson, Zochonis v. Elder, Dempster*.²⁰ In this case, the charterers were held “fully liable for cargo loss” while the shipowners were excluded from liability in terms of section 503 of the Merchant Shipping Act 1894. South African law mirrored the English law position by enacting section 261 of the Merchant Shipping Act²¹ which allowed only shipowners to limit liability against loss or damage caused to cargo.

It became increasingly necessary for charterers to clarify that they were not the contracting carriers and that cargo interests ought to sue shipowners as contracting carriers.²² Time charterers therefore began to include the demise clause in their bills of lading which gave effect to a contract of carriage between the shipowner and holders of bills of lading for goods

¹⁵ Gaskell (note 3 above; 104).

¹⁶ R W Pritchett ‘The demise Clause in American Courts’ 1980 *Lloyd’s Mar. & Com. LQ* 387, at 387

¹⁷ Gaskell (note 3 above; 103).

¹⁸ Pritchett R W (note 16 above; 387).

¹⁹ Gaskell (note 3 above; 103).

²⁰ (1922) 12 *Lloyds* 1. *Law Rep.* 69

²¹ Act 57 of 1951

²² Gaskell (note 3 above; 104).

carried on board a time-chartered vessel.²³ This was the original purpose for which the demise clause had been created.²⁴

With the demise clause in place, it was envisaged that cargo interests would sue shipowners for loss or damage to goods. The shipowner would in turn rely on the indemnity from the charterer in terms of the charterparty agreement.²⁵

Section 71 of the Merchant Shipping Act of 1906 included demise charterers in the category of persons entitled to limit liability. This statutory limitation of liability was later extended to all charterers by Article 6 of the 1957 Limitation Convention. The provision was enacted in the Merchant Shipping Act of 1958, thereby causing the demise clause to become redundant in its purpose.²⁶ Article 1(2) of the 1976 Limitation Convention also makes provision for this limitation of liability, which is now enacted in Schedule 7 of the Merchant Shipping Act of 1995. In 1981, South African law followed suit by adding section 263 to the South African Merchant Shipping Act, extending the limitation of liability to charterers, managers, operators and persons possessing a ship. However, despite this change in legislation, charterers have failed to remove the demise clause from their bills of lading. Most liner bills of lading persist with inclusion of demise clauses on the reverse side of the bill.

Cargo interests may find procedural benefits in holding the shipowner liable in order to arrest the vessel as security for their claim, however difficulties may arise if the cargo interests lacks knowledge of the contractual terms for chartering the vessel.²⁷ Also, cargo interests often view the face of the bill to ascertain who the carrier is. With the demise clause carefully tucked away on the reverse side of the bill, difficulties arise in identifying the carrier and proper defendant to a cargo claim.²⁸

²³ Pritchett R W (note 16 above; 388).

²⁴ Gaskell (note 3 above; 104).

²⁵ Pritchett R W (note 16 above; 388).

²⁶ Ibid.

²⁷ Gaskell (note 3 above; 105).

²⁸ Gaskell (note 3 above; 105).

1.4. Statement of purpose and rationale of research paper

The purpose of this dissertation is to examine the role of the demise clause and/or identity of carrier under a bill of lading in determining the identity of the carrier. It examines the conflicting approaches taken by English Courts, American Courts and Canadian Courts, regarding the validity and effectiveness of the demise clause and the identity of carrier clause. Many courts and scholars regard the demise clause as contravening Article 3(8) of the Hague-Visby Rules, on the grounds that that such a clause is used as a mechanism by a charterer who has entered into a contract of carriage with a shipper to lessen or exonerate himself of carrier liability. However, other courts have viewed the demise clause and the identity of carrier clause as confirming the common law principle that a contract of carriage is between the shipper and the shipowner.

The lack of uniformity in judicial decisions regarding the applicability of the demise clause and identity of carrier clause has led to extensive debate amongst scholars. It has become increasingly necessary to analyse the courts' reasonings in determining who is the carrier under a bill of lading that contains a demise and/or identity of carrier clause. Also, on an international level, international uniform law has failed to provide clear direction in determining this question. This being the case, there is the increasing need to establish uniformity under domestic legislation, and in judicial decisions and international rules.

This dissertation also examines the concept of "carrier" under international conventions and in domestic legislation, and analyses the complexities arising from conflicting approaches. Some courts have rigidly held on to the single carrier approach whilst other courts have extended the concept of "carrier" to include a multiplicity of parties.²⁹ The multicarrier approach has been accepted by some courts as affording certainty to a cargo interest that he will recover from an actual carrier or from the contracting carrier, since many parties are involved in the shipment of goods.³⁰

1.5. Key Research Questions

1. Chapter two of this dissertation details the various indicators in a bill of lading according to which the carrier under the bill of lading may be identified. The chapter

²⁹ V Rochester *The Lone "Carrier" An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable* (unpublished LLM thesis, University of Cape Town, 2005) 108-109.

³⁰ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)" (1976) 7 JMLC 615, at 630.

discusses the issue of how the contractual carrier may be identified where the indicators conflict with each other, and in such a case which of these indicators (the signature on the bill, the attestation clause, the heading of the bill, the definitions clause, and the demise clause/identity of carrier clause); must be given precedence in determining the carrier.

2. Chapter two sets out the definition of the term “carrier” in terms of international rules particularly the Hague-Visby Rules and the Hamburg Rules, and discusses whether under these Rules there can be more than one carrier against whom a cargo claimant may properly institute action.
3. Chapter two also examines whether the demise clause and identity of carrier clause can be seen as an exemption clause in conflict with Article 3(8) of the Hague-Visby Rules. The chapter examines international law and scholarly opinions to determine whether it is appropriate to regard the demise clause as a mechanism that a charterer may use to avoid liability as a cargo carrier, thereby directing cargo suits instead to a shipowner.
4. Chapter three undertakes a comparative analysis of the judicial decisions traditionally taken by English Courts and the current position taken by the House of Lords in *The Starsin*³¹ together with the criticisms surrounding the judgement, to determine the validity and effectiveness of the demise clause and the identity of carrier clause in identifying the carrier under a bill of lading in English courts.
5. Chapter four examines case authority regarding the validity of the demise clause in American Courts, noting the lack of uniformity in case law on this issue. The chapter also looks at the theory of joint and several liability between a shipowner and charterer as a means to determine who is the carrier/s to a contract of carriage and to prevent an exemption of liability by charterers.
6. Chapter five discusses the traditional approach adopted by Canadian Courts on the validity of the demise clause and analyses the approach currently adopted to determine the validity and effect of the demise clause in a bill of lading when identifying the carrier. The chapter also examines previous and current approaches adopted by Canadian Courts on the application of the joint venture theory to a contract of carriage as posited by Professor Tetley.

³¹ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2003 U.K.H.L. 12, 2004 A.C.1 715 (2003).

7. Chapter six examines the contractual interpretive process adopted in the United Kingdom, and the way in which this approach has influenced the interpretation of bills of lading where third party reliances are a factor for consideration, as in cases such as *The Starsin*.³²
8. Chapter six will also look at the development of the contractual interpretative process in South Africa up to its culmination in the current approach adopted in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.³³
9. Finally, Chapter six looks at the South African action *in rem*. The chapter considers what influential effects the approaches taken by English, American and Canadian Courts in identifying the carrier may have on a claimant seeking to enforce a maritime claim by way of an action *in rem* in a South African Court exercising its admiralty jurisdiction.

³² *The Starsin* *supra* note 31 at 588 para 73.

³³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

Chapter Two: Methods of identifying the carrier

2.1. Introduction

The issue of the identity of the carrier question has a long and contentious history. While a bill of lading may define the contracting carrier, there is in various instances still real doubt as to who is the carrier under a bill of lading.¹ As noted in the introductory chapter, the issue in identifying the carrier under a bill of lading arises where there is a conflict in the indicators, these being the stamped or printed words added by the parties at the time of issuing the bill of lading, the pre-printed terms on the standard form such as the demise clause on the reverse side of the bill and, the mode of signature.² When a bill of lading does not clearly stipulate who the carrier is, uncertainty³ can arise as to who must be sued as carrier under the contract of carriage.⁴

This chapter analyses the various different indicators contained in a bill of lading. The chapter will also look at extrinsic evidence such as for whom the bill of lading had been issued. Lastly, the chapter will examine the definition of the carrier under the Hague and Hague-Visby Rules as well as under the Hamburg Rules, and the possibility of there being more than one carrier to a contract of carriage. The different approaches to the interpretation of bills of lading that have been taken in case law, relating particularly to the treatment of the demise clause are discussed in subsequent chapters.

2.2. Conflicting indicators on the bill of lading

2.2.1. The attestation clause

The face of a standard liner bill of lading contains an attestation clause which typically reads;

“In witness whereof, the master or agent of the said vessel has signed three bills of lading, all of this tenor and date, and if one is accomplished, the other shall be void.”⁵

Historically, once a vessel had departed from the port of shipment, the master had full authority to act on behalf of the carrier who was ordinarily the shipowner. The attestation clause reflects this by indicating that it is the master who would have issued bills of lading in respect of cargo received on board the vessel. Ordinarily those bills of lading would bind the

¹ N Gaskell...et al *Bills of Lading: Law and Contracts* 1 ed (2000) 83.

² R Aikens... et al *Bills of Lading* 1 ed (2006) 140.

³ Gaskell (note 1 above; 83).

⁴ Ibid 85.

⁵ *The Berkshire* [1974] 1 Lloyd's Rep. 185 (Q.B.)

shipowner as carrier. Where the vessel is chartered by demise, the master is employed by the demise charterer and in this situation the master's signature on the bill of lading would bind the demise charterer. It was the master who was given charge of all day to day operations happening on the vessel due to the vessel's "distance from physical control on the shore."⁶

In modern shipping, the master remains responsible for ensuring proper performance of the vessel for the owner's business and must carry out his functions accurately and in keeping with the terms of the charterparty.⁷

Under a time charterparty, the master and crew are employees of the shipowner and must fulfil the shipowner's orders in regard to of the navigational management of the vessel. The master is required to perform all functions as per the charterparty agreement in the manner set out in the charterparty.⁸ However, he is not responsible for the commercial control of the vessel and does not "fix the vessel or look after the cargo"⁹ on board.

In terms of English law, the master is responsible for undertaking the charterer's instructions in terms of the charterparty. However this is not indicative of a relationship between the master and the charterer.¹⁰ Gaskell states that, "[c]harterparties are examples of contracts in which one party, the charterer; is entitled to exercise some control over the conduct of an employee of the other party, the shipowner."¹¹ The master is the servant of the shipowner even when fulfilling instructions of the charterer, and by so doing, the master fulfils the shipowner's duty in terms of the time charter.¹²

The standard Gentime and the NYPE 2015 forms make provision for the "charterer's right to give orders to the master." Gentime clause 12, paragraph 1 states that:

"The Master... shall at all times during the currency of this Charter Party be under the orders and directions of the Charterers as regards employment, agency or other arrangements. The Master shall prosecute all voyages with due dispatch"

⁶ N Lopez 'The master's role in charter performance' (1991) 8 *Australia & New Zealand Mar. Law Journal* 3 at 3.

⁷ Ibid 4.

⁸ Lopez N (note 6 above; 4).

⁹ Lopez N (note 6 above; 4).

¹⁰ C Pejovic 'The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law (2000) 31 *Journal of Maritime Law and Commerce* 379 at 382.

¹¹ Gaskell N 'Charterers' Liability to Shipowner-Orders, Indemnities and Vessel Damage' (2003) *J. Schelin (ed.) Modern Law of Charterparties* at 3-4.

¹² Pejovic C (note 10 above; 383).

Further, NYPE 2015 clause 8(a) provides that:

“The Master shall perform the voyages with due despatch and shall render all customary assistance with the Vessel’s crew. The Master... shall be under the orders and directions of the Charterers as regards employment and agency”¹³

These clauses stipulate that while the master is employed by the shipowner and is responsible for serving the shipowner’s interests, he is also obliged to carry out the instructions of the charterer and to provide assistance to the charterer during the time charter period.¹⁴ Taking into account the role of the master; the factual inquiry as to who employs the master is thus a critical issue. Rix J in *The Starsin*¹⁵ spoke of “the general preference in English law for owner’s bills” causing a court to be wary in holding liable as carrier anyone else other than the shipowner.¹⁶

2.2.2. Signature on the bill of lading

2.2.2 (a). Signature by the Master

Common law authorizes the master to sign bills of lading for the shipowner.¹⁷ The master is the employee of the shipowner and as such will have either implied, actual or ostensible authority to sign bills of lading for the owner.¹⁸ For this reason, it is common practice for the master’s signature on bills of lading¹⁹ to bind the shipowner, provided that the master signed within the ambit of his general authority.²⁰ An exception to this general rule would be where the vessel had been demise chartered. In the case of a demise charter, the demise charterer

¹³ P Alstergren *The Charterer’s Right to Order the Master* (unpublished LLM thesis, 2002) at 23.

¹⁴ Ibid 21.

¹⁵ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)* 2001 Lloyd’s Rep. 1 437 (2001).

¹⁶ *The Starsin supra* [2001] note 15 at 448 para 49.

¹⁷ M T Reilly ‘Identity of the Carrier: Issues Under Slot Charters’ (2001) 25 *Tulane Maritime Law Journal* 505, at 507.

¹⁸ Clifford Chance ‘An agent’s authority to sign bills of lading’ *Maritime Review* 6 May 1998 (Available at

¹⁹ Gaskell (note 1 above; 93).

²⁰ C J S Hill *Maritime Law Lloyd’s Practical Shipping Guides* 6 ed (2003) 192.

acquires full possession and control of the vessel and the master becomes the agent or employee of the charterer.²¹

In addition, all standard time charterparties make provision for “the charterer to order the master to sign bills of lading without prejudice to the charterparty between the shipowner and the charterer.”²² The employment clause contained in the time charter stipulating that the master “will sign bills of lading as presented by the charterer”²³ indicates that the master enters into a contract with the shipper on behalf of the shipowner “for the benefit of the charterer.”²⁴ As such, the master’s authority to sign bills of lading is not derived from the charterer, but rather from the shipowner.²⁵

An example of such a clause is found in the standard Gentime form in which clause 17 states that:

“(a)(i) The Master shall sign bills of lading or waybills as presented in conformity with mate’s receipts...”

The NYPE 2015 form²⁶ contains a similar provision in clause 31 which states that:

“(a) The Master shall sign the bills of lading or waybills for cargo as presented in conformity with mates or tally clerk’s receipts”

“(b) All bills of lading or waybills shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by... the Master at their request.”

In the case of *The Berkshire*²⁷, Brandon J held that the effect of a clause in a charterparty allowing a charterer to order the master to sign bills of lading as presented is “well settled.”²⁸

It was held;

“In the first place, the clause entitles the charterers to present to the master for signature by him on behalf of the shipowners bills of lading which contain or

²¹ Ibid 194.

²² D G S Chong ‘Unravelling the Identity of the Carrier’ (1994) 6 *SACLI* 182 at 185.

²³ *Smidt v. Tiden*, (1874) L.R. 9 Q.B. 446; I R. Colinvau, *Carver's Carriage by Sea* § 707 (13th ed. 1982).

²⁴ *Smidt v. Tiden*, (1874) L.R. 9 Q.B. 446; I R. Colinvau, *Carver's Carriage by Sea* § 707 (13th ed. 1982).

²⁵ *Pejovic C* (note 10 above; 383).

²⁶ [NYPE 2015 \(Available at https:// www.bimco.org%2F-%2Fmedia%2Fbimco%2Ftraining%2Fcourse-programmes%2Flearning%2Fnype2015\)](https://www.bimco.org%2F-%2Fmedia%2Fbimco%2Ftraining%2Fcourse-programmes%2Flearning%2Fnype2015)

²⁷ *The Berkshire* *supra* note 5 above.

²⁸ *The Berkshire* *supra* note 5 at 188.

evidence contracts between the shippers of the goods and the shipowners, provided always that such bills of lading do not contain extraordinary terms or terms inconsistent with the charter-party; and the master is obliged, on presentation to him of such bills of lading, to sign them on the shipowner's behalf.”²⁹

In the case of *Manchester Trust v. Furness*,³⁰ the shipowners chartered their vessel to the charterers, which charterparty contained terms stating that;

"the captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers."

The bill of lading referred to the charterparty but did not incorporate its terms. It was signed by the master without any qualification as to the capacity in which he did so. In a claim for cargo damage against the shipowners, it was held that though the cargo interests knew of the existence of the charterparty, they did not know of its terms. As such the shipowners were held to be bound by their master's signature. The charterparty further provided that the charterers were to “indemnify the owners from all consequences and liabilities that may arise from the captain signing the bills of lading.” This was held to support the contention that the Master had authority to sign on behalf of and to bind the shipowner.

However, bills of lading signed by the master, or the charterer by the authority of the master, may not always bind shipowners.³¹ It may be agreed between the shipowner and the charterer in terms of the charterparty that a bill of lading signed by the master shall be binding on the charterer alone.³² In such case, if the bill signed by the master indicates in writing or in printed terms that he has signed “for and on behalf of the charterer”, the bill will be binding on the charterer, provided that the master had authority to sign for the charterer.³³

2.2.2 (b). Signature by charterers on the Master's behalf

The master is at liberty to expressly delegate authority to sign bills of lading or such authority may be impliedly derived from the terms of the charterparty.³⁴ Some standard charterparties

²⁹ Ibid.

³⁰ *Manchester Trust v. Furness* (1895) 2 QB 539.

³¹ Pejovic C (note 10 above; 395).

³² Pejovic C (note 10 above; 395).

³³ Pejovic C (note 10 above; 395).

³⁴ Hill (note 20 above; 195).

make provision for the charterer or its agent to sign bills of lading on behalf of the Master³⁵ as is the case in the NYPE form.³⁶

Clause 31 in the NYPE 2015 provides:

- (a) "...the Charterers or their agents may sign bills of lading or waybills on behalf of the Master, with the Owners'/Master's prior written authority, always in conformity with mates' receipts."³⁷

In addition, clause 31(b) goes on to state that;

- (b) "...the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by the Charterers or their agents or by the Master at their request"³⁸

By way of such an indemnity clause, shipowners safeguard themselves against liabilities by virtue of the charterer's signature which outweigh those to which they are exposed in the charterparty.³⁹ These clauses may be express or implied.⁴⁰ Where there is an implied indemnity provision in terms of a charterparty, caution must be taken when ascertaining where and when indemnity exists.⁴¹

It follows that the charterer may "present the bill to the master to sign" or he may "short circuit"⁴² the process by signing the bill himself.⁴³ In *The Berkshire*,⁴⁴ Clause 8 of the NYPE time charter provided for the master "to sign Bills of lading... as presented, in conformity with Mate's or Tally Clerks' Receipts."⁴⁵ Brandon J in considering clause 8 held that; whether charterers sign bills of lading for themselves or present them to the master for

³⁵ Pejovic C (note 10 above; 395).

³⁶ Clause 30(a) states:

"The Master shall sign the bills of lading or waybills for cargo as presented in conformity with mates or tally clerk's receipts. However, the Charterers may sign bills of lading or waybills on behalf on the Master, with the Owner's prior written authority, always in conformity with mates or tally clerk's receipts."

³⁷ Clause 31 of the NYPE 2015.

³⁸ Clause 31 of the NYPE 2015.

³⁹ Hill (note 20 above; 195).

⁴⁰ Gaskell (note 1 above; 196).

⁴¹ Gaskell (note 1 above; 196).

⁴² *The Berkshire supra* note 5 above at 188.

⁴³ *The Berkshire supra* note 5 above at 188.

⁴⁴ *The Berkshire supra* note 5 above at 188.

⁴⁵ *The Berkshire supra* note 5 above at 188.

signature, the “signature binds the shipowners as principals to the contract contained in or evidenced by the bills of lading.”⁴⁶

It is generally presumed that when chartering on time, the charterer or his agent may sign bills of lading for the master or shipowner evidencing a contract of carriage between the shipowner and holder of the bill of lading.⁴⁷ Channel J upheld this stance in *Tillmans & Co. v S.S Knutsford Ltd*,⁴⁸ where the charterparty contained a clause providing that the master was to be under the charterer’s order and directions as well as an indemnity clause extending to the master signing bills of lading as presented by the time charterers or their agents. The master’s signature appeared on three bills under the printed words “For Captain and Owners” as directed by the time charterers.⁴⁹ The charterers however signed a fourth bill of lading under the words “For the Captain and Owners.”⁵⁰ Here, the Court upheld the charterer’s authority to sign. Channel J held that:

“If [the time charterers] had struck out the words “for the captain and owners”, and then signed [the bill of lading], I think they would, on the face of it, have been purporting to make it their own contract. They purported to sign it for the captain and owners; and therefore, to make it the contract of the captain and owners, and they had absolute power to do that by the terms of the charterparty.”⁵¹

This principle was further established in *The Rewia*⁵² in which case the Court of Appeal held that in the case of a charterparty other than a demise charter, where the master signs a bill of lading without qualification, he signs as agent of the shipowner.⁵³ As such the contract of carriage evidenced by the bill of lading is between the shipowner as principal and holder of the bill of lading.⁵⁴

⁴⁶ *The Berkshire* *supra* note 5 above at 188.

⁴⁷ Chong D G S (note 22 above; 186).

⁴⁸ [1908] 1 K.B. 185. See also *Wehner and Ors. v. Dene Steam Shipping Company & Ors.* [1905] 2 K.B. 92 at 98.

⁴⁹ Chong D G S (note 22 above; 186).

⁵⁰ Chong D G S (note 22 above; 186).

⁵¹ [1908] 1 K.B. 185 at 191.

⁵² *The Rewia* [1991] 2 Lloyd's Rep. 325.

⁵³ *The Rewia* *supra* note 52 at 330.

⁵⁴ Chong D G S (note 22 above; 189).

2.2.2 (c). Signature by sub-charterers or charterer's agents on the Master's behalf

Within the shipping industry, it is common practice for a shipowner or demise charterer to charter a vessel and subsequently for such charterer to sub-charter the vessel.⁵⁵ Vessels are often subjected to many successive charterparties and these charter agreements are widely known for its commercial convenience and popularity.⁵⁶ Within this framework of charterparties, each charterer and/or sub-charterer is known to be a disponent owner.⁵⁷

Some light was shed on the term "disponent owner" in *O/Y Wasa S.S. Co. Ltd. & Anor. v. Newspaper Pulp & Wood Export Ltd.*⁵⁸ In this case, it was held that;

"It would presumably cover a time charterer. It covers someone who can dispose of a ship without being the owner of the ship, for the 'disponent owner' must be different from the owner."⁵⁹

Where a charterer is authorised to sign a bill of lading on the master's behalf, provided that the bill of lading is not "manifestly inconsistent"⁶⁰ with the terms of the charterparty or provide for "extraordinary terms",⁶¹ it is generally accepted that authority to sign the bill may be delegated without any limitation.⁶² It has been accepted that once the charterer's authority to issue a bill of lading has been established, the act of signing the bill becomes a mere "ministerial act"⁶³ which may not be performed personally.⁶⁴ As such, charterers may request their agents or sub-charterers to sign on their behalf.⁶⁵

In the *Vikfrost*⁶⁶ the issue raised was one of delegating authority to sub-charterers to sign bills of lading. The charterparty in this case stated that:

"The master ... shall be under the orders and directions of the charterers ... The master to sign bills of lading as presented. The charterers to indemnify the owners against all consequences and liabilities which may arise from the master signing such bills of lading ... It is agreed that bills of lading issued for voyages under this charterparty

⁵⁵ Chong D G S (note 22 above; 183).

⁵⁶ Chong D G S (note 22 above; 183).

⁵⁷ Chong D G S (note 22 above; 183).

⁵⁸ *O/Y Wasa Steamship Co. Ltd. and N.V. Stoomschip "Hannah" v. Newspaper Pulp and Wood Export Ltd* [1949]

82 Lloyd's L.L. Rep. 936

⁵⁹ *O/Y Wasa Steamship Co. Ltd. and N.V. Stoomschip "Hannah" supra* note 58

⁶⁰ *The Berkshire supra* note 5 above at 188.

⁶¹ *The Berkshire supra* note 5 above at 188.

⁶² Clifford Chance (note 18 above; 15).

⁶³ *The Berkshire supra* note 5 above at 188.

⁶⁴ *The Berkshire supra* note 5 above at 188.

⁶⁵ *The Berkshire supra* note 5 above at 188.

⁶⁶ *The Vikfrost* [1980] 1 Lloyd's Rep.560.

may be signed on behalf of the master by the charterer's agents and may contain the demise clause.”⁶⁷

The charterparty also made provision for the charterers to sublet the ship which the charterers subsequently did.⁶⁸ The sub-charter also provided for the master to be under “the orders of the charterers as regards employment, agency... the charterers to indemnify the owners against all consequences and liabilities arising from the master, officers or agents signing bills of lading...”⁶⁹

Bills of lading had been issued in respect of the cargo and sub-charterers’ agents signed “for the master.”⁷⁰ The bills were governed by English law and contained an identity of carrier clause. In this case, the shipowner argued that the sub charterers’ agents were not authorised to sign the bills of lading for the master and that bills containing an English jurisdiction clause limited their authority to sign.⁷¹ The Commercial Court and the Court of Appeal dismissed these arguments and held:

“(i) that the head charter authorised the charterers both to issue bills of lading and to sublet the vessel;”⁷²

(ii) the head charterers were entitled to delegate their power to sign to the sub-charterers, which they did by the terms of the sub-charter;”⁷³

(iii) the sub-charterers therefore had authority to sign bills of lading on behalf of the owners and (because the ship was trading worldwide) they could delegate the physical task of doing so to an agent;”⁷⁴

(iv) both the agents in fact had authority to sign bills as agents of the sub-charterers;

(v) accordingly, by virtue of this chain of delegated authority the sub-charterers' agents' signature bound the owners.”⁷⁵

The Rewia,⁷⁶ further demonstrated this point. In that case the vessel was on time charter on the NYPE form having been amended. The charterparty provided for the master to sign bills

⁶⁷ *The Vikfrost supra* note 66 above at 562, See Clause 13 of the head charterparty.

⁶⁸ *The Vikfrost supra* note 66 above at 562, see Clause 19 of the head charterparty.

⁶⁹ *The Vikfrost supra* note 66 above at 562, see Clause 9 of the sub charterparty.

⁷⁰ *The Vikfrost supra* note 66 above at 563.

⁷¹ *The Vikfrost supra* note 66 above at 562.

⁷² *The Vikfrost supra* note 66 above at 567.

⁷³ *Ibid.*

⁷⁴ *The Vikfrost supra* note 66 above at 560.

⁷⁵ *The Vikfrost supra* note 66 above at 567.

of lading as presented and a further clause provided “It is understood that the Master will authorise Charterers, or their Agents, to sign Bills of Lading on his behalf...”⁷⁷ The vessel was duly sub-chartered, cargo was loaded on board the vessel, and liner bills of lading were issued on the sub-charterer’s standard form with no indication that the charterers were not the contracting carriers.⁷⁸ The bills contained the sub-charterers name at the head of the bill, and the printed words “For the Master”.⁷⁹ Beneath these words a *stamp* of the charterers agents together with an “indecipherable signature”⁸⁰ appeared. The agent of the charterer or the sub-charterer had performed the act of signature, but it was not discovered as to which of them it had been. The cargo interests instituted action against the owner and/or sub-charterers for damage to cargo. One of the issues before the Court was whether the agent had authority to sign on behalf of the master and thus bind the shipowners. The court found that the agent did in fact have such authority and held that:

“In the present case the master was required to sign bills of lading as presented, and the understanding was that with his authority the charterers or their agents would sign them on his behalf ...⁸¹ The bills of lading ... were signed for the master by agents to whom he was empowered to give authority and must be taken to have done so, since he was required to sign them as presented. The master was in fact the servant of the shipowners.”⁸²

The court concluded that, “a bill of lading signed for the master cannot be a charterer’s bill, unless the contract was made with the charterers alone, and the person signing has authority to sign and does sign, on behalf of the charterers and not the owners.”⁸³

2.2.2 (d). Signature by charterers and charterer’s agents on behalf of charterers

As discussed above, time charterparties often authorise charterers and their agents to sign bills of lading in respect of goods shipped.⁸⁴ However this fact does not always indicate that the contract of carriage shall be between the shipowner and the holders of the bills of lading.⁸⁵ Reilly states that a bill of lading signed by the charterer in its own name will

⁷⁶ *The Rewia supra* note 52 above.

⁷⁷ *The Rewia supra* note 52 at 329.

⁷⁸ Gaskell (note 1 above; 94).

⁷⁹ *The Rewia supra* note 52 at 329.

⁸⁰ *The Rewia supra* note 52 at 329.

⁸¹ *The Rewia supra* note 52 at 333.

⁸² *The Rewia supra* note 52 at 333.

⁸³ *The Rewia supra* note 52 at 336.

⁸⁴ Chong D G S (note 22 above; 196).

⁸⁵ Chong D G S (note 22 above; 196).

constitute a contract between the charterer and the shipper where “no shipper would assume that the bill of lading was issued on behalf of the shipowner.”⁸⁶ This would be the case when the bill is on the charterer’s form with the charterer’s name or logo in the heading, indicating that it was signed “for and on behalf of the charterers.” But even then, there has been legal dispute in English cases where a demise clause or identity of carrier clause appears on the bill.

It may be agreed upon between the shipowner and the charterer in terms of the charterparty that a bill of lading signed by the master shall be binding on the charterer.⁸⁷ In such a case, these bills signed “for and on behalf of the charterer” will be binding on the charterer if the master had authority to sign for the charterer.⁸⁸ For the sake of being certain that such agreement shall be binding as against third parties, the shipowner must guard against the master acting in a manner giving rise to apparent or ostensible authority.⁸⁹ The master is to guard against signing bills of lading in a manner so as to create a belief in third parties that he signs as an employee of the shipowner.⁹⁰ The master must therefore remove all indications on the bill leading to him acting on behalf of the shipowner.⁹¹

In *Harrison v Huddersfield S.S. Co. Ltd.*,⁹² it was found that the shipowner and time charterer agreed that for the duration of the time charter, the master was not authorised to sign bills for the shipowner.⁹³ While the vessel was on time charter, the evidence was that the master’s signature on this form was an express instruction of the charterers, and not authorised by the shipowners. As such, the master in signing bills of lading deleted the words “As Master” and replaced it with the written words “as agents for time charterers.”⁹⁴ This mode of signature against the background of “the whole circumstances of the case” meant that the charterers were party to the contract. As a result, holders of the bills of lading could not recover damages from the shipowners for short delivery of their goods.⁹⁵

In addition, where charterers and/or agents sign bills of lading with no clear indication that they sign for the master and thus the shipowner, the relevant facts and circumstances must be

⁸⁶ Reilly M T (note 17 above; 507).

⁸⁷ Reilly M T (note 17 above; 507).

⁸⁸ Reilly M T (note 17 above; 507).

⁸⁹ Chong D G S (note 22 above; 195).

⁹⁰ Chong D G S (note 22 above; 195).

⁹¹ Chong D G S (note 22 above; 195).

⁹² (1903) 19 T.L.R. 386.

⁹³ Chong D G S (note 22 above; 195).

⁹⁴ Chong D G S (note 22 above; 196).

⁹⁵ Chong D G S (note 22 above; 196).

carefully construed to ascertain if the charterer contracted as carrier with holders of the bills of lading.⁹⁶

Therefore, the general presumption in the case of a charter, other than a demise charter, that “a bill of lading signed by the master or by the charterer as authorised agent of the master is usually a contract with the shipowner” is not one that is fixed.⁹⁷ “It always falls to be decided on the facts and documents of each case.”⁹⁸ As per Hamilton J (as he then was) in *Steamship Calcutta Co. Ltd, v. Andrew Weir & Co.*,⁹⁹ it is “in each case... necessary for the Judge... to determine for himself on the documents and circumstances of the case whether the contract for the carriage of the cargo is made with the charterers or with the owners.”¹⁰⁰

Although the analysis above focused on a classic time charterparty, similar considerations would apply when considering a slot charterparty. A slot charter is a “hybrid” type of contract as the slot charterer hires a certain number of slots on each vessel but does not take over control of the operation of the vessel.¹⁰¹ In such a scenario, each slot charterer would issue bills of lading on their own form to their customers. Reilly argues that in this situation, the carrier is the slot charterer who issued the bill, but it may also be the shipowner.¹⁰²

2.2.3. The heading of the bill of lading

Under a time charter, a bill of lading may be issued on the shipowner’s form with the name of the shipowner appearing in the heading, or on the charterer’s form with the name of the charterer appearing in the heading or the bill may be blank. However, identifying the carrier using the heading of the bill cannot be regarded as conclusive.¹⁰³ This is because the form used may contain a named person in its heading who is not contractually linked to the contract of carriage.¹⁰⁴ As such, the heading of a bill of lading is significant in identifying the carrier where it is consistent with the signature on the bill.¹⁰⁵

⁹⁶ Chong D G S (note 22 above; 197).

⁹⁷ *Namchow Chemical v. Botany Bay Shipping Co. (Aust.) Pty. Ltd* [1982] 2 N.S.W.L.R. 523.

⁹⁸ *Namchow Chemical supra* note 97 at 527.

⁹⁹ (1909-10) 15 Com. Cas. 172.

¹⁰⁰ (1909-10) 15 Com. Cas. 172 at 182 -183.

¹⁰¹ *Northern Endeavour Shipping Pte Ltd v Owners of MV NYK Isabel* 2016 (3) All SA 418 (SCA) at 16-17 para 25.

¹⁰² Reilly M T (note 17 above; 510).

¹⁰³ Pejovic C (note 10 above; 399).

¹⁰⁴ Pejovic C (note 10 above; 399).

¹⁰⁵ Pejovic C (note 10 above; 399).

However, when dealing with a third party holder of a bill of lading acting in good faith, it is important to note that such a person is not the original contracting party to the contract of carriage, and commonly is unaware of the details concerning the carrier, except for those appearing on the bill of lading.¹⁰⁶ Third parties may not know of the existence of a time charter and cannot be expected to investigate the relationship between the shipowner and the charterer pursuant to the time charterparty. Also, they cannot be expected to have knowledge of why the name of the charterer appears in the heading of the bill of lading.¹⁰⁷ Pejovic concludes that where the charterer's name appears in the heading of the bill of lading, the carrier is the charterer by implication and the third party is justified in concluding same. Rix J made a similar point in *The Starsin*¹⁰⁸ and held that "[a] shipper would... look at the face of the bill to see [which] person was described as the carrier."¹⁰⁹

However, this conclusion is overstated in a case where other indicators give rise to ambiguity or a contradiction, in such a case the heading of the bill is not definitive. The case law is discussed in subsequent chapters.

2.2.4. The demise clause

Historically, the demise clause had been inserted into bills of lading in the United Kingdom and the United States of America, since only shipowners in the case of the United Kingdom and in the case of the United States shipowners and demise charterers were permitted to statutorily limit their liability. Time charterers and voyage charterers were excluded from the statutory limitation of liability, exposing them to unlimited liability.¹¹⁰

The demise clause is found on the reverse side of a bill and essentially provides that if the vessel is neither owned nor demise chartered to the company that issues the bill, the contract of carriage evidenced by the bill is between the shipowner/demise charterer and the shipper. It follows that the time charterer attracts "no personal liability whatsoever"¹¹¹ in terms of the contract of carriage.¹¹²

The following is a classic example of the demise clause:

¹⁰⁶ Pejovic C (note 10 above; 400).

¹⁰⁷ Pejovic C (note 10 above; 400).

¹⁰⁸ *The Starsin supra* [2001] note 15.

¹⁰⁹ *The Starsin supra* [2001] note 15 at 446 para 43.

¹¹⁰ W Tetley 'The Demise of the Demise Clause' (1998) 44 *McGill Law Journal* 807 at 842.

¹¹¹ Tetley W (note 110 above; 809).

¹¹² Tetley W (note 110 above; 809).

“If the ship is not owned by or chartered to the company or line by whom this bill of lading is issued, this bill of lading shall take effect only as contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who acts as agents only and shall be under no personal liability whatsoever in respect thereof.”¹¹³

In English case law, the demise clause is said to operate within the law of agency. As such, it has been held that the demise clause indicates that the signatory signs the bill on behalf of the shipowner or demise charterer.¹¹⁴ But this is only one indication of the agency mandate. There can be contrary indicators on the bill indicating that the signatory does not sign for the shipowner or demise charterer. The English case authorities have found that the demise clause is not a “paramount clause” and therefore does not override other contrary indications.¹¹⁵ This will be discussed in Chapter three.

Additionally, English case law has not discussed whether the demise clause is invalid as being contrary to Article 3(8) of the Hague-Visby Rules. On the contrary, in the United States of America and Canada, although their case law is not completely consistent, the demise clause has been held to be invalid for that reason. This will be discussed in Chapters four and five.

2.2.5. The identity of carrier clause

A clause that is closely related to the demise clause is the identity of carrier clause. This clause states that:

“The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel’s seaworthiness.”¹¹⁶

The identity of carrier clause is similar to the demise clause in its purpose and nature; and is often inserted into bills of lading enabling charterers to circumvent unlimited liability. The identity of carrier clause provides that the shipowner is the carrier under the contract of

¹¹³ J Hare *Shipping Law and Admiralty jurisdiction in South Africa* 2ed (2009) 709.

¹¹⁴ *The Starsin supra* [2001] note 15 at 450 para 61, Rix J held that:

‘[The] shipper is told that even so, the bill of lading contract is to take effect as one made with the owner/demise charterer as principal albeit through the agency of the liner company “who act solely as agent.”’

¹¹⁵ *The Starsin supra* [2001] note 15 at 451 para 66.

¹¹⁶ Hare (note 113 above; 711).

carriage while the time charterer or voyage charterer issuing the bill acts merely as the agent on the shipowner's behalf.¹¹⁷

There is sometimes a second type of identity of carrier clause known as the "definitions clause." For example, in *The Venezuela*,¹¹⁸ the court found the charterer C.A.V.N to be the carrier in the definitions clause.

2.3. Extrinsic evidence to the bill of lading (For whom was the bill of lading issued?)

Apart from indicators on the bill of lading itself, courts also take into consideration evidence concerning the surrounding circumstances in which the bill of lading was issued to ascertain on whose behalf the bill had been issued.

2.4. Can there be more than one carrier? An interpretation of the Hague/Visby Rules and the Hamburg Rules

Article 1(a) of the schedule to South Africa's Carriage of Goods by Sea Act¹¹⁹ incorporating the Hague-Visby Rules¹²⁰ provides that: "'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."¹²¹ However, it does not expressly state whether the carrier may be only the shipowner or only the charterer, or if the term may include another party.¹²² The term carrier has been generally defined in the Hague and Hague-Visby Rules¹²³ not clearly indicating if there may be more than one.¹²⁴ Further, the definition is not extensive enough to include another party that a carrier may appoint to "handle" the cargo.¹²⁵ For instance, a sub-contracted stevedore appointed to unload a vessel will not be imposed with any obligations¹²⁶ under the Rules.¹²⁷

¹¹⁷ Tetley W (note 110 above; 809).

¹¹⁸ [1980] 1 Lloyd's Rep. 393.

¹¹⁹ Act 1 of 1986.

¹²⁰ The Hague Rules as amended by the Brussels Protocol 1968.

¹²¹ D Damar 'Carriage by Sea' (2011) 22 *Hamburg Studies on Maritime Affairs* 119-219.

¹²² Damar D (note 121 above; 119-219).

¹²³ Damar D (note 121 above; 119-219).

¹²⁴ Pejovic C (note 10 above; 384).

¹²⁵ N Bond 'The Maritime Performing Party and the Scope of the Rotterdam Rules' (2014) 28 *Australian & New Zealand Maritime Law Journal* 95, at 97.

¹²⁶ Bond N (note 125 above; 97).

¹²⁷ It is noteworthy that Article 4 *bis* (2) expands the defences and limitation of liability available to the carrier to a "servant or agent of the carrier (such servant or agent not being an independent contractor)". However, the Rules do not impose carrier obligations on servants or agents of the carrier (not being independent contractors). Therefore, sub-contractors are excluded from this regime.

The general position taken by English courts is that there is but one contracting carrier, that being the shipowner or the charterer of the vessel.¹²⁸ The contracting carrier is the one having contracted with the shipper which contract is evidenced by the bill of lading.¹²⁹

Additionally, certain provisions in the Hague-Visby Rules presuppose the carrier to be the shipowner.¹³⁰ For example, Article 3(1)(a) of the Hague-Visby Rules obliges the carrier to exercise “due diligence to make the ship seaworthy.”¹³¹ The duty of ensuring the ship’s seaworthiness is the shipowner’s duty. The responsibility of maintenance to the vessel lies with the shipowner and not the time charterer on whom commercial responsibility of the vessel rests.¹³² There are other provisions in the Hague-Visby Rules which are less clear, where the time charterer is responsible for “loading, handling, stowing, carrying and discharging the goods.”¹³³

Where the contracting carrier is the charterer, the holder of the bill of lading may find difficulties in bringing action against the time charterer contractually or in delict since the charterer does not undertake physical responsibility for carrying the cargo.¹³⁴ Also, instituting action against charterers possessing no assets or who are otherwise not amenable to certain jurisdictions pose many difficulties for cargo interests.¹³⁵ But where the contracting carrier is the shipowner, cargo interests may find solace in acquiring security for a cargo claim by arresting the vessel.

The Hamburg Rules also define a “carrier” providing a broader definition than that of the Hague-Visby Rules. The Hamburg Rules define the carrier in Article 1 as “any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.”¹³⁶ The definition of carrier includes one who acts as principal in a contract of

¹²⁸ Gaskell (note 1 above; 88).

¹²⁹ Gaskell (note 1 above; 88).

¹³⁰ Pejovic C (note 10 above; 384).

¹³¹ Article 3(1)(a) of the Hague-Visby Rules provides that:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

¹³² Pejovic C (note 10 above; 384).

¹³³ Article 3(2) of the Hague-Visby Rules.

¹³⁴ Gaskell (note 1 above; 88).

¹³⁵ Aikens (note 2 above; 139).

¹³⁶ Hamburg Rules, United Nations Convention on the Carriage of Goods by Sea 1978.

carriage without intending to carry the goods himself.¹³⁷ It includes freight forwarders, combined transport operating companies or a carrier not otherwise owning vessels.¹³⁸

The Hamburg Rules also draw a distinction between the “carrier” and the “actual carrier”, the actual carrier being the one responsible for performing the carriage of goods.¹³⁹ Where the carrier does not himself perform the carriage, any person involved in performing the carriage will be termed as the “actual carrier.”¹⁴⁰ As such, the Rules clearly indicate that the party to the contract of carriage (the contracting carrier) may be different from the one responsible for transporting the cargo.¹⁴¹

Article 10.1 of the Hamburg Rules further stipulate that in the case of the contracting carrier entrusting performance of the carriage to an actual carrier, the contracting carrier “remains responsible” throughout for all “acts and omissions of [such actual carrier] and of his servants and agents acting within the scope of their employment.”¹⁴² The contracting carrier retains responsibility irrespective of any liberty clause contained in the contract of carriage.¹⁴³ In addition, the Rules govern the responsibility of the actual carrier in respect of the carriage he actually performed; and provide for joint and several liability of both carriers where their obligations overlap.¹⁴⁴ As such, a cargo interest may claim from either the contracting carrier or the actual carrier in terms of Article 10(4).¹⁴⁵ It is important to note that the actual carrier incurs no obligation under these Rules unless he has performed the carriage.¹⁴⁶

In this way, the Hamburg Rules differ from the Hague and Hague-Visby Rules as the Hague/Visby Rules make provision for only one carrier - that being the contracting carrier.¹⁴⁷ The Hamburg Rules impose the same obligations on both the “actual carrier” and the

¹³⁷ J F Wilson *Carriage of Goods by Sea* 7 ed (2010) 225.

¹³⁸ Wilson (note 137 above; 225).

¹³⁹ Wilson (note 137 above; 225).

¹⁴⁰ J Ramberg ‘The Vanishing Bill of Lading & the “Hamburg Rules Carrier”’ (1979) *The American Journal of Comparative Law* 391, at 393.

¹⁴¹ R Force ‘Comparison of The Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)’ (1995) 70 *Tulane Law Review* 2051, at 2056.

¹⁴² Article 10.1 of the Hamburg Rules.

¹⁴³ Article 10.1 of the Hamburg Rules.

¹⁴⁴ Article 10(2), Article 10(4) of the Hamburg Rules.

¹⁴⁵ Article 10(4) of the Hamburg Rules provides that:

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

¹⁴⁶ Article 10(2) of the Hamburg Rules provide:

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of article 7 and of paragraph 2 of article 8 apply if an action is brought against a servant or agent of the actual carrier.

¹⁴⁷ Wilson (note 137 above; 225).

“contracting carrier”¹⁴⁸ thus allowing for cargo interests to bring action against the “actual carrier” for loss or damage incurred during the performance of his part of the carriage even if he was not the contracting carrier at the relevant time. However, unlike the Hague-Visby Rules, the Hamburg Rules make no express provision for the duty of “due diligence” on the part of the shipowner to make the ship seaworthy, therefore where a demise charterer issues a bill of lading and a time charterer performs the actual carriage,¹⁴⁹ the question is whether the shipowner would have any responsibilities applicable to him under the Rules enabling him to be identified as an actual carrier.¹⁵⁰

2.5. Is the demise clause an exemption clause in conflict with Article 3(8) of the Hague-Visby Rules?

The demise clause has been infamously known as a clause that aimed to detract from the provisions of the Hague Rules and Hague-Visby Rules.¹⁵¹ The Hague Rules and Hague-Visby Rules are of “public order” (a law which cannot be contracted out of)¹⁵² and apply mandatorily to any party acting as a carrier. The provisions of the Hague/Visby Rules were designed to create a just and equitable balance in the rights and obligations between the carrier and the shipper.¹⁵³

According to Tetley, the demise clause and identity of carrier clause aim to contravene the principles contained in the Hague Rules and Hague-Visby Rules.¹⁵⁴ The demise clause is said

¹⁴⁸ Wilson (note 137 above; 225).

¹⁴⁹ V Rochester *The Lone “Carrier” An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable* (unpublished LLM thesis, University of Cape Town, 2005) 116.

¹⁵⁰ Comparison of Article 3(1)(a) of the Hague-Visby Rules obliging the carrier to exercise due diligence with Article 5 of the Hamburg Rules which provides a general basis for liability.

Article 3(1)(a) of the Hague-Visby Rules provides that:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
 - (a) Make the ship seaworthy

Article 5(1) of the Hamburg Rules provides:

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

¹⁵¹ Gaskell (note 1 above; 105).

¹⁵² Tetley W (note 110 above; 839).

¹⁵³ W Tetley ‘Limitation, Non-Responsibility and Disclaimer Clauses’ (1986) 11 *Mar. Law* 203 at 206.

¹⁵⁴ Tetley W (note 110 above; 812).

to circumvent the liability of the contracting carrier by allowing the carrier to deny that it is the contracting carrier,¹⁵⁵ and to assert rather that it acts only as agent for the shipowner.¹⁵⁶

Tetley regards these clauses as “non-responsibility clauses”¹⁵⁷ in direct conflict with Article 3(8) of the Hague-Visby Rules.¹⁵⁸ The “principle of fair balance” as between the rights and obligations of the carrier and shipper was strongly affirmed in *Encyclopedia Britannica v. S.S. Hong Kong Producer*,¹⁵⁹ where the court held that:

“The purposes behind...the Hague Rules and COGSA were to achieve a fair balancing of the interests of the carrier, on the one hand, and the shipper, on the other, and also to effectuate a standard and uniform set of persistent efforts by carriers, who are the drafters of ocean bills of lading, to limit or eliminate their own duties and responsibilities under the Act by inserting into the foot long, double columns of well-high indecipherable fine print, various exceptions to their possible liabilities, COGSA included self-protective provision, § 1303(8), which prohibited the inclusion of clauses which relieve the carrier or ship from liability for loss or damage to goods arising from negligence, fault or failure in fulfilling obligations specified in other portions of the section or lessening such liabilities.”¹⁶⁰

The Hague and Hague-Visby Rules render void any clause contained in a contract of carriage seeking to “relieve or lessen the liability” of a carrier for loss or damage to goods as a result of negligence or fault on the part of the carrier in fulfilling its duties and obligations.¹⁶¹ Article 3(8) specifically detracts the carrier from contracting out of his obligations under article 2, 3 and 4 of the Rules.¹⁶² The Hamburg Rules also prohibit any inclusion in a bill of lading which “derogates directly or indirectly” from the principles of the Rules.¹⁶³ In light of these provisions, Tetley asserts strongly that the demise clause ought to be rendered null and

¹⁵⁵ Gaskell (note 1 above; 105).

¹⁵⁶ Tetley W (note 110 above; 840).

¹⁵⁷ Tetley W (note 110 above; 812).

¹⁵⁸ Article 3(8) of the Hague-Visby Rules provides that:

‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.’

¹⁵⁹ 422 F.2d 7, 1969 AMC 1741, [1969] 2 Lloyd's Rep. 536 (2d Cir. 1969).

¹⁶⁰ 1969 AMC at 1746-47, [1969] 2 Lloyd's Rep. at 539.

¹⁶¹ Article 3(8) of the Hague-Visby Rules.

¹⁶² W Tetley ‘Case Comment: The House of Lords decision in *The Starsin*’ (2004) 35 *Journal of Maritime Law & Commerce* 121 at 122.

¹⁶³ Article 23(1) of the Hamburg Rules.

void as it amounts to “illegal attempts by charterers to limit or exclude their liability contrary to the Rules.”¹⁶⁴

2.6. Conclusion

Following the above discussion, it is evident that the various indicators on a bill of lading present great difficulty in identifying the contractual carrier under a bill of lading. Amongst other indicators on a bill, this chapter discussed the significance of the signature under a bill, as well as the importance of the qualification accompanying the signature. It has been established that bills of lading signed by the master or the charterer by authority of the master will bind the shipowner unless it has been agreed between the shipowner and charterer in terms of the charterparty that the bill of lading signed by the master shall bind the charterer alone. In this case, the master must be authorized by the charterer to sign, and the bill must be signed “for and on behalf of the charterer.”

In keeping with the question of identifying the contractual carrier under a bill of lading, the discussion focused on the definition of “carrier” under the Hague-Visby Rules and the Hamburg Rules. The chapter demonstrated a comparison between the definition of “carrier” under the Hague-Visby Rules and Hamburg Rules; and found that whilst the Hague-Visby Rules lean toward the possibility of only one contracting carrier; the Hamburg Rules provide a more extensive definition accommodating for more than one carrier to a contract of carriage.

This chapter also discussed the demise clause and identity of carrier clause often inserted into bills of lading notorious for resulting in conflicts with other indicators seeking to identify the contractual carrier under a bill. These clauses have often been deemed to be “non-responsibility clauses”¹⁶⁵ enabling charterers to circumvent their liability as carriers under bills of lading.

Chapter three will discuss the treatment of the demise clause and identity of carrier clause in identifying the contractual carrier within English Courts drawing comparisons between the

¹⁶⁴ Tetley W (note 110 above; 840).

¹⁶⁵ Tetley W (note 110 above; 812).

original position in cases such as *The Berkshire*¹⁶⁶ and the current position adopted in *The Starsin*.¹⁶⁷

¹⁶⁶ *The Berkshire* *supra* note 5 above.

¹⁶⁷ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2003 U.K.H.L. 12, 2004 A.C.1 715 (2003).

Chapter Three: The identity of the carrier problem under English Law

3.1. Introduction

This chapter seeks to examine the effectiveness of the demise clause and identity of carrier clause in identifying the contracting carrier under bills of lading in English law. The chapter will analyse the different approaches taken by English Courts in various cases to the interpretation of bills of lading paying particular attention to the treatment of the demise clause and identity of carrier clause. The chapter will assess the current approach adopted by English Courts to identifying the carrier and how the current approach differs from the approach historically taken by the courts.

3.2. Statutory law and International Conventions governing the carriage of goods by sea in the United Kingdom

During the nineteenth century amidst uncertainty concerning the contractual allocation of risk for loss and damage to cargo, the shipowner, being the carrier at common law was “absolutely liable” for cargo loss unless it could be shown that the shipowner’s negligence did not play a contributory role to the cargo loss and, that one of four excepted perils was found to exist.¹ These four exceptions included:²

1. An act of God;
2. Act of public enemies (the King or Queen’s enemies);
3. Fault on the part of the shipper; or
4. Inherent vice of the goods.³

As such, when one of the four exceptions existed, the carrier could be held liable only if fault could be proved. In every other instance, the carrier could be found liable, even if he had not been at fault.⁴ However, the common law principle of freedom of contract took precedence over this rule allowing for a carefully worded bill of lading or charterparty to relieve the carrier of his liability for cargo loss and damage.⁵

¹ R Aikens... et al *Bills of Lading* 1 ed (2006) 11

² Aikens (note 1 above; 11).

³ *Propeller Niagara v. Cordes*, 62 U.S. 7, 23 (1859) (U.S. law).

⁴ M F Sturley, ‘The History of COGSA and The Hague Rules’ (1991) 22 *Journal of Maritime Law & Commerce* 1 at 5.

⁵ Aikens (note 1 above; 11).

Therefore, the nineteenth century saw many nations promulgating different legislations governing the carriage of goods by sea and attributing rights and responsibilities to carriers and cargo interests.⁶ The Harter Act was enacted in the United States of America in 1893, later in 1903 New Zealand passed The Shipping and Seaman Act, whilst Australia enacted The Sea Carriage of Goods Act in 1904. Canada followed suit in 1910 by promulgating The Water Carriage of Goods Act in 1910.⁷

In May 1921, the International Law Association's Maritime Law Committee (formerly known as the Association for the Reform and Codification of the Law of Nations) chaired by Sir Henry Duke, president of the Probate, Divorce, and Admiralty Division of the English High Court of Justice⁸ came together to produce a "model law" regulating the carriage of goods by sea internationally.⁹ A first draft was put forward at The Hague during the Associations Conference in September 1921.¹⁰ This first draft became "The Hague Rules of 1921."¹¹ These Rules were considered and contested at great length by the Comité Maritime International (CMI) in London and the Diplomatic Conference on Maritime Law in Brussels. The conference culminated in "The Hague Rules of 1922."¹² In 1924, another draft of the convention was produced known as the Hague Rules of 1924.

Before the diplomatic conference had been completed, a bill was tabled in March 1923 in the United Kingdom incorporating the Hague Rules of 1922.¹³ The House of Lords and the House of Commons formulated a committee chaired by Lord Sterndale, the Master of the Rolls, to assess the Rules.¹⁴ The Rules were strongly contested by Lord Justice Scrutton, a judge of the Court of Appeal and Mr Frank MacKinnon Q.C, as he then was, stating that the rules lacked clarity and would lead to increased lawsuits.¹⁵ However, it was decided that these contentions did not "outweigh the advantages to be gained by giving statutory force to

⁶ Aikens (note 1 above; 12).

⁷ Aikens (note 1 above; 12).

⁸ Sturley M F (note 4 above; 20).

⁹ Aikens (note 1 above; 12).

¹⁰ Aikens (note 1 above; 12).

¹¹ Aikens (note 1 above; 12).

¹² Aikens (note 1 above; 12).

¹³ Sturley M F (note 4 above; 32).

¹⁴ Sturley M F (note 4 above; 33).

¹⁵ Sturley M F (note 4 above; 34).

an agreement concluded by those chiefly affected by legislation.”¹⁶ The Rules were ultimately enacted with amendments.¹⁷

The British Parliament introduced a new Carriage of Goods by Sea Bill into the House of Lords in 1924. The Bill’s schedule incorporated the most recent of the Hague Rules as amended by the sous-commission. The Bill was assented to and The Carriage of Goods by Sea Act was enacted on 1 August 1924 in the United Kingdom.¹⁸ The Hague Rules were enacted by the Brussels conference a few weeks later and was opened for signature.¹⁹ The Hague Rules sets out the liabilities of the carrier, prescribes limitations to the carrier’s liability and deals with the carrier’s exemptions.²⁰

With the increase of containerization in modern shipping trade, and the need for increased limitation of liability²¹ a diplomatic conference directed by the CMI began in Brussels in 1968 and a Protocol amending the Hague Rules was promulgated.²² The diplomatic conference concluded an Amendment to The Hague Rules known as the Hague-Visby Amendments. The Hague-Visby Rules were later amended again in 1979 taking into consideration the imbalances in currency exchange (The SDR Protocol of 1979).²³

Currently, the British Carriage of Goods by Sea Act 1971²⁴ enacts the Hague-Visby Rules as a schedule thus repealing the Carriage of Goods by Sea Act of 1924 that had the Hague Rules as a schedule. The Rules have legal application by domestic legislation to bills of lading issued in the United Kingdom.²⁵

As discussed in the previous chapter; neither the Hague Rules nor the Hague-Visby Rules adequately define the carrier; and the question of who is the carrier took on great significance after the enactment of the limitation of liability provisions of The Merchant Shipping Act

¹⁶ Sturley M F (note 4 above; 34).

¹⁷ Aikens (note 1 above; 12).

¹⁸ Sturley M F (note 4 above; 35).

¹⁹ Aikens (note 1 above; 12).

²⁰ M Lourens ‘An Overview of the Regimes Governing the Carriage of Goods by Sea.’ (1999) 10 *Stellenbosch Law Rev* 244 at 246.

²¹ Lourens M (note 20 above; 246).

²² S R Mandelbaum ‘Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under The Hague, COGSA, Visby and Hamburg Conventions’ (1995) 23 *Transp. Law Journal* 471 at 480.

²³ Mandelbaum S R (note 22 above; 482).

²⁴ Carriage of Goods by Sea Act of 1971.

²⁵ Lourens M (note 20 above; 248).

protecting shipowners and demise charterers.²⁶ It was in this background that the demise clause and identity of carrier clause began to appear in bills of lading in the United Kingdom.

3.3. The traditional approach taken by English Courts on the effectiveness of the demise clause and identity of carrier clause (An analysis of case law)

English Courts have been inclined to consider the demise clause and identity of carrier clause as reliable indicators in identifying the carrier and have often given effect to their provisions.²⁷ One such case is *The Berkshire*²⁸ which has been the leading case on the question of the identity of the carrier before the decision in *The Starsin*.²⁹

In *The Berkshire*,³⁰ the shipper of the goods entered into a contract of sale for bales of cotton with the receivers of the goods c.i.f Massawa. The shipper subsequently loaded the goods on board the vessel “Lancashire” owned by Bibby Line Ltd for carriage and delivery to Massawa.³¹ The vessel operated under time charter between the shipowner and the charterers known as Compass Agencies Inc. of Chicago. The charterer’s agent known as Ocean Wide Shipping Co. Ltd, issued a bill of lading on their own printed form, but the bill contained a demise clause. Further, the bill was signed by the charterer’s sub-agents, known as Ayers Steamship Co. Inc.³²

The charterers then ordered the master to discharge the goods at Jeddah for transshipment to Massawa. Upon arrival at Jeddah, the goods were discharged and transhipped onto the vessel *Star of Mariam* for delivery to Massawa.³³ The *Star of Mariam* was owned by Orri Navigation Lines of Saudi Arabia. At the time of transshipment, the goods remained in good order and condition.³⁴ However, upon arrival at Massawa, the goods discharged were damaged by sea water. The shippers and receivers of the cargo claimed damages for breach of contract against the shipowners of the vessel *Lancashire*.³⁵

The court considered the issue of whether the contractual carrier was the shipowner or the charterer? In considering this question, the court considered two sub-issues; whether the bill

²⁶ Section 503 of The Merchant Shipping Act.

²⁷ W Tetley ‘The Demise of the Demise Clause?’ (1999) 44 *McGill Law Journal* 807 at 818.

²⁸ *The Berkshire* [1974] 1 Lloyd’s Rep. 185 (Q.B.)

²⁹ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2003 U.K.H.L. 12, 2004 A.C.1 715 (2003).

³⁰ *The Berkshire* *supra* note 28 above.

³¹ *The Berkshire* *supra* note 28 at 186 para 1-2.

³² *The Berkshire* *supra* note 28 at 186.

³³ *The Berkshire* *supra* note 28 at 186.

³⁴ *The Berkshire* *supra* note 28 at 186.

³⁵ *The Berkshire* *supra* note 28 at 187.

of lading evidenced a contract of carriage between the shippers and shipowners; and; if so, whether the charterer and his sub-charterer had authority to issue the bill of lading?³⁶

In considering the first sub-issue, the court found it necessary to examine the construction of the bill of lading. The court found both sides of the bill to bear the name of the charterer's agent, the shipping line Ocean Wide Shipping Co. Ltd. The back of the bill contained details for shipment including the names of the shipper and consignee. Below this, a demise clause was found and below the demise clause a final sentence appeared stating; "In witness whereof, the master or agent of the said vessel has signed three bills of lading, all of this tenor and date, and if one is accomplished, the other shall be void." After this sentence, the following typed words in capitals appeared in the space provided for signature by the master or agent of the vessel:

"Ocean Wide Shipping Co.Ltd.,
Ayers Steamship Co. Inc. as Agents
[Illegible signature]
Fred Perez Jr." ³⁷

It was clear that charterers sub-agents signed the bill however the words "for the master" did not appear on the bill. As such, it was unclear for whom the bill was signed.

On this first point, Brandon J held there to be "no reason not to give effect to the demise clause in accordance with its terms."³⁸ Within the meaning of the demise clause, Ocean Wide was the company or line that issued the bill of lading and it was common cause that the vessel was owned by the shipowners.³⁹ The court held that the bill of lading purported to be a contract between the shippers and the shipowners which contract was made by Ocean Wide as the shipowner's agents. Additionally, the fact that Ayers signed the bill as sub-agents proved immaterial and was held to be the same as if Ocean Wide had signed the bill itself.⁴⁰

³⁶ M Karali and C Smith 'Identity of Carrier Conundrum Finally Resolved (review of court cases involving shipping industry; House of Lords revises confusing aspect of law) (2003) Mondaq Business Briefing.

³⁷ *The Berkshire supra* note 28 at 187.

³⁸ *The Berkshire supra* note 28 at 188.

³⁹ *The Berkshire supra* note 28 at 188.

⁴⁰ *The Berkshire supra* note 28 at 188.

In considering the second sub-issue, Brandon J assessed the terms of the charterparty and held that Clause 8 of the NYPE entitled the charterer to issue a bill of lading containing a demise clause to bind the shipowner.⁴¹

The shipowners contended that the demise clause purported to be an “extraordinary clause” and that charterers may not lawfully present a bill containing such a clause to the master for signature to bind shipowners. Brandon J disagreed with this contention and held the demise clause to be “entirely usual and ordinary.”⁴² The demise clause was not found to be an extraordinary term or a clause manifestly inconsistent with the charterparty. Instead, the demise clause reiterated that the charterparty entitled shipowner’s bills to be issued and signed by the master, the charterer or its agents and sub-agents on the shipowner’s behalf.⁴³ The court held that signing a bill of lading was a ministerial act. In this case, the demise clause was afforded precedence over other provisions in the bill of lading. The signature on the bill was not taken to be a decisive factor when identifying the carrier.

The judgement in *The Venezuela*⁴⁴ demonstrated a similar line of reasoning to that of *The Berkshire*,⁴⁵ however it differed in that the bill did not contain a demise clause. But, the bill did contain a definitions clause which is a form of identity of carrier clause. In this case, the definitions clause named the time charterers as the carrier, yet nothing else in the bill indicated the charterers to be the carrier.⁴⁶ Charterer’s agents NYK signed the bills under the words “signed by or on behalf of the master”⁴⁷ and beneath these words appeared in *print* the charterer’s name. Beneath those words appeared, “NYK general agents and as agents for the master.”⁴⁸ The court reasoned that the mode of signature on the bill did not cause the bill to be an owner’s bill. The definitions clause and the fact that the face of the bill contained no indication that the vessel was on time charter and led the court to find that the time charterer was the contracting carrier.⁴⁹ The significance that the court placed on this factor may be attributable to the fact that cargo interests cannot arrest the vessel *in rem* where the vessel was on time charter. So, if the definitions clause had made it clear that C.A.V.N was a time

⁴¹ N Gaskell...et al *Bills of Lading: Law and Contracts* 1 ed (2000) 105; *Vikfrost* [1980] 1 Lloyd’s Rep. 560 at 600.

⁴² *The Berkshire supra* note 28 at 188.

⁴³ Gaskell (note 41 above; 105).

⁴⁴ *The Venezuela* [1980] 1 Lloyd’s Rep. 393.

⁴⁵ *The Berkshire supra* note 28 above

⁴⁶ Aikens (note 1 above; 140).

⁴⁷ *The Venezuela supra* note 44 above.

⁴⁸ *The Venezuela supra* note 44 above.

⁴⁹ Gaskell (note 41 above; 96).

charterer, then there would be contradiction between that clause and the signature on the bill of lading for the master. But since the bill did not make it clear, the court held:

“It seems to me that if C.A.V.N. did not wish to contract as ‘the carrier’, then the bill of lading issued by C.A.V.N. should at least have made it clear with which company the shipper was entering into the contract of carriage. Until the shipper or holder of the bill of lading was told that Samjohn Governor was on time charter for the voyage in question there was nothing on either side of the bill of lading which indicated that anyone other than C.A.V.N. was contracting as carrier”

In this case, the court placed emphasis on a specific indicator namely the definitions clause to determine the contracting carrier rather than the signature and the attestation clause accompanying the signature.⁵⁰ The case demonstrated that even a signature signed for the master will not preclude the charterers from being held as carrier under a bill of lading. This is because C.A.V.N. was identified as the carrier upon construing the bill of lading in its entirety considering all indicators and surrounding factors.⁵¹ The case demonstrates that courts will attempt to safeguard cargo interests who might be unaware of the significance of the “signature provisions” contained in the charterparty agreement and who may otherwise be misguided by information on the bill.⁵²

This case did not find approval in *The Rewia*.⁵³ In that case, the vessel *Rewia* operated under time charter on the NYPE form. The owners of a cargo of nutmegs and mace as cargo interests claimed damages in respect of cargo carried on the vessel to Felixstowe, Rotterdam and Hamburg under contracts of carriage evidenced by bills of lading.⁵⁴ The claim was pursued against the shipowners and/or the sub-charterers of the vessel.⁵⁵ Amongst three other issues of contention, the Court of Appeal considered the issue of “whether the shipowners were parties to the bills of lading.”⁵⁶

The cargo interests alleged that the contract of carriage was concluded orally with the time charterers local agents at the port of shipment in Grenada, and that they were unaware that the vessel operated under time charter.⁵⁷ Liner bills of lading were issued on the sub-

⁵⁰ Aikens (note 1 above; 140).

⁵¹ *Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin)*, 2001 Lloyd's Rep. 1 437 (2001) at 447.

⁵² Gaskell (note 41 above; 96).

⁵³ *The Rewia* [1991] 2 Lloyd's Rep. 325.

⁵⁴ *The Rewia supra* note 53 at 327.

⁵⁵ *The Rewia supra* note 53 at 327.

⁵⁶ *The Rewia supra* note 53 at 328.

⁵⁷ *The Rewia supra* note 53 at 329.

charterer's standard form bearing the names of the sub-charterers at its heading.⁵⁸ The bills contained the printed words "For the Master" and beneath these words a *stamp* of the charterers agents together with an "indecipherable signature" appeared.⁵⁹ There was no carrier definition clause nor was there a demise clause or an identity of carrier clause contained in the bill of lading. The shipowners sought to be found as the contracting carrier for the purposes of jurisdiction.⁶⁰ The shipowners argued that the bills signed "For the Master" by charterers agents or sub-charterers were binding on the shipowners as a party to the contract of carriage. Clause 53 of the charterparty agreement provided that:

"It is understood that the Master will authorise Charterers, or their Agents, to sign Bills of Lading on his behalf provided the Bills are made up in accordance with Mate's and Tally Clerk's Receipts."

This clause, according to the shipowners, entitled agents to sign for the master on behalf of the shipowners. Further, the shipowners contended that even if "prior authority"⁶¹ had not been given, since the master knew of the bills of lading and accordingly carried the goods, it was possible for the master to subsequently ratify the agent's signature.⁶²

The cargo interests contended that the bills of lading constituted charterer's bills as "the bills contained no clause identifying any person other than the [sub charterers] as 'carriers.'"⁶³

The Court of Appeal in deciding the question of who is the carrier and thus whether the sub-charterers were parties to the contract of carriage evidenced by the bills; held the question to be a matter of "the true construction of the bills in the light of the surrounding circumstances."⁶⁴ The Court held that the "key words"⁶⁵ contained in the bill are the words "For the master."⁶⁶ This indicated that the bill signed for the master was binding on the shipowners. It was concluded that a bill signed for the master could not constitute a charterer's bill except if the contract of carriage was made with the charterer only, and the

⁵⁸ Gaskell (note 41 above; 94).

⁵⁹ *The Rewia supra* note 53 at 329.

⁶⁰ Gaskell (note 41 above; 94).

⁶¹ *The Rewia supra* note 53 at 333.

⁶² *The Rewia supra* note 53 at 333.

⁶³ *The Rewia supra* note 53 at 329.

⁶⁴ *The Rewia supra* note 53 at 336.

⁶⁵ *The Rewia supra* note 53 at 336.

⁶⁶ *The Rewia supra* note 53 at 336.

person signing the bill signs (with authority) on behalf of the charterers only.⁶⁷ The cargo interests were found to have no claim against the sub-charterers.⁶⁸

Contrary to *The Venezuela*,⁶⁹ the Court in *The Rewia*⁷⁰ reasoned that greater weight must be given to the signature and its qualification rather than to other indicators such as a definitions clause, demise clause and/or identity of carrier clause when determining the contracting carrier.⁷¹

However, the above well-established principle has not always been followed as the general rule. This is demonstrated in the case of *The Flecha*;⁷² where signatures on the bills were held not to be the determining factor in identifying the carrier. In this case, the defendants who owned the vessel ‘Flecha’, entered into a time charter with Continental Pacific Shipping Ltd for a time charter trip from Indonesia and Malaysia to the UK. The vessel loaded parcels of wood products on board at numerous Far Eastern ports and bills of lading had been issued in respect of the carriage to Rotterdam. Certain parcels of cargo had been damaged during the voyage, and the shipowner’s P & I club produced a letter to prevent the arrest of the Flecha. A writ was subsequently issued against the ship “claiming damages for breach of contract and negligence in loading, handling, custody, care and discharge of the cargo in respect of which the plaintiffs were holders of the bills of lading.”⁷³

The bills of lading were issued on the form of Continental Pacific Shipping (the time charterers) but contained an identity of carrier clause as well as a demise clause. The bills were signed by charterer’s agents as follows, “Multiport Sdn Bhd...[signature] as agents for Continental Shipping as carriers.” The issue before the court was whether the bills of lading constituted owner’s bills evidencing a contract of carriage between the shipowners and the holders of the bills; or whether they were charterers bills evidencing a contract of carriage between the charterers and the holders of the bills.⁷⁴

⁶⁷ *The Rewia* *supra* note 53 at 333.

⁶⁸ *The Rewia* *supra* note 53 at 336.

⁶⁹ *The Venezuela* *supra* note 44 at 393.

⁷⁰ *The Rewia* *supra* note 53 at 325.

⁷¹ Gaskell (note 41 above; 95).

⁷² *Fetim B.V. v. Oceanspeed (The Flecha)* [1999] 1 Lloyd’s Rep. 612 (Q.B.)

⁷³ *The Flecha* *supra* note 72 at 613.

⁷⁴ *The Flecha* *supra* note 72 at 612 - 614.

The court drew similarities between the case before it and *The Berkshire*⁷⁵ and prompted the question “Who is undertaking the contract of carriage?”⁷⁶ Commonly, liner bills of lading are issued on a “standard form” with the liner company’s name on it, and such company may not always be the time charterer of the vessel. The court held that the bills of lading, despite having been issued on time charterers’ form, contained standard terms, and upon viewing those terms and the face of the bill, the bill clearly evidences a contract of carriage between the shipowner and the holders of the bills.⁷⁷

Justice Moore-Bick reasoned that the forms of signature on the bills of lading may suggest the time charterers Continental Shipping to be the carriers.⁷⁸ However, upon viewing the contract in a wider context, he held that the contract set out in the printed form was intended to be a contract between the shipowner and the cargo interests.⁷⁹ In determining the intention of the parties as to whether the charterers or the shipowners were responsible for the carriage, the court held that the document is to be considered as a whole in its wider context.⁸⁰ The court also considered the terms “as a carrier” and held that liner companies are usually loosely referred to ‘as a carrier’ to describe the shipping line.⁸¹

Additionally, under a time charterparty, the charterers are entitled to sign bills of lading on the shipowner’s behalf. This effectively means that the shipowner would be bound by the charterer’s signature. This is contained in the demise clause and identity of carrier clause found in the bill of lading.⁸²

The court found that for the charterers to be held as the contracting carrier, it ought to have been stated more clearly that the time charterers intended to be personally liable for the carriage of goods.⁸³ The signatures featured on the bills of lading proved insufficient to show that the charterers were parties to the contract of carriage.⁸⁴ The court held that upon a true

⁷⁵ *The Berkshire* *supra* note 28 above.

⁷⁶ *The Flecha* *supra* note 72 at 618.

⁷⁷ *The Flecha* *supra* note 72 at 618.

⁷⁸ *The Flecha* *supra* note 72 at 618.

⁷⁹ *The Flecha* *supra* note 72 at 618.

⁸⁰ *The Flecha* *supra* note 72 at 618.

⁸¹ *The Flecha* *supra* note 72 at 619.

⁸² *The Flecha* *supra* note 72 at 618.

⁸³ *The Flecha* *supra* note 72 at 618.

⁸⁴ *The Flecha* *supra* note 72 at 618 – 619.

construction of the bills of lading, they evidenced contracts of carriage between the cargo interests and the shipowners.⁸⁵

This case clearly demonstrates that English Courts have been willing to give effect to the demise clause and identity of carrier clause even though bills of lading had been issued on time charterers' forms and with charterers and/or their agent's signatures.⁸⁶ The courts have overall found that viewing the bill of lading in its whole context is key to identifying the carrier. However, upon an analysis of each case, it can be seen that the courts have been inclined to give greater weight to a specific indicator on the bill, be it the signature and for whom the bill had been signed, or the printed demise clause and/or identity of carrier clause, or even the printed definitions clause on the bill of lading.

3.4. A revolutionary change in English case law

*The Starsin*⁸⁷ provided a revolutionary change in the approach adopted by the courts when determining the identity of the contracting carrier. As discussed previously, the courts in the leading cases, *The Berkshire*⁸⁸ and *The Flecha*⁸⁹ attributed greater weight to the demise clause and identity of carrier clause rather than to other indicators on the bill of lading.⁹⁰ However, in *The Starsin*,⁹¹ where the bills were in all material respects identical to the bills in *The Flecha*,⁹² Colman J in the court of first instance attributed significance to indicators on the bill of lading quite differently to the court in *The Flecha*.⁹³

3.4.1. The Commercial Court

The Court of first instance in *The Starsin*⁹⁴ considered the problems faced by the cargo interests in understanding the words found in the bills and the sense in which they could be expected to have understood these words.⁹⁵ Colman J found it increasingly necessary for

⁸⁵ *The Flecha supra* note 72 at 619.

⁸⁶ Gaskell (note 41 above; 99).

⁸⁷ *The Starsin supra* [2003] note 29 above.

⁸⁸ *The Berkshire supra* note 28 above.

⁸⁹ *The Flecha supra* note 72 above.

⁹⁰ Gaskell (note 41 above; 99).

⁹¹ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2000 Lloyd 1 (2000).

⁹² *The Flecha supra* note 72 above.

⁹³ Gaskell (note 41 above; 99).

⁹⁴ *The Starsin supra* [2000] note 91 above.

⁹⁵ Gaskell (note 41 above; 99).

holders of bills to have certainty concerning the party with whom it had contracted and against whom it may have a contractual claim.⁹⁶

In *The Starsin*,⁹⁷ the vessel carrying parcels of timber and plywood between ports in Malaysia and Antwerp/Avonmouth was on time charter to Continental Pacific Shipping Ltd (CPS). The condition of the cargo deteriorated on board the vessel as it had been stowed negligently before the voyage began.⁹⁸ The bills of lading issued were transferable bills in terms of which the cargo owners were holders of the bills by endorsement.⁹⁹ Upon discharge of the cargo, the cargo owners instituted action against the shipowner for breach of contract, or alternatively in delict for negligent stowage, if the charterers were found to be the contracting party.

The time charter was expressly governed by English law and the NYPE form was used. Clause 8 and 33 of the time charterparty agreement provided that the charterer is entitled to require the master to sign bills of lading on behalf of the shipowners or to authorize their agents to sign bills of lading on behalf of the master contracting for the shipowner.¹⁰⁰ Numerous bills of lading were issued on the time charterer's "pre-prepared printed forms"¹⁰¹ with its logo and the printed words "Continental Pacific Shipping" on the face of the bill. The face of the bill also contained details of the voyage including details identifying the shipper, the consignee, the notify address, the vessel and the voyage number, the port of loading and the port of discharge.¹⁰² In the bottom left corner on the face of the bill was the signature box, and the word "Signature" appeared in *printed* form.¹⁰³ Additionally, the attestation clause for signature by the master appeared on the face of the bill. However, the bills were not signed by or on behalf of the master of the vessel.¹⁰⁴ Instead, the signature box was filled by port agents in *typed* words "As Agent for Continental Pacific Shipping (The Carrier)," ¹⁰⁵ beneath which was a rubber stamp bearing the name of the company acting as port agent for CPS. Across the box appeared two "manuscript signatures."¹⁰⁶ The signature boxes in each bill of lading identified CPS as the "carrier."

⁹⁶ Gaskell (note 41 above; 108).

⁹⁷ *The Starsin supra* [2000] note 91 above.

⁹⁸ Gaskell (note 41 above; 574).

⁹⁹ Gaskell (note 41 above; 574).

¹⁰⁰ Gaskell (note 41 above; 587).

¹⁰¹ *The Starsin supra* [2003] note 29 at 614 para 177.

¹⁰² *Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin)*, 2001 Lloyd's Rep. 1 437 (2001) at 464.

¹⁰³ *The Starsin supra* [2001] note 102 at 445.

¹⁰⁴ *The Starsin supra* [2003] note 29 at 614 para 181.

¹⁰⁵ *The Starsin supra* [2001] note 102 at 447.

¹⁰⁶ *The Starsin supra* [2003] note 29 at 575 para 4.

The back of the bills contained *printed* clauses in small font including a definitions clause, in which clause 1(c) defined the “carrier” as “the party on whose behalf this Bill of Lading has been signed.”¹⁰⁷ The back of the bills also contained a *printed* demise clause (clause 35) and a *printed* identity of carrier clause (clause 33) stating that the contracting party was the owner of the vessel/demise charterer alone and that any other party entering into the contract, acted as agent for the owner. It was here where incompatibility between the indicators crept in.

Of the three issues discussed by the Court of Appeal, the issue before the court relevant for the present discussion was whether the contractual carrier was the shipowner or the charterer.¹⁰⁸

In the Court of first instance Colman J found the issue of whether the bills constituted owner’s bills or charterers’ bills to be a question of “whether the effect of the words in the signature box [was] to identify CPS as the party bound by the bill of lading contract notwithstanding clause 33(identity of carrier clause) and 35(demise clause).”¹⁰⁹ In relation to this, he held that the qualification of the signature on the bill, (that being the typed words added identifying CPS as the carrier), must be given greater weight than those printed clauses appearing on the bill.¹¹⁰ This is in accordance with the maxim that “written, stamped or typed words which are inconsistent with printed terms¹¹¹ are *prima facie* to be given a superseding effect as against the printed words.”¹¹² As such, Colman J found the typed words qualifying CPS as the carrier in the signature box to supersede the effect of the pre-printed demise clause and identity of carrier clause on the back of the bills.

Colman J held further that the term ‘carrier’ was not used “loosely” to define the time charterers, contrary to the views of Moore-Bick J in *The Flecha*.¹¹³ He held that the words “as carrier” in the signature box were not “too vague and uncertain”¹¹⁴ to displace the printed identity of carrier clause and demise clause, and/or the attestation clause.¹¹⁵ Colman J found

¹⁰⁷ *The Starsin supra* [2001] note 102 at 445.

¹⁰⁸ *The Starsin supra* [2001] note 102 at 439.

¹⁰⁹ *The Starsin supra* [2001] note 102 at 446 para 42.

¹¹⁰ *The Starsin supra* [2001] note 102 at 446 para 42; *Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.*, (1923) 15 LL.L. Rep. 99; [1923] A.C. 492. Lord Sumner referred to the qualification of the signature with the words “as agent” as a “dominating factor” to be viewed as part of the contract in its whole construction.”

¹¹¹ *Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.*, (1923) 15 LL.L. Rep. 99; [1923] A.C. 492 (see e.g. Lord Sumner at p. 102, p. 500).

¹¹² *The Starsin supra* [2001] note 102 at 449 para 55.

¹¹³ *The Flecha supra* note 72 above.

¹¹⁴ *The Starsin supra* [2001] note 102 at 469.

¹¹⁵ *The Starsin supra* [2001] note 102 at 469.

the bills to be charterers' bills and the charterers were accordingly held to be the contracting carrier.

3.4.2. The Court of Appeal

On appeal, the Court relied extensively on construing the bill of lading in its whole factual context and undertook an examination of the various indicators to determine the contractual carrier.

In the Court of Appeal, the claimants contended that the demise clause particularly the words in parenthesis "as may be the case notwithstanding anything that appeared to the contrary," upon a true construction, intends to be a paramount clause, notwithstanding that the signature box indicates the bill to have been issued on behalf of a party other than the owner.¹¹⁶ On this point, Chadwick LJ writing for the majority held; he thinks it unnecessary to "invoke some principle of "paramountcy.""¹¹⁷

Rix J in a dissenting judgement did consider the contention that a demise clause operates to override what is written in the signature box, but held that this could not be so.¹¹⁸ He held that the words in parenthesis did not apply to the execution of the bill of lading or to the signature on the bill, but rather to a situation where the liner company issuing the bill is not the vessel owner or demise charterer.¹¹⁹ The terms of the clause clarify that a time charterer/liner company does not attract liability as carrier by merely issuing a bill of lading. It does not intend to preclude a time charterer from attracting liability as carrier where he undertakes responsibility as the carrier and where he signed as such.¹²⁰ If the demise clause were to be construed as a paramount clause, Rix J held that the demise clause would have to read and mean "however the bill of lading was executed, it [is] to take effect only as a contract solely with the owner."¹²¹ This is not the intention of the demise clause.¹²² Rix J held that the demise clause is thus not a paramount clause.

¹¹⁶ *The Starsin supra* [2001] note 102 at 447 para 45.

¹¹⁷ *The Starsin supra* [2001] note 102 at 470 para 164.

¹¹⁸ *The Starsin supra* [2001] note 102 at 450 para 61.

¹¹⁹ *The Starsin supra* [2001] note 102 at 450 para 61.

¹²⁰ S Boyd Scrutton on *Charterparties and Bills of Lading* 20 ed (1996) 82.

¹²¹ *The Starsin supra* [2001] note 102 at 451 para 66.

¹²² *The Starsin supra* [2001] note 102 at 451 para 66.

A further point raised in argument was that the attestation clause provides that the bills were signed for the master and thus for the shipowner.¹²³ Rix J held that the bills were not signed by the master, nor were they signed for the master. The attestation clause was held to be an “inaccurate statement.”¹²⁴ Upon a whole construction of the bills, Rix J found the bills to be charterers’ bills thereby making the charterers the contractual carrier under the bills.¹²⁵

The majority of the Court however found the bills to be owners’ bills.¹²⁶ Chadwick LJ disagreed with the findings of Rix J, but maintained the principle that the bill of lading must be read and construed in its whole context.¹²⁷ The Judge of Appeal examined the position a shipper might find himself in when looking at the bill of lading. If the description of CPS in the signature box as carrier is to be effective, the definition of carrier found in the definitions’ clause (clause 1(c)) provides no conflict. The conflict creeps in with the opening words of the identity of carrier clause (Clause 33) which provides that “the contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein...”¹²⁸ He held that a shipper is likely to reconcile these indicators and conclude that the person named as carrier in the signature box and as defined in the definitions clause is the owner of the vessel, that is that CPS is the shipowner.¹²⁹ This line of reasoning can be likened to the approach taken in *The Venezuela*,¹³⁰ where similarly the bill of lading did not expressly state that C.A.V.N was a time charterer. It is upon examining the facts that it is known - CPS is not the owner but the time charterer of the vessel having authority to sign bills of lading for and on behalf of the master.¹³¹ However the bills had not been signed in that capacity.¹³²

Chadwick LJ found the demise clause and particularly the words in parenthesis to apply where on the face of the bill it looks as if the bill was issued by the shipowner but upon finding out the true facts, the bill was not issued by the shipowner.¹³³ As Lord Roskill and the

¹²³ *The Starsin supra* [2001] note 102 at 451 para 68.

¹²⁴ *The Starsin supra* [2001] note 102 at 451 para 68.

¹²⁵ *The Starsin supra* [2001] note 102 at 451 para 69.

¹²⁶ C J S Hill *Maritime Law Lloyd’s Practical Shipping Guides* 6 ed (2003) 251.

¹²⁷ *The Starsin supra* [2001] note 102 at 466 para 147.

¹²⁸ *The Starsin supra* [2001] note 102 at 466 para 147.

¹²⁹ *The Starsin supra* [2001] note 102 at 466 para 147.

¹³⁰ *The Venezuela supra* note 44 above.

¹³¹ *The Starsin supra* [2001] note 102 at 466 para 147.

¹³² *The Starsin supra* [2001] note 102 at 466 para 147.

¹³³ *The Starsin supra* [2001] note 102 at 470 para 162.

House of Lords quoting him put it, the words in parenthesis is intended “to put the bill of lading holder on express notice of the possibility that the ship concerned was chartered.”¹³⁴

In his judgement, Chadwick LJ discussed significant principles concerning the demise clause and identity of carrier clause which I respectfully submit should be used to assess the application of these clauses when construing the bill of lading in its entirety. In distinguishing between the identity of carrier clause and the demise clause, he pointed out that the identity of carrier clause applies *only* to cases where the bill of lading was made and issued by a liner company or its agent “for and on behalf of the master.”¹³⁵ Thereby making it a bill that was “actually issued” by the master for the shipowner. In contrast, the demise clause applies to cases where the bill of lading is issued by a liner company who is not the shipowner, which bill is not signed “for and on behalf of the master.”¹³⁶ The bill may very well be signed “as agent” or on behalf of the time charterer.¹³⁷ Chadwick LJ in this way makes the qualification for issuing the bill “for and on behalf of the master” notably important in determining the functions of both clauses. The importance of this qualification was also found to be central in the judgement of *The Rewia*.¹³⁸

The Judge proceeded to describe the purpose of the demise clause as having “two limbs;”¹³⁹

Firstly; to ensure that the bill is effective as a contract of carriage with the shipowner who is not the party issuing the bill. This leg directly leads one to the question of authority.¹⁴⁰ For this leg to be fulfilled, the party issuing the bill must have actual or ostensible authority derived from the shipowner to issue the bill.¹⁴¹ This may be found in the charterparty agreement as was discussed in the earlier chapter.

Secondly; to ensure that the person having issued the bill will not attract personal liability under it.¹⁴² This leg however does not require the bill to be made or issued with the authority of the shipowner.¹⁴³ This leg encapsulates that the charterer issuing the bill will not be held liable as carrier.

¹³⁴ *The Starsin supra* [2003] note 29 at 587 para 70.

¹³⁵ *The Starsin supra* [2001] note 102 at 469 para 157.

¹³⁶ *The Starsin supra* [2001] note 102 at 469 para 157.

¹³⁷ *The Starsin supra* [2001] note 102 at 469 para 157.

¹³⁸ *The Rewia supra* note 53 above.

¹³⁹ *The Starsin supra* [2001] note 102 at 469 para 157.

¹⁴⁰ *The Starsin supra* [2001] note 102 at 469 para 157.

¹⁴¹ *The Starsin supra* [2001] note 102 at 469 para 158.

¹⁴² *The Starsin supra* [2001] note 102 at 469 para 158.

¹⁴³ *The Starsin supra* [2001] note 102 at 469 para 158.

Chadwick LJ dealt with the inconsistency between the indicators by examining the bill, so as to determine whether the description of CPS as the “Carrier” in the signature box must “yield”¹⁴⁴ to the words of the identity of carrier clause.¹⁴⁵ The Judge found that the inclusion of the demise clause corroborated the terms of the identity of carrier clause and made it clear that the carrier was the shipowner.

Chadwick LJ also held that this was not a case in which it was “necessary to choose between written, stamped or typed words on the one hand and printed text on the other hand.”¹⁴⁶ However, it is respectfully submitted that the learned Judge reconciled the inconsistency between the indicators by giving greater weight to the identity of carrier clause and demise clause which are in fact *printed* clauses on a standard form. He construed the inclusion of the demise clause as supporting the intention of the parties and as such construed the *typed or stamped* description of CPS as “carrier” to be secondary to the *printed* demise clause. Respectfully, this is in contrast with the principle of construction that written, stamped or typed words supersede printed clauses.¹⁴⁷ The joint effect of the printed identity of carrier clause and the demise clause appeared to be “paramount” even in the face of contrary typed wording in the signature box.¹⁴⁸

The above-mentioned principle of construction was also considered by Sir Morritt, V.-C in his judgement where he held that another well-established general principle must be considered. This is the principle that;

“It is open to the parties to stipulate in their printed conditions of contract that written provisions appended to the printed form are not to override, modify or affect in any way the application or interpretation of that which is contained in the printed conditions, and effect must then be given to such a stipulation even though this is contrary to the ordinary rule.”¹⁴⁹

¹⁴⁴ *The Starsin supra* [2001] note 102 at 470 para 164.

¹⁴⁵ *The Starsin supra* [2001] note 102 at 470 para 164.

¹⁴⁶ *The Starsin supra* [2001] note 102 at 470 para 164.

¹⁴⁷ “*Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.*, (1923) 15 LL.L. Rep. 99; [1923] A.C. 492 as per Lord Sumner at 102; 500:

“As a matter of construction, when a signature so qualified is attached to a general printed form with blanks filled in ad hoc, preponderant importance attaches to the qualification in comparison with printed clauses or even with manuscript insertions in the form. It still, however, remains true, that the qualifying words “as agents” as a part of the contract and must be construed with the rest of it.”

¹⁴⁸ Hill (note 126 above; 251).

¹⁴⁹ *English Industrial Estates Corporation v. George Wimpey & Co. Ltd.*, [1973] 1 Lloyd's Rep. 118 and *Pagnan S.p.A. v. Tradax Ocean Transportation S.A.*, [1987] 2 Lloyd's Rep. 342. See also J Chitty & H G Beale *Chitty on Contracts: General Principles* 28 ed (2003) para 12- 068.

The Judge held that an examination of the bills of lading in its whole context should be construed to mean that the general principle of giving greater weight to written or typed words including those in the signature box “is qualified by and to the extent”¹⁵⁰ that the demise clause applies.¹⁵¹ The words in parenthesis found within the wording of the demise clause “notwithstanding anything that appeared to the contrary” brings this second principle into operation. The Judge found the conflicting indicator to be the typed words “as carrier” describing CPS in the signature box and held that the demise clause was intended to apply “notwithstanding those words.”¹⁵² The majority for the Court of Appeal accordingly found the bills to be shipowner’s bills evidencing the shipowner as contracting carrier.

3.4.3. The House of Lords

The House of Lords unanimously overturned the decision of the Court of Appeal and adopted a commercial approach to construing the conflicting indicators on the bills when identifying the contracting carrier.¹⁵³

Lord Bingham at the outset stated that a bill of lading must be viewed as a commercial document and that the construction of a commercial document by a court is directly linked to “ascertaining and giving effect to the intentions of the parties.”¹⁵⁴ The court viewed the issue as one of a “contractual interpretation of the bill of lading” - as a commercial document.¹⁵⁵

The House of Lords based their judgments strongly on business sense that must be given to commercial documents.¹⁵⁶ Lord Bingham found that the dictates of common sense rule that “greater weight should attach to terms which the...contracting parties have chosen to include in the contract than to pre-printed terms probably devised to cover very many situations to which the... contracting parties have never addressed their minds.”¹⁵⁷

In keeping with construing the bill of lading as a whole, the House of Lords found it necessary to give effect to the intention of the contracting parties according to the “reasonable

¹⁵⁰ *The Starsin supra* [2001] note 102 at 473 para 183.

¹⁵¹ *The Starsin supra* [2001] note 102 at 473 para 183.

¹⁵² *The Starsin supra* [2001] note 102 at 474 para 185.

¹⁵³ Aikens (note 1 above; 141).

¹⁵⁴ *The Starsin supra* [2003] note 29 at 577 para 9.

¹⁵⁵ P Todd *Principles of the Carriage of Goods by Sea* 1 ed (2015) 300.

¹⁵⁶ *The Starsin supra* [2003] note 29 at 577 para 10.

¹⁵⁷ *The Starsin supra* [2003] note 29 at 577 para 11.

expectations of businessmen”¹⁵⁸ Lord Bingham emphatically held that a shipper or cargo interest would not be expected to refer to “detailed conditions on the back of the bill...until reaching [the identity of carrier clause and demise clause]”¹⁵⁹ to ascertain who the contracting carrier is. Even more so, this cannot be expected where the face of the bill provides a “clear and unambiguous statement of who the carrier is.”¹⁶⁰ Lord Bingham agreed with the judgement of Lord Rix in adopting the principles of common market sense when determining the question of the carrier.¹⁶¹

Lord Steyn concurred with Lord Bingham in adopting the common market sense approach. It was reasoned that the bill must be looked at in the way a reasonable person “versed in the shipping trade”¹⁶² would look at it.¹⁶³ On the principle of construction that precedence must be given to written, typed or stamped words rather than pre-printed conditions on a standard form, Lord Steyn took the principle further and stated that a shipper would give “predominant effect”¹⁶⁴ to the conditions on the face of the bill rather than to the back of the bill.¹⁶⁵ The House of Lords agreed with Lord Steyn on this point and held that bills of lading must be construed “objectively and uniformly”¹⁶⁶ and identifying the carrier is to be based on an “unequivocal statement on the face of the document.”¹⁶⁷ The language on the face of the bill was held to take precedence over contradictory provisions on the back of the bill and “no attempt at reconciliation is required.”¹⁶⁸

Lord Steyn held that it makes “business common sense”¹⁶⁹ that the carrier would be identified on the face of the bill, especially by the signature box rather than by conditions set out on the bottom of the back of the bill.¹⁷⁰ The judgement of the majority in the Court of Appeal was criticised by the House of Lords for affording greater weight to “boilerplate clauses”¹⁷¹ on the back of the bill rather than to a clear statement on the face of the bill.¹⁷² The House of Lords

¹⁵⁸ *The Starsin supra* [2003] note 29 at 577 para 12.

¹⁵⁹ *The Starsin supra* [2003] note 29 at 578 para 15.

¹⁶⁰ *The Starsin supra* [2003] note 29 at 578 para 15.

¹⁶¹ *The Starsin supra* [2003] note 29 at 578 para 17.

¹⁶² *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁶³ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁶⁴ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁶⁵ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁶⁶ *The Starsin supra* [2003] note 29 at 589 para 80.

¹⁶⁷ *The Starsin supra* [2003] note 29 at 589 para 80.

¹⁶⁸ *The Starsin supra* [2003] note 29 at 590 para 85.

¹⁶⁹ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁷⁰ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁷¹ *The Starsin supra* [2003] note 29 at 583 para 46.

¹⁷² *The Starsin supra* [2003] note 29 at 583 para 46.

held this to prompt an “unacceptable trap”¹⁷³ impacting negatively on international shipping trade.¹⁷⁴ Modern international shipping gives one little time to thoroughly look at the effect of printed conditions in small typed words when bills are issued. Lord Hoffman agreed with the judgments of his learned colleagues stating that a reasonable reader looking at the face of the bill would conclude that CPS, “and only CPS, was accepting liability as carrier.”¹⁷⁵

Additionally, the House of Lords rejected the Court’s reasoning in *The Flecha*,¹⁷⁶ in which Justice Moore-Bick found there to be loose usage of the term ‘carrier’ which was not unusual.¹⁷⁷ In response Lord Hoffman held that “loose usage of a critical expression in the bill of lading itself does seem...surprising.”¹⁷⁸

In keeping with viewing bills of lading as commercial documents, the House of Lords referred to the UCP 500. It is important to note that bills of lading are addressed to shippers, bankers and lawyers, and are transferable to third parties as security for financial credit. The House of Lords held that a banker is not expected to examine the contractual conditions in tiny print¹⁷⁹ on the back of a bill of lading,¹⁸⁰ instead, a banker will accept the bill to have been issued by the “named carrier”¹⁸¹ on the face of the bill. Article 23(a) of the *ICC Uniform Customs and Practice for Documentary Credits* (UCP 500)¹⁸² makes it clear that banks will decline documents failing to state the name of the carrier on the face of the bill, even if the identity of the carrier is provided for on the back of the bill.¹⁸³ This requirement is in stark contrast with the demise clause and identity of carrier clause printed on the back on the bill

¹⁷³ *The Starsin supra* [2003] note 29 at 615 para 188.

¹⁷⁴ *The Starsin supra* [2003] note 29 at 583 para 45.

¹⁷⁵ *The Starsin supra* [2003] note 29 at 587 para 71.

¹⁷⁶ *The Flecha supra* note 72 above.

¹⁷⁷ *The Starsin supra* [2003] note 29 at 588 para 71.

¹⁷⁸ *The Starsin supra* [2003] note 29 at 588.

¹⁷⁹ *National Bank of Egypt v. Hannevig's Bank*, (1919) 3 L.D.A.B. 213; *British Imex Industries Ltd. v. Midland Bank Ltd.*, [1958] 1 Q.B. 542.

¹⁸⁰ *The Starsin supra* [2003] note 29 at 588 para 77.

¹⁸¹ *The Starsin supra* [2003] note 29 at 589 para 78.

¹⁸² Article 23(a) of the *ICC Uniform Customs and Practice for Documentary Credits* (UCP 500) provides that:

- a. If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
 - i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.
- Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting.

¹⁸³ *The Starsin supra* [2003] note 29 at 589 para 78.

and identifying the shipowner as the carrier, without naming the specific shipowner.¹⁸⁴ International trade requires prompt decisions and expecting one to view pre-printed conditions contained on the back of a bill is “far removed from the real world of commerce”.¹⁸⁵

Lord Hobhouse took a different approach to that of his learned colleagues in that whilst the House of Lords unanimously afforded greater weight to the provisions on the face of the bill rather than to the clauses on the back of the bill, Lord Hobhouse found the signature to play a decisive role.¹⁸⁶ In his judgement, Lord Hobhouse found the principal fact to be that the signature was inconsistent with the form used.¹⁸⁷ He held that predominant effect must be given to “special words”¹⁸⁸ typed, written or stamped in the signature box as it creates a “special agreement.”¹⁸⁹ This agreement must be given effect to as it demonstrates the intention of the parties, and all contradictory clauses will be “overridden.”¹⁹⁰ In this way, Lord Hobhouse reiterated the reasoning of Colman J and Rix J holding fast to the general principle of construction that typed and written provisions (the signature box is surely one such) override pre-printed provisions in the case of inconsistency.¹⁹¹

The cargo owners argued in the alternative that a relationship of agency existed between the shipowners and the time charterers in which CPS acted as agent for the shipowner as “disclosed but unnamed principal.”¹⁹² They argued that the signatures were made for the master - that the port agents signed as agents for the time charterer who in turn acted as agents for the shipowner thereby lengthening the chain of agency.¹⁹³ They argued also that CPS may have contracted for themselves and for the shipowners, that the description of CPS as carrier in the signature box confirmed and gave effect to the demise clause under which CPS acted as disclosed agent for the shipowner.¹⁹⁴ The House of Lords rejected this

¹⁸⁴ W Tetley ‘Case Comment: The House of Lords decision in *The Starsin*’ (2004) 35 *Journal of Maritime Law & Commerce* 121 at 127.

¹⁸⁵ *The Starsin supra* [2003] note 29 at 584.

¹⁸⁶ Aikens (note 1 above; 141).

¹⁸⁷ *The Starsin supra* [2003] note 29 at 597 para 128.

¹⁸⁸ *The Starsin supra* [2003] note 29 at 597 para 128.

¹⁸⁹ *The Starsin supra* [2003] note 29 at 597 para 128.

¹⁹⁰ *The Starsin supra* [2003] note 29 at 597 para 128.

¹⁹¹ Hill (note 126 above; 252).

¹⁹² *The Starsin supra* [2003] note 29 at 576 -577 para 8.

¹⁹³ *The Starsin supra* [2003] note 29 at 596 para 124.

¹⁹⁴ *The Starsin supra* [2003] note 29 at 590 para 84.

submission stating that there was no evidence alluding to “dual liability”¹⁹⁵ and that the standard provisions provide for a single carrier throughout the bills of lading.

The House of Lords agreed with the reasoning of Colman J and Rix LJ and held the bills to be charterers' bills.

3.5. Criticism surrounding *The Starsin* judgement in the House of Lords

The decision handed down by the House of Lords to a large extent addressed business concerns by viewing bills of lading as commercial documents. The House of Lords considered the UCP 500's requirement for the carrier to be named on the face of the bill which largely influenced their decision.¹⁹⁶ It is important to note that the UCP 500 does not comprise domestic or international law, nor is it considered an international convention.¹⁹⁷ Rather, the UCP 500 is a body of rules intended to govern letter of credit transactions in international sale contracts.¹⁹⁸ It aims to aid bankers, sellers, buyers, lawyers and anyone else that may be involved in documentary credit transactions.¹⁹⁹ Author Aikens suggests that the UCP 500 ought not to influence a determination of the identity of the carrier under a bill of lading, which notions a sense of “the tail wagging the dog”²⁰⁰ He adds that the UCP 500 has been designed for bankers who view the bill as a document of title and not as a contract. Aikens argues that in *The Starsin*,²⁰¹ overemphasis was placed on the face of the bill, and that this should not be so, since those commercially active are knowledgeable on bills of lading and understand that important contractual terms may be contained on the back of the bill.²⁰² To this end, he argues that distinguishing between two sides of the bill is unneeded.²⁰³

It is also equally important to note that the UCP 500 and now the most recent revision, the UCP 600²⁰⁴ though not binding as law, is a set of rules seeking to promote commercial certainty for identifying the carrier in clear terms.²⁰⁵ While we cannot rely solely on the requirements of the UCP 600 in determining the identity of the carrier, it is submitted that the

¹⁹⁵ *The Starsin supra* [2003] note 29 at 576 -577 para 8.

¹⁹⁶ Aikens (note 1 above; 142).

¹⁹⁷ Hill (note 126 above; 253).

¹⁹⁸ Hill (note 126 above; 252).

¹⁹⁹ Hill (note 126 above; 252).

²⁰⁰ Aikens (note 1 above; 142).

²⁰¹ *The Starsin supra* [2003] note 29 above.

²⁰² Aikens (note 1 above; 142).

²⁰³ Aikens (note 1 above; 42).

²⁰⁴ UCP 600 came into effect on 01 July 2007.

²⁰⁵ Hill (note 126 above; 253).

requirement for the carrier to be clearly named on the face of the bill could lead to a decrease in expensive legal disputes²⁰⁶ on the question of the carrier and could promote certainty for cargo interests unaware of charterparty terms.²⁰⁷ Author Hill suggests that certainty in knowing who the contractual carrier is when issuing a bill of lading will be advantageous to all parties involved, including “sellers, buyers, shippers, consignees, agents and negotiating banks.”²⁰⁸ A universal acceptance of its terms by the “sea transport community”²⁰⁹ could only prove to be beneficial.²¹⁰

The decision by the House of Lords was also criticized by Professor Tetley, however on a basis different to that of Aikens. Tetley submits that the determination of the carrier should not be confined to the possibility of only one carrier.²¹¹ He asserts that the carriage of goods by sea is a joint venture between the shipowner and charterers as they share the obligations of carrier under the Hague-Visby Rules.²¹² Under a time charterparty, the shipowner and charterer share the duties of “loading, carrying, caring for and discharging the cargo” and therefore should be held jointly and severally liable as carrier to third parties.²¹³ Also, the Hague-Visby Rules render void any clause contained in a contract of carriage that seeks to relieve or lessen the liability of a carrier for loss or damage to goods as a result of negligence or fault on the part of the carrier in fulfilling its duties and obligations.²¹⁴ As such, neither the shipowner nor the charterer should be able to contract out of their obligations in terms of the Hague-Visby Rules.²¹⁵ Tetley states in this regard, “To allow them to stipulate that one of them is not the carrier is the most opprobrious of non-responsibility clauses.”²¹⁶ He posits that the demise clause and identity of carrier clause protects the charterer from any responsibility in terms of the Rules, and are therefore “non-responsibility clauses.”²¹⁷

²⁰⁶ Hill (note 126 above; 253).

²⁰⁷ Tetley W (note 184 above; 123).

²⁰⁸ Hill (note 126 above; 253).

²⁰⁹ Hill (note 126 above; 253).

²¹⁰ Hill (note 126 above; 253).

²¹¹ Tetley W (note 184 above; 122).

²¹² Tetley W (note 184 above; 122).

²¹³ Tetley W (note 184 above; 122).

²¹⁴ Article 3(8) of the Hague-Visby Rules: provides that:

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

²¹⁵ J Hare *Shipping Law and Admiralty jurisdiction in South Africa* 2 ed (2009) 714.

²¹⁶ Tetley W (note 184 above; 121).

²¹⁷ Tetley W (note 184 above; 121).

Some scholars in agreement with Tetley have viewed the carriage of goods by sea as a joint venture noting that “the time charter is undoubtedly a joint venture in the sense that it is composed of acts and operations of both the shipowner and the charterer, who exploit the vessel for their joint benefit.”²¹⁸ However, other scholars while accepting the plausibility of there being more than one carrier, have rejected the notion of a time charter being a joint venture between shipowner and charterer. Marler notes this view to be “unnecessary and wrong.”²¹⁹

Furthermore, alluding to a time charter as being a joint venture is very different from what was argued by Rix J in the Court of Appeal,²²⁰ where it was mentioned as an *obiter dictum* that there may be two carriers within the agency mandate.²²¹ Rix J said that “if the charterer has authority to contract on behalf of the shipowner, it may be that the holder of the bill of lading can sue the shipowner upon it as an undisclosed principal.”²²²

3.6. Conclusion

The chapter initially looked at domestic legislation governing English maritime law, paying particular attention to the development of national legislation in the United Kingdom. The British Carriage of Goods by Sea Act 1971²²³ enacts the Hague-Visby Rules as a schedule and as noted in previous discussions, the Hague-Visby Rules fail to adequately define the term “carrier” and therefore provides little help in identifying the carrier under a bill of lading subject to the Rules.

Then the approach historically taken by English Courts on the effectiveness of a demise clause contained in a bill of lading in identifying the contracting carrier was discussed. Earlier cases such as *The Berkshire*²²⁴ gave effect to the demise clause finding the demise clause to reiterate the charterparty provision which entitled charterers and their agents to sign bills of lading on the shipowner’s behalf; this was held despite the qualification “for the master” being omitted. In signing bills of lading, the charterers were found to act as agents of

²¹⁸ C Pejovic, ‘The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law’ (2000) 31 *Journal of Maritime Law and Commerce* 379 at 383.

²¹⁹ D Marler ‘The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading’ (2002) 26 *Maritime Lawyer* 597 at 607.

²²⁰ *The Starsin supra* [2001] note 102 above.

²²¹ *The Starsin supra* [2001] note 102 at 451 para 70.

²²² S Boyd Scrutton *on Charterparties and Bills of Lading* 20 ed (1996) 81.

²²³ Carriage of Goods by Sea Act of 1971

²²⁴ *The Berkshire supra* note 28 above.

the shipowners thereby contracting with the shipper on behalf of the shipowners. *The Rewia*²²⁵ did not feature the insertion of a demise clause in the bills, but the court found the determination of the carrier to be an examination of the construction of the bills in light of the surrounding circumstances. The court found that the signature and qualification to the signature “for the master” must be afforded greater weight in determining the carrier rather than the demise clause. The court in *The Flecha*²²⁶ also found that the bill must be considered as a whole viewing the entire matrix of the document in order to properly identify the carrier. The signatures on the bill in this case were not sufficient to hold the charterers liable as the carrier.

Lastly, the chapter provided a detailed examination of the reasoning of the courts in *The Starsin*.²²⁷ The decision in the House of Lords which is the current position adopted by English Courts took on a different approach in identifying the carrier under a bill of lading. The court viewed the question of the identity of the carrier as ultimately being a construction of the bill as a commercial document. The court noted the importance of commercial sense finding that reasonable persons in the shipping trade would look to the front of the bill to determine the carrier and not the reverse side of the bill containing the pre-printed demise clause. The court found Article 23(a) of the *ICC Uniform Customs and Practice for Documentary Credits* (UCP 500)²²⁸ to support this position.

Ultimately, the chapter looked at the various criticisms of the House of Lords’ decision drawing particular attention for the purposes of subsequent chapters to Professor Tetley’s criticism based on his theory of a joint venture between shipowners and charterers to a contract of carriage. Tetley rejects the notion of a need to confine the question of the carrier to only one carrier.

²²⁵ *The Rewia* *supra* note 53 above.

²²⁶ *The Flecha* *supra* note 72 above.

²²⁷ *The Starsin* *supra* [2003] note 29 above.

²²⁸ Article 23(a) of the *ICC Uniform Customs and Practice for Documentary Credits* (UCP 500) states that:

- a. If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
 - (i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.
- Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting.

Chapter Four: The identity of the carrier problem under American Law

4.1. Introduction

This chapter will focus on the validity of the demise clause and identity of carrier clause under bills of lading in American law. The chapter will examine the approach taken historically by American Courts on the validity of the demise clause, and the approach taken by the Courts more recently. By so doing, the chapter will draw attention to the lack of uniformity in case law on the validity of the demise clause and identity of carrier clause. Additionally, the chapter will discuss Professor Tetley's theory of joint and several liability of shipowners and charterers as a means to identifying the carrier. Finally, the chapter will examine the multicarrier approach adopted by American Courts as a preferred approach to identifying the carrier to a contract of carriage.

4.2. Statutory law and International Conventions governing the carriage of goods by sea in the United States of America

The United States Carriage of Goods by Sea Act of 1936(COGSA)¹ is applicable to all bills of lading, or similar document of title covering a contract of carriage of goods by sea² “to or from ports of the United States in foreign trade.”³ COGSA provides rules that regulate the rights and duties of all carriers and shippers that are party to contracts of carriage to or from ports of shipment in the United States.⁴ Where COGSA is applicable to a contract of carriage, the Act provides “exclusive remedy”⁵ with no provision for common law remedies for breach of contract, or negligence.⁶

COGSA applies to the carriage of goods “from the time when the goods are loaded on to the time when they are discharged from the ship.”⁷ Quite often, however, COGSA will be incorporated by reference into contracts of carriage so as to regulate situations beyond its scope.⁸ For example, a period of responsibility clause, which is usually found within the paramount clause in a bill of lading, makes COGSA applicable beyond the “tackle to tackle”

¹ Hereinafter referred to as COGSA.

² COGSA 46 U.S. Code Appx. S. 1301(b).

³ COGSA 46 U.S. Code Appx. S. 1312.

⁴ COGSA 46 U.S. Code Appx. S. 1302.

⁵ *Miller Export Corp. v. Hellenic Lines, Ltd* 534 F. Supp 707 at 710-711., 1982 AMC at 1893-1982 (S.D.N.Y 1982).

⁶ *Ibid.*

⁷ COGSA 46 U.S. Code Appx. S. 1301(e).

⁸ COGSA 46 U.S. Code Appx. S. 1312.

period in foreign trade.⁹ In this way, the Act will apply to the pre-loading and after discharge period.¹⁰ Many courts have held that the period of responsibility clause in a bill of lading gives COGSA precedence over any conflicting U.S domestic law regulating the loading and discharging of goods.¹¹ However, the Second Circuit held that a contractual term such as a period of responsibility clause which broadens the application of COGSA beyond the “tackle to tackle”¹² period operates exactly as that - simply a contractual term, it does not prevail over domestic state law.¹³ While the courts are divided on this issue, it is an issue that goes beyond the scope of the present discussion and will not be discussed further in this paper.

COGSA expressly provides that its provisions do not apply to charterparties,¹⁴ but where bills of lading are issued under a charterparty, those bills must comply with the provisions of the Act.¹⁵ Should the parties to a charterparty wish for COGSA to govern the bills of lading issued under the charterparty, an express intention to that effect must be made.¹⁶ For example, the bill of lading must incorporate the charterparty by a clause in the bill.¹⁷

The Act defines a carrier as including “the owner or the charterer who enters into a contract of carriage with the shipper”¹⁸ and provides for the carrier’s *in personam* liability under section 1302. A determination of liability for loss or damage to cargo under COGSA as well as for breach of contract may be made only against a party who is found to be a carrier in terms of the Act.¹⁹

Additionally, section 1303(8) of the Act prohibits any clause in bills of lading that purport to exonerate a carrier from liability for loss or damage caused to goods by its negligence or fault, or that attempts to lessen a carrier’s liability as provided for in COGSA. As such, any term in a bill of lading contravening the provisions of COGSA will be of no effect, null and void.²⁰

⁹ COGSA 46 U.S. Code Appx. S. 1307.

¹⁰ COGSA 46 U.S. Code Appx. S. 1307.

¹¹ *Gebr. Bellmer KG v Terminal Servs. Houston, Inc* 711 F. 2d 622, AMC 607 (5 Cir. 1983).

¹² *Colgate Palmolive v. Dart Canada* 724 F.2d 313 1984 AMC 305 (2d Cir.1983) at 315.

¹³ *Ibid.*

¹⁴ COGSA 46 U.S. Code Appx. S. 1305.

¹⁵ COGSA 46 U.S. Code Appx. S. 1305.

¹⁶ T J Schoenbaum *Admiralty and Maritime Law* 4 ed (2004) 682.

¹⁷ Schoenbaum (note 16 above; 682)

¹⁸ COGSA 46 U.S.C section 1301(a).

¹⁹ Schoenbaum (note 16 above; 685).

²⁰ A Nakazawa and B A Moghaddam ‘COGSA and Choice of Foreign Law Clauses in Bills of Lading’ (1992) 17 *Tulane Maritime Law Journal* 1 at 3-4.

4.3. The traditional approach taken by American Courts on the validity and effectiveness of the demise clause and identity of carrier clause (An analysis of case law)

The demise clause and identity of carrier clause have been given effect to in some cases, and in others have been ruled as invalid by different Circuit Courts in the United States.²¹ The question of the role of the demise clause and/or identity of carrier clause under a bill of lading in determining who the carrier is did not feature in American Courts until the decision of *The Iristo*²² in 1941.²³ This case initiated almost a decade of approval by American judges for the acceptance of the demise clause in bills of lading.²⁴

In *The Iristo*,²⁵ the vessel lost its cargo when she sank after she struck an underwater reef off the northern west side of Bermuda.²⁶ The vessel was time chartered to Atlantic Maritime Corporation who subsequently sub-chartered the vessel to Ocean Dominion Steamship Corporation.²⁷ Both charterparties operated on the standard NYPE time charter form.²⁸

Both time charterparties provided that;

“The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment or agency; and Charterers are to load, stow and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate’s or Tally Clerk’s receipts.”²⁹

The cargo was loaded on board the vessel in Canada and the sub-charterers issued bills of lading in respect thereof.³⁰ It was found that the master of the vessel also gave written authority to the sub-charterers to sign bills of lading on his behalf. The cargo interests sought to recover damages for loss of cargo from the sub-charterer (Ocean Dominion Steamship Corporation) on the basis that the sub-charterer was the carrier.³¹ The United States District

²¹ W Tetley ‘The Demise of the Demise Clause’ (1998) 44 *McGill Law Journal* 807 at 814.

²² *The Iristo* 43 F Supp. 29 (S.D.N.Y. 1941).

²³ R W Pritchett ‘The Demise clause in American courts’ (1980) *Lloyd’s Maritime and Commercial Law Quarterly* 387 at 390.

²⁴ Pritchett R W (note 23 above; 390).

²⁵ *The Iristo* *supra* note 22 above.

²⁶ *The Iristo* *supra* note 22 at 32.

²⁷ *The Iristo* *supra* note 22 at 32.

²⁸ *The Iristo* *supra* note 22 at 32.

²⁹ *The Iristo* *supra* note 22 at 32.

³⁰ Pritchett R W (note 23 above; 390).

³¹ *The Iristo* *supra* note 22 at 31.

Court sought to determine whether the sub-charterer was in fact the carrier under the bills of lading.³²

Some of the bills issued in respect of the cargo were signed:

“Ocean Dominion Steamship Corporation, For Master and Owners, By....”

The signature was signed either by the sub-charterer’s agents or the sub-charterer’s employee.³³

The other bills issued were signed:

“Ocean Dominion Steamship Corporation, By authority of the Master and/or owners of the above-mentioned steamer, By...”

The signature appended was the same on these bills as the others.³⁴

The court held that “the very language of th[e] signature clearly indicates that the sub-charterers signed, not as principal, but as agent of the master and/or owner by express authority to so sign.”³⁵ The court held further that the clause commonly found in charterparties stipulating that “the master shall sign bills of lading...” effectively creates a contract with the shipowner and shippers through the master’s signature for the charterer’s benefit.³⁶ This does not mean that the master signs as agent for the charterer, but rather, the master signs “because he is bound to sign by reason of the charterparty.”³⁷

The bills of lading also contained a demise clause³⁸ which effectively provided that the carrying vessel was not owned by the charterer and that all claims for loss or damage to cargo was to be instituted against the vessel itself and/or against the shipowners.³⁹

³² *The Iristo supra* note 22 at 32.

³³ *The Iristo supra* note 22 at 33.

³⁴ *The Iristo supra* note 22 at 32.

³⁵ *The Iristo supra* note 22 at 33.

³⁶ *The Iristo supra* note 22 at 34.

³⁷ *The Iristo supra* note 22 at 34.

³⁸ The demise clause (Clause 4) provided; “As the Goods are carried upon a vessel not owned by, but under charter to Ocean Dominion Steamship Corporation, the Ocean Dominion Steamship Corporation shall not be liable for any loss or damage which may be sustained by said Goods from the time of their shipment upon said vessel until their discharge therefrom, and the shippers, consignees and other persons interested in said Goods hereby agree to make and enforce all such claims, whether or not based upon breach of warranty of unseaworthiness, solely against the carrying vessel and/or her owners, and hereby release Ocean Dominion Steamship Corporation from all liability or responsibility with respect to such claims.” See *The Iristo supra* note 22 at 35.

³⁹ *The Iristo supra* note 22 at 35.

The cargo interests alleged that the demise clause was a tool used by the sub-charterers to limit liability as the carrier⁴⁰ and therefore was null and void under the Hague Rules.⁴¹ However, the court found the demise clause to merely set forth the contractual relationship between the parties.⁴² The court held that the demise clause did not seek to limit the charterer's liabilities as carrier and was found not to be void under the Hague Rules.⁴³ The fact that the contract was signed by the sub-charterers as agent for the shipowner, together with the inclusion of the demise clause in the bill; demonstrated in clear terms that the contract of carriage was one between the shipper and the shipowner "alone."⁴⁴ The court held that the sub-charterers were not a party to the contract of carriage⁴⁵ and therefore was not a carrier.⁴⁶ Since the charterer was found not to be a carrier in the first instance, the "constrictions" of the Hague Rules did not come into play.⁴⁷ Additionally, the court rejected the notion alluded to by the cargo interests that bills of lading are a type of contract which allows for both charterer and shipowner to be liable.

While the court in this case examined the effect of the demise clause under Canadian law, the decision did not rely on any distinct point of Canadian law and therefore the judgement applies also to the United States adoption of the Hague Rules.⁴⁸

This early American decision demonstrates the court's reliance on the purpose of the demise clause and its wording when determining the carrier under a bill of lading,⁴⁹ finding that the demise clause sets out the contractual relationship between the parties.⁵⁰ This decision differs from the English decision *The Rewia*,⁵¹ in which case the court relied extensively on the signature and its qualification on the bills when determining the contractual carrier. In *The Rewia*,⁵² the court focused largely on what it called "the keywords" being "For the Master"⁵³

⁴⁰ Pritchett R W (note 23 above; 391).

⁴¹ Article 3(8) of The Hague Rules

⁴² *The Iristo supra* note 22 at 35.

⁴³ *The Iristo supra* note 22 at 35.

⁴⁴ *The Iristo supra* note 22 at 35.

⁴⁵ W Tetley *Marine Cargo Claims* 4 ed (2008) Vol 2: 604.

⁴⁶ *The Iristo supra* note 22 at 32.

⁴⁷ Pritchett R W (note 23 above; 391).

⁴⁸ Pritchett R W (note 23 above; 391).

⁴⁹ *The Iristo supra* note 22 at 35.

⁵⁰ *The Iristo supra* note 22 at 35.

⁵¹ *The Rewia* [1991] 2 Lloyd's Rep. 325.

⁵² *The Rewia supra* note 51 above.

⁵³ *The Rewia supra* note 51 at 333.

in the bills of lading.⁵⁴ Even though there was no carrier definition clause nor was there a demise clause or an identity of carrier clause contained in the bills, the court held that in determining the contracting carrier; greater weight must be afforded to the signature and its qualification rather than to other indicators such as a definitions clause, demise clause and/or identity of carrier clause.⁵⁵

4.4. A deviation from the traditional approach (An analysis of case law)

Almost a decade after *The Iristo*,⁵⁶ American Courts began taking a different approach to the validity and effectiveness of the demise clause in bills of lading when determining who is the carrier. This differed approach began with the case of *Epstein v. United States*.⁵⁷ In this case, the vessel S.S Farida was on time charter to United States through the agency of The War Shipping Administration.⁵⁸ The Administration appointed agents through whom the Administration “solicited” and obtained⁵⁹ cargo for carriage from New York to Havana, and issued bills of lading in respect thereof.⁶⁰ The bills of lading were signed “For the master by United Fruit Company as agent for the master”.⁶¹ United Fruit Company acted as agent for the vessel’s master, and the master acted as agent for the time charterer (The War Administration).⁶² The bills of lading also contained a demise clause. The War Administration held itself out to the public as a common carrier for the carriage of goods to Havana.⁶³ Some of the cargo was lost during the voyage to Havana⁶⁴ and the cargo interests accordingly sued for loss of cargo.

The time charterer sought to exonerate itself from liability as carrier by relying on the demise clause contained in the bill of lading.⁶⁵ The court rejected this and held that the demise clause was invalid because of its second sentence which constituted “an effort to relieve the carrier

⁵⁴ The court held that “a bill of lading signed for the master cannot be a charterer’s bill unless the contract was made with the charterers alone, and the person signing has authority to sign and does sign, on behalf of the charterers and not the owners.” See *The Rewia* *supra* note 51 at 336.

⁵⁵ N Gaskell... et al *Bills of Lading: Law and Contracts* 1 ed (2000) 95.

⁵⁶ *The Iristo* *supra* note 22 above.

⁵⁷ *Epstein v. United States* 86 F. Supp. 740 (S.D.N.Y. 1949).

⁵⁸ *Epstein* *supra* note 57 at 740.

⁵⁹ Pritchett R W (note 23 above; 392).

⁶⁰ Pritchett R W (note 23 above; 392).

⁶¹ *Epstein* *supra* note 57 above at 742.

⁶² *Epstein* *supra* note 57 above at 742.

⁶³ *Epstein* *supra* note 57 above at 742.

⁶⁴ Pritchett R W (note 23 above; 392).

⁶⁵ Pritchett R W (note 23 above; 392).

of liability for its fault; i.e. failure to deliver”⁶⁶ contravening Sections 1303(2) and 1303(8) of the Carriage of Goods by Sea Act.⁶⁷ The court also found the demise clause to be invalid on another basis, that being that the time charterparty provided no authority for the time charterer to contract on behalf of the shipowner,⁶⁸ and that even if such authority did exist, “that authority is for ordinary bills of lading and not to contract upon the owner’s liabilities properly devolving upon others.”⁶⁹ Clancy DJ found that the Administration was “disingenuous” in its attempt of using the demise clause to claim that the contract was between the shipowner and shipper.⁷⁰ The demise clause was held to be “a fraud on the shipper and conveys a false warranty of authority to contract.”⁷¹ Accordingly, the court found the time charterer liable as carrier. With this decision, the Southern District Court of New York disregarded its previous holding⁷² in the case of *The Iristo*.⁷³

Scholar Pritchett suggests that the court’s finding in *Epstein v United States*⁷⁴ on the invalidity of the demise clause as an attempt to avoid or limit liability in contravention of COGSA, should be assessed in line with the court’s holding⁷⁵ in *Pendleton v Benner Line*.⁷⁶ In that case, Benner Line hired space on a vessel for the carriage of cargo as the voyage charterer.⁷⁷ The court held that since the charter was not a demise charter, it is presumed, (and the bill of lading supports this fact); that the goods fell into the possession of the shipowners since the vessel remained in possession of the shipowners.⁷⁸ This would lead one to presume that the shipowner is the carrier. However, the court found that:

“Benner Line held itself out to the public as a common carrier, solicited and received the merchandise... [and] by acceptance of such merchandise contracted to be answerable for the transportation, chartered the vessels to carry what it received... fixed and received the freight and signed or had the bills of lading signed in its office.”⁷⁹

⁶⁶ *Epstein supra* note 57 at 742.

⁶⁷ United States Carriage of Goods by Sea Act of 1936.

⁶⁸ *Epstein supra* note 57 at 743.

⁶⁹ *Epstein supra* note 57 at 743.

⁷⁰ *Epstein supra* note 57 at 743.

⁷¹ *Epstein supra* note 57 at 742 - 743.

⁷² Pritchett R W (note 23 above; 392).

⁷³ *The Iristo supra* note 22 above.

⁷⁴ *Epstein supra* note 57 above.

⁷⁵ Pritchett R W (note 23 above; 393).

⁷⁶ *Pendleton v. Benner Line*, 246 U.S. 353, 62 L. Ed. 770, 38 S. Ct. 330 (1918).

⁷⁷ *Pendleton v. Benner Line supra* note 76 at 331.

⁷⁸ *Pendleton v. Benner Line supra* note 76 at 331.

⁷⁹ *Pendleton v. Benner Line supra* note 76 at 331.

Therefore, Pritchett argues, that where the charterer solicits a cargo as a common carrier and enters into “an independent pre-bill of lading contract”⁸⁰ with a shipper; that charterer is held to be the carrier. The subsequent issuance of a bill of lading containing a demise clause which evidences such contract will prove insufficient as an attempt by the charterer to avoid liability as carrier for loss or damage to the cargo.⁸¹ This is the case whether the voyage in question is governed by COGSA or not.⁸²

Pritchett argues that the governing factor then is the solicitation of cargo by the charterer, for instance by holding itself out to be a common carrier.⁸³ Where an independent contract between the charterer and shipper does not exist, the demise clause would be valid in its purpose of identifying the contractual parties especially the carrier.⁸⁴ In such a case, the charterer cannot be found to be the carrier since the charterer is not party to the contract of carriage at all.⁸⁵

Pritchett suggests that the demise clause is not always invalid as was held in *Epstein v United States*.⁸⁶ In that case the Administration (the time charterer) held itself out to the public as a common carrier and entered into an independent contract with the shipper before issuance of the bills of lading. As such, the demise clause could not be valid since it sought to exonerate the charterer of its rightful carrier liability.⁸⁷

4.5. The demise clause and identity of carrier clause viewed in light of statutory law

American Courts have taken a dim view to the demise clause and identity of carrier clause when considered in terms of statutory law. For example, in the case of *Blanchard Luber Co. v. SS Anthony II*,⁸⁸ the court held the demise clause to be invalid under COGSA’s predecessor the Harter Act.⁸⁹ The District Court of New York held that the demise clause sought to

⁸⁰ Pritchett R W (note 23 above; 393).

⁸¹ Pritchett R W (note 23 above; 394).

⁸² Pritchett R W (note 23 above; 394).

⁸³ Pritchett R W (note 23 above; 393).

⁸⁴ Pritchett R W (note 23 above; 393).

⁸⁵ Pritchett R W (note 23 above; 394).

⁸⁶ *Epstein supra* note 57 above.

⁸⁷ Pritchett R W (note 23 above; 394).

⁸⁸ *Blanchard Luber Co. v. SS Anthony II* [1966] 2 Lloyd’s Rep. 437 (S.D.N.Y. 1966).

⁸⁹ V Rochester *The Lone “Carrier” An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable* (unpublished LLM thesis, University of Cape Town, 2005) 38.

insulate the charterer from liability in direct contravention of Section 1 of the Harter Act.⁹⁰ This section prohibits clauses in bills of lading which purport to “relieve managers, agents, masters, or owners from liability for loss or damage to cargo resulting from negligence, fault or failure to load, stow, care and properly deliver the cargo.” In addition, the court held, that even before the existence of the Harter Act, judicial authority provided that common carriers may not be insulated from their liability “by any declaration or stipulation that they should not be considered such carriers.”⁹¹

A recent decision by the United States Fifth Circuit invalidated the demise clause on the same basis; being that the clause functioned as an attempt to avoid or lessen a carrier’s liability in contravention of section 1303(8) of COGSA.⁹² In *Thyssen Steel Co v M/V Kavo Yerakas*,⁹³ cargo interests Thyssen Steel Company and Associated Metals and Minerals Corporation entered into a contract of carriage with Eurolines for the shipment of steel pipes from Europe to the United States on board the vessel M/V Yerakas.⁹⁴ At the time of shipment, the vessel was on time charter to Eurolines by shipowner Dodekaton.⁹⁵ Bills of lading were issued and signed “for the master” by the time charterer’s agents.⁹⁶ Cargo interests instituted action against the vessel *in rem*, against the shipowner Dodekaton and against Eurolines the time charterer for damage caused to the cargo allegedly occurring during transit.⁹⁷

Clause 8 of the time charterparty stated that:

The Captain (although appointed by the Owners), is solely under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim, lash, dunnage, secure, tally and discharge the cargo at their expense under the supervision, directions and responsibility of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate’s or Tally Clerk’s receipts.

The issue before the court was whether the shipowner was a carrier under COGSA.⁹⁸ In examining this issue, the court stated that to recover damages under COGSA, it must be established by the cargo owner that there was a contract of carriage between itself and the

⁹⁰ The Harter Act of 1893.

⁹¹ *Bank of Kentucky vs. Adams Express Co.*, 93 U.S. 174, 181 (1876).

⁹² Tetley (note 45 above; 606).

⁹³ *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995).

⁹⁴ *Thyssen Steel Co. supra* note 93 at 1351.

⁹⁵ *Thyssen Steel Co. supra* note 93 at 1351.

⁹⁶ *Thyssen Steel Co. supra* note 93 at 1351.

⁹⁷ *Thyssen Steel Co. supra* note 93 at 1351.

⁹⁸ *Thyssen Steel Co. supra* note 93 at 1351.

shipowner or charterer.⁹⁹ The court found that the shipowner was not party to the contract of carriage since the master acted as agent for the time charterer and was given no authority by the shipowner to issue bills of lading on the shipowner's behalf.¹⁰⁰

The court referred to the identity of carrier clauses and the demise clause as clauses that attempt to avoid or lessen a party's COGSA liability.¹⁰¹ The court held that liability may not be determined at the discretion of the parties but rather by reference to the statute, i.e. COGSA.¹⁰² The Act specifically renders void any clause that seeks to relieve or lessen the liability of a carrier for loss or damage to goods due to negligence or fault on the part of the carrier in fulfilling its duties and obligations.¹⁰³ The court held the demise clause and identity of carrier clause to be void under Section 1303(8) of the Act.

4.6. A lack of uniformity in judicial decisions on the validity and effectiveness of the demise clause

The court's reasoning in *Thyssen Steel Co v M/V Kavo Yerakas* however, has not always been followed by American Courts. While some American Courts have attributed blanket invalidity to the demise clause for contravening statutory law, other American Courts have in certain instances validated the demise clause and identity of carrier clause based on other grounds.¹⁰⁴

A case in point is *Recovery Services International v. S/S Tatiana L.*¹⁰⁵ In this case, shipowner Elprogreso Incorporated entered into a time charter with Saudi International Shipping company on the NYPE form.¹⁰⁶ The charterparty agreement contained interlineations and rider clauses.¹⁰⁷ The charterparty contained the standard provisions of the NYPE standard time charter form, for example, paragraph 8 of the charterparty authorised the Captain "to sign Bills of Lading for cargo as presented with Mate's or Tally Clerk's receipts," and referred to paragraph 42 which provided that:

⁹⁹ *Thyssen Steel Co. supra* note 93 at 1351.

¹⁰⁰ *Thyssen Steel Co. supra* note 93 at 1352.

¹⁰¹ *Thyssen Steel Co. supra* note 93 at 1352.

¹⁰² *Thyssen Steel Co. supra* note 93 at 1352.

¹⁰³ COGSA 46 U.S. Code Appx. S. 1303(8).

¹⁰⁴ Rochester (note 89 above; 38).

¹⁰⁵ *Recovery Services International v. S/S Tatiana L* 1986 WL 1171 (S.D.N.Y. 1986).

¹⁰⁶ *Recovery Services International v. S/S Tatiana L supra* note 105 at 2.

¹⁰⁷ *Recovery Services International v. S/S Tatiana L supra* note 105 at 2.

“[t]he Master [is] to issue Bills of Lading for all cargoes carried under this Charter Party, if required by the Charterers and without prejudice to the terms and conditions of the Charter Party. Charterers and/or their agents are authorised to issue Bills of Lading on Owners’/Master’s behalf according to the Mate’s receipts.”¹⁰⁸

At the port of loading, the master wrote letters to Biehl Incorporated who acted as agents for the time charterer’s affiliate company Saudi-U.S. Line, stipulating that Biel was authorised according to paragraph 42 of the charterparty, to sign bills of lading on behalf of the master.¹⁰⁹

Mate’s receipts for the goods on board clearly indicated that certain cargo was “bleeding” while others were “stained with flour” and torn. Regardless of this fact, Biehl Incorporated issued bills of lading on the forms of Saudi-U.S. Line stating the cargo to be “Certified Loaded Clean on Board.” The bills were signed “For the Carrier: BIEHL & CO., INC. General Agent, FOR SAUDI-U.S. LINE.”¹¹⁰

The vessel S/S Tatiana L arrived in Saudi Arabia and certain cargo was reported as non-delivered while others were lost or damaged. Recovery Services International as subrogee of the consignee instituted action against the shipowner amongst other defendants to recover damages in respect of the cargo. The issue before the court was whether the shipowner was a COGSA carrier.

The shipowner Elprogreso argued that it cannot be a carrier under COGSA since the bills of lading were issued on Saudi-U. S Line forms, a company affiliated with the time charterer and were signed “for Saudi-U. S Line” by Biehl Incorporated.¹¹¹ They argued that a shipowner is exculpated from *in personam* liability where bills of lading were signed by the time charterer in a “non-representative capacity”, that being that the bills were not in fact signed for the master and thereby not binding on the shipowner.¹¹² The shipowner alleged that the bills were signed for Saudi-U. S. Line.¹¹³

Cargo interests alleged that despite the qualification of the signature by Biehl Incorporated stating ‘For the Carrier, For Saudi- U. S. Line,’ the identity of carrier clause found in

¹⁰⁸ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 2.

¹⁰⁹ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 2.

¹¹⁰ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 2.

¹¹¹ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 3.

¹¹² *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 3.

¹¹³ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 3.

paragraph 17 of the bill of lading indicated that the signature by Biehl Incorporated was made on behalf of the shipowner.

The identity of carrier clause read as follows:

“The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness.

“It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agent shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods.”

The court agreed that the terms of the identity of carrier clause subjected the shipowner to *in personam* liability as carrier since it provides that the contract of carriage is with the shipowner and the shipper.¹¹⁴ The clause effectively provided that Biehl Incorporated acted only as agent for the shipowner.¹¹⁵ However, the court held that the provisions of the clause were “wholly inconsistent”¹¹⁶ with all other terms on the bill of lading. The bill appeared on Saudi – U. S. Line’s printed form, was signed “for Saudi- U. S. Line” and did not contain the shipowner’s name anywhere on the bill.¹¹⁷ These facts, the court held, made it unreasonable for the “fine print”¹¹⁸ contained in the identity of carrier clause to impose carrier liability on the shipowner.

The shipowner proceeded to argue that the identity of carrier clause in a bill of lading is void as a matter of law.¹¹⁹ In support of its contention, the shipowner relied on cases in which it was held that time charterers may not rely on such clauses as an attempt to shift liability to a shipowner.¹²⁰ The idea was that since the time charterer executes the bills of lading, it may not “unilaterally” shift its liability to the shipowner.¹²¹ In this regard, the court held that the present case differed from those cases since those cases found the identity of carrier clause to be invalid where the time charterer by relying on the identity of carrier clause attempted to

¹¹⁴ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹¹⁵ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹¹⁶ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹¹⁷ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹¹⁸ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹¹⁹ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹²⁰ *Blanchard Lumber Co. v. S.S. Anthony II*, 1967 AMC 103, 120-21 F.Supp. 857, 865-66 (SDNY 1966).

¹²¹ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

shift its liability to the shipowners.¹²² The present case involved the shipper and not the time charterer attempting to rely on the identity of carrier clause and the court saw no reason why the shipper should be prevented from doing so in order to render the shipowner liable.¹²³ Tetley asserts that the reasoning of the court in this decision took on the *contra proferentem*¹²⁴ rule of construction.¹²⁵

The above analysis of case law demonstrates that most American Courts faced with the issue of determining the effectiveness and validity of the demise clause and identity of carrier clause in a bill of lading have held these clauses to constitute an attempt by a party to exonerate itself of carrier liability contrary to the provisions of COGSA;¹²⁶ while some American Courts have given effect to the demise clause and identity of carrier clause in a bill of lading. Tetley asserts that these clauses are a “subterfuge”¹²⁷ of charterers who hold onto it as non-responsibility clauses to evade liability as carriers. They do this notwithstanding their clear duties as carriers under the Hague and Hague-Visby Rules which apply a matter of public order.¹²⁸

4.7. The concept of joint and several liability of the shipowner and charterer in a contract of carriage

The general approach is that there can be only one contractual carrier to a contract of carriage, that being the owner or the charterer but not both. However, another approach adopted by American Courts in determining the contractual carrier is the concept of joint and several liability of a shipowner and a charterer under a bill of lading.¹²⁹ This approach has been labelled an “American-influenced principle”¹³⁰ since United States Courts have welcomed the concept that there may be more than one party held to be the COGSA carrier.¹³¹ In support of this approach, Tetley asserts that the carriage of goods by sea

¹²² *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹²³ *Recovery Services International v. S/S Tatiana L* *supra* note 105 at 4.

¹²⁴ *Contra proferentem* is a Latin term used in contract law referring to the principle that a judge will construe an ambiguous term against the party that imposed the inclusion of the term in the contract during drafting. Available at https://www.law.cornell.edu/wex/contra_proferentem

¹²⁵ Tetley (note 45 above; 605).

¹²⁶ W Tetley ‘The Demise of the Demise Clause?’ (1999) 44 *McGill Law Journal* 807 at 816.

¹²⁷ Tetley W (note 126 above; 847).

¹²⁸ Tetley W (note 126 above; 847- 848).

¹²⁹ M T Reilly ‘Identity of the Carrier: Issues Under Slot Charters’ (2001) 25 *Tulane Maritime Law Journal* 505, at 508.

¹³⁰ Reilly M T (note 129 above; 508).

¹³¹ Reilly M T (note 129 above; 508).

constitutes a “joint venture” between the shipowner and charterer since shipowners and charterers are “bound together by contract”¹³² and share the duties of a carrier under the Hague and Hague-Visby Rules; which duties may not be contracted out of.¹³³ Tetley asserts that the inclusion of a demise clause and/or identity of carrier clause in a bill of lading operates to exonerate charterers from their carrier liability under contracts of carriage,¹³⁴ even though charterers are thoroughly involved in the “loading, discharging, and trimming of cargo.”¹³⁵ He labels such clauses “non-responsibility clauses”¹³⁶ which violate the “mandatory nature and public order” of the Hague/Visby Rules, the Hamburg Rules, and COGSA.¹³⁷

In determining the contractual carrier, American Courts have traditionally followed the principles of agency law, that is, whether or not apparent or implied authority existed when the charterer issued and signed a bill of lading.¹³⁸ Where a charterer or his agent signs “for the master” with authority from the shipowner, the shipowner will be held as a COGSA carrier.¹³⁹ However if the charterer’s signature “for the master” was not authorised by the shipowner, the shipowner will not be bound as a COGSA carrier since he did not become party to the contract of carriage.¹⁴⁰ It is important to note that a signature signed “for the master” is not attributed the same weight in American Courts as it is in English Courts.¹⁴¹

In contrast to the “agency approach,”¹⁴² Tetley’s joint venture approach provides that bills of lading issued by the charterer on the charterer’s form and signed “for the master” may be binding on the charterer who will be liable along with the shipowner as a contracting carrier.¹⁴³ In addition, he asserts that a charterer who does not issue bills of lading, but who assumes responsibilities under the Hague and Hague-Visby Rules such as loading, stowing, discharging and care for cargo, may also be liable as a carrier.¹⁴⁴

¹³² Tetley (note 45 above; 583).

¹³³ Article 3(8) of the Hague-Visby Rules.

¹³⁴ Tetley (note 45 above; 603).

¹³⁵ Tetley (note 45 above; 603).

¹³⁶ Tetley (note 45 above; 601).

¹³⁷ Tetley (note 45 above; 601).

¹³⁸ Rochester (note 89 above; 65).

¹³⁹ Schoenbaum (note 16 above; 686 – 687).

¹⁴⁰ Schoenbaum (note 16 above; 686 – 687).

¹⁴¹ Rochester (note 89 above; 66).

¹⁴² Tetley W (note 126 above; 818).

¹⁴³ Tetley (note 45 above; 580).

¹⁴⁴ Tetley (note 45 above; 581).

4.8. The multicarrier approach/ The practical approach

American courts have gone even further than joint and several liability by adopting a multicarrier approach.¹⁴⁵ According to this approach, a determination of who the contracting party to a bill of lading is, be it the shipowner or the charterer, is not the deciding factor when determining the COGSA carrier.¹⁴⁶ The courts have reasoned that the wording in the definition of carrier under COGSA “includes the owner or the charterer,”¹⁴⁷ must be taken to include “all owners and charterers involved in the carriage of goods at issue.”¹⁴⁸ This approach has often been termed the ‘practical approach’ since it looks not only at who issued or authorised the bill of lading but it looks also at all parties actually involved in the carriage of goods under the contract.¹⁴⁹ These parties are considered to be carriers and are accordingly liable for those parts of the carriage they performed.¹⁵⁰ Tetley asserts that this practical approach is actually what he describes as the joint venture of shipowners and charterers to the carriage of goods.¹⁵¹ The multicarrier approach infers that there may be more than one carrier to a contract of carriage and that a carrier may be a party other than the owner or charterer having issued the bill of lading.¹⁵²

In *Joo Seng Hong Kong Co., Ltd v. S.S Unibulkfir*,¹⁵³ a case in which the demise clause was not contained in the bill of lading, the Southern District Court of New York held that:¹⁵⁴

“Although decisions [seek] to justify the imposition of COGSA carrier liability by finding specific evidence of a ‘contract of carriage’ between the charterer or owner and the cargo interest involved, there is strong statutory support for treating, except in exceptional situations, all owners and charterers involved in the carriage of goods at issue as COGSA carriers who are potentially liable to cargo interests under the bill of lading.”

The court in *Joo Seng Hong Kong v. S.S. Unibulkfir* noted that charterers or owners who have not signed bills of lading and who have not in any way contributed to its issuance can

¹⁴⁵ Reilly M T (note 129 above; 508).

¹⁴⁶ Reilly M T (note 129 above; 508).

¹⁴⁷ COGSA 46 U.S. Code Appx. S. 1301(a).

¹⁴⁸ *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979) at 46.

¹⁴⁹ *Hyundai Corp. v. Hull Ins. Proceeds of M/V Vulca*, 800 F. Supp. 124, 1993 A.M.C. 434 (S.D.N.Y. 1992) at 129.

¹⁵⁰ Rochester (note 89 above; 21).

¹⁵¹ Tetley W (note 126 above; 817).

¹⁵² Reilly M T (note 129 above; 509).

¹⁵³ *Joo Seng Hong Kong Co. supra* note 148 above.

¹⁵⁴ *Joo Seng Hong Kong Co. supra* note 148 above.

still be found liable as COGSA carriers.¹⁵⁵ It was held that the imposition of liability under COGSA is wide enough to include numerous parties involved in the shipment and handling of the cargo.¹⁵⁶ This ‘practical approach’ of holding all shipowners and charterers to be carriers was held to be in keeping with COGSA’s goal of “alleviating the Congressionally perceived imbalance of bargaining power between carriers and cargo interests.”¹⁵⁷ The New York and New Jersey Courts have adopted this expansive view to the multicarrier approach and have found no trouble in imposing carrier liability to multiple parties involved in the carriage process even in the absence of a link between the owner, charterer or other party and the bill of lading, for example, a link such as the requirement for privity of contract.¹⁵⁸

A recent case in point is *Central National – Gottesman Inc v M.V Gertrude Oldenforff*,¹⁵⁹ in which case the United States District Court, New York held that; in determining who qualifies as the carrier within the meaning of section 1302 of COGSA, the district courts have interpreted the term expansively to include all owners and charterers to the carriage of goods. The court referred to *Joo Seng Hong Kong Co Ltd v S.S. Unifbulkfir*,¹⁶⁰ which decision led to numerous courts within the district to viewing the definition of ‘carrier’ as all-encompassing of parties who did not issue the bill of lading.

Author Schoenbaum adopts a positive view to the multicarrier approach and argues that the “tangle of relationships between parties” render the principles of agency insufficient to determine the contracting carrier.¹⁶¹ He asserts that:

“[the] doctrine that all parties involved in the carriage of goods are COGSA carriers eliminates the initial skirmishing over the identity of the carrier issue and brings all relevant parties before the court where the ultimate allocation of responsibility for the loss can be ascertained. If COGSA liability is found, the loss can be apportioned among those found to be carriers based upon several considerations... This way of handling the identity of the carrier issue protects the shipper yet apportions liability fairly between the responsible parties.”¹⁶²

¹⁵⁵ *Joo Seng Hong Kong Co. supra* note 148 at 46.

¹⁵⁶ W J Lee ‘A Comparative Analysis on the Identification of the Bill of Lading Carrier’ (2006) 10(2) *Journal of Korea Trade* 143 at 161.

¹⁵⁷ Lee W J (note 156 above; 161).

¹⁵⁸ Rochester (note 89 above; 24).

¹⁵⁹ *Central National – Gottesman Inc v M.V Gertrude Oldenforff* 204 F.Supp.2d 675 (S.D.N.Y. 2002).

¹⁶⁰ *Joo Seng Hong Kong Co. supra* note 148 above.

¹⁶¹ Schoenbaum (note 16 above; 688).

¹⁶² Schoenbaum (note 16 above; 688 – 689).

A case clearly demonstrating the “tangled web of relationships”¹⁶³ between parties is *Hyundai Corp., U.S.A v. Hull Insurance Proceeds of the M/V Vulca*.¹⁶⁴ Here the agency approach proved inadequate in determining the contractual carrier and the multicarrier approach was therefore adopted.

In this case, Merchant Marine entered into a voyage charterparty with shipper Clarendon Ltd which provided for Merchant Marine as voyage charterer to arrange for the carriage of the shipper’s cargo from New Jersey in the United States to Inchon, South Korea.¹⁶⁵ Merchant Marine subsequently entered into a time charterparty with Vulcan Navigation Corporation, the owner of the vessel Vulca, for the shipment of goods under the contract of carriage between Merchant Marine and Clarendon.¹⁶⁶

The time charter provided that:

“The Captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment and agency; and Charterers are to load, stow, discharge and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading...

However, at Charterer’s option, Charterers or their agents may sign Bills of Lading on behalf of the Master... [T]he Charterers shall indemnify the Owners against all consequences or liabilities that may arise from any inconsistency between this Charter and any Bills of Lading signed by the Charterers or their agent.”

The master of the vessel gave written authority to port agents Overseas Shipping Inc, who had been chosen by the shipper, to sign and issue bills of lading in respect of the cargo shipped.¹⁶⁷ Overseas Shipping subsequently signed the bill of lading on the master’s behalf, and the master stated that he acted as agent for the shipowner of the Vulca alone.¹⁶⁸

The vessel sank during the final leg of its voyage to Korea and cargo was lost. Third party consignee Hyundai and cargo underwriter Inchon Iron & Steel instituted action against the shipowner and time charterer Merchant Marine for loss of cargo.¹⁶⁹

¹⁶³ *Hyundai Corp. v. Hull Ins. Proceeds of M/V Vulca*, 800 F. Supp. 124, 1993 A.M.C. 434 (D.N.Y. 1992) at 132.

¹⁶⁴ *M/V Vulca supra* note 163 above.

¹⁶⁵ *M/V Vulca supra* note 163 at 127.

¹⁶⁶ *M/V Vulca supra* note 163 at 127.

¹⁶⁷ *M/V Vulca supra* note 163 at 127.

¹⁶⁸ *M/V Vulca supra* note 163 at 128.

¹⁶⁹ *M/V Vulca supra* note 163 at 128.

The issue before the court was whether the time charterer was liable for loss of the cargo as COGSA carrier under the contract of carriage. In its discussion, the court noted that a contract of carriage in the form of a charterparty between the carrier and shipper is considered to be private carriage to which COGSA will not apply.¹⁷⁰ However, a ‘Clause Paramount’ may be included within the charterparty stipulating that “COGSA will apply to bills of lading issued pursuant to the charterpart[y].”¹⁷¹ In this case, both the time charterparty and the voyage charterparty contained such Clauses Paramount.

The court first applied the ‘agency test’ to determine whether the time charterer was a COGSA carrier and examined various factors of the contract of carriage.¹⁷² The first factor was “whether the time charterer was authorised to issue bills of lading”¹⁷³ and the answer was yes. However, this factor could not determine whether the time charterer was a COGSA carrier. The second factor the court looked at was “who signed the bill of lading.” The court found the bill to have been signed by a port agent authorised to do so by the master of the vessel. However, the master might have been given authority to issue bills of lading from the shipowner and the time charterer. Therefore, this factor too could not be decisive.¹⁷⁴

The third factor was “whose form was used in the bill of lading,” and in this case the bill was issued neither on the time charterer’s form nor on the shipowner’s form. The court proceeded to assess the last and most significant factor, that being, “who authorised the bill of lading.”¹⁷⁵

In supports of its allegation that the shipowner authorised the bill of lading, the time charterer cited a certificate by the Master in which the master stated that any bill signed was signed on behalf of the master of the ship so as to bind the shipowner.¹⁷⁶ The court then had to deal with the significant question of whether the master could also issue or sign bills of lading on behalf of the time charterer.¹⁷⁷ The master stated that he did not “recall” being granted authority by the time charterer to issue bills of lading on the charterer’s behalf. However, the time charterparty between the shipowner and time charterer allowed for the time charterer to

¹⁷⁰ *M/V Vulca supra* note 163 at 128.

¹⁷¹ *M/V Vulca supra* note 163 at 128.

¹⁷² *M/V Vulca supra* note 163 at 130.

¹⁷³ *M/V Vulca supra* note 163 at 130.

¹⁷⁴ *M/V Vulca supra* note 163 at 130.

¹⁷⁵ *M/V Vulca supra* note 163 at 131.

¹⁷⁶ *M/V Vulca supra* note 163 at 131.

¹⁷⁷ *M/V Vulca supra* note 163 at 132.

issue bills of lading. The court held that these facts must be weighed against the master's "recollection", which is not a task to be done by the court. The court held that as a matter of law, Merchant Marine, the time charterer did issue the bill of lading.¹⁷⁸

The court then turned to an application of the 'practical test' in which there may be more than one COGSA carrier under a bill of lading.¹⁷⁹ The court held that under this test, if it cannot be proved by cargo interests that the time charterer authorised the issuance of the bill of lading, it may be shown that the time charterer is a COGSA carrier by proving that, "Merchant Marine was involved in transporting the cargo, and was part of actions that led to the loss of cargo."¹⁸⁰ The court found that the cargo interests clearly established this. It was shown that Merchant Marine as time charterer of the vessel also undertook a voyage charter relationship with shipper Claredon, thereby becoming involved in the "instant voyage."¹⁸¹ The court found that this practical test and the goal of COGSA is to give shippers "a broad array" of defendants against whom to bring suit.¹⁸² The court held, that a defendant who is not a party to the bill of lading, but who was involved in the issuance of the bill, or in the loading of the goods, or who is shown to have participated in the loss of cargo, is a carrier under COGSA.¹⁸³ The matter was subsequently allowed to proceed to trial and the time charterer's motion summary was denied.¹⁸⁴ It is noteworthy to mention that judgements adopting the multicarrier approach have often come up in cases of motions to dismiss or motions for summary judgment.¹⁸⁵

It is important to note that while the multicarrier approach is applied expansively in the lower courts, it is followed in the Courts of Appeal narrowly within the framework of the requirement of privity of contract. The United States Courts of Appeal for the Fifth Circuit requires privity of contract of carriage before COGSA liability may arise.¹⁸⁶ As such, the multicarrier approach may be adopted and both a shipowner and a charterer may be held as carriers under COGSA where the charterer signs a bill of lading "for the master" and so signs

¹⁷⁸ *M/V Vulca supra* note 163 at 132.

¹⁷⁹ *M/V Vulca supra* note 163 at 132.

¹⁸⁰ *M/V Vulca supra* note 163 at 132.

¹⁸¹ *M/V Vulca supra* note 163 at 132.

¹⁸² *M/V Vulca supra* note 163 at 132.

¹⁸³ *M/V Vulca supra* note 163 at 130.

¹⁸⁴ *M/V Vulca supra* note 163 at 132.

¹⁸⁵ Reilly M T (note 129 above; 509).

¹⁸⁶ Reilly M T (note 129 above; 509).

by authority of the shipowner, thus making both shipowner and charterer parties to the contract of carriage.¹⁸⁷

A case demonstrating this is *Pacific Employers Ins. Co. v. M/V Gloria*.¹⁸⁸ In this case, the shipper Cargill Inc contracted to sell soybean meal to some parties in Costa Rica, these parties constituted the consignees and receivers of cargo.¹⁸⁹ The shipper instructed Greenwich to find a vessel to carry the goods from New Orleans to Puerto Limon, Costa Rica.¹⁹⁰ Subsequently, Greenwich entered into a voyage charter with Transportacion Maritima Mexica, S.A. (TMM) for carriage of the cargo on board the M/V Gloria.¹⁹¹ The vessel was on time charter to Transportacion Maritima Mexica, S.A. The cargo was loaded by stevedores Rogers Terminal at the port of shipment and bills of lading were issued and signed: ROGERS TERMINAL & SHIPPING CORPORATION, AS AGENTS BY AUTHORITY OF THE MASTER. The bills incorporated the provisions of the voyage charterparty and stipulated that COGSA applied to the bills.¹⁹² Upon discharge in Costa Rica, it was discovered that the goods were slack and short, and the bags were wet and torn¹⁹³. The cargo owners as well as the cargo underwriter Pacific Employers brought an action against the vessel M/V Gloria, the shipowner Aquarius Ltd, and the time charterers TMM.¹⁹⁴ One of the issues before the Fifth Circuit was whether the district court erred in its finding that the shipowner and the time charterer were carriers under COGSA and that the voyage charterer was not a carrier.¹⁹⁵

The district court found that in issuing the bills of lading, Rogers Terminal issued and signed the bills as agents for the time charterer since the time charterer was a party to the contract of carriage.¹⁹⁶ The time charterers argued that this finding was incorrect, and that Rogers Terminal did not act on their behalf. The voyage charterparty incorporated into the bills provided for the voyage charterer to “appoint” and “employ” stevedores at the port of loading.¹⁹⁷ The charterparty also stipulated that the time charterer and/or its agents were responsible for issuing bills of lading.¹⁹⁸ The voyage charter also provided that the time

¹⁸⁷ Rochester (note 89 above; 23).

¹⁸⁸ *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 236 (5th Cir. 1985).

¹⁸⁹ *M/V Gloria supra* note 188 at 233.

¹⁹⁰ *M/V Gloria supra* note 188 at 233.

¹⁹¹ *M/V Gloria supra* note 188 at 233.

¹⁹² *M/V Gloria supra* note 188 at 233.

¹⁹³ *M/V Gloria supra* note 188 at 234.

¹⁹⁴ *M/V Gloria supra* note 188 at 234.

¹⁹⁵ *M/V Gloria supra* note 188 at 234.

¹⁹⁶ *M/V Gloria supra* note 188 at 235.

¹⁹⁷ *M/V Gloria supra* note 188 at 236.

¹⁹⁸ *M/V Gloria supra* note 188 at 236.

charterer would issue bills upon payment of freight by the voyage charterer. Based on these provisions, the district court found that Rogers Terminal issued and signed bills of lading as agent for the time charterer.¹⁹⁹ The Fifth Circuit agreed with the district court and found that the time charterer was a party to the contract of carriage and was therefore a COGSA carrier.²⁰⁰

The court then turned to the issue of whether the shipowner was a carrier under COGSA. The court stated that the shipowner's liability is determined by the qualification of the signature "by authority of the master."²⁰¹ This means that what must be determined is whether Rogers Terminal issued and signed the bills with the authority of the shipowner to sign on behalf of the master and thus on the behalf of the shipowner.²⁰² The rules of agency dictate that if a bill is signed by the charterer or its agent "for the master" with the authority of the shipowner, the shipowner then falls within the provisions of COGSA and is bound by the Act.²⁰³ However, if a bill is signed by a charterer or its agent "for the master" without the authority of the shipowner, the shipowner cannot be held to be a COGSA carrier and will not be bound.²⁰⁴

In determining this question, the court found, based on evidence by the master, that the master authorised Rogers Terminal to sign the bills of lading.²⁰⁵ Also, the time charterparty provided in Clause 8 that:

"The Captain (although appointed by the Owners), shall be under the orders and orders and directions of the Charterers [TMM] as regards employment and agency; ... the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally's Clerk's receipts."

Additionally, a rider clause inserted into the charterparty under Rider 37 provided that:

"If required by Charterers and/or their Agents, Master to authorise Charterers or their Agents to sign Bills of Lading on his behalf in accordance with mates and/or tally clerks receipt without prejudice to this Charter Party."

¹⁹⁹ *M/V Gloria supra* note 188 at 236.

²⁰⁰ *M/V Gloria supra* note 188 at 237 para 7.

²⁰¹ *M/V Gloria supra* note 188 at 236.

²⁰² *M/V Gloria supra* note 188 at 237.

²⁰³ *M/V Gloria supra* note 188 at 237.

²⁰⁴ *M/V Gloria supra* note 188 at 237.

²⁰⁵ *M/V Gloria supra* note 188 at 237 para 8.

The court found that this rider clause enabled the master to bind the shipowner by giving authority to the time charterer's agent to sign bills of lading.²⁰⁶ As such, the shipowner was bound to the contract of carriage since the time charterer was authorised to sign bills "for the master" binding the master and thereby binding the shipowner. The shipowner was found to be a COGSA carrier.²⁰⁷ The court held that the time charterer and the shipowner were parties to the contract of carriage with the shipper, and as such were both carriers under COGSA.

The cargo interests alleged that the voyage charterer was also a COGSA carrier since it undertook responsibility for "loading, stowage and discharge of the goods,"²⁰⁸ duties which COGSA imputes upon a carrier.²⁰⁹ However, the court held that this fact alone could not cause the voyage charterer to be held as a carrier.²¹⁰ The court concluded that Greenwich, the voyage charterer, did not enter into a contract of carriage and could not be a carrier under COGSA.²¹¹

4.9. Conclusion

This chapter examined the validity of the demise clause under bills of lading in American Courts. The chapter demonstrated the lack of uniformity in American Courts on the issue of the validity and effect of the demise clause in American maritime law especially when viewed in light of domestic law and international conventions.

At the outset, the provisions of the United States Carriage of Goods by Sea Act of 1936 were discussed, particularly noting that the Act applies to all bills of lading covering a contract of carriage of goods by sea to or from ports of the United States in foreign trade.²¹² Notably, the provisions of the Act do not apply to charterparties; for the Act to apply to bills of lading issued under a charterparty, an express intention must be made that COGSA shall govern the bills and contract of carriage. The Act defines a carrier as including "the owner or the

²⁰⁶ *M/V Gloria supra* note 188 at 237.

²⁰⁷ *M/V Gloria supra* note 188 at 238.

²⁰⁸ *M/V Gloria supra* note 188 at 236.

²⁰⁹ COGSA 46 U.S. Code Appx. S. 1303(2).

²¹⁰ *M/V Gloria supra* note 188 at 237, See also *Demsey & Associates v. S.S. SEA STAR*, 461 F.2d 1009 (2d Cir.1972) at 1018-1019, where the court held that the time charterer was a COGSA carrier but that the voyage charterer was not. The fact that the charter party required the voyage charterer to load, stow, and discharge the cargo created a duty stemming from the voyage charterer to the time charterer but did not affect the time charterer's obligations under COGSA and did not operate to make the voyage charterer a COGSA carrier.

²¹¹ *M/V Gloria supra* note 188 at 235.

²¹² COGSA 46 U.S. Code Appx. S. 1312.

charterer who enters into a contract of carriage with the shipper”²¹³ The Act also prohibits any clause in bills of lading seeking to exonerate or lessen a carrier’s liability,²¹⁴ effectively mirroring Article 3(8) of the Hague-Visby Rules.

The chapter examined *The Iristo*,²¹⁵ in which case emerged the issue of the role of the demise clause in identifying the carrier under a bill of lading. This case led to almost a decade of acceptance by the courts of the demise clause in bills of lading. In this case, the court found the demise clause was simply a tool setting forth the contractual relationship between the parties. The demise clause was therefore not a means to limiting the charterer’s liability and therefore was not void under the Hague Rules.

However, a decade later, American Courts began taking the stance that the demise clause was invalid for contravening the provisions of the Carriage of Goods by Sea Act.²¹⁶ Going further, the court in *Epstein v. United States*²¹⁷ held the demise clause to convey to a shipper and third party holder a “false warranty”²¹⁸ of authority by the time charterer to contract for the shipowner.

The invalidity of the demise clause because of its inconsistency with domestic legislation has been hammered down in many early cases such as *Blanchard Luber Co. v. SS Anthony II*,²¹⁹ and *Thyssen Steel Co v M/V Kavo Yerakas*,²²⁰

Following the lack of uniformity in judicial decisions, *Recovery Services International v. S/S Tatiana L*²²¹ presented a resurrection in the validity of the demise clause albeit subtly. In this case the demise clause was rendered ineffective for being wholly inconsistent with all other provisions in the bill, but the court did not render the demise clause invalid. The court recognised that a shipper or third party consignee may rely on the demise clause so as to render the shipowner liable for loss or damage to goods, since the shipper does not act as a charterer would in relying on the demise clause as an attempt to shift liability to the shipowner.

²¹³ COGSA 46 U.S. Code Appx. S. 1301(a).

²¹⁴ COGSA 46 U.S. Code Appx. S. 1303(8).

²¹⁵ *The Iristo* *supra* note 22 above.

²¹⁶ United States Carriage of Goods by Sea Act of 1936.

²¹⁷ *Epstein* *supra* note 57 above.

²¹⁸ *Epstein* *supra* note 57 at 742 – 743.

²¹⁹ *Blanchard Luber Co. v. SS Anthony II* *supra* note 88 above.

²²⁰ *Thyssen Steel Co. supra* note 93 above.

²²¹ *Recovery Services International v. S/S Tatiana L* *supra* note 105 above.

The findings of this chapter demonstrate the great need in American Courts for unification on the validity or invalidity of the demise clause under bills of lading. In an attempt to navigate some uniformity on the validity of the demise clause and the question of identifying the carrier under a bill of lading, the chapter discusses Professor Tetley's concept of joint and several liability between shipowners and charterers. Whilst American law has traditionally followed principles of agency providing for only one carrier to a contract of carriage, in recent times American Courts have welcomed the concept of joint and several liability between shipowners and charterers to a contract of carriage. Additionally, American Courts have taken a step further and adopted the multicarrier approach. The courts have reasoned that the wording in the definition of carrier under COGSA "includes the owner or the charterer,"²²² must be taken to include "all owners and charterers involved in the carriage of the goods at issue."²²³ The multicarrier approach looks not only at who issued or authorised the bill of lading but it looks also at all parties actually involved in the carriage of goods under the contract.²²⁴ These parties are considered to be carriers and are accordingly liable for those parts of the carriage for which they performed.²²⁵ This approach has been adopted all-embracingly in the lower courts²²⁶ imposing carrier liability on multiple parties even in the absence of a link between the owner, charterer or other party and the bill of lading (such as the link of the requirement of privity of contract). However, in the Courts of Appeal the multicarrier approach has been applied restrictedly within the ambit of the requirement of privity of contract as was demonstrated in *Pacific Employers Ins. Co. v. M/V Gloria*.²²⁷

²²² COGSA 46 U.S. Code Appx. S. 1301(a).

²²³ *Joo Seng Hong Kong Co. supra* note 148 at 46.

²²⁴ *M/V Vulca supra* note 163 at 129.

²²⁵ Rochester (note 89 above; 21).

²²⁶ *Joo Seng Hong Kong Co. supra* note 148 above.

²²⁷ *M/V Gloria supra* note 188 above.

Chapter Five: The identity of the carrier problem under Canadian Law

5.1. Introduction

This chapter will first look at the national legislation and international convention regulating the carriage of goods by sea in Canadian maritime law. Thereafter the chapter seeks to analyse the original position taken by Canadian Courts on the validity of the demise clause and the notion of joint and several liability between shipowners and time charterers. The chapter will then examine the current position taken by the Federal Court of Appeal in upholding the validity of the demise clause under a bill of lading and further, will assess the present approach taken by the Courts on the joint venture theory postulated by Professor Tetley.

5.2. Statutory law and International Conventions governing the carriage of goods by sea in Canada

International trade in Canada, particularly the international carriage of goods by sea, is regulated by the Canadian Marine Liability Act.¹ The Marine Liability Act consolidates numerous international conventions and marine liability regimes into one statute.² Part V incorporating by reference the Hague-Visby Rules³ in Schedule 3 of the Act regulates liability in respect of the carriage of goods by sea in Canadian law.⁴ It is noteworthy to mention that Canada has not ratified the Hague-Visby Rules. Part V of the Marine Liability Act⁵ contains the legislation formerly governing the carriage of goods by sea in Canada namely the Carriage of Goods by Water Act of 1993.⁶ The Marine Liability Act applies to all contracts of carriage evidenced by a bill of lading regulating the relationship between the carrier and holder of the bill for the carriage of outbound shipments of cargo from Canada to other nations.⁷ The Rules will not apply where a contract of carriage is regulated by a foreign law which has not acceded to the Hague-Visby Rules or where the Hamburg Rules apply to

¹ C J Giaschi *Canadian Law of Carriage of Goods by Sea: An Overview* (unpublished thesis, Vancouver BC, 2004) 9. (Available at http://www.admiraltylaw.com/papers/carriage_of_goods_outline.pdf.)

² R F Southcott & C Y Strickland 'Canadian Maritime Law Update: 2003' (2004) 35 *Journal of Maritime Law & Commerce* 341 at 345.

³ The Hague-Visby Rules.

⁴ Giaschi (note 1 above; 9).

⁵ Marine Liability Act S.C. 2001, c. 6.

⁶ S.C. 1993, C.21.

⁷ D Colford 'Contracts of Carriage of Goods by Water in the Federal Courts – A Primer' 14 May 2014 at 5. (Available at http://www.cmla.org/papers/Contracts_of_Carriage_-_Colford.pdf.)

the contract of carriage.⁸ Where a contract of carriage is not governed by the Act incorporating the Hague-Visby Rules as a force of law, the common law principles of Canadian Maritime law will be enforced through which the principles of freedom of contract will be adopted.⁹

5.3. The traditional approach taken by Canadian Courts on the validity and effectiveness of the demise clause and identity of carrier clause (An analysis of case law)

Canadian maritime law concerning the validity and effect of the demise clause and identity of carrier clause has differed vastly over a number of judicial decisions.¹⁰ The first of these cases to be mentioned is the early decision of *Canadian Klockner v. D/S A/S Flint* (The Mica).¹¹ In this case, cargo interests instituted action against both the shipowner and the time charterer of the vessel.¹² The charterer argued that as a result of the demise clause contained in the bill of lading, he was excluded from liability as carrier.¹³ Here, the Federal Court found the demise clause to be invalid for its inconsistency with Article 3(8) of the Hague Rules which prohibits any clause seeking to relieve the carrier from its liability.¹⁴ As such, the court allowed the action against the charterer.¹⁵

Similarly, in *Carling O'Keefe Breweries v. C.N. Marine*,¹⁶ the court was confronted with the issue of whether the time charterer was the carrier under the bill of lading. In this case, the court held that in determining the carrier to a contract of carriage evidenced by a bill of lading, it is vital to examine the language of the bill and to analyse the construction of the bill.¹⁷

It was argued for the time charterer that it was not a party to the contract of carriage and could not be found as the carrier since the contract of carriage was between the shipowner

⁸ Colford D (note 7 above; 5 – 6).

⁹ Colford D (note 7 above; 6).

¹⁰ V Rochester *The Lone "Carrier" An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable* (unpublished LLM thesis, University of Cape Town, 2005) 41.

¹¹ *Canadian Klockner v. D/S A/S Flint* [1973] 2 Lloyd's Rep. 478.

¹² W Tetley *Marine Cargo Claims* 4 ed (2008) Vol 2: 622.

¹³ Tetley (note 12 above; 622).

¹⁴ Tetley (note 12 above; 622).

¹⁵ Tetley (note 12 above; 622).

¹⁶ *Carling O'Keefe Breweries v. CN Marine*, 1990 F.C.1 483 (1990).

¹⁷ *Carling O'Keefe Breweries supra* note 16 at 3.

and shippers.¹⁸ The charterer argued that it acted only as agent for the shipowner and accordingly signed the bill of lading in its capacity as agent for the shipowner.¹⁹ Further, the charterer argued that improper stowage of the goods occurred due to the shipowner's negligence who was the "sole carrier", as ensuring proper stowage was not in any way a duty to be performed by the charterer.²⁰ Since the vessel concerned (Newfoundland Coast) was on time charter and the bill of lading included a demise clause, the charterer submitted that it could not be held as carrier of the cargo.²¹

The Court of Appeal dismissed the appeal based on the following reasons:²²

The court referred to the Supreme Court of Appeal's decisions in *Paterson Steamships Ltd. V. Aluminum Co.*²³ and *Aris Steamship Co. Inc. v. Associated Metals & Minerals Corporation*²⁴ and held that in these cases, the validity of the demise clause was upheld; which clause in a contract of carriage will lead to the contract "ordinarily" being one between the shipowner and shipper.²⁵ However, this is not a "hard and fast rule"²⁶ since the terms of relevant documents and the circumstances of each case will differ. This position is supported by Rand J's dictum in *Paterson Steamships Ltd. V. Aluminum Co.*,²⁷ in which case the charterer was not found to be the carrier since the charterer did not undertake to act as carrier of the cargo.²⁸

The court held that a true construction of the bill encompasses examining all the terms and not only the demise clause (clause 18)²⁹ contained in the bill.³⁰ The court found the opening words of the demise clause "where the ship is not owned or chartered by demise to the ocean carrier by which the goods are intended to be carried hereunder,"³¹ to be of particular

¹⁸ *Carling O'Keefe Breweries supra* note 16 at 9.

¹⁹ *Carling O'Keefe Breweries supra* note 16 at 9.

²⁰ *Carling O'Keefe Breweries supra* note 16 at 5.

²¹ *Carling O'Keefe Breweries supra* note 16 at 5.

²² Tetley (note 12 above; 623).

²³ *Paterson Steamships Ltd. v. Aluminum Co. of Canada Ltd* [1951] S.C.R. 852.

²⁴ *Aris Steamship Co. Inc. v. Associated Metals & Minerals Corporation* [1980] 2 S.C.R. 322.

²⁵ *Carling O'Keefe Breweries supra* note 16 at 12.

²⁶ *Carling O'Keefe Breweries supra* note 16 at 12.

²⁷ *Paterson Steamships Ltd. supra* note 23 above.

²⁸ *Carling O'Keefe Breweries supra* note 16 at 12.

²⁹ Clause 18 in the bill of lading states:

If the ship is not owned by or chartered by demise to the ocean carrier by which the goods are intended to be carried hereunder (as may be the case notwithstanding anything that appears to the contrary), this bill of lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, made through the agency of Canadian National Railways or the said ocean carrier which in either case acts as agent only and which shall be under no personal liability whatsoever in respect thereof.

³⁰ *Carling O'Keefe Breweries supra* note 16 at 14.

³¹ *Carling O'Keefe Breweries supra* note 16 at 14.

importance. The court held that the terms “the ship” under this clause refer to the vessel that is to be named and identified on the face of the bill of lading.³² The purpose of this is that the time charterer would sign the bill of lading as agent for the owner of the vessel *identified* on the bill.³³ However, the name of the carrying vessel was not included on the face of the bill and the portion on the bill for identifying the vessel was found blank.³⁴ A few days had passed before the time charterer chose a vessel for the cargo to be loaded on and for such vessel to perform its voyage.³⁵ The shipper was unaware that the carrying vessel was a chartered vessel rather than a vessel owned by the time charterer.³⁶ Since the carrying vessel was not named in the bill of lading; the terms in the bill “as agent only,” describing the charterer as agent for the shipowner was rendered ineffective.³⁷ This is because, when the bill was issued, the “only principal”³⁸ contemplated insofar as the bill was concerned was the time charterer. Therefore the time charterer signed the bill in its personal capacity and accordingly became carrier of the cargo.³⁹

In addition, it was established that the bills of lading were signed “by or on behalf” of the time charterer’s terminal superintendent notwithstanding the time charterparty’s provision for the master or time charterer’s representative on board the vessel to sign the bills of lading.⁴⁰

The bills were signed in the following terms:

“IN WITNESS WHEREOF, the Agent has signed this bill of lading on behalf of the Canadian National Railway Company and its connecting railway and steamship lines, severally and not jointly.”

“D. M. Mercer

Terminal Super.

Agent on behalf of the carriers severally and not jointly.”

The Court of Appeal affirmed the trial judge’s reasoning that:

“The bill of lading was a [time charterer’s] bill...filled out and signed precisely in the same manner as if the cargo were going to be taken on a [time charterer’s] owned ship. No where was it indicated on the bill of lading that the [time charterer’s]

³² *Carling O’Keefe Breweries supra* note 16 at 14.

³³ *Carling O’Keefe Breweries supra* note 16 at 14.

³⁴ *Carling O’Keefe Breweries supra* note 16 at 7.

³⁵ *Carling O’Keefe Breweries supra* note 16 at 7.

³⁶ *Carling O’Keefe Breweries supra* note 16 at 14.

³⁷ *Carling O’Keefe Breweries supra* note 16 at 14 – 15.

³⁸ *Carling O’Keefe Breweries supra* note 16 at 14 – 15.

³⁹ *Carling O’Keefe Breweries supra* note 16 at 15.

⁴⁰ *Carling O’Keefe Breweries supra* note 16 at 12.

employee who signed it signed it on behalf of the master or the owners of the ship but only on behalf of [the time charterer].”

The Federal Court of Appeal found the time charterer to be the carrier notwithstanding the inclusion of a demise clause in the contract of carriage.⁴¹ Having found the time charterer to be the carrier, the Court of Appeal affirmed the trial court’s finding on the invalidity of the demise clause which contravened Article 3(8) of the Hague-Visby Rules⁴² since it purported to relieve and lessen the time charterer’s duties⁴³ under Article 3(2).⁴⁴

Additionally, the court rejected any notion of there being more than one contracting carrier under the Hague Rules.⁴⁵ The court found the multicarrier approach to be “patently erroneous” since the Hague Rules provide for only one carrier to a contract of carriage.⁴⁶ This finding has been critiqued by Professor Tetley who postulates that it is an “unnecessary finding”⁴⁷ contrary to his theory of joint and several liability between shipowners and charterers.

However, a few years later, the notion of a joint venture between shipowners and time charterers in the carriage of goods by sea was endorsed in the *Lara S*.⁴⁸ In this case, the time charterer Kim-Sail entered into a time charter with shipowner Armadaores Lara S.A.⁴⁹ The charterparty contained the standard clause found in a time charterparty under Clause 8 which stated that:

“The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim discharge and tally and, if necessary lash and secure the cargo at

⁴¹ Tetley (note 12 above; 622).

⁴² Article 3(8) of the Hague-Visby Rules states that:

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

⁴³ *Carling O’Keefe Breweries supra* note 16 at 15.

⁴⁴ Article 3(2) of the Hague-Visby Rules states that:

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

⁴⁵ The Hague Rules of 1924.

⁴⁶ *Carling O’Keefe Breweries supra* note 16 at 15.

⁴⁷ Tetley (note 12 above; 623).

⁴⁸ *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.).

⁴⁹ *Lara S supra* note 48 at 7.

their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts."⁵⁰

Additionally, rider Clause 50 provided that:

"Charterers Bill of Lading respectively Charter Party Bill of Lading [sic] to be used as required by Charterers...or their representatives have authority to sign...Bill of Lading for and on Master's behalf in conformity with Mate's and/or Tally Clerk's receipts."⁵¹

In this case, cargo interests bought a cargo of bailer twine from the shipper.⁵² The cargo was loaded by stevedores hired by the time charterer on board the vessel *Lara S* in Brazil for its voyage to Toronto and Milwaukee.⁵³ The master supervised the loading and stowage of the cargo on board the vessel.⁵⁴ Bills of lading in respect of the consigned cargo were issued "to order of shipper, blank endorsed."⁵⁵ The bills of lading were on the time charterer's form, and the top front of the bills contained in bold printed words "KIMBERLY LINE."⁵⁶ The bills were signed by Kimberly Line being a trade name utilized by the time charterer,⁵⁷ as "Agent, For the Master." by the port agent.⁵⁸ The Master provided the port agent with written authority to sign bills of lading on his behalf.⁵⁹ Upon the vessel's arrival in Toronto, a portion of the cargo was found to be damaged,⁶⁰ and the cargo interests subsequently sued the time charterer and shipowner.⁶¹

The time charterer argued that it was not liable for damage caused to the cargo since it was not a cargo carrier based on the identity of carrier clause contained in the bill.⁶²

⁵⁰ *Lara S supra* note 48 at 7.

⁵¹ *Lara S supra* note 48 at 7.

⁵² *Lara S supra* note 48 at 2.

⁵³ *Lara S supra* note 48 at 2.

⁵⁴ *Lara S supra* note 48 at 13.

⁵⁵ *Lara S supra* note 48 at 2.

⁵⁶ *Lara S supra* note 48 at 2.

⁵⁷ *Lara S supra* note 48 at 11.

⁵⁸ *Lara S supra* note 48 at 2.

⁵⁹ *Lara S supra* note 48 at 11.

⁶⁰ *Lara S supra* note 48 at 5.

⁶¹ *Lara S supra* note 48 at 26.

⁶² G J Pollack 'The Identity of the Carrier in Canadian Maritime Law' at 6 (Available at <http://cmla.org/papers/Identity%20of%20the%20Carrier%20in%20Canadian%20Maritime%20Law.George%20Pollack.28.Apr.2000.pdf>.)

The Federal Court disregarded the identity of carrier clause,⁶³ and agreed with Professor Tetley's theory of a joint venture between shipowners and charterers ascribing to them joint and several liability as carriers.⁶⁴

Reed J held that:

“The logic of holding both the shipowner and the charterer liable as carriers seems entirely reasonable under a charter such as that which exists in this case. The master will have knowledge of the vessel and any peculiarities which must be taken into account when stowing goods thereon. He supervises that stowage. He has responsibility for the conduct of the voyage and presumably also has knowledge of the type of weather conditions it would be usual to encounter. In such a case it seems entirely appropriate to find the master and therefore, his employer, the shipowner jointly liable with the charterer for damage arising out of inadequate stowage.”⁶⁵

The court found that under Canadian law, both the shipowner and the time charterer were carriers under the Hague Rules.⁶⁶ Subsequently, both the shipowner and time charterer took the judgment on appeal where the Court of Appeal affirmed Madame Justice Reed's judgment.⁶⁷

5.4. A deviation from the traditional approach (An analysis of case law)

While Canadian Courts were initially accepting of the notion of joint and several liability between charterers and shipowners in the carriage of goods by sea, such as in the case of the *Lara S*,⁶⁸ this notion has not stood in law.⁶⁹ Additionally, with the reasoning of the aforementioned cases, one would believe that Canadian maritime law viewed the demise clause and identity of carrier clause as invalid provisions void for its contravention of statutory law.⁷⁰ However, more recent decisions have rejected the joint venture theory and have effectively resurrected the validity of the demise clause in support of the 'agency approach' i.e. the approach that there may be only one carrier.⁷¹

⁶³ Rochester (note 10 above; 27).

⁶⁴ *Lara S supra* note 48 at 29.

⁶⁵ *Lara S supra* note 48 at 29.

⁶⁶ *Lara S supra* note 48 at 41

⁶⁷ C J Giaschi 'Who is the Carrier? Shipowner or Charterer' at 10 (1994) Paper presented January 20, 1994 at the Canadian Maritime Law Association Meeting, Toronto. (Available online at:

www.admiraltylaw.com/papers/carrier.htm)

⁶⁸ *Lara S supra* note 48 above.

⁶⁹ Rochester (note 10 above; 27).

⁷⁰ Tetley (note 12 above; 603).

⁷¹ Rochester (note 10 above; 42).

The case of *Union Carbide Corp. v. Fednav Ltd.*,⁷² a decision rendered by Mr. Justice Marc Nadon, will be the first of these cases to be discussed. In this case, shipper Union Carbide shipped a cargo of synthetic resin on board the vessel Hudson Bay from Montreal to Bangkok and Manila.⁷³ The cargo was carried as pursuant to bills of lading issued and dated at Montreal.⁷⁴ Upon the vessel's arrival at the port in Bangkok, a portion of the cargo discharged was found to be damaged.⁷⁵ The vessel proceeded on its voyage to Manila and upon arrival at the Manila port, a further portion of cargo was found to be damaged.⁷⁶ The cargo interests being the shipper and consignees of the cargo, brought action against Fednav Limited, a company formed by the merger of Federal Commerce and Federal Marine.⁷⁷ The vessel was owned by Bona Maritime Corporation of Liberia and was time chartered to Federal Commerce under the NYPE time charterparty form.⁷⁸

Clause 8 of the charterparty provided for;

“[the] charterers ...to load, stow, trim and discharge the cargo at their expense under the supervision of the captain, who is to sign or if requested by charterers to authorise charterers and/or their agents to sign bills of lading for cargo as presented...”⁷⁹

Additionally, clause 26 provided for:

“[t]he owners to remain responsible for the navigation of the vessel, acts of pilotage and tugboats, insurance, crew, and all other matters, same as when trading for their own account.”⁸⁰

The bills of lading were issued on the time charterer's printed form,⁸¹ and the face of the bills at the top right-hand side contained the name Federal Commerce and Navigation Ltd. accompanied by its address in Montreal.⁸² The bills were signed by Federal Commerce on behalf of the master “by authority of master as agent only.”⁸³ Additionally, the bills of lading contained a demise clause under Clause 2 providing that “the contract evidenced by the bill

⁷² *Union Carbide* (1998) 131 F.T.R. 241, 1998 AMC 429 (Fed. C. Can.)

⁷³ *Union Carbide supra* note 72 at 2.

⁷⁴ *Union Carbide supra* note 72 at 2.

⁷⁵ *Union Carbide supra* note 72 at 6.

⁷⁶ *Union Carbide supra* note 72 at 6.

⁷⁷ *Union Carbide supra* note 72 at 6.

⁷⁸ *Union Carbide supra* note 72 at 4.

⁷⁹ *Union Carbide supra* note 72 at 4.

⁸⁰ *Union Carbide supra* note 72 at 4.

⁸¹ *Union Carbide supra* note 72 at 5.

⁸² *Union Carbide supra* note 72 at 5.

⁸³ *Union Carbide supra* note 72 at 5.

of lading is one between the “merchant” and the owner of the vessel named in the bill of lading.”⁸⁴

One of the issues before the court to be discussed for the purposes of this discussion was who were “the parties to the contract of carriage.”⁸⁵ Of importance to this issue, was whether Federal Commerce (the time charterer) was the carrier under the contract of carriage.⁸⁶

Federal Commerce argued that it was not party to the contracts of carriage since these were contracts that bound the shipowners.⁸⁷ Contrastingly, the cargo interests submitted that the bills of lading were binding upon Federal Commerce, the time charterer.⁸⁸

In deciding this issue, Nadon J made reference to *Paterson Steamships Limited v. Aluminium Company of Canada Limited*⁸⁹ in which case the Supreme Court of Canada was confronted with the same issue as in the present case, namely “whether the shipowners or the time charterers were parties to the contract of carriage.”⁹⁰ Rand J stated in regard to this issue that;

“For the purpose of committing cargo to carriage, the captain, the charterer and the ship’s agent are all agents of the owner, acting in the name of the captain; and where the charterer has authority, as here, to sign for the captain, that he may appoint and act by an agent would seem to me to be unquestionable. To hold him to a personal performance would under modern conditions of traffic, be an intolerable restriction.”⁹¹

The court in *Paterson Steamships Limited v. Aluminium Company of Canada Limited*⁹² stated that the shipowner is the carrier where the vessel is under time charter and in issuing bills of lading, the master of the vessel fulfils his role as the shipowner’s agent.⁹³ The exception to this general principle is where the time charterer *expressly undertakes* to carry the goods, in that case then, the time charterer will be the carrier.⁹⁴ This principle was subsequently

⁸⁴ *Union Carbide supra* note 72 at 21.

⁸⁵ *Union Carbide supra* note 72 at 8.

⁸⁶ *Union Carbide supra* note 72 at 21.

⁸⁷ *Union Carbide supra* note 72 at 21.

⁸⁸ *Union Carbide supra* note 72 at 21.

⁸⁹ *Paterson Steamships Ltd. supra* note 23 above.

⁹⁰ *Union Carbide supra* note 72 at 21.

⁹¹ *Paterson Steamships Ltd. supra* note 23 at 853 – 854.

⁹² *Paterson Steamships Ltd. supra* note 23 above.

⁹³ *Union Carbide supra* note 72 at 23.

⁹⁴ *Union Carbide supra* note 72 at 23.

affirmed by the Supreme Court in *Aris Steamship Co. v. Associates Metals and Minerals Corporation*.⁹⁵

The court in the present case agreed entirely with this principle as one that was “settled” in law dating back to a line of English cases since 1893.⁹⁶ Nadon J held, that in light of the above-mentioned judgements, Canadian Courts too have taken the position that in the case of the NYPE charterparty, the time charterer assumes the role of the shipowner’s agent under a bill of lading evidencing the contract of carriage.⁹⁷ As such, in the absence of a specific and clear undertaking by the time charterer to carry the cargo, the shipowner will be the carrier.⁹⁸ In this case, the court found that the booking note issued by the time charterer contained no undertaking by Federal Commerce to carry the shipper’s cargo to Bangkok and Manila.⁹⁹

The court then turned to consider the demise clause contained in the bill of lading which provided that:

“The contract evidenced by the bill of Lading was between the shipowner and cargo owner and therefore the shipowner shall be liable solely for any damage or loss resulting from non-performance or breach of the obligations in terms of the contract of carriage. The company or agent having issued the bill on the master’s behalf shall not be held as principal and should not be liable as carrier nor as bailee of the cargo”,¹⁰⁰

Regarding the demise clause, Nadon J held that despite the existence of a demise clause under a time charter, where bills are signed on behalf of the master, the bills of lading evidencing the contracts of carriage bind the shipowner and not the time charterer, with the exception being that the time charterer expressly undertakes to carry the cargo.¹⁰¹

Further, Nadon J held that while Federal Commerce was described as the carrier in the booking note contract, a “true construction” of the contract of carriage in its entirety clearly indicates the carrier to be the owner of the cargo carrying vessel.¹⁰²

⁹⁵ *Aris Steamship Co supra* note 24 above.

⁹⁶ *Union Carbide supra* note 72 at 23.

⁹⁷ *Union Carbide supra* note 72 at 26.

⁹⁸ *Union Carbide supra* note 72 at 26.

⁹⁹ *Union Carbide supra* note 72 at 27.

¹⁰⁰ *Union Carbide supra* note 72 at 32.

¹⁰¹ *Union Carbide supra* note 72 at 32-33.

¹⁰² *Union Carbide supra* note 72 at 33.

The cargo interests proceeded then to argue that the shipowners and the time charterer were both carriers under the contract of carriage.¹⁰³ In support of this contention, cargo interests relied on Professor Tetley's joint venture theory between shipowners and time charterers in the carriage of cargo;¹⁰⁴ which also found approval by Reed J in *The Lara S.*¹⁰⁵

However, Nadon J rejected this argument refusing to accept the "soundness"¹⁰⁶ of the theory.¹⁰⁷ He held that a joint venture cannot exist between the shipowner and charterer except where there has been "a meeting of the minds between the parties."¹⁰⁸ By entering into a time charterparty on the NYPE standard form, the shipowner and charterer cannot be said to have agreed to form a joint venture to jointly carry the cargo.¹⁰⁹

Additionally, in dealing with Article 1(a) of the Hague-Visby Rules which defines the "carrier" as including "the owner or the charterer who enters into a contract of carriage with a shipper;" Nadon J held that where the contract of carriage binds the charterer, the shipowner shall not be bound.¹¹⁰ If the charterer issues and signs the bill of lading on his own behalf, he will be liable on the bill. But where the charterer does so on behalf of the master having been authorized by the master, the shipowner remains liable on the bill.¹¹¹ The term "or" contained in Article 1(a) of the Hague-Visby Rules contemplates only one carrier, either the shipowner or the charterer.¹¹² The court concluded that the shipowner was party to the contract of carriage and therefore the contractual carrier.¹¹³

In *Jian Sheng Co. v. Great Tempo S.A.*,¹¹⁴ the Federal Court had to determine the validity of an identity of carrier clause within its frame of reference to the enforceability of a jurisdiction clause in the bill of lading which stated that "disputes under the contract of carriage were to be decided in the country where the "carrier" had its principal place of business."¹¹⁵ In this case, the shipper hired space on the vessel M.V. "TRANS ASPIRATION" for the carriage of

¹⁰³ *Union Carbide supra* note 72 at 33.

¹⁰⁴ W Tetley *Marine Cargo Claims* 3 ed (1988): 235; 236; 242.

¹⁰⁵ *Lara S supra* note 48 at 586.

¹⁰⁶ *Union Carbide supra* note 72 at 35.

¹⁰⁷ *Union Carbide supra* note 72 at 35.

¹⁰⁸ *Union Carbide supra* note 72 at 35.

¹⁰⁹ *Union Carbide supra* note 72 at 35.

¹¹⁰ *Union Carbide supra* note 72 at 36.

¹¹¹ *Union Carbide supra* note 72 at 36.

¹¹² *Union Carbide supra* note 72 at 36.

¹¹³ *Union Carbide supra* note 72 at 36.

¹¹⁴ *Jian Sheng Co. v. Great Tempo S.A* [1998] 3 F.C. 418 (Fed. C.A Can.).

¹¹⁵ *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 at 1 para 3.

lumber from Nanaimo, Canada to the plaintiff Jian Sheng in Taichung, Taiwan.¹¹⁶ The vessel was owned by Great Tempo S.A, a Panamanian company, however the company's business was managed and run from Hong Kong by Wah Tung Shipping Agency Co.¹¹⁷ The vessel was on time charter to Sinotrans (Bermuda) Ltd.¹¹⁸ The carriage was booked with a booking note issued by defendant Sinotrans (Canada) Inc based in British Columbia, Canada.¹¹⁹ However, the bill of lading covering the cargo was issued in Vancouver by Sinotrans (Bermuda) Ltd with Jian Sheng as the party to notify.¹²⁰ The bill of lading stated the master's name;¹²¹ and Sinotrans (Canada) Inc signed the bills "AS AGENTS ONLY FOR CARRIER: TRANS ASPIRATION."¹²² During the voyage, some pieces of lumber carried on the deck were lost,¹²³ and Jian Sheng sued the shipowner, the charterer, and all interested parties on the vessel for loss of the goods.¹²⁴

One of the provisions at issue before the Federal Court, Trial Division, was the identity of carrier clause inserted in the bill of lading, which provided that the contract of carriage was between the Merchant (cargo interest) and the shipowner.¹²⁵

Tremblay-Lamer J in the Trial Division made mention of Prothonotary Hargrave's comment in the lower court where Prothonotary Hargrave held that the time charterer Sinotrans (Bermuda) Ltd may be a carrier¹²⁶ agreeing with Professor Tetley's theory of joint and several liability between the shipowner and charterer as carriers despite the inclusion of any identity of carrier clause.¹²⁷ The Trial Division, however dismissed this theory as being a "general statement."¹²⁸ The Court held that unless the charterer makes an express undertaking to carry the goods, the shipowner and charterer cannot be jointly and severally liable as carriers.¹²⁹ In line with this reasoning, the court upheld the identity of carrier clause and

¹¹⁶ *Jian Sheng Co. v. Great Tempo S.A* [1997] 129 F.T.R. 55 (Fed.C.Can.) at 1.

¹¹⁷ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 2.

¹¹⁸ Tetley (note 12 above; 627).

¹¹⁹ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 2.

¹²⁰ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 2.

¹²¹ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 6.

¹²² *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 2.

¹²³ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 3.

¹²⁴ Tetley (note 12 above; 627).

¹²⁵ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 2.

¹²⁶ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 6.

¹²⁷ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 6.

¹²⁸ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 6.

¹²⁹ *Jian Sheng Co. v. Great Tempo S.A supra* [1997] note 116 at 8.

found the shipowner to be the carrier under the bill of lading.¹³⁰ It was held; on the face of the bill, neither Sinotrans (Bermuda) Ltd nor Sinotrans (Canada) could be held as a carrier.¹³¹

On appeal, the issue before Mr. Justice Decary was based on the jurisdiction clause being void for uncertainty.¹³² Within the context of this issue, the Federal Court of Appeal too had to determine the validity of the identity of carrier clause contained in the bill of lading.¹³³ In relation to this, the court held that the clause clearly demonstrates that the bill intends to evidence a contract of carriage between the shipowner and cargo owner, and that as against a third-party consignee, the bill of lading is a shipowner's bill.¹³⁴

Decary J.A held:

“I am not convinced that, as against a consignee, the fact of using the words “agents for the ship” rather than the words “agents for the shipowner” is enough to displace the presumption [that the shipowner is the carrier].”¹³⁵

As such, the court effectively upheld the identity of carrier clause.¹³⁶

In relation to the notion that there may be more than one carrier to a contract of carriage, the Court of Appeal agreeing with Tremblay-Lamer J, found the joint venture theory to be “incompatible” with the judgements of the Supreme Court in previous decisions.¹³⁷ The court reasoned that the role of the carrier would be fulfilled by a joint venture or partnership where the shipowner and charterer actually agree to form and carry out such joint venture or partnership in the carriage of goods.¹³⁸ In stating this, the court alluded to a joint venture as one legal entity being liable as the carrier.¹³⁹ Decary J.A relied extensively on Nadon J's reasoning in *Union Carbide*¹⁴⁰ and held that Professor Tetley's notion of a joint venture

¹³⁰ *Jian Sheng Co. v. Great Tempo S.A* supra [1997] note 116 at 8.

¹³¹ *Jian Sheng Co. v. Great Tempo S.A* supra [1997] note 116 at 8.

¹³² *Jian Sheng Co. v. Great Tempo S.A* supra [1998] note 114 at 1 para 2.

¹³³ Tetley (note 12 above; 629).

¹³⁴ *Jian Sheng Co. v. Great Tempo S.A* supra [1998] note 114 at 14-15 para 35.

¹³⁵ *Jian Sheng Co. v. Great Tempo S.A* supra [1998] note 114 at 14-15 para 35.

¹³⁶ Tetley (note 12 above; 630).

¹³⁷ See *Paterson Steamships Ltd. v. Aluminum Co. of Canada Ltd* [1951] S.C.R. 852; *Aris Steamship Co. Inc. v. Associated Metals & Minerals Corporation* [1980] 2 S.C.R. 322; *Canficorp v. Cormorant Bulk Carriers*, 1985 A.M.C. 1444 (1985); *Carling O'Keefe Breweries v. CN Marine*, 1990 F.C.1 483 (1990).

¹³⁸ *Jian Sheng Co. v. Great Tempo S.A* supra [1998] note 114 at 7-8 para 19.

¹³⁹ Tetley (note 12 above; 630).

¹⁴⁰ *Union Carbide* supra note 72 above.

between shipowner and charterer does not apply to Canadian maritime law.¹⁴¹ The assertion that there may be more than one carrier was effectively dismissed.¹⁴²

5.5. Criticisms surrounding the current approach taken by Canadian courts on the validity and effectiveness of the demise clause and identity of carrier clause

The judgements rendered by the Federal Court of Appeal in *Union Carbide Corp. v. Fednav Ltd.*,¹⁴³ and *Jian Sheng Co. v. Great Tempo S.A.*,¹⁴⁴ in dismissing the notion of joint and several liability between shipowners and charterers and, in upholding the validity of the demise clause and identity of carrier clause has been criticized by Professor Tetley as “directly contravening the spirit and letter of the Hague and Hague-Visby Rules, the Hamburg Rules and general principles of law.”¹⁴⁵ Particularly, Professor Tetley asserts that Nadon J’s judgment lacked consideration of Article 3(8) of the Hague-Visby Rules.¹⁴⁶ He asserts that the judgement also failed to consider the mandatory nature of the Rules applying to a party acting as a carrier.¹⁴⁷ These considerations significantly attributed to the decision of Reed J¹⁴⁸ in *The Lara S.*¹⁴⁹ Tetley strongly suggests that the relationship between a shipowner and time charterer constitutes a joint venture¹⁵⁰ making them both the carrier.¹⁵¹ The demise clause allows a party to escape liability by portraying a party to be an agent of the shipowner

¹⁴¹ *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 at 14 para 34.

¹⁴² G J Pollack ‘The Identity of the Carrier in Canadian Maritime Law’ at 10, (Available at <http://cmla.org/papers/Identity%20of%20the%20Carrier%20in%20Canadian%20Maritime%20Law.George%20Pollack.28.Apr.2000.pdf>.)

¹⁴³ *Union Carbide supra* note 72 above.

¹⁴⁴ *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 above.

¹⁴⁵ Tetley (note 12 above; 603-604).

¹⁴⁶ Article 3(8) of the Hague-Visby Rules states that:

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.’

¹⁴⁷ Tetley (note 12 above; 626).

¹⁴⁸ Tetley (note 12 above; 626).

¹⁴⁹ *Lara S supra* note 48 above.

¹⁵⁰ Tetley (note 12 above; 636); Professor Tetley asserts that:

[t]he owner and the charterer share the duties of a carrier; the charterer is usually responsible for loading, discharging at the ports visited (and any deviations), while the owner is responsible for care of the cargo during the voyage. In other words, the carriage is really a joint venture between owner and charterer, who are together the carrier.

¹⁵¹ Tetley (note 12 above; 636).

under a bill of lading instead of a carrier.¹⁵² The demise clause unjustly excludes certain parties from carrier liability.¹⁵³

Marler also criticises the decision in *Union Carbide*¹⁵⁴ based on Nadon J's finding that; in the absence of an express undertaking by the time charterer to carry the cargo, the time charterer cannot be held as the carrier.¹⁵⁵ He submits that this finding takes beyond a warranted extent the trueness of the contractual relationship between the shipper and the cargo carrier.¹⁵⁶ It is a principle that contravenes the general principles of contract law.¹⁵⁷ He asserts emphatically that the charterer does not assume the role of the shipowner's agent in procuring the shipper's cargo.¹⁵⁸ This is supported by the fact that the time charterer collects the freight from third parties in its own name, and not on behalf of the shipowner as his agent.¹⁵⁹ Marler submits that the charterer acts as agent for the shipowner only with respect to issuing and signing bills on behalf of the master and thereby on behalf of the shipowner binding the shipowner to the contract of carriage.¹⁶⁰ However; this does not refute the charterer's role as principal to the contract of carriage between itself and the shipper.¹⁶¹ As such, a charterer having entered into a contract of carriage with a shipper may not contract out of its liability under the contract in terms of the Hague-Visby Rules.¹⁶²

Moreover, since time charterers undertake most of the financial and operational responsibilities of a carrier, including the issuance of bills of lading, as well as the loading, discharge and delivery of cargo carried, it is asserted that the fulfilment of these duties give rise to an *implied undertaking* by the charterer to carry the goods.¹⁶³

However, despite the contentions of disapproval by many scholars of the judgements rendered in *Union Carbide*¹⁶⁴ and *Jian Sheng*,¹⁶⁵ the decision by Nadon J in *Union Carbide*

¹⁵² Pollack (note 142 above; 13).

¹⁵³ Tetley (note 12 above; 637).

¹⁵⁴ *Union Carbide supra* note 72 above.

¹⁵⁵ D Marler 'The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading' (2002) 587(26) *Maritime Lawyer* 603-604.

¹⁵⁶ Marler D (note 155 above; 604).

¹⁵⁷ Marler D (note 155 above; 604).

¹⁵⁸ Marler D (note 155 above; 604).

¹⁵⁹ Tetley (note 12 above; 636).

¹⁶⁰ Marler D (note 155 above; 606).

¹⁶¹ Marler D (note 155 above; 604).

¹⁶² Marler D (note 155 above; 606).

¹⁶³ Pollack (note 142 above; 14).

¹⁶⁴ *Union Carbide supra* note 72 above.

¹⁶⁵ *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 above.

found approval by the court in *Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd.*¹⁶⁶ and its principles were applied accordingly. This case dealt with the burden of proof with respect to cargo claims and whether or not the goods had been damaged during the voyage.¹⁶⁷ The issues of who had performed the carriage and whether the time charterer and shipowner were jointly liable as cargo carrier were also in dispute.¹⁶⁸ In this case,¹⁶⁹ the Hague-Visby Rules applied to the contract of carriage.¹⁷⁰

The cargo interests submitted that the shipowner and the time charterer undertook a joint venture in carrying the goods and were thus jointly liable as the carrier.¹⁷¹ In respect of this submission, Mr Justice Blais referred to Nadon J's comment in *Union Carbide*,¹⁷² in which he rejected the joint venture theory disagreeing with the statement that once a time charter is entered into on the NYPE standard form, a joint venture is created between the shipowner and time charterer to carry the goods.¹⁷³ The Federal Court agreeing with Nadon J's statement held that the joint venture theory may only apply where the "documents"¹⁷⁴ and the "circumstances"¹⁷⁵ of the case clearly indicate a specific undertaking of a joint venture.¹⁷⁶ The court found, based on the documents and specifically the bill of lading; as well as the circumstances of the case, that no such undertaking was made.¹⁷⁷

Additionally, the court held that the customary role of the time charterer is to secure space on a vessel, and having booked that space, he obtains the cargo asking the carrier or owner of the vessel to carry such cargo.¹⁷⁸ Subsequently, the carrier issues a bill of lading thereby forming a contract of carriage between itself and the shipper.¹⁷⁹ As such, the court concluded that the shipowner was the carrier under the contract of carriage¹⁸⁰

¹⁶⁶ *Voest-Alpine Stahl Linz GmbH v. Federal Pacific Ltd.*, 174 F.T.R. 69 (1999).

¹⁶⁷ Pollack (note 142 above; 11).

¹⁶⁸ Pollack (note 142 above; 11).

¹⁶⁹ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 18.

¹⁷⁰ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 18.

¹⁷¹ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 17.

¹⁷² *Union Carbide supra* note 72 above.

¹⁷³ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 19.

¹⁷⁴ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

¹⁷⁵ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

¹⁷⁶ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

¹⁷⁷ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

¹⁷⁸ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 18.

¹⁷⁹ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

¹⁸⁰ *Voest-Alpine Stahl Linz GmbH supra* note 166 at 20.

The combined effect of the decisions in *Union Carbide*,¹⁸¹ *Jian Sheng*¹⁸² and *Voest Alpine*¹⁸³ have effectuated the validation of the demise clause in identifying the carrier under Canadian maritime law.¹⁸⁴ As such, under Canadian Maritime law, the issue of who is the carrier under a bill of lading will be determined by following the principles as set out in *Union Carbide*¹⁸⁵ and *Jian Sheng*¹⁸⁶ until the Supreme Court of Canada makes a finding of finality on the matter or until the Hamburg Rules is enacted.¹⁸⁷

5.6. Conclusion

This chapter first set out the traditional approach taken by Canadian Courts on the validity of the demise clause under bills of lading in cases such as *Canadian Klockner v. D/S A/S Flint (The Mica)*¹⁸⁸ and *Carling O'Keefe Breweries v. C.N. Marine*.¹⁸⁹ The original position taken by Canadian Courts ascribed invalidity to the demise clause for its contravention of international law regimes. In this way Canadian maritime law differed from American law with respect to the development on the role of the demise clause in identifying the carrier under bills of lading. The notion of a joint venture between time charterers and shipowners, and the multicarrier approach was also met with disapproval in early Canadian judgments.

It was only a few years later in the *Lara S*¹⁹⁰ that courts accepted the concept of a joint venture ascribing to shipowners and charterers joint and several liability as carriers. However, acceptance of the joint venture theory did not maintain its status in Canadian Courts. The court in *Union Carbide Corp. v. Fednav Ltd*¹⁹¹ rejected the notion of joint and several liability between shipowners and charterers finding the concept to be unsound. The court held fast to the single carrier approach making provision for either the shipowner or the charterer to be carrier but not both. Significantly, a later decision of the Federal Court¹⁹² relying extensively on the judgment in *Union Carbide Corp. v. Fednav Ltd*¹⁹³ ascribed validity to the

¹⁸¹ *Union Carbide supra* note 72 above.

¹⁸² *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 above.

¹⁸³ *Voest-Alpine Stahl Linz GmbH supra* note 166 above.

¹⁸⁴ Pollack (note 142 above; 12).

¹⁸⁵ *Union Carbide supra* note 72 above.

¹⁸⁶ *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 above.

¹⁸⁷ Pollack (note 142 above; 14).

¹⁸⁸ *Canadian Klockner supra* note 11 above.

¹⁸⁹ *Carling O'Keefe Breweries supra* note 16 above.

¹⁹⁰ *Lara S supra* note 48 above.

¹⁹¹ *Union Carbide supra* note 72 above.

¹⁹² *Jian Sheng Co. v. Great Tempo S.A supra* [1998] note 114 above.

¹⁹³ *Union Carbide supra* note 72 above.

demise clause in support of the approach that there may be only one carrier to a contract of carriage.

The current position of the courts has been criticised by scholars as opposing the spirit and letter of international conventions regulating sea carriage as well as the principles of contract law. However, the identity of carrier question in Canadian law continues to be determined according to the principles set forth in these cases.

Chapter Six: A South African Perspective – A look at contractual interpretation and the effects of identifying the carrier under bills of lading when enforcing the action *in rem*

6.1. Introduction

This chapter will deal primarily with the processes and approaches taken to contractual interpretation. The chapter will first discuss the objective approach/contextual approach to contractual interpretation adopted in the United Kingdom and will analyse certain challenges surrounding the contextual approach such as third-party reliance on contractual documents as was found in *The Starsin*.¹ The chapter will also examine two mechanisms suggested in expanding the contextual approach to account for third party reliance on contractual documents. The chapter seeks also to examine the important role of commercial common sense in the process of contractual interpretation and, the need to ensure that this factor does not override the language of the contractual document. Additionally, the chapter will discuss the judicial shift undertaken in South African Courts from a literal approach to a contextual approach of interpretation. South African courts now follow the iterative/unitary interpretive approach as set forth in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.²

Finally, in light of the previous chapters, it is clear that judicial decisions dealing with the validity and effect of the demise clause have differed vastly through a number of cases; it is therefore necessary to ascertain the influence of these decisions on a South African Court exercising its admiralty jurisdiction. As such, the chapter will ultimately analyse the question of who is the carrier under a bill of lading containing a demise clause by applying the current judicial position taken by the English courts, American courts and Canadian courts in the context of a claimant seeking to enforce a maritime claim by way of the South African action *in rem*.

6.2. Contractual interpretation in the United Kingdom

English courts adopt an objective approach to the interpretation of contractual documents.³ The famously cited judgement by Lord Hoffman in *Investors Compensation Scheme Ltd v*

¹ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2003 U.K.H.L. 12, 2004 A.C.1 715 (2003); [2004] AC 59 at 588 para [73].

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

³ K Gibbons, S James & M Newick 'The strange death of literal England' (2010) 4(1) *Law and Financial Markets Review* 36.

*West Bromwich Building Society*⁴ sets out the interpretive process of contracts undertaken by English Courts.⁵ This objective approach which is also known as the contextual approach, affords primacy to the principle of good faith and places commercial practices and reasonable expectations as decisive factors when interpreting contractual documents.⁶ This approach directs the courts to view a contractual document as a reasonable person who possesses the relevant background information would.⁷ The words used in the contract, with their dictionary and grammatical meanings play a key role to this objective consideration.⁸ Importantly, in every case, regard must be given to the relevant context in which the contractual provisions are used - not as an attempt to alter the meaning of the words; but rather to ascertain the meaning of the words.⁹

⁴ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

⁵ Gibbons et al (note 3 above; 36); see also *Investors Compensation Service Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 as per Lord Hoffman:

‘(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to... as the ‘matrix of fact,’ but this phrase is, if anything, an understated description of what the background may include.

Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.. . .The law makes this distinction for reasons of practical policy...

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had . . . “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense”.’

⁶ Z X Tan ‘Beyond the Real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation’ (2016) 79(4) *The Modern Law Review* 623 at 624.

⁷ M Wallis ‘What’s in a word? Interpretation through the Eyes of Ordinary Readers’ (2010) 127(4) *South African Law Journal* 673 at 691.

⁸ Wallis (note 7 above; 691).

⁹ Wallis (note 7 above; 691).

6.2.1. The effects on third parties in contractual interpretation

Whilst contextualism is the present approach to interpreting contracts, problems such as reliance by a third party¹⁰ has occurred in cases such as *The Starsin*.¹¹ The approach adopted in *Investors Compensation Scheme Ltd v West Bromwich Building Society*¹² is problematic in instances of third parties relying on the apparent meaning of a contract, without having knowledge of the background information which is known to the contractual parties and which may be used in order to ascertain the meaning of the contract.¹³ For example, a third party assignee relying on the apparent meaning of a contract later finding out that this meaning has been changed by information that he was unaware of and which may not have been available to him; is placed in an unfavourable position by use of that information.¹⁴

However, Lord Hoffman has suggested that the contextual approach is able to account for third party reliance on contracts.¹⁵ Scholars have recognized that there are two ways in which this may be done.¹⁶ The first approach is to “limit the knowledge available to the reasonable man in ascertaining the meaning of the document.”¹⁷ This means that the reasonable person would have knowledge only of information “which is shared by the parties and those third parties likely to be affected.”¹⁸ The reasonable person would not have access to “all the knowledge reasonably available to the parties.”¹⁹

The alternative approach involves acknowledging the prospect of a third-party reliance on the contract, which the reasonable person must consider as a factor when interpreting the document.²⁰ Therefore, the prospect of a third-party reliance may have a bearing on the meaning of the document as read by the reasonable person.²¹

This approach was adopted by Lord Hoffman²² in *The Starsin*.²³ The principle in *Investors Compensation Scheme Ltd v West Bromwich Building Society*²⁴ recognizes that contracts are

¹⁰ M Barber & R Thomas ‘Contractual Interpretation, Registered Documents and Third Party Effects’ (2014) 77(4) *The Modern Law Review* 597 at 598.

¹¹ *The Starsin supra* [2003] note 1 at 588 para [73].

¹² *Investors Compensation Scheme Ltd supra* note 4 above.

¹³ Barber et al (note 10 above; 607).

¹⁴ Barber et al (note 10 above; 598).

¹⁵ Barber et al (note 10 above; 607).

¹⁶ Barber et al (note 10 above; 607).

¹⁷ Barber et al (note 10 above; 607).

¹⁸ Barber et al (note 10 above; 607).

¹⁹ Barber et al (note 10 above; 607).

²⁰ Barber et al (note 10 above; 608).

²¹ Barber et al (note 10 above; 608).

²² Barber et al (note 10 above; 608).

addressed to the contractual parties, however that principle was extended by Lord Hoffman in *The Starsin*²⁵ to incorporate the effect on third parties, for in some instances the contract may also be addressed to third parties.²⁶ Lord Hoffman noted that the bill of lading evidences the contract of carriage and also constitutes a document of title that may be transferred to third parties or may act as security.²⁷ The reasonable reader of the bill will know that such a bill is addressed not only to the contractual parties but to “a potentially wide class of third parties.”²⁸ It was held that:

*“The interpretation of a legal document involves ascertaining what meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed. A written contract is addressed to the parties; a public document like a statute is addressed to the public at large; a patent specification is addressed to persons skilled in the relevant art, and so on.”*²⁹

In this way, Lord Hoffman broadened the interpretive process by stating that the bill of lading should be viewed as being addressed to the contractual parties as well as to bankers.³⁰

However, some scholars assert that this approach of excluding the reasonable reader from knowledge, which would be available to contractual parties is contrary to the principle of interpretation³¹ set forth in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.³² This is because the contextual approach accounts for all background information except for prior negotiations to be included for the reasonable person’s ascertainment of the meaning of the contract.³³ Barber finds the suggestion in *The Starsin* to be “clumsy”³⁴ as it seeks the “absolute removal of material that would otherwise be relevant”³⁵ to the interpretive process.³⁶

²³ *The Starsin supra* [2003] note 1 above.

²⁴ *Investors Compensation Scheme Ltd supra* note 4 above.

²⁵ *The Starsin supra* [2003] note 1 above

²⁶ Barber et al (note 10 above; 608).

²⁷ *The Starsin supra* [2003] note 1 at 588 para 74.

²⁸ *The Starsin supra* [2003] note 1 at 588 para 74.

²⁹ *The Starsin supra* [2003] note 1 at 588 para 73.

³⁰ *The Starsin supra* [2003] note 1 at 588 para 74.

³¹ Barber et al (note 10 above; 611).

³² *The Starsin supra* [2003] note 1 above.

³³ Barber et al (note 10 above; 611).

³⁴ Barber et al (note 10 above; 611).

³⁵ Barber et al (note 10 above; 611).

³⁶ Barber et al (note 10 above; 611).

6.3. The role of ‘commercial common sense’ in contractual interpretation

The notion of “commercial common sense”³⁷ plays a significant role when contextually interpreting a contract. Commercial common sense forms part of the contractual interpretation criterion to be used by the reasonable person when ascertaining the meaning of a document.³⁸ Lord Neuberger in *Arnold v Britton*³⁹ held that common sense is a factor to be applied when interpreting a contractual document.⁴⁰

Commercial common sense entails a judge taking into account in the interpretive process how a document would be read by those in business “positioned in the relevant market or commercial context.”⁴¹ In *The Starsin*,⁴² Lord Bingham commented that “business sense is that which businessmen, in the course of their ordinary dealings, would give the document.”⁴³ Additionally, in *The Seaflower* (2001), Sir Jonathan Parker L.J held that commercial common sense is to refrain from “subjecting [a] clause to a process of minute textual examination and analysis.”⁴⁴ The court held that it entails an enquiry into the “commercial aims and objectives”⁴⁵ as directed in the contract rather than delving into the words alone.⁴⁶

In light of the above, courts have found it inappropriate to subject commercial documents such as bills of lading to semantic analysis since,

“to seek perfect consistency and economy of draftsmanship in a complex form of contract which has evolved over many years is to pursue a chimera... If an obviously inappropriate form is used, its language must be adapted to apply to the particular case.”⁴⁷

As was noted by Lord Gribner, “It is critically important that the commercial purpose of the transaction is derived from the contract as a whole and from an accurate understanding of the way in which the various provisions interact”⁴⁸ Therefore, judges ought to construe the whole

³⁷ N Andrews ‘Interpretation of Contracts and “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ (2017) 76(1) *The Cambridge Law Journal* 36 at 1.

³⁸ Andrews N (note 37 above; 14).

³⁹ *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 at para 15.

⁴⁰ *Arnold v Britton supra* [2015] note 39 at para 15.

⁴¹ Andrews N (note 37 above; 6).

⁴² *The Starsin supra* [2003] note 1 above.

⁴³ *The Starsin supra* [2003] note 1 at 577 para 10.

⁴⁴ *BS&N Ltd (BVI) v Micado Shipping Ltd (Malta) (“The Seaflower”)* [2001] C.L.C. 421 at [82] as per per Jonathan Parker L.J.

⁴⁵ *The Seaflower supra* [2001] note 44 above.

⁴⁶ *The Seaflower supra* [2001] note 44 above.

⁴⁷ *The Starsin supra* [2003] note 1 above at 577 para 12.

⁴⁸ Lord Gribner ‘The Iterative Process of Contractual Interpretation’ (2012) 128 *Law Quarterly Review* 41 at 46.

document in its factual matrix, “giving effect to the contract as intended”⁴⁹ in keeping with the “reasonable expectations of businessmen.”⁵⁰

So essential is the concept of commercial common sense to contractual interpretation that Lord Diplock in *The Antaios*⁵¹ held that: “If detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must yield to business common sense.”⁵² Additionally Christopher Clarke L.J. in *Wood v Sureteir Direct Ltd & Capita Insurance Services Ltd* (2015) noted that:

“The more unbusinesslike or unreasonable the result of any given interpretation the more the court may favour a possible interpretation which does not produce such a result and the clearer the words must be to lead to that result. Thus if what is prima facie the natural reading produces a wholly unbusinesslike result, the court may favour another, even if less obvious, reading...”⁵³

However, it is imperative that we do not view commercial common sense as a criterion which overrides the significance of the language of the contract.⁵⁴ A court may not rewrite⁵⁵ the contractual language if the terms appear to be commercially unwise or unreasonable to some extent.⁵⁶ Courts must guard against “[substituting] for the bargain actually made one which the court believes could better have been made.”⁵⁷ The case of *Rainy Sky*⁵⁸ sets forth clearly that the judiciary will not undertake a “broad, purposive approach to questions of construction, which allows them, in effect, to rewrite contracts by reference to their own notions of commerciality.”⁵⁹ Wallis notes that the risk of rewriting or replacing words is that judges subvert the parties’ intended contract or force upon the parties a contract different from the one they entered into.⁶⁰ Courts are not responsible for creating agreements for parties; parties create their own bargains and respect for party autonomy dictates that courts

⁴⁹ *The Starsin supra* [2003] note 1 above at 577 para 12.

⁵⁰ *The Starsin supra* [2003] note 1 above at 577 para 12.

⁵¹ *Antaios Cia Naviera SA v Salen Rederierna AB* (1985) [1985] A.C. 191, 201, H.L.

⁵² *Antaios Cia Naviera SA v Salen Rederierna AB supra* note 51 above.

⁵³ [2015] EWCA Civ 839 at [31] (affirmed. [2017] UKSC 24; [2017] 2 W.L.R. 1095).

⁵⁴ Andrews N (note 37 above; 20-21).

⁵⁵ *Arnold v Britton supra* [2015] note 39 at paras 18 to 20, 77, 110.

⁵⁶ Andrews N (note 37 above; 21.).

⁵⁷ *Charter Reinsurance Co Ltd v Fagan* [1997] A.C. 313, 388, H.L. per Lord Mustill.

⁵⁸ *Rainy Sky SA and Others v Kookmin Bank* [2011] UKSC 50 [2012] Lloyd’s Rep 34 (SC).

⁵⁹ C. Arthurs and S. Kokelaar, ‘I Can See Clearly Now ... Interpreting Contracts post-Rainy Sky’, *Procurement & Outsourcing Journal* (Sept/Oct 2012) 18.

⁶⁰ Wallis (note 7 above; 687).

must give regard to that bargain, subject to public policy imbued by the Constitution.⁶¹ This principle has been settled in South African case law in *Barkhuizen v Napier*.⁶²

‘On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.’⁶³

6.4. The development of contractual interpretation in South Africa

South African law has also made a judicial shift from literalism to contextualism in the interpretation of contracts and statutes.⁶⁴ The contextual approach adopted by South African Courts view ‘context’ as including “the rest of the contract, background and surrounding circumstances to the transaction, as well as of course the Constitution and the Bill of Rights.”⁶⁵ Both English Courts and South African Courts have recognized commercial practices, trade customs and norms to play a vital role in the judicial interpretation of contracts.⁶⁶

English contract law has been influential on the interpretative process followed in South African Courts due to England’s abundance of commercial activity, the commercial contract adjudication in English Courts, the reputation of English contract law as to certainty, and the extensive use of English law in governing international contracts.⁶⁷

Traditionally, the approach to contractual interpretation under South African law involved ascertaining “the external manifestation of the minds of the parties rather than their subjective intentions.”⁶⁸ This process constituted an objective enquiry into the common intention of the

⁶¹ Wallis (note 7 above; 690).

⁶² *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57.

⁶³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57.

⁶⁴ A Hutchison ‘Relational theory, context and commercial common sense: views on contract interpretation and adjudication’ 2017 (2) *South African Law Journal* 296 at 297; see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17-26.

⁶⁵ Hutchison (note 64 above; 303); Wallis (note 7 above; 673).

⁶⁶ Hutchison (note 64 above; 306).

⁶⁷ Hutchison (note 64 above; 307).

⁶⁸ Wallis (note 7 above; 676).

parties based on the words used by the parties in their contract.⁶⁹ However, this approach indicated that the interpretive process involved an examination into the minds of the contracting parties.⁷⁰ Therefore, the examination was limited to establishing “the meaning of the words and language itself.”⁷¹ Additionally, a determination of the “intention of the parties” despite its use by lawyers; poses difficulty since the contractual aims of the parties are “filtered”⁷² through the language and words of lawyers in contractual negotiations who seek to fulfil client instructions stemming from financial advisers.⁷³ Even more difficult is seeking the intention of the parties from contractual agreements that are “embodied in standard form agreement and imposed as the terms on which the more powerful contracting party will conclude an agreement.”⁷⁴ Wallis JA noted that a search for the intention of the parties restricts the enquiry to the “ordinary grammatical meaning” of the words used.⁷⁵

Wallis JA found that:

“If interpretation is... an exercise in ascertaining the meaning of the words used... and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them.”⁷⁶

Rather, seeking the intention of the parties must act solely as a guard restricting judges to the ascertainment of the words used by the contracting parties,⁷⁷ and restraining them from venturing into making the contract “more effective”⁷⁸ or to better the contract entered into by the parties.⁷⁹

The judgement in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸⁰ set forth in clear terms the new interpretive process of written documents in South African law known as the ‘unitary’ or ‘iterative’⁸¹ approach.⁸² The Supreme Court of Appeal shifted away from

⁶⁹ Wallis (note 7 above; 688).

⁷⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 20.

⁷¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 20.

⁷² *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 20.

⁷³ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 20.

⁷⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 20.

⁷⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 22.

⁷⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 23.

⁷⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁷⁸ Wallis (note 7 above; 690).

⁷⁹ Wallis (note 7 above; 690).

⁸⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 above.

⁸¹ D Donnelly ‘A new approach to the interpretation of contracts and the management of strategic corporate relationships’ (2014) 11(1) *Journal of Contemporary Management* 18.

⁸² With regard to contractual interpretation, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17–26; *Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms)*

looking at the ‘ordinary grammatical meaning’⁸³ of the words and the intention of the parties when interpreting legal documents and statutes.⁸⁴ However, the judicial shift in interpretation is not a completely new notion in South African Courts.⁸⁵ In earlier times the courts have moved away from the literal interpretive approach for its inappropriateness,⁸⁶ but hesitated from moving away completely from literalism and formalism despite the “internal tensions”⁸⁷ of the process.⁸⁸

The court held that the “proper approach”⁸⁹ to interpretation is “to read the words used in the context of the document as a whole and in light of all relevant circumstances.”⁹⁰ The court held this to be the manner in which people use and understand words; this approach being “sensible”⁹¹ and “transparent.”⁹² It makes clearer the interpretive process when adopted by the courts.⁹³ The court noted the unprofitability of attempts to determine the meaning of a word which can have more than one meaning without having regard to the context in which the word is used.⁹⁴ As such, the new approach to interpretation gives language and grammar equal footing as background and context,⁹⁵ “neither predominating over the other.”⁹⁶

The new approach to the interpretative process was encapsulated in the following terms:

1. The interpretation exercise follows an objective process and not a subjective one.⁹⁷
2. The starting point is to look at the language of the contractual document,⁹⁸ however not with a view to seek the subjective intentions and motives of the contractual

Bpk 2014 (2) SA 494 (SCA) paras 10–12; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) paras 24–31. With regard to statutory interpretation, see (by way of example) the Constitutional Court dicta in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA545 (CC) paras 21–6; *African Christian Democratic Party v The Electoral Commission* 2006 (3) SA 305 (CC) paras 20–5; *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 51–5.

⁸³ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁸⁴ Donnelly D (note 81 above; 24).

⁸⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 17.

⁸⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 19.

⁸⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 17.

⁸⁸ Donnelly D (note 81 above; 22).

⁸⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 paras 16–17.

⁹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁹² *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁹³ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 24.

⁹⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 25.

⁹⁵ Wallis (note 7 above; 692).

⁹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

⁹⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

⁹⁸ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

parties,⁹⁹ but rather to be considered against the contextual knowledge and background of the document.¹⁰⁰

3. The meaning of words used in statutes and contracts is to be interpreted with consideration to the context in which the words have been used, viewing the document as a whole and with regard to the relevant circumstances.¹⁰¹
4. The meaning of the words is to be determined having regard to the language adopted by the parties in terms of the “ordinary rules of grammar and syntax.”¹⁰²
5. “The apparent purpose” for which the language has been assigned and determined in use, and the information known to the relevant parties upon its coming into existence must be considered.¹⁰³

Much like the approach adopted in English contract law,¹⁰⁴ Wallis JA noted that, where a word bears more than one possible meaning in terms of the language used, the “apparent purpose of the provision” and the use of the word in its proper context play important roles in rightly interpreting the document.¹⁰⁵ Importantly, it was held that:

“An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”¹⁰⁶

In keeping with the values of the current unitary approach to interpretation, it is likely that South African Courts will take a “businesslike” or commercially practicable view to the interpretation of bills of lading, particularly in the ascertainment of contractual provisions relating to the identity of carrier. South African Courts have not been confronted with the issue of determining the contractual carrier under a bill of lading containing a demise clause or identity of carrier clause; however, in light of the contractual interpretation adopted by South African Courts, it is likely that our courts will follow the judicial reasoning of English Courts on this matter. The case of *The Starsin*,¹⁰⁷ which decision is the current position adopted by English Courts in determining the carrier under a bill of lading indicates that it

⁹⁹ Hutchison (note 64 above; 305).

¹⁰⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

¹⁰¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

¹⁰² *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

¹⁰³ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 18.

¹⁰⁴ [2015] EWCA Civ 839 at [31] (affirmed. [2017] UKSC 24; [2017] 2 W.L.R. 1095).

¹⁰⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 26.

¹⁰⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* note 2 at para 26.

¹⁰⁷ *The Starsin supra* [2003] note 1 above.

makes business sense¹⁰⁸ that the written provisions on the face of the bill identifying the parties to convey to the reasonable person who the contractual carrier is.¹⁰⁹ Should South African Courts be faced with the same issue, it is likely that the meaning of the bill of lading will be ascertained in a similar manner.

6.5. The effects of identifying the carrier under a bill of lading for a claimant seeking to enforce a maritime claim by way of the Action *in rem*

South African law provides for all matters relating to maritime to be brought before a South African Court exercising its admiralty jurisdiction.¹¹⁰ The South African Admiralty Court is regulated by the Admiralty Jurisdiction Regulation Act 105 of 1983,¹¹¹ as amended.¹¹²

The action *in rem* is a form of procedure that “is instituted by the arrest within the area of the court’s jurisdiction of property in respect of which the maritime claim lies.”¹¹³ Where a cargo interest seeks to institute a maritime claim by way of an action *in rem*, the maritime claim may be enforced according to section 3(4) of AJRA.

Section 3(4) of the Act provides that:

“Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action, a maritime claim may be enforced by an action *in rem*, (a) if the claimant has a maritime lien over the property to be arrested, or (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.”¹¹⁴

This means that where a maritime lien does not exist over the property to be arrested (here ownership of the vessel is immaterial), the claimant must establish that the shipowner would be personally liable to the claimant in respect of the claim,¹¹⁵ i.e. that the shipowner would be liable to the claimant in an action *in personam* in respect of the maritime claim.¹¹⁶ Important to note is section 1(3) of the Act which provides that “[f]or the purposes of an action *in rem*, a

¹⁰⁸ *The Starsin supra* [2003] note 1 above at 583 para 45.

¹⁰⁹ R Aikens... et al *Bills of Lading* 1 ed (2006) 141.

¹¹⁰ R J Barge *The Recognition, Transfer and Extinction of Maritime Liens in South African Law* (unpublished LLM thesis, University of Natal, 1994) 33.

¹¹¹ Act 105 of 1983, hereinafter referred to as AJRA.

¹¹² Barge R J (note 110 above; 33).

¹¹³ Section 3(5) of AJRA.

¹¹⁴ Section 3(4) of AJRA.

¹¹⁵ G Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2 ed (2012) 122.

¹¹⁶ M Wallis *The Associated Ship and South African Admiralty Jurisdiction* 1 ed (2010) 339-340.

demise charterer is deemed to be the owner of the ship for the period of the demise charter.”¹¹⁷ As such, an action *in rem* may be validly instituted against a demise charterer who is personally liable to the claimant based on the maritime claim. Additionally, section 3(4) of the Act requires the shipowner to be personally liable to the claimant when the action is instituted and at the time of the vessel’s arrest.¹¹⁸ In order to satisfy this requirement, the defendant to the cargo claim must be the owner of the ship to be arrested.¹¹⁹

The conflicting judgements handed down by the various courts in the United Kingdom, the United States of America as well as in Canada as discussed in previous chapters, present great difficulty in establishing the correct defendant to a cargo claim, i.e. whether the carrier of the cargo is the shipowner or time charterer.

In *The Starsin*,¹²⁰ which decision is the current position adopted by English courts in determining the carrier under a bill of lading, it was held that, it makes business sense¹²¹ for the contractual carrier to be determined by looking at the provisions on the face of the bill (written and typed), paying particular attention to the signature box and not by viewing the pre-printed clauses on the back of the bill (clauses which are usually inconsistent with the provisions on the front of the bill).¹²² Therefore, where the provisions on the front of the bill including the signature box provide for the time charterer to be the carrier, the demise clause on the back of the bill stating the shipowner to be the carrier will be rendered ineffective.

As such, if the English position for determining the contractual carrier had to be adopted in South African Courts, a demise clause contained in a bill of lading which is inconsistent with the provisions on the face of the bill will be ineffective in identifying the carrier. In a case where a time charterer is found to be the contractual carrier, a cargo interest may not enforce a claim for loss of or damage to goods by way of an action *in rem*. Whilst a claimant may have a valid maritime claim in terms of section 1(1)(g) of AJRA¹²³ for the loss of or damage

¹¹⁷ See *Transol Bunker BV v MV Andrico* 1989 (4) SA 325 (A) 331; this case was decided prior to the amendment of the Act by Section 1(3) and was set aside where the demise charterer and not the shipowner was liable on the claim. Therefore, there was no personal liability on the part of the shipowner.

¹¹⁸ Wallis (note 116 above; 339-340).

¹¹⁹ J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 708.

¹²⁰ *The Starsin supra* [2003] note 1 above.

¹²¹ *The Starsin supra* [2003] note 1 above at 583 para 45.

¹²² Aikens (note 109 above, 141).

¹²³ Section 1(1)(g) of AJRA states:

In this Act, unless the context indicates otherwise –
‘maritime claim’ means any claim for, arising out of or relating to –

to goods, it is not permissible for the claimant to institute an action *in rem* against the shipowner in terms of section 3(4)(b) of the Act. This is because the shipowner or demise charterer of the vessel is not personally liable on the maritime claim,¹²⁴ i.e. he is not liable as the cargo carrier under the bill of lading.

The action *in rem* may only be pursued then if the claimant has a maritime lien over the vessel.¹²⁵ The holder of a maritime lien can bring an action *in rem* against the shipowner even in the absence of personal liability on the part of the shipowner in respect of the claim.¹²⁶ However, a claim for loss of or damage to cargo on board a vessel is not a claim giving rise to a maritime lien in South Africa. South African law recognizes only the six maritime liens of English law, that being, the salvage lien, the seaman's wages lien, the bottomry lien, master's wages, master's disbursements, and collision damage.¹²⁷ Therefore, a cargo interest may not successfully pursue the action *in rem* in terms of section 3(4)(a) either. In such instances an action *in personam* must be instituted in terms of section 3(2),¹²⁸ and since it is unlikely that the debtor would be domiciled or carrying on business in South Africa, an application for the attachment of property (such as bunkers) belonging to the time charterer must be made to found or confirm the jurisdiction of the South African Court.

To complicate matters further, should South African Courts follow the current position adopted by U.S courts in determining the carrier using the multicarrier approach; the result may be that a cargo interest would not be permitted to institute an action *in rem* against a shipowner in respect of a claim for loss of or damage to cargo.¹²⁹ This is because the multicarrier approach provides that there may be more than one contractual carrier, and that a

(g) loss of or damage to goods (including the baggage and the personal belongings of the master, officers or seaman of a ship) carried or which ought to have been carried in a ship, whether such claim arises out of any agreement or otherwise;

¹²⁴ Section 3(4) of AJRA.

¹²⁵ Section 3(4)(a) of AJRA.

¹²⁶ M Wallis 'The Associated Ship and South African Admiralty Jurisdiction' (published Ph.D thesis, University of KwaZulu Natal, 2010) 432; *Transol Bunker BV v MV Andrico* 1989 (4) SA 325 (A) 331.

¹²⁷ Wallis (note 116 above; 367-368).

¹²⁸ Section 3(2) of AJRA states:

- (2) An action *in personam* may only be instituted against a person –
 - (a) resident or carrying on business at any place in the Republic;
 - (b) whose property within the court's area of jurisdiction has been attached by the plaintiff or the applicant, to found or to confirm jurisdiction;
 - (c) who has consented or submitted to the jurisdiction of the court;
 - (d) in respect of whom any court in the Republic has jurisdiction in terms of Chapter IV of the Insurance Act, 1943 (Act No.27 of 1943);
 - (e) in the case of a company, if the company has a registered office in the Republic.

¹²⁹ Section 1(1)(g) of AJRA.

carrier may be a party other than the shipowner or charterer having issued the bill of lading.¹³⁰ This approach is in direct conflict with the enforcing requirement for the action *in rem*¹³¹ since the owner or demise charterer of the vessel may not be personally liable as carrier to the claimant in respect of the cargo lost or damaged.¹³² Instead, the contractual carrier will include all parties involved in the carriage of goods,¹³³ even a party who has not issued and signed the bill of lading.¹³⁴ Therefore, a claimant seeking to enforce a maritime claim by way of an action *in rem* in a South African Court may find great difficulty in establishing the correct defendant to a cargo claim.

Alternatively, where the shipowner or demise charterer is the first defendant, and the time charterer is a second defendant liable jointly or in the alternative, it may be possible to utilise the joinder provisions in section 5(1) of AJRA¹³⁵ to include the time charterer as a second defendant to an action instituted both *in rem* and *in personam*.¹³⁶ Section 5(1) allows for the

¹³⁰ M T Reilly 'Identity of the Carrier: Issues Under Slot Charters' (2001) 505(25) *Tulane Maritime Law Journal* 509.

¹³¹ Section 3(4)(b) of AJRA states:

(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* –

(b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.

¹³² Section 3(4) of AJRA.

¹³³ T J Schoenbaum *Admiralty and Maritime Law* 4 ed (2004) 688-689.

¹³⁴ Reilly M T (note 130 above; 509).

¹³⁵ Section 5(1) of AJRA states:

5 (1) A court may in the exercise of its admiralty jurisdiction permit the joinder in proceedings in terms of this Act of any person against whom any party to those proceedings has a claim, whether jointly with, or separately from, any party to those proceedings, or from whom any party to those proceedings is entitled to claim a contribution or an indemnification, or in respect of whom any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined and which should be determined in such a manner as to bind that person, whether or not the claim against the latter is a maritime claim and notwithstanding the fact that he is not otherwise amenable to the jurisdiction of the court, whether by reason of the absence of attachment of his property or otherwise.

¹³⁶ See *The Dictator* [1892] P 304 ([1891 – 4] All ER Rep 360) in which case the procedural theory arose as one of two propositions, that being that once a shipowner enters an appearance to defend, if such owner is personally liable under the claim, in terms of the forms of procedure applicable within English courts exercising admiralty jurisdiction, such person has submitted to the court's jurisdiction and is expressly cited; the claim then proceeds as both an action *in rem* and action *in personam*. Any judgment will be enforceable as a judgement *in personam* against him.

In response to this proposition it was held by Wallis JA in *MV Alina II* 2011 (6) SA 206 (SCA) at para 30 that this is not the case in terms of South African admiralty proceedings. The SCA stated that:

"[I]n terms of admiralty rule 2(4), read with form 1 to the admiralty rules, the summons *in rem* is not addressed to and does not cite the owner or other persons having an interest in the vessel or other [property] arrested in order to commence the action. To make sure that judgment lies against the shipowner personally, [one may] amend the summons to join [the shipowner] in terms of rule 22(5) that the action will proceed as an action both *in rem* against the vessel and *in personam* against that

joinder of ‘any person against whom the party seeking the joinder has a claim whether or not the claim is a maritime claim and notwithstanding that the person is not otherwise amenable to jurisdiction of the court, whether by virtue of the absence of attachment of his property or otherwise.’¹³⁷ It must be noted that a third party *peregrinus* will be made amenable to the court’s jurisdiction in the case of an attachment,¹³⁸ this is permissible in order to effect the joinder of the third party.¹³⁹ Provision for the joinder in terms of the Act seeks to avoid multiple proceedings.¹⁴⁰ Section 3(4)(a) is specifically stated to be without prejudice to the rules on joinder.¹⁴¹ Although as far as I am aware the provisions of section 5(1) have not been applied in this scenario,¹⁴² it has been utilised before in admiralty cases.¹⁴³

Finally, we look at the position if South African Courts were to adopt the current position taken by Canadian maritime law in identifying the carrier under a bill of lading and the consequences that will flow to a cargo interest seeking to institute an action *in rem* against a shipowner for the loss of or damage to cargo. The decision by Nadon J in *Union Carbide*¹⁴⁴ stands as the current position followed by Canadian Courts despite critiques by scholars surrounding the judgement. In that case, Nadon J held that where the carrying vessel is under

person...Alternatively a separate action *in personam* can be commenced on the basis of the submission to the court’s jurisdiction.”

See also *Northern Endeavour Shipping Pte Ltd v Owners of NYK Isabel & Another* 2017 (1) SA 25 (SCA) at 22 para 38.

¹³⁷ Section 5(1) of AJRA.

¹³⁸ Hofmeyr (note 115 above; 212).

¹³⁹ Hofmeyr (note 115 above; 212).

¹⁴⁰ Hofmeyr (note 115 above; 212).

¹⁴¹ Section 3(4)(a) of AJRA states:

(4) Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* –

(a) if the claimant has a maritime lien over the property to be arrested; or

¹⁴² *MV 'PrivGulf' v ING Bank N.V and Others* (A72/2015) [2016] ZAKZDHC 23 confirmed section 5(1) of AJRA to be wide in scope permitting the joinder of an alternative defendant which envisages the scenario at hand.

¹⁴³ *MY 'Summit One'* 2005(1) SA 428 at 438-439 para 17 where the question of whether section 5(1) allows the joinder of a defendant in the alternative. Scott JA held that:

“because no express reference is made to a defendant in the alternative does not mean that the joinder of such a party is precluded. The section permits, for example, the joinder of a person ‘in respect of whom any question or issue which has arisen or will arise between the party [seeking the joinder] and the person to be joined...’ There is furthermore nothing in the section to indicate an intention to preclude the joinder of a person on the ground that to do so may result in a party over whom the Court would not otherwise have had jurisdiction possibly being found to be the only party liable... In the circumstances, I can see no reason for construing s 5(1) so as not to include the joinder of an alternative defendant. Admittedly, the powers of joinder in terms of the section so construed are far-reaching. But the object of the Legislature was clearly to permit all the parties to a dispute to be joined in action.”

See also *The Tigr* 1998 (3) SA 861 (SCA).

¹⁴⁴ *Union Carbide* (1998) 131 F.T.R. 241, 1998 AMC 429 (Fed. C. Can.).

time charterparty, the shipowner will be the carrier.¹⁴⁵ It is only where the charterer expressly undertakes to carry the goods, that the charterer will be held to be the carrier.¹⁴⁶ This will be the position despite the inclusion of a demise clause in the bill of lading.¹⁴⁷

It is then likely that cargo interests seeking to pursue an action *in rem* based on a maritime claim against a shipowner may find solace in the principle set out in *Union Carbide*.¹⁴⁸ Since the existence of the demise clause in a bill of lading plays no role in identifying the carrier in terms of Nadon J's decision;¹⁴⁹ and since it is the general presumption that in the case of a time charterparty, the shipowner will be the carrier unless the charterer expressly undertakes to carry the goods;¹⁵⁰ the action *in rem* may be pursued by a claimant with less difficulty. A claimant may enforce a maritime claim by way of an action *in rem* where the shipowner would be personally liable to the claimant in respect of the maritime claim.¹⁵¹ If the general presumption is followed in determining the carrier, then the claimant will satisfy the requirement of section 3(4)(b) of AJRA, since the shipowner would be found personally liable to the cargo interest as cargo carrier in respect of loss or damage to cargo.¹⁵²

6.6. Conclusion

The objective of this chapter was to analyse the interpretive approaches to contractual documents adopted in judicial processes. The iterative/unitary approach adopted by South African Courts provide that the context and background of the document together with the Constitution; play a significant role in the interpretive process.

Following the unitary approach taken by South African law, it is likely that South African Courts would take a commercial practicable view to the interpretation of bills of lading. Should our courts be faced with the issue of interpreting a bill of lading containing a demise clause in order to identify the contractual carrier, it is respectfully submitted that our courts would likely adhere to the judicial reasoning of English Courts on the matter. This is so also

¹⁴⁵ *Union Carbide supra* note 144 at 27.

¹⁴⁶ *Union Carbide supra* note 144 at 32-33.

¹⁴⁷ *Union Carbide supra* note 144 at 32-33.

¹⁴⁸ *Union Carbide supra* note 144 above.

¹⁴⁹ *Union Carbide supra* note 144 at 32-33.

¹⁵⁰ *Union Carbide supra* note 144 at 27.

¹⁵¹ Section 3(4)(b) of AJRA.

¹⁵² *Ibid.*

because English contract law has influenced South African law due to England's abundance of commercial activity, and the reputation of English contract law as to certainty.¹⁵³

This chapter also discussed the effects of identifying the carrier under a bill of lading for a claimant seeking to enforce a maritime claim by way of the action *in rem*. The chapter examined the procedure for the action *in rem* under AJRA and in so doing, also looked at the action *in personam* and joinder provisions under the Act. An integral requirement for enforcing a maritime claim by way of an action *in rem* is to establish personal liability on the part of the shipowner. As such, uncertainty in identifying the contractual carrier under a bill of lading can create challenges for a cargo interest seeking to identify the correct defendant to a cargo claim. Therefore, the chapter undertook a hypothesis proposing the probable outcomes were the current English law position, American law position and Canadian law position to be adopted in a South African Court confronted with the issue of identifying the carrier under a bill of lading containing a demise clause and/or identity of carrier clause.

¹⁵³ Hutchison (note 64 above; 307).

Chapter Seven: Conclusion

7.1. Introduction

The Hague and Hague-Visby Rules have possessed dominance amongst nations as the chosen regime in international maritime carriage.¹ However the scope of the conventions have become outdated due to fundamental changes in the shipping trade industry.² With the advancement in maritime trade, the increase in containerized transportation and the growth of multimodal carriage,³ the “loading, handling, stowage, carriage, custody and discharge of goods”⁴ by third parties such as independent contractors have become unavoidable.⁵ The traditional concept of the “carrier” as a single carrier performing every leg of the carriage⁶ provided for particularly in the Hague and Hague-Visby Rules, fail to account for the performance of carriage by multiple subcontractors other than the contracting carrier.⁷ The multiplicity of parties to a contract of carriage has a direct bearing on the identity of carrier problem⁸ domestically and in terms of international law⁹ as we have discussed in chapter four.

The Hamburg Rules was adopted as an attempt to update the Hague-Visby Rules in certain respects such as with the inclusion of the “actual carrier”¹⁰ provision. Tetley asserts that it is the Hamburg Rules which has settled the issue on the effect of the demise clause and identity of carrier clause in bills of lading,¹¹ particularly that the role of the demise clause in a bill of lading is ineffective in light of Article 10 of the Hamburg Rules.¹² As such, a cargo claimant is prevented from having to familiarise itself with all the contractual relations and terms

¹ N Bond ‘The Maritime Performing Party and the Scope of the Rotterdam Rules.’ (2014) 28 *Australian & New Zealand Maritime Law Journal* 95 at 116.

² Bond N (note 1 above; 116).

³ S Tong-jiang and W Peng ‘Carrier’s liability under international maritime conventions and the UNCITRAL draft convention on contracts for the international carriage of goods wholly or partly by sea.’ (2009) 24(4) *Transport* 345. (Available at <http://dx.doi.org/10.3846/1648-4142.2009.24.345-351>.)

⁴ V Rochester *The Lone “Carrier” An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable* (unpublished LLM thesis, University of Cape Town, 2005) 108.

⁵ Rochester (note 4 above; 108).

⁶ Rochester (note 4 above; 108).

⁷ Bond N (note 1 above; 116).

⁸ Rochester (note 4 above; 109).

⁹ Rochester (note 4 above; 109).

¹⁰ Bond N (note 1 above; 116).

¹¹ W Tetley ‘The Demise of the Demise Clause’ (1998) 44 *McGill Law Journal* 807 at 843.

¹² Waldron A ‘The Hamburg Rules – A Boondoggle for Lawyers’ (1991) *Journal of Business Law* 305 at 307.

between the shipowner and charterer before instituting action for cargo loss or damage.¹³ However other scholars assert that the demise clause will continue to be inserted in bills of lading as an effort to hold liable the shipowner or demise charterer for the carriage of goods and in so doing substantiating the single carrier approach adopted by most national courts.¹⁴

7.2. Summary of findings

Chapter two examined the different indicators contained in a bill of lading in detail. It was stated that, the problem in identifying the carrier under a bill of lading presents itself where there is conflict in the various indicators stipulating who the carrier of goods is. One of the most controversial indicators on the bill of lading is the signature. The bill of lading may be signed by the master of the vessel, who binds the shipowner provided that the master signed within the ambit of his general authority as employee of the owner.¹⁵ The master may also delegate authority to charterers and agents to sign bills of lading or authority may be implied in terms of the charterparty.¹⁶ *The Rewia*¹⁷ bolted down the rule that a bill of lading signed on behalf of the master by charterers or sub-charterers is a shipowner's bill unless the contract of carriage is made with the charterers alone.¹⁸ A bill of lading on the charterer's form, signed in the charterer's own name or logo, "for and on behalf of the charterers"¹⁹ will constitute a charterer's bill. However, even then dispute will arise where the bill contains a demise clause or an identity of carrier clause.

Therefore in each case, the court taking into account the documents and whole circumstances of each case, must determine whether the contract of carriage is made with the charterers or the shipowners.²⁰

The heading of the bill is another indicator that may assist in identifying the carrier. As was pointed out in *The Starsin*,²¹ "[a] shipper would... look at the face of the bill to see [which]

¹³ Rochester (note 4 above; 120).

¹⁴ Ping-fat S 'Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules' (2002) *Kluwer Law International, The Hague* 28.

¹⁵ C J S Hill *Maritime Law Lloyd's Practical Shipping Guides* 6 ed (2003) 192.

¹⁶ Hill (note 16 above; 195).

¹⁷ *The Rewia* [1991] 2 Lloyd's Rep. 325.

¹⁸ *The Rewia supra* note 18 at 336.

¹⁹ M T Reilly 'Identity of the Carrier: Issues Under Slot Charters' (2001) 25 *Tulane Maritime Law Journal* 505 at 507.

²⁰ (1909-10) 15 Com. Cas. 172. at 182 and 183.

²¹ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)* 2001 Lloyd's Rep. 1 437 (2001) at 446-447 para 43.

person was described as the carrier.”²² However, the heading of the bill will not be conclusive where ambiguity occurs with other indicators on the bill.

Another controversial issue discussed in Chapter two is the question of having more than one carrier to a contract of carriage. The term “carrier” under the Hague-Visby Rules provides a general definition not clearly indicating if there may be more than one carrier.²³ Additionally, the definition is not extensive enough to include another party that a carrier may appoint to “handle” the cargo.²⁴ While the Hague-Visby Rules presuppose the shipowner to be the carrier²⁵ in provisions such as Article 3(1)(a),²⁶ other provisions such as Article 3(2)²⁷ are less clear.²⁸

Contrastingly, the Hamburg Rules make a distinction between the ‘carrier’ and the ‘actual carrier.’ The actual carrier being the one responsible for performance of the carriage of goods.²⁹ The Rules govern the responsibility of the actual carrier in respect of the carriage he actually performed, and provide for joint and several liability of both the contracting carrier and the actual carrier where their obligations overlap.³⁰ As such, a cargo interest may claim from either the contracting carrier or the actual carrier in terms of Article 10(4).³¹ However, unlike the Hague-Visby Rules, the Hamburg Rules make no express provision for the duty of “due diligence” on the part of the shipowner to make the ship seaworthy, therefore where a demise charterer issues a bill of lading and a time charterer performs the actual carriage,³²

²² *The Starsin supra* [2001] note 22 at 446-447 para 43.

²³ C Pejovic ‘The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law (2000) 31(379) *Journal of Maritime Law and Commerce* 384.

²⁴ Bond N (note 1 above; 97).

²⁵ The duty of ensuring the ship’s seaworthiness is the shipowner’s duty. The responsibility of maintenance to the vessel lies with the shipowner and not the time charterer on whom commercial responsibility of the vessel rests.

²⁶ Article 3(1)(a) of the Hague-Visby Rules provides that:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
(a). Make the ship seaworthy;

²⁷ Article 3(2) of the Hague-Visby Rules provides that:

2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

²⁸ The time charterer is responsible for “loading, handling, stowing, carrying and discharging the goods.

²⁹ J F Wilson *Carriage of Goods by Sea* 7 ed (2010) 225.

³⁰ Article 10(2) and Article 10(4) of the Hamburg Rules.

³¹ Article 10(4) of the Hamburg Rules provides that:

4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.

³² Rochester (note 4 above; 116).

the question is whether the shipowner would have any responsibilities applicable to him under the Rules enabling him to be identified as an actual carrier.³³

The second chapter also examined the question of whether the demise clause and identity of carrier clause is used as a mechanism by the charterer to avoid liability as a cargo carrier in contravention of Article 3(8) of the Hague-Visby Rules. According to Tetley, the demise clause is said to circumvent the liability of the carrier by allowing the carrier to deny that it is the contracting carrier,³⁴ and to assert rather that it acts only as agent for the shipowner.³⁵ Tetley asserts strongly that the demise clause ought to be rendered null and void as it amounts to “illegal attempts by charterers to limit or exclude their liability contrary to the Rules.”³⁶

Chapter three of this paper examined the applicability or effectiveness or lack thereof of the demise clause under a bill of lading in identifying the carrier to a shipment of cargo under English law. Traditionally, English Courts have viewed the demise clause and identity of carrier clause as reliable indicators in identifying the contracting carrier,³⁷ a case in point is *The Berkshire*.³⁸ The court held the demise clause to be “entirely usual and ordinary”³⁹ in bills of lading reinforcing the charterparty provision that allows charterers and agents to sign bills on the shipowner’s behalf.⁴⁰ The qualification “for the master”⁴¹ did not appear with the signature on the bill.⁴² This judgement also brought clarity as far as issues of authority for charterers and sub-charterers to sign bills of lading are concerned.⁴³ The case gave precedence to the demise clause over other provisions in the bill of lading leading to the

³³ Comparison between Article 3(1)(a) of the Hague-Visby Rules obliging the carrier to exercise due diligence with Article 5 of the Hamburg Rules which provides a general basis for liability.

Article 3(1)(a) of the Hague-Visby Rules provides that:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
 - (a) Make the ship seaworthy

Article 5(1) of the Hamburg Rules provides that:

1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

³⁴ N Gaskell...et al *Bills of Lading: Law and Contracts* 1 ed (2000) 105.

³⁵ Tetley W (note 11 above; 840).

³⁶ Tetley W (note 11 above; 840).

³⁷ Tetley W (note 11 above; 818).

³⁸ *The Berkshire* [1974] 1 Lloyd’s Rep. 185 (Q.B.).

³⁹ *The Berkshire supra* note 39 at 188.

⁴⁰ Gaskell (note 35 above; 105).

⁴¹ *The Berkshire supra* note 39 at 187.

⁴² P Todd *Principles of the Carriage of Goods by Sea* 1 ed (2015) 300.

⁴³ *The Berkshire supra* note 39 at 188.

shipowner being the carrier. *The Venezuela*⁴⁴ adopted a similar stance to that of *The Berkshire*,⁴⁵ but placed greater emphasis on the construction of a bill of lading as a whole; considering all surrounding factors.⁴⁶

Contrastingly, the court in *The Rewia*⁴⁷ reasoned that the “key words”⁴⁸ “For the master”⁴⁹ in the bill of lading indicated that the bill signed was binding on the shipowners.⁵⁰ The court held that in identifying the contracting carrier, greater weight must be afforded to the signature and its qualification rather than to other provisions on the bill such as a definitions clause, demise clause and/or identity of carrier clause.⁵¹

*The Flecha*⁵² however, found the signature on bills of lading not to be a decisive factor when identifying the carrier, but rather that the bills must be construed in a wider context so as to determine the intention of the parties.⁵³ The signatures by the charterers were not sufficient to prove that the charterers were the contracting carrier.⁵⁴ The court held that the demise clause supported the fact that under a time charterparty, the charterer is entitled to sign bills of lading on the shipowner’s behalf thereby binding the shipowner.⁵⁵

Finally, it was the House of Lords in *The Starsin*⁵⁶ that undertook a commercial approach in construing a bill of lading.⁵⁷ The court viewed the bill of lading as a commercial document;⁵⁸ and the issue of identifying the carrier as one requiring the contractual interpretation of such commercial document.⁵⁹ The House of Lords strongly adhered to the dictates of business sense and common commercial sense in their judgements.⁶⁰ The court found that greater weight must be given to terms of a contract specifically elected by the parties rather than to

⁴⁴ *The Venezuela* [1980] 1 Lloyd’s Rep. 393.

⁴⁵ *The Berkshire supra* note 39 above.

⁴⁶ *The Starsin supra* [2001] note 22 at 447.

⁴⁷ *The Rewia* [1991] 2 Lloyd’s Rep. 325.

⁴⁸ *The Rewia supra* note 48 at 336.

⁴⁹ *The Rewia supra* note 48 at 336.

⁵⁰ *The Rewia supra* note 48 at 333.

⁵¹ Gaskell (note 35 above; 95).

⁵² *Fetim B.V. v. Oceanspeed (The Flecha)* [1999] 1 Lloyd’s Rep. 612 (Q.B.).

⁵³ *The Flecha supra* note 53 at 618.

⁵⁴ *The Flecha supra* note 53 at 618.

⁵⁵ *The Flecha supra* note 53 at 618.

⁵⁶ *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, 2003 U.K.H.L. 12, 2004 A.C.1 715 (2003).

⁵⁷ R Aikens... et al *Bills of Lading* 1 ed (2006) 141.

⁵⁸ Todd (note 43 above, 300)

⁵⁹ *The Starsin supra* [2003] note 57 at 577 para 9.

⁶⁰ *The Starsin supra* [2003] note 57 at 577 para 10.

standard pre-printed provisions on the bill.⁶¹ It was held that the signature box is filled in with written, typed or stamped words while the demise clause constitutes a pre-printed clause on the bill of lading.⁶²

The fourth chapter of this paper provided an examination on the lack of uniformity within American Courts with respect to the validity of the demise clause contained in bills of lading. The chapter also dealt extensively with the proposition of joint and several liability of parties as a means to properly identifying the carrier of goods. The demise clause found successful validation in earlier cases such as *The Iristo*,⁶³ which followed almost a decade of approval within American Courts.⁶⁴ However, some later decisions invalidated the demise clause as a provision in contravention of statutory law,⁶⁵ essentially as an attempt to relieve or lessen a carrier's COGSA liability for loss or damage to goods.⁶⁶ The outcome was that American Courts have seen an increasing lack of uniformity in decisions relating to the applicability and validity of the demise clause in bills of lading.

However, American Courts have manoeuvred around the issue of identifying the carrier under a bill of lading containing a demise clause by adopting the view that there may be more than one carrier to a contract of carriage. The contentious 'multicarrier approach' is in keeping with Professor Tetley's 'joint venture' theory between shipowners and charterers. In terms of the multicarrier approach, the issuing of the bill of lading and the authority to sign the bill are not decisive factors in determining the carrier, but rather all parties involved in the carriage of goods can be found to be carriers. While this approach has been applied expansively in the lower courts, the Courts of Appeal have cautiously applied it within the ambit of the requirement of privity of contract.

In Chapter five, an examination of the traditional and current approaches taken by Canadian maritime law regarding the validity and effectiveness of the demise clause was undertaken. The chapter also dealt significantly with the current approach held by Canadian Courts regarding joint and several liability of both shipowner and charterer as carrier under a contract of carriage.

⁶¹ *The Starsin supra* [2003] note 57 at 577 para 11.

⁶² Todd (note 43 above, 300)

⁶³ *The Iristo* 43 F Supp. 29 (S.D.N.Y. 1941).

⁶⁴ R W Pritchett 'The Demise clause in American courts' (1980) 387 *Lloyd's Maritime and Commercial Law Quarterly* 390.

⁶⁵ *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995) at 1352.

⁶⁶ COGSA 46 U.S. Code Appx. S. 1303(8).

Early Canadian judgments such as *The Mica*⁶⁷ and *Carling O'Keefe Breweries v. C.N. Marine*⁶⁸ invalidated the demise clause under a bill of lading for its inconsistency with Article 3(8) of the Hague-Visby Rules, which prohibits any clause seeking to relieve or lessen liability on the part of the carrier. Additionally, the court in *Carling O'Keefe Breweries v. C.N. Marine*⁶⁹ rejected the multicarrier approach as being contrary to the definition of carrier⁷⁰ under the Hague-Visby Rules which provide for only one carrier to a contract of carriage.

However, a few years later, Canadian judgements posited approval to the notion of a joint venture between shipowners and time charterers. The court in the *Lara S*⁷¹ found it fitting to hold both shipowner and charterer liable as carrier under a time charterparty. In this case, the court also disregarded the demise clause contained in the bill of lading.

However, the endorsement of joint and several liability between shipowners and charterers did not maintain its status in Canadian Courts. Later judgements such as *Union Carbide Corp. v. Fednav Ltd.*⁷² and *Jian Sheng Co. v. Great Tempo S.A.*⁷³ found the joint venture theory to be unsound and applicable only where the shipowner and charterer have agreed to form and carry out a partnership in the carriage of goods. Regarding the demise clause, the court found in *Union Carbide Corp. v. Fednav Ltd.*⁷⁴ that in spite of the inclusion of a demise clause under a bill of lading, where a bill is signed on behalf of the master, the bill binds the shipowner to the contract of carriage and the shipowner will be the carrier. The time charterer will be the carrier only where the charterer expressly undertakes to carry the goods. However, in *Jian Sheng Co. v. Great Tempo S.A.*,⁷⁵ the court upheld the demise clause finding that it evidences a contract of carriage between the shipowner and cargo interests. This case has effectively led to the current validation of the demise clause in identifying the carrier under Canadian maritime law.

⁶⁷ *Candian Klockner v. D/S A/S Flint* [1973] 2 Lloyd's Rep. 478.

⁶⁸ *Carling O'Keefe Breweries v. CN Marine*, 1990 F.C.1 483 (1990).

⁶⁹ *Carling O'Keefe Breweries* *supra* note 69 above.

⁷⁰ Article 1(a) of the Hague-Visby Rules states:

(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with the shipper.

⁷¹ *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.).

⁷² *Union Carbide* (1998) 131 F.T.R. 241, 1998 AMC 429 (Fed. C. Can.).

⁷³ *Jian Sheng Co. v. Great Tempo S.A.* [1998] 3 F.C. 418 (Fed. C.A. Can.).

⁷⁴ *Union Carbide* *supra* note 73 above.

⁷⁵ *Jian Sheng Co.* *supra* note 74 above.

The sixth chapter undertook an analysis of contractual interpretation. The chapter examined the objective approach to contractual interpretation adopted in the United Kingdom and the effects resultant on third parties relying on a contractual document. In *The Starsin*,⁷⁶ in which case there was a third party reliance on the contractual document being the bill of lading, Lord Hoffman broadened the objective interpretive process by noting that the bill of lading evidences the contract of carriage and also constitutes a document of title that may be transferred to third parties or may act as security.⁷⁷ The reasonable reader of the bill will know that such bill is addressed not only to the contractual parties but to “a potentially wide class of third parties.”⁷⁸

Another important aspect dealt with in the chapter is that of the role of ‘commercial common sense’ in contractual interpretation. Commercial common sense forms part of the criterion used in the objective approach to contractual interpretation in ascertaining the meaning of a contractual document. However, commercial common sense should not be viewed as overriding the significance of the language of the document, as such, courts are to guard against rewriting the language to suit their own notions of commercial and business sense.⁷⁹

The chapter also examined the development of contractual interpretation in South African law. Traditionally, the South African approach to contractual interpretation involved an objective enquiry of “the external manifestation of the minds of the parties rather than their subjective intentions.”⁸⁰ However an examination of the intention of the parties is problematic since the parties’ contractual objectives stem from the language and words of lawyers in contractual negotiations.⁸¹ As such, the judgement in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁸² set forth in clear terms the new interpretive process of written documents in South African law known as the ‘unitary’ or ‘iterative’⁸³ approach.⁸⁴

⁷⁶ *The Starsin supra* [2003] note 57 at 588 para 73.

⁷⁷ *The Starsin supra* [2003] note 57 at 588 para 74.

⁷⁸ *The Starsin supra* [2003] note 57 at 588 para 74.

⁷⁹ N Andrews ‘Interpretation of Contracts and “Commercial Common Sense”: Do Not Overplay This Useful Criterion’ (2017) 76(1) *The Cambridge Law Journal* 21.

⁸⁰ M Wallis ‘What’s in a word? Interpretation through the Eyes of Ordinary Readers’ (2010) 127(4) *South African Law Journal* 673 at 676.

⁸¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 20.

⁸² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁸³ D Donnelly ‘A new approach to the interpretation of contracts and the management of strategic corporate relationships’ (2014) 11(1) *Journal of Contemporary Management* 18.

⁸⁴ With regard to contractual interpretation, see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 17–26; *Bothma- Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) paras 10–12; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) paras 24–31. With regard to statutory interpretation, see (by way of example) the Constitutional Court dicta in

This current approach gives language and grammar equal footing as background and context,⁸⁵ “neither predominating over the other.”⁸⁶

Lastly, chapter six deals with the effects of identifying the carrier under a bill of lading for a claimant seeking to enforce a maritime claim by way of the action *in rem* and/or action *in personam*. The conflicting judgements of the various courts in the United Kingdom, the United States of America as well as in Canada as discussed in previous chapters present great difficulty in establishing the correct defendant to a cargo claim, that is, whether the carrier of the cargo is the shipowner or the time charterer. The chapter examines the scenario and possible outcomes if the English position, the American position as well as the Canadian position for determining the contractual carrier had to be adopted in South African Courts, where a demise clause is contained in the bill of lading which conflicts with other indicators on the bill.

7.3. Conclusion

It is clear that current international rules, judicial decisions and domestic legislation have proved to be inadequate in solving the identity of carrier issue, particularly where a demise clause/identity of carrier clause is contained in the bill of lading.⁸⁷ It is to this end that it is respectfully submitted that the multicarrier approach; if adopted cautiously within the constraints of contractual interpretation of bills; may bring clarity on the identity of the carrier question.

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA545 (CC) paras 21–6; *African Christian Democratic Party v The Electoral Commission* 2006 (3) SA 305 (CC) paras 20–5; *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) paras 51–5.

⁸⁵ Wallis (note 81 above; 692).

⁸⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* *supra* note 82 at para 18.

⁸⁷ Rochester (note 4 above; 148).

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06 April 2017

Ms Terina Simone Naidoo (211521992)
School of Law
Howard College Campus

Dear Ms Naidoo,

Protocol reference number: HSS/0311/017M

Project title: The role of the demise clause in identifying the carrier under bills of lading

Full Approval – No Risk / Exempt Application

In response to your application received on 28 March 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenuka Singh (Chair)

/ms

cc Supervisor: Dusty Lee Donnelly
cc Academic leader Research: Dr Shannon Bosch
cc School administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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