

**UNIVERSITY OF CAPE TOWN
FACULTY OF LAW
SCHOOL FOR ADVANCED LEGAL STUDIES
DEPARTMENT OF COMMERCIAL LAW**

**LLM DISSERTATION: SHIPPING LAW
CML 5616W: Masters in Shipping Law Dissertation**

TITLE:

Are the relevant provisions of the Rotterdam Rules dealing with the identification of the carrier an improvement over the Hamburg and Hague-Visby Rules?

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Masters of Laws (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Masters of Laws (LLM) dissertations contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Date: 28 August 2017

Word Count: 23 924

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Are the relevant provisions of the Rotterdam Rules dealing with the identification of the carrier an improvement over the Hamburg and Hague-Visby Rules?

Ruvarashe Samkange

Acknowledgements

I would like to thank my parents, Godfrey and Porai Samkange, for their unconditional love and support. You have given me room to explore my passion, for that I will always be grateful.

I would like to thank Professor Bradfield, for his guidance and patience.

My siblings, Chido, Tinashe and Tatenda, for their friendship and humour.

R.B and L.M, thank you for our friendship, you motivate me in countless ways. Thank you to all my friends for their joy, encouragement and above all, love.

“Always the tone of surprise.”

— J.K. Rowling, Harry Potter and the Deathly Hallows

Contents

CHAPTER 1 INTRODUCTION	6
I Aim of the dissertation	6
II Background to research	6
III International Regulation and the need for Uniformity	8
IV The Carrier Identity Problem.....	8
V Outline of Dissertation.	10
CHAPTER 2 THE PROBLEM OF IDENTIFYING THE CARRIER	12
I Who is confronted with the carrier identity problem?.....	12
II Why is the carrier’s identity important?	14
III Ways in which the carrier’s identity may be determined.	14
IV What are the particular difficulties in identifying the carrier?	15
(a) Insufficient Information to Identify Person or Entity that is the Contractual Carrier	15
(b) Different Contractual and Performing Parties	22
(c) Multimodal Transportation.....	22
CHAPTER 3 THE CARRIER IDENTITY PROBLEM UNDER THE HAGUE-VISBY RULES AND THE HAMBURG RULES.	26
I Introduction	26
II Hague-Visby Rules.....	26
III Hamburg Rules.....	28
IV The Carrier Identity Problems	30
(a) When there is insufficient information to identify the person or entity that is the contractual carrier	30
(b) When there are different contractual and performing parties.....	32
(c) Multimodal transportation of goods	34
CHAPTER 4 THE ROTTERDAM RULES AND THE CARRIER IDENTITY PROBLEM	36
I Introduction	36
II The definition of ‘carrier’ under the Rotterdam Rules	36

III	Addressing the carrier identity problems.....	38
(a)	When there is insufficient information to identify the person or entity that is the contractual carrier	38
(b)	When there are different contractual and performing parties.....	43
(c)	Multimodal transportation of goods	45
CHAPTER 5 EVALUATION OF THE PROVISIONS UNDER THE ROTTERDAM RULES IN PROVIDING A SOLUTION TO THE CARRIER IDENTITY PROBLEM		48
I	Introduction	48
II	The carrier identity problems	48
(a)	Identifying the carrier	48
(b)	Insufficient information to identify the person or entity that is the contractual carrier ..	51
(c)	When there are different contractual and performing parties.....	53
(d)	The carrier identity problem in the context of multimodal transportation.	55
III	Commentary on the successes and shortfalls of the Rotterdam Rules in solving the identity of the carrier problem(s)	55
CHAPTER 6 CONCLUSION.....		59

CHAPTER 1 INTRODUCTION

‘The lynchpin of any compulsory international carriage regime concerning carriage is a clear definition of who is the “carrier” - the central character inescapably obliged to care for and look after the goods, to provide a seaworthy ship to carry them, and so on, and who has to be differentiated from the other who remain free to agree whatever terms they can get. The difficult matter is not so much to distinguish him from the cargo-owner (that distinction is obvious), but to deal with various intermediaries in between.’¹

I Aim of the dissertation

This aim of this dissertation is to assess whether the relevant provisions in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea² that aim to address some of the problems in identifying the contractual carrier of goods by sea are an improvement on the provisions, if any, of the Hague-Visby Rules,³ and the Hamburg Rules⁴ in addressing these problems.

The dissertation will argue that the relevant provisions of the Rotterdam Rules relating to the identity of the carrier are an improvement on the relevant provisions in the Hague-Visby Rules and the Hamburg Rules in that they provide a more coherent and clearer solution to the carrier identity problem than the previous carriage regimes did as well as providing solutions where the previous dispensations did not, even though they do not solve the carrier identity problem entirely satisfactorily.

This dissertation will not address all manifestations of the carrier identity problem and will use specific examples to highlight the various aspects of the fundamental problem in order to assess whether the Rotterdam Rules have been an improvement on the previous carriage regimes.

II Background to research

The carriage of goods by sea is based on contracts of carriage. A contract of carriage entails one party (the carrier) being tasked by another (the shipper) with transporting goods by sea

¹ Professor Andrew Tettenborn ‘Freedom of contract and the Rotterdam rules: framework for negotiation or one-size-fits-all?’ in Professor D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules. An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2009) 83.

² United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea dated 11 December 2008 (Rotterdam Rules).

³ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 Brussels, as amended by the Protocol of 1968, Brussels, (Hague-Visby Rules).

⁴ United Nations Convention on the Carriage of Goods by Sea, 1978 Hamburg, adopted on 31 March 1978, (Hamburg Rules).

from one location to another.⁵ The contract of carriage plays a crucial role in that it is likely to be a source as to the carrier's identity, however, it may not always be accessible to a third party consignee to whom the identity of the carrier would be of importance when there is doubt on the matter.

The parties involved in the carriage of goods are the consignor/shipper that wishes to transport the goods and the carrier who undertakes to transport the goods. The consignee or the consignor, depending on the contract of carriage terms⁶ will usually be the party confronted with any problem relating to short delivery or the delivery of damaged cargo. The consignee is not the party to the original contract for the carriage of goods but rather it is the party to whom goods are delivered. The consignee will have arranged for the goods to be delivered to them based on sea transport documents such as negotiable bills of lading and is unlikely to have seen the original contract of carriage. The consignee would, under a negotiable bill of lading would acquire the contractual rights under transfer of the bill of lading.⁷ The consignee would be reliant on the bill of lading to determine the identity of the contractual carrier in order to seek redress for any loss of or damage to the cargo when the goods were being transported. The consignee is the party with potentially the most acute problem of identifying the carrier because the person did not enter a contract of carriage with the carrier. For the purpose of this dissertation, the focus will be on the consignee as the cargo claimant seeking the identity of the carrier.

In practice, the carriage of goods by sea does not solely involve the consignor, the carrier and the consignee. There are various intermediaries involved in the carriage process. More often than not transport documents are prepared by agents or representatives of the parties involved.⁸ Thus the parties involved in the carriage process are likely to use agents such as the carrier's agents, the master, freight forwarders, stevedores or loading agents. The difficulty with intermediaries who are agents arises because of the difficulty of identifying their principal whom they represent in the conclusion of the contract of carriage and whom they bind when acting within the course and scope of their authority. The contractual carrier's identity may not be evident, or easily ascertainable, when there are various parties involved in the carriage process with a cornucopia of documents that have the potential to mask the carrier's identity.

⁵ G B Bradfield 'Shipping' in W A Joubert (founding ed) *The Law of South Africa* vol 25 (2) Second Edition Replacement (2016) para 94.

⁶ Paul Todd *Principles of the Carriage of Goods by Sea* (2015).

⁷ John F Wilson *Carriage of Goods by Sea* 6 ed (2008) 361.

⁸ Stephen Girvin *Carriage of Goods by Sea* 2 ed (2007) 16.

III International Regulation and the need for Uniformity

It is something of a truism that, '[i]n the context of international trade and the emergence of a global economy, shipping remains extremely important'.⁹ The fact that much shipping is international in nature while legal systems are national, with differences depending on their jurisdiction, does call for regulation by international regimes. The regulation by international regimes is based on a desire for international uniformity that can be achieved through international intervention.¹⁰ The international system of carriage has been governed by different regimes that have attempted to regulate contracts of carriage.¹¹ The regimes of concern to this dissertation are the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. These regimes are not mandatory but rather may be adopted by states, or by parties to the contract carriage themselves.¹² There is a lack of international uniformity and consistency in the rules governing international trade.¹³ This is exacerbated by the fact that the international regimes co-exist rather than preceding one another. Thus states and parties to contracts of carriage are free to choose which regime applies and are free to modify them. Currently therefore, there is a mixture of various regimes governing the international carriage of goods creating uncertainty and confusion.¹⁴

IV The Carrier Identity Problem

The carrier identity problem is fundamentally one of identify the party to sue for recovery of damages for breach of the contract of carriage and has been an issue of concern for cargo claimants.¹⁵ It is particularly a third party consignee under a bill of lading that may confront difficulty in identifying the carrier because it would not have been party to the original contract of carriage and so would not know with whom the shipper of goods had contracted for the carriage of the goods. This consignee, when faced with a breach of the contract of carriage, would be reliant on the bill of lading, and perhaps the governing carriage regime, to determine the identity of the party to sue for the breach.

⁹ M Lourens 'An Overview of the Regimes Governing the Carriage of Goods by Sea' (1999) 10 *Stellenbosch Law Review* 244 at 244.

¹⁰ *Ibid.*

¹¹ *Ibid* at 245.

¹² *Ibid* at 246.

¹³ Theodora Nikaki 'The Carrier's Duties under the Rotterdam Rules: Better the Devil you Know' (2010) 35 (1) *Tulane Maritime Law Journal* 1 at 2.

¹⁴ Kofi Mbiah 'Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules' at 2, available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf>, accessed 29 January 2017.

¹⁵ David Chong 'Unraveling the Identity of the Carrier' (1994) 6 *Singapore Academy of Law Journal* 182.

It has been stated that there is ‘no general answer to the question of who is the carrier.’¹⁶ This does not mean that there have been no attempts to find solutions to the carrier identity problem. This problem existed before the carriage regimes and continues to exist because of the failure of the carriage regimes to provide adequate solutions.

The international carriage regimes have the ability to be the solution to the identity of the carrier problem in international carriage. This dissertation aims to identify the relevant provisions in the Hague-Visby, Hamburg and Rotterdam Rules that relate to the carrier identity problem and to analyse whether these provisions have adequately dealt with the carrier identity problem. In doing this, the dissertation seeks to discuss the shortfalls of the Hague-Visby and Hamburg Rules and assess whether Rotterdam Rules have adequately addressed and provided solutions to the carrier identity problem.

The Hague-Visby Rules and the Hamburg Rules can be said to have some shortcomings when it comes to addressing the carrier identification problems.¹⁷ The Rotterdam Rules seek to fill the gaps relating to the identification of the contractual carrier left by the previous regimes and this dissertation seeks to analyse whether the Rotterdam Rules have provided adequate solutions to the carrier identity problem, thus succeeding where the previous regimes did not.

The Rotterdam Rules do not replace the previous Hamburg and Hague-Visby Rules but rather are another carriage regime option for parties involved in the carriage of goods. The Rules are intended to be a uniform set of rules that reflect the modern international carriage of goods.¹⁸ The Rotterdam Rules intend to be more specific or clarify what the Hamburg and Hague-Visby Rules fail to cover. There is no international uniformity in regards to the adoption of these various regimes, with the Hamburg Rules having only been ratified by 20 states¹⁹ and so the Rotterdam Rules seek to reduce or minimise the disparities and encourage international uniformity as well reflect modern shipping practices.²⁰ The Rotterdam Rules are said to be a consequence of the ‘need to update and modernize...’, and this is illustrated in the new

¹⁶ Caslav Pejovic ‘The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law’ (2000) 31 *Journal of Maritime Law & Commerce* 379 at 405.

¹⁷ Ibid.

¹⁸ Nikaki op cit note 13 at 5.

¹⁹ Kofi Mbiah ‘Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules’ at 3, available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf>, accessed 29 January 2017.

²⁰ Ibid.

provisions included in the convention that are not found in either the Hamburg or the Hague-Visby Rules.²¹

The Rotterdam Rules were introduced as a consequence of the increase in containerization in shipping, the carriage of goods by multimodal transport and the narrow scope of the Hague-Visby Rules.²²

The Rotterdam Rules, in being more extensive and clear in the relevant provisions regarding the carrier, attempt to establish more clearly who is responsible when there is a claim against a carrier. By considering how the problems arising from carrier identity are dealt with under Hague-Visby Rules and Hamburg Rules one can analyse whether the provisions of the Rotterdam Rules have solved the carrier identification problem.

V Outline of Dissertation.

Chapter 2 identifies those problems associated with the identification of the carrier that this dissertation will consider. This chapter will highlight the difficulties with the identification of the carrier; to whom the carrier identity problem is of concern and when the carrier identity problems arise. In order to assess whether the Rotterdam Rules are an improvement on the previous regimes it is necessary to identify and discuss the carrier identity problems.

The three carrier identity problems of concern in this dissertation are; when there is insufficient information to identify the person or entity that is the contractual; when there are different contractual and performing parties and; the carrier identity problem in the context of multimodal transportation. This chapter will discuss these three problems in order to highlight the contexts in which the carrier problem may arise.

Chapter 3 considers how, if at all, each of the Hague-Visby Rules and Hamburg Rules, addresses each of the carrier identity problems identified in this dissertation to lay a foundation for a comparison between these regimes' solutions to the problems and the provisions of the Rotterdam Rules that attempts to solve them. The chapter will identify how the different regimes have sought to address the carrier identity problem and how the relevant provisions in the regimes have been interpreted and applied in practice. This chapter will analyse the shortcomings of these Regimes and the consequences when the Regimes do not fully address the problems that arise in the identification of the carrier.

²¹ Michael F Sturley 'General Principles of Transport Law and the Rotterdam Rules' in Meltem Deniz Güner-Özbek (ed) *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (2011) 79.

²² Sabena Hashmi 'The Rotterdam Rules: A Blessing?' (2011-2012) 10 *Loyola Maritime Law Journal* 227 at 228.

Chapter 4 examines the provisions of the Rotterdam Rules that relate to the identification of the carrier. This chapter will consider the solutions provided to the selected carrier identity problems to provide a basis for the assessment of whether the solutions in the Rotterdam Rules are an improvement in this regard on the preceding carriage regimes. The carrier identity problems in the context multimodal transportation will be addressed in this chapter as the Rotterdam Rules can operate as a multimodal transport carriage regime. The chapter examines how the Rotterdam Rules seek to provide preventative measures and solutions to the carrier identity problem. This chapter lays the foundation for the analysis of the solutions provided on the carriage regime regarding the carrier identity problem.

Chapter 5 evaluates the solutions to the identity of the carrier problems in the various international regimes and compares the solutions in the Rotterdam Rules with those in the two preceding sea carriage regimes to determine whether and, if so to what extent, the Rotterdam Rules' solutions are an improvement. The shortcomings of the Hague-Visby Rules and the Hamburg Rules in providing solutions the carrier identification problems are examined, and the relevant provisions of the Rotterdam Rules analyzed to determine whether they have sufficiently dealt with these shortcomings. It concludes with an assessment of whether the relevant provisions of the Rotterdam Rules have successfully solved this problem.

Chapter 6 concludes that the Rotterdam Rules are an improvement on the Hague-Visby and Hamburg Rules but do not solve all the problem of identifying the contractual carrier.

CHAPTER 2 THE PROBLEM OF IDENTIFYING THE CARRIER

‘The identity of the contracting carrier is of great significance. It is significant because once the identity of the carrier has been ascertained, persons who have maritime claims against the carrier may bring into motion all the remedies available against the carrier.’²³

I Who is confronted with the carrier identity problem?

The third party consignee is the person or entity that will be confronted with the carrier identification problem when they, as the buyer of the goods carried by sea, become the cargo owner. The consignee is usually named in the bill of lading or waybill as the receiver of the goods transported by sea.²⁴ In some cases the consignee will not have been party to the original contract of carriage as that is between the consignor and the carrier. The consignor is defined as the person whose goods are transported by the carrier.²⁵ The consignor can be named in the bill of lading as the shipper of goods.²⁶ As the other party to the contract of carriage, the consignor is not the party of concern in this dissertation. This is because the consignor will not struggle to determine the carrier’s identity having entered into a carriage of contract with the carrier. In some cases the consignee would also be the consignor when it is both the sender and receiver of the goods. The consignee could also be the assignee who is the person who received the rights from the consignee.²⁷ The consignee, as described above, will be identified as the cargo claimant in this dissertation. The documents of concern in this dissertation are the contract of carriage and the sea transport documents, particularly the negotiable bill of lading. The carrier identity problem may arise in relation to other sea transport documents such as sea waybills. These problems will not be fundamentally different from the problems illustrated through the bill of lading. For the context of this dissertation, the negotiable bill of lading is the focal instrument for the problems of carrier identification.

The carrier identity problem is fundamentally a problem of identifying the defendant in an action to recover damages whether in contract or delict. The consignee who was not the shipper of goods and not party to the original carriage contract, as in the case of a sale contract on CIF terms would acquire the contractual rights against the carrier and ownership of the goods when the bill of lading is transferred in respect of the carriage of the goods. Transfer of the bill of lading occurs when the bill is negotiable and transferred to the consignee by the

²³ Chong op cit note 15 at 182.

²⁴ Simon Baughen *Shipping Law* 6 ed (2015) lxxi.

²⁵ Girvin op cit note 8 at 18.

²⁶ Baughen op cit note 24.

²⁷ Felix W H Chan, Jimmy J M Ng and Bobby K Y Wong *Shipping and Logistics Law: Principles and Practice in Hong Kong* (2002) 533.

method required to qualify the consignee as the holder of the bill of lading. A negotiable bill of lading is a transferrable bill of lading which gives the transferee as good as title as the transferor of the bill of lading.²⁸ The consignee who acquires the contractual rights of claim and ownership of the goods, upon discovery of the loss of or damage to the goods, will be able to sue in contract or delict. The carriage regimes make it clear that the carrier's liability for loss whether contractual or delictual is still covered by the carriage regimes.

To recover in delict for loss of or damage to cargo, a claimant has to prove, among other elements, that such loss or damage was attributable to the fault of the person sued.²⁹ In the context of carriage of goods by sea, this person would generally be the master or member of the crew of the carrying vessel as the person directly responsible for the loss in delict, and such person's employer would then generally be vicariously liable for such loss.³⁰ The party liable in delict may be someone other than the contractual carrier, for example, when the carrying vessel is chartered not by demise and the charterer not by demise is the contractual carrier. The charterer not by demise would not be the employer of the master or crew and would therefore be vicariously liable for their actionable wrongs. This situation gives rise to the distinction between the contractual carrier and the actual or performing carrier which will be discussed in later chapters. The carriage is carried out, through the master and crew, by the employer of the master and crew. The employer, however, does not contract with the consigner. This may give rise to the carrier identity problem.

To recover on a contractual basis, the cargo claimant would sue the contractual carrier as the party responsible for the breach of contract. The consignee will be able to sue for the losses under a contract when the rights of claim against the carrier under the contract of carriage have been transferred to the consignee.³¹ When the claim for the losses is contractually based the consignee would claim against the contractual carrier. The contractual carrier may also be the person vicariously liable as the employer of the master or crew responsible in delict for the loss of or damage to the cargo, as would be the case where the contractual carrier was either the owner or the demise charterer of the carrying vessel. Ascertaining the identity of the shipowner is a relatively easy task as it can be found on the ships register and so this does not give rise to the carrier identity problems that are of concern to this dissertation. The carrier identity problem

²⁸ *Kum v Wah Tat Bank* [1971] 1 Lloyd's Rep 439 (PC) 446.

²⁹ Francis McManus *Delict Essentials* (2013) 1.

³⁰ *Ibid* at 109.

³¹ Charles Debattista 'Cargo Claims and Bills of Lading' in Yvonne Batz (ed) *Maritime Law* 3 ed (2014) 196.

may arise, however, in the situation where the vessel is under a demise charter and the third party consignee would not know that the vessel is under a charterparty arrangement.

II Why is the carrier's identity important?

The identity of the carrier is important as it affects key issues relating to enforcing the claim against the carrier. In litigation, claimants have to consider the consequences of claiming against the wrong defendant.³² These consequences include incurring unnecessary costs and generally wasting time, particularly bearing in mind the aspect of prescription. The cargo claimant seeks to pursue a claim against the party actually responsible for the loss of or damage to the cargo. To do this this, the claimant has to be able to identify the correct party.³³

The claimant must bring the claim within the correct time-frame as such claims are likely subject to a time-bar.³⁴ It is not reasonable to leave it to the claimant to search beyond the bill of lading or relevant transport document to correctly determine the identity of the contractual carrier. This may take considerable time and increases the pressure placed on the claimant to bring the claim within the prescription period. The difficulty with identifying the carrier is exacerbated in the case of carriage claims under these conventions, which often have truncated prescription periods.³⁵

The identity of the carrier may also have an effect on whether the cargo claimant can effect an 'admiralty arrest of a vessel beneficially owned by the contracting carrier.'³⁶ The carrier is not always the shipowner. In this situation the cargo owner may find it difficult or, in some instances, impossible to recover security for their claim through the arrest of the carrying vessel.³⁷

III Ways in which the carrier's identity may be determined.

In order to address the carrier identity problem it is imperative to note the circumstances in which the carrier's identity can be determined. If the terms in the carriage of contract and the sea transport documents are clear as to the carrier's identity then the carrier identity problem does not arise. When the terms in sea transport documents or the contract of carriage are not clear they serve as an impediment to discovery to a third party not party to the contract of carriage or who has the sea transport documents transferred to him. The importance of these

³² Pejovic op cit note 16.

³³ Chong op cit note 15 at 182.

³⁴ Ibid.

³⁵ Hague-Visby Rules, Article 3 (6); Hamburg Rules, Article 20; Rotterdam Rules, Article 62.

³⁶ Chong op cit note 15 at 182.

³⁷ Won-Jeong Lee 'A Comparative Analysis on the Identification of the Bill of Lading Carrier' (2006) 10 (2) *Journal of Korea Trade* 143 at 146.

documents has been noted by the courts as the careful examination of the contracts and the relationships borne in such contracts will assist in deducing the identity of the carrier.³⁸ The identification of the carrier is a question of fact that can be drawn from the circumstances surrounding the carriage contract and the transport documents issued in relation to the carriage of goods by sea.³⁹ There are various ways in which the carrier may be identified, however, it must be understood that the solution to the carrier's identity problem is not so straightforward. The carrier identity problem can stem from the difficulties or lack of clarity that is evident from the way in which these methods of identifying the carrier are executed in practice. The core question in solving this problem is to ask is which party assumed responsibility for the carriage and delivery of the goods.⁴⁰

IV What are the particular difficulties in identifying the carrier?

The carrier identity problem could appear to be easily solved by stating that the claimant should claim against the other party to the contractual agreement but this is not always easily the case as there may be instances whereby it may be difficult to identify that other contractual party.⁴¹

The aim here is not to address all the carrier identity problems, but to identify three situations in which it is difficult to establish the identification of the carrier as specific instances in which the problem arises. These specific instances are; when there is insufficient information to identify person or entity that is the contractual carrier; when there are different contractual and performing parties and; the carrier identity problem in the context of multimodal transportation. These problems are interrelated and may overlap in particular instances therefore the concerns that arise under one carrier identity problem may not be completely dissimilar from the others.

These carrier identity problems at the centre of this dissertation are to be discussed in the context of the negotiable bill of lading. The identity of the carrier problem may arise in other context however these would be variation of the same fundamental problem

(a) Insufficient Information to Identify Person or Entity that is the Contractual Carrier

The third party who acquired the consignor's rights under the bill of lading and was not party to the original contract of carrier but obtains contractual rights and obligations when they are

³⁸ Pejovic op cit note 16 at 394.

³⁹ Christopher Giaschi 'Who is Carrier? Shipowner or Charterer?' available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3urzsrtdRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usq=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw, accessed on 20 January 2017.

⁴⁰ Ibid.

⁴¹ Charles op cit note 29 at 189.

transferred to him may be confronted with the carrier identity problem. The consignee would not have been privy to the original contract of carriage and so the bill of lading can serve as an important tool in establishing the identity of the carrier⁴² as it may consist of the terms of the carriage contract which are usually indicated on the reverse of the bill of lading.⁴³ The bill of lading can both assist with and give rise to the carrier identity problem for the claimant. This carrier identity problem can be broken down so as to understand the facets of the problem that arise in the when the carrier identity problem arises because the information provided in the transport document fails to provide a clear picture of who the carrier is. These facets of this carrier identity problem have the potential to overlap nevertheless distinguishing these ‘sub-problems’ in some instances assists in bringing a coherent understanding to the bigger carrier identity problem.

(i) *Insufficient information*

Lack of information arises when the details of the contractual carrier are insufficient or in some cases wrong or not included at all. This lack of information on the contractual carrier makes it difficult for the contractual carrier to be identified as an entity with legal personality that can be sued or at least identify the contractual carrier with relative ease in the sense of the third party claimant not having to undertake further investigation within the truncated prescription periods.

The carrier identity problem is relevant to the information provided on the face of the bill of lading. The bill of lading is usually drawn up and issued by the carrier containing clauses on the front and reverse of the document, this includes standard and non-standard terms.⁴⁴ The bill of lading contains important information in regard to the contracting parties and terms on which they agree upon. It serves as evidence as to the contents of the contract of carriage such as the name of the contracting parties.⁴⁵ The carrier’s name can usually be indicated on the face of the bill of lading.⁴⁶ However the face of the bill may not always provide accurate or sufficient or, in some cases, any information as to the carrier’s identity. The carrier’s name on the face of the bill of lading is of importance to the third party holder who is not party to the original contract of carriage as it will serve as evidence as to the carrier’s identity.⁴⁷ In some instances

⁴² Indira Carr ‘Carriage of Goods by Sea: Bills of Lading and the Carriage of Goods by Sea Act 1971’ in Indira Carr, Peter Stone (eds) *International Trade Law* 5 ed (2013) 220.

⁴³ Girvin op cit note 8 at 39.

⁴⁴ Richard Aikens, Richard Lord and Michael Bools *Bills of Lading* 2 ed (2015) 177.

⁴⁵ Pejovic op cit note 16 at 398.

⁴⁶ Ibid.

⁴⁷ Lee op cit note 37 at 150.

where the bill of lading does not clearly indicate the carrier's name the courts have given the bill of lading holder the right to sue the vessel's owner who can be identified through the vessel's name.⁴⁸ The third party holder seeking to enforce a claim against a carrier will not have access to the carriage contract and so will rely on the information provided on the bill of lading.

Insufficient information in the bill of lading can include instances where the bill of lading fails to make it clear who the carrier is by not referring to the identity of the carrier; referring to the carrier by its trade name or their booking agent,⁴⁹ or the bill of lading being signed by a representative who does not indicate on whose behalf the signature was appended.⁵⁰

This problem is addressed in the Rotterdam Rules, which calls for the contract particulars to contain details that are aimed to make the identification of the carrier a less burdensome task for an interested party.⁵¹ This dissertation will address, in Chapter 3 and 4, how the carriage regimes and the courts have addressed the conflicting information between the face and the reverse of the bill of lading.

(ii) Conflicting indicators in the bill of lading as to the contractual carrier's identity

It has been noted that a bill of lading may contain different information on the face and on the reverse regarding the carrier's identity. Conflicting information may suggest that more than one party may be the contractual carrier when the face of the bill of lading identifies a certain party as the carrier and the reverse of the bill of lading identifying another party as the carrier. The identity of the carrier problem may occur situations where there are contradictory indicators on the bill of lading as to whom of the charterer not by demise and shipowner or disponent owner is the party contractually responsible for the carriage.⁵² A third party who holds the bill of lading after it has been issued to the shipper by the carrier does not always know that the vessel may be under a charterparty arrangement.⁵³ Such third parties are usually not concerned with such matter or even aware that there is a charterparty arrangement. The difficulty with charterparties does not lie in the fact that they are charterparties but rather who,

⁴⁸ Pejovic op cit note 16 at 401.

⁴⁹ David Yates, Paul Todd, Malcolm Clarke et al (eds) *Contracts for the Carriage of Goods by Land, Sea and Air* (1993).

⁵⁰ Ibid at 380.

⁵¹ The Rotterdam Rules Article 36 (1), (2) and (3).

⁵² Gard Insight No 163 'A Charterer's involvement in cargo claims', 1 August 2011, available at <http://www.gard.no/web/updates/content/53043/a-charterers-involvement-in-cargo-claims>, accessed on 24 January 2017.

⁵³ Pejovic op cit note 16 at 380.

in the multitude of persons involve in the carriage could be identified as the contractual carrier.⁵⁴

This carrier identity problem arose in the case of *Homburg Houtimport BV v Agrosin Private Ltd* (the *Starsin*).⁵⁵ In this case the goods were carried in conformance to contracts of carriage contained in/ evidenced in a series of bills of lading. One of the issues the House of Lords dealt with was how to solve the issue of contradictory evidence in the bill of lading. The House of Lords allowed the shipowner's appeal stating that the terms of specially chosen by the parties should have greater weight attached to them than standard terms and conditions.⁵⁶ The House of Lords further found that when the bills of lading contain a clear and unambiguous statement on their face that were only made with one sole carrier they were charterer's bills of lading regardless of the contradictions on the back of the bills of lading.⁵⁷

What is relevant from this judgment for the purposes of this dissertation is the approach of the House of Lord's to the contradictions in the bills of lading and how to address such contradictions. Of particular importance to the carrier identity problem are whether demise clauses and identity of carrier clauses should carry more weight than the information on the face of the bill of lading. Demise clauses and identity of carrier clauses are often included in a bill of lading, they have element in common but are distinguishable. The demise clauses defines who the carrier is and in doing so distinguish between whether the bill of lading is a charterer's or a shipowner's document.⁵⁸ The purpose of the demise clause is to protect the shipowner from being liable to the cargo claimant.⁵⁹ The identity of carrier clause will name either the shipowner or the charterer as the carrier under the bill of lading and this serves as a tool of providing clarity regarding who is the carrier when there is doubt.⁶⁰ Demise clauses and identity of carrier clauses do have some differences with one of the main differences being that 'the demise clause extends liability to the demise charterer.'⁶¹ These clauses are relevant to the identity of the carrier problem and may assist in solving the problem. The demise clause and the identity of carrier clause may assist in identifying the carrier's identity when the carrier is not explicitly named on the face of the bill of lading.⁶² The effectiveness of the demise and

⁵⁴ Yvonne Baatz (ed) *Maritime Law* 2 ed (2011) 189.

⁵⁵ *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Baughen op cit note 24 at 30.

⁵⁹ Lee op cit note 37 at 150.

⁶⁰ Pejovic op cit note 16 at 386.

⁶¹ Pejovic op cit note 16 at 401.

⁶² Lee op cit note 37 at 150.

identity of carrier clauses as means to identify the carrier is not absolute. When there are terms on the bill of lading that provide contradicting evidence such the signature on the face of the bill of lading or the stamp or logo of the carrier that serve as indicators as to the carriers identity demise clauses and identity of carrier clauses may be overridden.⁶³ This evidence includes situation whereby the bill of lading on its face identifies a charterer as the carrier thus putting the identity of carrier clauses, which lists the shipowner as the carrier, into doubt.⁶⁴

The House of Lords took the approach that such clauses, as standard terms in a contract, were not to be given greater weight than the intention of the parties as illustrated by the terms they chose to include into the contract.⁶⁵ The *Starsin* judgment also highlights the indicators that may be used to identify the carrier despite the presence of demise and identity of carrier clauses.

When the charterer's logo and printed words are clearly marked on the face of the bill of lading and the reverse of the bill of lading contains clauses stating that the carrier was the person on whose behalf the bill of lading was signed demise clauses and identity of carrier clauses may be not conclusive evidence as to the identity of the carrier. This case raised an important outcome that would come to be influential in relation to the Rotterdam Rules when the face of the bill of lading or a document accurately reflects the agreement between the two parties then contradictory evidence in the small print should not have greater weight attached to it than the information provided on the face of the document.⁶⁶ The discussion about the contradictions between the face and the back of the bill of lading and the influence of this judgment regarding the Rotterdam Rules is further explored in Chapter 5.

An example of contradictory indicators giving rise to the carrier identity problem is when the charterer's bill is signed by the master on behalf of the charterer but with an identity of carrier clause or demise clause on the reverse claiming that the owner or demise charterer is to be sued.⁶⁷ The demise clauses and the identity of carrier clauses in the bill of lading are inserted in a bill of lading as a means to identify the carrier.⁶⁸

⁶³ Jonathan Lux and Ince & Co (eds) 'Shipping 2011' at 64, available at www.gettingthedealthrough.com, accessed on 25 January 2017.

⁶⁴ Pejovic op cit note 16 at 386.

⁶⁵ *The Starsin* supra note 55.

⁶⁶ Ibid.

⁶⁷ Baughen op cit note 24 at 31.

⁶⁸ Miranda Karali and Charles Smith 'UK: Identity of Carrier Conundrum Finally Resolved', available at <http://www.mondaq.com/x/22203/Marine+Shipping/Identity+Of+Carrier+Conundrum+Finally+Resolved>, accessed on 17 January 2017.

(iii) *Where it is unclear on whose behalf the representative who issued the bill of lading acted*
In some instances the master may have two principals. The Master may issue the bill of lading on behalf of his employer, whether that is the shipowner or the disponent owner of the vessel. The master issues bills of lading on behalf of the carrier when the carrier is the disponent owner or the shipowner, in this situation the carrier would be either the contractual and actual carrier or performing party.⁶⁹

Identity of carrier problems also arise in situations in which the contractual carrier is a person or entity other than the shipowner or disponent owner. The master may issue the bill of lading on behalf of the charterer not by demise. In this case the contractual carrier is the charterer but the vessels owner or disponent owner, through the master, is the actual or performing party. The carrier identity problem does not arise when it is clear from the bill of lading that it was issued by the master on behalf of the charterer not by demise as well as the bill not containing any contradictory evidence. The carrier identity problem does arise when it is not clear who the master was representing when issuing the bill and the issued bill of lading is the owner's standard bill of lading or when the bill contains contradictory evidence as to the contractual carrier's identity.

When the ships agent's issues the bill of lading the agent's principal would have to be identified or it can give rise to the carrier identity problem. This was the situation in the case of the *Starsin*. The vessel was on a time charter with the bills of lading were signed on their face by representatives of charterer and the charterer was described on the face as the carrier.⁷⁰ The reverse of the bills of lading contained demise clauses and an identity of carrier clause which stated that the bills of lading evidenced a contract between the owner of the goods and the shipowner.⁷¹ The query of the matter was the identity of the party responsible for the damage caused to the goods during the voyage; whether the bills of lading were owner's bills or charterer's bills of lading.⁷²

This case highlights one of the carrier identity problems, the situation where there is a lack of clarity resulting from the fact that the bill of lading is issued by a representative of a principle contractual carrier but it is unclear on whose behalf the representative is acting on when issuing the bill of lading. When there is uncertainty as to whether the bill of lading is the owners or the charterer the claimant can actually sue both. This could be a potential solution

⁶⁹ Pejovic op cit note 16 at 385.

⁷⁰ *The Starsin* supra note 55.

⁷¹ Ibid.

⁷² Ibid.

for dealing with the carrier identity problem. One of the defendants may dropout as that entity would not have been the contractual carrier. This avoids the issue of prescription periods. In the *Starsin* this was not sensible as the charterer was insolvent and so the carrier identity problem had to be solved by the court.

It has been stated that the carrier identity problem ‘lies in the way bills of lading are signed and by whom’.⁷³ The signature on the bill of lading can be said to be a crucial tool for the identification of the carrier.⁷⁴ This is based on the assumption that the carrier or their representative signs the bill of lading thus the signature on the bill of lading serves as the identification of the carrier. The signature of the bill of lading may hold significant weight in the determination of the carrier’s identity.

The signatory of the bill of lading and whether it has been signed by an agent or a principal is are two key considerations regarding the signature on a bill of lading.⁷⁵ Almost unvaryingly the signature on the face of the bill of lading is appended in a representative capacity. The carrier can be identified in two ways: either on the heading of the bill of lading or through the signature in the bill of lading.⁷⁶ It is problematic when the terms on the reverse of the bill indicate that the shipowner or disponent owner is the contractually carrier despite the fact the bill was not issued on its bill of lading and that the signature of the representative on the face of the bill of lading indicates that such representative is acting on behalf of the charterer not by demise.⁷⁷ Again, the *Starsin* judgment is relevant here. The focus is rather on ‘who signed the bill of lading, whose bill of lading form was used, and under whose authority was the bill of lading issued’.⁷⁸ When the bill of lading is signed by or on behalf of the master it is considered the shipowner’s bill of lading, the consequence of this is liability on the part of the shipowner for the obligations of the contract of carriage.⁷⁹ In the case of a charterparty the master may sign the bill of lading on the behalf of the charterer and so responsibility is on the charterer.⁸⁰ These two circumstances illustrate that it may be unclear on whose behalf the master or representative is signing the bill of lading. In the *Starsin* judgment the bills of lading evidenced that the contract was between the owner of the vessel and the shipper of the goods.

⁷³ Debattista op cit note 31 at 189.

⁷⁴ Pejovic op cit note 16 at 394.

⁷⁵ Pejovic op cit note 16 at 295.

⁷⁶ Debattista op cit note 31 at 191.

⁷⁷ N H Margetson ‘The Identity of the Carrier’ in M L Hendrikse, N H Margetson and N J Margetson (eds) *Aspects of Maritime Law: Claims under Bills of lading* (2008) 232.

⁷⁸ Pejovic op cit note 16 at 387.

⁷⁹ Jonathan Lux and Ince & Co (eds) ‘Shipping 2011’ at 64, available at www.gettingthedealthrough.com, accessed on 25 January 2017.

⁸⁰ Carr op cit note 42.

However, the case shows that the master's signature does not bind the shipowner in all cases. It is not a hard and fast rule.⁸¹

(b) Different Contractual and Performing Parties

The identification of the carrier problem may arise when the contracting carrier and the actual carrier, who transports the goods, are different parties.⁸² This may occur when the contracting carrier is a charter not by demise and the carriage is performed by either the shipowner or the disponent owner of the vessel through its employee, the master. It is not always the case that there is one carrier or that the contractual carrier is actually the carrier who performs the carriage. When the ship is under a voyage or time charter the identity of the carrier is not as clear as it would be under the demise charter arrangement whereby the demise charter is liable as carrier.⁸³ The misperception of the carrier's identity lies with the 'division of the ships management'.⁸⁴ The question is who at the time of the carriage of the goods was in control of the vessel. The demise charterparty arrangement has the following elements; the demise charterer enjoys full possession and control of the vessel without the services of the master and crew for a period of time.⁸⁵ Of particular relevance to this dissertation is that the master of the vessel as hired by the charterer is the employee of the charterer and so in instances when the master signs bills of lading on behalf of the charterer the charterer by demise is considered the carrier.⁸⁶

(c) Multimodal Transportation

Multimodal transportation has been defined as the transporting of goods through the use of at least two separate modes of transport as in accordance with a multimodal transport contract for the delivery of goods from one country to another.⁸⁷

Multimodal arrangements can be structured in two ways. When a negotiable multimodal bill of lading, covering the carriage of goods by sea and one or more other methods of

⁸¹ Pejovic op cit note 16 at 386.

⁸² Professor D Rhidian Thomas 'An Analysis of the Liability Regime of Carriers and Maritime Performing Parties' in Professor D Rhidian Thomas (ed) *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules. An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (2009) at 71.

⁸³ Christopher Giaschi 'Who is Carrier? Shipowner or Charterer?', available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3urzrtDRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usg=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw, accessed on 20 January 2017.

⁸⁴ Ibid at 381.

⁸⁵ Bradfield op cit note 5 at para 52.

⁸⁶ Ibid.

⁸⁷ United Nations Convention on Multimodal Transport of Goods, 24 May 1980, Article 1 (1), available at https://treaties.un.org/doc/Treaties/1980/05/19800524%2006-13%20PM/Ch_XI_E_1.pdf, accessed on 27 January 2017.

transports, is negotiated to a third party consignee and the goods are damaged or lost in the course of transit the consignee may wish to recover, in contract, for the loss of or damage to the goods. If the multimodal transportation is arranged by a freight forwarder, the freight forwarder may conclude the contract as principle to the contract and sub-contract those elements to other.⁸⁸ The freight forwarder may, alternatively, act as an intermediary acting as a representative of either the consignor or carrier(s), concluding the contracts between the consignor and carrier for the whole transportation and then maybe sub-contract the elements of the contract of carriage.⁸⁹ The problem is identifying at which point the loss of or damage to the goods occurred to determine in whose custody those goods were at the time of such loss or damage. If the freight forwarder has contracted as principal for the multimodal carriage of the goods, then this problem is the freight forwarder's problem. The consignor would sue the freight forwarder and leave it to the freight forwarder to recover from the appropriate unimodal sub-contractor. This is the consignor's problem if the freight forwarder has acted as agent to contract with each of the unimodal carriers on the consignor's behalf. The carrier identity problem here is whether the freight forwarder is considered the carrier and liable to the consignee for the loss of or damage to goods or is the freight forwarder an agent of the carrier. The query as to the identity of the carrier problem is who is actually considered the carrier in such a situation. The carrier identity problem in the context of multimodal transportation does not give rise to new carrier identity problems but gives rise to variation on the carrier identity problems that arise in the context of unimodal transportation.

The problems in the context of multimodal transportation relate to the contract carrier and actual carrier or performing party distinction. The contractual carrier may be the sea carrier and this carrier may subcontract carriage by other methods of transport. The carrier identity problem may arise where the sea carrier is a charterer not by demise. Where the contractual carrier is not the sea carrier and they subcontract the sea carriage to a sea carrier the situation that arises is that, as far as the consignor of the goods is concerned, there is a contractual carrier and, because there is no contractual link between the consignor and the subcontracted sea carrier, an actual or performing carrier and specifically a maritime performing carrier. This gives rise to the carrier identity problem.

When goods are short-delivered or damaged in the multimodal transportation of goods the claimant may find it difficult to ascertain on which leg of the transport or which of the

⁸⁸ Umut Akdeniz 'Freight Forwarder's Undertaking the Transportation and Its Legal Consequences' (2013) 4 (2) *Journal of the Faculty of Law of Inonu University* 204 at 182.

⁸⁹ O Sagi 'The International Freight Forwarder' (1989) 14 (3) *Tel Aviv University Law Review* 568 at 538.

series of carriers caused the loss of or damage to the cargo occurred. This is crucial as it will be relevant in determining the liable carrier as well indicating which carriage regime is applicable.⁹⁰ The cargo claimant in this situation will want to claim against the carrier responsible for the leg of the journey in which the damage to the goods occurred. However if the claimant does not know the identity of the contractual carrier it will find difficulty in being able to sue the responsible party.⁹¹ In some instances the carrier issues bills of lading that cover the entire voyage so the shipper is not inconvenienced by having to deal with the various documents and carriers used in the different stages of the carriage of goods.⁹² This will give rise to the carrier identification problem whereby the relevant carrier's identity may be indiscernible to a concerned third party seeking to claim for the short-delivery or damage of goods against the carrier.

The performing carrier is based on the distinction drawn between the contracting carrier and the actual carrier who performs the carriage of goods by sea. The distinction between the contractual and actual carriers is relevant in understanding the carrier identity problem in relation to the multi-modal transport. In multi-modal transport, as highlighted above, there are possibly different carriers for the different stages of transportation. The contractual carrier in this situation may not be the actual carrier for the different stages of the transportation even though the transportation documents may state that there is one carrier for the entirety of the multimodal transportation. This may be the case in the situation where the contractual carrier subcontracts for the different legs of transport to other carriers, these subcontracting carriers are sometimes referred to as the actual carrier of performing carriers.⁹³ The effect of this is two-fold: it highlights the carrier identity problem as well as increasing the complex nature of the problem as it involves other forms of transportation beyond the sea transport leg. Which carrier is liable for the loss of or damage to goods?

The identity of the contractual carrier depends on how the contract is interpreted by the third party not privy to the original contract. The carriage regimes assist third parties to the contract of carriage through their requirements of information relating to the contractual carrier's identity in the contract terms. The carriage regimes go a step farther through the inclusion of a contingency plan should the information required is missing, namely placing

⁹⁰ Bradfield op cit note 5 at para 90 footnote 5.

⁹¹ Gard Insight No. 140 'Through Transport' 1 January 1996 available at <http://www.gard.no/web/updates/content/52159/through-transport>, accessed on 25 January 2017.

⁹² Ibid.

⁹³ Mariam Hoeks *Multimodal Transport Law: the Law Applicable to the Multimodal Contract for the Carriage of Goods* (2010) 7.

responsibility on the shipowner to provide information or holding the shipowner as liable as carrier. When there are successive contracts of carriage as a result of the consignor contracting with the successive carriers in the carriage of goods in multiple modes of transportation and the goods are lost or damaged, the stage at which such loss or damage occurred must first be established by the consignor so as to know which carrier had care of the goods. This is difficult to establish. If the multimodal transportation is governed by different carriage regimes and the parties cannot identify when the goods were damaged then there will be uncertainty as to which carriage regime applies. The problem is further exacerbated when the claimant cannot identify the party responsible for the loss of or damage to goods.

Having described the selected forms of carrier identity problems, the following chapters consider the solutions, if any, to these problems provided under the Hague-Visby, Hamburg and Rotterdam Rules respectively before turning to an evaluation of whether the Rotterdam Rules' solutions are an improvement over those of the Hague-Visby and Hamburg Rules in this regard.

CHAPTER 3 THE CARRIER IDENTITY PROBLEM UNDER THE HAGUE- VISBY RULES AND THE HAMBURG RULES.

‘...the problem of identifying the carrier has not been resolved by the two principal international conventions that regulate the carriage of goods by sea.’⁹⁴

I Introduction

This chapter considers how the Hague-Visby and Hamburg Rules define the term ‘carrier’. This lays the foundation for how the Hague-Visby and Hamburg Rules respectively address each of the carrier identity problems identified in chapter 2. The chapter will then consider the carrier identity problems outlined in chapter 2 and whether, if at all, the Hague-Visby and Hamburg Rules provide solutions to the carrier identity problems. This will enable a comparison between the solutions, if any, to these problems and the provisions of the Rotterdam Rules that attempt to solve them.

The definitions of the ‘carrier’ in these conventions can be considered to be part of the problem and part of the solution to the carrier identity problem. The definitions can be considered a problem, as noted in II of this chapter regarding the Hague-Visby Rules, by being ambiguous the definition of carrier can lead to confusion as to who falls under the category of carrier. The definitions of ‘carrier’ provided in the Hague-Visby, Hamburg and Rotterdam Rules are not the answer to the carrier identity problem. They do not provide insight as to how the carrier may be identified but rather they just provide a solution as to which category of person or entity if the carrier, in other words whether the owner or charterer not by demise. These definitions create the framework that illustrates who can be considered a carrier. The definitions of carrier assist in recognising who has the appropriate responsibilities and liabilities in terms of the regimes.

II Hague- Visby Rules

The Hague-Visby Rules define the carrier as including an owner or charterer ‘who enters into contract of carriage with a shipper’.⁹⁵ This definition, through referring to entering into a contract of carriage, makes it clear that this definition is of the contractual carrier. The definition of carrier under the Hague-Visby Rules has the effect of limiting contractual liabilities to the person or entity who is party to the contractual arrangement and has the obligation, breach of which exposes the person or entity to liability. In this definition there is no mention of the actual or performing carrier though the actual or performing parties may be

⁹⁴ Pejovic op cit note 16 at 385.

⁹⁵ The Hague-Visby Rules, Article 1 (1).

liable under delict for the loss of or damage to goods carried. This is because the Rules are concerned solely with the contractual carrier and the actual or performing carrier is not the contractual carrier.

The definition of carrier under the Hague-Visby Rules is vague and is not particularly enlightening in providing an extensive definition as to which category of persons fall under the notion of carrier.⁹⁶ The Rules restrict the range of categories of entities who can be deemed to be the carrier. The definition does indicate that there could possibly be other categories but fall short by failing to specify those other categories. This gives rise to the notion that there is only one carrier under the Hague-Visby Rules and so there is no joint and several liability under the Rules meaning there is a lack of accountability for a party who is not the contractual carrier but who performed part of the carriage operation with the loss of or damage to goods occurring whilst the goods were under his responsibility. The consignee who suffered the loss or damage would be able to sue the contractual carrier, most likely the shipowner or the charterer. The consignee may seek delictual recourse from the party who caused the loss of or damage to goods or if they sue the contractual carrier that carrier may in turn recover from the party it sub-contracted with for performance of the carriage operation.

The word ‘includes’ may be interpreted in two ways, one interpretation of the definition is that in using ‘includes’, there is an indication that a carrier has the potential to be other parties besides the charterer or the owner who issued the bill of lading. An alternative interpretation is that the use of ‘or’ in the definition of carrier could be construed as the contractual carrier being categorized as either the shipowner or the charterer, the carrier is not limited to one or the other but falls into either category. The Hague-Visby Rules view the contract of carriage as concluded between the carrier and the shipper. The Hague-Visby Rules do not clearly state whether the Rules apply to other parties who are sub-contracted by the contractual carrier to handle the goods.⁹⁷ The Rules are not concerned with contractual arrangements between the contractual carrier and the sub-contracted party. The limitation by the Rules to the notion of a single ‘carrier’, in other words excluding sub-contracted carrier from the obligations of the

⁹⁶ Christopher Giaschi ‘Who is Carrier? Shipowner or Charterer?’, available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3urzsrtdRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usg=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw, accessed on 20 January 2017.

⁹⁷ Nicholas Bond ‘The Maritime Performing Party and the Scope of the Rotterdam Rules’ (2014) 28 *ANZ Mar LJ* 95 at 97.

contractual carrier fails to reflect sub- contracting as an integral part of international shipping and may give rise to difficulties.⁹⁸

The cargo interest has a claim against the contractual carrier for the loss of or damage to goods during transportation even when the contractual carrier sub-contracts. The claim against the contractual carrier will be subject to the Hague-Visby Rules. The cargo claimant may pursue a delictual claim against the sub-contracted carrier as the party responsible for the loss of or damage to the goods especially in cases where the sub-contracted carrier may financially be a better party to claim against or when the Rules do not apply. Judicial interpretation would be required to address how the notion of the single carrier in terms of the Hague-Visby Rules is to be dealt with.

There is a need to determine whether parties such as stevedores, terminal operators and freight forwarders can be considered carriers for the part of the carriage that they were responsible for when the contractual carrier sub-contracts and the Hague-Visby Rules do not provide clarity on this. Stevedores and terminal operators carry out components of the carriage process for example loading and unloading, either as sub-contractors of the carrier or as principal contracting parties for the consignor, or cargo interest. As such they are considered performing parties and not the contractual carrier in relation to the cargo interest. Stevedores can be sued in delict by the cargo interest for the loss of or damage to goods during the loading or unloading processes when the cargo interest did not contract with the stevedores for such service. As they are not contractual carriers, they cannot be sued as contractual carriers by the cargo interest. Freight forwarders are a special case in this group to be differentiated from stevedores and terminal operators. In the present context they are essentially part of the multimodal problem. The Hague-Visby Rules have been subject to inconsistent interpretations in different jurisdictions leading to inconsistency and uncertainty regarding the way in which they are to be applied.⁹⁹

III Hamburg Rules

The Hamburg Rules are said to highlight the difficulties that emerged under the Hague-Visby Rules.¹⁰⁰ The Hamburg Rules are said to ‘represent a fundamental break with the past.’¹⁰¹

⁹⁸ Ibid.

⁹⁹ Carr op cit note 42 at 219.

¹⁰⁰ Francis Reynolds ‘The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules’ (1990) 7 *Austl & NZ Mar LJ* 16 at 27.

¹⁰¹ Paul Myburgh ‘Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?’ (2000) 31 *Victoria U Wellington L Rev* 355 at 361.

The Hamburg Rules differentiate between the contractual and the actual carrier. The contractual carrier is defined as ‘any person by whom or in whose name a contract of carriage has been concluded with a shipper’.¹⁰² The contractual carrier is ‘the party whose name appears on the front of the carriage document...’.¹⁰³ The definition of carrier under the Hamburg Rules does not restrict the carrier to only the shipowner or the carrier. This allows for the inclusion of other parties who perform carrier duties although they are not per se the contracting carrier, for example the freight forwarder. The freight forwarder may fall under the contractual carrier as they sign the contract of carriage with the shipper and then contract with the carriers who actually perform the carriage of the goods.¹⁰⁴

The actual carrier is defined separately as ‘any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted’.¹⁰⁵ The actual carrier is the party that carries out the carriage of goods even though it will not be party to the contract of carriage. The actual carrier is responsible for that part of the carriage performed by him and so in this way can be differentiated from the performing party - the liability for the loss of or damage to goods arises when the actual carrier performs the carriage of the goods.¹⁰⁶ The carrier who contracted with shipper will continue to be liable throughout the carriage as per Article 10 (1) of the Hamburg Rules.¹⁰⁷ The claimant would be able to have recourse against the contracting carrier even when part of the performance of the carriage contract was carried out by another party as well as having recourse against the party that performed the contract of carriage.¹⁰⁸ The ‘actual carrier’ and the ‘carrier’ are differentiated in the Hamburg Rules and so simplifies the process of identifying the party liable for the loss of or damage to goods during the carriage of goods.’¹⁰⁹ The Hamburg Rules, in this sense, have made it easier for the cargo claimant to have recourse to recover for the loss of or damage to goods during carriage.

¹⁰² The Hamburg Rules, Article 1(1).

¹⁰³ Gard Insight No. 163 ‘A Charterer’s involvement in cargo claims’, 1 August 2001, available at <http://www.gard.no/web/updates/content/53043/a-charterers-involvement-in-cargo-claims>, accessed on 24 January 2017.

¹⁰⁴ Anonymous Student Comment ‘Intermodal Transportation and the Freight Forwarder’ (1966-1967) 76 *Yale Law Journal* 1360 at 1362

¹⁰⁵ The Hamburg Rules Article 1(2).

¹⁰⁶ Jan Ramberg ‘The Vanishing Bill of Lading & the Hamburg Rules Carrier’ (1979) *American Journal of Comparative Law* 391 at 393.

¹⁰⁷ The Hamburg Rules, Article 10(1).

¹⁰⁸ Ramberg op cit note 106 at 393.

¹⁰⁹ Indira Carr ‘Carriage of Goods by Sea: Bills of Lading and the Carriage of Goods by Sea Act 1971’ in Indira Carr, Peter Stone (eds) *International Trade Law* 5 ed (2013) 274.

The Hamburg Rules provide in Article 10 (4) that the carrier and actual carrier share joint and several liability when they are both liable.¹¹⁰ What this illustrates is that the Hamburg Rules recognise the practices of the industry and try to accommodate such practices. This provision averts the necessity to differentiate between them in deciding whom to sue. The claimant can sue either party and recover in full from that party, leaving that party to recover any contribution from the other that may be due.

IV The Carrier Identity Problems

(a) *When there is insufficient information to identify the person or entity that is the contractual carrier*

As discussed in chapter 2 the bill of lading can serve as evidence as to the contractual terms as well as describing the goods to be shipped and information regarding the voyage the bill of lading may also contain information regarding to the parties identified as carrier and shipper of the goods. Thus the bill of lading serves as the *prima facie* basis upon which a carrier may be identified. The face of the bill of lading will usually provide the information as to the carrier's identity.¹¹¹ This becomes a factual enquiry based on the transport documents to identify the parties to the contract.¹¹² Thus when the bill of lading insufficiently provides or fails to provide information that can assist in identifying the carrier the third party consignee have difficulty in identifying the carrier against whom the consignee can seek recourse for the loss of or damage to goods during the transportation.

One of the carrier identity problems identified is that insufficient information is provided in the bill of lading for a third party consignee to identify the person or entity that is the carrier. The Hague-Visby Rules do not provide any rules requiring the bill of lading to have information regarding the identification of the carrier and so do not provide a solution to this particular carrier identity problem. The consequence of this is that it does not create a situation whereby information relevant to the carrier's identity is deemed necessary in the bills of lading issued incorporating the Hague-Visby Rules or consequences and alternative solutions for when that information is lacking. This does not necessarily mean that the bill of lading should not provide for the identification of the parties to the contract of carriage by sea.¹¹³ The information can still be added by the party issuing the bill of lading however the Hague-Visby

¹¹⁰ The Hamburg Rules, Article 10(4).

¹¹¹ J E Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009, Juta & Co: Cape Town) at 708.

¹¹² *Ibid.*

¹¹³ Stefano Zunarelli 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' 2009 *Rev dr unif* 1101 at 1012.

fall short by not calling for such information. Where information regarding the identity of the carrier is lacking, the task of sourcing the identity of the carrier would be difficult for the consignee especially in situations where there were multiple carriers involved in the carriage process.

The Hamburg Rules however, require the contract particulars to contain the name and address of the carrier,¹¹⁴ and so they take some steps forward in solving this carrier identity problem. These provisions may, in a way, be categorised as self-identification by the carrier. This means that the carrier in the bill of lading provides details such as their name and place of business. Thereby the holder of the bill of lading has access to information as to the identity of the carrier as provided by the carrier. The Hamburg Rules appear to make it easier for a claimant to determine the identity of the carrier and where to locate it. The carrier, in having to include its particulars in detail in the bill of lading, identifies itself clearly at the outset in the carriage process. This does not mean that this is conclusive proof as to the carrier's identity¹¹⁵ in that the provisions do not prevent contract particulars from being incomplete. The failure of the Hamburg Rules to provide a contingency when such information is lacking lead to a shortcoming in adequately providing a solution to the carrier identity problem.

The Hague-Visby Rules do not address the situation whereby the bill of lading may contain contradictory evidence on the face and reverse of the bill of lading. Through not regulating such matters, the Hague-Visby Rules fall short of addressing the carrier identity problems, either by having preventative provisions such as those that state what information should be on the bill of lading that could prevent the carrier identity problem from arising or by having provisions that account for the situation where the information is lacking or ambiguous. However it can be inferred that, from the definition of carrier in the Hague-Visby rules requiring the issuing of a bill of lading or similar document of title so the carriage contract is subject to the Rules, the bill of lading is necessary for the purpose of identifying the carrier.¹¹⁶

The identifying provisions of article 15 (2) of the Hamburg Rules may assist in the identification of the carrier. In requiring that the carrier's name and principal place of business is provided for in the bill of lading,¹¹⁷ the Hamburg Rules enable the carrier to self-identify when the bill of lading is drafted and issued. The Rotterdam Rules have a similar provision,¹¹⁸

¹¹⁴ The Hamburg Rules Article 15 (1) (c).

¹¹⁵ C C Nicoll 'Do the Hamburg Rules Suit a Shipper-Dominated Economy?' (1993) 24 *Journal of Maritime Law & Commerce* 151 at 169.

¹¹⁶ Zunarelli op cit note 113.

¹¹⁷ The Hamburg Rules, Article 15 (1) (c).

¹¹⁸ The Rotterdam Rules, Article 36 (2) (b).

should these provisions be complied with the carrier identity problem would not arise. However should the carrier fail to add the information or provide false information, these provision would be rendered ineffective in providing a resolution to the carrier identity problem.

Where it is unclear on whose behalf the representative who issues the bill of lading acted, the Hague-Visby Rules provide no assistance in determining how the matter may be resolved. Ways to avoid or solve this carrier identity problem are not addressed by the Hague-Visby Rules, the consignee who is struggling to find the identity of the carrier in situations where they were not privy to the contract of carriage and the bill of lading provides little or no information as to the identity has a challenging task of sourcing the carrier's identity. When the carrier identity problem does arise in regard to a bill of lading subject to the Hague-Visby Rules the courts have considered the signature on the bill of lading by or on behalf of a named carrier or the charterer of named ship or; the heading of the bill of lading.¹¹⁹

The Hamburg Rules provide that the bill of lading, when signed by the master of the vessel transporting the goods, is deemed to have been signed on behalf of the carrier.¹²⁰ The effect of this is that it can be inferred that the party responsible in terms of the bill of lading is the party that entered into the carriage contract with the shipper.¹²¹ The Hamburg Rules further state that 'the signature of the carrier or a person acting on his behalf' must be provided on the bill of lading.¹²² This provision provides a further tool for the identification of the carrier on the bill of lading. It does not necessarily make it easier for the claimant to identify the carrier especially if the signature appended is not in a representative capacity, or, is in a representative, but the signatory was not authorised to sign on the carrier's behalf. There are still complications that arise in the provisions that assist the claimant in identifying the carrier.

(b) When there are different contractual and performing parties

The carrier identity problem may arise when there is uncertainty in the bill of lading as to the person or entity that is the contractual carrier, this problem arises when the contractual and actual or performing carrier are not the same entity. The cargo interest in such a situation would have to analyse the relationships meticulously to identify who the contractual carrier actually is especially when the information as to the carrier's identity is not easily discernable. This tedious and time-consuming process may delay initiation of a claim and the chance of identifying the wrong party as carrier and may be subject to a time-bar clause.

¹¹⁹ Zunarelli op cit note 113.

¹²⁰ The Hamburg Rules, Article 12 (2).

¹²¹ Ramberg op cit note 106 at 395.

¹²² The Hamburg Rules, Article 15 (1) (j).

One of the ways this problem may arise is that there may be contradictory indicators as to whom of the charterer and owner is to be regarded as the contractual carrier. This arises when the bill of lading states on the face that the charterer is the carrier or it has been signed on behalf of the carrier however the clauses on the reverse of the bill of lading state that the owner or the demise charterer is the contractual carrier.

The definition of the contractual carrier under the Hague-Visby Rules only states that either the owner or the charterer can be the contractual carrier.¹²³ The Rules do not provide a solution to this particular carrier identity problem when there are contradictory indicators as to the identity of the carrier in the bill of lading. Demise and identity of carrier clauses have been argued to be non-responsibility clauses,¹²⁴ and in terms of article 3 (8) of the Hague-Visby Rules, such clauses are null and void.¹²⁵ This argument that the demise and identity of carrier clauses may be non-responsibility clauses may mean that the Hague-Visby Rules address this carrier identity problem by invalidating the clauses that give rise to such contradictions. This approach has been used in some jurisdictions but in English courts these clauses have been enforced.¹²⁶

Under the Hamburg Rules the identity of carrier clauses are invalid and contrary to article 10 of the Rules as they 'provide that only the shipowner is responsible'.¹²⁷ The same approach is taken towards demise clauses that are 'used to hide the identity of the carrier in some jurisdictions'.¹²⁸ The identity of carrier and demise clauses are unenforceable under the Hamburg Rules. The significance of this is that the claimant seeking recourse has one party to whom they can hold accountable for the loss of or damage to goods during their transportation at sea. The shipowner in turn can claim against the actual carrier who performed the carriage where such damage to the goods occurred.¹²⁹ The Hamburg Rules further, through providing that the contractual and actual carrier are jointly and severally liable,¹³⁰ avoid the problem of contradicting information as to whether the owner or the charterer is to be regarded as the contractual carrier.

¹²³ The Hague-Visby Rules, Article 1 (1).

¹²⁴ William Tetley QC 'The Demise of the Demise Clause' (1999) 44 (4) *McGill Law Journal* 807 at 812.

¹²⁵ The Hague-Visby Rules Article 3 (8).

¹²⁶ Freight Transportation Association 'Demise and identity of carrier clauses', available at http://www.fta.co.uk/policy_and_compliance/sea/long_guide/demise_identity.html, accessed 22 August 2017.

¹²⁷ Pejovic op cit note 16 at 402.

¹²⁸ George F Chandler III 'A Comparison of "COGSA", the Hague/Visby Rules, and the Hamburg Rules' (1984) 15 *Journal of Maritime Law & Commerce* 233 at 284.

¹²⁹ The Hamburg Rules, Article 10 (2).

¹³⁰ The Hamburg Rules, Article 10 (4).

Another problem that arises under is that it may not be clear from the face of the bill of lading on whose behalf or for whom the master has acted in issuing the bill of lading. Under the Hamburg Rules the carrier is not limited to the owner or the charterer however the Rules ‘fail to answer the crucial question: who is the carrier - the shipowner or the charterer?’¹³¹ The Rules do not clarify the complex relationships in charterparties that give rise to carrier identity problems. The benefit of requiring that the bill of lading name the carrier is that the cargo claimant can claim against the named carrier directly. It is not directly clear what the effect of this will be when the carrier named on the carrier was the shipowner and not the charterer. A further problem arises when the shipowner’s name appears in the bill of lading with the bill of lading having been signed by the charterer’s agent.¹³² Following the notion of joint and several liability for the carrier and the actual carrier,¹³³ a time charter who enters a carriage contract with the shipper may be considered the carrier with the actual carrier being the party who performs the carriage under orders from the charterer.¹³⁴ The cargo claimant may sue either the carrier or the actual carrier.

(c) *Multimodal transportation of goods*

The definition of carrier under the Hague-Visby Rules extends only to the carriage of goods at sea as they are a unimodal carriage regime.¹³⁵ It does not address multimodal transport, as they only apply when goods are transported by sea.¹³⁶ This does not mean that contracts of carriage regulated by the Hague-Visby Rules will not include another mode of transportation. The Hague Rules would simply not apply to the other modes of transportation. The carrier is responsible for the goods from what is termed ‘tackle to tackle coverage’.¹³⁷ The Hague-Visby Rules contain the word ‘includes’ in the definition of the carrier.¹³⁸ This opens up the possibility that other parties functioning as the carrier are also intended to be included. Under the term ‘includes’, the definition of the carrier under the Hague-Visby Rules could be interpreted to include a freight forwarder who may be acting as a carrier.¹³⁹ It will also cover the situation where the vessel is under bareboat charter.¹⁴⁰ The shortfall of the Hague-Visby Rules is that they do not fully cater for the needs of modern transportation contracts in

¹³¹ Pejovic op cit note 16 at 385.

¹³² Samir Mankabady *The Hamburg Rules on the Carriage of Goods by Sea* (1978) 36.

¹³³ The Hamburg Rules, Article 10 (4).

¹³⁴ Pejovic op cit note 16 at 404.

¹³⁵ Girvin op cit note 8 at 260.

¹³⁶ The Hague-Visby Rules, Articles 1 (b) and 2.

¹³⁷ Girvin op cit note 8 at 260.

¹³⁸ The Hague-Visby Rules, Article 1 (1).

¹³⁹ Girvin op cit note 8 at 262.

¹⁴⁰ Girvin op cit note 8 at 263 and the Hague-Visby Rules, Article (4) (2) (q).

providing the definition of carrier that make it possible for the shipper to use the Rules as a form of assistance in identifying the carrier when the need arises.

The Hamburg Rules are a unimodal carriage regime governing the carriage by sea. The Rules in this way acknowledge that there are other parties involved in the carriage of goods that are not necessarily ocean carrier who are involved in the carriage process and should be held accountable for their involvement should any loss or damage occur to the cargo. This is limited to the duration of responsibility the carrier is exposed to in terms of the Rules,¹⁴¹ and so does not account fully for all the parties involved who could be considered to be the carrier in the carriage of goods. Like the Hague-Visby Rules, the Hamburg Rules fall short of providing a regime that caters for the modern practices of the shipping industry by failing to take into account the multimodal transportation of goods. Though the Hamburg Rules have extended beyond the limited scope of the Hague-Visby Rules by covering from 'port to port' it still is not sufficient.

The Hamburg Rules can be said to better the position of the claimant who seeks to pursue the carrier. The Hamburg Rules failed to gain widespread acceptance and it is therefore difficult to gauge the effectiveness of those of its provisions that deal with the carrier identity problem. all that can perhaps be said is that the position of a claimant seeking to pursue a claim under the Rules appears to be better off insofar as being able to identify whom to sue is concerned in the following respects What is noticeable is that the claimant is in a better position than the claimant operating under the Hague-Visby Rules.

¹⁴¹ Bond op cit note 97 at 98.

CHAPTER 4 THE ROTTERDAM RULES AND THE CARRIER IDENTITY PROBLEM

‘Believing that the adoption of uniform rules to govern international contracts of carriage wholly and partly by sea will promote legal certainty, improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets...’¹⁴²

I Introduction

This chapter considers the Rotterdam Rules’ solutions to the selected carrier identification problems to provide a basis for comparing these solutions with those, if any, under the Hague-Visby and Hamburg Rules respectively. This comparison will, in turn, enable an assessment of whether the solutions provided under the Rotterdam Rules are an improvement in this regard on the preceding carriage regimes.

II The definition of ‘carrier’ under the Rotterdam Rules

Under the Rotterdam Rules, a carrier is defined as the person who enters in a carriage contract with the shipper.¹⁴³ This has been said to be the broadest definition of carrier compared to the Hague-Visby and Hamburg Rules in that it does not restrict the categories of entities that might be considered to be the contractual carriers.¹⁴⁴ Under this definition ‘any number of different entities’ can act as carrier as the entity should be party to the carriage contract regardless of that entities relation to the vessel.¹⁴⁵ Under the Rotterdam Rules the carrier may be the freight forwarder and multimodal transport operator, adding a multimodal dimension to the Rotterdam Rules.¹⁴⁶

The Rotterdam Rules can operate as a unimodal convention when the mode of carriage on only by sea, the Rules can also operate as multimodal carriage regime where other modes of transport are used and one of the modes of transportation is the carriage of goods by sea, this ensures flexibility of the Rules.¹⁴⁷

The definition of carrier cannot be read in isolation and so must be read with the definition of the contract of carrier so as to understand who may be categorized as a carrier in terms of the Rules.¹⁴⁸

¹⁴² The Rotterdam Rules, Aims.

¹⁴³ The Rotterdam Rules, Article 1 (5).

¹⁴⁴ Nikola Mandic and Vesna Skorupan Wolff ‘Maritime Performing Party under the Rotterdam Rules 2009’ (2015) 4 (2) *Transactions on Maritime Science* 132 at 133.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Hashmi op cit note 22 at 229

¹⁴⁸ Ibid at 245.

The definition of ‘carrier’ in the Rotterdam Rules refers to the contract of carriage,¹⁴⁹ which is defined as an agreement in which the carrier who, for the payment of freight, undertakes to transport goods ‘from one place to another’.¹⁵⁰ This carriage contract would be for the carriage of goods by sea and may also provide for carriage by other forms of transport in addition to the carriage by sea.¹⁵¹ The Rotterdam Rules extend the period of carriage beyond port-to-port carriage to door-to-door carriage.¹⁵² Thus the Rotterdam Rules are a partial multimodal carriage regime in that they apply to modes of transport other than sea carriage if the scope of application provisions render the Rules applicable or, domestic legislation makes them applicable, or the parties agree that the Rules will apply and then provided that other unimodal carriage conventions do not apply. The carrier in terms of the contract of carriage is responsible for the transportation of goods by sea and possibly other modes of transport.¹⁵³

The definition of ‘carrier’ under the Rotterdam Rules, the references to carrier, as defined in the Rules, are references to the contractual carrier.¹⁵⁴ This, in turn, distinguishes the contractual carrier from the performing party. The Rotterdam Rules define the carrier as the contractual carrier whilst also recognizing that the contractual carrier may not perform all legs of the multimodal transportation of goods and that these may be performed by parties other than the contracting carrier. The performing party is defined as:

‘a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.’¹⁵⁵

Within performing parties,¹⁵⁶ the Rules further distinguish maritime performing parties,¹⁵⁷ who are parties who perform the contractual carrier’s obligation for the sea leg of the carriage. The differentiation between the performing party and the maritime performing part is based on the partly multimodal regime seeking to avoid imposing on non-maritime

¹⁴⁹ Charles Debattista ‘General Provisions’ in Yvonne Baatz Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis (eds) *The Rotterdam Rules: A Practical Annotation* (2009) 2.

¹⁵⁰ The Rotterdam Rules, Article 1 (1).

¹⁵¹ The Rotterdam Rules, Article 1 (1).

¹⁵² Girvin op cit note 8 at 285.

¹⁵³ Hashmi op cit note 22 at 229.

¹⁵⁴ Girvin op cit note 8 at 287.

¹⁵⁵ The Rotterdam Rules, Article, 1(6)(a).

¹⁵⁶ The Rotterdam Rules, Article 1(6)(a).

¹⁵⁷ The Rotterdam Rules, Article 1(7).

carriage aspects of a liability regime that are peculiar to sea carriage. The maritime performing party is defined as the:

‘performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.’¹⁵⁸

The non-maritime performing party is a label used to describe road, rail and air performing parties who may perform all or part of the carriage on behalf of the carrier.¹⁵⁹

The identity of the carrier problem is one of the issues that the Rotterdam Rules seek to provide clarity on. The remaining sections in this chapter seek to address how the Rotterdam Rules have sought to provide such clarity and to analyse whether they have been successful in providing a solution to the carrier identity problems. Addressing the carrier identity problems

III Addressing the carrier identity problems

The relevant provisions in the Rotterdam Rules that concern the identity of the carrier are articles 36 (2) (b) as well as 37 (1) and (2). These provisions do not just refer to a bill of lading but rather any transport documents that the parties to the carriage contract are relying on. The purpose of these provisions is to assist a claimant in identifying the carrier (the person deemed to be the carrier) by requiring the carrier self-identify at earlier stages of the carriage process.

The problems concerning the identity of the carrier may arise when the bills of lading, or the sea transport documents, do not name the carrier or the name of the carrier is indistinct or an incorrect name provided. The identity of the carrier may also be unclear when the sea transport document has contradictory evidence on the face and reverse of the documents, naming two different entities as the carrier. The identity of the carrier may also be unclear when the sea transport documents are signed on behalf of or by the master and it is unclear on whose authority this action is being taken. These are examples of problems that arise regarding a lack of clarity as to the carrier’s identity.

(a) When there is insufficient information to identify the person or entity that is the contractual carrier

Article 36 (2) (b) provides that the transport document should include the ‘name and address of the carrier’.¹⁶⁰ This information on the transport document serves of proof as to the carrier’s

¹⁵⁸ The Rotterdam Rules, Article, 1(7).

¹⁵⁹ Mandic op cit note 144 at 134.

¹⁶⁰ The Rotterdam Rules, Article 36 (2) (b).

identity as well as providing accessibility to the information as to the identity of the carrier and their place of business so the claimant is not in the position of wasting time seeking the carrier's identity.

Articles 36 (2) (b) and Article 37 (2) are closely linked. When the contract particulars are not supplied or an insufficiently supplied or incorrectly supplied, making it difficult to identify the carrier, the Rotterdam Rules provide a solution in article 37. In terms of the provision the rebuttable presumption is that the registered shipowner is the contractual carrier.¹⁶¹ If the registered owner does not rebut this presumption it is deemed to be the contractual carrier. Article 37 (2) provides that:

'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, unless 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. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner'

Article 37 (2) provides for alternative method of identifying the carrier and this alternative method involves shifting the burden of doing so onto the shipowner.¹⁶² The provision shifts the burden of identifying the carrier onto the registered owner or demise charter.¹⁶³ The shipowner may have actually chartered the vessel to another party. The shipowner can identify the party that is actually the carrier when the vessel is under a bareboat charter, this stems from the fact that it would have contracted with the demise charterer. The shipowner is in a better position than the third party consignee to know who they have contracted with, when the shipowner is not the contractual carrier and it is fitting that they would be the ones under the Rules to be able to identify the contractual carrier. The third party consignee may potentially be concerned with the registered shipowner delaying notifying the consignee of the carrier's identity. This delay if too close to the end of the time- bar period may give rise to difficulty in instituting an action against the contractual carrier.

The provision can be both effective, as it places the task of finding the contractual carrier on the shipowner, as well as ineffective by not making a contingency for the claimant when

¹⁶¹ The Rotterdam Rules, Article 37 (2).

¹⁶² The Rotterdam Rules, Article 37 (2).

¹⁶³ The Rotterdam Rules, Article 37 (2).

either the vessel's name or carrier's name are not indicated in the contract particulars. The provision accounts for two situations which must be distinguished: (a) where the contract particulars indicate that the goods have been loaded on board a named ship; and (b) where they do not.¹⁶⁴ This effectiveness of this provision as a solution to the carrier identity problem depends on the ship being named. In the first situation, the shipowner is presumed to be the carrier but the shipowner can rebut this presumption by proving that there was a bareboat charter identifying them as the carrier.¹⁶⁵ This presumption and treatment of the shipowner as the carrier may be said to stem from the 'history of maritime commerce ... that the shipowner has traditionally been considered responsible for cargo.'¹⁶⁶ This shipowner having the ability to rebut such presumption is a reflection of the idea that it is considered to be in a better position to identify the contractual carrier. Further, the shipowner or the bareboat charterer may identify the contractual carrier to rebut the presumption that they are the carrier in the situation.

Under (b), when the transport document does not provide the name of the carrier and the name of the vessel is also missing, the claimant is left in a tenuous position as the Rules fail to provide any assistance to the claimant.¹⁶⁷ This situation leaves the claimant in a precarious legal position whereby they have little assistance with pursuing a claim because an essential element, the identity of the carrier, is missing. This is one of the shortcomings of the Rotterdam Rules.

Article 37 (1) addresses the situation where there the provisions of transport document identifying the carrier differ from information about the carrier in the contract particulars.¹⁶⁸ This is the case of the transport document containing contradictory information that may give rise to the carrier identity problem. Article 37 (1) provides that '[if] a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification'.¹⁶⁹ This provision relates to the situation where the demise or identity of carrier clauses are part of the transport document particulars when such clauses are contained in the transport document it should actually be of assistance to the third party

¹⁶⁴ Charles Debattista 'Transportation Documents and Electronic Records' in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis (eds) *The Rotterdam Rules: A Practical Annotation* (2009) 110.

¹⁶⁵ The Rotterdam Rules, Article 37 (2).

¹⁶⁶ Pejovic op cit note 16 at 404.

¹⁶⁷ Debattista op cit note 164.

¹⁶⁸ Francesco Berlingieri 'The History of the Rotterdam Rules' in Meltem Deniz Güner-Özbek (ed) *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (2011, Springer Science & Business Media) at 25

¹⁶⁹ The Rotterdam Rules, Article 37 (1).

consignee who seeks to hold the contractual carrier responsible for any loss of or damage to the cargo during carriage.¹⁷⁰ The problem arises when such identity of carrier and demise clauses are contradicted by information in the contract particulars, which would have identified another entity as the carrier. Article 37 (1) seeks to address this contradictory indicators problem by deeming the name of the carrier provided in the contract particulars as conclusive proof as to the identity of the carrier when the transport documents provide information indicating otherwise.¹⁷¹ This allows a claimant to rely on the contract particulars when there is uncertainty as to the carrier's identity. This provision is applicable when there is access to both the sea transport document and the contract of carriage.

However it should be mentioned that centering the identification of the carrier on a name stated in the contract of carriage should not be conclusive of the matter. This could perhaps leave room for argument when there is doubt that the name provided in the contract particulars is correct identification of the carrier. When the name of the carrier provided is the trade name of the carrier or when there is deliberate concealment of the carrier's name the provision may fall short. In the *Starsin* judgment, the House of Lords suggested that other documentation such as the time charter could be consulted to resolve ambiguity that arises in such situations.¹⁷²

The provision would be of no assistance when the carrier's name is not provided or, when the incorrect name is provided it would consider the false information as conclusive giving rise to a variety of problems. It could be suggested that this provision should not be taken to provide conclusive evidence as to the carrier's identity but could be read with other information such as the address of the carrier or information provided in related transport documents.

Article 37 (1) considers the situation when the transport document and transport document provide conflicting information as to the carrier's identity. Article 37 (1) does not directly address the situation that arises when the face of the bill of lading identifies the carrier and the reverse of the bill of lading has contradicting evidence as to the carrier's identity. The position has been that the information on the front of the bill of lading will be considered the correct information when there is contradicting evidence on the reverse.¹⁷³ The other approach that could be taken is the application of Article 37 (2), the rebuttable that the shipowner is the contractual carrier.¹⁷⁴

¹⁷⁰ Chong op cit note 15 at 198.

¹⁷¹ Berlingieri op cit note 168.

¹⁷² *The Starsin* supra note 55 at 73.

¹⁷³ *The Starsin* supra note 55.

¹⁷⁴ The Rotterdam Rules, Article 37 (2).

This position is the result of the decision in *The Starsin* regarding conflicting information on the face and on the reverse of the bill of lading.¹⁷⁵ In *The Starsin* case,¹⁷⁶ there was contradictory information between the terms of the bill of lading and the signature on the bill of lading. The court sought to give effect to the terms agreed upon by the parties to the agreement in that case as the contract, being in the hands of a third party consignee, was conclusive proof as to the terms of the contract.¹⁷⁷ Lord Bingham, in his judgment, stated that the contractual terms inserted into the contract by the parties were of greater importance than the standard terms as they are more likely to reflect the intentions of both parties to the contract.¹⁷⁸ This means that where the carrier is named in the contract, where there is contradictory evidence the contract document is a strong source as to the carrier's identity.

The court found that the information on the face of the bill of lading regarding the carrier's identity was to be taken as the clear indication as to the carrier's identity.¹⁷⁹ This was also based on relying on the contract particulars included by the parties in the carriage contract as well as giving effect to commercial practices.¹⁸⁰ The judgment took the approach that commercial parties, such as banks 'would expect the identity of the carrier to be revealed in the material on the front of the bills...'¹⁸¹ The approach taken in this judgment clarifies the position regarding contradicting evidence on the bill of lading as well as influencing the Rotterdam Rules placing importance on information contained in the contract over transport documents which may have contradicting evidence regarding the carrier's identity. The aim of the Rotterdam Rules, as with the *Starsin* judgment, is to prevent the situation in which the claimant is left uncertain as to the carrier's identity based on conflicting information and providing a solution where such a situation does arise.

The Rotterdam Rules, through these provisions, have sought to provide a solution to the carrier identity problem. The solutions are documentary based: the contract of carriage itself as well as the transport documents serve as the tools on which the claimant can rely on as to identify the carrier. The Rotterdam Rules attach great importance to what the parties have agreed upon in the contract particulars and the information in these agreements regarding the carrier's identity are considered decisive proof of the carrier's identity.

¹⁷⁵ Ibid.

¹⁷⁶ *The Starsin* supra note 55.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Baughen op cit note 24 at 32.

¹⁸¹ Ibid.

The carrier identity problem still arises in the following circumstances: when the bill of lading is signed by an agent and there is uncertainty as whether he or she is agent of the charterer or shipowner. In regards to where there is uncertainty, when the bill of lading is signed on behalf of or by the master without the basis of the master's authority being stated, the position is that 'the registered owner is presumed to be the carrier or alternatively the owner identifies the bareboat charterer or they both identify the carrier'.¹⁸² This is the position under article 37, as previously discussed above, and provides the solution to uncertainty regarding on whose behalf the agent signs. The Rotterdam Rules also ensure that when there is uncertainty whether there is a signature on behalf of the carrier or by the carrier themselves on the transport document the claimant can sue the shipowner.¹⁸³ This shifts the responsibility of finding the identity of the carrier from the claimant to the shipowner when there is uncertainty as to the carrier's identity in charterparty situations or when the transport document is unclear.

The Rotterdam Rules, in Article 37(3), provide that the claimant can prove that another party not necessarily involved in the carriage contract as the carrier may be identified as carrier.¹⁸⁴ This provision accounts for the situation where no carrier has been identified in the contract particulars and the vessel carrying the goods has not been named. The cargo claimant is in the position whereby they are tasked with the burden of finding out the carrier's identity with little assistance.

The Working Group that drafted the Rotterdam Rules considered inserting a provision into the Draft Instrument providing that, if the face of the transport document had information regarding the carrier's identity, such information would prevail over contradictory information on the reverse side of the document.¹⁸⁵ This provision is not to be found in the final version of the Rotterdam Rules but it may be inferred that Article 37 (2) applies to the situation.

(b) When there are different contractual and performing parties

When there are multiple parties involved in the carriage of goods, the situation becomes complicated when a claimant is attempting to break through various relationships to identify the carrier. The complexity of charterparty arrangements can have the effect of masking the identity of the parties involved including who the actual carrier may be. When the vessel in

¹⁸² Berlingieri op cit note 168 at 26.

¹⁸³ Tomotaka Fujita 'Rotterdam Rules and the Underlying Sales Contract' (2012) Schellenberg Wittmer / CMI Conference Beijing at 8-9, available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Tomotaka%20Fujita.pdf>, accessed on 29 January 2017.

¹⁸⁴ The Rotterdam Rules, Article 37 (3).

¹⁸⁵ Berlingieri op cit note 168 at 25.

under a charter arrangement and/or the bill of lading is signed by, or on behalf of, someone other than the shipowner, the carrier's identity may become an issue of concern.¹⁸⁶ When the vessel is under a demise charter, the demise charterer is liable as the carrier, but the carrier's identity is less clear when there is a time or voyage charter not by demise.¹⁸⁷

In a time charter, where the master remains the employee of the shipowner and the bill of lading is signed as for the master the contract of carriage will be assumed to be between the shipowner and the shipper.¹⁸⁸ When the master signs the bill of lading on behalf of the charterer, it may still be seen as the agent of the shipowner and a third party consignee would be unlikely to know on whose behalf the master signed the bill of lading.¹⁸⁹ It has been suggested that the carrier may be identified by seeing on whose behalf the bill of lading was issued; if issued on the shipowner's behalf then the shipowner would be considered the carrier, the charterer will be considered the carrier if the bill of lading is issued on its behalf.¹⁹⁰ This in itself is not an absolute solution as the bill of lading may fail to indicate on whose behalf it has been signed, or issued.¹⁹¹ When this problem arises the solution may be to fall back on the article 37 (2) presumption of the shipowner as carrier.

When the vessel is under a time charter, the charterer or the shipowner may be acting as the carrier.¹⁹² In such situations the carriage obligations are shared between the shipowner and charterer and so the third party consignee would find it difficult to ascertain the party who is the carrier.¹⁹³ When the bill of lading is signed it is normally identified as the shipowner's bill of lading however when the vessel is under a time charter the bill can be signed on the shipowner's or the charterer's behalf. In some cases, the bill of lading may be signed by the charterer, or its agent, without the master's authority.¹⁹⁴ The previous approach by the courts was to suggest the shipowner as the carrier, the more recent approaches have taken the suggested that the charterer and the owner will be liable.¹⁹⁵

¹⁸⁶ Christopher Giaschi 'Who is Carrier? Shipowner or Charterer?', available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3urzsrtdRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usq=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw, accessed on 20 January 2017.

¹⁸⁷ Ibid.

¹⁸⁸ Ramberg op cit note 106 at 394.

¹⁸⁹ Pejovic op cit note 16 at 397.

¹⁹⁰ Ibid.

¹⁹¹ Ibid at 397-8.

¹⁹² Ibid at 379

¹⁹³ Ibid at 380.

¹⁹⁴ Ibid.

¹⁹⁵ Christopher Giaschi 'Who is Carrier? Shipowner or Charterer?', available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj3urzsrtdRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usq=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw

The Rotterdam Rules do not expressly have a provision that holds the performing party who performs part of the contract of carriage directly liable to the claimant.¹⁹⁶ This may arise from the fact that the maritime performing party is not party to the carriage contract but does perform part or whole of the carriage contract.¹⁹⁷ The Rotterdam Rules, however, do provide that the contractual carrier and maritime performing party may be directly liable to the cargo claimant.¹⁹⁸

The Rotterdam Rules permit the cargo claimant to sue the maritime performing party directly.¹⁹⁹ This claim would be one based in delict as the third party consignee would not have any contractual claim against the maritime performing party. If, however, the requirements for a delictual claim are met the consignee would be able to seek recourse against the maritime performing party for the loss of or damage to goods during the carriage.

In the case of carrying vessels chartered not by demise, with the charterer not by demise as contractual carrier and the shipowner as actual carrier or maritime performing party, it is difficult to identify the carrier because there is charterer of the ship but the transport document has been issued or signed on behalf of another party and the goods are lost or damaged at sea. The consignee may use article 37 to bring an action against the shipowner as the carrier of the goods.²⁰⁰

(c) *Multimodal transportation of goods*

The Rules seek to regulate the sea aspect of the multi-modal transportation of goods. In the absence of a multimodal carriage regime, or partially multimodal carriage regime, it would be necessary to identify the carriage leg during which loss of or damage to goods occurred to identify the carrier to be held liable and unimodal carriage regime that would be applicable. This difficulty of establishing the leg on which the loss or damage occurred is considerably alleviated where there is a multimodal carrier and multimodal regime. The identity of the carrier and period of that carrier's responsibility will be crucial in determining who is liable when there is a claim for lost or damaged cargo.

In operating as a partial multimodal carriage regime the Rotterdam Rules may give rise to other carrier identification problems that arise in addition those that occur under a unimodal

3urzsrtdRAhWPHsAKHXEoDAEQFggaMAA&url=http%3A%2F%2Fwww.admiraltylaw.com%2Fpapers%2FCarrier.pdf&usg=AFQjCNEZ1qEWfx1YV_Ym4Vc4C6V8SZMeUw, accessed on 20 January 2017.

¹⁹⁶ John S Mo `Determination of Performing Party's Liability under the Rotterdam Rules` (2010) 18 (2) *Asia Pacific Law Review* 243 at 244.

¹⁹⁷ Hashmi op cit note 22 at 245.

¹⁹⁸ Ibid at 251.

¹⁹⁹ The Rotterdam Rules, Article 68.

²⁰⁰ Zunarelli op cit note 113 at 1018.

carriage regime. The identification of carrier problems that arise under multimodal transportation may include the situation in which it has to be determined whether there is a party acting as a carrier for the carriage of goods for each mode of transportation used. The carrier identity problem that arises in this scenario is similar to the unimodal carrier identity problems that have been dealt with in the sections above.

The carrier identity problem may arise where there is one party acting as carrier regardless of different parties performing the carriage such as the situation where a freight forwarder contracts with the shipper for the carriage of the goods and in turn contracts with the carrier as principal for the carriage of the goods.²⁰¹ In this situation, the freight forwarder is the contractual carrier in relation to the shipper. This gives rise to the distinction between the contractual carrier and performing party. The carriers responsible for the transportation by road, rail or air would be considered performing parties and the carrier responsible for the sea leg would be considered a maritime performing party.²⁰² As noted above the performing parties have not been expressed directly in the Rotterdam Rules as being liable to the cargo claimant for loss or damage to the goods during carriage. When the goods are lost or damaged during transportation, the consignee who acquires the shipper's rights under the bill of lading may recover against the freight forwarder regardless of the leg of the multimodal transport where the loss or damage occurred. This would be because the freight forwarder would be considered as the contractual carrier for the entire carriage even though it may not perform the actual carriage.²⁰³ Commonly the freight forwarder would have no transportation equipment,²⁰⁴ and so the party responsible for the loss or damage would be one of the sub-contracted carriers who would be contractual responsible to the freight forwarder for such loss or damage. The liability would either be that of the contractual carrier or the maritime performing party. Article 37 (2) of the Rotterdam Rules creates a rebuttable presumption that the registered shipowner is the contractual carrier. The shipowner is able to rebut the presumption in terms of article 37 if it was not the carrier but rather the bareboat charterer or another party who carried out the carriage.²⁰⁵ The presumption in the Rules that the shipowner is the carrier in article 37(2) of the Rotterdam Rules,²⁰⁶ raises difficulty when there is multimodal transport of the carriage of

²⁰¹ Anonymous Student Comment op cit note 104 at 1362.

²⁰² Bond op cit note 97 at 96.

²⁰³ Peter Cain, 'Complexity, Confusion and the Multifaceted Legal Roles of the International Freight Forwarder' (2014) 14 *Macquarie Law Journal* 25 at 33.

²⁰⁴ Anonymous Student Comment op cit note 104 at 1362.

²⁰⁵ The Rotterdam Rules, Article 37 (2).

²⁰⁶ The Rotterdam Rules, Article 37 (2).

goods. This complication is evident as the shipowner may not have the ability to rebut the presumption and identify the actual carrier. The shipowner may not know who the other carriers are as there is no contractual relationships between different carriers in multimodal transportation of goods. A further complication may arise in the case where the shipowner cannot be identified in the transport document, The Rotterdam Rules provide no solution on this.

When the freight forwarder is an intermediary contracting in a representative capacity with the shipper on behalf of carriers for each leg of the transportation, the carriage contract would be between the shipper and the carrier for that leg of the carriage.²⁰⁷ The problem of identifying the leg of transport on which loss of or damage to the goods occurred does arise for the cargo interest, who would have acquired the rights of the shipper under the bill of lading. The freight forwarder when acting as agent would not be liable for the breach of the carriage contract between the carrier and the shipper.²⁰⁸ When loss of or damage to the goods occurs during one of the legs of transportation and it is not clear which leg it may be that article 37 (2) will be used leaving the shipowner to rebut the presumption that it is the carrier by identifying the carrier. However the application of this provision would be contentious as the shipowner would not have contracted with any of the other multimodal transportation carriers and would face difficulty in rebutting the article 37 (2) presumption. The approach that could be possibly taken by the consignee would be to sue all the carriers the freight forwarder had acted as agent for in order to recover for the lost or damaged cargo.

From the discussion above it can be noted that the Rotterdam Rules, in terms of article 37, have made a great effort to provide solutions to the carrier identity problems. These efforts include providing mechanisms that may assist in preventing the problem of identifying the carrier from arising as well as providing contingency measures for when the carrier identity problem does arise. The position of the third party consignee is improved under the Rotterdam Rules as regards the identification of the carrier. The Rules, are not without their shortcomings and this shall be discussed in chapter 5 where, through comparison with the solutions to the carrier identity problems provided by the Hague-Visby Rules and Hamburg Rules, it will be assessed whether the Rules adequately solve the carrier identity problems.

²⁰⁷ William Leung 'The Dual Role of the Freight Forwarder: *Vastfame Camera Ltd v Birkart Globistics Ltd*, 2005 High Court of Hong Kong 117, Stone J, 5 October 2005; 2005 AMC 2864 (High Court of Hong Kong, 2005)' (1997) 38 (1) *Journal of Maritime Law and Commerce* 97 at 97

²⁰⁸ *Ibid* at 98.

CHAPTER 5 EVALUATION OF THE PROVISIONS UNDER THE ROTTERDAM RULES IN PROVIDING A SOLUTION TO THE CARRIER IDENTITY PROBLEM

‘The new international legal regime on the international carriage of goods wholly or partly by sea, builds on the strengths of the predecessor treaties and eliminates some of their weaknesses. Moreover, the Rotterdam Rules codify modern commercial practice and especially for common law jurisdictions, preserve the rich body of case law that has been built over the years as a result not only of the application of the Hague-Visby Rules, but other international instruments on the international carriage of goods.’²⁰⁹

I Introduction

This chapter assesses whether the Rotterdam Rules’ solutions to each of the selected carrier identity problems improves on those, if any, under each of the Hague-Visby Rules and Hamburg Rules respectively. This assessment is based on a comparison between the Rotterdam Rules’ solution and each of the Hague-Visby Rules and the Hamburg Rules to ascertain whether the Rotterdam Rules provide a solution to a problem not addressed in the previous Rules or whether the solutions provided in the Rotterdam Rules are more effective than that provided under either of the previous dispensations.

II The carrier identity problems

(a) Identifying the carrier

As has been noted in the previous chapters, the carrier identity problem affects the third party consignee who seeks to claim against the contractual claimant for the loss of or damage to goods during the transportation of goods. This consignee would not have been party to the original contract of carriage and so there may be difficulty in ascertaining the carrier’s identity. In comparing how the different Rules provide solutions to the carrier identity problems, it must be noted that it is key to determine whether the Rules provide measures that assist in preventing the carrier identity problem arising, as well as whether they provide measures to address the situation when the carrier identity problem arises. In other words, do the Hague-Visby Rules, Hamburg Rules or Rotterdam Rules respectively provide pre-emptive and or reactive measures that address the carrier identity problems?

One of the shortfalls of the Hague-Visby Rules is the inability to clarify how the cargo claimant may go about seeking to identify the carrier when there is uncertainty as to whether the shipowner is the carrier or not. The Hague-Visby Rules are a partial sea carriage regime

²⁰⁹ Kofi Mbiah ‘Updating the Rules on International Carriage of Goods by Sea: The Rotterdam Rules’ at 1, available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf>, accessed 29 January 2017.

and do not deal with all aspects of the carriage arrangement. Those aspects the Rules did not address are left for the parties to deal with. The consequence of this is that individual countries have treated the shipowner as the contractual carrier or have allowed the consignee to claim against both the contractual and actual carrier.²¹⁰ This has led to a lack of international uniformity regarding the approach to the carrier identity problem and legal uncertainty for cargo claimants when faced with such a situation.

The Hague-Visby Rules have not provided pre-emptive measures that can assist in preventing the carrier identity problems. These measures could include requesting that the sea transport document, such as the bill of lading, provide information such as the name and address of the carrier so its identity is easily ascertainable. The Hague-Visby Rules list the certain information to be provided in the bill of lading when issued by the carrier on demand of the shipper, however, information such as the carrier's name or address is not one of these listed requirements.²¹¹ It has been suggested that the Hague-Visby Rules, in defining 'contract of carriage' as applying to carriage contracts covered by a bill of lading,²¹² implies that the bill of lading is relevant for the purpose of identifying the carrier.²¹³ The provision does state that the bill of lading issued by the carrier to the shipper may provide other information.²¹⁴ From this it may be inferred that information such as the carrier's name and address is intended to be included in the Rules through the requirement of documents such as the bill of lading. Though the Hague-Visby Rules do not provide any rules regarding information regarding the carrier's identity it does not mean that the bill of lading should not provide such information.²¹⁵

The Hamburg Rules detail what information should be included in the bill of lading,²¹⁶ this includes the 'name and principal place of the business of the carrier'.²¹⁷ This is one of the pre-emptive measures that can provide assistance to the consignee who may not have access to the original contract of carriage and relies on the bill of lading as evidence of such contract. If the bill of lading provides the relevant information as to the carrier's identity then the consignee would have no difficulty identifying the carrier. However, as indicated in chapter 3, such

²¹⁰ Professor Dr Frank Smeele 'The Maritime Performing Party In The Rotterdam Rules 2009' at 3, available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjY8K6zvLfRAhVLHxoKHV6WCyoQFggaMAA&url=http%3A%2F%2Frepub.eur.nl%2Fpub%2F23175%2Fmaritime_performing.pdf&usg=AFQjCNEz9jVXsUceByBv13CjKzRv9wPiw, accessed on 29 January 2017.

²¹¹ The Hague-Visby Rules, Article 3 (3).

²¹² The Hague-Visby Rules, Article 1 (b).

²¹³ Zunarelli op cit note 113 at 1012.

²¹⁴ The Hague-Visby Rules, Article 3 (3).

²¹⁵ Zunarelli op cit note 113 at 1012.

²¹⁶ The Hamburg Rules, Article 15 (1).

²¹⁷ The Hamburg Rules, Article 15 (1) (c).

information may at times may be insufficient or in some cases wrong. The Hamburg Rules provide that if any of the contract particulars in the bill of lading are not provided the document remains legally valid as long as Article 1 (7) requirements are satisfied.²¹⁸ Though the provisions are aimed to making the process of identifying the carrier an easier task for the consignee it does not necessarily mean that such problem can be avoided in all cases. The identity of the carrier under the Hague-Visby and Hamburg Rules will be a factual inquiry based on the information provided on the relevant transport documents. There is a need for the pre-emptive measures to be combined with reactive measures.

The Rotterdam Rules have combined both pre-emptive and reactive measures that may make the task of identifying the carrier easier for the consignee. Article 36 (2) requires the name and address of the carrier to be provided in the transport document.²¹⁹ This has the same effect as discussed above regarding the Hamburg Rules. The difference between these requirements is that the Hamburg Rules require the ‘principal place of business of the carrier’²²⁰ whilst the Rotterdam Rules require the ‘address of the carrier’.²²¹

The Rotterdam Rules address the situation where such information is not provided in the bill of lading in article 37 (2). The provision states that the shipowner is to be presumed to be the carrier unless the shipowner dispels this presumption either by proving the vessel is under a bareboat charter or by identifying the carrier and their contact information.²²² This provision recasts the responsibility of identifying the carrier on the party most likely to have better knowledge on the carrier’s identity from the consignee. This provision acknowledges the roles of the parties involved in the carriage of goods and their relationships and is an attempt to use the recognition of such relationships to provide solutions to issues that may arise. It relieves the third party consignee of the burden and difficult task of identifying the carrier when it is mostly unlikely to have access to information that can assist with the identification of the carrier.

Article 37 (3) provides that the claimant can prove that the carrier is ‘any other person other than a person identified in the contract particulars’.²²³ This provision is an option available to the claimant who would still have the option to sue the shipowner and leave it to the shipowner in terms of article 37 (2) to identify the carrier. The Rotterdam Rules in this way

²¹⁸ The Hamburg Rules, Article 15 (3).

²¹⁹ The Rotterdam Rules, Article 36 (2).

²²⁰ The Hamburg Rules, Article 15 (1) (c).

²²¹ The Rotterdam Rules, Article 36 (2) (b).

²²² The Rotterdam Rules, Article 37 (2).

²²³ The Rotterdam Rules, Article 37 (3).

have provided the claimant with options on how to handle a situation when the carrier identity problems arise and assist in making the task less difficult for the claimant.

Identifying the carrier is important for the consignee who wants to bring a claim against the correct party so as to avoid costs as well as bringing the claim within the prescribed time period. Under the Hague-Visby Rules the time period in which to bring a claim is one year.²²⁴ The Hamburg Rules place a two year period in which a claimant can institute a claim.²²⁵ The Rotterdam Rules take an approach different to these two regimes, ‘it considers the time from the standpoint of the claimant rather from that of the defendant.’²²⁶ The Rotterdam Rules provide a two year period in which claims can be enforced which ‘commences on the day which the carrier has delivered the goods or... on the last day on which the goods should have been delivered.’²²⁷ The Rotterdam Rules have made both for lengthening the prescription period generally and introducing measures specifically designed to address the time pressures related to ascertaining the identity of the carrier. The Rotterdam Rules have also provided that an action against the party identified as carrier in terms of article 37 (2) may be instituted after the two year time bar has passed.²²⁸ Compared to the time-bar under the Hague-Visby Rules, the Rotterdam Rules can be considered cargo interest friendly through alleviating the pressure previously exerted by the time- bars under the previous carriage regimes as well as being more effective than the Hague-Visby and Hamburg Rules by providing both pre-emptive of reactive measures that may prevent or assist in solving the carrier identity problems.

(b) Insufficient information to identify the person or entity that is the contractual carrier

Under the Hague-Visby Rules, the carrier identification problem has been dealt with largely by the courts which have sought to use the following methods to identify the carrier: ‘signature of the bill of lading by/on behalf of a named carrier.... signature of the bill of lading by/on behalf of the charterer of a named ship... the heading of the bill of lading’.²²⁹ These identifying markers have assisted the courts in identifying the carrier with the Hague-Visby Rules being

²²⁴ The Hague-Visby Rules, Article 3 (6).

²²⁵ The Hamburg Rules, Article 20.

²²⁶ Francesco Berlingieri ‘A Comparative Analysis of the Hague Visby Rules, the Hamburg Rules and the Rotterdam Rules’ at 36, available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi am4aSwunRAhWKTSYKHefRBvoQFggaMAA&url=https%3A%2F%2Fwww.uncitral.org%2Fpdf%2Fenglish%2Fworkinggroups%2Fwg_3%2FBerlingieri_paper_comparing_RR_Hamb_HVR.pdf&usg=AFQjCNE6WFEf dNQgNJyHMA8NGoUx3B5QTg, accessed on 29 January 2017.

²²⁷ The Rotterdam Rules, Article 62.

²²⁸ Yvonne Baatz, Charles Debattista, Filippo Lorenzon, et AL *The Rotterdam Rules: A Practical Annotation* (2009) 110.

²²⁹ Zunarelli op cit note 113 at 1012.

unable to contribute to the cargo claimant's attempts to identify the carrier. The courts in different regions do not take a uniform approach,²³⁰ and this can lead to forum shopping as well as legal uncertainty in dealing with the an action against a carrier.

Article 37 of the Rotterdam Rules provides guidelines which the previous conventions did not and seek to address the carrier problem. This provision is of utmost importance to the cargo claimant when faced with a carrier identification problem. The Rules provide guidelines for crucial stages of the carriage; the contractual and performance aspects. By providing that the information in the contract particulars naming the carrier serves as conclusive proof of the carrier's identity despite contradicting evidence in the transport documents, the Rules are seeking to ensure legal certainty that is usually sought in the law of contract. When there is insufficient information to identify the person or entity that is the contractual carrier the Rotterdam Rules provide in article 37 (2) alternative ways in which the carrier can be identified.²³¹

One of the improvements in the Rotterdam Rules is the provision stating that the face of the bill of lading will serve as conclusive proof regarding the identity of the carrier and any contradicting evidence on the reverse of the bill of lading will not nullify this.²³² This follows the decision in the *Starsin* judgment,²³³ in which the House of Lords indicated that the 'wording on the front of a bill of lading will be conclusive on the identity of the carrier and it is only if these words are not sufficiently clear that any identity of the carrier and/or demise clause on the back of the bill will be given consideration.'²³⁴ When demise or identity of carrier clauses are included in the bill of lading but fail to provide the name of the carrier and the front of the document does not provide information as to the carrier's identity the approach has been to apply article 37 (1).²³⁵

The Rotterdam Rules place significance on the contract particulars as a means to help identify the carrier based on the notion that the parties have such knowledge of the accuracy of the information having contracted on it. When the transport documents are signed, the Rotterdam Rules recognise that transport document may be signed by the carrier, or its agent,²³⁶ and such signature may be key in the identification of the carrier. The Rotterdam Rules have

²³⁰ Ibid.

²³¹ The Rotterdam Rules, Article 37 (2)

²³² The Rotterdam Rules, Article 37 (1).

²³³ *The Starsin* supra note 55

²³⁴ Ibid.

²³⁵ Baatz, Debattista, & Lorenzon, op cit note 228 at 110.

²³⁶ The Rotterdam Rules, Article 38.

effectively shifted the responsibility from the cargo claimant to the carrier in terms of identification as the carrier under the Rotterdam Rules has to self-identify.²³⁷

(c) *When there are different contractual and performing parties*

The definition of the carrier in the Hague-Visby Rules has been criticised as inadequate to solve the carrier identity problem.²³⁸ The word ‘includes’ raises the question of whether the carrier refers only to the shipowner or charterer or refers to other parties and who these other parties actually are. When there are multiple carriers it is said that the Hague-Visby Rules do not apply to more than one carrier and so the third party consignee will struggle to pursue a claim against the actual carrier under the contract. The consignee may, however, pursue a delictual claim against the actual carrier in order to recover the loss. This notion of the single carrier under the Hague-Visby Rules fails to recognise the different parties who can be considered the carrier whether contractual or not. It is a failure to recognise that the performance of the carriage contract can be carried out by parties other than the contractual carrier thus failing to ensure that the correct party is held liable for its performance of the contract of carriage. The consequence of this is that many jurisdictions have treated the shipowner as the contractual carrier or allowed the cargo claimant to sue against the contractual and actual carrier.²³⁹ This means that the consignee may bring a contractual claim against the contractual carrier and pursue a claim in delict against the actual carrier for any loss or damage to the goods carried by sea. These approaches taken by different legal systems have been adopted by the Rotterdam Rules and the Hamburg Rules.²⁴⁰

The Hamburg Rules introduced the term ‘actual carrier’ as acknowledgment of the difference between the party that contracts to perform the carriage of goods and the party that performs the carriage of the goods. These Rules thus hold the actual carrier liable for any loss or damage to cargo that occurred under its period of responsibility.²⁴¹ The Hamburg Rules do not actually solve the carrier identity problem as they leave the determination of the identity of the contractual carrier a ‘question of fact that depends upon the documents and circumstances of each case.’²⁴²

²³⁷ The Rotterdam Rules, Article 36 (2) (b).

²³⁸ William Tetley ‘Maritime Transportation’ in K Zweigert and K Drobnič (eds) *International Encyclopedia of Comparative Law Instalment 12* (1981) 30.

²³⁹ Professor Dr Frank Smeele ‘The Maritime Performing Party In The Rotterdam Rules 2009’, available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjY8K6zvLfRAhVLHxoKHV6WCyoQFggaMAA&url=http%3A%2F%2Frepub.eur.nl%2Fpub%2F23175%2Fmaritime_performing.pdf&usq=AFQjCNEz9jVXsUceByBv13CjKzRv9wPiw, accessed on 29 January 2017.

²⁴⁰ The Rotterdam Rules, Article 20, and the Hamburg Rules, Article 10 (4).

²⁴¹ The Hamburg Rules, Article 10 (2).

²⁴² Lee op cit note 37 at 146-7.

The Rotterdam Rules introduce the term ‘maritime performing party’ who is the performing party who undertakes the carrier’s obligation during the time when goods arrive at the port of loading and the departure from the port of discharge.²⁴³ This term is similar to the ‘actual carrier’ under the Hamburg Rules who performs the carriage of goods or part of the carriage on behalf of the carrier.²⁴⁴ The maritime performing party, however, is intended to be broader in its application than the actual carrier.²⁴⁵ This is based on the choice by the drafters of the Rotterdam Rules who considered that ‘actual carrier’ suggests that the contractual carrier is not actually a carrier and limiting the actual carrier to parties who carry the goods excluding those who store or handle the goods.²⁴⁶

Through the inclusion of the notion of maritime performing parties in relation to the carrier, the Rotterdam Rules account for the situation in which the cargo claimant may not have a contractual claim against the shipowner on the basis that it is not the contractual carrier. When this is the case the claimant who suffered the loss of or damage to the goods during their transportation may have a claim in delict against the shipowner for the vicarious liability of the master and members of the vessel. The shipowner, even though it is not the contractual carrier, will be the actual carrier through the master, as the master is the employee of the shipowner thus making the shipowner vicariously liable for the master’s actions. The claimant may also enforce a delictual claim against the maritime performing party even where there is no contractual link. The claimant may have a claim against the shipowner on the ground that it is a maritime performing party performing the carrier’s obligations.²⁴⁷ The Rotterdam Rules have sought to hold the correct parties liable to cargo claimants by the inclusion of the term ‘maritime performing party’. This is crucial in modern shipping industry through the recognition of the various parties who should be held accountable for the period of carriage for which they are responsible.

The Rotterdam Rules have a wider notion of which categories of persons or entities who may be considered a carrier and thus liable under the Rules.²⁴⁸ This differs from the Hamburg Rules under which there was uncertainty as to who among those falling within the definition of ‘actual carrier’ could be held liable under a contract of carriage.

²⁴³ The Rotterdam Rules, Article 1 (7).

²⁴⁴ The Hamburg Rules, Article 1 (1).

²⁴⁵ Bond op cit note 97 at 99.

²⁴⁶ Ibid.

²⁴⁷ Ibid at 97.

²⁴⁸ Tomotaka Fujita ‘The Coverage of the Rotterdam Rules’ at 5, 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 27 January 2017.

The Rotterdam Rules include and regulate the parties involved in the carriage operation who perform part of the carriage contract and can be identified as the carrier. This assists the claimant in identifying particular parties involved in the carriage process and hold them accountable for the obligations of the carrier. In a way, the Rotterdam Rules holds these parties responsible due to them purporting to act as carriers.

The Rotterdam Rules in creating joint and several liability for the carrier and the maritime performing party have gone a step further than the notion of the single carrier under the Hague-Visby Rules. The definition of carrier in the Hague-Visby Rules is said to be contradicted by the notion of joint and several liability.²⁴⁹ This stems from the notion that under the Hague-Visby Rules there is only one carrier and that the claimant can sue the charterer or owner not both.²⁵⁰ This extension by the Rotterdam Rules rectifies the shortcomings caused by the Hague-Visby Rules whereby limiting the scope of coverage to a notional single ‘carrier’ fails to reflect industry practice and can cause difficulties.²⁵¹ The Hamburg Rules impose joint and several liability for the actual and contractual carriers.²⁵²

(d) The carrier identity problem in the context of multimodal transportation.

As noted in chapter 3, the Hague-Visby Rules and the Hamburg Rules are unimodal carriage regimes and so they do not address multimodal transportation. For this they have been criticised as outdated.²⁵³ The Rotterdam Rules are a partial multimodal carriage regime and have provisions that address this form of carriage. This places them as an improvement over both the Hague-Visby Rules and Hamburg Rules.

III Commentary on the successes and shortfalls of the Rotterdam Rules in solving the identity of the carrier problem(s)

The Rotterdam Rules are said to ‘significantly differ from those of the Hague-Visby Rules and of the Hamburg Rules and appear to be definitely more clear and complete.’²⁵⁴ The Rotterdam Rules, through their provisions, identify the main issues that arise in the carrier identity problem. These include the lack of clarity in transport documents when only the trade names

²⁴⁹ Pejovic op cit note 16 at 403.

²⁵⁰ Ibid.

²⁵¹ Ibid at 97.

²⁵² The Hamburg Rules, Article 10 (4).

²⁵³ Hashmi op cit note 22 at 229.

²⁵⁴ Francesco Berlingieri ‘A Comparative Analysis of the Hague Visby Rules, the Hamburg Rules and the Rotterdam Rules’ at 25, available at https://www.google.co.zw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi am4aSwunRAhWKTSYKHefRBvoQFggaMAA&url=https%3A%2F%2Fwww.uncitral.org%2Fpdf%2Fenglish%2Fworkinggroups%2Fwg_3%2FBerlingieri_paper_comparing_RR_Hamb_HVR.pdf&usg=AFQjCNE6WFEf dNQgNJyHMA8NGoUx3B5QTg, accessed on 29 January 2017.

of the carrier or their booking agents are provided; the problems with the reverse of the bill of lading providing contradictory evidence as to the identity of the carrier, and when the master signs the transport documents yet it is unclear on whose authority this is based on.²⁵⁵ The drafters of the working group sought to address the issue where the face of the transport document was indistinct stating ‘only the trade names of the carrier or the name of the carrier’s booking agent, rather than identifying the carrier’ and included, in Article 36 (2) (b), that the Rules should include in the transport document the name and address of the carrier.²⁵⁶ This provision would enable the carrier to be identified in the relevant documents thus making their identification an easier task for a concerned party.

The Rotterdam Rules are unclear as to the position when the information on the face of the transport document, reflecting the contract particulars, is incorrect. Thomas has commented that where the name of the company is stated on the face of a bill of lading and is subject to a demise clause it stretches matters to say that a carrier’s identification should be based on the name on the face of the bill of lading and how the matter is dealt with by the courts would depend on how the court’s interpret Article 79 and the transport document itself.²⁵⁷

The *Starsin*²⁵⁸ judgment has been criticised by Simon Baughen as leaving unclear ‘whether a demise clause or identity of carrier clause on the reverse of the bill can prevail over the form of the signature on the front.’²⁵⁹ The judgment did state that the demise clause will be considered when the information on the ‘front of the bill of lading is not sufficiently clear.’²⁶⁰ The effect of this is seen in the Rotterdam Rules, which followed the *Starsin* judgment,²⁶¹ in the relevant provisions and not accounting for a situation where the demise clause or identity of carrier clause actually contains the correct information regarding the carrier’s identity.

This problem is further illustrated in the Rotterdam Rules’ reliance on having a name presented on the face of a transport document to serve as conclusive proof as to the carrier’s identity. This is problematic as it may give rise to difficulties such as having companies with similar trade names being held to be carrier based on the ambiguity of the provided name. Such ambiguous names could potentially cause a cargo claimant to institute an action against the wrong party based on the trade name provided. The way this would be resolved does depend

²⁵⁵ Girvin op cit note 8 at 177.

²⁵⁶ Berlingieri op cit note 168 at 25.

²⁵⁷ D Rhidian Thomas (ed) *The Carriage of Goods by Sea Under the Rotterdam Rules* (2010) 86.

²⁵⁸ *The Starsin* supra note 55.

²⁵⁹ Baughen op cit note 24 at 32.

²⁶⁰ Lee op cit note 37 at 158.

²⁶¹ *The Starsin* supra note 55.

on how the courts interpret and give effect to the provisions of the Rotterdam Rules. The lack of favour for demise clauses and identity of carrier clauses is based on the premise that such clauses are often illegible on the bill of lading. This leaves the information on the face of bill of lading as more likely to serve as accurate proof as the carrier's identity. The Rotterdam Rules do not account for the situation where the 'conflicting indications on the front of the bill that are both of the same order... both are typed, or both are printed.'²⁶² Thus the claimant seeking to identify the carrier is bound to the Rotterdam provisions with no indication of what the outcome could be where the face of the bill of lading has the incorrect information regarding the carrier's identity.

Article 39 (1) states that when the name of the carrier is not included as a contract particular under Article 1 (23) the transport document is still a valid document.²⁶³ It has been suggested that if the Rules had demanded that the carrier be explicitly identified in terms of Article 1 (5) then the shipper would not struggle with the carrier identity problem.²⁶⁴ The consequence of this is that the carrier identity problem would be less likely to arise when there is sufficient proof regarding the carrier's identity provided in the contract particulars of the transportation documents. However, it is to be noted that the Rules require that the transport document include the name and address of the carrier.²⁶⁵

The identification of the sea carrier under the Rotterdam Rules regarding the multimodal transportation is potentially problematic as Article 37 (2) creates the presumption that the shipowner, as identified in the contract of carriage, is the carrier.²⁶⁶ In creating the presumption in Article 37 that the shipowner is the carrier in the carriage of contract, the Rotterdam Rules create a difficulty in terms of multi-modal transportation where the shipowner lacks knowledge regarding the other transport legs of the carriage operation.²⁶⁷ Zuranelli concludes that the shipowner could become liable for the damage of goods even when the damage occurred at a different transportation leg of the carriage of the goods.²⁶⁸ This means that the Rotterdam Rules create a possible unfair and burdensome responsibility on the shipowner based on the assumption that they can identify and have access to the necessary information to rebut the

²⁶² Baughen op cit note 24 at 32.

²⁶³ The Rotterdam Rules, Article 39 (1).

²⁶⁴ Kerim Atamer *et al* 'Constructing Problems in the Rotterdam Rules Regarding the Identity of the Carrier' in Meltem Deniz Güner-Özbek (ed) *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (2011) 160.

²⁶⁵ The Rotterdam Rules, Article 36 (2) (b).

²⁶⁶ The Rotterdam Rules, Article 37 (2).

²⁶⁷ Berlingieri op cit note 168 at 26.

²⁶⁸ *Ibid*.

presumption that it was the carrier.²⁶⁹ When the Rotterdam Rules provide for the carrier to be identified by the shipper, it is not always easy for this to occur for example when the consignee is not party to the contract of carriage.²⁷⁰ The Rotterdam Rules, through this presumption, create a ‘fall guy’ who then takes the steps to identify the correct carrier when they are not.

The Rotterdam Rules can be said to be an improvement on the Hague-Visby and Hamburg Rules in addressing the carrier problem. The Hague-Visby and Hamburg Rules have not fully addressed or generated solutions to the carrier identity problem. The Rotterdam Rules, by including provisions, mainly Article 37, provide guidelines on how to address some of the carrier identity problems. The discussion above illustrates how the Rotterdam Rules are more clear and detailed than the previous dispensation and this is a major step up in bringing international uniformity as well as clarity in regards to how the carrier identity problem could be resolved.

As discussed above the Rotterdam Rules are not a complete solution to the carrier identity problem. They have sought to address some of the problems that have arisen in the carriage of goods and have gone further in doing so than the previous conventions however they are not an absolute success in resolving the carrier identity problem.

²⁶⁹ Ibid.

²⁷⁰ Atamer and Suzel op cit note 264 at 160.

CHAPTER 6 CONCLUSION

‘There is no doubt that the new regulation contained in the Rotterdam Rules will permit some important improvements. It is clear, for example, that its detailed provisions take care of and incorporate the results obtained by prevailing international jurisprudence... uncertainty that still exists in some cases in identifying the carrier will be avoided to a large extent. That is not to say that all the problematic issues have been resolved.’²⁷¹

This dissertation has sought to assess whether the solutions provided in the Rotterdam Rules to the three identified carrier identity problems are an improvement on the solutions, if any, provided by the Hague-Visby and Hamburg Rules. This assessment included considering whether the solutions provided in the Rotterdam Rules are an improvement to the previous dispensations in that they either recognize or address the carrier identity problem that the previous Rules failed to recognize or address, or provide a better solution than the previous dispensations. Following this assessment the dissertation sought to assess whether the Rotterdam Rules provide an adequate solution to the carrier identity problems or whether they fall short of providing a satisfactory solution.

Through an examination of the relevant provisions in the Rotterdam Rules and the comparisons drawn with the Hague-Visby and Hamburg Rules, it can be seen that the Rotterdam Rules have sought to address the carrier identity problems and are an improvement on the previous conventions. The Hague-Visby and Hamburg Rules fail to cater to the growing trends of the shipping industry though they remain the principal carriage regimes. The Rotterdam Rules have sought to be more advanced than the Hague-Visby and Hamburg Rules in attempting to make it easier for cargo claimants to identify the carrier and whom to claim against. The Hague-Visby and Hamburg Rules have a narrow scope in providing the cargo claimant with guidelines on how to address and solve the carrier identity problem and leave many issues regarding the carrier identity problem unsolved.

The Rotterdam Rules have been described as having ‘the most ambitious scope of any maritime carriage convention to date’.²⁷² The solutions in the Rotterdam Rules address the problems of insufficient information and contradictory information in the contract particulars and transport documents. The Rules cast the responsibility of identifying the carrier to the party in the best position to do so and accommodate the difficulty that may arise with identifying the carrier by flexible prescription periods.²⁷³ In dealing with the problem of the contractual carrier

²⁷¹ Zunarelli op cit note 113 at 1014.

²⁷² Bond op cit note 97 at 116.

²⁷³ The Rotterdam Rules, Articles 62 and 65.

and performing party being different entities, the Rules seek to resolve this by making such parties joint and severally liable.²⁷⁴

The Rotterdam Rules, through its provisions, namely Article 37, have sought to provide more clear and detailed requirements and guidelines on how to address the carrier identity problem. The Rotterdam Rules provide what can be labelled as pre-emptive and reactive measures that address the carrier identity problems. The pre-emptive measures seek to prevent the carrier identity problem from arising, particularly requiring the carrier to be identified in the sea transport documents.²⁷⁵ This provision is not unique to the Rotterdam Rules. The Hamburg Rules include a similar provision.²⁷⁶ This requirement would make the identification of the carrier a simple task as their information would be provided, however the carrier identity problem may still arise when such information is incorrect or indiscernible. The Hamburg and Rotterdam Rules state, in their respective provisions,²⁷⁷ that the lack of information in the transport documents will not invalidate the document itself. The effect of this is that the Hamburg and Rotterdam Rules fail to provide adequate measures that ensure that the task of identifying the carrier is easy for a concerned party as there is no actual consequence for the failure to provide such information in the transport document.

The reactive measures provided in the Rotterdam Rules are more progressive than the previous dispensations, in that the Rotterdam Rules actually provide solutions for situations when the carrier identity problems arise. When there is contradictory information in the transport document and the contract particulars, the information in the contract particulars is taken to be conclusive evidence as to the carrier's identity.²⁷⁸ This is because the contract of carriage is more likely to be an accurate indicator as to the intentions of the parties. The Rotterdam Rules further create the presumption that the shipowner is the carrier when there is doubt as to the carrier's identity,²⁷⁹ as the shipowner is more likely to be in the position to know who the contractual carrier is than the third party consignee. This provision does rely on the shipowner being identifiable in order to be effective. The third party consignee would be in the same position as before the Rotterdam Rules should the contractual carrier and the shipowner be difficult to identify. They would have the difficult task of ascertaining the carrier's identity.

²⁷⁴ The Rotterdam Rules, Articles 17 (6) and 19.

²⁷⁵ The Rotterdam Rules, Article 36 (2) (b).

²⁷⁶ The Hamburg Rules, Article 15 (1).

²⁷⁷ The Hamburg Rules, Article 15 (3), and the Rotterdam Rules, Article, 39 (1).

²⁷⁸ The Rotterdam Rules, Article 37 (1).

²⁷⁹ The Rotterdam Rules, Article 37 (2).

The Rotterdam Rules have followed the decisions from case law that arose in addressing the shortcoming of the Hague-Visby Rules in addressing the carrier problem. This includes the *Starsin*²⁸⁰ judgment where the information on the face of the transport documents was found to serve as conclusive proof as to the carrier's identity. The Rotterdam Rules, following the *Starsin* judgment, create a stronger reliance on the information provided in contract provisions as well as taking in depth assessments of the relevant documents to provide assistance in determining the carrier's identity.

The Rotterdam Rules have extended the notion of the single contractual carrier in the Hague-Visby Rules and the differentiation between the actual and contractual carriers under the Hamburg Rules by distinguishing between the contractual carrier, the performing party and the maritime performing party.²⁸¹ The Rotterdam Rules recognize that parts of the carriage contract may be performed by other parties such as independent contractor and the Rules enable these parties to be held accountable for loss or damage to goods as performing carriers.²⁸² The liability of a performing party would not be as the contractual carrier but they can be delictually liable to the consignee. The performing party is not held liable separately from the carrier, the maritime performing party however may be held liable separately from the contractual carrier as determined by the Rules.²⁸³ Such parties are treated as the carrier for the part of the carriage operation they perform.²⁸⁴ This does not necessarily resolve the carrier identity problem but adjusts the liability for parties besides the contractual carrier who may be held delictually liable for any loss of or damage to cargo during their performance of the carriage operation.

Although the Rotterdam Rules are an improvement as compared to the previous carriage regimes with regard to solutions to the identified carrier identity problems, the Rules are not an unqualified success in dealing with such problems.²⁸⁵ Regarding conflicting information on the face and reverse of the transport document, the Rules are silent on how to address and solve this. The consequence is that uncertainty arises as to what the position is when clauses such a demise clauses and identity of carrier clauses provide contradictory information, especially when they may contain the right information regarding the carrier's identity. The carrier identity problem is not fully resolved when the face of the document states the carrier's name as in some cases such information may be incorrect or indiscernible. The information cannot

²⁸⁰ *The Starsin* supra note 73.

²⁸¹ The Rotterdam Rules, Article 1 (6) and (7).

²⁸² The Rotterdam Rules, Article 19.

²⁸³ The Rotterdam Rules, Articles 18 and 19.

²⁸⁴ *Mo op cit* note 195 at 245.

²⁸⁵ *Zunarelli op cit* note 113 at 1019.

not serve as conclusive prove as to the carrier`s identity in such situations and the Rules do not shed any light on this issue.

In the context of multimodal transportation, the presumption that the shipowner is carrier²⁸⁶ will exacerbate the carrier identity problem when the shipowner lacks knowledge as to the identity of the other carriers responsible for the other modes of transportation involved in the carriage operation. This places an unfair burden on the shipowner. The Rotterdam Rules fail to account for situations in which the contract particulars fail to provide information regarding the carrier`s identity thus placing the carrier in the same position as under the Hague-Visby Rules in having to seek the carrier with little proof as to the carrier`s identity. The Rotterdam Rules do not provide clarity on the consequences whereby the name of the bill of lading is not the carrier`s name though the Rules provide that it serves as conclusive proof. The Rules place too much emphasis on the reliance on a name provided on the transport documents as conclusive proof of the carrier`s identity giving rise to potential problems that will affect the claimant`s action if it turns out that the named carrier is not the carrier against whom the action should be brought. These are examples of how the Rotterdam Rules could be said to give rise to new problematic issues regarding the carrier identity problem instead of solving the issue.²⁸⁷

The Rotterdam Rules are to be commended for ‘incorporating a variety of topics that were not previously governed by the Hague-Visby Rules or any other International Convention’.²⁸⁸ To say that the Rotterdam Rules have completely resolved the carrier identity problem would be incorrect.²⁸⁹ Overall, the provisions in the Rotterdam Rules relating to the problem of identifying the party to sue to enforce a claim for damages for loss or damage to goods carried by sea are an improvement, firstly in recognizing that there is a problem, expressed in various ways and secondly, by attempting to resolve some of these problems. Having assessed whether the solutions provided in the Rotterdam Rules to each of the carrier identity problems selected it can be stated that the solutions provided in the Rotterdam Rules are an improvement to the previous dispensations, though not entirely satisfactory in addressing and solving these problems.

²⁸⁶ The Rotterdam Rules, Article 37 (2).

²⁸⁷ Ibid.

²⁸⁸ Hashmi op cit note 22 at 265.

²⁸⁹ Zunarelli op cit note 113 at 1014.

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