

UNIVERSITY OF CAPE TOWN

CML 5616W – MASTERS IN SHIPPING LAW DISSERTATION

**AN EVALUATION OF THE SOLUTIONS PROVIDED BY THE
ROTTERDAM RULES TO IDENTIFYING THE CARRIER**

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Submission date: 11 December 2013

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the 'Master of Laws (LLM) by Coursework and Minor Dissertation' in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Cape Town, _____

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CHAPTER I INTRODUCTION

While the identification of the carrier under a contract for the carriage of goods by sea, whether as unimodal transport or as a leg of a multimodal transport, for the purposes of determining the person liable for the loss or the damage to goods carried, does not generally present a cargo interest with difficulties, there are instances in which it may do so. This minor dissertation evaluates the solutions provided by the Rotterdam Rules to certain ‘identity of the carrier problems’.

The identity of the carrier problems referred to can be divided, basically, into two different kinds. First, problems with identifying the carrier can arise in case of a carriage of goods solely by sea, in particular where a bill of lading covering the goods carried is transferred to a third party consignee and the ship carrying the goods is operated under a charterparty. This first kind of problem concerns thus specifically the carriage of goods by the mode of transport ‘sea’. Secondly, problems with identifying the carrier can also arise where the carriage of goods is of multimodal nature, *i.e.* by two or more modes of transport. In such a scenario of multimodal transportation it is important to determine whether there is, for each mode of transport employed, a different person acting as carrier for the carriage of the goods or whether there is a person acting as carrier irrespective of the different persons conducting the carriage of the goods under the modes. This second kind of problem thus relates to the multimodal transportation of goods (and not to any specific modes of transportation such as *e.g.* sea, rail or road carriage).

In the transportation of goods business it sometimes happens that a person as consignee receives – at the end of an international door-to-door conveyance of goods involving, *inter alia*, transportation by sea – goods delivered in damaged condition or short-delivered. Assuming that the person acting as consignor overseas handed these goods in good order and condition over to the first carrier, it becomes clear that the damage to the goods occurred during their transportation. Hence, the consignee might want to know who is the person liable for the damage or loss suffered against whom it could institute legal proceedings, *e.g.* an action for damages or for loss. In such a case, both kinds of ‘identity of the carrier problems’ referred to above can be at play and have an influence on the answer to the question who the person liable is.

Before addressing this question, Chapter II is dedicated to the ‘basics’ of the carriage of goods topic. In this chapter terms like ‘carrier’, ‘contract of carriage’, ‘consignor’ and ‘consignee’ are discussed and an overview over different types of contracts of carriage of goods by sea is given in order to set the scene for the considerations as regards the identification of the carrier.

Chapter III deals mainly with the problem of identifying the carrier in the context of carriage of goods by sea subject to the Hague-Visby Rules¹ whereas the carrying vessel is under charter. Hence, an analysis of the question who the carrier is or rather a determination of the identity of the carrier will be provided for the first time in this chapter which is written on the assumption that the carriage of the goods is unimodal, *i.e.* purely by sea, and that the Hague-Visby Rules apply. In this chapter, particular consideration will be given to the different kinds of charterparties and their respective influences on the identification of the legal carrier.

Chapter IV focuses, by contrast, on the multimodal transportation of goods and deals with problems of identification of the carrier in the context of such multimodal transportation, particularly where the consignor contracts with or through a freight forwarder in view of transporting the goods. Here the problem of identification of the carrier depends in the first instance on whether the consignor has contracted with the freight forwarder as principal or not. In the former case, any difficulty with regard to identifying the person ultimately liable for the loss of or damage to the goods carried is that of the freight forwarder. In the latter case, where the freight forwarder acts as agent for the consignor when concluding contracts of carriage with the carriers required for the transportation of the goods by means of various modes of transport, the problem of identifying the person or rather the carrier liable is that of the consignor, or where the contractual rights of the consignor are transferable, the transferee or cessionary of those rights, usually the consignee. The problem is essentially that of identifying in whose custody the goods were when the loss or damage occurred in order to determine the carrier liable, at least *prima facie*. It follows that the question of who the carrier is can arise also under multimodal

¹ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading dated 25 August 1924 (the ‘Hague Rules 1924’) as amended by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading dated 23 February 1968 (the ‘Visby Rules’, and together with the Hague Rules 1924, the ‘Hague-Visby Rules’ or ‘HVR’).

transportation arrangements. However, the difficulties in identifying the carrier revolve around the capacity in which a person, particularly a freight forwarder, can act. In this regard, reference is made to international legislative initiatives such as the MT Convention 1980² and the MTD Rules³ which aimed (and still aim) at a unification in particular in relation to multimodal transport documents issued.

Chapter V examines the provisions of the Rotterdam Rules⁴ relating to the identification of the carrier. As an international convention that deals both with unimodal sea carriage of goods and, to a limited extent with multimodal carriage involving a sea leg, its provisions, at least in this particular regard, attempt to address both kinds of problems relating to the identity of the carrier outlined in chapters III and IV. The chapter provides, thus, an evaluation of the solutions adopted in the Rotterdam Rules explains in what situations the Rotterdam Rules might be of assistance to the cargo interest and in which situations the cargo interest might still have to revert to today's standard of proving the identity of the carrier.

Based on the considerations of all the foregoing chapters, this minor dissertation will conclude in Chapter VI with some remarks regarding whether and, if so, in what way the Rotterdam Rules improve the position of a potential cargo claimant confronted with difficulties in identifying the person from which to recover damages for loss of or damage to goods carried.

² United Nations Convention on International Multimodal Transport of Goods of 1980 of 24 May 1980.

³ UNCTAD/ICC Rules for Multimodal Transport Documents dated 7 January 1992.

⁴ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea adopted on 11 December 2008. To date, only Spain and Togo are parties to the Rotterdam Rules and 23 other states have signed them. As the minimum of 20 signatory states pursuant to art 94 RR has not been reached so far, the Rotterdam Rules have not yet entered into force (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en, accessed on 18 November 2013).

CHAPTER II DEFINITIONS

I INTRODUCTION

It is one of the aims of this minor dissertation to highlight, in particular, two kinds of problems that may exist when the carrier is identified under a contract of carriage of goods. However, before addressing these specific problems, the groundwork shall be laid for any such analyses. When one speaks of ‘carrier’, what is meant by such term and which role does the ‘carrier’ take in terms of a contract of carriage? Are there other parties to the contract of carriage and, if so, whom are they? What are the different types of contracts of carriage of goods by sea and why is a distinction of these types of contracts important for purposes of this minor dissertation? In other words, the term ‘carrier’ shall be the starting point, adding and exploring step by step further important terms and concepts in view of exploring ultimately the identity of the legal carrier.

II ‘CARRIER’

The term ‘carrier’ is used very often and is easily understood in laymen’s terms to refer to a person or entity that carries goods or persons.⁵ The meaning of ‘carrier’ as a legal term requires closer examination. Basically, when speaking of ‘carrier’ in a legal context this implies that there is a specific kind of *contractual* relationship, often called ‘contract of carriage’,⁶ between at least two persons whereas at least one of these persons qualifies as carrier.⁷ If there is indeed a ‘contract of carriage’, the person responsible for the carriage of the goods is the first party in such a contract of carriage and is considered to be the ‘carrier’.⁸

⁵ Cf. <http://en.wikipedia.org/wiki/Carrier> (accessed on 3 December 2013); <http://www.thefreedictionary.com/carrier> (accessed on 3 December 2013).

⁶ If the contract for carriage of goods is one for carriage by sea, it is ‘also referred to as a contract of affreightment’ (JP Van Niekerk ‘An Introduction to the Carriage of Goods by Sea’ (1993) 5 *South African Mercantile Law Journal* 79; Bernard Eder, Howard Bennet & Steven Berry et al *Scrutiny on Charterparties and Bills of Lading* 22 ed (2011) para 1-001; Lars Gorton, Rolf Ihre *A Practical Guide to Contracts of Affreightment and Hybrid Contracts* (1985) 55).

⁷ The carrier can be one by sea, road, rail or air (Francesco Berlingieri ‘General Introduction’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2010) 15); *Homburg Houtimport BV v Agrosin Private Ltd and others (The Starsin)* [2003] 2 All ER 785 (HL) at 809.

⁸ JP van Niekerk & WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) at 118; Philippe Delebecque ‘Obligations of the Carrier’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli *The Rotterdam Rules 2008 – Commentary to the United*

The ‘carrier’ respectively the ‘carriage’ topic often becomes of importance and necessity upon conclusion of an international contract of sale of goods which requires that the sale contract goods are transported from the seller to the buyer.⁹ Depending on which party to the international contract of sale is responsible for arranging the transportation of the sale contract goods,¹⁰ such person may either transport the goods itself, in which case it becomes the carrier at least in laymen’s terms, or it can engage the services of a third party to convey the goods in which case such engagement is generally in terms of a contract of carriage and such third party becomes the carrier both in laymen’s terms but also in legal terms.¹¹ It is only the latter scenario – insofar as it concerns the identification of the legal carrier under a contract of carriage – that is of interest for the purposes of this minor dissertation.

III ‘CONTRACT OF CARRIAGE OF GOODS’

If the ‘identity of the carrier problems’ arise only in the context of contractual arrangements regarding the carriage of goods, *i.e.* within the context of a contract of carriage of goods, the first issue to obtain clarity on is whether a particular contract is one for the carriage of goods.

Whether a contractual arrangement between the parties thereto qualifies as a contract of carriage of goods depends, *inter alia*, on what the obligations of the parties are.¹² Or in other words, a contract is usually ‘defined on the basis of the obligations of the parties.’¹³

Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2010) 72.

⁹ JP van Niekerk & WG Schulze op cit note 8 at 56; Note, however, that it is not only an international contract of sale which requires the carriage of goods. The conclusion of a contract of carriage of goods can also be required if *e.g.* a contract of barter has been concluded (Ibid at 56).

¹⁰ In case of a CIF (Cost, Insurance and Freight) sale, it is the exporting seller’s obligation to arrange for the transportation whereas such obligation lies with the importing buyer in case of an FOB (Free On Board) sale (Ibid at 118).

¹¹ Ibid at 118.

¹² Ibid at 67.

¹³ The Hague-Visby Rules ‘(...) merely connect the notion of contract of carriage to the document issued thereunder, the bill of lading. For that reason it has been said that they have adopted a documentary approach.’ (Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Comparative%20analysis%20of%20the%20Hague-Visby%20Rules,%20the%20Hamburg%20Rules%20and%20the%20Rotterdam%20Rules.pdf> (accessed on 28 June 2013) at 2).

(a) *Contract of carriage of goods in international sea transportation law*

To arrive at a definition a ‘contract of carriage of goods’, the Hague-Visby Rules may serve as a starting point. At a first glance, rather surprisingly, the Hague-Visby Rules do not contain a definition of a ‘contract of carriage of goods’.¹⁴ Nonetheless, Faber argues that such definition can be inferred from case law relating to the Hague-Visby Rules and from this it is clear that for a contract to be considered as one of carriage ‘(...) the person entering into the contract with the cargo interests must accept some liability for the transportation’.¹⁵

By contrast, the Rotterdam Rules expressly define a ‘contract of carriage’ at the outset.¹⁶ Pursuant to such definition, for a contract to qualify as contract of carriage under the Rotterdam Rules it must contain the characteristic obligations of the parties to such a contract, which are, on the one hand, (i) an undertaking ‘to carry goods from one place to another’ whereas the carriage shall be by sea and maybe, in addition, by other modes of transport, against, on the other hand, (ii) ‘payment of freight’.¹⁷

(b) *Contract of carriage of goods in international transportation law relating to other modes of transport*

(i) *Road*

If the international carriage of goods is not by sea but *e.g.* by road, it has to be determined whether the CMR¹⁸ applies and whether the criteria contained therein are fulfilled in order that the contract qualifies as a contract of carriage of goods by road pursuant to CMR. According to art 1(1) CMR, the CMR applies if there is ‘a

¹⁴ The Hague-Visby Rules ‘(...) merely connect the notion of contract of carriage to the document issued thereunder, the bill of lading. For that reason it has been said that they have adopted a documentary approach.’ (Ibid at 2).

¹⁵ Diana Faber ‘The problems arising from multimodal transport’ (1996) *Lloyd’s Maritime and Commercial Law Quarterly* at 510.

¹⁶ Art 1(1) RR reads: “‘Contract of carriage’ means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.’; Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 2.

¹⁷ Only if these characteristic obligations form the substance of the contract of carriage (and all the other requirements are fulfilled in order that the Rotterdam Rules would apply, cf. *e.g.* arts 5 and 6 RR), the specific obligations of each party to such contract of carriage as set out under Chapter 4 (Obligations of the Carrier) respectively Chapter 7 (Obligations of the shipper to the carrier) of the Rotterdam Rules will apply.

¹⁸ Convention on the Contract for the International Carriage of Goods by Road dated 19 May 1956.

contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.’

(ii) Rail

If the international carriage of goods is by rail, a determination has to be made whether the COTIF-CIM¹⁹ applies and whether the contract of carriage of goods meets the requirements pursuant to COTIF-CIM in order that it is considered to be a contract of carriage of goods by rail in accordance with COTIF-CIM. Pursuant to art 1(1) CIM, the CIM ‘[applies] to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage.’²⁰ In addition, art 6(1) CIM explicitly mentions the characteristic obligation of the carrier, namely the undertaking ‘to carry the goods for reward to the place of destination and to deliver them there to the consignee.’

(iii) Air

If the international carriage of goods is, however, by air, it has to be determined whether the Montreal Convention²¹ applies and whether the contract of carriage of goods fulfils the conditions set out in the Montreal Convention. Pursuant to art 1(1) Montreal Convention, the Montreal Convention applies, *inter alia*, to all international carriage of baggage or cargo performed by aircraft for reward. In addition, ‘[i]t applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.’²²

¹⁹ Convention concerning International Carriage by Rail dated 9 May 1980 and its appendix B ‘Uniform Rules Concerning the Contract of International Carriage of Goods by Rail’ dated 9 June 1999.

²⁰ Note that the CIM requires that both the place of taking over and the place of delivery of the goods must be within Member States whereas the CMR only requires that at least one of these is within a contracting country (Brian Harris *Ridley’s Law of the Carriage of Goods by Land, Sea and Air* 8 ed (2010) footnote 141 at 125).

²¹ Convention for the Unification of Certain Rules for International Carriage by Air dated 28 May 1999.

²² There is no definition of the term ‘air transport undertaking’ in the Montreal Convention (Brian Harris *op cit* note 20 at 346).

(c) *A general definition of contract of carriage of goods*

What seems evident is that each and every transportation law regime has its own explicit or implicit definition of the term ‘contract of carriage’. These definitions, however, seem to share certain features, namely an undertaking to carry (by the means of transport described in the relevant transportation regime) of goods (whereas the scope of that term may be further described in the relevant transportation regime) which will be performed for reward.²³ This seems, in other words, to be what the rudimentary definition of the term ‘contract of carriage’ (irrespective of the mode of transport) boils down to under the current international transportation law regimes.

With reference to this finding and the considerations as regards the term ‘carrier’²⁴ it is thus possible to attribute, in legal terms, a more concise meaning to the phrase pursuant to which the carrier is ‘the person responsible for the carriage of the goods’. It follows that, in terms of a contractual arrangement such as a contract of carriage of goods, a ‘carrier’ is not just the person responsible for the effective carriage of the goods. A ‘carrier’ in terms of such a contractual arrangement is a person who *undertakes* to carry the goods.²⁵

IV PERSONS OTHER THAN THE CARRIER INVOLVED IN A CONTRACT OF CARRIAGE OF GOODS

(a) *Consignor/shipper and its relationship with the carrier*

A contract of carriage of goods²⁶ consists basically of two characteristic obligations.²⁷ These two obligations are generally undertaken by different persons²⁸ in order that a contract of carriage can be argued. As the person undertaking to carry the goods under the contract of carriage is termed the ‘carrier’,²⁹ the other person

²³ NB that only the Montreal Convention has a broader scope of application as it applies also to gratuitous carriage (cf. art 1(1) Montreal Convention).

²⁴ Cf. CHAPTER II.II above.

²⁵ NB that there may be other kinds of carrier such as e.g. actual carriers or performing carriers next to the legal carrier which is of interest in this minor dissertation.

²⁶ Cf. CHAPTER II.III above.

²⁷ It is these characteristic obligations that distinguish the contracts of carriage from other commercial contracts (Brian Harris op cit note 20 at 3).

²⁸ Or by one person acting in different capacities, often for the purpose of performing contractual obligations as they arise e.g. under a contract of sale and purchase (Ibid at 3).

²⁹ Cf. CHAPTER II.I. above.

dispatching the goods 'is known as the consignor or the shipper (...) of the goods.'³⁰ A contract of carriage is hence concluded between a 'consignor' (or particularly in terms of sea carriage a 'shipper') and a 'carrier'.³¹

(b) *Consignee and its relationship with the carrier*

The 'person to whom the goods are to be delivered is the consignee, addressee or receiver'.³² Such a consignee may be either the consignor/shipper or a third party. In the former case, the consignee is a party to the contract of carriage. In the latter case, *i.e.* if the consignee is not the same person as the consignor/shipper, the consignee is normally not a party to the contract of carriage (as such is usually concluded solely between the consignor/shipper and the carrier who are thus the only persons privy to the contract).³³

Whereas the Hague-Visby Rules do not contain provisions 'in respect to the rights and obligations of the consignee (...)'³⁴, the Rotterdam Rules by contrast contain specific provisions, in particular, as regards 'the rules applicable to claims against the carrier'.³⁵

³⁰ JP van Niekerk & WG Schulze op cit note 8 at 118; The Hague-Visby Rules use the term 'shipper' but do not define it whereas the Rotterdam Rules define the term 'shipper' in art 1(8) RR as 'a person that enters into a contract of carriage with a carrier'.

³¹ Francesco Berlingieri 'General Introduction' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 7 at 18; Philippe Delebecque 'Obligations of the Carrier' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 8 at 72.

³² JP van Niekerk & WG Schulze op cit note 8 at 118; The Hague-Visby Rules do not use and hence not define this term whereas art 1(11) RR defines it as meaning 'a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.'

³³ Francesco Berlingieri 'General Introduction' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 7 at 21; John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 705; Charles Debattista 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed) *Maritime Law* 2 ed (2011) 198.

³⁴ Francesco Berlingieri 'General Introduction' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 7 at 22.

³⁵ *Ibid* at 22; These rules do, however, not determine the *locus standi*. Whether the consignee has sufficient *locus standi* is determined pursuant to the respective national law applicable (John Hare op cit note 33 at 707; Charles Debattista 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed) op cit note 33 at 195 et seq.); Under South African law, in particular the Sea Transport Documents Act 65 of 2000, the transfer of a bill of lading 'passes to the transferee (consignee) all the contractual rights which the transferor (consignor) had against the carrier and which are evidenced by the bill of lading. Therefore, as holder of the bill of lading, the consignee is able not only to obtain delivery of the goods from the carrier but also to sue the latter in the case of any breach of the contract of carriage.' (JP van Niekerk & WG Schulze op cit note 8 at 157).

V TYPES OF CONTRACTS OF CARRIAGE OF GOODS BY SEA

(a) *Introduction*

Maritime commerce and trading has a long history,³⁶ and until now, a contract of carriage of goods by sea has generally been ‘either evidenced by a bill of lading or is contained in a charterparty’.³⁷ However, ‘the classical division into charterparties and bills of lading is not exhaustive’,³⁸ and contracts of carriage of goods are nowadays also evidenced in other types of documents (see below CHAPTER II.V(c)).³⁹ The following brief overview of the different types of contracts of carriage of goods by sea shall serve as basis for the considerations contained in the following chapters of this minor dissertation.

(b) *‘Conventional’ carriage of goods by sea: bills of lading and charterparties*

Which of the two traditional types of contract of carriage of goods is employed in a specific case depends, *inter alia*, on the kind of goods and the amount of goods to be transported. If the transportation of the goods requires a whole ship,⁴⁰ the goods will most likely be carried under a charterparty. However, if *e.g.* only a smaller consignment of goods is to be made, the contract of carriage will generally be evidenced by a bill of lading.⁴¹

Notwithstanding, ‘these two [conventional] types of carriage are not mutually exclusive, for the charterer of a ship may employ that ship as a general ship and may

³⁶ Carol Proctor *The legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* (1997) 19 et seq.; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-001; Stephen Girvin *Carriage of Goods by Sea* (2007) para 35.01 et seq.

³⁷ JP van Niekerk & WG Schulze op cit note 8 at 118.

³⁸ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-001.

³⁹ Contracts of carriage of goods by sea may these days also ‘be contained in or evidenced by [other non-negotiable] documents which do not strictly fall into either category [bill of lading or charterparty]: *e.g.* freight contracts, mate’s receipts, sea waybills, ship’s delivery orders [a ship’s delivery order is ‘a document containing an undertaking from the carrier in respect of the delivery of the goods. It is generally employed to split bulk cargoes shipped under one bill of lading: the bill of lading will be surrendered in exchange for the issue of a number of ship’s delivery orders.’ (Ibid para 1-009)] and through transport documents.’ (SD Girvin ‘Third Party Rights under Shipping Contracts in English and South African Law’ (1997) 9 *South African Mercantile Law Journal* 97; Stephen D Girvin ‘Carriage by Sea: The Sea Transport Documents Act 2000 in Historical and Comparative Perspective’ (2002) 119 *SALJ* 317 at 322 et seq.).

⁴⁰ As *e.g.* bulk consignments of oil, coal and grain.

⁴¹ JP van Niekerk & WG Schulze op cit note 8 at 118 et seq.

itself issue bills of lading.⁴² As regards the consequences this might have as regards the identity of the carrier, reference is made to CHAPTER III.II(b) below.

(i) *Charterparties, in particular charterparties not by demise*

It is important to note that not every charterparty is *per se* a contract of carriage.⁴³ Only if the charterparty is a charterparty not by demise (non-bareboat charterparty) for the purposes of carrying goods, the charterparty qualifies as a contract of carriage.⁴⁴ The reason for this lies in the fact that under a charterparty not by demise the possession of the ship and the control and command over the ship concerning her management and her navigation remain with the party having the power to dispose over her (*i.e.* the shipowner or, possibly, the demise charterer as disponent owner).⁴⁵ The charterer, *i.e.* the person requesting the carriage services to be performed by the ship, has only a personal, contractual right to have the goods carried on the ship, be it for one or several particular voyage/s (voyage charterparty) or for a certain period of time (time charterparty) while the shipowner renders the service of carriage.⁴⁶

- In other words, the shipowner undertakes in the case of a voyage charter ‘to carry cargo from one port to another’⁴⁷ against payment of ‘freight per ton of whatever cargo is actually carried’.⁴⁸
- By contrast, ‘[i]n the case of a time charter, (...), the owner undertakes to place the carrying capacity of the ship at the disposal of the charterer for a specific period of time’⁴⁹ against payment of hire.⁵⁰ It is the augmentation of the

⁴² Ibid at 141.

⁴³ If the charterparty is one by demise, *i.e.* a bareboat charter, such contract of charterparty is not qualified as a contract of carriage but a lease of the ship (Ibid at 141 and 143).

⁴⁴ The charterparty not by demise (non-bareboat charterparty) could, for example, also be for the towage of another ship. If this was the case, it would not qualify as a contract of carriage (Ibid at 143). Note further that in case of a charterparty by demise (bareboat charterparty), the contract qualifies as a contract of lease of the ship. This is as the *charterer* receives possession of the ship as well as control and command over the employment, management and navigation of the ship (Ibid at 141 et seq.).

⁴⁵ Ibid at 142 et seq.; John Hare op cit note 33 at 752.

⁴⁶ JP van Niekerk & WG Schulze op cit note 8 at 142 et seq.; John Hare op cit note 33 at 746 and 752.

⁴⁷ JP van Niekerk & WG Schulze op cit note 8 at 143.

⁴⁸ John Hare op cit note 33 at 752; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-013.

⁴⁹ JP van Niekerk & WG Schulze op cit note 8 at 143; John Hare op cit note 33 at 746 et seq.

⁵⁰ Ibid at 746. As a time charterparty normally does not transfer possession and control of the vessel from the owners to the party chartering the vessel, the term ‘hire’ used in a time charterparty is to be distinguished from the term ‘hire’ under a lease (where, ordinarily, possession and control over

carrying capacity of the fleet of ships of the charterer that is most often the ‘main consideration for chartering a vessel, (...) for a period of time (...)’⁵¹ and the time charterer ‘may employ the ship to carry either its own cargo, or that of others, or a combination of these.’⁵² Thus, ‘[t]he time charterer (...) is directly concerned with the operation of the ship’⁵³ as it ‘controls the commercial functioning of the vessel’⁵⁴ by ‘directing where it should go and which cargoes it should convey, subject only to such limitations as the parties [to the time charterparty] may have agreed.’⁵⁵ Thus, the time charterer has the ‘right to exploit the income-generating capacity of the vessel by directing its use for the period of time fixed in the charter.’⁵⁶ However, ‘[t]he time charterer’s control is limited to its contractual power to require the ship to trade to its own nominated ports of loading and discharge’⁵⁷ and he does not acquire any ‘significant “possession or control”’⁵⁸ as ‘the owner retains possession and navigational control of the vessel, provides the master and crew, remains responsible for the vessel’s fitness to trade, and continues to pay the vessel’s normal running costs.’⁵⁹ The time charterer will usually ‘enter into contracts for the use of the vessel (...) [whereas] the vessel may be sub-chartered to another charterer [(by demise or otherwise) if the charterparty allows him to do so], or the charterer may contract for the carriage of goods under a contract evidenced by a bill of lading or other carriage document.’⁶⁰

It follows from the aforesaid that a charterparty is concluded between two parties, namely the shipowner (or disponent owner) and another person called the (time or voyage) charterer.⁶¹ The charterparty respectively the contract of carriage evidenced therein ‘is governed, in the first place, by the express terms agreed upon

the object of lease is transferred from the lessor to the lessee) (Ibid at 746; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-013).

⁵¹ JP van Niekerk & WG Schulze op cit note 8 at 161.

⁵² Ibid at 143.

⁵³ Whereas the voyage charterer is ‘not concerned with the operation of the ship.’ (Ibid at 144).

⁵⁴ Ibid at 144.

⁵⁵ Ibid at 144.

⁵⁶ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-013.

⁵⁷ John Hare op cit note 33 at 733.

⁵⁸ Ibid at 733; ‘The nautical control of the operation of the ship remain[s] with the owners.’ (Ibid at 747).

⁵⁹ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-013.

⁶⁰ Ibid para 1-013; JP van Niekerk & WG Schulze op cit note 8 at 145.

⁶¹ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-012.

between the parties.’⁶² Consequently and insofar as there are no third parties involved or concerned, the determination of the identity of the carrier is rarely of an issue in such pure charterparty matters.

(ii) *Bill of lading, its characteristics and development*

To begin with, it must be highlighted that the following explanations refer to the ‘conventional’ bill of lading only.⁶³

‘A bill of lading⁶⁴ is a type of transport document [usually in a printed standard-form⁶⁵ and having different legal properties] that may be issued in respect of the carriage of goods by sea by or on behalf of the owner, or less commonly the charterer, of the carrying ship.’⁶⁶ A bill of lading has, in principle, three different legal properties: first, it ‘serves as a receipt for the goods entrusted to the carrier in respect of both the quantity and the condition of the goods received’⁶⁷, secondly, it evidences the ‘contract of carriage concluded earlier between the consignor and the carrier’⁶⁸ and thirdly, it constitutes a ‘document of title’.⁶⁹

⁶² JP van Niekerk & WG Schulze op cit note 8 at 145.

⁶³ Even though there are nowadays documents entitled ‘bills of lading, possibly accompanied by an epithet such as “through”, “combined transport”, “intermodal” or “multimodal”’ (Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-011), it must be kept in mind that a document does not become a bill of lading merely by naming it so. In fact, it is questionable to what extent such documents ‘share the characteristics of the conventional bill of lading’ (Ibid para 1-011).

⁶⁴ The concept of the ‘bill of lading’ evolved due to changes in the ways of trading. Until the 14th century it was ‘the practice of merchants to travel with their goods, the particulars of which were entered into a single book or register which constituted part of the ship’s papers’ (Carol Proctor op cit note 36 at 23) and ‘the bill of lading as such did not exist’ (Ibid at 23). However, once it became statutorily required that the shipper was given a copy respectively excerpt of the register, the bill of lading as ‘a document separate and independent of the “book” of lading’ (Ibid at 23) emerged. The delivery of copies of the register to the shipper had two reasons and/or effects: first, it constituted ‘proof of the goods loaded on board the vessel, their quantity and quality’ and, secondly, the merchants no longer needed to travel with their goods as they could transfer the ‘copy of the register, signed by the master, [to the consignee which] would provide the best indication of title and would bind the shipowner and consignee to the conditions of the shipment’ (Ibid at 2 et seq. and 23); In other words, the separate document was ‘at first in the nature of a receipt for the goods but later [with the development of trade] became a document which embodied the terms on which the carrier would carry and deliver the goods at the port of destination. So was born the bill of lading which, in future years, was to develop into the negotiable document of present times.’ (W E Astle *Bills of Lading Law* (1982) 13).

⁶⁵ JP van Niekerk & WG Schulze op cit note 8 at 146.

⁶⁶ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-002.

⁶⁷ Ibid para 1-002.

⁶⁸ By contrast, ‘a charterparty is always the actual contract of carriage between the charterer and the shipowner itself and not merely evidence of it’ (JP van Niekerk & WG Schulze op cit note 8 at 141); Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-006.

⁶⁹ Ibid para 1-0024

It follows that due to these legal properties, the bill of lading does not necessarily solely confirm the contractual relationship between the consignor/shipper and the carrier entered into earlier on by conclusion of a contract of carriage, but can also have legal effects with regard to a third party (not involved into the contract of carriage 'underlying' the bill of lading) which, as consignee, becomes the holder of such a bill of lading. Hence, whereas the persons concerned by a contract of carriage contained in a charterparty are easily determinable and limited in number to the parties of the charterparty, the range of persons ultimately concerned by a contract of carriage evidenced by a bill of lading can be wider and encompass also a third party (in addition to the consignor/shipper and the carrier).

By transferring a bill of lading to a third party, *e.g.* the consignee, a legal relationship between the carrier and the third party is created by means of the bill of lading respectively its legal properties. As such the third party is not party to the underlying contract of carriage (and usually has no means of influencing the negotiation of such) and the carrier is interested in limiting its liability *vis-à-vis* the consignee to a minimum, carriers have been tempted to exempt themselves from liability for the loss of or damage to goods as far as possible.⁷⁰

However, the manner with which the carriers exercised 'this right of freedom of contract (...) caused serious concern among the trading nations (...) and cargo and banking interests were complaining bitterly about the manner in which shipowners and carriers were (in their opinion) abusing the right of freedom of contract.'⁷¹ As this imbalance to the detriment of a consignee was found unjust, the United States took legislative action by adopting the Harter Act of 1893 which served as forerunner of the international law regarding the carriage of goods by sea, in particular the Hague Rules 1921.⁷²

⁷⁰ In the early days of the bills of lading, these 'did not normally contain any clauses exempting the shipowner or carrier from liability for cargo loss or damage. But when cargo interests began in the latter part of the nineteenth century to take action against shipowners for the recovery of loss or damage to cargo occurring during the voyage, and to obtain legal rulings establishing the shipowners' liability for such loss or damage to their goods, shipowners generally sought to counter this by including in their bills of lading clauses exonerating them from liability for cargo loss or damage and so limiting contractually the strict liability imposed upon them by law.' (W E Astle *op cit* note 64 at 14).

⁷¹ *Ibid* at 14.

⁷² *Ibid* at 9 and 14 *et seqq.*

(c) *'Modern' carriage of goods by different modes of transport: multimodal transport document*

Advances in transport technology (e.g. containerisation, faster ships, improved port terminal facilities) of the past decades have had several implications on the (sea) transportation of goods.

First, the transit time of the goods on sea has reduced. However, the 'processing and posting of documentation has not kept pace'⁷³ and it occurred, especially on short sea routes, that the goods arrived at the port of destination before the bill of lading arrived.⁷⁴ Hence, when possible, resort has been made to the sea waybill⁷⁵ instead of the bill of lading.⁷⁶

Secondly, as a consequence of the containerisation, goods are often loaded in standardised containers (e.g. at the inland factory of the manufacturer) and these containers are then conveyed to their destination(s), e.g. a warehouse located inland in another country.⁷⁷ Such a conveyance from 'door-to-door' requires in most instances transportation of the containers by various modes of transport, *i.e.* by sea, by road, by rail and possibly even by air.⁷⁸

Where two or more modes of transport are involved, this is known as multimodal transport.⁷⁹ In such a case, the conventional bill of lading covering only the carriage by sea could not be used to cover all the legs of the transportation.⁸⁰ Hence, a variation on the traditional shipping documents was developed in order to accommodate what is commonly referred to as 'door-to-door' or 'warehouse-to-warehouse' transportation of goods. This variation is a single document generally

⁷³ Carol Proctor op cit note 36 at 83.

⁷⁴ Ibid at 83; Such 'late' arrival of the bill of lading may have serious implications for the carrier, cf. Ibid at 84.

⁷⁵ 'Sea waybills are generally used for short journeys, where it is not contemplated that the goods will be sold in transit and where time is short to transmit the document to the intended receiver of cargo for presentation to take delivery. (...) It is non-negotiable and is not a document of title. (...) [It] is not a presentation document: it is generally retained by the shipper, and the carrier is entitled to deliver the goods against production of proof of identity as the beneficiary of the delivery obligation as originally nominated in the document or as subsequently nominated by the shipper in accordance with the terms of the contract as evidenced by the document.' (Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 1-008).

⁷⁶ Carol Proctor op cit note 36 at 85 et seq.

⁷⁷ JP van Niekerk & WG Schulze op cit note 8 at 123.

⁷⁸ Ibid at 123; Carol Proctor op cit note 36 at 97.

⁷⁹ A unimodal transportation occurs, if the transportation of the goods occurs by using only one mode of transport, e.g. the road (Ibid at 123).

⁸⁰ Ibid at 167.

referred to as multimodal transport document that may be issued by a carrier involved in the transportation or by a person that is not itself a carrier for the entire 'door-to-door' transportation.'⁸¹

VI IMPORTANCE OF THE IDENTITY OF THE CARRIER

The identification of the carrier becomes important when the goods (shipped in good order and condition) arrive at the place of destination either damaged or short delivered and the third party consignee wants to claim damages from the carrier based on the contract of carriage of goods. One of the essential averments for such a claim to be successful is that the defendant is liable.⁸²

It is in such cases where the third party consignee wants to sue the carrier that it often becomes evident that the identity of the carrier is not always that clear. Such lack of clarity can be due to various reasons. They range from bad drafting to poor business administration (*e.g.* by indicating names and capacities in which persons are acting in an incomplete manner) to deliberate obfuscation. Particularly if charterparties are involved, it is often not evident 'whether the shipowner or the charterer, and in the latter case, which charterer, is party to the contract of carriage.'⁸³ Hence, the cargo interest must proceed with utmost care and diligence in examining and determining with which person it has contractual relationship; which is not always easy due to the 'often complex ownership and chartering structures of a cargo carrying vessel (...)'.⁸⁴ Despite such efforts, it may *e.g.* happen that the cargo interest holds a bill of lading that does not clearly indicate the carrier liable and sue

⁸¹ Ibid at 123.

⁸² John Hare op cit note 33 at 707 et seq.; Charles Debattista 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed) op cit note 33 at 193.

⁸³ N.H. Margetson 'The Identity of the Carrier' in M.L. Hendrikse, N.H. Margetson & N.J. Margetson *Aspects of Maritime Law Claims Under Bills of Lading* (2008) 231; 'Some shipowners are aware of the fact that it sometimes is difficult to establish the identity of the carrier and for that reason they sometimes include clauses in the bills of lading in which a definition (...) of [the] carrier is given.' (Ibid at 232) As long as the meaning of any such clause corresponds with the information contained on the face of the bill of lading, the identity of the carrier can be established well. 'However, in practice, it is not unusual for the face of the bill of lading to contain different information concerning the identity of the carrier than the back of the bill. It is possible for a charterer's bill to be used, with the logo, name and address of the charterer prominently shown on the front of the bill. The signature box could possibly be signed by the charterer, or the master, or by an agent signing on behalf of the master or maybe on behalf of the charterer. The information contained in the bill of lading could therefore indicate that there are various possible carriers. In such cases, identity of carrier clauses in bills of lading do not always identify the carrier with certainty.' (Ibid); Charles Debattista 'Cargo Claims and Bills of Lading' in Yvonne Baatz (ed) op cit note 33 at 207; cf CHAPTER III.II(b)(iii) below.

⁸⁴ John Hare op cit note 33 at 707 et seq.

able under the contract of carriage evidenced by such bill of lading, allowing the latter to try to 'escape from liability'.⁸⁵

⁸⁵ Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2010) 172); N.H. Margetson 'The Identity of the Carrier' in M.L. Hendrikse, N.H. Margetson & N.J. Margetson op cit note 83 at 232.

CHAPTER III IDENTITY OF THE CARRIER IN CASE OF UNIMODAL SEA TRANSPORTATION SUBJECT TO THE HVR

I INTRODUCTION

It is the topic of this chapter to show possible ‘identity of the carrier problem’ scenarios that can be encountered if the goods are carried solely, *i.e.* unimodally, by sea where the Hague-Visby Rules apply to such carriage (whether by voluntary incorporation of the Hague-Visby Rules in the form of a choice of law clause, *i.e.* a so-called ‘Clause Paramount’, in the contract of carriage or by mandatory application as rules of law of a nation state).⁸⁶ Before doing so, attention is drawn to the fact that, first, the origin of the Hague-Visby Rules lies in instruments dating from the 1920s which were directed at creating some kind of a balance between the interests of shipowners and the interests of the cargo owners.⁸⁷ In order to achieve the creation of such a balance, an elaboration of a comprehensive code regulating the international carriage of goods by sea was not necessary and the Hague-Visby Rules,

⁸⁶ Cf. art X HVR; JP van Niekerk & WG Schulze op cit note 8 at 141; John Hare op cit note 33 at 611, 650, 675 et seqq. and 720.

⁸⁷ JP van Niekerk & WG Schulze op cit note 8 at 134; John Hare op cit note 33 at 623 et seq.; Stephen Girvin op cit note 36 para 15.13. The Hague-Visby Rules originate from the ‘Hague Rules 1921’. The latter are ‘a code of rules’ with no mandatory effect adopted by the International Law Association on 3 September 1921 (the ‘Hague Rules 1921’) (W E Astle op cit note 64 at 15; John Hare op cit note 33 at 624). The Hague Rules 1921 were ‘thought to be introduced by the market in the form of a model bill of lading’ (Alexander von Ziegler ‘Main concepts of the new Convention: its aims, structure and essentials’ (2009) 9 *Transportrecht* 347) as they contained ‘standard bills of lading clauses’ (Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 6). However, due to the lack of widespread voluntary incorporation of these into the contracts of carriages by sea, the Hague Rules 1921 were a few years later, upon pressure by cargo interests, transformed into an international convention having the force of law, *i.e.* the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading dated 25 August 1924 (the ‘Hague Rules 1924’) (W E Astle op cit note 64 at 16; Francesco Berlingieri ‘Revisiting the Rotterdam Rules’ (2010) *Lloyd’s Maritime and Commercial Law Quarterly* 583; M Lourens ‘An overview of the regimes governing the carriage of goods by sea’ (1999) 10 *Stellenbosch Law Review* 245 et seq.; ‘The Travaux Préparatoires of the Hagues Rules and of the Hague-Visby Rules’ at 31 available at <http://www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoires%20of%20the%20Hague%20Rules%20and%20of%20the%20Hague-Visby%20Rules.pdf> (accessed on 25 September 2013). The Hague Rules 1924 ‘are not a comprehensive code’ as they deal only with selected issues relating to the carriage of goods by sea and ‘(...) enumerate the responsibilities of the carrier and shipper, explain the exemptions of the carrier and set out the limitations on carrier liability.’ (M Lourens ‘An overview of the regimes governing the carriage of goods by sea’ op cit note 87 at 246). The Hague Rules 1924 were modernised with the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading dated 23 February 1968 (the ‘Visby Rules’) whereas the Hague Rules 1924 together with the Visby Rules constitute the ‘Hague-Visby Rules’ (Francesco Berlingieri ‘Revisiting the Rotterdam Rules’ op cit note 87 at 583). A further amendment of the Hague-Visby Rules occurred in 1979 when a protocol to the Visby Rules (the ‘SDR Protocol’) was ratified (M Lourens ‘An overview of the regimes governing the carriage of goods by sea’ op cit note 87 at 246 et seq.).

thus, deal mainly with liability issues of the carrier and the cargo interest.⁸⁸ Secondly, the Hague-Visby Rules predate the transport revolution of ‘containerisation’ that started in the 1960s. Thus, the Hague-Visby Rules do not contain any provisions applicable specifically to the containerised transport of goods.⁸⁹

II IDENTITY OF THE CARRIER UNDER THE HAGUE-VISBY RULES

(a) *Article I(a) HVR as starting point*

While the Hague-Visby Rules do not contain a definition of the term ‘contract of carriage’,⁹⁰ they describe in art I(a) HVR who is considered to be a ‘carrier’. Article I(a) HVR states that “‘Carrier’ includes the owner or the charterer who enters into a contract of carriage with the shipper.”⁹¹ Hence, as the word ‘includes’ is used, any person who enters into a contract of carriage in terms of the Hague-Visby Rules with the shipper is considered to be the carrier, be it the owner or any kind of charterer of the ship.⁹²

(b) *Identification of the carrier under the Hague-Visby Rules in more detail*

As regards the identification of the carrier, such is identified, in practice, by means of a *factual inquiry* that begins with an analysis of the face of the bill of lading in view of determining ‘whether there is a clear indication on the bill of lading of who the contracting parties are.’⁹³

Often, the master or another agent of the carrier signs the bill of lading together with indicating ‘the agency capacity in which the signatory is signing.’⁹⁴ Sometimes, the bill of lading even specifies the carrier precisely, irrespective of whether that

⁸⁸ JP van Niekerk & WG Schulze op cit note 8 at 134.

⁸⁹ Stephen Girvin op cit note 36 para 15.13

⁹⁰ See CHAPTER II.III(a) above.

⁹¹ For the sake of completeness it is to be mentioned here that the Hague-Visby Rules do not apply to charterparties *per se* but only ‘if bills of lading are issued in the case of a ship under a charter party’ (cf. art V HVR) or if the parties to a charterparty make the Hague-Visby Rules applicable to the charterparty by way of a clause paramount (Yvonne Baatz ‘Charterparties’ in Yvonne Baatz (ed) *Maritime Law* 2 ed (2011) 131).

⁹² Consequently, the Hague-Visby Rules ‘could apply to a contract with a freight forwarder who does not own or operate the means of transport but who accepts responsibility for the carriage.’ (Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 509).

⁹³ John Hare op cit note 33 at 708.

⁹⁴ *Ibid* at 708.

person specified is the shipowner or not. In such a case, the cargo interest is entitled to sue the person specified as carrier.⁹⁵

It is possible that a vessel is employed under a demise and/or a time and/or a voyage charterparty and that at the same time bills of lading are issued which incorporate the terms of some or all the charterparties.⁹⁶ Commonly, a voyage charterer or a time charterer enters into a contract of carriage of goods ‘not on behalf of the legal owner of the vessel, but as principal in its own right.’⁹⁷

Despite such common usages, it is nonetheless always the specific ‘factual situation, the identification of the party on whose behalf the bill of lading was issued, and, importantly, the provisions of the various contracts’⁹⁸ that is determinant in every single case for establishing the identity of the legal carrier. Hence, if a bill of lading is issued to a consignor and transferred to a third party consignee as regards goods shipped on a ship under a charterparty, the determination of the identity of the legal carrier can be quite complicated, in particular as it is one of the most difficult tasks of the cargo interest to ‘unravel the charterparty arrangements’⁹⁹ that are in place and in accordance with which the cargo is carried. Whether the shipowner or rather the charterer is the legal carrier of the goods in such cases depends, thus, a lot on the facts and, once discovered, on the terms of the several contracts involved.¹⁰⁰

(i) Who is the carrier if no charterparty is in place

If a carrying ship is not under charter, a bill of lading issued to the consignor will be signed by or on behalf of the shipowner. Accordingly, ‘the shipowner is the actual

⁹⁵ Ibid at 708.

⁹⁶ See CHAPTER II.V(b) above.

⁹⁷ John Hare op cit note 33 at 708; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-012 et seqq.; Bernard Eder, Howard Bennet & Steven Berry et al even argue that ‘[i]f in form a bill of lading only constitutes a contract with the charterer, but in fact, as between charterer and shipowner, the charter 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.’ (Ibid para 6-031.) However, ‘[t]he possibility that both the charterer and the shipowner could be liable on the bill of lading contract on this basis was canvassed’ in the decision *Homburg Houtimport BV v Agrosin Private Ltd and others (The Starsin)* [2003] 2 All ER 785 (Ibid footnote 98 relating to para 6-031).

⁹⁸ JP van Niekerk & WG Schulze op cit note 8 at 164.

⁹⁹ John Hare op cit note 33 at 708. For this reason, ‘it is not uncommon, and (...) perhaps wise, for a cargo claimant to proceed against its defendant both in contract and in delict (tort).’ (Ibid at 708).

¹⁰⁰ JP van Niekerk & WG Schulze op cit note 8 at 161.

and the legal carrier [in terms of art I(a) HVR] and the consignor's contract is with the shipowner and is evidenced by the bill of lading'.¹⁰¹

(ii) *Who is the carrier if a person voyage charterers a ship from the shipowner and such a person's own goods and/or goods of third parties are carried on the chartered ship*

In order to determine who the carrier is where the ship is under a voyage charter, two scenarios have to be distinguished. The first is the situation in which the bill of lading is signed by the master on behalf of the shipowner. The second is where it is signed by the charterer in its own name.

Where the bill of lading is signed by the master on behalf of the shipowner, two questions arise. The first concerns the identity of the carrier – who is the carrier if a person voyage charters a ship from the shipowner and the consignor receives a bill of lading *signed by the master on behalf of the shipowner* upon shipment of either its own goods¹⁰² or of goods of a third person? The second relates to the function of such bill of lading – '[w]hat is the function of a bill of lading in these circumstances, when on the face of it, two types of contract of carriage are involved at the same time?'¹⁰³

- If the bill of lading is issued to the voyage chartering consignor, the bill of lading has only two functions: 'will serve merely as a receipt for the cargo shipped and as a document of title. The bill of lading does not in such a case provide any evidence of the contract of carriage concluded between the exporter/charterer as consignor and the shipowner as carrier.'¹⁰⁴ The legal relationship between the charterer and the shipowner is governed exclusively by the previously concluded voyage charterparty which thus also identifies the carrier in terms of art I(a) HVR (if applicable).

¹⁰¹ Ibid at 164.

¹⁰² '[W]here the owner of the cargo as shipper contracts with a shipowner (or disponent owner) for the carriage of its cargo [under a voyage charterparty] (...) it is likely that no demand will be made by the voyage charterer for issuing a bill of lading. The cargo will be carried against the receipt of a sea waybill or other non-negotiable receipt.' (John Hare op cit note 33 at 761). A bill of lading is usually only issued if 'the cargo owner wishes to on-sell the cargo *en voyage*' (Ibid at 761) or if the goods are sold internationally and the issuance of a bill of lading is required in order that the (voyage chartering) exporter is able to 'fulfil its obligations in terms of the contract of sale it has concluded with the buyer of the goods (...)' (JP van Niekerk & WG Schulze op cit note 8 at 159).

¹⁰³ Ibid at 159.

¹⁰⁴ Ibid at 159 and 162; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-002.

In case the voyage charterer becomes endorsee of a bill of lading that has originally been 'issued to a shipper other than the charterer, the bill of lading does not modify or vary the terms of the charterparty, at least where the charterparty provides that bills of lading are to be signed "without prejudice to this charterparty"'.¹⁰⁵

In the other case where a bill of lading issued to the voyage chartering consignor is endorsed over to a third party, the bill of lading will be considered to contain and evidence the contract of carriage between the shipowner and the consignor.¹⁰⁶ Thus, the carrier in terms of art I(a) HVR will be determined based on the terms contained in the bill of lading. Usually, the contract of carriage is with the shipowner.¹⁰⁷

- The carrier will also be determined based on the terms and statements contained in the bill of lading if such is issued to – from the perspective of the charterparty contract – a 'third party consignor' meaning 'a consignor (...) other than (...) [the] consignor which has shipped its own goods on a ship it has chartered itself'.¹⁰⁸ In such a case, the bill of lading has again all three functions and the contract of carriage is usually with the shipowner as carrier in terms of art I(a) HVR.¹⁰⁹ This result will be the case even 'where the charterparty contains a term to the effect that the master will, in signing the bills of lading, be acting on behalf of the charterer and not the shipowner, unless the consignor had or may be considered to have had knowledge of that [clause] (...) [limiting] the master's authority, which will not be the case if the charterer [corrigena: consignor] merely knew of the existence of the charterparty.'¹¹⁰

However, if the 'consignor may be considered bound by and as having agreed to the terms of the charterparty concluded between the charterer and the shipowner [e.g. where the bill of lading contains an express provision incorporating some or all terms of the charterparty in itself] and where the

¹⁰⁵ Ibid para 6-002.

¹⁰⁶ Ibid para 6-009 et seq.

¹⁰⁷ Ibid para 6-028.

¹⁰⁸ JP van Niekerk & WG Schulze op cit note 8 at 162.

¹⁰⁹ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-028.

¹¹⁰ Ibid para 6-028; JP van Niekerk & WG Schulze op cit note 8 at 162.

charterparty in turn limits the master's authority and determines that the charterer and not the shipowner will incur liability as carrier on bills of lading issued by the master'¹¹¹, the charterer is the legal carrier pursuant to art I(a) HVR.¹¹² As a consequence of such an incorporation, 'the contract of carriage between the consignor and the charterer is regulated both by the bill-of-lading contract between the consignor and the charterer and by the charterparty between the charterer and the shipowner.'¹¹³

Nonetheless, it is also possible that the second scenario prevails and the bill of lading issued for the goods to be on-sold is '*signed by the charterer in its own name*'¹¹⁴, in which case it, and not the shipowner, will be the legal or contracting carrier'¹¹⁵ in terms of art I(a) HVR. The shipowner will, thus, merely be 'the actual or performing carrier and it may, in appropriate cases, incur delictual – as opposed to contractual – liability in that capacity.'¹¹⁶

(iii) Who is the carrier if a person time charters a ship from the owner and such a person's own goods and/or goods of third parties are carried on the chartered ship?

Who is the legal carrier if a person 'concludes a contract of carriage not with the owner but the (... time) charterer of the ship'?¹¹⁷ And '[w]hat is the function of a bill of lading in these circumstances, when on the face of it, two types of contract of carriage are involved at the same time?'¹¹⁸

To begin with, attention shall be drawn to the fact that a time charterparty concluded with the shipowner 'will in fact ordinarily entitle it [the time charterer] to issue bills of lading to third-party consignors and to present them to the master of the ship for signature. In exchange, though, the charterer undertakes to indemnify the

¹¹¹ Ibid at 162; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-034.

¹¹² Clauses like these incorporating terms of the charterparty 'are usually interpreted strictly and their wording is therefore of importance (...)'(JP van Niekerk & WG Schulze op cit note 8 at 162).

¹¹³ Ibid at 163.

¹¹⁴ Stress added by author.

¹¹⁵ Ibid at 162; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-029;

¹¹⁶ Ibid para 6-029; JP van Niekerk & WG Schulze op cit note 8 at 162.

¹¹⁷ Ibid at 159.

¹¹⁸ Ibid at 159.

owner against any liabilities arising from bills of lading issued under its instructions.’¹¹⁹

Once again, two scenarios have to be distinguished, namely whether the bill of lading is signed by the master on behalf of the shipowner or whether it is signed by the charterer in its own name.

Hence, who is the carrier if the ship is time chartered from the shipowner and a bill of lading *signed by the master on behalf of the shipowner* is issued upon the shipment of the goods?

- If such a bill of lading is issued to the time chartering consignee meaning that the time charterer himself is the shipper of the goods, ‘the bill normally operates only as a receipt and the contract of carriage between the parties is the charterparty.’¹²⁰ Thus, the identity of the carrier in terms of art I(a) HVR (if applicable) is determined pursuant to the charterparty (whereas it is often the shipowner who is the carrier).

Should the charterer become ‘indorsee of a bill of lading, originally issued to a shipper other than the charterer, the bill of lading does not modify or vary the terms of the charterparty, at least where the charterparty provides that bills of lading are to be signed “without prejudice to this charterparty”. This rule may be subject to qualification where the charterparty in question is a time charterparty which does not make provision for the terms on which goods are to be carried.’¹²¹

- If the bill of lading is however issued to a consignee other than the time charterer conveying its own goods, the bill of lading, in addition, evidences respectively contains the contract of carriage.¹²² Thus, the carrier in terms of art I(a) HVR will be determined pursuant to the terms and statements contained in the bill of lading, meaning that the shipowner will be the carrier as the bill of lading was signed by it or on its behalf.

¹¹⁹ Ibid at 161.

¹²⁰ Ibid at 164; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-002.

¹²¹ Ibid para 6-002.

¹²² Ibid para 6-009.

However, if the *bill of lading issued is signed by the time charter in its own name, i.e.* '[w]here there is a plain identification of the charterer as the carrier on the front of the bill of lading by a term specifically included by the parties'¹²³, the contract of carriage of goods is with the undersigned charterer and not the shipowner. This is even the case 'if the bill contains a printed demise clause or identity of carrier clause stating that the bill of lading contract is with the shipowner on the reverse.'¹²⁴

(iv) *Who is the carrier if a person demise charters a ship from the owner and such a person's own goods and/or goods of third parties are carried on the chartered ship?*

A charterparty by demise (bareboat charterparty) is different from a voyage or time charterparty of a ship which, as we have seen, can be contracts of carriage of goods. By contrast to a voyage or time charterparty 'a charter by demise involves a transfer of possession of the vessel from the owner to [the demise] charterer; it is a contract of hire of the vessel.'¹²⁵

Thus, in case the demise charterer 'contracts with a third party [consignor] for the carriage of goods, the owner will have no responsibility under that contract (...)'¹²⁶ as long as the demise charter is in place.¹²⁷ It is the demise charterer who is 'effectively in the position of a shipowner'.¹²⁸ Thus, it is the demise charterer who 'will be liable [against the third party consignor] for loss of or damage to cargo under bills of lading signed by the master.'¹²⁹ In other words, '[t]he master of a ship chartered by demise who signs bills of lading does so on behalf of and as employee and representative of the demise charterer, and the contract of carriage evidenced by those bills is therefore between the consignor of goods on the chartered ship and the demise charterer as the actual and legal carrier of the cargo.'¹³⁰

¹²³ Ibid para 6-029.

¹²⁴ Ibid para 6-029.

¹²⁵ Ibid para 1-015 and para 4-002.

¹²⁶ Ibid para 1-015;

¹²⁷ JP van Niekerk & WG Schulze op cit note 8 at 161; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-027 and para 4-013.

¹²⁸ Ibid para 1-015.

¹²⁹ JP van Niekerk & WG Schulze op cit note 8 at 161.

¹³⁰ Ibid at 161; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-027 and para 4-013.

- Consequently, if a bill of lading is issued to the demise chartering consignor meaning that the demise charterer himself is the shipper of the goods, the bill of lading again ‘normally operates only as a receipt and the contract of carriage between the parties is the charterparty.’¹³¹ Thus, the identity of the carrier in terms of art I(a) HVR (if applicable) is determined pursuant to the demise charterparty, *i.e.* it is the demise charterer who is the carrier in such an instance.
 - If a bill of lading is however issued to a consignor other than the demise charterer conveying its own goods, the bill of lading evidences respectively contains also the contract of carriage.¹³² Thus, the carrier in terms of art I(a) HVR will be determined pursuant to the terms and statements contained in the bill of lading. As the ship is under a demise charterparty, it will be the demise charterer (and not the shipowner) who will be the carrier.¹³³
- (v) *Who is the carrier if a person time charters a ship from a time charterer and such a person’s own goods and/or goods of third parties are carried on the chartered ship?*

The determination of the identity of the carrier becomes even more challenging and possibly unclear if there are two or more charterparties in place as regards one ship.¹³⁴

- Nonetheless, if a bill of lading is issued to a chartering consignor, the bill of lading again ‘normally operates only as a receipt and the contract of carriage between the parties is the charterparty.’¹³⁵ Thus, the identity of the carrier in terms of art I(a) HVR (if applicable) is determined pursuant to the charterparty upon which the claim is based, *i.e.* it is the charterer sub-chartering the ship to the chartering consignor who is the carrier in such a case.¹³⁶

¹³¹ JP van Niekerk & WG Schulze op cit note 8 at 164; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-002.

¹³² Ibid para 6-009.

¹³³ A problem which might arise in such a circumstance is that the third party consignee is not aware of the fact that the ship is under a demise charterparty. Thus, the cargo interests might sue the shipowner (instead of the charterer) (Ibid para 6-032).

¹³⁴ Charles Debattista ‘Cargo Claims and Bills of Lading’ in Yvonne Baatz (ed) op cit note 33 at 207.

¹³⁵ JP van Niekerk & WG Schulze op cit note 8 at 164; Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-002.

¹³⁶ Charles Debattista ‘Cargo Claims and Bills of Lading’ in Yvonne Baatz (ed) op cit note 33 at 208.

- However, if a bill of lading is issued to a consignor other than the charterer conveying its own goods, the bill of lading again evidences the contract of carriage.¹³⁷ Thus, the carrier in terms of art I(a) HVR will be determined pursuant to the terms and statements contained in the bill of lading.¹³⁸ The leading case which arose exactly out of such a scenario is *The Starsin*¹³⁹. In this case, the ship *Starsin* had been demise chartered by the shipowner in the first instance and the demise charterer then time chartered the vessel to the time charterer in the second instance.¹⁴⁰ While being under the time charter, goods carried were damaged. Due to the fact that the time charterer became insolvent, the cargo interests concerned decided to sue the shipowner and the demise charterer for damages.¹⁴¹ As some of the bills of lading of the cargo interests concerned bore, on their face, some name and logo of the time charterer and they were in addition signed by the port agents of the time charterer *as agents for such*, the House of Lords held that only the time charterer was the contractual carrier (and not also the shipowner and/or the demise charterer) even though the reverse of the bills of lading contained, in barely legible print, an ‘identity of carrier clause’ and a ‘demise clause’¹⁴² which was saying something different.¹⁴³ Had the bills of lading simply been signed ‘as agents’ (without specifying on whose behalf), the legal analysis might have led to different finding.¹⁴⁴

¹³⁷ Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-009.

¹³⁸ Charles Debattista ‘Cargo Claims and Bills of Lading’ in Yvonne Baatz (ed) op cit note 33 at 208.

¹³⁹ *The Starsin* supra note 7 at 785.

¹⁴⁰ *The Starsin* supra note 7 at 785 notes 118 and 119 at 819 et seq.

¹⁴¹ *The Starsin* supra note 7 at 785 note 1 at 790.

¹⁴² Formerly, under s 503 of the Merchant Shipping Act 1894 of England and under s 261 of the Merchant Shipping Act 57 of 1951 of South Africa, only the owner of a ship was allowed to limit its liability for damage or loss; not, however, the time charterers (Bernard Eder, Howard Bennet & Steven Berry et al op cit note 6 para 6-035; John Hare op cit note 33 at 709). Hence the bill of lading demise clause (see John Hare op cit note 33 at 709 for an example of a typical demise clause), often accompanied by an identity of carrier clause, was used to circumvent the narrow ambits of the abovementioned legislations in view of ‘draw[ing] owners into litigation in order to plead [the shipowner’s statutory right of] limitation’ (Ibid at 709). In the meantime, both, South African law as well as the English law, have been amended by ‘extend[ing] the right to limit to charterers, managers, operators and any person in possession of a ship’ (Ibid at 709). Nonetheless, using the demise clause remains common in England as well as in South Africa. Whether such a demise clause is effective from a South African law perspective, depends on whether the person signing the bill of lading containing such clause does/did so in pursuance of an agency mandate, i.e. the principles of agency apply (Ibid at 709).

¹⁴³ *The Starsin* supra note 7 at 785, in particular notes 4 and 5 at 792, note 68 at 809 and note 123 at 822.

¹⁴⁴ *The Starsin* supra note 7 at 822.

III CONCLUSION

It should have become evident from this that determining the identity of the contractual carrier under a unimodal contract of carriage by sea subject to the Hague-Visby Rules depends very much (i) on the factual situation¹⁴⁵ as well as (ii) on the legal setup and documentation. It has been shown that, in particular where charterparties are involved, the identification of the contractual carrier is often not as straightforward as one might think and/or hope for as cargo interest. It is in these instances that a meticulous analysis of the facts at hand and the terms contained in the various document(s) of relevance has to be made. As has been shown impressively in the case *The Starsin*, the addition or omission of only a few words on the face of a bill of lading can change the outcome of the 'identification of the carrier procedure' completely. The position of cargo interests who have their goods carried pursuant to a contract of carriage subject to the Hague-Visby Rules is, in respect of identifying the contractual carrier, rather weak in case there are ambiguities as regards the identity of the contractual carrier.

¹⁴⁵ *E.g.* whether a third party such as the third party consignee is concerned with filing the claim or 'only' the consignor who entered into the contract of carriage. Depending on the circumstances, it may be that the bill of lading is the relevant document or the 'initial' contract of carriage concluded with the consignor.

CHAPTER IV IDENTITY OF THE CARRIER IN MULTIMODAL TRANSPORTATION ARRANGEMENTS

I INTRODUCTION

Whereas the previous chapter focused on the identity of the contractual carrier under a unimodal carriage of goods by sea under the Hague-Visby Rules, this chapter deals with different kinds of arrangements for obtaining a multimodal transportation of goods respectively with identity of contractual carrier issues related therewith.

What is the situation if the goods are, for instance, to be transported by sea *and* road? Pursuant to arts I(b) and II HVR, the Hague-Visby Rules apply only if there is a ‘carriage of goods by sea’ and the related contract of carriage (by sea) is covered by a bill of lading or any similar document of title.¹⁴⁶ It follows from these articles *e contrario*, that the Hague-Visby Rules do not apply to a contract of carriage of goods by a mode of transport other than sea, such as *e.g.* by road.

The reason goods were increasingly transported under multimodal transport arrangements was the introduction of standardised (maritime) containers (measured in Twenty-foot Equivalent Units [TEU’s]) into which the goods were packed for carriage. The introduction of these containers led to a transport revolution of ‘containerisation’ which started in the shipping industry in the 1960s.¹⁴⁷ It then spread to the land transport modes, road and rail, as they adapted to carrying the standardised container size. As a result of such adaptation, it became possible for containerised goods to ‘be handled seamlessly between the three modes.’¹⁴⁸

As it became physically possible to pack the goods into a container once at an inland place (*e.g.* at the manufacturing plant) and to have such container carried to its (overseas inland) place of destination (*e.g.* to the place of business of the buying

¹⁴⁶ John Hare op cit note 33 at 599; Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at footnote 10 at 509.

¹⁴⁷ John Hare op cit note 33 at 599; Hannu Honka ‘General Provisions’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2010) 27; David A. Glass *Freight Forwarding and Multimodal Transport Contracts* (2004) para 1.1.

¹⁴⁸ John Hare op cit note 33 at 599.

wholesaler or retailer), the merchants wanted to be able to conclude only one contract of carriage covering the whole door-to-door conveyance.¹⁴⁹

This demand was met in practice by freight forwarders acting as non-vessel operating multimodal transport operators ('NVO-MTO') issuing multimodal transport documents.¹⁵⁰ However, '[t]he law (...) has struggled to keep pace with the alacrity with which the transport industry embraced containerisation.'¹⁵¹ As a result, the multimodal transport¹⁵² has remained contract based whereas in practice various contractual solutions are used.¹⁵³

II CONTRACTUAL ARRANGEMENTS FOR MULTIMODAL TRANSPORT IN PRACTICE AND THEIR IMPLICATIONS AS REGARDS THE IDENTITY OF THE CARRIER

(a) *Individual (unimodal) contracts of carriages concluded by the consignor*

One way of achieving a kind of multimodal transportation of goods is the conclusion of individual (unimodal) contracts of carriage of goods by the consignor with each successive carrier.¹⁵⁴ Such arrangements for unimodal transportation 'fit neatly'¹⁵⁵ the several, compulsory regimes regulating contracts of international carriage by various modes of transport.¹⁵⁶ However, it has to be noted that each such contract of carriage produces 'its own transport documentation (...)'.¹⁵⁷

If the goods carried are damaged or lost while being carried according to these successive contracts of carriage, the consignor has, first, to establish the stage in the transportation at which the damage/loss to the goods occurred, to determine the carrier in whose custody the goods were at the relevant time.¹⁵⁸ Thus, this option of

¹⁴⁹ Ibid at 599.

¹⁵⁰ Carol Proctor op cit note 36 at 97.

¹⁵¹ John Hare op cit note 33 at 599.

¹⁵² Under combined or multimodal transport one understands the linking of two or more modes of transport via a contractual arrangement (David A. Glass op cit note 147 para 1.1).

¹⁵³ Simone Lamont-Black 'Claiming Damages in Multimodal Transport: A Need for Harmonisation' (2012) 36 *Tulane Maritime Law Journal* 707; Hannu Honka 'General Provisions' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 147 at 28.

¹⁵⁴ JP van Niekerk & WG Schulze op cit note 8 at 167; Brian Harris op cit note 20 at 387.

¹⁵⁵ Brian Harris op cit note 20 at 387 et seq.

¹⁵⁶ Cf. CMR, COTIF-CIM, Montreal Convention (Ibid at 387 et seq.).

¹⁵⁷ JP van Niekerk & WG Schulze op cit note 8 at 167.

¹⁵⁸ If, after examination of the situation complicated by the multimodal nature of transportation of the goods, the consignor arrives at the conclusion that the goods were damaged while being carried by sea, the consignor, secondly, might have to overcome another hurdle, namely the identification of

achieving a multimodal transportation of goods is of little favour to the consignor as the identification of the carrier contractually liable is extremely difficult to achieve in practice and thus uncertain.

(b) Individual (unimodal) contracts of carriage of goods concluded through agency arrangements...

(i) ... by a person acting purely as agent

A multimodal transportation of goods occurs also if a person, *e.g.* a freight forwarder, acts purely as the consignor's agent and enters on behalf of such 'into a series of individual carriage contracts with the relevant road, rail, air and sea carriers'.¹⁵⁹ Each of these individual carriers will then issue a transport document for their respective leg of transportation and '[e]ach of these contracts is independent and will be governed by the appropriate unimodal provisions.'¹⁶⁰ In this respect it is noteworthy that documents which the freight forwarder issues to the shipper under the agency agreement do not constitute transport documents.¹⁶¹

Consequently, if the goods are damaged or lost in the course of transportation, 'the cargo interests have a direct right of action against the responsible carrier'¹⁶² in order to claim for compensation of the damage suffered. As regards the difficulties the cargo interests might encounter, reference is made to the considerations above CHAPTER IV.II(a). However, the cargo interests do not have such a claim against the freight forwarder.¹⁶³ 'A claim against him [the freight forwarder acting as agent of the cargo interests] would only arise in the event of some fault of his, such as his failure to make arrangements for one leg of the transportation'¹⁶⁴, hence for breach of the agency agreement.

the contractual carrier if the goods were damaged while being carried on a ship which was under several charterparties (cf . CHAPTER III.II(b) above).

¹⁵⁹ Carol Proctor op cit note 36 at 97.

¹⁶⁰ Ibid at 97.

¹⁶¹ Ibid at 97.

¹⁶² Diana Faber 'The problems arising from multimodal transport' op cit note 15 at 504.

¹⁶³ Ibid at 504.

¹⁶⁴ Ibid at 504.

(ii) ...by a person acting as agent and as 'carrier' (through transport contract)

It can however also be that the person¹⁶⁵ contracting with the consignor undertakes to (i) 'act as principal for one stage of the carriage'¹⁶⁶, *i.e.* he/she 'undertakes responsibility for the care of the goods only when he has control of them'¹⁶⁷ and to (ii) conclude, as the consignor's agent, independent contracts of carriage for the remaining means of transport required for the complete transportation of the goods between the places mentioned in the contract of carriage entered into between the person and the consignor (a so-called 'through transport contract').¹⁶⁸

The document issued by the person, *e.g.* freight forwarder, for the part of the transport 'which [it] (...) undertakes as an actual carrier, the relevant document issued (...) to the shipper will be a transport document.'¹⁶⁹ Transport documents are also issued 'by the other actual carriers to the freight forwarder who receives them on the shipper's behalf.'¹⁷⁰

Classically, a contract concluded between a consignor and a freight forwarder is viewed as falling within this category of through transport contracts.¹⁷¹ This is as a freight forwarder in the country of origin of the goods, after having received instructions from the cargo interests as to the place of dispatch and the place of delivery of the goods, either 'makes [as agent of the cargo interest] arrangements with carriers for the collection, carriage and delivery of the goods (...)'¹⁷² or collates the individual packages (often against issuance of a 'house bill of lading'¹⁷³ covering such goods) and arranges for the overland transport to the port of first shipment. There, the goods collated are 'groupage shipped' for containerisation and, after having been packed into a container, the container is carried by sea 'under a

¹⁶⁵ The freight forwarder or a specific carrier.

¹⁶⁶ Carol Proctor op cit note 36 at 98.

¹⁶⁷ Diana Faber 'The problems arising from multimodal transport' op cit note 15 at 503.

¹⁶⁸ Ibid at 503; Carol Proctor op cit note 36 at 98; 'Many multimodal transport operators not only carry the goods but also enter into booking arrangements with cargo interests.' (Diana Faber 'The problems arising from multimodal transport' op cit note 15 at 504). Therefore, it is of importance to determine in what capacity (principal or agent) the multimodal transport operator entered into such arrangements; This kind of 'segmented responsibility' is the main contrast in comparison with combined transport bills of lading (David A. Glass op cit note 147 paras 3.7 and 3.9).

¹⁶⁹ Carol Proctor op cit note 36 at 98.

¹⁷⁰ Ibid at 98.

¹⁷¹ Diana Faber 'The problems arising from multimodal transport' op cit note 15 at 503.

¹⁷² Ibid at 503.

¹⁷³ The naming 'house bill of lading' 'is a misnomer because these documents are not bill of lading in a technical legal sense.' (Carol Proctor op cit note 36 at footnote 6 98).

groupage bill of lading issued by the [sea] carrier to the freight forwarder'¹⁷⁴ (and not to the individual consignors of the goods).¹⁷⁵

In case of damage to or loss of the goods carried, the consignor will have to establish, in the first instance, again under which mode of transport the damage occurred. It has been said that '[t]he difficulty of proving where the loss or damage has taken place and the possibility of concealed damage are central in the context [of container carriage].'¹⁷⁶ If the damage or loss occurred at a stage in the transportation when the goods were in the responsibility and custody of the person who contracted as principal for that respective transport, the identity of the contractual carrier liable should be determinable without too difficulty. However, if the goods were damaged or lost at a stage in the transportation while the goods were in the responsibility and custody of one of the other carriers (with which the contracting person concluded, as the agent of the consignor, independent contracts of carriage), the identification of the respective contractual carrier liable has to be determined, once again, by the consignor.

(c) Combined transport contract

Multimodal transportation of goods can, in addition, be arranged in terms of a single contract that provides for the transportation of the goods on a multimodal 'door-to-door' basis under which a person agrees to act as carrier for the whole transportation of the goods involving different means of transport between the places named in the contract of carriage, accepting full legal responsibility for the cargo through all the legs of transportation (combined transport contract).¹⁷⁷ If this is the case, a

¹⁷⁴ Ibid at footnote 6 98.

¹⁷⁵ John Hare op cit note 33 at footnote 85 599 et seq. 'This practice often leads to great difficulty in establishing the true contractual nexus between the various parties, particularly where damage to the cargo occurs, and the actual owner wishes to sue.' (Ibid at footnote 85 599 et seq.).

¹⁷⁶ David A. Glass op cit note 147 para 3.25.

¹⁷⁷ Diana Faber 'The problems arising from multimodal transport' op cit note 15 at 503. A multimodal transport operator 'may enter into the contract as principal for all those legs, not only for those which use the means of transport which he owns or operates (...)' (Ibid at 504) or '[h]e may accept responsibility for the entire transportation but carry out none of it himself' (Ibid at 504). 'Combined transport bills of lading involve through, as opposed to segmented, responsibility on the part of the carrier issuing the bill.' (David A. Glass op cit note 147 para 3.38). Carol Proctor op cit note 36 at 98; Alexander von Ziegler 'Main concepts of the new Convention: its aims, structure and essentials' op cit note 87 at 349.

multimodal transport document (which may be a negotiable document of title) is issued to the consignor by the person acting as carrier.¹⁷⁸

In such case, the cargo interest has a contractual relationship only with such person acting as carrier and not with the individual ‘actual carriers’. In this instance, the rights and obligations of the cargo interest depend solely on the terms of the multimodal transport.¹⁷⁹ The conclusion of a combined transport contract therefore allows the cargo interest to claim for loss of or damage to the goods that occurred at any point in the transportation from the contractual carrier, irrespective of who the actual carrier for the stage may have been.¹⁸⁰ Consequently, this kind of contractual arrangement is – from a pure ‘identification of the carrier procedure’ perspective – the best a cargo interest may hope for.

III UNIFICATION EFFORTS IN RELATION TO MULTIMODAL TRANSPORT DOCUMENTS

(a) *Introduction*

With the advent of the multimodal transport document pursuant to the combined transport contract, ‘a need for international uniformity as far as the nature, format and legal implications of and practice concerning the transport document were concerned’,¹⁸¹ arose.¹⁸²

¹⁷⁸ Carol Proctor op cit note 36 at footnote 8 98; JP van Niekerk & WG Schulze op cit note 8 at 167; The following two scenarios should, however, be distinguished: (i) It is possible that a freight forwarder (employed by the consignor) assumes liability as ‘carrier’ and hence becomes a NVO-MTO by ‘concluding a contract with the consignor for the multimodal transportation of the consignment while in turn contracting with the different individual unimodal carriers involved in conveying the consignment to their final destination.’ (JP van Niekerk & WG Schulze op cit note 8 at 120 and 167; Carol Proctor op cit note 36 at 98) or (ii) It is also possible, however, that the ‘principal carrier assumes liability against the consignor as carrier for the whole conveyance of the cargo (...) and contracts with other carriers involved.’ (JP van Niekerk & WG Schulze op cit note 8 at 167). Under these circumstances, the principal carrier is referred to as vessel-operating multimodal transport operator (‘VO-MTO’) (Ibid at 167).

¹⁷⁹ Carol Proctor op cit note 36 at 98.

¹⁸⁰ Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 503; As regards the ‘problems which a multimodal transport operator may encounter when he wishes to recover from his sub-contractors money which he has had to pay to cargo interests as compensation for loss of or damage to goods carried under the multimodal transport contract’ see Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 516.

¹⁸¹ JP van Niekerk & WG Schulze op cit note 8 at 167.

¹⁸² When multimodal transport contracts emerged, there was no uniformity as regards the terms and conditions of the carriage. Furthermore, ‘[n]o uniform documentary practice emerged. The existence of a number of different mandatory unimodal transport conventions with different liability regimes for the carriers by the various modes and the lack of a generally accepted

To this point, there have been two major efforts aimed at achieving uniformity with regard to multimodal transport documentation, and interpretation of that documentation.¹⁸³ The first was the MT Convention 1980 attempted, unsuccessfully, to introduce what has been termed a ‘uniform system’¹⁸⁴ approach. The second attempt was the MTD Rules that adopted a ‘network system’¹⁸⁵ approach.¹⁸⁶

(b) *MT Convention 1980*

The MT Convention 1980 as an instrument of public international law aims at creating a ‘uniform international legal regime which will regulate a contract for the multimodal international transportation of goods from origin to destination’.¹⁸⁷ However, the MT Convention 1980 has not received the support required for coming into force. Until now, only six States have signed the MT Convention 1980 whereas art 36(1) MT Convention 1980 requires the signature of 30 States in order that the MT Convention 1980 enters into force.¹⁸⁸ Based on the *status quo*, it is unlikely that the MT Convention 1980 will come into force in the near future.¹⁸⁹

(c) *MTD Rules*

As it became evident that the MT Convention 1980 was not on the course of a universal adoption, the concern arose that ‘commercial parties would not have an

convention to govern the multimodal contract complicated the situation.’ (Carol Proctor op cit note 36 at 101 et seq.).

¹⁸³ John Hare op cit note 33 at 600.

¹⁸⁴ Under a ‘uniform system’, the same liability regime applies to all claims based on multimodal transport contracts (irrespective of the kind of transport vehicle used when the goods were lost or damaged). However, according to Diana Faber, the MT Convention (if adopted) would not implement a pure uniform system as arts 4, 18 and 19 of the MT Convention are provisions which ‘clearly derogate from the principle of a unitary system. They apply a network-like system (...).’ (Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 507 et seq.); In other words, the ‘liability is uniform but a limited network system applies to limitation of liability.’ (David A. Glass op cit note 147 para 3.105). Thus, Glass and Harris argue that the MT Convention adopt a ‘modified network system’ (Ibid para 3.105; Brian Harris op cit note 20 at 396).

¹⁸⁵ Under a ‘network system’, it is important to know what kind of transport vehicle was used when the goods were lost or damaged as ‘claims caused while a particular means of transport is in use should be dealt with under the [respective] Convention relevant to that type of transport’ (Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 507); Thus, the ‘network system’ provides for common terms for a multimodal transport contract but subjects these to the respective unimodal regime applicable (Brian Harris op cit note 20 at 396).

¹⁸⁶ JP van Niekerk & WG Schulze op cit note 8 at 167.

¹⁸⁷ Carol Proctor op cit note 36 at 104.

¹⁸⁸ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&lang=en (accessed on 5 December 2013).

¹⁸⁹ Brian Harris op cit note 20 at 396.

instrument to govern multimodal transport.’¹⁹⁰ Thus, the international business community was forced to elaborate another solution. In fact, the community was forced to ‘use transport documents which apply a network system of liability, making different legs of the carriage subject to international conventions when those apply compulsorily and otherwise to contractual terms.’¹⁹¹

Consequently, the international business community agreed on the MTD Rules which ‘were intended to be a voluntary stop-gap until more universal adoption’¹⁹² of the MT Convention 1980.¹⁹³ Accordingly, the MTD Rules aim at uniformity, too, but not by way of a legislative instrument such as *e.g.* a convention, but by way of common practice as the MTD Rules only apply when they are referred to, *i.e.* incorporated into the contract of carriage.¹⁹⁴

IV CONCLUSION

Owing to the absence of any (widely) ratified and implemented international convention in the field of the multimodal transportation of goods, a person requiring a multimodal transportation of goods has to choose and make use of one of the contractual arrangements. In case the goods are damaged or lost in the course of such a multimodal transportation, the determination of the exact nature of the contract concluded for the multimodal transportation (combined or through contract) becomes of utmost importance to the cargo interest concerned. Depending on the nature of the contract, it may either sue its contractual counterparty (in case of a contract concluded on a combined transport basis) or it must sue the carrier responsible (*e.g.* in case of a contract concluded on a through transport basis) for the damage/loss of the goods. If the latter is the case, it is the problem of the cargo interest if it cannot determine and prove ‘the point at which the cargo was damaged [which is often difficult to determine in containerised transport] (...) so as to establish

¹⁹⁰ Carol Proctor op cit note 36 at 109.

¹⁹¹ Richard Williams ‘Transport documentation – the new approach’ in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (2009) 192.

¹⁹² John Hare op cit note 33 at 600; MTD Rules, Introduction para 1 at 2.

¹⁹³ Brian Harris op cit note 20 at 397.

¹⁹⁴ JP van Niekerk & WG Schulze op cit note 8 at 167; section 1.1 of the MTD Rules; Explanation of Rule 1 at 3; Brian Harris op cit note 20 at 398.

which carrier to sue.¹⁹⁵ If the former is the case, the cargo interest knows whom to sue.¹⁹⁶

In short, a cargo interest may face ‘many hurdles in establishing and making a valid claim arising out of a multimodal carriage contract.’¹⁹⁷

¹⁹⁵ Diana Faber ‘The problems arising from multimodal transport’ op cit note 15 at 504 and 506.

¹⁹⁶ The problems regarding the determination and identification of the carrier liable is shifted to the cargo interest’s counterparty that assumes full responsibility and liability for the multimodal carriage.

¹⁹⁷ Simone Lamont-Black ‘Claiming Damages in Multimodal Transport: A Need for Harmonisation’ op cit note 153 at 707 et seq.

CHAPTER V IDENTITY OF THE CARRIER(S) UNDER THE ROTTERDAM RULES

I INTRODUCTION

(a) *General remarks*

Based on the concern that there is no uniformity in the existing legal framework regulating the international carriage of goods by sea and that the legal framework does not appropriately take into account modern means of transportation such as *e.g.* containerisation, contracts providing for a door-to-door conveyance of goods and the use of electronic transport documents, the General Assembly of the United Nations adopted on 11 December 2008 the Rotterdam Rules.¹⁹⁸

It was not the idea

‘to prepare a revision of the Hague or Hamburg Rules, but rather to seek a comprehensive legislation, which would also include liability issues, and would be aimed at the regulation of the entire contract of carriage by sea and the mechanisms by which the documents generated by this contract would operate, not just for the purposes of transportation, but, more importantly, for the purposes of international trade.’¹⁹⁹

The point of departure was to position the contract of carriage in the right context within trade transactions which often involve the conveyance of goods over large distances.²⁰⁰ Consequently, the main goal of the contract of carriage is to

¹⁹⁸ Resolution adopted by the General Assembly 63/122 regarding the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

¹⁹⁹ Alexander von Ziegler ‘Main concepts of the new Convention: its aims, structure and essentials’ op cit note 87 at 348; ‘Die neue Konvention will alle Elemente des Seefrachtvertrages regeln’ (Alexander von Ziegler ‘Neues Seefrachtrecht der UNICITRAL: Zukunft oder Utopie?’ (2006) 5 *SVS Journal* 26); By contrast, Philippe Delebecque holds that ‘[t]he Rotterdam Rules were not conceived as a comprehensive and self-sufficient code regulating the carriage of goods wholly or partly by sea, but mainly designed to provide a basic, but compulsory, framework for the contract of carriage, outside of which the parties were free to negotiate the remaining terms.’ (Philippe Delebecque ‘Obligations of the Carrier’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 8 at 71.

²⁰⁰ Alexander von Ziegler ‘Main concepts of the new Convention: its aims, structure and essentials’ op cit note 87 at 348; Such ‘trade transactions [which base *e.g.* on international sale contracts] are the »raison d’être« of the shipping industry’, which provides the tool (maritime transport) to overcome the ‘geographical distance between the places where the goods are located at the time of sale, and the place to which the goods will have to be moved for the buyer’ (Ibid at 348).

provide for the safe transportation of the goods.²⁰¹ As the Rotterdam Rules shall ‘cover the entire contract of carriage’,²⁰² the scope of application of the Rotterdam Rules must, as a result, be an extended one; ‘from a liability convention to a convention on the contract of carriage.’²⁰³ Notwithstanding, the law regulating the contract of carriage must also pay close attention to the complex and thus fragile international trade transaction and must hence ensure that such can be performed smoothly.²⁰⁴

The perhaps most important alteration in the Rotterdam Rules is the extension of the period of responsibility (in certain circumstances) to a door-to-door coverage.²⁰⁵ In other words, international contracts of carriage of goods that provide for a ‘door-to-door’ transportation involving, *inter alia*, transportation by sea, fall within the scope of application of the Rotterdam Rules that adopt a contractual approach.²⁰⁶ The downside of such a door-to-door coverage and the widening of the scope of application is, however, that the Rotterdam Rules could come into conflict with existing transportation conventions as, *e.g.* the CMR or the COTIF-CIM.²⁰⁷ Therefore, the Rotterdam Rules regulate also the treatment of possible legal issues arising from such extension (cf. art 26 RR which introduces the network principle ‘in as limited a way as possible’²⁰⁸ and art 82 RR).

²⁰¹ Such transportation can *e.g.* constitute a part of the performance of a sale contract. It is worth mentioning here, too, that in instances where there is a (time and distance wise) gap between the interests of the parties to a sale contract, i.e. the seller’s interest to receive the purchase price upon delivery of the goods and the buyer’s interest to pay the purchase price only if conform goods have been delivered, the transport document (issued in relation to the contract of carriage and confirming, *inter alia*, the receipt of the goods) plays a key role also in the sale contract. This is the case as ‘[s]uch a document proves (to the buyer) that the sold goods were indeed delivered as requested under the sales contract at loading port [and] [t]hanks to the negotiability of the bill of lading [a form of such transport document], the trade partners can tender this key document to trade finance banks for the financing of the letter of credit facilities.’ (Ibid at 348).

²⁰² Ibid at 349.

²⁰³ Ibid at 349.

²⁰⁴ Ibid at 349.

²⁰⁵ Michael F. Sturley in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (2009) 31; By contrast, the Hague-Visby Rules apply just to the maritime leg between ‘tackle and tackle’ (Alexander von Ziegler ‘Main concepts of the new Convention: its aims, structure and essentials’ op cit note 87 at 349).

²⁰⁶ By contrast, the Hague-Visby Rules adopted an exclusively documentary approach (Ibid at 349; Francesco Berlingieri ‘General Introduction’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 7 at 8).

²⁰⁷ Alexander von Ziegler ‘Main concepts of the new Convention: its aims, structure and essentials’ op cit note 87 at 349.

²⁰⁸ Tomotaka Fujita ‘The Coverage of the Rotterdam Rules’ at 4 available at [http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/the%20coverage%20of%20rotterdam%20rules%20\(BA2010\)%20-%20T.Fujita.pdf](http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/the%20coverage%20of%20rotterdam%20rules%20(BA2010)%20-%20T.Fujita.pdf) (accessed on 26 July 2013).

It has to be highlighted, however, that the Rotterdam Rules were not elaborated with the intention to regulate multimodal carriage of goods in general. The scope of application of the Rotterdam Rules is limited to multimodal carriage of goods contracts that specify that there is a carriage of the goods by sea and, if applicable, a preceding and/or following carriage of the goods by other modes of transport.²⁰⁹ The Rotterdam Rules are, for this reason, not a full multimodal convention in the traditional sense that applies whatever the modes of transport at issue are ‘but rather a “maritime-plus” convention’²¹⁰ as the carriage of the goods by other modes of transport must form an addition to the carriage by sea.²¹¹

To sum up, the Rotterdam Rules apply whenever there is a contract of carriage which provides for at least carriage by sea that fulfils the geographical links set out under art 5 RR and which is not excluded from the scope of application pursuant to art 6 RR.²¹²

It is, furthermore, noteworthy that the issuance of a transport document is the norm, but not a requirement for the Rotterdam Rules to apply.²¹³

(b) Exclusions from the scope of application pursuant to art 6 RR

It is with regard to the exclusions from the scope of application that art 6 RR is worth mentioning. Art 6 RR exempts (i) charterparties and (ii) other contracts for the use of a ship or of any space thereon from the application of the Rotterdam Rules.

The exemption of charterparties is a continuation of the approach taken with regard to the Hague-Visby Rules and evident in art V HVR which exempts charterparties from the scope of application of the Hague-Visby Rules.²¹⁴ What is

²⁰⁹ Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 53.

²¹⁰ Michael F. Sturley ‘Scope of Application’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli *The Rotterdam Rules 2008 – Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2010) 42.

²¹¹ Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 53.

²¹² Cf. CHAPTER V.I(b) below.

²¹³ This is ‘the issuance of a transport document is not required if carrier and shipper agree otherwise or if it is a custom, usage or practice not to use one.’ (Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 25 and 53; G J van der Ziel in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (2009) 245.

²¹⁴ It was and is thought that ‘contracting parties in the charter context, as a general rule, will be sophisticated commercial actors with more-or-less equal bargaining power, and thus each side can

new under the Rotterdam Rules, however, is the addition of the phrase ‘other contracts for the use of a ship or of any space thereon’. It is sought to cover ‘a broad range of [new] contracts [which grew with new commercial practices such as *e.g.* slot charters or space charters] that bear a closer resemblance to traditional charterparties than to bills of lading but that do not fit into either category’ under the condition that ‘the parties to these “new” contracts are sophisticated commercial actors with comparable bargaining power (...)’.²¹⁵ However, the point made by Andrew Tettenborn²¹⁶ in this regard, namely that container carriage contracts increasingly blur the distinction between contracts of carriage of goods on the one hand and contracts granting someone the right to use space on the ship on the other hand, seems, in my opinion, to be a good one. First, ‘container carriage contracts’ could indeed be qualified as a contract for the use of space on a ship and, secondly, the Rotterdam Rules do not explicitly require by their wording that there is an approximately equal bargaining power in order that they do not apply.

II ‘CARRIER’ IN TERMS OF THE ROTTERDAM RULES

Like the Hague-Visby Rules²¹⁷, the Rotterdam Rules define ‘carrier’. Pursuant to art 1(5) *sv* ‘carrier’ RR a ‘carrier’ is ‘a person that enters into a contract of carriage with a shipper’.²¹⁸ This definition has been described as ‘the [c]onvention’s principal rule governing [and defining] the identity of the carrier.’²¹⁹

Owing to the fact that the Rotterdam Rules may, in addition to sea carriage, cover carriage of goods by other modes of transport, the definition of the ‘carrier’ in the Rotterdam Rules is formulated differently compared to art I(a) HVR. However, as under the Hague-Visby Rules, any person can be a carrier if the respective

protect itself in the marketplace.’ (Michael F. Sturley ‘Scope of Application’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 210 at 48).

²¹⁵ Ibid at 47.

²¹⁶ Andrew Tettenborn ‘Freedom of contract and the Rotterdam Rules: framework for negotiation or one-size-fits-all?’ in D Rhidian Thomas (ed) *The Carriage of Goods by Sea under the Rotterdam Rules* (2010) 88.

²¹⁷ See CHAPTER III.II(a) above.

²¹⁸ ‘The contractual nexus may be on a place to place basis, a multimodal contract, accompanied by the issue of a multimodal transport document or records, or on a port to port basis, a unimodal maritime contract, accompanied by the issue of a unimodal maritime transport document or records.’ (D Rhidian Thomas in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (2009) 56).

²¹⁹ Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2010) para 7.044 et seq.

requirements are met. As under the Hague-Visby Rules, the person identified as carrier is the contractual carrier.²²⁰ Insofar, the Rotterdam Rules do not introduce anything new as regards the qualification as (contractual) ‘carrier’.

A further provision that might assist the consignor is art 36(2)(b) RR which stipulates that ‘[t]he contract particulars²²¹ in the transport document²²² (...) shall also include: [t]he name and address of the carrier’.²²³

III IDENTIFICATION OF THE CARRIER(S) UNDER THE ROTTERDAM RULES

(a) General remarks

Where a transport document is issued to a shipper of goods, the transport document may cause difficulties in the identification of the carrier. It may be unclear on whose behalf a signatory as *e.g.* the master or an agent signing in a representative capacity has signed, for example, a (blank) bill of lading²²⁴ or a waybill. It could be that the transport document was signed on behalf of (i) the shipowner or (ii), if there is only one charterparty in place, the charterer, or (iii), in case of the existence of various charterparties, one of the charterers – but which one.²²⁵ It could, however, also be that the transport document contains statements as regards the identity of the carrier but these statements are of contradicting nature, such as was the case in *e.g. The Starsin*.²²⁶

Hence, when it happens that a transport document is issued which is not compliant with art 36(2)(b) RR and that this transport document is, in turn, transferred to a third party consignee, such person often cannot establish the identity of the carrier liable based on the transport document. In this event, the provisions of

²²⁰ D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 56.

²²¹ See CHAPTER V.IV(b) below.

²²² See CHAPTER V.IV(c) below.

²²³ Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.035; cf. also CHAPTER V.IV(b)(ii) below.

²²⁴ A ‘blank bill of lading’ is a ‘bill of lading which bears all the hallmarks of being a bill of lading, but with no obvious carrier name on the face.’ (‘CMI 2012 Beijing 40th Conference of the Comité Maritime International Rotterdam Rules Session – Panel 3 Hypothetical Problems Treated Under the Rules’ at 2 available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Panel%203%20-%20final%20clean.pdf> (accessed on 1 July 2013)).

²²⁵ D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 71.

²²⁶ Cf. CHAPTER III.II(b)(v) above as regards the facts underlying *The Starsin*. As the Rotterdam Rules are a multimodal convention, even more combinations and permutations as regards the identity of the carrier are possible in case of a multimodal carriage of goods.

arts 36(2)(b) and 1(5) RR are supplemented by three ‘claimant friendly’²²⁷ legal default rules contained in art 37 RR. It is the purpose of these rules that a cargo interest can rely on them in order to identify the (deemed) contractual carrier under a transport document.²²⁸

In other words, in particular art 37(1) and (2) but also art 36(2)(b) RR aim at helping the cargo interest with the identification of the (deemed) contractual carrier (who, ultimately, either is indeed the carrier pursuant to art 1(5) RR or else just treated as such). These two articles are, however, not intended to redefine the term ‘carrier’ ‘according to their terms’.²²⁹ In the following, the three legal rules of art 37 RR will be considered.

(b) If the carrier is identified by name in the contract particulars (art 37(1) RR)

The first of these rules is art 37(1) RR which reads as follows:

‘If a carrier is identified by name in the contract particulars, any other information in the transport document relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.’

If *the name* of the carrier is provided in the contract particulars of a contract of carriage subject to the Rotterdam Rules, art 37(1) RR might be of assistance (in particular where the transport document contains ‘other information’ relating to the identity of the carrier).²³⁰ The effect of art 37(1) RR is that it ‘effectively renders the identification conclusive’²³¹ and overrides so-called demise and/or identity of carrier clauses which may be contained on the reverse of a bill of lading by invalidating them and leaving them without effect.²³² Consequently, ‘a person other than the true

²²⁷ D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 72.

²²⁸ Ibid at 71. Article 37 RR is entirely new to the international sea carriage legislation giving a new solution to the problem of identifying the carrier. That this solution is, however ‘not a perfect one’ is known and has been acknowledged (Tomotaka Fujita ‘Transport Documents and Electronic Transport Records’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 172).

²²⁹ Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.045.

²³⁰ No name of the carrier will, however, be indicated in case a ‘blank bill of lading’ is issued. In such a case, reference has to be made to art 37(2) RR (cf. ‘CMI 2012 Beijing 40th Conference of the Comité Maritime International Rotterdam Rules Session – Panel 3 Hypothetical Problems Treated Under the Rules’ op cit note 224 at 2).

²³¹ D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 72.

²³² Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 25; D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 72; Richard Williams ‘Transport documentation – the new approach’ in D Rhidian

carrier may also be treated as the carrier'.²³³ However, such deemed carrier does not replace the true carrier.²³⁴

In this regard it is worth mentioning that a correct and complete identification of the carrier by its name is of utmost importance and that the indication of *a name* of the carrier should not be considered to be sufficient. For illustrative purposes, reference is made to *Homburg Houtimport BV v Agrosin Private Ltd and others (The Starsin)* [2003] 2 All ER 785. The bill of lading underlying the dispute contained some kind of identification of the carrier on its face as 'Continental Pacific Shipping' had been indicated as carrier.²³⁵ However, 'Continental Pacific Shipping' is a trading name that does not distinguish between Continental Pacific Shipping Ltd and its sister company Continental Pacific Shipping NV. According to Lord Hobhouse of Woodborough, the ambiguity as regards the identity of the carrier could only be resolved 'by having regard to other documents, eg the time charter.'²³⁶ In my opinion, such an indication of a name of the carrier would not constitute an identification as required under art 37(1) RR as the trading name indicated did not unequivocally indicate which company was concerned and bound, Continental Pacific Shipping Ltd or its sister company, Continental Pacific Shipping NV.²³⁷ For the sake of achieving legal certainty as to the identity of the carrier, it is to be hoped that the courts seized will apply a very strict and rather technical examination with regard to the identification criterion 'name' of the carrier if the contract particulars of the transport document contain an ambiguity of some importance (which is *e.g.* the case where the contract particulars contain no further clear indicative data relating to the identity of the carrier such as, for example, the address of the carrier). In case of such an ambiguity regarding the identity of the carrier, reference should rather be made to art 37(2) RR in order to determine the identity of the carrier.

Thomas (ed) op cit note 191 at 201; According to Andrew Tettenborn the effort made under Rotterdam Rules to deal with the issue is 'not a very good one' (Andrew Tettenborn 'Freedom of contract and the Rotterdam Rules: framework for negotiation or one-size-fits-all?' in D Rhidian Thomas (ed) op cit note 216 at 87).

²³³ Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.048.

²³⁴ Ibid para 7.048.

²³⁵ *The Starsin* supra note 7 at 785 note 176 at 791.

²³⁶ *The Starsin* supra note 7 at 785 note 176 at 821.

²³⁷ However, if – in addition to the ambiguous trading name – the complete address was also indicated in the contract particulars of the transport document and thus allowed for a much clearer identification of the carrier, the situation and most likely the legal conclusion would be different.

Furthermore, it must be mentioned that this rule will not be able to improve the situation of the cargo interest in the many cases where *no name* of the carrier is indicated on the transport document but such is just signed 'for the master'.²³⁸

(c) *If no person is identified as the carrier in the contract particulars (art 37(2) RR) and...*

In case that no person is²³⁹ or can be identified pursuant to the contract particulars as the carrier²⁴⁰, the presumption contained in art 37(2) RR which states the following might apply:²⁴¹

'If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier (...).'

(i) *... a ship is named in the contract particulars*

In case there is an unclear or ambiguous indication of the identity of the carrier, this situation should be treated as if no person is identified in the contract particulars.²⁴² If one follows this argument and if the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner is presumed to be the carrier (art 37(2) RR).

The Rotterdam Rules address with this provision respectively its presumption the 'notorious difficulty'²⁴³ of identifying the 'correct' carrier for suing as there are no registers identifying a bareboat charterer whereas the identity and the address of

²³⁸ Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 172.

²³⁹ For instance, in case of a 'blank bill of lading'.

²⁴⁰ The failure to indicate the name the carrier is 'undoubtedly a breach of article 36(2)(b)' for which the carrier who issued the transport document is liable. However, in order 'to have any meaningful remedy, the claimant must first identify the carrier – or at least find a person that will be responsible as though it were the carrier.' (Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.049).

²⁴¹ Art 37(2) RR was 'one of the most controversial provisions during the deliberations in the UNICITRAL Working Group.' (Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 173; Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.052).

²⁴² Cf. CHAPTER V.III(b) above.

²⁴³ Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) op cit note 191 at 202.

the registered owner of a ship is recorded in various registers and constitutes public information.²⁴⁴

The registered owner (identified as the carrier pursuant to art 37(2) RR) has then two possibilities in order to rebut the presumption of being the carrier responsible and liable: either 'it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier' or, alternatively, the registered owner identifies the true carrier and indicates its address.²⁴⁵

However, 'the registered owner or the bareboat charterer cannot defeat the presumption simply by proving it did not enter into the contract of carriage with the shipper.'²⁴⁶ This means that art 37(2) RR should be understood as a means in favour of the cargo interest to extract information as regards the identity of the carrier under the contract of carriage from the registered owner or the bareboat charterer 'rather than to make them ultimately responsible'.²⁴⁷

(ii) ... *no ship is named in the contract particulars*

Where the contract particulars neither identify the carrier in an unequivocal manner nor indicate the name of a ship on whose board the goods have been loaded, the Rotterdam Rules 'provide no assistance to the claimant (...)'.²⁴⁸

Thus, what happens if no carrier is indicated and no ship is named in the contract particulars? Is there a duty to indicate a ship on the contract particulars? These questions will be answered in the following.

²⁴⁴ Ibid at 202.

²⁴⁵ Art 37(2) second sentence RR; *NB* that the bareboat charterer 'may rebut any presumption of being the carrier in the same manner' (art 37(2) last sentence RR).

²⁴⁶ Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 173.

²⁴⁷ Ibid at 173; Consequently, the registered owner should thus care about 'being kept informed of how and by whom its ship is operated' as it runs otherwise the risk of not being able to rebut the presumption to be the carrier (by providing the identity of the true carrier) and will be treated as the carrier (Ibid at 173; Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.051).

²⁴⁸ Filippo Lorenzon 'Transport Documents and Electronic Transport Records' in Yvonne Baatz, Charles Debattista, Filippo Lorenzon et al *The Rotterdam Rules: A Practical Annotation* (2009) para 37-05.

(d) Proof adduced by claimant of who the carrier is (art 37(3) RR)

In the case that no person is identified in the contract particulars and the contract particulars do not indicate a named ship, the Rotterdam Rules do not provide any further legal presumption assisting the cargo interest in identifying the carrier liable. The cargo interest will in such instance have to fall back on art 37(3) RR which reads:

‘Nothing in this article [37] prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.’

In other words, the burden of proving the identity of the carrier is again on the cargo interest but art 37(3) RR does not say how the cargo interest can accomplish the proof.²⁴⁹ As the question of ‘Who is a party to the contract of carriage?’ is governed by the ordinary principles of contract law, the cargo interest must ‘look to the governing law of contract’ in order to determine how the proof can be accomplished.²⁵⁰ Under South African law, it is of greatest importance that the cargo interest exercises ‘particular care to ensure that a contractual claim is brought against a defendant with whom [the] cargo [interest] has a contractual nexus. For it is an essential averment of any claim that the defendant is liable.’²⁵¹

(e) Conclusion as regards the identification of the carrier under the Rotterdam Rules

So far, it can be held that the Rotterdam Rules with art 37 RR indeed aim at improving the position of the cargo interest as regards the identification of the carrier (if there is any ambiguity about that fact in the first instance). However, if the first two rules of law of art 37 RR, that is art 37(1) and 37(2) RR, do not apply, the cargo interest will be – in relation to goods carried by sea – in the same position as it has been so far under the Hague-Visby Rules. If the carriage of the goods has even been multimodal, this multimodal factor will most likely add another layer of complication in determining who the carrier responsible and liable is.

²⁴⁹ Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel op cit note 219 para 7.047.

²⁵⁰ Ibid para 7.047; *NB* that art 37(3) RR protects the cargo interest’s right to sue the true carrier (even though such person might be someone else than the one identified by means of art 37(1) and (2) RR). ‘Article 37 does not supersede ordinary contract principles but instead supplements them.’ (Ibid para 7.047).

²⁵¹ John Hare op cit note 33 at 707 et seq.

(f) The question of the number of carrier(s), i.e. one or two, under the Rotterdam Rules

In principle, the Rotterdam Rules consider that there is only one person ‘the carrier’, namely the ‘person that enters into a contract of carriage with a shipper’.²⁵²

However, if art 37(1) RR applies, it might be that the ‘carrier (...) identified by name in the contract particulars’ is not the same person as the person considered to be the carrier pursuant to art 1(5) RR. If such was the case, it would in my opinion be arguable that there are, on the whole, two persons acting as carrier in terms of the Rotterdam Rules.

On the one hand, there is the person who concluded the contract of carriage with the shipper, *i.e.* the contractual carrier in terms of the Rotterdam Rules. On the other hand, there is the person named in the contract particulars in the transport document who is thus considered to be the deemed carrier pursuant to art 37(1) RR.

Whether the shipper can proceed against the person identified as carrier in terms of art 37(1) RR (i) in addition to its ‘original’ contractual counterparty or (ii) instead of its ‘original’ contractual counterparty remains to be decided by the courts as art 37(1) RR solely provides for a hierarchy of interpretation and construction in relation to diverging statements contained in the transport document itself (but not in relation to the contract of carriage situation as a whole which would include the contract of carriage effectively concluded between the shipper and the carrier).

IV ‘CONTRACT PARTICULARS’, ‘TRANSPORT DOCUMENT’ AND DUTIES OF THE CARRIER

(a) Introduction

The determination of the identity of the carrier in terms of art 37(1) and (2) RR depends to a large extent on the respective content of the contract particulars. Since these must inevitably be contained in the transport document, or its electronic equivalent (cf. arts 1(23) and 36(1) to (3) RR), it would matter to the consignor that a transport document was issued, which raises the question as to whether the consignor is entitled to the issue of such document respectively whether there is a duty on the carrier to issue such a transport document under the Rotterdam Rules. If there was no

²⁵² Art 1(5) RR.

such duty, what implications does it have for the cargo interests if no transport document is issued? These questions will be examined in more detail below under CHAPTER V.IV(c)(ii) and CHAPTER V.V(b)(i).

(b) *'Contract particulars'*

(i) *'Contract particulars' as defined in art 1(23) RR*

The Rotterdam Rules contain a wide definition of the term 'contract particulars' in art 1(23) RR.²⁵³ Consequently, 'identifications made by a specially designed box and manually filled, a pre-printed definition clause on the back of the document or a signature where the signing party signs "as carrier" would all produce the same effect'²⁵⁴ and would constitute contract particulars in terms of art 1(23) RR.

(ii) *'Contract particulars' as described in art 36 RR*

Whereas art 1(23) RR defines the term 'contract particulars' content wise, art 36 RR regulates what specific information and data must respectively shall be included in the transport document (which then constitutes a 'contract particular' pursuant to art 1(23) RR). The list contained in art 36 RR is, however, not exhaustive.²⁵⁵ The contract particulars relevant for present purposes are those that relate to the identity of the carrier and the provisions of art 36 RR dealing specifically with this issue are arts 36(2)(b) and 36(3)(b) RR.

- Article 36(2)(b) RR requires that the 'contract particulars' include '[t]he name and address of the carrier'.²⁵⁶ This provision of the Rotterdam Rules, on the one hand, reduces to writing what has been the – more or less successfully lived – current general practice so far, *i.e.* the naming of the carrier in the transport document respectively the bill of lading or any other similar

²⁵³ Cf. art 1(23) RR which reads: "'contract particulars" means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.'; Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) op cit note 191 at 204.

²⁵⁴ Filippo Lorenzon 'Transport Documents and Electronic Transport Records' in Yvonne Baatz, Charles Debattista, Filippo Lorenzon et al op cit note 249 para 37-02.

²⁵⁵ Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 167).

²⁵⁶ Cf. CHAPTER V.II above.

document of title. On the other hand, it requires that an utterly new piece of information is given, namely the address of the carrier.²⁵⁷

- Pursuant to art 36(3)(b) RR, the ‘contract particulars in the transport document (...) shall further include’ ‘[t]he name of a ship, if specified in the contract of carriage’. With respect to this provision it must be noted that the naming of a ship is contingent upon the fact whether the ship is specified already in the contract of carriage concluded earlier on. Whereas it seems that such specification with regard to the name of the ship can be expected to be contained in contracts of carriage of goods on a port-to-port or a port-to-door²⁵⁸ basis, it seems that such specification is less likely to be contained in contracts of carriage of goods from door-to-door.²⁵⁹

(iii) Consequences if the ‘contract particulars’ pursuant to art 36 RR are not provided

What are the legal consequences if the contract particulars do not include the pieces of information they are supposed to pursuant to art 36 RR?

It seems that the Rotterdam Rules do not ‘impose any particular sanction’²⁶⁰ if the contract particulars ‘which “shall” (ie must) be furnished’²⁶¹ are in fact not furnished.²⁶² The Rotterdam Rules only state in art 39(1) that ‘[t]he absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document (...)’

²⁵⁷ In this respect, art 37(2)(b) RR goes further than the ICC’s Uniform Customs and Practice for Documentary Credits 600 (UCP 600) rules which only require the indication of the name of the carrier (but not its address) (cf arts 19 to 24 UCP 600) (Richard Williams ‘Transport documentation – the new approach’ in D Rhidian Thomas (ed) op cit note 191 at 199); Filippo Lorenzon ‘Transport Documents and Electronic Transport Records’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon et al op cit note 249 para 36-07.

²⁵⁸ E.g. in cases where the (contracting) carrier performs the carriage of the goods by sea itself by means of employing (one of) ‘its’ ship(s) of which he knows respectively determines the trading route and hence knows about the expected arrival etc.

²⁵⁹ E.g. in cases where the (contracting) carrier is a NVO-MTO who books the services of a ship or space thereon only after the conclusion of the contract of carriage (cf. also Tomotaka Fujita ‘Transport Documents and Electronic Transport Records’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 161 and 171).

²⁶⁰ Richard Williams ‘Transport documentation – the new approach’ in D Rhidian Thomas (ed) op cit note 191 at 202.

²⁶¹ Ibid at 202.

²⁶² Filippo Lorenzon ‘Transport Documents and Electronic Transport Records’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon et al op cit note 249 para 36-07.

One of the consequences might be that art 37(2) RR and its sequel of presumption(s) might apply if there is no identification of the carrier contained in the contract particulars as required pursuant to art 36(2)(b) RR.²⁶³ However, '[a]rticle 37.2 provides assistance [only] when the transport document relates to cargo which has been loaded on a [named] ship but not in other circumstances'.²⁶⁴ Whether the transport document indicates the name of a ship in its contract particulars is dependent upon whether such ship was specified already in the contract of carriage concluded previously (cf. art 36(3)(b) RR). This might depend very much on the kind of contract of carriage entered into (port-to-door or door-to-door contract of carriage). Furthermore, as the Rotterdam Rules do not contain provisions sanctioning the omission of information to be indicated in the contract particulars pursuant to art 36 RR, there is no 'real, financial incentive' for a carrier to fill in all the (new) information required under the Rotterdam Rules. A shipowner might want to try to escape the presumption contained in art 37(2) RR (if this provisions becomes applicable at all in the first instance) by instructing its employees, agents and charterers (including their employees and agents) – unless required to do so, *e.g.* where the goods are sold under a documentary letter of credit governed by the UCP 600 – not to indicate the name of the ship on the transport document (as there is no duty to do so under the Rotterdam Rules).²⁶⁵ This would then, in turn, leave the cargo interest – in the best case²⁶⁶ – in the same situation as it is now under the Hague-Visby Rules.²⁶⁷ In the worst case,²⁶⁸ the cargo interest would face an additional hurdle, namely to determine first on which leg of transportation the damage or loss occurred and, if such damage or loss occurred while the goods were carried on the sea leg, second, to establish the identity of the carrier.

²⁶³ Tomotaka Fujita 'Transport Documents and Electronic Transport Records' in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 161 and 170).

²⁶⁴ Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) op cit note 191 at 202; cf. CHAPTER V.III(c)(ii) above.

²⁶⁵ The UCP 600 require in their arts 20(a)(ii) and 22(a)(ii) that the respective bill of lading 'must appear to indicate that the goods have been shipped on board a named vessel' in order that they are acceptable to the bank concerned.

²⁶⁶ I.e. in case of a pure port-to-port carriage of goods by sea contract subject to the Rotterdam Rules.

²⁶⁷ Cf. CHAPTER III.II above.

²⁶⁸ I.e. in case of a door-to-door carriage of goods contract subjected to the Rotterdam Rules.

(c) 'Transport document'

(i) Definition

The term 'transport document', linked with the term 'contract particular' pursuant to art 36 RR,²⁶⁹ is defined in art 1(14) RR.²⁷⁰ Compared with the Hague-Visby Rules, the term 'transport document'²⁷¹ constitutes a new term whereas the creation of this new, generic term has different reasons.

First, the Rotterdam Rules aim at making 'international regulation applicable to a wider spectrum of contracts of carriage'²⁷² by regulating door-to-door rather than just port-to-port conveyances.²⁷³ As a consequence, the traditional terminology (such as *e.g.* bill of lading, sea waybill etc) is often no longer suitable.

Secondly, the Rotterdam Rules (while recognising 'the fundamental distinction between the various forms of contracts that are used to regulate the movement of goods around the world'²⁷⁴) try by refraining from using the traditional terminology but by employing for any such specific form of contract of carriage of goods instead the generic term 'transport document' to overcome possible problems related with such specific forms of contracts of carriage of goods (which are not necessarily understood the same way in all countries).

Hence, by defining the term 'transport document' in the manner as done in art 1(14) RR, such a definition 'recognises the fundamental characteristics common to traditional contracts of carriage, whether they are transferable contracts or not.'²⁷⁵

²⁶⁹ Cf. CHAPTER V.IV(a) above.

²⁷⁰ Cf. art 1(14) RR which reads: "'Transport document" means a document issued under a contract of carriage by the carrier that:

- (a) Evidences the carrier's or performing party's receipt of goods under a contract of carriage; and
- (b) Evidences or contains a contract of carriage.'

²⁷¹ In an international transaction involving a 'transport document', it is common that such a 'transport document' must cater for many requirements (*e.g.* confirmation of receipt of the goods *vis-à-vis* the consignee; act as one of the documents triggering the payment of an amount of money to a beneficiary if it conforms to the terms set out in a documentary letter of credit when presented; evidence of the contract of carriage entered into between the consignor and the carrier) (Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) op cit note 191 at 191). Particularly, parties to international transactions want 'to be sure that if goods are lost or damaged during transportation then the transport document will provide clear guidance as to the rights and responsibilities of both the cargo interests and the carrier.' (Ibid at 191).

²⁷² Ibid at 193.

²⁷³ Cf. art 1(1) RR.

²⁷⁴ Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) op cit note 191 at 193.

²⁷⁵ Ibid at 193.

(ii) *Duty of the carrier to issue a transport document and the scope of the duty*

It is furthermore important to know whether the carrier is under any legal duty at all to issue such a transport document. As regards the issuance of a transport document, art 35 RR²⁷⁶ is the provision of relevance.

As under the Hague-Visby Rules, the carrier has under the Rotterdam Rules a general duty ‘to issue upon delivery of the goods for carriage to the carrier or performing party and on demand of the shipper (...) a transport document (...)’²⁷⁷ unless he is excepted from doing so pursuant to so-called ‘opt-out’ rights.²⁷⁸ Article 35 RR contains, in other words, a general duty of the carrier to issue a transport document to the consignor which is, however, subject to some specific qualifications. By contrast to the Hague-Visby Rules,²⁷⁹ the Rotterdam Rules do, however, not require the issuance of a transport document in order for the Rotterdam Rules to apply.²⁸⁰

²⁷⁶ Cf art 35 RR which reads: ‘Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper, or if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper’s option:

- (a) A non-negotiable transport document (...) or
- (b) An appropriate negotiable transport document (...).’

²⁷⁷ Theodora Nikaki in D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules* (2009) 89 et seq.

²⁷⁸ A carrier is excepted from issuing a transport document if the shipper and the carrier have agreed not to use a transport document (or its electronic equivalent or it is custom, usage or practice of trade not to use one (cf. art 35 RR); Richard Williams ‘Transport documentation – the new approach’ in D Rhidian Thomas (ed) op cit note 191 at 196; The opt-out rights are necessary is it has recently become increasingly more common to carry goods by sea without using bills of lading (Tomotaka Fujita ‘Transport Documents and Electronic Transport Records’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 161 and 164).

²⁷⁹ Cf art I(b) of the HVR which requires that the contract of carriage is ‘covered by a bill of lading or any similar document of title’.

²⁸⁰ G J van der Ziel in D Rhidian Thomas (ed) op cit note 213 at 245; Francesco Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ op cit note 13 at 25.

V DETERMINATION OF THE IDENTITY OF THE CARRIER(S) UNDER THE ROTTERDAM RULES

(a) Importance and influence of a unimodal versus a multimodal transportation of the goods for the determination of the identity of the carrier under the Rotterdam Rules

The Rotterdam Rules can apply either to a contract of carriage of goods where the carriage of goods is solely by sea (unimodal transportation)²⁸¹ or also where there is a multimodal transportation of goods (under the condition that the goods are carried, at least, by sea and that all further requirements are met).²⁸² Irrespective of the various possibilities to arrange for the transportation of the goods at least partially by sea, the fact whether the goods were transported unimodally or multimodally is from a pure substantive law perspective not of relevance for answering the question who the carrier is under the Rotterdam Rules as art 1(5) RR and, if a transport document is issued, art 36(2)(b) RR apply in the same manner and do not make any distinction whether the goods have been transported unimodally or multimodally.²⁸³

(b) Importance and influence of the fact whether or not a transport document has been issued for the determination of the identity of the carrier

The applicability of the Rotterdam Rules does not depend on the fact whether a transport document has been issued or not.²⁸⁴ However, the fact whether a transport document has been issued or not can be of importance for determining the identity of the carrier under the Rotterdam Rules. Hence, the distinction has to be made on the basis whether a transport document has been issued or not.

(i) Determination of the identity of the carrier if no transport document has been issued

It is possible that no transport document is issued in terms of a contract of carriage of goods pursuant to the Rotterdam Rules. Such scenario is the case if ‘the shipper and the carrier have agreed not to use a transport document (...), or it is the custom, usage

²⁸¹ As regards the specific circumstances which must prevail for the Rotterdam Rules to be applicable, see chapter 2 of the Rotterdam Rules.

²⁸² Cf. arts 5 to 7 RR.

²⁸³ However, the fact whether goods were transported unimodally or multimodally might ultimately have impacts in terms of establishing the proof which person is liable in case of damage or loss of the goods when several modes of transport were involved under the contract of carriage of goods.

²⁸⁴ Cf. CHAPTER V.IV(c)(ii) above.

or practice of the trade not to use one'.²⁸⁵ Nonetheless, a contract of carriage of goods exists and the identity of the carrier might have to be determined. However, the determination of the identity of the carrier seems to be quite 'easy' in such a case.

First, there is only one 'document' which is relevant for the determination of the identity of the carrier, namely the contract of carriage concluded between the shipper and the carrier. Hence, as there is no transport document issued by the carrier after receipt of the goods, the chances of any subsequent diverging statements is reduced significantly.

Secondly, there is usually no transfer of rights and obligations from the shipper to a third person (as there often is if a transport document is issued) and if there is a transfer of rights and obligations, such transfer requires more than just handing over or transferring a document, *i.e.* it is not as easily effected as in the case where a transport document is issued.

Hence, the identity of the carrier is in such circumstances determined pursuant to art 1(1) read together with 1(5) RR and the carrier identified in these circumstances will always be the contractual carrier.

(ii) Determination of the identity of the carrier if a transport document has been issued

By contrast, where a transport document is issued, the identification of the carrier might involve the application of some further provisions of the Rotterdam Rules.

To begin with, there is art 1(5) RR which defines the term 'carrier' as 'a person that enters into a contract of carriage with a shipper'. From the perspective of the shipper, this provision gives a clear indication of who the carrier is. However, one has to bear in mind that the shipper and the consignee might not be the same person. Should the consignee be a person other than the shipper, the consignee becomes 'involved' in the contract of carriage only insofar as the respective transport document by its transfer to the consignee allows and provides for. With the intent of introducing international uniformity as regards the transfer of the rights and

²⁸⁵ Art 35 RR.

obligations in case of a transfer of the transport document, chapter 11 RR, *i.e.* arts 57 and 58 RR, was elaborated.

Arts 57 and 58 RR regulate the extent to which rights (and obligations respectively liabilities) incorporated in transport documents are transferred to another person such as *e.g.* the consignee.²⁸⁶ The wording of these provisions indicates that (only) specific rights (and obligations) incorporated in the negotiable transport document are transferred and not the whole contract of carriage *per se*. Hence, the consignee (who is someone other than the shipper) has solely the transport document providing it with specific rights and obligations that serves as the legal ground for making a claim based on contract. As the transport document '[e]vidences or contains a contract of carriage'²⁸⁷ concluded between the carrier and the shipper, the identification of the carrier should, in theory, not be problematic. However, one must not forget that, in practice, a transport document will only be issued by the carrier, *i.e.* without collaboration on the part of the shipper as regards the effective issuance²⁸⁸, 'upon delivery of the goods for carriage to the carrier', *i.e.* 'long after' the conclusion of the contract of carriage between the shipper and the carrier. Hence, as the shipper is interested mainly in receiving a transport document containing statements as to what goods have been shipped and indicating their condition when shipped, the shipper will not make, by itself, the rather complex legal analysis whether the identity of the carrier shown on the transport document issued by the carrier is the same as the one under the contract of carriage of goods concluded earlier on.²⁸⁹ Thus, issues as regards the identity of the carrier can arise later on if the transport document is transferred to a consignee other than the shipper.

²⁸⁶ The question of what rights and obligations third parties can obtain and incur under non-negotiable transport documents such as *e.g.* sea waybills or straight bills of lading which are not 'freely transferable from holder to holder in the same manner as negotiable (*ie* to order) bills of lading' has to be answered pursuant to the municipal law of the country concerned in the respective case (Richard Williams 'Transport documentation – the new approach' in D Rhidian Thomas (ed) *op cit* note 191 at 216 et seq.).

²⁸⁷ Art 1(14)(b) RR.

²⁸⁸ This is not to be confused with the preparation of the transport document for the issuance by the carrier. Pursuant to arts 36(1) and 36(3)(a) RR, the shipper has to furnish information as well. However, apart from that furnishing of information, the shipper is not involved in the effective issuance of the transport document.

²⁸⁹ The shipper will most likely trust on the premise 'that the bill of lading was a recordal of the actual contract of carriage' (John Hare *op cit* note 33 at 697). However, as a shipper is at liberty to 'complain upon receiving the bill of lading that its terms do not reflect the true agreement of the parties' (*Ibid* at 697), the shipper would, in my opinion, also be entitled to complain about the fact

It is exactly in such scenarios where the new art 37 RR with its ‘three legal rules’²⁹⁰ comes into play and might be able to relieve the consignee to some extent of its ordinary burden of proof concerning the identification of the ‘correct’ carrier for suing such in case of damage or loss of the goods (or delay).²⁹¹ As regards the functioning and possible pitfalls of art 37 RR, reference is made to CHAPTER V.III above.

that the party indicated as carrier in the transport document is not the same as with which a contract of carriage was concluded in the first instance.

²⁹⁰ D Rhidian Thomas in D Rhidian Thomas (ed) op cit note 218 at 71.

²⁹¹ Tomotaka Fujita ‘Transport Documents and Electronic Transport Records’ in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli op cit note 85 at 173.

CHAPTER VI CONCLUSION

For a long time, goods have been carried by sea whereas particular legal devices, such as *e.g.* the bill of lading, evolved in order to facilitate the trade of such goods while they were in transit at sea. Due to the technical development in the shipping industry, in particular containerisation, which made it possible to transport containerised goods from one inland place to another without having to open the container and repack them while they were in transit, the merchants raised the demand for concluding only one contract of carriage covering the whole door-to-door transport. However, the legal instruments evolved so far (and in the meantime regulated by international unimodal carriage regimes such as *e.g.* the Hague-Visby Rules) proved no longer to be adept for this new demand. In order to overcome the problems generated by the unimodal carriage conventions of mandatory nature (if implemented/adopted), the shipping industry respectively the freight forwarders started to offer the service requested by the merchants on a contractual basis.

No legal issues arise if the carriage of the goods is executed without any problems such as damage or loss. However, in case of damage or loss of the goods carried, major legal issues can arise in connection with the determination of the identity of the carrier responsible and liable for the damage or loss suffered. It is, *inter alia*, in this respect – and irrespective whether the carriage is of unimodal or multimodal nature – that the Rotterdam Rules try to provide some clarity and legal certainty in case a transport document has been issued that has been transferred to a consignee (other than the shipper). However, it seems that the onerous question of who the carrier is will not become utterly redundant even if provisions relating to the identification of the carrier (as they are contained in the Rotterdam Rules) are adopted and implemented widely. Nevertheless and even though such provisions relating to the identification of the carrier might not be of the assistance desired in every case, they seem to provide a step in the right direction in order to improve the situation of cargo interests.

For the sake of the trading of goods business and for the further development of the law of the carriage of goods, it is to be hoped that provisions relating to the identification of the carrier as contained in the Rotterdam Rules will be adopted and implemented uniformly and widely around the world by major and minor shipping nations.

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