

THE LONE “CARRIER”

An Analysis of the Implications of the General Reluctance to Hold Parties Involved in Sea Carriage Jointly and Severally Liable

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I hereby declare that I have read and understood the regulations governing the submission of LLM: Shipping Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

To Dad

You have given me a gift that can never be lost,
will never decrease in value, and will not go out of fashion.
I will always be thankful for it.

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1. INTRODUCTION

Unfortunately, what would appear to be a deceptively simplistic question, ‘who is the carrier?’, has resulted in close to a century of complex and idiosyncratic law and jurisprudence. This notion of a single Hague Rules carrier, has spawned a multitude of bill of lading clauses and judicial doctrines, such that one is left with the impression that there must be a simpler solution. Arguably, many of the difficulties faced with regard to litigation concerning parties involved in the carriage of goods, would be resolved by holding such parties to be jointly and severally liable as carriers. Yet this solution, although employed intermittently in several jurisdictions, remains an unpopular choice when considering multiple defendants in cargo claims.

Interestingly enough, when one examines the legislative process that gave rise to the uniform law regulating shipper and carrier interests, it becomes evident that the current single-carrier view of the Hague Rules is perhaps not the approach that was envisioned by the drafters of the Rules. Secondly, when the simplicity with which performing parties are dealt with under an expansive view of “carrier” is contrasted with the legal difficulties that arise as a result of a restrictive view of “carrier” one is left wondering whether we are giving effect to the reasonable expectations of parties engaged in carriage. By virtue of propagating a single carrier view, the law has had not only to adapt to finding “the carrier” amongst multiple performing parties, but also to accommodate multiple causes of action both within and outside the Hague Rules regime. A pluralistic or expansive notion of “carrier” is evidently desired when one canvasses more recent attempts at uniform carriage law. The domestic law of many nations also evidences the desire for such an approach. Judicial reform in the law of carriage is not a novel concept, with the prime example being the validation of the Himalaya clause despite the doctrine of privity. Nevertheless, when faced with the opportunity to hold both the shipowner and the charter to be “carriers”, the bench has often declined. One is left questioning why is it that there is such a resistance to the notion of ‘carriers’ or of multiple parties comprising ‘the carrier’?

2. HISTORICAL DEVELOPMENT OF THE ‘CARRIER’ AND UNIFORM LAW

An examination of the winding path that eventually led to the Hague Rules is in order. Understanding the sequence of events that led to the creation and the adoption of uniform law governing the relationship between the carrier and the cargo owner or shipper, allows one to better comprehend the aims of the Rules, and as such, the violence that is done to them when circumvented by the very parties whose activities they had aimed to regulate. Prior to uniform law in carriage, the shipping industry has in essence passed through two phases. In earlier times, carriers bore strict liability and were subject to onerous duties. When shipping first modernized with the advent of steel and steam, the pendulum swung and carriers bore almost no responsibility by virtue of expansive exclusion clauses.¹ Uniform law first and foremost sought to strike a balance between the competing interests of cargo owners and shipowners. A second important point to note is the development of the definition of “carrier”. The Hague Rules notion of “carrier” can be contextualized not only by examining the conferences that resulted in the Rules, but also by considering the statutory instruments that informed the drafters of the Rules.

In earliest times, prior to the development of more complex commercial relationships, those wishing to transport their goods simply bought or hired a vessel,² and traveled with their property.³ “The contract of carriage, when used, was often a mere oral agreement between the merchant and the carrier, who was usually the ship’s master.”⁴ In Roman law, the carrier was liable under *action de recepto*, or praetorian action, to cargo

¹ See Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, who describes the history of international liability regimes in terms of “the pendulum of liability” at pp. 485-494.

² Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 7 - 8.

³ Knauth, A. *The American Law of Ocean Bills of Lading, 4th Ed.* (1953) AMC, Baltimore, at p. 374, notes that from the earliest trading days “either the merchant went to the port of shipment, and personally saw and bought his goods there and risked the sea-passage to the distant market, or he traveled with his goods to the port of delivery and personally offered his goods there to the local buyers.”

⁴ Mankabady, S. “Comments on the Hamburg Rules” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 28.

interests for any loss or damage to goods, excluding force majeure.⁵ In time however, “as a result of the expansion of the Roman Empire and its ports in the eleventh century, overseas trade grew, and it became less the practice for the merchant to transport good himself in response to orders from different places.”⁶ Thereafter the owner of the cargo tended to stay behind and entrusted the cargo to a carrier, but often a “super cargo” was placed on board to look after the goods and arrange for their sale.⁷ As trade began to flourish throughout the northern Italian cities around the thirteenth century, the ship was required to keep a book with all the shipments and the name of their owners, and an extract from the book was issued to cargo owners.⁸ As commerce became more complex, so did the law. By the late 17th century in England, the jurisdiction of the courts of common law had been extended to include maritime litigation.⁹ The English courts, “by adopting the common carrier’s liability by land as the origin of the custom at common law, obliged carrier’s to deliver goods in the same state as that in which they had received them.”¹⁰ The reasoning behind imposing strict liability on the carrier was that “[a]t common law it was believed that a cargo owner who shipped his goods by a marine carrier should be afforded special protection; he was prevented, by geographic remoteness, from closely supervising the passage of his goods and he was particularly

⁵ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 8-9.

⁶ *Ibid.*, at p. 8.

⁷ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 512.

⁸ Mankabady, S. “Comments on the Hamburg Rules” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 28, but “this document was considered only as a receipt and the cargo-owner had to send a representative with the goods.” Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 10, notes that as a result of trade growth between Northern Europe and the Mediterranean because of the Crusades, carriage expanded and the bill as a receipt appeared.

⁹ Gorton, L. *The Concept of the Common Carrier in Anglo-American Law* (1971) Gothenburg, at p. 94.

¹⁰ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 11, although Karan has argued that the English courts “imposed strict liability on all of [the ocean carriers] regardless of whether they were common carriers or not.” Interestingly enough, “in maritime law, there is no good reason for distinguishing between a common carrier, who is a person not having any right to refuse to carry goods, and a private carrier, who is one reserving the right to accept cargo interests offers, because both of them are carriers undertaking to transport cargo by sea, this separation belongs to land transport rather than sea carriage.” (*Ibid.*, at p. 11, f.n. 15). The distinction, however, has taken on meaning over time. Essentially, all shipowners who “offer their ships as general ships for the transit of the goods of any shipper” are common carriers. (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 200). Where a ship is chartered to one shipper and contains an express stipulation in the contract of affreightment, the law does not consider him to be a common carrier (Boyd, *ibid.*, at p. 201).

susceptible to collusion between dishonest carriers and thieves.”¹¹ This level of strict liability imposed on the carrier was not unique to England, rather this approach was adopted in other common law nations, including the United States,¹² as well as civilian nations.¹³ In France, the *droit commun* places the carrier under a very strict *obligation de résultat*, meaning he is liable for any loss or damage to the goods unless he falls within the narrow range of exonerating circumstances that amount to *forces majeures* or *cas fortuits*.¹⁴ In essence, the law regarding carriage by sea was arguably well in favour of cargo interests.

Carriers objected to the sometimes harsh imposition of liability in instances beyond their control.¹⁵ In the mid 18th century, carriers had attempted to escape the severe common law and civil law liability through contractual exemptions, however, the adverse reactions from cargo interests restricted this practice.¹⁶ By the 19th century

¹¹ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-1. This is essentially a restatement of the original justification for the liability of common carriers. Lord Holt in *Coggs v. Bernard* (1703) 2 Ld.Raym. 909 (K.B.) at p. 918 opined that the reason for the common carrier’s liability is to avoid “collusion whereby the carrier may contrive to be robbed on purpose and share the spoil.” Best CJ in *Riley v. Horne* (1828) 130 ER 1044 (Com Pleas), at p. 1045 held that the carrier is liable as “an insurer” with the rationale being, “In a state of society such as that we live in – in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world – so much property must be entrusted to carriers, that is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property...”.

¹² Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 12.

¹³ Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 4.

¹⁴ Song, S. *A Comparative Study on Maritime Cargo Carrier’s Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 124.

¹⁵ Shipowners had no opportunity to prevent loss or damage to goods as a result of the master’s actions. That era has been characterized as the “days of wooden ships and iron men”, where “cargo was carried in wooden sailing ships whose course was subject to the winds, reliable charts were few, navigational aids could not yet cope with cloudy weather and uncharted shoals, and shipowners could not communicate with ships at sea.” (Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 104).

¹⁶ Todd, P. *Modern Bills of Lading*, 2nd Ed. (1990) Blackwell Law, Oxford, at p. 136. The only exemption the shipowner was able to secure in the 18th century was for liability as a result of “dangers of the sea.” (Karan, *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 13.) As a result of a 1795 case, *Smith v. Sheppard*, wherein the strict liability of carriers was exemplified, the shipowners became so alarmed that, according to Lord Tenterden, they attempted to have a bill passed that would limit their common law liability. The bill passed the Commons but was thrown out by the Lords, and thus the shipowners were left attempting to alter their liability by contract. (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 208).

however, shipping and the shipping industry had fundamentally changed.¹⁷ The financial position of the shipowner was greatly improved by technological advancements in shipping,¹⁸ and as the shipowner's bargaining power increased, the scope of his liability to cargo interests decreased. "The rapid development of ocean steamers, built of iron and steel, with Scotch boilers, reciprocating engines and screw propellers, in the decades following the Civil War, resulted in a great expansion of safe and rapid ocean trade, accompanied by an elaboration of shipping documents, banker's drafts, bills of lading, insurance policies, and devices for the assertion of subrogated tort and contract claims for losses and damages and for avoiding or defending such claims."¹⁹ By virtue of the superior bargaining power of the ship owners, extensive exculpatory clauses were inserted into the bills of lading resulting in virtually little or no liability on the part of the carriers.²⁰ The exemption clauses became all encompassing, so much so that it inspired one commentator to remark that "there seems to be no other obligation on a ship owner than to receive the freight."²¹ By the later half of the 19th century, the balance of liabilities had therefore swung entirely in favour of the carrier.

The repercussions of the changes in shipping were not only amongst the parties to the bills of lading, but became a concern amongst certain governments at the time as shippers began to lobby for their governments to intervene. This was particularly the case in the United States. In the mid 19th century, the American owned fleet began to decrease in size as wealthy investors found more profitable alternatives in railroads and factories.²² What did remain of the American flag merchant fleet was all but destroyed by the Civil

¹⁷ Regular liner service in the North Atlantic had begun in the second decade of the 19th century, and by the mid 19th century large iron and steel steam-powered vessels with greater and greater carrying capacity were plying the trade (Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 548).

¹⁸ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 13.

¹⁹ Knauth, A. *The American Law of Ocean Bills of Lading, 4th Ed.* (1953) AMC, Baltimore, at p. 119.

²⁰ *Sturley, M, et al. Benedict on Admiralty, 6th Ed., Volume 2A* (1990) Matthew Bender & Co, New York, at p. 2-1 to 2-2. Knauth, *ibid*, at p 116, has noted that a shipowner was able to carry goods "when he liked, as he liked, and wherever he liked."

²¹ Scutton, T. *Charterparties and Bill of Lading* (1984) at p. 210, as cited in Lee, S & Kim, S. "A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel." (2000) 27 *Transp. L.J.* 205, at p. 209.

²² Sweeney, J "The Prism of COGSA" (1999) 30 JMLC 543, at p. 549.

War several years later.²³ Conversely, Great Britain's merchant fleet, supported by the Royal Navy, "ruled the waves".²⁴ By the late 19th century, cargo owning and shipping interests were lobbying the United States government to alter the balance that had become so heavily weighted in favour of the British shipowners,²⁵ although it should be noted that American cargo interests were not alone in their distress.²⁶ French shippers were not pleased with the situation either, but had managed to obtain a few measures of protection through legislation.²⁷ The American legislature sought to remedy the situation when it became apparent that the British parliament and the British courts were unconcerned with the plight of cargo owners.²⁸ The British courts were willing to enforce the exemption clauses on the basis of freedom of contract,²⁹ while the Supreme Court of the United States in a unanimous decision had invalidated such clauses on the grounds of public policy.³⁰ In effect, these clauses became valid on one side of the Atlantic and

²³ The American Civil War began in 1861 and lasted until 1865. Sweeney, *ibid*, at p. 551.

²⁴ Sweeney, *ibid*, at p. 551. By 1900, it has been estimated that 52% of the world's shipping was carried by the British merchant marine (Howarth, *Sovereign of the Seas*, at cited by Sweeney, J. "Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary" (1993) 24 JMLC 1, at p. 9, f.n. 39). It has also been estimated that at the time, that nearly all of the American export trade was carried by 20 British liner companies (Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 120).

²⁵ Sturley, M. "The History of COGSA and the Hague Rules", (1991) 22 JMLC 1, at p. 10.

²⁶ US cargo interests, however, were not the only ones lobbying their government. In 1890, the Glasgow Corn Trade Association complained to the British Prime Minister that "carrier's bills of lading are so unreasonable and unjust in their terms as to exempt [the carriers] from almost every conceivable risk and responsibility." (Sturley, *ibid*, at p. 10). French cargo interests shared the same concerns as well (*Ibid*).

²⁷ The position of the shippers was recognized in art. 353 of the *code commercial* which allowed insurance against the negligence or faults of the master and crew, which is significant given that French public policy was opposed to allowing insurance against negligence. As well, the shipper had the benefit of arts. 221 and 222 of the *code commercial* which imposed heavy personal responsibility on the master where there was loss or damage to cargo. (Song, S. *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 220)

²⁸ Sturley, M, et al. *Benedict on Admiralty, 6th Ed.*, Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-3.

²⁹ See *The Ferro* [1893] P. 38, enforcing and applying such a clause, as well as *Tattersall v. National Steamship Co.* (1884) 12 Q.B. Div. 297. See also Lord Justice Scrutton opining on the acceptability of such defences in the 19th cen. English courts in *Gosse, Millerd, Ltd. v. Canadian Government Merchant Marine* (1927) 29 Ll. L. Rep. 190 at pp. 190-191 (H.L.).

³⁰ *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397 (1889). In this instance cargo, shipped in a British ship from New York to Liverpool, was lost due to the negligent actions of the crew in grounding the vessel near Holyhead, Wales. The bill of lading contained a clause exempting the shipowner from "negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew..." (*Ibid*. at p. 438). Justice Gray wrote "...the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and as it is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excusing him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed...It [is] against the public policy of the

invalid on the other. One author describes the resulting Harter Act as “originally conceived as an instrument of international trade war.”³¹

The Harter Act was in essence the true precursor to uniform carriage law. “It was the first national statute which established a compromise between carriers’ and shippers’ interests by mitigating the strict nature of the common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list.”³² This compromise bore itself out in the wording of s.3 of the Harter Act.³³ The original bill submitted to the House by Congressman Harter had been drafted strongly in favour of cargo interests by providing such obligations as an absolute duty to furnish a seaworthy ship,³⁴ however, there were concerns that the bill may impede the ability of US shipowners to compete with the English carriers and therefore when the bill reached the Senate Commerce Committee many sections were amended.³⁵ In the Senate debates, exemptions were added,³⁶ and the absolute duty to furnish a seaworthy ship was reduced to a due diligence

law to allow stipulations which will relieve [the carrier] from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.” (*Ibid* at p. 438 and 441). It should be noted though that the U.S. Federal Courts had been invalidating such clauses on the grounds of public policy for decades prior to the Supreme Court judgment. See *Niagara v. Cordes*, 62 US 7 (1858), as well as *The Branthford City*, 29 F 373 (1886).

³¹ Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 46.

³² Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 19. The Harter Act was not however the first attempt to reach a compromise between cargo owners and carriers. In 1882, a committee established by the International Law Association, consisting of Liverpool merchants, shipowners, underwriters and lawyers prepared a model bill of lading that could be adopted voluntarily by shipping interests that included a similar compromise, however, the International Law Association’s efforts in the end were unsuccessful, as a final agreement was never reached (Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 6-7).

³³ 46 U.S.C. § 192; Section 3 entitled “Limitation of Liability for Errors of Navigation, Dangers of the Sea and Acts of God” stipulates: “If the owner of vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel...”

³⁴ Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 12.

³⁵ Sturley, *ibid*, at p. 13.

³⁶ Such as the exemption for errors in navigation or in management of the vessel. Congressman Lind, speaking to the House on the Senate amendments to the Bill that was to become the Harter Act, explained the rationale behind adding an exception for errors in navigation: “Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas in stress of weather or in storms, when every man is worn out with watching, if a man falls asleep on the watch or commits any fault of navigation whereby injury results,

obligation.³⁷ It was viewed that the resulting bill “was a more balanced compromise between cargo and carrier interests.”³⁸ The general compromise between cargo and carrier interests were not the only significant changes made by the Senate. The original House bill commenced in section 1 by stating: “It shall not be lawful for any common carrier or the manager, agent, master or owner of any vessel transporting merchandise or property...”.³⁹ Whereas the version as amended by Senate stipulates: “It shall not be lawful for the manager, agent, master or owner of any vessel...”.⁴⁰ Inherent in the first version therefore is the notion a carrier separate from the shipowner. The reason for the amendment is unknown as “these [Senate committee on commerce] proceedings were officially unreported, [thus] a veil has been drawn over the most crucial part of the legislative process.”⁴¹ The final bill passed and was signed on the 13th of February, 1893,⁴² leading one commentator to note that “[i]n the economic warfare between cargo and carrier a truce of sorts had been achieved in the United States in the 1893 legislation.”⁴³ The Harter Act proved to be an influence on other nations, and just over a decade later, similar legislation had been enacted in several countries.⁴⁴ Australia,⁴⁵ New Zealand,⁴⁶ Canada,⁴⁷ and Morocco,⁴⁸ all adopted legislation styled after Harter.⁴⁹ Many

the master, owner, or charterer is held responsible under the law. To this extent the bill relieves domestic shipping from those burdens.” (Sweeney, J. “Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 12, f.n. 49).

³⁷ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20.

³⁸ Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 13.

³⁹ Sweeney, J. “Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 12, footnote 50.

⁴⁰ 46 U.S.C. § 190; Section 1.

⁴¹ Sweeney, J. “Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 11.

⁴² Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 14; Sweeney, J. “Happy Birthday, Harter”, (1993) 24 JMLC 1, at p. 12-13.

⁴³ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)” (1976) 7 JMLC 69, at p. 70.

⁴⁴ Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 555; Knauth, *supra* note , at p. 122; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20; Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 15-18.

⁴⁵ Sea Carriage of Goods Act, 3 Commonwealth Acts 37 (1904).

⁴⁶ Shipping and Seaman Act, Acts No. 96, (1903).

⁴⁷ Water Carriage of Goods Act, 9&10 Edw. , ch. 61 (1910)

⁴⁸ Code de Commerce Maritime (Maritime Commercial Code), 1919.

⁴⁹ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 555; Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 122; Karan, H. *The Carrier’s Liability Under*

other nations, such as Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain and Sweden, had contemplated introducing legislation modelled after Harter,⁵⁰ while Holland had already introduced a Bill embodying the provisions of the Harter Act.⁵¹ The Harter Act was not simply copied; rather several nations did alter the provisions to a certain extent,⁵² in most cases rendering them more onerous on the carrier.⁵³ This was not the case, however, with respect to the Canadian Act.

The Canadian Water Carriage of Goods Act, although inspired by the Harter Act, differed in certain respects. Its more modern conception, would ultimately serve as the principal model for the Hague Rules.⁵⁴ The Canadian Act, unlike the Australian Act, altered the benefits for both cargo interests and carriers.⁵⁵ With regard to cargo interests, forum selection clauses that lessened the jurisdiction of the Canadian courts were prohibited,⁵⁶ and a specific package limitation was added in order to prevent carriers from inserting clauses in the bill of lading limiting his liability to a lower amount.⁵⁷ While on the other hand, the carriers benefited from an expanded list of exemption

International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules (2004) Edwin Mellen Press, Lewiston, NY; Sturley, M. "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 15-18.

⁵⁰ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 23; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20; Sturley, M. "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 17-18.

⁵¹ Comité Maritime International, *The Travaux Préparatoires*, at p. 23-24.

⁵² The Dominion Acts, Canada, New Zealand, and Australia, were not uniform in their provisions, thus giving rise to difficulties. (Maclachlan, D. *Treatise on the Law of Merchant Shipping*, 7th Ed. (1932) Sweet & Maxwell, London, at p. 364).

⁵³ Australia's Act was more generous to cargo interests in several respects: it removed the due diligence qualification to the seaworthiness obligation, in essence rendering it "absolute" and it prohibited choice of law clauses that avoided the application of Australian law for shipments outbound shipments from Australia (Sturley, M. "The History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 15). New Zealand followed Australia's example and essentially copied the Australian Act directly (Sturley, *ibid*).

⁵⁴ Sturley, *ibid*, at p. 17.

⁵⁵ See footnote 53 above, noting Australia's cargo friendly amendments.

⁵⁶ Water Carriage of Goods Act, section 5.

⁵⁷ Water Carriage of Goods Act, section 8. See Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 21.

clauses.⁵⁸ It was this formula found in the Canadian Act, that ultimately formed for the basis for the balancing of interests in the Hague Rules. Where the Canadian Act also differed from the Harter Act, is the addition of a definition section. Unlike the Hague Rules, however, Section 2 of the Canadian Act defines “goods”, “ship” and “port”, but does not define the carrier.⁵⁹ The Harter Act does not address or mention “the charterer”, however the Canadian Act expressly governs the responsibilities and liabilities of the charterer as well as the owner of the vessel. Section 4(a) referring to exculpatory clauses for negligence covers “the owner, charterer, master or agent of any ship”, while Section 4(b) stipulates that any clause whereby: “any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship’s hold, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided...such clause...shall be illegal...”. Section 8 stipulates: “The ship, the owner, the charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars...”. Recall that article IV(5) of the Hague Rules provides: “Neither the carrier nor the ship shall in any event become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package...”. The Canadian Act therefore demonstrated a very clear intention to include, regulate and protect all parties involved in the performance of the carriage of goods, with the exception of servants who are not protected by the act.⁶⁰ Despite the fact servants are not protected, their actions are nevertheless regulated in other provisions.⁶¹ The Canadian Act also envisions the division of responsibility between several parties acting as carriers by the fact that the shipowner is responsible for exercising due diligence, but the charter may be responsible for acts that would be

⁵⁸ Water Carriage of Goods Act, section 6 and 7. The list now included: latent defects, fire, any reasonable deviation, strikes, and losses arising without the carrier’s actual fault or privity or without the fault or neglect of his agents, servants or employees.

⁵⁹ Water Carriage of Goods Act.

⁶⁰ The servants of the shipowner and charterer, were not protected by either section 7 which lists the exemptions, or section 8 which provides the limits of liability.

⁶¹ See section 4(c) concerning clauses relieving parties from the obligations of the master, officers, agents or servants to carefully stow, handle and care for goods, and section 7 exempting parties for loss without the fault or neglect of their agents, servants or employees.

viewed as errors in navigation or management of the vessel: “[Section] 6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or on the management of the ship.”⁶² While, the Hague Rules impose the duty to exercise due diligence to make the ship seaworthy in Article III(1)(a) on “the carrier”, and exempt “the carrier” for nautical fault in Article IV(2)(a). The fact that the Canadian specifically governs, regulates and protects shipowners, charterers, their agents, and the master, appears to be neglected, and in certain instances misrepresented, by most authors discussing the role of the Act in the drafting of the Hague Rules.⁶³ Nevertheless, the Canadian Act clearly demonstrates the intent to protect and regulate the shipowners and charterers. Was the Canadian conception of a regime governing multiple parties performing the carriage of goods lost in the drafting of the Hague Rules? Or rather did the drafters simply use the term “carrier” for simplicity of drafting instead of listing all the parties?

⁶² Water Carriage of Goods Act.

⁶³ Those that refer to the Canadian Act and its role in the creation of the Hague Rules either fail to address that distinction (See Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543), or worse, misrepresent the Act. See for example, Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 21, who refers to sections 6 and 7 as expanding the exemption clauses to include...losses arising without the carrier’s actual fault or privity,” when in fact the Act refers to the fault or privity of the owner, charterer, agent or master. See also Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 16, footnote 121, who quotes the Canadian Act, section 6 and 7 as follows: “Section 6 and 7 expanded the list of the carrier’s statutory exceptions to include latent defects, fire, any reasonable deviation, strikes, and losses “arising without [the carrier’s] actual fault or privity or without the fault or neglect of [the carrier’s] agents, servants or employees”.”

3. THE HAGUE AND HAGUE-VISBY RULES: “CARRIER”

After the First World War, it has become apparent that uniformity in bills of lading terms and in the legal regimes governing them were desirable in order to facilitate international trade.⁶⁴ The impetus for Hague Rules, however, came from England, where the overseas dominions⁶⁵ were pressuring the Imperial Government to create a uniform regime throughout the entire British Empire.⁶⁶ In 1921, the Imperial Shipping Committee, appointed by the Imperial Government, issued a report concluding that “there should be uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners’ liability, but based more precisely on the Canadian Water Carriage of Goods Act, 1910...and not the Harter Act which it closely resembles...because it embodies the latest experience.”⁶⁷ England, however, had become concerned that domestic legislation might result in its shipowners being placed at a disadvantage with regard to international competition,⁶⁸ as well the shipowners agreed and preferred to have uniform regulation rather than simply regulation at their home port.⁶⁹ An appeal was therefore made to the International Law Association (ILA) to tackle the issue through an international conference.⁷⁰ In 1921, a draft based on the Canadian Act was prepared by the Maritime Law Committee of the ILA, and was adopted at the ILA’s Conference at The Hague later that year.⁷¹ As a matter of substance, the Committee’s draft included the compromise between cargo and carrier interests

⁶⁴ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448.

⁶⁵ Canada, Australia and New Zealand, where cargo interests and importers were politically powerful (Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 18).

⁶⁶ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sturley, *ibid*, at p. 18; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 22; Maclachlan, D. *Treatise on the Law of Merchant Shipping*, 7th Ed. (1932) Sweet & Maxwell, London, at p. 364.

⁶⁷ Imperial Shipping Committee, “Report of the Imperial Shipping Committee on the Limitation of Shipowners’ Liability by Clauses in Bills of Lading and on Certain Other Matters Relating to Bills of Lading,” Report issued February 25th, 1921, sections of which are reproduced in Comité Maritime International, *The Travaux Préparatoires*, at p. 18-21.

⁶⁸ Diamond, A. “The Hague-Visby Rules” [1978] LMCLQ 225.

⁶⁹ Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 19.

⁷⁰ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 125; Sturley, *ibid*, at p. 19.

⁷¹ Knauth, *ibid*, at p. 125-126; Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 23.

following section 6 of the Canadian Act.⁷² The draft, however, contained a definition of the carrier, and had eliminated the pluralistic style of drafting of the Canadian Act that had ensured all parties came under the Act. The draft, entitled the “Hague Rules of 1921” was subsequently amended by the Comité Maritime International (CMI), and then during the Diplomatic Conferences held at Brussels in 1922, 1923 and 1924.⁷³ The resulting document became the Hague Rules of August 25th, 1924.

3.1. Travaux Préparatoires

During the Brussels Conferences which resulted in the Hague Rules of 1924, there was almost no discussion with regard to the definition of the carrier. Ironically, the small discussion concerning that provision over the three years of preparation, resulted in the correction of what was viewed to be an error, yet may have resolved the difficulties that arise as a result of the notion of the single Hague Rules carrier. The International Law Association, ILA, submitted their draft entitled “Hague Rules of 1921” to the 1921 Hague Conference, with a provision that read, “(a) “Carrier” includes the owner and the charterer, who enters into a contract of carriage with the shipper.”⁷⁴ The Chairman stated that there must be an error, and asked if he could alter “and” to read “or” as a literal error, and the Committee gave their consent.⁷⁵ Interestingly enough, the notion of the owner and the charterer, would have paved the way for joint and several liability. The amended article was submitted to the CMI London Conference in 1922, and was further amended to read “(a) “Carrier” means the owner...”.⁷⁶ The final text as amended and adopted at the Brussels Conference in 1924, returned to the wording “includes” although no explanation is provided as to why the change was made.⁷⁷ It appears therefore that deliberation with regard to the definition was extremely limited. Interestingly enough,

⁷² Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 21.

⁷³ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448.

⁷⁴ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 87.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, at p. 88. The article was amended with no discussion as to the amendment or meaning thereof found in the travaux préparatoires.

⁷⁷ *Ibid.*, at p. 87.

what presumably appeared clear to the drafters, has caused 80 years of interpretive difficulties.

3.2. Textual Interpretation

Article I of the Hague and Hague Visby Rules defines ‘carrier’ in the following manner: “Carrier” includes the owner or the charterer who enters into a contract of carriage with the shipper. Despite the fact that one would have hoped that given the international character of the Hague Rules such provisions would have a fair degree of uniform interpretation,⁷⁸ this has proven not to be the case. From the perspective of the text of the provision, a diversity of interpretations have arisen. Generally, they center around two issues. The first being whether the “or” is disjunctive or conjunctive, with the distinction being between the notion of a single carrier and the possibility of multiple carriers. The second issue revolves around the word ‘includes’, thus raising the question whether a carrier is only a charterer or a shipowner, or whether the provision is not so restricted. The word “includes” has also been used to argue that the provision envisages multiple parties performing the carriage as carriers. Regardless, it is generally viewed that the definition is in fact ambiguous,⁷⁹ therefore lending itself to several different interpretations.

Those favoring a more restrictive interpretation tend to reason as follows. The focus will often be on the contracting carrier. “The safer view is thus that the term [“carrier”] should be limited to the contracting carrier himself.”⁸⁰ “Given that the term “carrier” is restricted to the contracting carrier, notwithstanding its inclusive definition in article I, it is fair to say that the Rules do not apply to – nor are they available to – the

⁷⁸ Lord Macmillan expressed the aim that the Rules would be interpreted uniformly several years after their creation: “It is important to remember that the Act of 1924, was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.” *Stag Line v. Foscolo, Mango & Co.* (1931) Ll. L. Rep. 165 (H.L.), at p. 174.

⁷⁹ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 384.

⁸⁰ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 26.

actual carrier (if not the contracting carrier).”⁸¹ “From [the wording of article 1(a)] it can be concluded that the Hague Rules recognize that the carrier can be either the shipowner or the charterer.”⁸² Interesting enough, Scrutton allows for a wider interpretation of the types of parties included in the definition, but nonetheless restricts it to a single contracting carrier; “The use of the word [includes] suggests that the definition is not exhaustive, and if so, the term ‘carrier’ might include a freight agent or a forwarding agent or carriage contractor...At all events, it does not extend beyond the person who is contracting as carrier under the relevant contract of carriage.”⁸³ It has nevertheless been noted, “the expression ‘includes’ is ambiguous, for it leaves in doubt whether the carrier can be only the charterer or only the shipowner, or whether it can be some other party.”⁸⁴

On the other hand, the interpretation of the article through the prism of the word ‘includes’ results in a view of the carrier that is more expansive. “Article I(a) states that the carrier includes the owner or the charterer, but is not so restricted. The carrier might be a freight agent, or carriage contractor, but the term does not include stevedores.”⁸⁵ One author argues that because “includes” was substituted for the word “means” during the drafting of the rules, the provision should be given a wider interpretation: “It is not fanciful to suppose that the word ‘includes’ was substituted for ‘means’ because it bore a different and, as far as the delegates were concerned, more appropriate meaning. [Includes]...suggests a wider operation for the rights and immunities thrown up by reason of the carrier’s contract...It is reasonable to suppose that other parties performing the contract of carriage might have the benefit of the Rules.”⁸⁶ In commentary on the definition of ‘carrier’, it has been described as “not a particularly clear or exhaustive definition. Under this definition the “carrier” could be the owner or the charterer or both. The word “includes” also implies the carrier could be some other person who is neither

⁸¹ Ping-fat, *ibid*, at p. 25.

⁸² Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 384.

⁸³ Boyd, S. *Scrutton on Charterparties and Bills of Lading, 20th Ed.* (1996) Sweet & Maxwell, London, at p. 422.

⁸⁴ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 384.

⁸⁵ Kindred, H. et al. *The Future of Canadian Carriage of Goods by Water Law* (1982) Dalhousie Ocean Studies, Halifax, at p. 7.

⁸⁶ Newell, R. “Privity Fundamentalism and the Circular Indemnity Clause” [1992] LMCLQ 97, at p. 107.

owner or charterer.”⁸⁷ Regardless, it is clear that the definition of ‘carrier’ in article 1(a) of the Hague Rules has received a myriad of interpretations.

3.3. Uniformity and Harmonization Achieved?

The Hague Rules came into force on June 2nd, 1931. The Rules were a success, and the desired uniformity of the law of carriage of goods had generally been achieved. “[T]he Rules had redressed the imbalance which had formerly existed as between ship and cargo as regards the risk of loss or damage occurring to the goods in the course of a sea transit. In place of wide exceptions clauses exempting shipowners for almost every conceivable loss or damage occurring in the course of a sea voyage, the Rules had produced a more or less balanced division of risk as between ship and cargo.”⁸⁸ By the time of the 1968 Visby Protocol, there were 73 states who were parties to the Hague Convention, including most of the major maritime nations of world, as well, many nations had introduced the Hague Rules into their domestic law without actually ratifying the Convention.⁸⁹ Of the nations that did not ratify the Hague Rules, many of them adopted the rules into special statutes, for example Carriage of Goods by Sea Acts,⁹⁰ or incorporated them into provisions of commercial codes that were already in force.⁹¹ The popularity of the Hague regime has continued to grow, as by 1995 there were 83 state

⁸⁷ Giaschi, C. “Who is Carrier? Shipowner or Charterer” (1994) Paper presented January 20, 1994 at the Canadian Maritime Law Association Meeting, Toronto. Available online at: www.admiraltylaw.com/papers/carrier.htm.

⁸⁸ Diamond, A. “The Hague-Visby Rules” [1978] LMCLQ 225, at p. 226.

⁸⁹ Comité Maritime International, “Uniformity of the Law of Carriage of Goods by Sea” in *CMI Yearbook 1995*, Scandinavian University Press, Stockholm, at p. 107. Canada, for example, had domestically implemented the Hague Rules in the Carriage of Goods by Water Act 1936, but had never actually ratified the Hague Convention.

⁹⁰ For example, Canada, Australia, New Zealand, and the Union of South Africa (Knauth, A. *The American Law of Ocean Bills of Lading, 4th Ed.* (1953) AMC, Baltimore, at p. 457). Carriage of Goods by Sea Acts were also enacted in Norway, Denmark, Sweden, Finland, Spain, Portugal, Japan, although these nations did formally adhere to the convention, while Yugoslavia, Liberia, Tunis and the Republic of Ireland, never formally adhered to the convention but passed acts based on it (Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 56-57 for further information on the domestic statutes of these nations).

⁹¹ Indonesia and Greece, although not adhering to the Convention, inserted the Hague Rules into their codes in substance and in form, while Soviet Russia, Syria, and Lebanon, not parties inserted provisions echoing the principles of the Convention. Conversely, Belgium, Switzerland, the Netherlands and Turkey gave force of law to the Hague Rules by inserting them into their commercial codes. See Yiannopolous, *ibid*, at p. 58-59 detailing the codal amendments of the above nations.

parties to the Convention,⁹² and in the year 2004, 93 state parties had ratified the Convention.⁹³ Of the major trading nations, the vast majority operate under the Hague and Hague-Visby system, for example in 2004, 46.27% of Canada's waterborne trade was conducted with Hague-Visby Rules countries, 19.87% with Hague Rules countries, and 2.65% with Hamburg Rules nations.⁹⁴ Depending on the source, it has been estimated that today 75% to 85% of the world's trade is conducted under the Hague and Hague-Visby Rules.⁹⁵ Despite the fact that uniformity is currently breaking down,⁹⁶ one cannot help but think that the general uniformity achieved and the impact made by the Hague Rules has far exceeded the intentions of its drafters.⁹⁷ Despite this glowing report on the success of the Rules generally, one notable area has proved to be largely resistant to international uniformity. This is the law with respect to multiple parties to the carriage endeavor. Where there is more than one 'carrier', uniformity breaks down internationally. Arguably, regulating carrier and cargo owner relations was one of the fundamental aims of the Hague Rules, and unfortunately this is where the regime is most dysfunctional. As the following sections will demonstrate, where there are "carriers" often the Rules will not apply to more than one carrier, thus either preventing the unfortunate cargo claimant from pursuing the party who actually carried their goods, or allowing an opportunistic claimant to circumvent the limitations and exemptions in the Rules. As the Rules have failed to bring uniformity in the regulation of carrier – shipper relations in this respect then arguably they have failed in one of their fundamental aims. As the chairman of the

⁹² *Ibid.*

⁹³ Comité Maritime International, *CMI Yearbook 2004*, CMI Headquarters Pub., Antwerp, Belgium, at p. 463-469, giving the statue of ratifications to the Hague Rules. Note that this number includes nations that have since denounced the Hague Rules in favor of Hague-Visby, Hamburg, or domestic legislation.

⁹⁴ Transport Canada, "Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water" (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 8. Available online from the Canadian Maritime Law Association website at:

www.cmla.org/papers/2004/TransportReport-Oct.4,%202004.pdf. See also Thornton, "An Optimal Model for Reforming COGSA in the United States: Australia's COGSA Compromise" (2001) 29 *Transp. L.J.* 43, at p. 53, noting that the vast majority of Australia's trading partners fall under the Hague-Visby regime.

⁹⁵ Tetley, W. "Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99." (2003) 28 *Tul. Mar. L.J.* 1, at p. 9, providing the figure of 75%. Hare, J. "The Pendulum of Liability: Harter, Hague, Hamburg to UNCITRAL Draft", Lecture at University of Cape Town, South Africa (August 10, 2005), providing the figure of 85%.

⁹⁶ See section 12, *infra* addressing the breakdown in uniformity and the response by UNCITRAL with the new draft convention.

⁹⁷ Especially given the fact that, according to Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 6, "the Brussels Convention was not conceived as a comprehensive and self-sufficient code regulating the carriage of goods by sea."

United States Bill of Lading Committee stated in 1927, “uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the shipper and his underwriter from the responsibility of the carrier and his underwriter. The all-important question is that you draw the line somewhere and that that line be drawn in the same place for all countries and for all importers.”⁹⁸ Sadly, where multiple parties are involved in the carriage of goods, this bright line division of responsibility is lost.

⁹⁸ Statement of Charles S. Haight before the Subcommittee of the Senate Committee on Foreign relations, 70th Cong., 1st Sess. 3 (1927), as quoted by Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 JMLC 553, at p. 557.

4. THE CARRIERS: THE JOINT AND SEVERAL LIABILITY SOLUTION

There has been a fair amount of doctrinal support for rendering multiple parties performing the carriage joint and severally liable. The basis is the notion that there is not a single carrier, but that rather “carriers” or multiple performing parties are liable under the Hague regime. It is therefore argued by some that these carriers must then be jointly and severally liable. ‘Joint and several liability’ is defined as: “Liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary’s discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.”⁹⁹ The term ‘solidary liability’ is the civilian equivalent,¹⁰⁰ while Scottish lawyers employ the term ‘conjunct and several liability’.¹⁰¹

Tetley has argued: “Carriage of goods by sea can be characterized as a joint venture between the owners and the charterers, because they share the responsibilities of a carrier under the Hague/Visby Rules which cannot be contracted out of by virtue of article 3(8). As a result of the shared responsibilities, the carrier and the charterer should be held jointly and severally responsible as carriers.”¹⁰² This notion of a carriage as a joint venture has received some support, with one commentator noting “the time charter

⁹⁹ Garner, B. ed. *Black’s Law Dictionary 7th Ed.* (1999) West Group, St. Paul, Minn., at p. 926.

¹⁰⁰ Solidary liability is defined as: “Solidary liability. Civil law. The liability of any one debtor among two or more joint debtors to pay the entire debt if the creditor so chooses. This is the equivalent to joint and several liability in the common law. Also termed *liability in solido*.” (Garner, B. ed. *Black’s Law Dictionary 7th Ed.* (1999) West Group, St. Paul, Minn., at p. 926.). This term is used in Louisiana, Puerto Rico and civil law countries (Garner, B. ed. *A Dictionary of Modern Legal Usage 2nd Ed.* (1995) Oxford University Press, Oxford, at p. 479). The term is also used in the Quebec Civil Code, for example in article 1480: Where several persons have jointly taken part in a wrongful act which has resulted in injury...they are solidarily liable for the reparation thereof.”

¹⁰¹ Garner, B. ed. *A Dictionary of Modern Legal Usage 2nd Ed.* (1995) Oxford University Press, Oxford, at p. 479

¹⁰² Tetley, W. “Case Note: The Starsin” (2004) 35 JMLC 121, at p. 123. See also Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed.*, Online at: <http://tetley.law.mcgill.ca/maritime>, at p. 17, asserting “carriage of goods is effectively a joint venture of owners and charterers (except in the case of a bareboat charter) and, consequently, they should be held jointly and severally (or solidarily) liable as carriers.” Tetley has in essence championed the cause of joint and several liability for carriers for well over three decades (see Tetley, W. “Identity of the Carrier – The Hague Rules, Visby Rules, UNCITRAL” [1977] LMCLQ 519). More recently the Federal Court of Appeal of Canada has commented on the above quote, noting that treating owners and charterers alike had “merits from the policy point of view.” (*Lantic Sugar Ltd. v. Blue Tower* (1993) 163 N.R. 191 (Fed. C.A. Can.), at p. 194).

is undoubtedly a joint venture in the sense that it is composed of acts and operations of both the shipowner and the charterer, who exploit the vessel for their joint benefit.”¹⁰³ The nature of the relationship does appear to coincide with the modern definition of a joint venture.¹⁰⁴ Arguably, to characterize the carriage of goods by sea in relation to a joint venture is appropriate given the evolution of carriage. The notion of a joint venture has its roots deep in the history of carriage. In past centuries, wooden sailing ships were small town and family based operations often where cargoes were owned partly by the shipowner and the ship was partly owned by cargo owners.¹⁰⁵ “Theory and reality united in the description of a voyage as a common venture and the shipment of cargoes as a joint venture of cargo owners and shipowners.”¹⁰⁶ Although the focus now is on charterers and shipowners, as opposed to cargo owners, the principle remains fundamentally the same as in both instances joint venture refers to those who provide the vessel and perform the carriage. Conversely, some authors who nevertheless support a multiple carrier approach have rejected the description of owners and charterers as involved in a joint venture.¹⁰⁷

The characterization of such parties as carriers, need not rest on a joint venture notion, rather it can simply be justified by article III(8), as also mentioned by Tetley above. It has been noted by one commentator that the Rules, by virtue of article III(8),

¹⁰³ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 383, where Pejovic goes on to state: “The shipowner has the duty to navigate the vessel during the contract period while the charterer is bound to find customers, contract with them, and take care in handling their cargo. The shipowner and the charterer share duties and liabilities for loss of or damage to the cargo.”

¹⁰⁴ Joint venture is defined as, “a business undertaking by two or more persons engaged in a single defined project. The necessary elements are: 1) an express or implied agreement, 2) a common purpose that the group intends to carry out, 3) shared profits and losses, 4) each member’s equal voice in controlling the project.” (Garner, B. ed. *Black’s Law Dictionary 7th Ed.* (1999) West Group, St. Paul, Minn., at p. 843). Where perhaps the joint venture analysis may fall short in view of Black’s definition is the notion of equal voice, although in practice many joint ventures and partnerships are not completely egalitarian, and disproportionate responsibility can be allocated by agreement.

¹⁰⁵ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 512.

¹⁰⁶ Sweeney, *ibid*, at p. 512.

¹⁰⁷ Marler, D. “The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading” (2002) 26 Tul. Mar. L.J. 597, at p. 607 noting the fact that the notion of a joint venture had been referred to and stating that “the ‘view’ he is referring to is Professor Tetley’s suggestion, a suggestion which in my view is unnecessary and wrong, that there is, in such circumstances, some form of joint venture involved between a charterer and a shipowner.”

prevent “carriers, be they owners, charterers or others” from escaping liability.¹⁰⁸ Although the article III(8) is utilized in the U.S. as a justification,¹⁰⁹ this is not necessarily needed. Popular in the United States is simply the notion that on interpretation of the term ‘includes’ in the definition of carrier, the term ‘carrier’ therefore includes “all owners and charterers involved in the carriage of the goods at issue.”¹¹⁰ This has been termed “the practical approach” on the basis that such parties are considered to be carriers on the grounds that they have performed a portion of the carriers duties.¹¹¹ This approach has been justified in the following manner: “The doctrine that all parties involved in the carriage of goods are COGSA carriers eliminates the initial skirmishing over the identity of the carrier issue and brings all relevant parties before the court where the ultimate allocation of responsibility for the loss can be ascertained. If COGSA liability is found, the loss can be apportioned among those found to be carriers...Clauses in a charterparty that identify the carrier or that apportion the losses incurred to third parties, should not control the ability of the third party to recover, but there is no reason why they should not be given effect as between the charterer and the owner. When it is found that one party or another – the shipowner or charterer is liable for damages to cargo, the court will examine the charterparty to determine who had the responsibility for the matter in question. Thus where the charterer is held liable for the unseaworthiness of the vessel – something the charterer has no control over – indemnity should be allowed. This way of handing the identity of the carrier issue protects the shipper yet apportions liability fairly between the responsible parties.”¹¹² In some instances, despite supporting the principle, caution in certain respects has been suggested; “The principle of joint and several liability for the different “members of the family of carriers” may be desirable to protect the interests of the shipper. However in my view this

¹⁰⁸ Marler, *ibid*, at p. 601.

¹⁰⁹ See discussion below for jurisprudential examples, particularly *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949).

¹¹⁰ *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979), at p. 46.

¹¹¹ See Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 817-818. Tetley, at p. 818 likens the ‘practical approach’ to his theory: “In effect, the American “practical approach” is what has been called my “joint venture theory” of carriage of goods...”. For an analysis and application of the “practical approach” see *Commercial Metals Co. v. M/V Luckyman*, 1993 U.S. Dist. LEXIS 17484 (E.D. Penn. 1993), where the court characterizes the notion as “if a party has actual and factual responsibility for running the ship and handling the cargo, they should incur legal responsibility.”

¹¹² Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at p. 314.

should go no further than is necessary to achieve this aim, since a multiplication of carrier liabilities will involve a multiplication of liability insurance premiums.”¹¹³

Unfortunately in practice, rendering several ‘carriers’ joint and severally liable is a comparatively rare event. Judiciaries in certain nations have nevertheless proved receptive to it, notably the U.S., Canada, France and Belgium. There are many nations who have legislatively instituted joint and several liability for parties performing the carriage, however, this is discussed below in another section.¹¹⁴ In this instance we are examining instances where judiciaries under a Hague or Hague-Visby type regime have interpreted the Rules to allow for multiple carriers and joint and several liability.

4.1. Application of Principles of Joint and Several Liability to “Carriers”

By far the dominant example of joint and several liability of carriers is American jurisprudence. Interestingly enough, one cannot speak of American law in this respect as one can Canadian, English or French law due to the fact that various districts have interpreted ‘carrier’ differently. The most notable distinction is between the Circuits that require privity, as exemplified by the approach of the 5th Circuit Court of Appeals, and those that do not, as exemplified by the district courts of New York and New Jersey. Although, in both instances the courts allow both the charterer and the shipowner to be ‘carriers’ and defendants, the distinction between them is that in the privity based line of reasoning, the shipowner, charterer, and other entities must be found to be parties to the contract to become subject to COGSA. It should be noted however, that American courts have in a few instances adopted a single carrier approach.¹¹⁵

Where privity is required, the U.S. courts still interpret who is a party to the contract in an expansive manner. In *The M/V Gloria*, the 5th Circuit Court of Appeals found that the time charterer had entered into a contract of carriage by virtue of having

¹¹³ Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391, at p. 405.

¹¹⁴ See section 11 entitled “National Solutions: Legislation”.

¹¹⁵ *Glynwed Steels v. Great Lakes and European Lines*, 1979 AMC 1290 (N.D. Ill. 1978), where at p. 1291 the court opined “A simple reading of section 1301(a) indicates that either the owner or the charterer is governed, not both. The decisive factor is determining who entered into the contract.”

issued bills through its agent and signed by its agent on the payment of freight, while the shipowner had been bound to the contract by virtue of the charterer having been authorized to sign bills “for the master”.¹¹⁶ Both the shipowner and the time charterer were therefore parties to the contract and liable as “carriers”.¹¹⁷ More recently, the 5th Circuit affirmed the requirement of privity noting that “the [plaintiffs] rely on cases from the Second Circuit to assert a direct claim against the vessel owner under COGSA in the absence of privity of contract... However, these cases are distinguishable, and are not controlling authority in this Circuit which requires privity of contract of carriage before liability under COGSA arises.”¹¹⁸ Therefore both the charterer and the shipowner will be liable jointly as parties to the contract where the charterer has signed the bill of lading ‘for the master’ with the shipowner’s authority to do so.¹¹⁹ The requirement of privity has not vastly impeded the rendering of parties to the carriage jointly liable,¹²⁰ but has complicated the judicial analysis and provided a narrower concept of joint liability, especially when compared to the more expansive approach discussed below. It would also appear that the Courts of Appeal for the 4th Circuit, 1st Circuit, and 9th Circuit adopt a similar approach as the 5th Circuit Court of Appeals.¹²¹

¹¹⁶ *Pacific Employers Insurance Co. v. The M/V Gloria*, 767 F.2d 229 (5 Cir. 1985), at p. 236-237. The 5th Circuit stated the rule that “generally, when a bill of lading is signed by the charterer or its agent “for the master” with the authority of the shipowner, this binds the shipowner and places the shipowner within the provisions of COGSA.” (*Ibid*, at p. 237).

¹¹⁷ *Ibid*, at p. 243. The 5th Circuit upheld the district court’s finding that the shipowner and the time charterer were COGSA carriers. The voyage charterer was however not held to be a carrier as he did not enter into a contract of carriage with the shipper (*ibid*, at p. 236).

¹¹⁸ *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1353. In this instance, the time charterer had already settled, and the 5th Circuit held that the master had in fact bound the shipowner defendant to the contract.

¹¹⁹ Authority to sign the bills of lading, and therefore bind the shipowner, is an issue in many of the cases as the “authority” is a prerequisite. The shipowner does not become a party to the contract if the charterer signs the bills of lading without the authority of the shipowner (*Pacific Employers Insurance Co. v. The M/V Gloria*, 767 F.2d 229 (5 Cir. 1985), at p. 237; *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1352; *Dempsey & Associates v. S.S. Sea Star*, 461 F.2d 1009 (2 Cir. 1972), at p. 1015).

¹²⁰ *Steel Coils v Lake Marion*, 2001 WL 1518302, 2002 AMC 1680 (E.D. La. Nov. 29 2001), in this instance the time charterer and the vessel owners were held jointly and severally liable for the unseaworthiness, both enjoying the 500\$ per package limitation of COGSA. *In re The M/V Floreana*, 65 F. Supp. 2d 489 (S.D. Tex. 1999) holding that both shipowner and charterer can be liable as co-contractants with shippers; *Procter & Gamble Co. v. M/T Fort Fraser*, 1991 U.S. Dist. LEXIS 21159 (E.D. La. 1991); *Pacific Employers Insurance Co. v. M/T Iver Champion* 1996 U.S. Dist. LEXIS 1826 (E.D. La. 1996), finding the time charterer and voyage charterer both to be COGSA carriers as they both entered into contracts of carriage; *Gerber & Co. v. M/V Galini*, 1993 WL 185622 (E.D. La. 1993), at para 18, holding the shipowner and the charterer liable “jointly and *in solido*.”

¹²¹ The Court of Appeals for the 4th Circuit in *In re Intercontinental Properties Management*, 604 F.2d 254 (4 Cir. 1979), at p. 258 determined that a shipowner is only a COGSA carrier, in the situation where a time

The analysis in the courts of New York and New Jersey is much more expansive. In *The Unibulkfir*, the court considered whether charterers and owners were carriers, opining that “the statutory language of COGSA itself supports a broad definition of the term “carrier”. The statute seems to have been deliberately drawn so as not to limit the term to a party to the bill of lading or contract of carriage.”¹²² The approach has been described in different ways. In *M/V Agia Sophie*, the court, in determining whether the owners, operators, managers and charterers were carriers, noted that “a ‘practical test’ has been developed, which delineates COGSA carriers as those entities (1) involved in the transportation of the relevant cargo; and (2) engaged in actions that wound up causing the loss of the cargo.”¹²³ This approach has also been referred to as “the multicarrier approach” which considers that “in light of the carrier’s statutory obligations with respect to the loading, handling, stowage, carriage, custody, care, and discharge of cargo under COGSA, [this approach] endorses treatment of all owners and charterers engaged in the carriage of goods under COGSA as COGSA carriers.”¹²⁴ Regardless of the terminology used, the courts have no difficulty finding multiple parties involved in the carriage endeavor as “carriers” or as jointly and severally liable under COGSA.¹²⁵ The 11th Circuit has also endorsed the approach.¹²⁶

charterer has been found to be a COGSA carrier, if the shipowner has entered into a contract of carriage with the shipper or has some form of privity of contract with the shipper. The 1st Circuit Court of Appeals, when considering a claim involving the vessel owner, time charterer, vessel manager, in *EAC Timberlane v. Pisces Ltd.*, 745 F.2d 715 (1 Cir. 1984), at p. 719, referred to and relied upon the authorities of the 4th and 5th Circuit Courts of Appeal with respect to who may be a COGSA carrier. The 9th Circuit Court of Appeal opined in *Hasbro Industries v. M/S St. Constantine*, 705 F.2d 339 (9 Cir. 1983), at p. 341, that “Under COGSA, both shipowners and charterers who enter into a contract of carriage are considered ‘carriers’.”¹²² *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979), at p. 46. The court also noted, at p. 46, “obviously then, there can be more than one COGSA carrier of a given shipment. Second, the courts have not hesitated to impose liability on charterers or owners who are non-signatories to a bill of lading and who cannot in any real sense of the word be said to have issued the bill.” One can therefore the more flexible approach of the 2nd Circuit courts who have rejected the exercise of trying to find some form of evidence to tie the defendant to the bill of lading as is done in the 5th Circuit.

¹²³ *Tradearbed Inc. v. M/V Agia Sophia*, 1997 AMC 2838 (S.D.N.J. 1997), at p. 2840. See also *Hyundai Corp. M/V Vulca*, 800 F. Supp. 124 (D.C. N.J. 1992), at p. 132 also referring to the approach as “the practical test”. The Court in *M/V Vulca* found, at p. 130, that “even if the defendant is not a party to the bill of lading, that party may still be a carrier under COGSA if the plaintiff shows that the defendant was involved in some way in the issuance of the bill of lading or the loading of cargo.”

¹²⁴ Reilly, M. “Identity of the Carrier: Issues Under Slot Charters” (2001) 25 Tul. Mar. L.J. 505, at p. 509.

¹²⁵ See *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979); *Nichimen v. M/V Farland*, 1972 AMC 1573 (2 Cir. 1972), at p. 1595, the time charterer and the shipowner were held to be jointly liable as COGSA carriers; *Hyundai Corp. M/V Vulca*, 800 F. Supp. 124 (D.C. N.J. 1992); *Duferco*

It is notable that parties who are not carriers can also be held jointly and severally liable with parties found to be carriers. In *The President Monroe*, the shipowner and the shipbuilder were held to be jointly and severally liable where a combination of defective hatch covers and negligent ballasting resulted in the wetting of the plaintiff's cargo.¹²⁷ The shipbuilder is not a carrier, however, the court having established that the plaintiff's cargo was wetted by one or both negligent parties, ordered joint and several liability on the basis that it could not tell how much water came from which source.¹²⁸

The Japanese have recently adopted an approach that is in line in certain respects with the American approach. In *The Camfair*, the time charterer and the owner were held both to be the carrier.¹²⁹ Although, the approach is more in line with the reasoning in the 5th circuit, as the Tokyo district court determined that both parties were "the contractual carrier".¹³⁰

Steel v. M/V Festivity, 1999 AMC 1184 (S.D.N.Y. 1998), at p. 1187 finding a strong statutory support for treating all owners and charterers involved in the carriage of goods as COGSA carriers; *Samsung America v. M/T Fort Producer*, 798 F. Supp. 184 (S.D.N.Y. 1992), at p. 187, holding both the shipowner and time charterer jointly liable; *Jordan International Co. v. M/V Cyclades*, 782 F.Supp. 25 (S.D.N.Y. 1992), at p. 27; *Mente & Co. v. Isthmian (The Quarrington Court)*, 36 F. Supp. 278 (S.D.N.Y. 1940), holding both the time charterer and the shipowner jointly liable, although the court held that they were both bound by the bills of lading, as this case is prior to the mutlicarrier approach; *International Produce Inc. v. S.S. Frances Salman* [1975] 2 Lloyd's Rep. 355 (S.D.N.Y. 1975), at p. 364, holding that the time charterer how issued the bill of lading was jointly liable with the shipowner whose master the bill of lading was issued on behalf of; *Hartford Fire v. Novocargo USA Inc. (M/V Pacific Senator)*, 257 F.Supp. 2d 665 (S.D.N.Y. 2003), holding a NVOCC and a carrier jointly and severally liable; *Blanchard Lumber Co. v. The Anthony II* [1966] 2 Lloyd's Rep. 437 (S.D.N.Y. 1966), at p. 447 holding both the shipowner and the charterer jointly and severally liable as "the relationship between the charterer and the owner does not affect the charterer's liability to the shipper."; *Thyssen Inc. v. S/S Eurounity*, 1993 U.S. Dist. LEXIS 6309 (S.D.N.Y. 1993), holding the charterer and shipowner jointly and severally liable for damage to the cargo.

¹²⁶ See *Hale Container Line v. Houston Sea Packing*, 137 F.3d 1455 (11 Cir. 1998), at p. 1465 relying on *Joo Seng Hong Kong v. S.S. Unibulkfir* 483 F. Supp. 43 (S.D.N.Y. 1979) and stating that the shipowner and charterer may be jointly and severally liable, but absolving the shipowner from liability at p. 1467 on the basis that the time charterer signed the bills without authority to bind the shipowner. See *Martin & Robertson v. The Steamship Barcelona*, 1968 AMC 331 (S.D. Fla. 1967), at p. 336 holding owner, bareboat charterer, and time charterer jointly and severally liable.

¹²⁷ *Sears Roebuck v. American President Lines (The President Monroe)* [1972] 1 Lloyd's Rep. 385 (N.D. Cal. 1971).

¹²⁸ *Ibid.*, at p. 392.

¹²⁹ Satori, K. "The Demise Clause in Japan" [1998] LMCLQ 489, at p. 496.

¹³⁰ *Ibid.* The basis for the determination was that both parties had rights to freight and liens on cargo, as well the demise clause, although held invalid with respect to the shipper or consignor, was evidence that the shipowner also voluntarily assumes the carrier's contractual liability. For further discussion on this

The French courts have been amenable to holding parties involved in the carriage endeavor jointly and severally liable. The Cour d'Appel de Paris held: “*Que les sociétés Ioninan Fortune Marine (opérateur) et Van Vamare (armateur) doivent donc être condamnées in solidum à réparer le préjudice subi par la compagnie d'assurances subrogée dans les droits du propriétaire de la cargaison.*”¹³¹ The Cour d'Appel de Rouen, has held similarly with respect to a time charter and a voyage charterer,¹³² and so has the Cour d'Appel d'Aix.¹³³ In Belgium, the courts also appear to have no difficulty holding parties jointly and severally liable. The Belgian Court of Appeal has held that a time charterer who issued a bill of lading was jointly and severally liable with the vessel owner for losses during carriage.¹³⁴ It has been noted that “*la jurisprudence a estimé généralement que le propriétaire du navire est solidairement responsable avec le transporteur concernant l'action d'avarie.*”¹³⁵ Such joint and several liability is now addressed by the Commercial Code of Belgium.¹³⁶

4.2. The Rise and Fall of Joint Liability and ‘Carriers’ in the Commonwealth

The notion of carriers or a multi-carrier approach is still a current feature in the law of such nations as the United States and France, unfortunately the same cannot be said for Canada. To compound matters, a resurgence in Canadian law of the notion of joint and several liability for ‘carriers’ is unlikely given a recent House of Lords decision rejecting the notion of holding both the shipowner and the time charterer liable under the bills of lading.¹³⁷

judgment see Section 5 *infra* entitled “The Contractually Stipulated Carrier: The Demise And Identity of The Carrier Clauses”.

¹³¹ Cour d'Appel de Paris, March 2, 1993, (The Eugenia V) DMF 1995, 372, at p. 376.

¹³² Cour d'Appel de Rouen, June 14, 1984, DMF 1985, 351, at p. 358, holding the time charterer liable “solidairement” with the voyage charterer.

¹³³ Cour d'Appel d'Aix, September 8, 1994 (The Jessica J), DMF 1995, 52, at p. 52, holding that both the time charterer and the voyage charterer “ont la qualité de transporteur.”

¹³⁴ *Hof Van Beroep Te Brussel* March 3, 1972; [1972] E.T.L. 992, as summarized and cited by Tetley, W. “Identity of the Carrier – The Hague Rules, Visby Rules, UNCITRAL” [1977] LMCLQ 519, at p. 522., where other Belgian case law to the same effect is cited.

¹³⁵ Delwaide, L. “Chronique de droit maritime belge II” DMF 1989, 734, at p. 765.

¹³⁶ See section 11.5, *infra*, for further discussion.

¹³⁷ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.). See discussion of the judgment further on in this section.

Canadian courts were receptive to the concept of joint and several liability for parties involved in the performance of carriage and implemented it accordingly. In *Grace Kennedy v Canada Jamaica Line*, a cargo of sugar was wetted and Smith J. determined that the charterer and the shipowner would be jointly and severally liable to the claimant.¹³⁸ In *The Lara S*, the Federal Court of Canada considered the liability of a shipowner and a charterer for damage to a cargo of bailer twine where the bill of lading was on the charterer's form, signed for and on behalf of owners, and contained an identity of carrier clause.¹³⁹ Reed J. reasoned: "The logic of holding both the shipowner and the charterer liable as carriers seems entirely reasonable under a charter such as that which exists in the case. The master will have knowledge of the vessel and any particularities which much be taken into account when stowing goods thereon. He supervises that stowage. He has responsibility for the conduct of the voyage and presumably also has knowledge of the type of weather conditions it would be usual to encounter. In such a case it seems entirely appropriate to find the master and therefore, his employer, the shipowner jointly liable with the charterer for damage arising out of the inadequate stowage."¹⁴⁰ Unfortunately, this high point in Canadian law did not last long. Three years later in *Union Carbide v. Fednav*, Justice Nadon in the Federal Court of Canada opined: "Madam Justice Reed seems to have accepted Professor Tetley's theory that where goods are loaded on a time chartered ship the owners of that ship and the time charterers are engaged in a joint venture insofar as the carriage of goods is concerned. I cannot accept the soundness of that view... The position taken by the learned author [Scrutton] appears to be that in circumstances where the charterer is liable on the contract of carriage, the shipowner will not. I agree with this point of view. A charterer will issue and sign bills on behalf of the master, and is so authorized, the shipowner will be bound by the issuance of the bills of lading but not the charterer. Where the charterer issues and

¹³⁸ *Grace Kennedy & Co. v. Canada Jamaica Line* [1967] 1 Lloyd's Rep. 336 (Que. S.C.), at p. 340. Smith J. determined that as the demise clause was an impediment to liability in contract, the charterer and shipowner were held liable in tort (*Ibid*, at p. 338). In order to render the shipowner liable, Smith J. gave effect to the demise clause statement that any other party contracting was doing so as agent of the shipowner. The charter was therefore held liable for negligent cargo damage as he was responsible for the navigation and operation of the vessel, and the shipowner was held jointly and severally liable due to the fact that his duly authorized agent was negligent.

¹³⁹ *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.).

¹⁴⁰ *Ibid*, at p. 587. Justice Reed concludes at p. 618 by "finding the defendants jointly and severally liable to pay the plaintiff damages."

signs bills of lading on his own behalf, he shall be bound by those bills. Consequently, in most cases, the word “or” in article 1(a) of the Hague Rules will mean exactly that. The carrier shall either be the owner or the charterer, but not both.”¹⁴¹ This Nadon J’s reasoning has been criticized by one commentator for his single carrier mentality: “Judge Nadon’s conclusions are once again conditioned by his engrained error of believing that only one person can be committed to the obligations which arise from the contract.”¹⁴² Nevertheless, the Federal Court of Appeal, soon thereafter considered the issue of identity of the carrier, and rejected the joint venture concept, finding rather that “the concept has been found unsound by Nadon J...and I entirely agree with his reasons for reaching that conclusion. The law, in my view, is clearly stated by Nadon J.”¹⁴³ The trend in the jurisprudence appears to have been set. Recently, it was pleaded that a time charterer and shipowner are liable “since they operated under a joint venture”.¹⁴⁴ Blais J. speaking for the Federal Court rejected the argument based on Tetley’s theory, and held only the shipowner liable.¹⁴⁵ It would therefore appear that the notion of multiple carriers in Canadian law has been soundly rejected. Perhaps, the notion of ‘joint venture’ has tainted the underlying issue of liability based on acting and performing as a carrier, nevertheless it appears that as the law stands joint liability is out of the question.

England has never adopted a multicarrier approach, rather English law has always viewed the Hague Rules carrier as a single carrier.¹⁴⁶ Recently suggestion had been made in a dissenting judgment of the English Court of Appeal that perhaps both shipowner and charterer were liable where bills were issued that were on the charterer’s form, which

¹⁴¹ *Union Carbide v. Fednav Ltd* (1997) 131 F.T.R. 241 (Fed. Ct. Can.), at p. 264-265. Nadon, J. subsequently found the shipowner to be ‘the carrier’ and due to the fact that only the time charterers were defendants, the plaintiff’s action was dismissed with costs (*Ibid*, at p. 289).

¹⁴² Marler, D. “The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading” (2002) 26 Tul. Mar. L.J. 597, at p. 605. Not surprisingly, Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, devotes three pages to the criticism of the decision, noting at p. 837 that Nadon J. failed to consider Article III(8) and the public order nature of the rules.

¹⁴³ *Jian Sheng Co. v. Great Tempo S.A.* [1998] 3 F.C. 418 (Fed. C.A. Can.), at p. 430, per Decary J.A.

¹⁴⁴ *Voest-Alpine Stahl Linz v. Federal Pacific Ltd.* (1999) 174 F.T.R. 69 (Fed. Ct. Can.), at para 40.

¹⁴⁵ *Ibid*, at para 50.

¹⁴⁶ See Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at pp. 123 and ff concerning distinguishing between owner’s bills and charterer’s bills, as well as p. 460 for a definition of ‘carrier’ under the Hague Rules and an assertion that a performing carrier “is liable only in tort”.

indicated on the face of the bill that the charterer was ‘the carrer’, but nevertheless had a demise and identity of carrier clause on the back.¹⁴⁷ Rix L.J. stated: “I raised in argument the possibility that there did not have to be a black and white choice between owner’s bills and charterer’s bill and that the true analysis in such a case may well be that the owners as well as the charterers are liable on the bills.”¹⁴⁸ Rix L.J.’s reasoning was largely based on agency theory with the shipowner as a undisclosed principle, and he suggested that the charterer “created a contract in respect of which both they and their principal, the owner, had rights and liabilities.”¹⁴⁹ The House of Lords rejected the idea.¹⁵⁰ Lord Hoffman did so on the basis that no reasonable merchant would imagine that there would be more than one carrier.¹⁵¹ While Lord Bingham also rejected the notion on the basis of the construction of the bill.¹⁵² While American law does not seem to take issue with the fact that ‘carrier’ in bills of lading is in the singular,¹⁵³ this was problematic enough for the Lords to discount the possibility of dual liability. The likely effect of this judgment, despite the fact that it was based on the construction of this

¹⁴⁷ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2001] Lloyd’s Rep. 437 (C.A.), at p. 451.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, at p. 452. Rix L.J. did not however hold on that point as it had not been pleaded before him (*Ibid.*).

¹⁵⁰ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.). Not only explicitly, see below, but also implicitly by engaging in the debate of whether the bills were charterer’s bills or owner’s bills. See also Girvin, S. “Contracting Carriers, Himalaya Clauses and Tort in the House of Lords” [2004] LMCLQ 311, at p. 313, who on the basis of his interpretation of the judgments states that in relation to both the charterer and the shipowner being carriers “The House unanimously held that the language of the bill itself did not support it.” Although, only Hoffman and Bingham addressed the issue.

¹⁵¹ *The Starsin, ibid.*, at p. 590, stating: “Mr. Milligan also submitted that CPS may have contracted for both themselves and the shipowners, the latter being unnamed or undisclosed principals...I do not think that any reasonable merchant or banker who might be assumed to be the notional reader of this bill of lading would imagine that there was more than one carrier or that the carrier was anyone other than CPS.”

¹⁵² *Ibid.*, at p. 577: “Mr. Milligan submitted that on a proper construction of the whole of the bill the shipowner should be held to be the contracting party, perhaps by regarding the shipowner as the disclosed but unnamed principal of CPS, perhaps by construing the contract as made with the shipowner as well as CPS, perhaps because of the description of CPS as carrier was unauthorized by CPS and so ineffective. There is in my opinion no evidence that CPS contracted as agent for the shipowner as disclosed but unnamed principal, and the terms of the signature are inconsistent with that suggestion. There is, again, nothing to suggest dual liability in CPS and the shipowner; the standard conditions are expressed in singular throughout, with no provision that the singular shall include the plural...In the present case, the suggestion that CPS contracted jointly on its own behalf and on behalf of the shipowner loses credibility when one notes that this possibility, although not objectionable in legal principle, first occurred to a member of the Court of Appeal during argument.”

¹⁵³ See Lord Bingham’s speech above.

particular set of bills, is to discourage arguments of based on the notion of multiple carriers in England, and likely throughout the Commonwealth.¹⁵⁴

4.3. A Problematic Lack of Uniformity: Forum Shopping

Unfortunately, the variation with which “carrier” under the Hague Rules is interpreted poses very real problems with respect to forum shopping. Consider suit in the commercial court in London, England, where in an action against the shipowner and the time charterer, one party will likely be absolved of liability under contract. Or consider suit also brought in London, but against the time charterer, and should the bills be considered ‘owner’s bills’, the potential exists for the defendant to escape liability all together. This situation stands in marked contrast to a suit taken in the Southern District of New York against a shipowner and charterer, as discussed above.¹⁵⁵ In fact, the Southern District Court of New York, when faced with a time charterer attempting to enforce an exclusive jurisdiction clause for London, invalidated the clause on the basis of the difference between English law regarding the liability of time charterers as carriers and the law in his district.¹⁵⁶ Evidently, the London commercial court would have enforced this clause. A similar case in the Eastern District of Louisiana arose, where Justice Fallon ruled that a Japanese forum selection clause could not be enforced, as the forum court did not recognize multiple carriers.¹⁵⁷ This divide in the law on either side of

¹⁵⁴ Although Australia has begun to diverge legally from England on several matters, including privity, however, given Australia’s disinterest in a definition of ‘carrier’ that is plural (See section 11.8 entitled “Other Nations”), divergence from England on this matter is unlikely. The same can be said of New Zealand (See section 11.8 entitled “Other Nations”).

¹⁵⁵ The Southern District of New York, S.D.N.Y., has provided a majority of the case law rendering shipowners and charterers jointly and severally liable. See *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979); *Duferco Steel v. M/V Festivity*, 1999 AMC 1184 (S.D.N.Y. 1998); *Samsung America v. M/T Fort Producer*, 798 F. Supp. 184 (S.D.N.Y. 1992); *Jordan International Co. v. M/V Cyclades*, 782 F.Supp. 25 (S.D.N.Y. 1992); *Mente & Co. v. Isthmian (The Quarrington Court)*, 36 F. Supp. 278 (S.D.N.Y. 1940).

¹⁵⁶ *Central National-Gottesman v. M/V Gertrude Oldendorff*, 204 F. Supp. 2d 675 (S.D.N.Y. 2002), at p. 681, commenting, “the court is of the view that there is a real danger that a London court may not hold defendant Olendorff, as time charterer, to the same duties that he would be expected to comply with were the action brought in this district under COGSA.”

¹⁵⁷ *Kanematsu USA v. M/V Ocean Sunrise*, 2003 U.S. LEXIS 11575 (E.D. La. 2003). The District Court determined that the defendant vessel owner would not be a ‘carrier’ under Japanese COGSA and that the plaintiff would be forced to take action against him in tort and thus be deprived of their rights under COGSA. See *Nippon Fire & Marine Insurance v M/V Spring Wave*, 92 F. Supp. 574 (E.D. La. 2000) at p. 576, also refusing to enforce a Japanese jurisdiction clause on the same basis. Conversely, see *Tradearbed Inc. v. M/V Agia Sophia*, 1997 AMC 2838 (S.D.N.J. 1997), at p. 2843, finding that a forum selection clause

the Atlantic strikes at the heart of what uniform law was attempting to achieve, and ironically is reminiscent to a certain extent of the legal situation that gave rise to the Harter Act over a century ago.¹⁵⁸

4.4. An Issue of Equity and Fairness?

Evidently, there is a strong current of equitable protection of the plaintiff running through the argumentation for multiple carrier liability. The notion is that one must protect the plaintiff from defendants attempting to escape liability, or purporting to contractually assign carrier status to a party who in practice is unknown to the plaintiff. In many instances, cargo claimants have found themselves without a remedy, and unfairly so. When considering the question of equity and fairness, however, the tendency is to focus on the position of the plaintiff or cargo claimant faced with a complex ownership structure and a limited time for suit. It would be remiss however to advocate on behalf of the claimant without due consideration of the defendants in this instance. Arguably, the rarity with which the courts hold parties to the carriage endeavor jointly and severally liable is as potentially damaging to carrier and charterer interests as it is to cargo interests. The bargain or compromise of uniform law was for the benefit and protection of all parties to the carriage endeavor. One may argue that it is inequitable and fundamentally unfair when parties who are not ‘the carrier’ are then exposed to liability through other causes of action unprotected by contractual and mandatory stipulations governing the limits of liability, prescription, and exemptions. A shipper’s commercial expectations upon entering into the contract of carriage are such that they will be bound to the terms of the contract of carriage, and thus to be allowed to circumvent such terms in an action against the charterer or shipowner, demonstrates a fundamental inequity in the interpretation and application of the Hague rules. The problem is therefore two-fold. The first hurdle is the reluctance of courts to conceptualize the parties as ‘carriers’ under a more expansive definition. Yet even where a party is not a carrier, the argument has been that inequities may be avoided by allowing the third party to benefit from the terms

for Korea will be upheld as “the Korean Commercial Code – although different from COGSA, the Harter Act, and the Hague Rules – provides [the plaintiff] with the same, if not greater, protection with respect to the issues raised.”

¹⁵⁸ See section 2, *supra*, for a discussion of the events that gave rise to the Harter Act.

of carriage. Where problems arise, therefore is in the instance where a shipowner or charterer is viewed as a third party, and then subsequently denied the terms of the Hague Rules despite arguments for third party benefits. Third party benefit for entities deemed not to be the carrier is discussed further below,¹⁵⁹ nevertheless it is sufficient for the purposes of this point to simply note that the issue of equity and fairness is one that should not simply be viewed from the perspective of the cargo claimant.

¹⁵⁹ See Section 6 *infra*, for a discussion on the Himalaya Clause.

5. THE CONTRACTUALLY STIPULATED CARRIER: THE DEMISE AND INDENTITY OF THE CARRIER CLAUSES

Where there is a multicarrier approach, or a judiciary receptive to the notion of ‘the carriers’, generally the performing parties are carriers. Where there is only one carrier, the situation is created where other entities involved in the carriage endeavor will want to distance themselves from the regime, or the contract, where it is in their interests. The converse is true however, where the regime or the contract offers protection, parties will attempt to bring themselves within the regime despite the fact that they are not, legally speaking, ‘the carrier’. The former situation has given rise to what are termed demise and identity of carrier clauses which are examined below, while the later situation, discussed in the following section, has given rise to Himalaya clauses. An examination of these clauses, their effect and scope, and the legal complexities they have spawned, allows one to better grasp the legal reasoning, and arguably legal gymnastics, involved when evaluating ‘who is the carrier’ under a single carrier approach.

The demise clause and the identity of the carrier clause are two constructs of the past century, which have in certain respects hindered uniformity in international and even national maritime law. The demise clause essentially stipulates that that the bill of lading contract will only take effect as a contract between the shipowner or the demise charterer.¹⁶⁰ The identity of carrier clause is similar, declaring the shipowner to be the carrier and characterizing the time and voyage charterers as agents only.¹⁶¹ These clauses

¹⁶⁰ *The Berkshire* [1974] 1 Lloyd’s Rep. 185 (Q.B.), at p 187 for an example of such a clause: “If the ship is now owned or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything to the contrary) the Bill of Lading shall take effect as a contract with the Owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.” The wording of the clause is common, as the identical clause appears in Roskill, Lord. “The Demise Clause” (1990) 106 L.Q.R. 403, at p. 403; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 558; Marler, D. “The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading” (2002) 26 Tul. Mar. L.J. 597; Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed*, at p. 24.

¹⁶¹ *Jian Sheng Co. v. Great Tempo S.A.* [1998] 3 F.C. 418 (Fed. C.A. Can.), at p. 434 is an example of a identity of carrier clause: “The contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall

have been the source of much doctrinal criticism and much judicial consternation. Most jurisdictions have law both validating and invalidating such clauses. The characterization of the clauses by courts and authors, tends to fall within two general categories. The first is the argument is that such clauses simply confirm the common law rule that the contract is between the shipowner and the shipper,¹⁶² or that they indicate that the bills are owner's bills and thus define who the carrier is.¹⁶³ Secondly, such clauses have been viewed as non-responsibility clauses in violation of Art. 3(8) of Hague-Visby,¹⁶⁴ or an attempt to by the person who has entered into a contract of carriage with the shipper to exonerate himself from liability.¹⁶⁵ Regardless of which opinion one holds concerning the characterization of the clause, the clause would be rendered ineffective or unnecessary if one adopts a view of all the performing parties as "carriers".

5.1. History of the Demise Clause

It has been noted that the demise clause came to be included in bills of lading due to the fact that the *Merchant Shipping Act* in the United Kingdom did not provide for charterers to limit their liability.¹⁶⁶ Lord Roskill, being present at the time the demise

be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the forgoing, it is adjudged that any other is the Carrier and/or the bailee of the goods shipped hereunder, all limitations of and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for an on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage nor as Carrier nor bailee of the goods.¹⁶² *Cascade Shipping Inc. v. Eka Jaya Agencies (Grace Liberty II)* [1993] 1 SLR 980 (C.A. Singapore), at p. 993 opining that "the demise clause is really no more than a confirmation of the common law rule that the bill of lading issued pursuant to a time-charterparty is intended to be a shipowner's bill of lading."

¹⁶³ *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 574, noting that "the demise clause does not relieve the carrier from liability but defines who the carrier is." See also Reynolds, F. "The Demise Clause: The Jalamohan" [1988] LMLCQ 285, at p. 285 noting the position of English law as upholding the clause on the basis that it merely identifies the carrier. See also *The Berkshire* [1974] 1 Lloyd's Rep. 185 (Q.B.), where at p. 188, the clause was viewed as stipulating that the contract as evidenced by the bill of lading was one between the shipowner and the shipper, and not the shipper and the charterer.

¹⁶⁴ Tetley, W. "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807, at p. 812, "in particular, article 3(8) of the Hague and Hague/Visby Rules prohibits non-responsibility clauses. Identity-of-carrier and demise clauses are not-too-subtle non-responsibility clauses."

¹⁶⁵ Marler, D. "The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading" (2002) 26 Tul. Mar. L.J. 597, at p. 601. See also *Canadian Klockner Ltd. D/S/ A/S Flint (The Mica)* [1973] 2 Lloyd's Rep. 478 (Fed. Ct. Can.).

¹⁶⁶ *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 574; Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at p. 381 notes the clause's purpose is "to

clause was conceived explains in detail the events that lead to its creation.¹⁶⁷ Lord Roskill notes that it was the operation of the Liner Requisition Scheme by the British government during the two world wars that led to the demise clause.¹⁶⁸ By virtue of the scheme, the Crown became the time charterer of all the ships involved and all cargo claims were borne ultimately by the crown, in an account between liner companies and the crown.¹⁶⁹ The scheme was utilized during the first world war with no problems, and by 1939, the scheme was put into operation again.¹⁷⁰ This time “shortage of tonnage was even more critical. Switching ships from one service to another became a regular feature of the scheme. Tramp ships were frequently switched to liner companies to operate. Government owned and requisitioned ships, government chartered ships, whether British or foreign, and government requisitioned ships would all from time to time be consigned to liner companies for operation.”¹⁷¹ As a result of this practice the limitation problem arose, and according to Roskill who was involved at the time, “none of us foresaw it.”¹⁷² The problem was “if a government owned ship or a P & O owned ship was, for example, consigned to Cunard for operation and a Cunard bill of lading was issued and disaster followed through unseaworthiness (not difficult to establish under wartime conditions of restricted repair facilities), Cunard alone would be liable in contract but they could not limit. The Crown or P & O who could limit were not liable in contract since neither would be a party to the bill of lading and any unlimited liability incurred by Cunard would be debited to the Crown in Cunard’s operating accounts with the Ministry.”¹⁷³ The Merchant Shipping Act could not be amended during war time, and thus a clause was drafted and generally accepted, much to the relieve of the Treasury as the potential

ensure that the person who is thus liable is entitled to the benefit of statutory limitation of liability, which at one time did not extend to charterers.”

¹⁶⁷ Roskill, Lord. “The Demise Clause” (1990) 106 L.Q.R. 403.

¹⁶⁸ *Ibid.*, at p. 403. The scheme, which appeared in 1917, had as its purpose “not merely to bring passenger and cargo liners under direct government control by a combination of requisition and time charter, but also to bring under the control the entire organization of the great British liner companies, then still at the height of their power and fame.”

¹⁶⁹ *Ibid.*, at p. 404.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, at p. 405.

¹⁷² *Ibid.*.

¹⁷³ *Ibid.*, at p. 405. Until the law was amended in 1958 only the owner or the demise charterer of a ship could limit overall liability under sections 502 and 503 of the Merchant Shipping Act 1894 (*Ibid.*, at p. 403)

liability of the Crown was immense.¹⁷⁴ Lord Roskill finishes his account of the history of the demise clause by noting that the law has changed, “[b]ut as so often happens, once a clause appears in a bill of lading there seems to be no rule against perpetuities which prevents its continued appearance long after it has ceased to serve any useful purpose.”¹⁷⁵ The argument that the demise clause, from the perspective of the charterer limiting his liability, is no longer useful due to the fact that England¹⁷⁶ and other commonwealth nations¹⁷⁷ have amended their legislation is not entirely a valid argument. Certain trading nations are not party to the 1976 Limitation Convention,¹⁷⁸ and arguably the clause from this perspective has not entirely outlived its usefulness. As well, it has been noted that the demise clause is desirable for the charterer for many reasons that no longer involve limitation.¹⁷⁹ It is interesting nonetheless, that the clause arose unconnected with the

¹⁷⁴ *Ibid*, at p. 405. The United States treasury on the other hand was not so fortunate. See *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949), where at p. 743, the Clancy D.J stated that the War Shipping Administration was “disingenuous” in trying to use an identity of carrier clause when it had time chartered a vessel, and thus found the government liable for damage to cargo.

¹⁷⁵ Roskill, *ibid*, at p. 405. The 1976 Limitation Convention, rendered applicable in the U.K. by the Merchant Shipping Act 1995, ss.185 and 185, stipulates in Article 1.2 “The term “shipowner” shall mean the owner, charterer, manager or operator of a seagoing ship.”

¹⁷⁶ Roskill, *ibid*, at p. 405. See Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, noting that “the clause was first devised during the Second World War to ensure that claims in respect of ships in North Atlantic convoys were against owners rather than charterers of the vessel, because at the time, charterers were not able to rely on overall tonnage limitation. Since this is no longer the case, it is uncertain exactly why it and more modern forms of it are still used.”

¹⁷⁷ See Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 842, footnote 185, discussing the changes in Canadian law and the implementation of the 1976 Limitation Convention. See also the Australian Court of Appeal in *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 574, discussing the fact that the demise clause is no longer relevant based on changes to the British and Australian regimes. See also Meng, T. *The Law in Singapore on Carriage of Goods by Sea 2nd Ed.* (1994) Butterworths, Singapore, at p. 300-301 noting that the demise clause has outlived it’s original purpose because the U.K. Merchant Shipping Act was amended in 1958 and the Singapore Merchant Shipping Act was amended in 1959.

¹⁷⁸ South Africa’s legislation, the *Merchant Shipping Act*, Act 57 of 1951, s. 261 stipulates only the “owner of a ship” may limit his liability. See Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at pp. 557-558, for a discussion on the usefulness and applicability of the demise clause in South African law and s. 261 of the S.A. Merchant Shipping Act governing limitation. In the United States, the *Limitation of Shipowner’s Liability Act 1851*, 46 U.S.C. ss.181-189, does not include certain charterers. Only an “owner” may limit his liability, and “owner” is defined in s. 186 to include a charterer who actually mans, victuals and navigates the vessel, which has been interpreted to mean demise and bareboat charterers but not time or voyage charterers (Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at p. 482). In *Marine Sulphur Queen Lim. Proc.*, 1970 AMC 1004 (S.D.N.Y. 1970), at p. 1036, a time charterer petitioned for limitation, along with the shipowner and bareboat charterer, and the court held: “as a time charterer, TGS was not entitled under the Limitation of Liability Act to petition for exoneration or limitation, and its petition is therefore dismissed.”

¹⁷⁹ Peter Jones in “The Demise Clause in Bills of Lading” has argued: “To a charterer the demise clause is important because of its indirect functioning in the relationship between the charterer and the shipowner. Where there is a demise clause in the bill of lading, the cargo claimant will prudently join the owner as a

specific liabilities for loss or damage to goods under the Hague Rules regime, and yet has since become such a prominent issue with regard to ‘who is the carrier’ in carriage of goods litigation.

5.2. Uncertainty Surrounding the Validity of the Demise Clause

Unfortunately, the validity of the demise clause, and therefore the identity of the carrier clause, is an area of great variability in the law. Not only does its validity vary on an international scale between nations, but in some instances it has varied within national jurisdictions as well.

Certain American commentators have confidently stated that the demise clause is unproblematic in their jurisdiction. “The ‘demise clause’, denounced because of the possibility that the shipper would have no rights against the charterer who issued the bill of lading and no rights against the shipowner who was not formally the carrier, has not caused major problems to cargo owners in the United States since the courts have refused to give it effect as against H.R. III(8).”¹⁸⁰ This was the case in a 5th Circuit Court of Appeals decision, where in referring to a “demise clause in the bills of lading [which] shifted liability from the charterer to the vessel owner,” the Court of Appeal noted that “such clauses are void under COGSA 46 U.S.C. App. S. 1303(8).”¹⁸¹ A 2nd Circuit Court of Appeals decision has equally invalidated such clauses.¹⁸² Identity of carrier clauses have also been invalidated as exculpatory provisions in contravention of 1303(8) of

party defendant which assures the charterer of certain advantages: (a) the owner will co-operate in the defence of the claim by providing informations and making witnesses available; (b) a multiplicity of proceedings will be avoided since, as a practical matter, the responsibility of the owner and the charterer inter se will be settled in the action brought by the cargo claimant without the necessity of arbitration under the charter party; and (c) the claim may be one to be apportioned and the practical way to insure such apportionment is to have the owner facing direct responsibility.” (Conference paper presented at Conference on Maritime Law at Dalhousie University Law Faculty, Halifax, Canada, 1976, as quoted in Tetley, W. “Identity of the Carrier – The Hague Rules, Visby Rules, UNCITRAL” [1977] LMCLQ 519, at p. 527).

¹⁸⁰ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)” (1976) 7 JMLC 615, at p. 630, footnote 193, noting also that COGSA 1303(8) forbids clauses in the bill of lading which lessen the liability of the carrier.

¹⁸¹ *Thyssen Steel Co. v. M/V Kavos Yarakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1353.

¹⁸² *Transatlantic Marine Claims Agency v. OOCL Inspiration*, 137 F.3d 94 (2 Cir. 1998), where again the 2nd Circuit Court of Appeals invalidated such a clause where it purported to relieve one of the parties to the carriage of responsibility, although in this instance the clause sought to define the time charterer as the carrier, thus the court held gave the clause no effect in holding the shipowner to be a carrier.

COGSA.¹⁸³ Such clauses have also been disregarded simply on the basis of interpretation: “Union steel points to the definitions clause of the bill of lading which states that ‘carrier’ means the ‘owner’ or ‘demise charterer’. Yukong lines [time charterer] was neither the ‘owner’ nor the ‘demise charterer’. But the terms of the bill of lading must be read in context. The bills are labeled as being Yukong Line’s bills of lading. The bills indicate that freight was prepaid to Yukong Line, and Yukong Line signed ‘as carrier’. Only excessive formalism could yield any conclusion other than Yukong Lines was the entity to which the parties meant to refer by ‘carrier’.”¹⁸⁴ In *The MV Gertrude Oldendorff*, the District Court of New York has even gone so far as to decline to enforce a forum selection clause on the basis that the London court would uphold the identity of carrier clause.¹⁸⁵ The identity of carrier clause has however, been validated by courts in order to benefit claimants seeking to hold the shipowner liable.¹⁸⁶ Despite the blanket assertions by certain authors that the demise clause is invalid in the United States, there are nonetheless decisions that do not invalidate the clause.¹⁸⁷ Nevertheless, it would

¹⁸³ *Epstein v. United States*, 86 F. Supp. 740 (S.D.N.Y. 1949), where at p. 743, the Clancy D.J. remarked on the fraudulent nature of the clause, referring to it as a clear violation of 1303(8). Interestingly enough, this case arose in 1949 and the defendant was the War Shipping Administration of the United States, who had time chartered the vessel. Clancy D.J. stated that the War Administration was “disingenuous” in trying to use an identity of carrier clause (*ibid*). Evidently, the clause provided no protection to the U.S. government as charterer, unlike its success for the English government. See also *Blanchard Lumber Co. v. The Anthony II* [1966] 2 Lloyd’s Rep. 437 (S.D.N.Y. 1966), holding the demise clause invalid under the predecessor to COGSA, The Harter Act, for reasons of public policy.

¹⁸⁴ *Union Steel America v. M/V Sanko Spruce*, 1999 AMC 344 (D. N.J. 1998), at p. 347.

¹⁸⁵ *Central National-Gottesman v. M/V Gertrude Oldendorff*, 204 F. Supp. 2d 675 (S.D.N.Y. 2002), at p. 681, comments “the court is of the view that there is a real danger that a London court may not hold defendant Oldendorff, as time charterer, to the same duties that he would be expected to comply with were the action brought in this district under COGSA.”

¹⁸⁶ In *Recovery Services Intl. v. S/S Tatiana L*, 1986 WL 1171 (S.D.N.Y. 1986), where the shipowner argued that he was not a COGSA carrier as the time charterer had issued the bills of lading in their name and signed on their behalf. The District Court found at para. 3, that the identity of carrier clause indicated that despite the fact the bill was signed by the time charterer, he was doing so as agent for the shipowner. The shipowner then proceeded to argue that the identity of carrier clause was void as a matter of law, but the Court at para. 3 found that all cases cited invalidating the clause were doing so with respect to time charterers attempting to shift their liability to the shipowner, and therefore the court saw no reason why the shipper could not rely on the clause to render the shipowner liable.

¹⁸⁷ Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at pp. 814 – 815, and Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed*, at pp. 26 – 27, contain several U.S. decisions that apparently uphold the demise clause, but truly do so by not specifically invalidating them. Arguably, one of the decisions mentioned, *Daval Investors v. M/V Kamtin*, 1993 WL 764606 (N.D. Fla. 1993), the result is similar to *S/S Tatiana L*, discussed above where the clause was used by the plaintiff to demonstrate that the shipowner should not be relieved of liability. In *Daval Investors*, the court accepted the argument at para 1. and in para. 5 denied the shipowner’s motion for summary judgment on the basis that it was not a COGSA carrier. It would appear therefore that the American courts do not always

appear that the demise and identity of carrier clause is invalidated where it is being utilized by a party as an exculpatory provision to avoid liability as ‘a carrier’.

In English law, Cooke notes that with regard to a demise clause, “such a clause is effective, and is probably unaffected by the manner in which the bill of lading is signed.”¹⁸⁸ The clause is viewed by some English commentators as central to the contract, despite the fact that it has been argued to be ‘unreasonable’ by cargo interests.¹⁸⁹ The demise clause has a long and strong history of being upheld in English law.¹⁹⁰ Although there have been a few instances where the clause has not been given effect.¹⁹¹ Nevertheless, due to a recent House of Lords decision,¹⁹² this generally unshakable confidence in the enforcement of demise clauses appears to have been shaken. In *The Starsin*, a bill of lading was issued on the time charterer’s form, Continental Pacific Shipping, with the signature box on the face of the bill of lading containing “As agent for Continental Pacific Shipping (carrier)”, but contained both an identity of carrier

invalidate the clause in ever respect, but only do so where it acts as an exculpatory provision for a party attempting to avoid liability.

¹⁸⁸ Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at p. 381.

¹⁸⁹ Reynolds, F. “The Demise Clause: The *Jalamohan*” [1988] LMLCQ 285, at p. 286.

¹⁹⁰ *The Berkshire* [1974] 1 Lloyd’s Rep. 185 (Q.B.); *W.R. Fletcher v. Sigurd Haavik Aksjeselskap (The Vikfrost)* [1980] 1 Lloyd’s Rep. 560 (C.A.); *Kenya Railways v. Antares Co. (The Antares)* [1987] 1 Lloyd’s Rep. 424 (C.A.); *NGO Chew Hong Edible Oil v. Scindia Steam Navigation (The Jalamohan)* [1988] 1 Lloyd’s Rep. 443 (Q.B.); *M.B. Pyramid Sound v. Briese Schifffahrts (The Ines)* [1995] 2 Lloyd’s Rep. 144 (Q.B.); *Fetim B.V. v. Oceanspeed (The Flecha)* [1999] 1 Lloyd’s Rep. 612 (Q.B.).

¹⁹¹ Although there are instances where the clause is not given effect. See *Sunrise Maritime v. Uvisco Ltd. (The Hector)* [1998] 2 Lloyd’s Rep. 287 (Q.B.), where the front of the bill of lading identified the time charterer as “carrier” and the back of the bill of lading contained a demise clause, Rix J. determined that the bill was a charterer’s bill based on the stipulation on the face of the bill of lading “Carrier: U.S. Express lines”. For further discussion on *The Hector* see Waldron, A. “Owner’s or Charterer’s Bill of Lading? The Mystery Deepens” [1999] LMCLQ 1, at p. 1 noting that the judgment is an “exception to the general rule that a bill of lading signed for the master and containing a demise clause is a contract of carriage with the owners of the vessel.” See also Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 821 noting that the *Hector* is interesting as the only U.K. decision finding a bill of lading with a demise clause to be a charterer’s bill, but commenting that “the judgment makes no reference to the *validity* of the clause, as opposed to its *effectiveness*.” For another example where the demise clause was not given effect see *Pacol Ltd. v. Trade Lines Ltd. (The Henrik Sif)* [1982] 1 Lloyd’s Rep. 456 (Q.B.), where the bill of lading contained a demise clause, but the time charterer had allowed the plaintiff to continue the claim against him until it became time barred as against the shipowner. Webster J. at p. 467, found that the time charterer was estopped from relying on the demise clause. Reynolds, F. “The Demise Clause and the Hague Rules” [1987] LMCLQ 259, at p. 260 has criticized the decision in *The Henrik Sif* and noting that “on English views of estoppel at least, the decision goes to the verge of the law.” Nevertheless, *The Henrik Sif* has still be cited as supporting the demise clause (*Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.)).

¹⁹² *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.).

clause and a demise clause stipulating the contract was with the owner of the vessel.¹⁹³ At first instance, the bills were found to be charterer's bills despite the clauses,¹⁹⁴ but the Court of Appeal found otherwise,¹⁹⁵ with a strong dissent from Rix L.J..¹⁹⁶ The House of Lords overturned the Court of Appeal decision, and held unanimously on the issue of the bills of lading being owner's bills.¹⁹⁷ Steyn noted that Rix and Colman had adopted a "mercantile view" and therefore reasoned accordingly: "Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business sense to for a shipper to turn to the face of the bill, and in particular the signature box, rather than clauses at the bottom of column two of the reverse side of the bill."¹⁹⁸ Lord Bingham adopted a similar approach, noting that "business sense is that which businessmen, in the course of their ordinary dealings, would

¹⁹³ *Ibid*, at p. 575.

¹⁹⁴ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2000] 1 Lloyd's Rep. 85 (Q.B.). Colman J. at p. 90, focused on the question of in what sense could the shipper be expected to understand the words used in the bill of lading. In relying on *The Hector* Colman J. found at p. 93 that the words used represented that the time charterer was content to be treated as a carrier despite the words on the reverse.

¹⁹⁵ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2001] Lloyd's Rep. 437 (C.A.). The Court of Appeal preferred giving effect to the clauses on the reverse which stipulated the issuer would not become personally liable on the bill, thus finding that the contract took effect only with the owner (*Ibid*, at pp. 470-471 and 473-474). For discussion on the Court of Appeal judgment see Andrewartha, J. & Riley, N. "English Maritime Law Update: 2001" (2002) 33 JMLC 329, at pp. 362-364; Girvin, S. & Bennet, H. "English Maritime Law 2000" [2002] LMCLQ 76, at pp. 84-87.

¹⁹⁶ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2001] Lloyd's Rep. 437 (C.A.), at pp. 439-464. Rix J. at p. 450, looked the history of the demise clause and opined: "the demise clause was there to protect a time charterer who did not want to accept the liability of a carrier, and who therefore cautiously sought to ensure that the mere issue of a bill of lading by himself or his agent would not have that effect. It was not, however, intended to ensure that a time charterer who did want to undertake the liability of a carrier and signed as such could not do so." Rix, L.J., at p. 451, was critical of the dishonest nature of the clause in certain instances: "the form is that of the liner company, and the demise clause is, as explained above, a liner company's clause whose purpose is to prevent itself being found to be the carrier when it does not wish to be... Given that in practice a demise clause is printed in tiny print on the back of a form, and in the present case is not even identified by any title, I do not see that commercial certainty or honesty is promoted by the submission that the form of signature, which on a bill of lading is on the front of the form, and which in mercantile contracts generally, including bills of lading, has always been a focus of attention, should be ignored."

¹⁹⁷ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.). Lord Steyn had dissented with respect a Himalaya clause issue and suit in tort against the shipowners, at pp. 584-586.

¹⁹⁸ *Ibid*, at p. 583. Lord Steyn reasoned that one must approach the problem of who is the carrier under the bill of lading "objectively in the way in which a reasonable person versed in the shipping trade would read the bill. The reasonable expectations of such a person must be decisive. In my view he would give greater weight to words specifically chosen, such as the words which appear above the signature, rather than standard form printed conditions. Moreover, I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill."

give the document. . . the Court must of course construe the whole instrument before it in its factual context, and cannot ignore the terms of the contract. But it must seek to give effect to the contract as intended, so as not to frustrate the reasonable expectations of businessmen.”¹⁹⁹ What is evident is that the reasoning given by the Lords for disregarding the demise and identity of carrier clauses is fundamentally different from the reasoning generally used in the United States.²⁰⁰ The Lords have in no way invalidated the clause, rather they simply declined to give it effect based on a construction of the bill of lading contract that was in line with commercial practices and expectations. Some previous jurisprudence has been overruled,²⁰¹ however the effect of the judgment is to alter the way that bills with demise clauses are construed when the ‘carrier’ identified on the face of the bill is neither the shipowner nor the demise charterer.²⁰² It has been suggested that precise drafting of terms on the face and on the reverse of the bill of lading will be a priority after the *Starsin* judgment.²⁰³

In Canada, the law with regard to demise clauses has been far from consistent. Given the connection the demise clause has with the notion of joint and several liability of carriers, the validity of the clause has therefore followed the same trajectory. Although in earlier instances it had been held to be valid,²⁰⁴ the law then went through a phase of invalidating them, much like it did with the notion of joint and several liability for carriers. A demise clause had been specifically invalidated by the Federal Court on the basis that it purported to relieve the defendant charterer of liability in contravention of

¹⁹⁹ *Ibid.*, at p. 577.

²⁰⁰ Although, notably *Union Steel America v. M/V Sanko Spruce*, 1999 AMC 344 (D. N.J. 1998), discussed above did disregard the demise clause on a similar basis to *The Starsin*. Nevertheless, generally the U.S. reasoning is public policy based.

²⁰¹ For example *Fetim B.V. v. Oceanspeed (The Flecha)* [1999] 1 Lloyd’s Rep. 612 (Q.B.), where faced with a similar Continental Pacific Shipping bill of lading stipulating CPS as the “carrier” on the front, Moore-Bick J. nevertheless gave effect to the demise clause on the reverse of the bill of lading. See *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.), at p. 584 and 588 on this point.

²⁰² See discussion on ‘who is the carrier’ as between shipowners and time charterers below in section 7.2.

²⁰³ Girvin, S. “Contracting Carriers, Himalaya Clauses and Tort in the House of Lords” [2004] LMCLQ 311, at p. 313.

²⁰⁴ *Grace Kennedy & Co. v. Canada Jamaica Line* [1967] 1 Lloyd’s Rep. 336 (Que. S.C.); *Apex (Trinidad) Oilfields v. Lunham & Moore Shipping (The Wynchwood)* [1962] 2 Lloyd’s Rep. 203 (Exch. C. Can.); Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed.*, at p. 36; Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 826.

Article III(8) of the Hague Rules.²⁰⁵ The demise clause has also simply been disregarded in order to hold the charterer liable,²⁰⁶ or to hold the charterer and shipowner jointly and severally liable.²⁰⁷ Two of the judgments that sounded the death toll for joint and several liability of carriers in Canada, are the ones that have also apparently entrenched the validity of the demise clause in Canadian law based very much on the notion of a single carrier.²⁰⁸ Nevertheless, it will be interesting to see how the finding of the Lords in *The Starsin*, will affect the current Canadian approach. Similarly, it will be interesting to see whether the *Starsin* alters Australian law. Unlike Canada, Australian courts have generally upheld the demise clause, with the Court of Appeals for New South Wales stating “the demise clause which I have set out above is itself an indication that this was intended to be an owner’s bill of lading... [the clause] remains a mean of clarifying any ambiguity which might arise as to the identity of the party bound by the bill of lading.”²⁰⁹ The tendency in Australia has been to follow the English authorities on demise clauses: “In a matter of shipping law I would in any case tend, where our courts are silent, to

²⁰⁵ *Canadian Klockner Ltd. D/S/ A/S Flint (The Mica)* [1973] 2 Lloyd’s Rep. 478 (Fed. Ct. Can.), at p. 484. The case went to the Court of Appeal simply to be reversed by consent of the parties in a one line judgment. See *Canadian Klockner Ltd. D/S/ A/S Flint (The Mica)* [1975] 2 Lloyd’s Rep. 371 (Fed. C.A.). The judgment was evidently bought to prevent the precedent. This is unfortunate. .

²⁰⁶ *Carling O’Keefe Breweries v. CN Marine (The Newfoundland Coast)* [1990] 1 F.C. 483 (Fed. C.A. Can.). The Federal Court of Appeal found on the construction of the bill of lading the charterer had signed in his personal capacity, but also affirmed that the trial judge was correct in hold that the clause was null and void for being contrary to Article III(8) of the Hague Rules (*Ibid*, at p. 501). The Court of Appeal also acknowledged that past jurisprudence involving the demise clause will normally mean the contract will be between the shipper and the shipowner, it cautioned that “it would seem unwise (as has been observed) to lay down a hard and fast rule.” (*Ibid*, at p. 497).

²⁰⁷ *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.).

²⁰⁸ *Union Carbide v. Fednav Ltd* (1997) 131 F.T.R. 241 (Fed. Ct. Can.), at p. 264-265; *Jian Sheng Co. v. Great Tempo S.A.* [1998] 3 F.C. 418 (Fed. C.A. Can.), at p. 430. Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 837 argues however that the Court of Appeal in *Jian Shen* didn’t actually rule on the validity of the demise clause, but rather simply presumed it was valid and applied it. Marler, D. “The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading” (2002) 26 Tul. Mar. L.J. 597, at p. 607, notes however that the effect of these two decisions with regard to the clause will be given much weight due to Nadon J’s extensive experience in maritime law.

²⁰⁹ *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 573-574. There have however been instances where the demise clause has not been given effect, such as *Andersons (Pacific) Trading v. Karlander New Guinea Line* [1980] 2 N.S.W.L.R. 870 (Sup. Ct. N.S.W.), where the time charterer was held responsible was damaged cargo despite the demise clause, however it was not given effect on the basis that the time charterer as agent had failed to sufficiently disclose his principal, the shipowner. Arguably, the reasoning in this decision is fairly unique, especially given that the existence of an undisclosed principal is possible in the common law. See *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2001] Lloyd’s Rep. 437 (C.A.), per Rix L.J. at p. 452 on the issue of a principal known to exist but unnamed.

incline towards the English standpoint.”²¹⁰ The same trend is visible in the law of Singapore.²¹¹ The Singapore Court of Appeal, similarly to the Australian Court of Appeals, found that the clause evidenced that “the contract contained in a bill of lading issued by the charterer under the authority contained in a charterparty which does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, is a contract between the shipowner and the shipper is a well established rule.”²¹²

The situation in Japan is similar in certain respects to Canada, wherein there have been contradictory judgments concerning the validity of the demise clause. Prior to the introduction of the Hague Rules into Japanese law, the Supreme Court of Japan had held that there can only be one carrier under a time charter and in that instance it will be the time charterer.²¹³ The demise therefore, by implication was invalid. Nevertheless, in 1991, Japanese courts considered the matter and determined that the demise clause was valid, and holding the shipowner to be the carrier.²¹⁴ In *The Jasmin*, the court held that

²¹⁰ *Kaleej International Pty v. Gulf Shipping Lines (The Sun Diamond)* [1986] 6 N.S.W.L.R. 569 (C.A.), at p. 575.

²¹¹ See Meng, T. *The Law in Singapore on Carriage of Goods by Sea 2nd Ed.* (1994) Butterworths, Singapore, at p. 299 – 301 discussing the law in Singapore on the demise clause as identical to English law and authorities.

²¹² *Cascade Shipping Inc. v. Eka Jaya Agencies (Grace Liberty II)* [1993] 1 SLR 980 (C.A. Singapore), at p. 990. The Court of Appeal however in this instance was considering the question of whether the shipowners were able to exercise a lien on freight where the charterers had failed to pay outstanding hire charges. For further discussion on the judgment of the Court of Appeal see Meng, T. *The Law in Singapore on Carriage of Goods by Sea 2nd Ed.* (1994) Butterworths, Singapore, at p. 301-302, and Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 822-823.

²¹³ *R.D. Tata & Co. v. Taiyo Shipping Co.* (1928) 7 Minshu 8 (Supreme Court of Japan), as summarized and discussed extensively in Margolis, R. “Validity of the Demise Clause Under Japanese Law and the Consequences for Enforcement Abroad of Claims Under Japanese Bills of Lading” [1993] LMCLQ 164, at p. 164-166. See also two Hong Kong decisions, *The Dong Do* [1991] 2 H.K.L.R. 563 (H.K. H.C. Adm.J.). *The Griesheim* (1984) Unreported, No. 70 of 1983 (Civil) (H.K. C.A.), where the bills of lading has stipulated for Japanese law and both courts on the basis of expert testimony had determined that the demise clause is invalid under Japanese law (Margolis, *ibid*, at pp. 166-167, summarizing and discussing the two judgments).

²¹⁴ The decision of the Tokyo District Court was then upheld by the High Court and the Supreme Court: *The Jasmine* (19 March 1991) Tokyo District Court. English Translation appears in: The Bulletin of the Japan Shipping Exchange Inc., March 1992; *The Jasmine* (24 February 1993) Tokyo Court of Appeal (Tokyo High Court). English Translation appears in: The Bulletin of the Japan Shipping Exchange Inc., December 1993; *The Jasmine* (27 March 1998) Supreme Court of Japan. For mention and discussion of the judgments see Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 492-493; Margolis, R. “Validity of the Demise Clause Under Japanese Law and the Consequences for Enforcement Abroad of Claims Under Japanese Bills of Lading” [1993] LMCLQ 164, at p. 167-169; Pejovic, C. “The Identity of

the demise clause did not in fact contravene article 15(1) of Japanese COGSA, which is the equivalent of article III(8) of the Hague Rules.²¹⁵ In reasoning similar to the English authorities, the court also found that the demise clause did not have the effect of reducing the liability of the carrier, rather it merely specified his identity.²¹⁶ This was not to remain the status quo in Japanese law as in 1998, in *The Camfair*, the Tokyo district court failed to give effect to a demise clause.²¹⁷ Essentially, the court held that the demise clause was invalid under Japanese COGSA, article 15(1), “because it intends to discharge the time charterer from liability as a carrier and it is a special agreement unfavorable to the consignor, consignee or the holder of the bill of lading.”²¹⁸ It has been noted by one commentator “[b]ecause Japanese courts are not bound by precedents (Japanese law is based on civil law concepts), it is not uncommon for judges to reach opposite conclusions. As such, a definitive solution to the identity of carrier problem does not yet exist under Japanese law.”²¹⁹ Nevertheless, in considering *The Camfair*, which placed importance on who is identified on the face of the bill of lading, “it is hoped that future decisions will further incorporate the perspective of the bill of lading holder, and take into account modern business efficacy, and reduce academic arguments.”²²⁰ One may speculate, therefore, that Japan may be moving towards a commercial approach as exemplified in *The Starsin*.

The approach in France is similar in ways to the American approach in that the demise clause is not necessarily invalid, rather they have been given effect when invoked by shippers or consignees seeking to hold the shipowner liable. It has been noted that

Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 393-394.

²¹⁵ Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 492; Margolis, R. “Validity of the Demise Clause Under Japanese Law and the Consequences for Enforcement Abroad of Claims Under Japanese Bills of Lading” [1993] LMCLQ 164, at p. 168.

²¹⁶ Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 492.

²¹⁷ *Anuk Fire and Marine v. Shinwa Kaiun Kaisha (The Camfair)* (30 September 1997) Tokyo District Court. See Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 493-496 and Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 394.

²¹⁸ Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 496. The court did however find that the demise clause had unilateral enforceability, and used it to demonstrate that the shipowner had voluntarily assumed the carrier’s contractual liability. (*Ibid*).

²¹⁹ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 394.

²²⁰ ²²⁰ Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 498.

“l’hostilité des tribunaux à l’égard de la clause identity of carrier et de la demise clause est manifeste.”²²¹ In France therefore “the demise and identity of carrier clauses are, in general, without effect when they are invoked by a party in order to evade or deny liability. French doctrine...has rarely endorsed the validity of such clauses, and has more often treated them with contempt. French courts have also in the past, as a general rule, refused to apply the demise of identity of carrier clause vis-à-vis third parties.”²²² There are instances, however, where French courts have allowed third parties to rely on the clause to render the shipowner liable.²²³ The situation is similar in Germany where “d’une manière general il n’y a pas d’objection à admettre la clause Identity of Carrier”, however it does not have effect as against third parties.²²⁴ In *The M/V Planet*, the Bundesgerichtshof considered an identity of carrier clause.²²⁵ The German Court held that the owner was not the carrier despite the clause, relying instead on the fact that the time charterer’s on the face of the bill of lading showing him to be the carrier.²²⁶

5.3. The Current Problem

It would perhaps be slightly simplistic to state that if entities involved in carriage were held jointly and severally liable, or were viewed as “carriers” then artifices such as the demise and identity of carrier clauses would not be able to be employed to shield parties who should be carriers, nonetheless this statement does have an air of truth to it. Ironically, the English position prior to *The Starsin* was at least predictable, with the shipowner determined to be the carrier where there is a demise clause. With uncertainty surrounding the validity of the demise clause in so many jurisdictions, as well as the conflict of laws issue where the clause is valid in other jurisdictions, it would appear the ‘who is the carrier’ enquiry is more complex than ever.

²²¹ Chao, A. "Reflèxions sur la 'Identity of Carrier' Clause' ", DMF 1967, 12, at p. 18.

²²² Tetley, W. "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807, at p. 824.

²²³ Cour d'Appel de Versailles, March 20, 1995 (The Soufflot), DMF 1995, 813. The Cour d'Appel rejected the shipowner's arguments that the time charterer was the issuer and the party that signs the bills of lading, because the bill of lading did not mention the shipowner or the time charterer (*ibid*, at p. 813).

²²⁴ Schölch, M. "Jurisprudence maritime de la République fédérale d'Allemagne", DMF 1977, 116, at p. 118-119.

²²⁵ Trappe, J. "Chronique de jurisprudence allemande" DMF 1991, 743, who at p. 744-745 summarizes and discusses the judgment.

²²⁶ *Ibid*, at p. 745.

6. BENEFIT UNDER THE CARRIAGE CONTRACT: THE HIMALAYA CLAUSE

The inequalities that may result from the finding that the party who in essence performed all or a portion of the carriage contract, is not the ‘carrier’ has consequentially led to attempts to extend the protection of the carriage contract to what are viewed as third parties. The genesis of the Himalaya clause was with respect to benefits conferred on stevedores,²²⁷ however, its function and application is just as relevant for any party that may have been characterized as a carrier but for the narrow interpretation of the term. It has been noted that the Rules were intended to confer benefit on those considered to be third parties to the carriage contract,²²⁸ such as a shipowner in the instance where charterer’s bills were issued. With one argument being that the problem arises in common law jurisdictions where an “uncritical assumption [is made] that the drafters could not

²²⁷ The Himalaya Clause technically arose out of the judgment in *Adler v. Dickson (The Himalaya)* [1954] 2 Lloyd’s Rep. 267 (C.A.) where an injured passenger was able to take suit against the employees of the carrier on the basis that the terms of the passenger ticket did not expressly or by implication benefit the servants of the vessel. Nevertheless the two seminal cases which concerned the clause were in relation to cargo damage resulting from the activities of stevedores. See *Scruttons v. Midland Silicons* [1962] A.C. 446, (H.L.) at p. 474 where Lord Reid laid out the four conditions by which a stevedor would benefit under the contract, adopting an approach based on agency: “I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as an agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.” See then *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.), which approved Lord Reid’s conditions and applied them to allow the stevedores to benefit from the clause. The Himalaya clause as found in *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.) at p. 165, as 3rd para of clause 1 in the bill of lading stipulates: “It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the forgoing provisions of this clause, every exemption, limitation, conditions and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every servant or agent of the carrier acting as aforesaid and for the purpose of all the forgoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.”

²²⁸ Newell, R. “Privity Fundamentalism and the Circular Indemnity Clause” [1992] LMCLQ 97, at p. 100.

have intended to confer any benefits on so-called ‘third parties’ to the bill of lading contract.”²²⁹ It has thus been forgotten that a majority of the delegates at the Hague conferences represented continental legal systems, which are noted “for [their] lack of squeamishness about conferring enforceable benefits on third parties to contracts.”²³⁰ In essence, the third party benefit is only really necessitated with respect to shipowners and charterers as a result of a restrictive interpretation of ‘carrier’, and therefore it is often employed to counteract inherent inequities that result. When a party is not “the carrier” he is therefore denied protection and benefit on the basis of the doctrine of privity.

6.1. An Exception to Privity

Allowing servants, agents and independent contractors to benefit, depending on the wording of the clause, from the terms of the contract of carriage through a Himalaya clause has become a well accepted method of circumventing the often harsh results of the privity doctrine in common law.²³¹ The jurisprudence on the clause is extensive, dealing frequently with stevedores and terminal operators, and generally turns on the wording of the clause.²³² Nevertheless the pertinence of the clause in this instance is in its application to cover shipowners, charterers and any other party that could be considered the carrier.

The notion that some doctrine or artifice would be needed to prevent tortious liability on the part of the shipowner was recognized by the House of Lords in 1924 where the bills of lading were found to be charterer’s bills: “It would be absurd that the owner of the goods could get rid of the protective clauses of the bill of lading, in respect

²²⁹ Newell, *ibid*, at p. 100.

²³⁰ *Ibid*.

²³¹ See Tetley, W. “Chapter 36: The Himalaya Clause – Heresy or Genius” in *Marine Cargo Claims, 4th Ed.* Online at: <http://tetley.law.mcgill.ca/maritime>, at pp. 11-30; Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at pp. 311-324; Tetley, W. “The Himalaya Clause – Revisited” (2003) 10 JIML 40, at pp. 46-58. Although, the clause does have its limits. See *Burke Motors v. Mersey Docks* [1986] 1 Lloyd’s Rep. 155 (Q.B.), at p. 161-162, holding that in order to benefit the defendant stevedores must have performed services that were referable to the carrier’s contract, and that causing damage to goods by negligently unloading cargo from another ship would not be covered.

²³² See authors cited *ibid* for a complete discussion of jurisprudence on the clause. For an example of a decision turning on the wording of the clause see *Wilson v. Darling Island Stevedoring Co.* [1956] 1 Lloyd’s Rep. 346 (Aust. H.C.), at p. 357 holding that the wording of the clause, extending protection to any other person who may be “the carrier or bailee”, was not sufficient to cover the stevedores.

of all stowage, by suing the owner of the ship in tort.”²³³ In relation to shipowners benefiting from the contract via a Himalaya clause, *Carver* has noted that he “must establish that he falls within one or more of the classes of persons to whom the clause extends the benefit of bill of lading terms”.²³⁴ In *The Mahuktai*, the Privy Council considered the question of whether a shipowner, who was not party to the bill of lading as it was a charterer’s bill, was entitled to benefit from the jurisdiction clause within it by virtue of a Himalaya clause.²³⁵ With regard to the Himalaya clause, the Lords opined that the function of the Himalaya clause is “to prevent cargo-owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and the limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier’s behalf.”²³⁶ The question was whether on the wording of the clause, the shipowners qualified as “sub-contractors”.²³⁷ Unfortunately, it was considered that the jurisdiction clause was not covered by the Himalaya clause, and thus the sub-contractor issue fell away, and the shipowners were not able to benefit from the jurisdiction clause.²³⁸ The issue concerning a non-carrier shipowner was considered again

²³³ *Elder, Dempster Co v. Paterson, Zochonis & Co* [1924] A.C. 522 (H.L.), at p. 548. The House of Lords held that the shipowners were protected by the exemptions in the bills of lading, however, Viscount Cave and Viscount Finlay did so on the basis of vicarious immunity (*Ibid*, at p. 534 and p. 548), while Lord Summer (with Lord Dunedin and Lord Carso agreeing) did so on the basis of bailment upon terms (*Ibid* at p. 564).

²³⁴ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 324.

²³⁵ *The Mahkutai* [1996] 2 Lloyd’s Rep. 1 (P.C.). The Privy Council also considered the question of whether the shipowner could benefit on the grounds of bailment on terms. Bailment and bailment on terms is discussed *infra* in section 8.3.

²³⁶ *Ibid*, at p. 9.

²³⁷ The clause stipulated: “4. Sub-Contracting. (i) The Carrier shall be entitled to sub-contract on any terms the whole or part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever under taken by the Carrier in relation to the Goods. (ii) The Merchant undertakes that no claim or allegation shall be made against any servant, agent or sub-contractor of the Carrier, including but limited to stevedores, terminal operators, which imposes or attempts to impose on any of them or any vessel owned by any of them any liability whatsoever in connection with the goods...every such servant, agent or sub-contractor shall have the benefit of all exceptions, limitations, provision, conditions, and liberties herein benefiting the Carrier...” (*Ibid*, at p. 3).

²³⁸ “Two questions arose in the course of argument which are specific to this case. The first is whether the shipowners qualify as ‘sub-contractors’ within the meaning of the Himalaya clause (cl. 4 of the bill of lading). The second is whether, if so, they are entitled to take advantage of the exclusive jurisdiction clause (cl. 19). Their Lordships have come to the conclusion that the later question must be answered in the negative. It is therefore unnecessary for them to answer the first question.” (*Ibid*, at p. 8). See also Nossal, S. “Bailment on Terms, Himalaya Clauses, and Exclusive Jurisdiction Clauses: The Decision of the Privy Council in the Mahkutai” (1996) 26 Hong Kong L.J. 321, particularly at p. 330 who has criticized the decision of the Privy Council, noting “it complicated unnecessarily the application of techniques used to mitigate the harshness of the rule of privity of contract.” At p. 331, Nossal comments that the Privy Council failed to address the lacuna in the law where the charterer issues its own bills of lading, the shipowner is un

in *The Starsin*, and this time was decided. Colman J. at first instance determined that the shipowners were in fact an “independent contractor” with regard to the Himalaya clause, reasoning that he performed a substantial portion of the contractual obligations in the same manner as other parties hired by the ‘Carrier’.²³⁹ The House of Lords agreed.²⁴⁰ The shipowner had submitted that the Himalaya clause should exempt him from all liability whatsoever in respect of the cargo, as Lord Hobhouse noted “they are not content that they should have the benefit of the same exemptions and limitations as are available to the ‘contracting’ carrier (for the obvious reason that those exceptions would not enable them to defeat the claim).”²⁴¹ With regard to the submission that the shipowners should be exempt from all liability, it was viewed that “these are remarkable submissions which seek to carry the reach of a Himalaya clause in a bill of lading far further than any previous decision. If their submissions are correct they are highly significant. They will provide the actual performing carrier with a route for evading by means of a bill of lading clause the Hague Rules scheme.”²⁴² The Lords, with the exception of Lord Steyn,²⁴³ rejected the shipowner’s submission and allowed him to benefit from the Himalaya clause only in so far as the limitations and exemptions were allowed by the Hague Rules.²⁴⁴ The benefit for parties involved in carriage deemed not to be the carrier, therefore seems to be supported by *The Starsin*, however, this is dependent on clear stipulation or language that would permit this in the actual Himalaya clauses. This is now

protected and the “cargo interests are free to sue in tort or bailment unimpeded by the terms of the charterer’s bills of lading.”

²³⁹ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2000] 1 Lloyd’s Rep. 85 (Q.B.), at p. 99, reasoning: “Ordinarily understood the word “independent contractor” in the context of a head contract means a third party with whom a party to the contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party has undertaken to perform under the head contract, in other words, a sub-contractor. Where a carrier has chartered a vessel to perform the sea carriage which that carrier has contracted with the shipper to perform, he has in effect employed the shipowners to carry out the substantial part of his own contractual obligations. He has therefore employed the shipowner as an independent contractor just as if he had employed a stevedore to carry out the handling of the goods at the port of loading.”

²⁴⁰ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.)

²⁴¹ *Ibid.*, at p. 603.

²⁴² *Ibid.* Arguably, under English law given that the actual carrier is not necessarily governed by the Hague Rules scheme due to the narrow interpretation of the term carrier, such concern for his evading the Rules is perhaps misplaced.

²⁴³ *Ibid.*, at p. 584-586, Lord Steyn reasons that the Himalaya clause protected the shipowner against any liability in tort, with the effect of channeling liability to the charterers which he considers is a readily predictable scheme.

²⁴⁴ *Ibid.*, at pp. 582, 610-611.

further supported in the United Kingdom by the recent ‘Contracts (Rights of Third Parties) Act 1999’ which provides that contracts may confer benefits on third parties where expressly provided for in the contract, although the party need not be mentioned by name, but simply as a member of a class of persons.²⁴⁵ Although the Act general exempts matters relating to contracts for the carriage of goods by sea,²⁴⁶ the exception to this is permitting a third party to “avail himself of an exclusion or limitation of liability in such a contract”.²⁴⁷ The explanatory note for that provision states that “this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process to be enforced by those servants, agents or independent contractors (so called ‘Himalaya Clauses’).”²⁴⁸ Arguably, the scope of the provision is wider than the explanatory note implies, given the holding in *The Starsin*.

Other common law nations plagued with the notion of privity in this context have followed the English approach and have in certain instances upheld the Himalaya clause. Canada,²⁴⁹ Australia,²⁵⁰ New Zealand,²⁵¹ and South Africa,²⁵² have all done so, however,

²⁴⁵ The Contracts (Rights of Third Parties) Act 1999, U.K. 1999, c.31, section 1(1)(a) and 1(1)(b). Tetley notes that the provision for members of a class would therefore benefit parties where classes such as , stevedores, subsequent owners, etc are mentioned (Tetley, W. “Chapter 36: The Himalaya Clause – Heresy or Genius” in *Marine Cargo Claims, 4th Ed*, at p. 15).

²⁴⁶ *Ibid*, section 6(5)(a).

²⁴⁷ *Ibid*, section 6(5)(a).

²⁴⁸ As quoted by Tetley, W. “Chapter 36: The Himalaya Clause – Heresy or Genius” in *Marine Cargo Claims, 4th Ed*, at p. 16. For further discussion on the impact of the Act, particularly with respect to charterparties see Vlasto, T. & Clark, J. “The Effect of Contracts (Rights of Third Parties) Act 1999 on Voyage and Time Charter Parties” (2001) 25 Tul. Mar. L.J. 519, who notes at p. 529 that the Act does not exclude charterparties in 6(5) in the same manner that it does contracts for the carriage of goods by sea.

²⁴⁹ Canadian courts had in the past relied on *Midland Silicones* to deny the use of a Himalaya clause (Tetley, W. “Chapter 36: The Himalaya Clause – Heresy or Genius” in *Marine Cargo Claims, 4th Ed*, at p. 17). In *International Terminal Operators v. Miida Electronics (Buenos Aires Maru)* [1986] 1 S.C.R. 752 (S.C.C.) the Himalaya clause was upheld, although mostly on bailment inspired reasoning (*ibid*, at p. 782-794). For further discussion on the judgment see Tetley, W. “The Buenos Aires Maru” (1988) 10 Sup. Ct. L.R. 399. For an in-depth analysis of the Himalaya clause in Canadian law see Tetley, W. “Chapter 36: The Himalaya Clause – Heresy or Genius” in *Marine Cargo Claims, 4th Ed*, at pp. 17-20, and Tetley, W. “The Himalaya Clause – Revisited” (2003) 10 JIML 40, at pp. 50-52.

²⁵⁰ Previously, Australia had used a bailment reasoning to protect stevedores where actions in tort were brought, as found in *Gilbert Stokes v. Dalgety* [1948] 81 Ll. L. Rep. 337 (Sup. Ct. N.S.W.). But the clauses have since been upheld in *Carrington Slipways Pty. v. Patrick Operations Pty. (The Cape Comorin)* (1991) 24 N.S.W.L.R. 745 (C.A. N.S.W.) and *Godina v. Patrick Operations Party* [1984] 1 Lloyd’s Rep. 333 (N.S.W. C.A.). For disussion on the Himalaya clause in Australian law see Grime, R. “Bills of Lading” in *Australian Maritime Law* (1991) M. White (Ed.) Federation Press, Sydney, at p. 86-89.

due to either liberal judicial policies, or legislative intervention, in many respects those nations today have a more relaxed approach to privity than the English authorities.²⁵³

This is also the case in the United States. Despite an early willingness to allow third

²⁵¹ In *Air NZ Ltd. v. Contship America* [1992] 1 N.Z.L.R. 425 (H.C. N.Z.), Lord Reid's requirements were utilized to test whether the Himalaya clause was effective, however this decision has been criticized. Myburg, P. "Current Developments Concerning the Form of Bills of Lading – New Zealand" in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 249 has argued that the New Zealand Contracts (Privity) Act 1982 has rendered New Zealand law less restrictive than Reid's agency test. Myburg, at p. 250 has noted that post-1982 in New Zealand, all that is required would be that the bill of lading makes it clear that the third party servant, agent or sub-contractor was intended to be covered, and that this third party is designated clearly by name, description or reference to a class.

²⁵² South Africa is actually not a common law nation, rather Roman-Dutch law, a civilian legal system, prevails. In maritime law matters, however, certain areas are governed by English admiralty law. The determination of which matters are governed by English admiralty law and which are governed by South African Roman Dutch law, is made through reference to s. 6 of the Admiralty Jurisdiction Regulation Act 105 of 1983. For an in-depth discussion on the operation of the Act and the applicable law governing various maritime matters see Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at pp.17 and following. Nevertheless, in *Santam Insurance Co. v. SA Stevedores Ltd.* 1989 (1) SA 182 (Div. Durban), the court upheld the Himalaya clause relying on both English law, specifically Lord Reid's first three requirements in *Midland Silicones*, and also by relying on the Roman Dutch notion of *stipulatio alteri* (*ibid*, at p. 189-190). This decision has been subject to criticism on two fronts: firstly, that Wilson J. should only have applied English admiralty law, as by virtue of the South African Admiralty Jurisdiction Regulation Act, that was the proper law to apply given the subject matter at hand, and secondly, given *stipulatio alteri* was inapplicable, Wilson J. should not have omitted the fourth requirement of Lord Reid's test simply because it was not a requirement of *stipulatio alteri* (Staniland, H. "The Himalaya Clause in South Africa" [1992] LMCLQ 317, at pp. 319-321). *Stipulatio alteri* is civilian in nature and provides that party A may stipulate in a contract with party B, for the benefit of third party C (Staniland, *ibid*, at p. 321). The distinction between the English law and the Roman-Dutch law therefore in English law there is a requirement of consideration and the involvement of agency principles, where both are not necessary in Roman Dutch law (*ibid*, at p. 321-322). The South African courts have more recently taken an expansive approach to the Himalaya clause in *LTA Construction v. Mediterranean Shipping Co Depots (The Izmir)*, 21 April 2004, SCSZ at D211 (D& C LD). Using English law, the court determined that the wording of the Himalaya clause which extended immunity to "every such servant or agent of the Carrier (including any stevedore, terminal operator or any other independent contractor)" was broad enough to cover the sub-contractor of the agent of the carrier. For a discussion of the judgment see Wragge, M. & Wagener, M. "South African Maritime Law Update: 2004" (2005) 36 JMLC 343, at pp. 356-357.

²⁵³ For example the Canadian Supreme Court in *London Drugs v. Kuehne & Nagle Intl* [1992] 3 S.C.R. 299 (S.C.C.), adopted a much more relaxed approach to the privity doctrine employing a two part test with respect to third party benefit, which was subsequently applied in *Fraser River Pile & Dredge v. Can-Dive Services* [1999] 3 S.C.R. 108 (S.C.C.) allowing a demise charterer to benefit under the barge owner's insurance contract. The Supreme Court in *London Drugs* characterized the test as the first limb providing that the parties to the contract must intend to benefit the third party, and the second limb providing that the activities performed by the third party must be within the scope of activities performed under the contract (*Ibid*, at p. 109). Tetley, has argued however that although the two part test would be perfectly applicable in a Himalaya situation, the fact that Lord Reid's test is so frequently applied by the Canadian Courts, renders it likely that the courts will continue using an agency analysis (Tetley, W. "Chapter 36: The Himalaya Clause – Heresy or Genius" in *Marine Cargo Claims, 4th Ed*, at pp. 19). While Canada has relaxed the privity requirements judicially, the English authorities are not longer applicable in New Zealand following the New Zealand Contracts (Privity) Act 1982, which relaxes the requirements for third party benefit in a manner similar to the U.K. Contracts (Rights of Third Parties) Act 1999.

parties to benefit from carriage contracts,²⁵⁴ the Supreme Court in 1959 adopted a somewhat restrictive approach to third party benefit. In *Robert C. Herd v. Krawill Machinery Corp.*, the Supreme Court of the United States considered the extension of the carrier's defences to stevedores facing suit in tort for damage to an industrial press.²⁵⁵ Although, there was actually no Himalaya clause in *Herd*, the Supreme Court's reasoning with regard to denying the stevedores the benefit of COGSA has formed the basis for subsequent jurisprudence: "We can only conclude that if Congress had intended to make such an inroad on the rights of claimants (against negligent agents) it would have said so in unambiguous terms"²⁵⁶ therefore "[n]o statute has limited [the stevedore's] liability, and [the stevedore] was not a party nor a beneficiary of the contract of carriage between the shipper and the carrier, and hence its liability was not limited by that contract."²⁵⁷ A general test therefore emerged from *Herd*,²⁵⁸ however it was gradually expanded over

²⁵⁴ See Costabel, A. "The Himalaya Clause Crosses Privity's Far Frontier: Norfolk southern Railway v. James N. Kirby" (2005) 36 JMLC 217, outlining at p. 222-223 the early American law on Himalaya clauses. See also Tetley, W. "Chapter 36: The Himalaya Clause – Heresy or Genius" in *Marine Cargo Claims, 4th Ed*, at pp. 20-21 outlining and discussing early U.S. jurisprudence that had departed from the restrictive mid-nineteenth century notion of privity in England. Conversely, see Sweeney, J. "Crossing the Himalayas: Exculpatory Clauses in Global Transport" (2005) 36 JMLC 155, at p. 162-163, who characterizes American jurisprudence in the earlier part of the last century as hostile to exculpatory clauses on public policy grounds, thus the implication being that negligent parties would have difficulty exempting themselves from liability. Nevertheless in *Collins & Co. v. Panama Railroad*, 197 F.2d 893 (5 Cir. 1952), the 5th Circuit Court of Appeals considered the instance where longshore men hired by a railroad had damaged cargo and the railroad sought to benefit from the terms of the bill of lading. The Court opined at p. 897 that "the limitation of liability of the carrier under the Carriage of Goods by Sea Act is not intended to be personal, but, unless otherwise agreed, extends to any agency by means of which the carrier performs its contract of transportation and delivery." One commentator has described this judgment as follows: "Collins offers a vision of carriage as a concerted effort of multiple parties who are all instrumental to the achievement of the venture's common goal." (Costabel, *ibid*, at p. 222).

²⁵⁵ *Robert C. Herd v. Krawill Machinery Corp.*, 359 U.S. 297 (S.C.).

²⁵⁶ *Ibid*, at p. 301.

²⁵⁷ *Ibid*, at p. 308.

²⁵⁸ Although, not necessarily a clear test as found in Lord Reid's four requirements. Rather it appears to depend on who is discussing the judgment as to what the ratio is. Nevertheless there appears to be consensus on the notion that the contract will be strictly construed. See Sweeney, J. "Crossing the Himalayas: Exculpatory Clauses in Global Transport" (2005) 36 JMLC 155, at p. 164, noting a strict construction of exemption clauses. See also Costabel, A. "The Himalaya Clause Crosses Privity's Far Frontier: Norfolk southern Railway v. James N. Kirby" (2005) 36 JMLC 217, at p. 226 noting that the Supreme Court found two conditions attached to providing benefit under the contract: "(1) that the contractual intent to benefit the third party be strictly construed to apply only to 'intended' beneficiaries; and (2) that the contractual intent be expressed with 'clarity of language'." While Tetley, W. "Chapter 36: The Himalaya Clause – Heresy or Genius" in *Marine Cargo Claims, 4th Ed*, at pp. 22-25 has discussed three preconditions to benefit: "(i) There had to be a contractual relationship between the contracting party and anyone who purported to claim the benefit of any clause in that contract... (ii) The language of the Himalaya clause had to be very specific as to who was being protected... (iii) The clause needed to be specific as to what benefit is being granted."

the years.²⁵⁹ In *The M/V Hanjin Marseilles*, the 9th Circuit Court of Appeals reasoned that “we reject the appellants’ argument that privity of contract is required in order to benefit from a Himalaya clause. Rather the proper test is to consider the nature of the services performed compared to the carrier’s responsibility under the carriage contract.”²⁶⁰ The holding by the 9th Circuit was soon utilized by the District Court of New Jersey in *The M/V Hanjin Osaka*, in extending the benefit of the Himalaya clause to allow a shipowner and a demise charterer to enforce a forum selection clause in the bill of lading on the basis that it was reasonable for the parties to expect that other parties would benefit from the protections in the same manner as the carrier.²⁶¹ The District Court characterized the shipowner and the demise charterer as parties that were “intimately involved in the transactions.”²⁶² Despite the district court’s holding with respect to Himalaya clauses and benefit for non-carrier performing parties, it has been noted by one commentator that “American cases have not fully confronted the issue of whether a registered owner who is not the COGSA carrier is nevertheless protected by COGSA.”²⁶³ This may change

²⁵⁹ Donovan, C. & Haley, J. “Who Done It and Who’s Gonna Pay? Rights of Shippers and Consignees Against Non-Ocean Carriers Performing part of a Contract of Carriage Covered by a Through Bill of Lading” (1998) 7 DCL J. Int’l L. & Prac. 415, at p. 419, discusses a “Two Factor Test” that was employed by certain courts by the 1980’s and 1990’s in order to extend third party benefit. “The two factors involved are (1) the contractual relations between the party seeking protection and the ocean carrier, and (2) the nature of the services performed by the third party compared to the ocean carrier’s responsibility under the carriage contract.” (*Ibid*).

²⁶⁰ *Akiyama Corp. of America v. M/V Hanjin Marseilles*, 162 F.3d 571, at p. 574 (9 Cir. 1998). One must note however that in this respect there is a divergence between two Circuits. In *Minkinberg v. Baltic Steamship Co.*, 988 F.2d 327 (2 Cir. 1993), the 2nd Circuit Court of Appeals adopted a narrower approach with respect to the privity requirement than the 9th Circuit holding at p. 333: “There must be a contractual relationship between [the stevedore] and [the carrier] in order for the provisions of the ‘Himalaya clause’ to apply... We decline to extend COGSA protections through the ‘Himalaya clause’ to indefinite and unforeseeable defendants who may have only an attenuated connection to the ‘carriage of goods by sea’.” Admittedly, this distinction will likely not affect such parties as shipowners or charterers found not to be ‘the carrier’ as invariably there will be a contractual relationship through a charterparty. For a discussion on the different privity requirements in several of the circuits see Robertson, D. & Sturley, M. “Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits” (2003) 27 Tul. Mar. L.J. 495, at p. 568-569.

²⁶¹ *Chisso America Inc. v. M/V Hanjin Osaka*, 307 F.Supp. 2d 621 (D.C. N.J. 2003), at p. 626, where the district court quoted the 9th Circuit in *M/V Hanjin Marseilles* as a justification for the reasoning that parties would expect such benefit to be extended beyond the carrier. This was also done on the wording of the Himalaya clause, as the district court found that the wording “agents...or others by whom the... carriage is procured,” would include the shipowner and the demise charterer who were “others” given they were intimately involved in the transactions (*ibid*).

²⁶² *Ibid*.

²⁶³ Sweeney, J. “Crossing the Himalayas: Exculpatory Clauses in Global Transport” (2005) 36 JMLC 155, at p. 183. Although Sweeney does acknowledge that it has been considered in his discussion of *EAC Timberlane v. Pisces Ltd.*, 745 F.2d 715 (1 Cir. 1984), where the Court of Appeals for the 1st Circuit

however, with a 2004 Supreme Court decision that extended the benefit of the Himalaya clause immeasurably.²⁶⁴ In *Kirby*, the inland rail carrier who damaged the goods sought protection from the provisions of the carrier's bill of lading as against a shipper who had contracted with a freight forwarder that had issued the shipper their own bill of lading. The Supreme Court held that the rail carrier could benefit under both the ocean carrier bill of lading and the freight forwarder's bill of lading, dispensing with privity and opining that "the parties must have anticipated that a land carrier's services would be necessary for the contract's performance."²⁶⁵ The implication of the *Kirby* decision with regard to Himalaya clauses is that privity is no longer a prerequisite and the agency theory or doctrine becomes unnecessary.²⁶⁶ The reaction to the decision is mixed.²⁶⁷ Nevertheless, it would appear that the ability of a party performing a portion of the carriage or a shipowner found not to be the carrier will now have an easier time benefiting from the protections offered under the bill of lading if so stipulated. This is simply another example of the existing desire to bring parties performing carriage within the regime that should in essence govern their liability.

allowed the shipowner to benefit from the 4(2)(q) defence in COGSA along with other parties who were not the carrier.

²⁶⁴ *Norfolk Southern Railway Co. v. James N. Kirby Pty*, 2004 AMC 2705 (U.S. S.C. 2004). The Supreme Court overturned the 11th Circuit Court of Appeals who had held that where a freight forwarder, who had then contracted with a carrier, who had then subcontracted with an inland transporter who had damaged the goods, the shipper of the goods was not bound by the Himalaya clause in the carrier's bill of lading vis-à-vis the inland transporter. The 11th Circuit had reasoned that the party seeking protection must have privity with the shipper as based on the principle of *Herd* (*Norfolk Southern Railway Co. v. James N. Kirby Pty*, 300 F.3d 1171 (11 Cir. 2002)). For discussion on the 11th Circuit Court of Appeals decision see Glenn, R. & McRae, C. "Admiralty" (2003) 54 Mercer L.R. 1317, at p. 1320-1324.

²⁶⁵ *Kirby*, *ibid*, at p. 2717.

²⁶⁶ Costabel, A. "The Himalaya Clause Crosses Privity's Far Frontier: Norfolk southern Railway v. James N. Kirby" (2005) 36 JMLC 217, at p. 241-242.

²⁶⁷ Theis, W. "Third-Party Beneficiaries in Multimodal Contracts of Carriage: Norfolk Southern Railway v. James N. Kirby" (2005) 36 JMLC 201, at p. 214-215, criticizes the decision as incomplete and unhelpful, leaving several key issues concerning third party benefit unanswered, including the issue of when a third party does not know about the benefit can he still claim it? Conversely, Costabel, A. "The Himalaya Clause Crosses Privity's Far Frontier: Norfolk southern Railway v. James N. Kirby" (2005) 36 JMLC 217, at p. 244-245 supports the decision's overruling of the privity rule with respect to Himalaya clauses and considers that American law is now in step with other common law jurisdictions that have relaxed the notion of privity, finishing with the thought that "it is time to read and digest it, treasure the ideas and inspirations from old time that seemed to be forever gone, and savor "heresy" turned rule of law. Wherever you are, Lord Denning, we suspect that you are hiding a smile." Sweeney, J. "Crossing the Himalayas: Exculpatory Clauses in Global Transport" (2005) 36 JMLC 155, at p. 199, warns that the "the rationale for approval and limitation of Himalaya clauses in England now differs from the rationale in the United States provided by the *Kirby* decision and this divergence demonstrates the need for an international solution to this major trade problem."

6.2. Stipulation Pour Autrui

Briefly, the notion of third party benefit is not foreign to civilian nations in the same manner as it is to common law ones, and therefore does not pose the same judicial and doctrinal headaches as found in common law authorities. As discussed above in relation to South Africa's *stipulatio alteri*,²⁶⁸ civilian jurisdictions possess this notion of third party benefit, known often as *stipulation pour autrui*, or stipulation for another. By virtue of article 1121 of the French Civil Code, and Article 1328 of the German Commercial Code (HGB), parties may impliedly or expressly confer rights in contracts for the benefit of third parties such that the third party may enforce those rights or performance in their own behalf.²⁶⁹ Similarly in the Civil Code of Quebec, article 1444 provides: "A person may make a stipulation in a contract for the benefit of a third person. The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor."²⁷⁰

In France, one need no longer rely on *stipulation pour autrui* with regard to stevedores as legislation has been enacted governing their liability, and limiting it in certain instances to the limits of liability applicable to the carrier.²⁷¹ This however does not benefit a shipowner or charterer seeking to benefit under a Himalaya clause or by virtue of the notion of *stipulation pour autrui*. It has been noted that for a *stipulation pour autrui* to be successful the following four conditions must be complied with: "First, at its base, must lie a valid contract. Secondly, the stipulator must have a valid interest, pecuniary or otherwise, in having an obligation performed for the benefit of a third party.

²⁶⁸ See footnote 252 above, discussing the civilian notion of *stipulatio alteri* found in South African Roman-Dutch law.

²⁶⁹ Vlasto, T. & Clark, J. "The Effect of Contracts (Rights of Third Parties) Act 1999 on Voyage and Time Charter Parties" (2001) 25 Tul. Mar. L.J. 519, at p. 522.

²⁷⁰ Civil Code of Quebec, 1994. Article 1445 stipulates: A third person beneficiary need not exist nor be determinant when the stipulation is made, he need only be determinable at that time and exist when the promisor is to perform the obligation for his benefit.

²⁷¹ Tetley, W. "The Himalaya Clause – Revisited" (2003) 10 JIML 40, at p. 62-63. The provisions governing the liability of stevedores are found in the Law of 18 June 1966, Articles 50-51 and 53, as well as Article 38 of the Decree of 31 December 1966, and provide among other things, that the stevedore's liability is limited to that of the carrier, the stevedore is not bound by bill of lading clauses in a contract of carriage of a container to which he is a stranger, the stevedore cannot lessen his liability but actions against him are prescribed after one year (*ibid*, at p. 62-64).

Thirdly, the third party who benefits from the stipulation must be determinable and must exist when the promisor is obliged to perform his obligation towards him. Fourthly, the third party beneficiary must accept the stipulation and notice of the acceptance must be brought to the attention of either the stipulator or the promisor.”²⁷² On the basis of these requirements it has been argued by Tetley that a Himalaya clause cannot fall within the terms of the civilian notion of *stipulation pour autrui* for three reasons, firstly that the clause does not confer a benefit rather it is a negative right not to be sued, secondly, two conditions are not met by the fact that the third party is not determinably and does not signify his assent, and thirdly, that as such a stipulation is an exception and will be interpreted restrictively.²⁷³ Regardless, it was held in *The Federal Schelde*, that the defendant stevedores could rely on a Himalaya clause as by the law of Quebec the clause constituted a valid *stipulation pour autrui*.²⁷⁴ The Superior Court of Quebec found that “if one accepts the following simple definition of the stipulation pour autrui...there is no reason why, in principle, it cannot be applied to a clause of limitation contained by reference in a contract of carriage: *la stipulation pour autrui est un contrat par lequel une personne appelée stipulant obtient d’une autre appelée commettant un engagement au profit d’une troisième appelée tiers bénéficiaires*. There is nothing in that definition which would forbid the application of the principle contained [in the Civil Code] to the benefit stipulated in favour of all the agents of defendant Commerce including defendant Stevedoring.”²⁷⁵ Similarly, a Himalaya clause was found to be valid with regard to the Roman-Dutch *stipulatio alteri*, by the Durban Divisional Court of South Africa.²⁷⁶ It would appear therefore that perhaps Professor Tetley, has characterized *stipulation pour autrui* in an overly restrictive manner with respect to Himalaya clauses.

²⁷² *Ibid*, at p. 60. Tetley had noted however that the second condition has been interpreted by the French courts “as entailing nothing more than the stipulator have a moral interest in the stipulation.” (*ibid*, at p. 60, footnote 157).

²⁷³ *Ibid*, at p. 61.

²⁷⁴ *Miles International Corporation v. Federal Commerce & Navigation Co. (The Federal Schelde)* [1978] 1 Lloyd’s Rep. 285 (Que. S.C.), at p. 292.

²⁷⁵ *Ibid*, at p. 291. The provision of the Quebec Civil Code in force at the time of the judgment (The current Civil Code of Quebec was revised in 1994), and relied on by Justice O’Connor, at p. 291, was 1029: “A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person [has] signified his assent to it.”

²⁷⁶ *Santam Insurance Co. v. SA Stevedores Ltd.* 1989 (1) SA 182 (Div. Durban).

Nevertheless, the boundaries of the civilian principle with respect to entities such as shipowners and charterers remains to be seen.

6.3. The Visby Protocol, Article IV *Bis* 1

Article IV *Bis* 1 was adopted by the 1968 Visby Protocol in order to rectify certain problems, one of them being the tendency for claimants to attempt to circumvent the Rules by bringing an action against other parties, such as the employees of the carrier or independent contractors that were hired by the carrier. Article IV *bis* 1(2) provides that if “an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.” Originally, the article that was suggested was broader in scope. The report of the Committee on Bills of Lading Clauses presented at the 1963 CMI Conference in Stockholm recommended a draft article with similar wording, although it included independent contractors.²⁷⁷ The report noted however that “a minority wishes to put on record that they cannot adhere to these provisions as far as independent contractors are concerned. In their view a contractor who is independent of the carrier should not, by the mere fact that he performs the duties which might have been performed by the carrier himself, become entitled to avail himself of the limitations and exceptions in the Convention.”²⁷⁸ In the plenary session at the 1963 CMI Conference, the American delegation suggested an amendment that excluded independent contractors and following debate it was adopted with 15 votes for and 6 abstentions.²⁷⁹ The text of the article as

²⁷⁷ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 596. The text of the draft article reads: “If such an action is brought against a servant or agent of the carrier or against an independent contractor employed by him in the carriage of goods, such servant, agent or independent contractor shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.”

²⁷⁸ *Ibid.*, at p. 598. The report presented that those opposed to the inclusion of independent contractors, felt that the servants should be included and protected for social reasons, but that such reasons did not apply to independent contractors. (*Ibid.*). In particular, the Greek delegate and the Italian delegate were anxious to exclude independent contractors (*Ibid.*, at p. 610 and 612).

²⁷⁹ *Ibid.*, at p. 630. Those having voted in favour were: Belgium, Canada, Denmark, Finland, France, Great-Britain, India, Ireland, Italy, Netherlands, Norway, Portugal, Sweden, United States, Yugoslavia.

presented to the Diplomatic Conference in Stockholm in 1967, was identical to the one finally adopted.²⁸⁰

The provision appears resolve the problem of making the defences and the limits of liability available to servants and agents of the carrier. This is all fine and well where one finds themselves in a *Himalaya* inspired situation where the master or deckhand is being sued, however, the difficulty arises where others, such as shipowners or charterers, who do not enjoy privity of contract are not so easily characterized as servants or agents. *Scutton* has noted that the provision “does not purport to protect the ‘actual carrier’ in cases where the carriage is performed by someone other than the party who issued the bill of lading.”²⁸¹ Arguably, it is unfortunate that by excluding independent contractors this article has in essence done little to alleviate the problem with respect to shipowners and charterers. Nevertheless, as cases such as *The Starsin* have demonstrated, if there is clear wording in the Himalaya clause the benefit will be extended to shipowners, and arguably charterers, on the same reasoning.

²⁸⁰ *Ibid*, at p. 631.

²⁸¹ Boyd, S. *Scutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London.

7. THE MULTIFACETED LONE CARRIER

7.1. Who is the Carrier? A Complex Enquiry

Who is the carrier? Arguably, this is the darling topic of many a journal article, textbook chapter, colloquium and conference. Not without just cause however, as this question is one that has plagued claimant's attorneys and judges alike for the past eighty years. The unfortunately narrow interpretation given often to Art. 1(a) of Hague necessitates this doctrinal and judicial enquiry, which would otherwise be avoided under a more inclusive view of the definition of carrier as demonstrated above. When determining who is to be characterized as 'the carrier', the two parties who most often are found to be the source of litigation in this regard are the time charterer and the shipowner. This is where the issue is perhaps most contentious. Nonetheless, there are other parties who have been found to be the carrier in certain instances. Frequently the demise charterer is found to be the carrier, however, this determination is not terribly surprising and is in line with even the most narrow interpretation of the Hague Rules. Where the issue becomes more difficult is when considering parties who are performing several of the essential functions in the carriage of the goods, such as slot charterers, freight forwarders, or vessel managers. Unlike the difficulties with regard to the time charterer and the shipowner where the issue is determining which of the two is the carrier, the enquiry concerning the other parties often revolves around whether they can be considered to be a carrier under the Hague Rules.

The enquiry is particularly complex and often litigious partly on the basis that determining the identity of the carrier is "a question of fact that depends upon the documents and circumstances of each case."²⁸² As discussed below, the courts have nevertheless in certain instances set out criteria and guidelines in order to facilitate the

²⁸² Pejovic, C. "The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law" (2000) 31 JMLC 379, at p. 386. See also *Canficorp (Overseas Projects) Ltd. v. Cormorant Bulk-Carriers* (1984) A.C.W.S.J. LEXIS 32028 (Fed. C.A. Can.), where the Canadian Federal Court of Appeal at para 37 noted that "the question of whether a given party is not a carrier within the meaning of the Rules so as to attract liability for damages sustained to the cargo is a question of fact depending upon the documents in each case."

enquiry. This is particularly the case in instances involving a choice between a shipowner and a time charterer, as well as in situations involving freight forwarders.

7.2. Shipowner vs. Time Charterer

Generally, the issue of ‘who is the carrier’ tends to arise most frequently when a time charterer has issued bills of lading. The inquiry is therefore whether the shipowner is the ‘carrier’ or whether the time charterer fills that role under the Hague and Hague-Visby Rules. The law in this area is unnecessarily complex given that as demonstrated above, both of these parties share what are the core duties of the carrier under uniform law. Nevertheless, various tests, doctrines, and legal principles are employed by the courts in the quest for allocating the ‘carrier’ label to one of the two parties. The unfortunate result of this process however is the determination that once either the shipowner or the charterer is labeled the ‘carrier’, the remaining entity is therefore not a party to the carriage contract. With regard to the aims of the Hague Rules as discussed above, this polarized view is perhaps at its worst when the shipowner is viewed not to be the carrier. Recalling that the Rules had at their core the aim to regulate shipowner and cargo owner relationships and provide an equitable bargain with respect to duties and liabilities. It therefore does violence to the Rules to then hold in many instances that they do not govern the shipowner. This is particularly true where the shipowner escapes all responsibility.²⁸³ It is this eventuality that is one of the undesirable results of a single carrier characterization of the Hague and Hague-Visby Rules. A non-pluralistic view of the term carrier, thus necessitates the creation of judicial tests to determine whether to assign carrier status to the shipowner or the time charterer.

²⁸³ Arguably, it is equally unjust that a plaintiff may circumvent the Rules to render a shipowner fully liable for all losses, contrary to their expectation under contract. This polarized view and its unfortunate consequences are exemplified in an Australian decision where it was held that the time charterer was the ‘carrier’ under the bill of lading, and thus the shipowner was not a party to the bill of lading contract. (*Garsden v. Australian Coastal Shipping Commission* [1977] 2 N.S.W.L.R. 575 (N.S.W. C.A.)). The court of first instance had found that the shipowner, as a bailee of the goods, was unable to benefit from the one year time limitation in Art. III(6), and on appeal Moffitt J. opined that the definition of ‘carrier’ in the Rules “makes it clear that the owner is brought with the Rules and, in particular, Article III dealing with responsibilities and liabilities, only when he is a party to the relevant contract, that is he enters into a contract of carriage covered by a bill of lading or a similar document of title. The Rules, and hence the discharge of liability provided in Rule 6 of Article III, do not extend to a liability which is not under a contract of carriage.” (*Ibid*, at p. 579).

By way of introduction, a brief explanation of what the term “time charterer” encompasses is perhaps desirable. As the term implies, a time charterer is an individual or entity that has contracted to hire a vessel for a designated period of time.²⁸⁴ Perhaps the reason why the time charterer and shipowner arrangement has resulted in complications and difficulties with regard to ‘who is the carrier’ is the nature and division of the responsibilities for carriage under the time charterparty contract.²⁸⁵ The essence of the arrangement is such that the time charterer has the vessel and the master and crew placed at his disposal for his use and employment, yet the master and crew remain the servants of the owner.²⁸⁶ The owner therefore is responsible for “the nautical operation and maintenance of the vessel and the supervision of the cargo – at least from a seaworthiness point of view. Within the framework of the contract, however, the charterer decides the voyages to be made and the cargoes to be carried.”²⁸⁷ It is this division of responsibility that in many instances has given rise to confusion. One author characterizes this relationship as “a joint venture between the owners and the charterers, because they share the responsibilities of a carrier under the Hague/Visby Rules.”²⁸⁸ It is this sharing of responsibilities that has led to a grey area with respect to the assignment of liability for cargo claims, leading one commentator to describe this process in a less than definite manner; “The liability for the cargo may be determined in different ways and may rest with the owner or with the charterer or may be divided between them in one way or another.”²⁸⁹

The enquiry as to whether the carrier is the shipowner or time charterer, or whether the bills are charterer’s bills or the shipowner’s bills, is one that has consumed a

²⁸⁴ For further discussion and a concise description concerning the of the nature of a time charterparty see Hill, C. *Maritime Law 4th Ed.* (1995) Lloyd’s of London Press, London, at p. 186. For an indepth and complete examination of the subject see generally Wilford, M et al. *Time Charters* (2003) LLP, London.

²⁸⁵ For an example of a time charterparty see the New York Produce Exchange form issued by the Association of Ship brokers and Agents USA Inc., or NYPE form, with the most recent version being the NYPE 1993, which is arguably the most frequently used time charterparty. For further examples see Gorton, L. et al. *Shipbrokering and Chartering Practice 4th Ed.* (1995) LLP, London, at appendix II for the BIMCO LINERTIME charterparty, appendix IV for the NYPE 1993 charterparty, and appendix V for the SHELLTIME 4 charterparty, 1984.

²⁸⁶ See Hill, C. *Maritime Law 4th Ed.* (1995) Lloyd’s of London Press, London, at p. 186.

²⁸⁷ Gorton, L. et al. *Shipbrokering and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 90.

²⁸⁸ Tetley, W. “Case Note: The Starsin” (2004) 35 JMLC 121, at p. 123.

²⁸⁹ Gorton, L. et al. *Shipbrokering and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 92.

fair amount of effort and energy in most jurisdictions. Perhaps nowhere is this more the case than in the United Kingdom. Justice Colman remarked in *The Starsin* that “it would strike one unfamiliar with maritime law as quite extraordinary that there should have grown up such an immense body of decided cases devoted to the issue whether owners or time charterers are parties to the bills of lading contracts.”²⁹⁰ The question as to whether a bill of lading is an owner’s bill or a charterer’s bill is one of construction of the bill of lading.²⁹¹ Generally, one of the most telling elements tends to be the signature. There is a long line of established authority reaching back to the mid-nineteenth century that where the master has signed the bill of lading, despite the fact that the ship is chartered, the bill is an owner’s bill and the shipowner is liable.²⁹² Where the bill of lading is signed “for the master” by an agent, the owners will also be held to be the contracting parties.²⁹³ The general rule with respect to signatures and charterer’s bills as laid down in *The Rewia*, after synthesizing the authorities is: “a bill of lading signed for the master cannot be a charterer’s bill unless the contract was made with the charterers alone, and the person signing has authority to sign and does sign, on behalf of the charterers and not the owners.”²⁹⁴ Therefore the issue of who is the carrier will often depend on by whose

²⁹⁰ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2000] 1 Lloyd’s Rep. 85 (Q.B.), at p. 89. This is also seen by referring to *Carver*, where 16 pages are devoted to the topic of deciphering whether a bill is an owner’s bill or a charterer’s bill. (Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at pp. 123-139).

²⁹¹ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at pp. 127; *The Venezuela* [1980] 1 Lloyd’s Rep. 393 (Q.B.), at p. 395; *The Berkshire* [1974] 1 Lloyd’s Rep. 185 (Q.B.), at p. 187. See the *M.B. Pyramid Sound v. Briese Schiffahrts (The Ines)* [1995] 2 Lloyd’s Rep. 144 (Q.B.), at p. 149, where Clark opined: “in order to ascertain who the true contracting parties were it is necessary to examine the whole document and indeed to consider the whole context in which it came into existence.”

²⁹² See Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at pp. 129-130 discussing decisions from the 19th and 20th century on that point. See also Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at p. 713, stating “generally, the shipowner is to be identified as “the carrier” under a bill of lading signed by or on behalf of the master.”

²⁹³ Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at p. 382-383. Nevertheless this is not always the case, see *Namchow Chemical v. Botany Bay Shipping* [1982] 2 N.S.W.L.R. 523 (C.A.), at p. 529 “the presence of the words “For master” is, I would think, no more than a historical vestige, alike with the opening words of the testatum clause. I think that the words “for the master” were not struck out because the [charterer’s] employee who signed probably thought it quite unnecessary to do so. In the circumstances I have mentioned I do not accord it any greater significance.”

²⁹⁴ *The Rewia* [1991] 2 Lloyd’s Rep. 325 (C.A.), at p. 336. However, see also *The Venezuela* [1980] 1 Lloyd’s Rep. 393 (Q.B.), at p. 396 where an identity of carrier clause indicating the time charterer as the carrier was held to be sufficient to render the time charterer liable as ‘the carrier’ under the terms of the bill of lading despite the fact that the bill of lading had been signed under the words “on behalf of the master”.

authority the bill was signed.²⁹⁵ In *The Knutsford*, the House of Lords resorted to the time charterparty to determine if authority existed, and found that it did thus binding the owners where the time charterers signed the bill.²⁹⁶ Construction of the terms of the bill of lading will also play a part as in *The Hector*, where although the time charterers were authorized to sign bills of lading on behalf of the shipowner, Rix J. found the bills to be charterers' bills given the fact that the face of the bill had the time charterer listed as "carrier".²⁹⁷ The House of Lords decision in *The Starsin*, as discussed previously, has added a new dimension to the enquiry as to whether the bills are charterer's bill or owner's bills.²⁹⁸ Despite certain authorities,²⁹⁹ where the bill of lading is on the charterer's form and signed by the charterer as 'the carrier' then the bill is a charterer's bill despite the demise clause and identity of carrier clause in the back of the bill.³⁰⁰ The construction of the bills will now be subject to an analysis intended to reflect what the

²⁹⁵ See Pritchett, R. "Charterer's Authority to Sign Bills of Lading under Standard Time Charter Terms" [1980] LMCLQ 21, at p. 21. See also *M.B. Pyramid Sound v. Briese Schiffahrts (The Ines)* [1995] 2 Lloyd's Rep. 144 (Q.B.), at p. 149, after examining the charterparty, Baltimore, Clause 9 indicated that "the charterers to indemnify the owners against all consequences or liabilities arising from the master, officers or Agents signing bills of lading." Clark J. then held "it is in my judgment implicit in that clause that the charterers or their agents had authority to sign bills of lading on behalf of the owners," and thus the bills to be owners bills. For a similar result see *The Berkshire* [1974] 1 Lloyd's Rep. 185 (Q.B.), at p. 188-189, although in this instance authority was found in clause 8 of NYPE.

²⁹⁶ *S.S. Knutsford v. Tillmanns & Co.* [1908] A.C. 406 (H.L.), at p. 191. See *The Ines*, *ibid.* See also *NGO Chew Hong Edible Oil v. Scindia Steam Navigation (The Jalamohan)* [1988] 1 Lloyd's Rep. 443 (Q.B.), at p. 451 holding that by virtue of the NYPE time charterparty the owners had expressly authorized the issuing of bills of lading on their behalf and thus the bills were owners bills. See also *W.R. Fletcher v. Sigurd Haavik Aksjeselskap (The Vikfrost)* [1980] 1 Lloyd's Rep. 560 (C.A.), at p. 567, where the authority given by the owners in the time charter extended not only to the charterer but to the subsequent sub-charterer. Conversely, for a different approach see the Australian decision of *Andersons (Pacific) Trading v. Karlander New Guinea Line* [1980] 2 N.S.W.L.R. 870 (Sup. Ct. N.S.W.), where it was found that the time charterer was signing on the authority of the shipowner and as agent of the shipowner, but the court at p. 875-876 held that in the absence of disclosure on the face of the bill of lading of the existence of the charterer's principal, the charterer was liable.

²⁹⁷ *Sunrise Maritime v. Uvisco Ltd. (The Hector)* [1998] 2 Lloyd's Rep. 287 (Q.B.) at p. 293, where Rix J. continued: "of course, even questions of construction must be set in their factual matrix: but that is usually limited to matter which are either known or ought to be known to both parties to the contract." For further discussion on the judgment and its implications with regard to identity of carrier see Waldron, A. "Owner's or Charterer's Bill of Lading? The Mystery Deepens" [1999] LMCLQ 1.

²⁹⁸ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.).

²⁹⁹ *Fetim B.V. v. Oceanspeed (The Flecha)* [1999] 1 Lloyd's Rep. 612 (Q.B.), at p. 618-619, where the bills were held to be owner's bills despite similar fact to *The Starsin*, on the basis that the time charterer did not go far enough to make it clear that the parties intended that the time charterer would be contracting in place of the owner.

³⁰⁰ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.), at pp. 579, 584, 590, 597, and 615.

“reasonable expectations of businessmen” would be.³⁰¹ Finally, certain authors have provided guidelines to aid in the enquiry.³⁰² Canadian law with respect to whether the time charterer or the shipowner is the carrier is in essence very similar to the English approach,³⁰³ and the same can be said for the law of Singapore.³⁰⁴

In the United States, despite the tendency in many instances to hold the shipowners and charterers jointly and severally liable, there are still certain Circuits that require privity of contract, and therefore one must still determine who is the contractual carrier. One commentator, however, has noted that “identifying the proper defendant is somewhat more difficult, but even this issue is less of a concern for United States courts than it is for many forum courts. The combination of less formal legal approaches in this country...ensure that this issue is rarely dispositive.”³⁰⁵ Nevertheless, there are guidelines for determining whether the shipowner or the charterer is the contractual carrier. In *Otto*

³⁰¹ *Ibid*, at p. 577.

³⁰² Hill, C. *Maritime Law 4th Ed.* (1995) Lloyd’s of London Press, London, at pp. 207-208 provides: “(1) If the bill of lading is signed by the master personally or it is signed on his behalf by the charterer or his agent, then the contract of carriage evidenced by (or eventually contained in) the bill of lading would be likely considered on with the registered shipowner... (2) In those rare circumstances where the time charterer has signed the bill in his own name and where the intention appears to have been that he was signing on his own behalf with no indication that he was signing for the master or as agent for the owner, then he, the charterer will be considered the carrier. (3) A clue as to the carrier’s identity may be found in the charterparty itself by way of some provisions pointing to the true intended identity provided that such a provision is incorporated into the bill of lading itself, thus giving the shipper and/or third-party holder of the bill constructive notice of that information.” See also Cooke, J. et al. *Voyage Charters* (1993) LLP, London, at pp. 381-382, summarizing the authorities into four steps. Although it should be noted that step 4 concerning when bills are charterer’s bills should be viewed with suspicion in light of the judgment by the House of Lords in *The Starsin*.

³⁰³ Although, with the exception of Canada’s brief foray into joint and several liability as discussed above in section 4. Otherwise, in *Aris Steamship Co. v. Associated Metals & Minerals* (1980) 110 D.L.R. (3d) 1 (S.C.C.), the Supreme Court of Canada held that where the ship’s captain signs the bill of lading, the captain therefore contracts on behalf of the owner and not the time charterer. The Supreme Court of Canada opined in *Paterson Steamships Ltd. v. Aluminum Co.* [1952] 1 D.L.R. 241 (S.C.C.), at p. 256: “where the charterparty does not amount to a demise of the ship and possession remains with the owner, the contract is made not with the charterer but with the owner.” See *Apex (Trinidad) Oilfields v. Lunham & Moore Shipping (The Wynchwood)* [1962] 2 Lloyd’s Rep. 203 (Exch. C. Can.), where the master signed as agent of the shipowners, thus the plaintiff’s action failed as the time charterer’s were not the carrier and thus not party to the action.

³⁰⁴ *The Arktis Sky* [2000] 1 SLR 57 (H.C. Singapore), where the High Court relied on the seminal English judgments of *The Berkshire* and *The Ines*, when deciding where the shipowner had privity of contract by virtue of the vessel being on time charter. The High Court found that at p. 72, as the bill was stamped by the time charterer’s as “agents only”, and at p. 78, that the master’s signature bound the shipowner, thus holding, at p. 79, that the shipowner and not the time charterer was the carrier.

³⁰⁵ Sturley, M. “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L.J. 263, at p. 268.

Wolf the court outlined factors providing guidance in determining whether a vessel owner was the carrier: “1) Who advertised the service? 2) Who booked the cargo or, if the cargo was booked through an agent, on whose behalf did the agent act? 3) If the cargo was not delivered directly to the vessel, on whose behalf was the cargo received and stored prior to loading? 4) Who hired the loading stevedores? 5) Whose name appears on the heading of the bill of lading? 6) On whose behalf was the bill of lading signed? 7) Who ultimately received from the shipper the remuneration for the transportation services? 8) Who selected the vessel which performed the carriage? 9) Who issued the notice of arrival or on whose behalf was the notice of arrival issued? 10) Who hired the discharging stevedores? 11) Who hired the clerks to tally the cargo off the ship? 12) If the cargo was not delivered directly from the vessel to the consignee, who stored the cargo or on whose behalf was it stored following discharge and pending delivery? 13) Who hired the clerks who delivered the cargo to the consignee and who issued the delivery receipts... The two most important factors are the name on the heading of the bill of lading and the signature on the bill of lading.”³⁰⁶ The signature will often be deciding.³⁰⁷ Judge Learned Hand in *The Poznan*, in considering the liability of a shipowner and the charterer where the bills were issued by the charterer, opined: “Clearly the [charterer] is liable for all bills of lading signed by it. It is liable besides on those signed by the master, since they were signed with its consent and in its name, and since it had no right to compel him to sign for the owners.”³⁰⁸ The issue in the American courts tends to center around whether the charterer signed or issued the bill with or without authority from the owners.³⁰⁹ Notably,

³⁰⁶ *Otto Wolf Handelsgesellschaft v. Sheridan Transportation Co.*, 800 F. Supp. 1359 (E.D. Vir. 1992), at p. 1362. In this instance, the court found that there was no privity between the cargo claimant and the shipowner, and thus the shipowners motion for summary judgment was granted and the claimant’s action was dismissed (*ibid*, 1366-1367). See also *D B Trade International v. Astramar CIA Argentina*, 1988 WL 139329 (N.D. Ill. 1988), at para 2, finding that determining liability as a carrier involves the documents between the parties and dealings between the parties.

³⁰⁷ *United Nations Children’s Fund v. S/S Nordstern*, 251 F. Supp. 833 (S.D.N.Y. 1965), where it was held at p. 838 that the charterer was liable as they signed the bills in their own name, and on behalf of the charterer; *Centennial Insurance Co. v. M/V Constellation Enterprise*, 639 F. Supp. 1261 (S.D.N.Y. 1986), at p. 1265.

³⁰⁸ *The Poznan*, 276 F. 418 (S.D.N.Y. 1921), at p. 432.

³⁰⁹ *Dempsey & Associates v. S.S. Sea Star*, 1970 AMC 1088 (S.D.N.Y. 1970), at p. 191, where the court found that where shipowner did not authorize the time charterer to issue bills of lading on the master’s behalf, the shipowner is not liable for cargo damage; *Union Steel America v. M/V Sanko Spruce*, 1999 AMC 344 (D. N.J. 1998), at p. 347; *Ingersoll Milling v. M/V Bodena*, 619 F. Supp. 493 (S.D.N.Y. 1985), at p. 504, holding the time charterer but not the shipowner liable as “the master accepted the bills of lading as presented. He did not authorize or require that they be issued under his authority. I see no connection

the signature “for the master” is not given as much weight in American law as it is in English law.³¹⁰ As discussed above, demise and identity clauses generally will not be used to identify the shipowner or the time charterer as ‘the carrier’.³¹¹

The French have a different approach to the British and the Americans with regard to establishing who is the carrier given carriage involving a shipowner and a time charterer. The master’s signature is seen to bind the charterer more often than the owner as “[g]enerally, the master is considered to be acting for the person who is in charge of the commercial management of the vessel. In the case of a time charterer, that person is the charterer.”³¹² An example of this is found in *The Antares*, where the Cour d’Appel de Rennes found that the charterer had taken control of the commercial aspects of the vessel, therefore the captain now signs the bills for him and no longer represents the owner.³¹³ Nevertheless, the Cour de Cassation has found that in the instance where the bill does not mention the name of the owner or the name of the charterer, the claimant has a right of action against the owner of the vessel despite the fact that the bill indicates that the vessel is under charter.³¹⁴ The Cour de Cassation has held again recently that where the time charterer is not identified on the bill of lading, the shipowner is liable.³¹⁵ In commentary

whatsoever between [the shipowner] and the plaintiff.”; *Glynwed Steels v. Great Lakes and European Lines*, 1979 AMC 1290 (N.D. Ill. 1978), at p. 1291, holding the time charterers liable for having issued the bills; *Yeramex International v. S.S. Tendo*, 1979 AMC 1283 (4 Cir. 1979), at pp. 1288-1289; *Thyssen Steel Co. v. S.S. Adonis*, 364 F. Supp. 1332 (S.D.N.Y. 1973), at p. 1355; *Fireman’s Fund Insurance Co. v. M/V Vigsnes*, 1985 WL 6414 (N.D. Fla. 1985), at para 3.

³¹⁰ *Yeramex International v. S.S. Tendo*, 1979 AMC 1283 (4 Cir. 1979), finding the bills were charterer’s bills despite signature “for the master”. The Court of Appeals for the 4th Circuit opined that the caption ‘for the master’ “has ambiguous meaning in modern-day commerce.” (*Ibid*, at p. 1289). See also *Mente & Co. v. Isthmian (The Quarrington Court)*, 36 F. Supp. 278 (S.D.N.Y. 1940), at p. 283, disregarding the signature “as agents for the master”.

³¹¹ See section 5.2 *supra*. See also *Union Steel America v. M/V Sanko Spruce*, 1999 AMC 344 (D. N.J. 1998), where the time charterer was held to be the carrier despite a demise clause.

³¹² Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 389.

³¹³ Cour d’Appel de Rennes, January 30, 1986, DMF 1987, 586, at p. 586.

³¹⁴ Cour de Cassation, July 21, 1987 (The Vomar), DMF 1987, 573, at p. 573-574. The Cour d’Appel had also found in *The Volmar*, that the shipowner was responsible. See Cour d’Appel Aix-en-Provence, October 22, 1985, DMF 1987, 155.

³¹⁵ Cour de Cassation, January 22, 2002 (The Jian Ge Hai), DMF 2002, 937. See also Cour d’Appel de Rennes, June 15, 1988, DMF 1989, 444, holding that where the bill had no en-tete, no mention of who the carrier is, no reference to a charterparty, and simply the signature of the master under the name of the vessel, the shipowner is responsible for the damage to the goods. See also Cour d’Appel de Rouen, May 11, 1984, DMF 1985, 162, where on similar fact that shipowner was the “*transporteur apparent*” on the basis

following the decision, Corbier noted that “*cette affaire illustre aussi les difficultés du transporteur maritime à s’exonérer de la présomption de responsabilité qui pèse sur lui.*”³¹⁶ Simon has noted that French courts will examine the bill of lading and find: “*s’il est sans en-tête, l’armateur propriétaire du navire désigné sur ce document est déclaré transporteur; si au contraire il est émis à l’en-tête de l’affréteur ou de toute autre personne, c’est ce dernier qui se voit attribuer cette qualité et, par voie de conséquence, ce n’est plus l’armateur.*”³¹⁷ Although, this is not always the case.³¹⁸ Similarly in Belgium, “*lorsque le connaissement ne comporte pas d’indication concernant le transporteur maritime, il doit être considéré comme signé uniquement pour le compte du propriétaire.*”³¹⁹

7.3. Demise Charterer and Bareboat Charterer

The characterization of a demise charterer or bareboat charterer as ‘the carrier’ is not a terribly problematic exercise and therefore has not given rise to the same dilemmas that arise with regard to time charterers. In this nature of chartering arrangement the “[b]areboat charter [or] demise charter means that the vessel is put at the disposal of the charterer for a certain period of time, but here the charterer takes over virtually the entire responsibility for the operation of the vessel and all the costs and expenses except the capital costs.”³²⁰ Given that both the demise and the bareboat charterers control the master and crew,³²¹ it has been noted that if a vessel is chartered by demise or bareboat,

that the master signed, the bill had no en-tête, the bill referred to a charterparty but it was unattached and the content was unknown.

³¹⁶ *Ibid.*, at p. 940. See also Remond-Gouilloud, M. *Droit Maritime, 2nd Ed.* (1993) Ed. A. Perdone, Paris, at p. 348-349, noting that in situations where there is no en-tête the shipowner, or “*transporteur apparent*”, is therefore liable. For the same holding see also Cour d'Appel de Rouen, April 25, 1996 (The Panagiotis), DMF 1998, 268.

³¹⁷ Simon, P. “Qui est le transporteur maritime?”, DMF 1995, 26, at p. 26.

³¹⁸ The Cour de Rennes in *The Julia* found there where the bill of lading had no *l'en tete* but none of the documents mentioned *the armateur* then *il n'avait pas la qualité de transporteur*. The decision has been criticized by Tassel, Y. “Le connaissement sans en-tête” DMF 1987, 547, at p. 553, and by Achard, R. “L'action directe des porteurs de connaissements contre le propriétaire du navire dans l'affrètement à temps” DMF 1984, 259, who at p. 260 refers the way in which the *armateur Cypriote* was able to escape all responsibility for wetted cargo as generally a *fraude*.

³¹⁹ Delwaide, L. “Chronique de droit maritime belge II” DMF 1989, 734, at p. 756.

³²⁰ Gorton, L. et al. *Shipbrokering and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 85.

³²¹ There is not a great distinction between a bareboat charterer and a demise charterer. The former hires the master and crew, while the latter only controls them. In BARECON 89, which is the 1989 BIMCO bareboat charter, Clause 9, entitled “Maintenance and Operation”, part (b) stipulates: “The Charterers shall at their own expense and by their own procurement man, victual, navigate, operate, supply, fuel and repair the

the charterer “generally replaces the shipowner.”³²² Not only is this the case in practice but with respect to the legal characterization of the charterer as well. “It has long been recognized that in the case of a bareboat charter, bills of lading bind the charterers and not the owners.”³²³ The rationale given is that the master of the vessel is the agent of the charterer, and thus when signing the bill of lading binds the charterer.³²⁴ Arguably though, through the control of essentially every aspect of the vessel, the charterer is acting as owner. The House of Lords, over a century ago, determined that the owner was not liable to a cargo claimant where the vessel was under a demise charter.³²⁵ Lord Herschell first enquired, “[w]as it a “demise” of the ship, or if not strictly speaking a demise was it an agreement which put the vessel altogether out of the power and control of the owner, and vested that power and control in the charterer, so that during the time that this hiring lasted she must be regarded as the vessel of the charterers, and not as the vessel of the owner?”³²⁶ Having answered in the affirmative, Lord Herschell then opined; “[i]n the present case the right of the plaintiff to complain of the loss of their goods by reason of the facts alleged, may be regarded as arising as a matter of contract out of the bills of lading that were signed [and therefore] seems to me impossible to contend that these were contracts made either with the master of the agents on behalf of the defendant [shipowner].”³²⁷ This is now well established.³²⁸ Generally, viewing the bareboat or

Vessel whenever required during the Charter period and they shall pay all charges and expenses of any kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter, including any foreign general municipality and/or state taxes. The Master, officers and crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the owner.” (BARECON 89 can be found as the appendix in Davis, M. *Bareboat Charters* (2000) LLP, London). [FILL IN TETLEY DIFF BWT BARE BOAT AND DEMISE/ HARE

³²² Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed*, at p. 13. Available online at: <http://tetley.law.mcgill.ca/maritime>.

³²³ Davis, M. *Bareboat Charters* (2000) LLP, London, at p. 99.

³²⁴ Tetley, W. “Chapter 10: Whom to Sue” in *Marine Cargo Claims, 4th Ed*, at p. 14, stating “[t]he demise charterer replaces the shipowner as carrier, and this is confirmed by the signing of the bills of lading by the master or his authorized agent, who does so as the agent of the demise charterer.” See *Travelers Indemnity Co. v. S.S. Polarland*, 1976 AMC 1878 (S.D.N.Y. 1976), where there was a bareboat charter and thus at p. 1886, the court found that the owner “entered into no relationship, contractual or otherwise, with Nimpex, the shipper.”

³²⁵ *The Baumwooll Manufactur von Carl Scheibler v. Christopher Furness* [1893] A.C. 8 (H.L.).

³²⁶ *Ibid*, at p. 14.

³²⁷ *Ibid*, at p. 16. See also p. 21, per Lord Watson, concurring with Lord Herschell.

³²⁸ Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at p. 311 states “if the factual context is demise, with the complete relinquishment of the possession, command, and navigation of a ship to the demise charterer, the later will be held to be a COGSA carrier.” See *The Guiseppe di Vittorio* [1998] 1 Lloyd’s Rep. 136 (C.A.), holding a demise charterer liable, and at p. 159

demise charterer as the carrier is an appropriate characterization given that demise charterers for all intents and purposes are responsible for every aspect of carriage as ‘the carrier’ in the eyes of third parties.

Where bareboat and demise charterparties have arisen as an issue with respect to who is the carrier, is in the unfortunate instance where cargo claimants have instituted suit against the owners of the vessel unaware of the existence of a charterparty, only becoming aware after the expiration of the limitation period. Interestingly enough, the English courts in two instances, have manipulated the facts or employed legal gymnastics in order to protect the claimant where arguably it would not have been necessary. Characterizing the shipowner and the charter to be carriers, would have provided an equitable solution to the dilemma for all parties, thus allowing the claimants to recover from the shipowners, who would have then recovered from the demise charterers. It must be recalled that the charterparty between the shipowner and the charter provides a clear right of indemnity, not subject to the one-year time limitation, and therefore the proper party would have borne the loss.³²⁹ Nevertheless, the courts adopted an infinitely more complex approach. In *The Puerto Acevedo*, at first instance it had been held that the bareboat charterers could not be joined given the expiry of the time limitation, however the Court of Appeal allowed the joinder.³³⁰ Lord Denning reasoned that “[i]f justice requires it, the additional defendant can be joined, even though it means depriving him of the time bar under the Hague Rules... In this case the cargo-owners believed all the time, quite honestly and reasonably, that the shipowners were the people responsible and were accepting responsibility. It would be most unjust that, after the year had expired, the P.

opining: “Blasco was, or was in a situation equivalent to that of a demise charterer... Blasco is, to all intents and purposes, the practical “owner” of the vessel.” See *Dibiase v. United States*, 711 F.Supp. 648 (D.C. Maine 1989), holding that a demise charterer is to be treated as owner for most purposes including liability for unseaworthiness.

³²⁹ Clause 21, entitled “Bills of Lading”, of BARECON 89 reads: “The Charterers are to procure that all Bills of Lading issued for carriage of goods under this Charter shall contain a Paramount Clause incorporating any legislation relating to the Carrier’s liability for cargo compulsorily applicable in the trade; if no such legislation exists, the Bills of Lading shall incorporate the British Carriage of Goods by Sea Act. The Bills of Lading shall also contain the amended New Jason Clause and the Both-to-Blame Collision Clause. The Charterers agree to indemnify the Owners against all consequences or liabilities arising from the Master, officers or agents signing Bills of Lading or other documents.”

³³⁰ *Marubeni Corporation and Marubeni American Corporation v. Pearlstone Shipping Corporation (The Puerto Acevedo)* [1978] 1 Lloyd’s Rep. 38 (C.A.).

and I. Club (who covered both shipowners and demise charterers) should escape. It is plain to me that leave should be given to add the demise charterers as defendants.”³³¹ The legal ground relied on was a wide judicial discretion to add defendants,³³² which arguably when faced with a statutory time bar is not the strongest legal grounding. In *The Stolt Loyalty*, the Court of Appeal faced a similar situation in that the defendant bareboat charterer objected to the writ on the basis that it was time barred.³³³ In this instance, the solicitors for cargo had sent a telex stating “please confirm by return that owners grant [time extension] as requested” and Gard U.K., the P&I Club for both the shipowner and the charterer, had replied by telex “we have received authority to grant you an extension on behalf of the Shipowners”.³³⁴ The charterers argued that the extension was only granted to the owners, yet the Court of Appeal determined that the term “owner” in the telexes meant the charterer, despite what is arguably very clear wording. Lord Justice Hoffman reasoned “[i]t seems to me that a word like “owner” does not have a very fixed and absolute meaning. It can vary according to its context. It can of course mean the registered owner, but in the context of a bill of lading it can also mean the party which has the liabilities of the shipowner under the contract of affreightment... It seems to me that the use of the word “owner” in that telex meant, and was understood to mean, the company which was the owner for the purposes of the bill of lading... the bareboat charterers.”³³⁵ It is interesting therefore that the narrow interpretation of a flexible term such as ‘carrier’ has required an interpretation of the term ‘owner’ that arguably does violence to its fairly standard meaning.

7.4. Voyage Charterer

³³¹ *Ibid*, at p. 40-41.

³³² *Ibid*, at p. 40, per Lord Denning. As well, at p. 41, per Lord Justice Bridge: “we have jurisdiction to make such an order. It may be a jurisdiction which will rarely be exercised...”. As well it should be noted that it was an unopposed ex parte application, leaving Lord Justice Bridge at p. 41 to comment that “of course the second defendants, as they now become, will have the opportunity if so minded to apply to have our order set aside.”

³³³ *The Stolt Loyalty* [1995] 1 Lloyd’s Rep. 598 (C.A.).

³³⁴ *Ibid*, at pp. 600-601.

³³⁵ *Ibid*, at p. 601. See *K. Lokumal & Sons v. Lotte Shipping (The August Leonhardt)* [1985] 2 Lloyd’s Rep. 28 (C.A.), for a contrary result where similar facts arose but in the instance of a time charterer and an owner, and the Court of Appeal at p. 35 allowed the owner’s defence of a time bar. See also *Kenya Railways v. Antares Co. (The Antares)* [1987] 1 Lloyd’s Rep. 424 (C.A.), again involving a time charterer and an owner, where the Court of Appeal found that the claim against the owner was time barred.

A voyage charter is a contract “under which a vessel is to load at one or more named ports (or identified berth within a port) a particular specified cargo to be carried to a named discharging port or ports. The shipowner’s remuneration for performing his obligations under the charterparty is known as freight.”³³⁶ The majority of the time liabilities that arise are with respect to the voyage charterer as plaintiff against the shipowner or time charterer, or where the voyage charterer is not the plaintiff, claims are simply channeled to time charterers or shipowners.³³⁷ Where there is a tendency for the voyage charterer to become a carrier, is where he is liable jointly and severally along with other ‘carriers’.³³⁸ This has been the case where the voyage charterer has issued a bill of lading,³³⁹ as well as where the voyage charterer is not responsible for issuing bills of lading.³⁴⁰ The factual situation that tends to give rise to a voyage charterer as a defendant in a cargo claim, is where party X has sold goods to party Y, and party X ships the goods to party Y by chartering a vessel under a voyage charterparty. Party X is therefore the ‘shipper’ as listed in the bills of lading as well as the voyage charterer. This has been the situation in several cases that have concluded that the voyage charterer was ‘a carrier’.³⁴¹

³³⁶ Hill, C. *Maritime Law 4th Ed.* (1995) Lloyd’s of London Press, London, at p. 221.

³³⁷ See Bauer, G. “Responsibilities of Owner and Charterer to Third Parties – Consequences under Time and Voyage Charterers” (1975) 49 Tul. L.R. 995, at pp. 1010-1012. See *Office of Supply Government of the Republic Korea v. M/V Naftoporos*, 1985 U.S. Dist. LEXIS 15671 (S.D.N.Y. 1985), Gagliardi J., at lexis p. 15, found that where the voyage charterer had simply nominated an agent for the owners who then signed the bill of lading as agent for the master, the voyage charterer was not a carrier. The shipowner was the carrier, and the voyage charterer “simply exercised its right under the voyage charter to nominate the ship’s agent at the loading port.” (*Ibid*).

³³⁸ See *Tribunal de commerce de Paris*, December 21, 1977, DMF 1978, 501, finding the voyage charterer jointly and severally liable with the time charterer. See also discussion section 4, *supra*. Note though, even where there is a tendency to hold shipowners and charterers jointly and severally liable, the voyage charterer may not be among them. See *Pacific Employers Insurance Co. v. The M/V Gloria*, 767 F.2d 229 (5 Cir. 1985), at p. 235, where the 5th Circuit court of Appeal found that the shipowner and the time charterer were carriers under COGSA but that the voyage charterer was not a carrier under COGSA as he “did not enter into a contract of carriage defined by the Act and thus was not a carrier.” For a discussion on the difference between the definition of ‘carrier’ in the 5th Circuit and the 2nd Circuit of the U.S. see section 4 *supra*.

³³⁹ *Tribunal de commerce de Paris, ibid*, where the voyage charterer had issued the bill of lading.

³⁴⁰ *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979), where despite the fact that the voyage charterer did not issue bills of lading, he was held to be a carrier under COGSA.

³⁴¹ *Thyssen Steel Caribbean v. Palma Armadora*, 1983 U.S. Dist. LEXIS 15926 (S.D.N.Y. 1983), where the plaintiff had purchased steel rods, from a company who then voyage chartered a vessel. The voyage charterer, one of several defendants argued that although the charter was in his name, he was also the ‘shipper’ and therefore could not have entered into ‘a contract of carriage with the shipper’ as well he did not sign the bills of lading (*Ibid*, at lexis p. 16). Sweet D.J. dismissed those arguments on the basis that to be considered a carrier one does not need to sign the bills of lading, in this district. *Joo Seng Hong Kong v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979), had similar facts where the voyage charterer and the party to whom the bill of lading was issued and named as ‘shipper’ were the same entity. The court

As well, liability on the part of the voyage charterer will also tend to arise where the voyage charterer assumes responsibility for loading, stowing and discharge.³⁴² As with time charters and shipowners, whether the bills are voyage charterer's bills or the shipowner's bills is a matter of construction.³⁴³ The Court of Appeal of Australia found that by virtue of the construction of the bills of lading and the voyage charterparty, that the voyage charterer was the carrier: "in my opinion the construction which the documents and the surrounding circumstances yield is that the defendant intended to issue the bills on its own account as carrier."³⁴⁴

7.5. Slot Charterer

It has been noted that "the growth of vessel sharing arrangements in the liner industry has been nothing short of explosive."³⁴⁵ Vessel sharing arrangements are implemented by slot charterparties. According to Hill, the term "slot charterparty" has "reference to the carriage of containers, or to use current jargon, TEUs (20-foot equivalents). The shipowner or operator 'rents out' or hires a 'piece' of space (a percentage of the total space available on vessel) for carrying TEUs in return for which he receives hire calculated in accordance with the number of slots (accommodation for each TEU) payable whether or not those slots or spaces are actually used."³⁴⁶ In practice, slot charters are employed where "two or more operators, usually of similarly size vessel in a particular geographic trade, will agree to share space on one another's vessels...Space is utilized more efficiently and operating costs are reduced while service is expanded."³⁴⁷ Each operator books cargo under its own name and furnishes, stuffs, lashes, loads and discharges its own containers.³⁴⁸ Despite what would ordinarily be a potentially complex arrangement given that bareboat and time charterers may also enter

determined that "it is clear that Cook, as a voyage charterer, is a carrier subject to suit under COGSA on the bills of lading now held by the plaintiff." (*Ibid*, at p. 47).

³⁴² See Bauer, G. "Responsibilities of Owner and Charterer to Third Parties – Consequences under Time and Voyage Charterers" (1975) 49 Tul. L.R. 995.

³⁴³ *Namchow Chemical v. Botany Bay Shipping* [1982] 2 N.S.W.L.R. 523 (C.A.), at p. 527.

³⁴⁴ *Ibid*, at p. 529.

³⁴⁵ Reilly, M. "Identity of the Carrier: Issues Under Slot Charters" (2001) 25 Tul. Mar. L.J. 505, at p. 506, noting that as of September 1999, "the six top alliances accounted for approximately ninety percent of Teu capacity in the Asia-Europe and Asia-North America Trades."

³⁴⁶ Hill, C. *Maritime Law 4th Ed.* (1995) Lloyd's of London Press, London, at p. 186.

³⁴⁷ Reilly, M. "Identity of the Carrier: Issues Under Slot Charters" (2001) 25 Tul. Mar. L.J. 505, at p. 506.

³⁴⁸ *Ibid*.

into alliances to share vessel space via slot charterers, the law with regard to slot charters appears to be not as problematic as several of the areas discussed above.

What facilitates the search for ‘the carrier’ with regard to a slot charter is the fact that such parties jealously guard their customers and actively avoid the situation where the shipper is in doubt as to whom he is contracting with. “Of paramount importance to an alliance member is maintaining its role as carrier to its own customers...For this reason, each party to the slot charter issues its own bills of lading to cargo carried in its slots. In fact, to distance its alliance partners and commercial competitors from its cargo, the slot charterer takes pains to avoid a contractual relationship between the [ship]owner and the slot charterer’s cargo.”³⁴⁹ The standard form slot charterparty issued by BIMCO, Slothire, in clause 13, prohibits the use of Identity of Carrier clauses in bills of lading issued by the charterer that seek to establish a contractual link between the vessel owner and the cargo carried.³⁵⁰ Under the traditional approach, the slot charterer would therefore be the carrier as it is this party who has entered into a contract of carriage with the shipper. There appears to be no conceptual barrier to holding a slot charterer to be the carrier, or even deeming him to be one of several carriers, in the United States.³⁵¹ Under English law the situation is perhaps more complex. It would appear that in slot charter arrangement, the slot charterer who issues the bill of lading is the carrier vis-à-vis the cargo claimant. In *The Hamburg Star*, several containers were lost overboard, which had been covered by bills of lading issued by a slot charterer.³⁵² The slot charterer was viewed as carrier for having issued the bills of lading,³⁵³ but ultimately the shipowner was the defendant, and one of the issues was whether the goods were bailed to the slot charterer, then sub-bailed to a second charterer then sub-bailed to the shipowner, or whether the goods were simply bailed to the slot charterer and then sub-bailed to the

³⁴⁹ *Ibid.*

³⁵⁰ Slothire clause 13(a)(i) stipulates “No Identity of Carrier Clause which purports to establish a contractual relationship between the Owners and the cargo interests of the Charterer.” Slothire can be found at: www.bimco.dk/upload/slothire.pdf.

³⁵¹ *Transatlantic Marine Claims Agency v. OOCL Inspiration*, 137 F.3d 94 (2 Cir. 1998), at p. 102.

³⁵² *The Hamburg Star* [1994] 1 Lloyd’s Rep. 399 (Q.B.). In this instance the Bermuda shipowners, whose vessel was managed by a Hong Kong company, time chartered the vessel. The time charterer then back to back chartered the vessel, to a company who has entered in a vessel sharing agreement, with two other parties.

³⁵³ *Ibid.*, at p. 403 and chart on p. 410-411.

shipowner.³⁵⁴ In a simple action therefore, the slot charterer is generally the carrier, however, where the factual situation involves other parties, which it will more often than not due to the nature of a slot charter agreement, then difficulties arise characterizing the respective roles of the parties. It has been noted that in situations involving novel and complex contractual arrangements, such as slot charters, there is a tendency in England for plaintiffs to base claims in bailment or tort.³⁵⁵ Slot charterers themselves appear therefore to not give rise to the complex enquiry on carrier status as do other charterers, however, where the law does become complex is with regard to the legal status vis-à-vis other parties involved and the founding of the action. Actions founded outside the Hague and Hague-Visby scheme are discussed below.³⁵⁶

7.6. Freight Forwarder

A freight forwarder had been described as an entity who “acts as an intermediary between the shipper and the ocean carrier. The freight forwarder arranges for ocean transportation by locating available spaces, handles various ocean documentation for the shipper’s goods, including preparation of bills of lading, and performs such other services as arranging for the transport of the goods to dockside... The freight forwarder receives compensation from both the shipper and from the carrier.”³⁵⁷ The legal characterization of the freight forwarder is a problematic area in most jurisdictions given the dual nature of his role in carriage. “The freight forwarder traditionally acts as an agent who arranges for the shipment of goods belonging to his client/the shipper... At times, the freight forwarders has acted a principal contractor arranging the carriage in his own name.”³⁵⁸ Generally, when acting as agent the freight forwarder is not regarded as a carrier, however when acting as principal his liability is frequently that of a carrier. “Freight forwarders may or may not be considered as carriers depending on whether their

³⁵⁴ *Ibid*, at p. 403.

³⁵⁵ Gaskell, N et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 270.

³⁵⁶ See section 8, *infra*.

³⁵⁷ *In re Black & Geddes*, 1984 AMC 451 (Bkrcty. N.Y. 1984), at p. 453.

³⁵⁸ Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed.* Online at: <http://tetley.law.mcgill.ca/maritime>, at p. 3. Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at p. 281 notes: “The freight forwarder, who receives compensation from both shippers and carriers, may either be an agent or an independent contractor with respect to both parties.”

activities involve merely “arranging” or actually “effecting” the shipment.”³⁵⁹ Aside, from the evident result of this distinction being that the freight forwarder has the liabilities and limits imposed upon him that the carrier would if found to be carrier,³⁶⁰ there is another important repercussion from the agent/principal distinction. Where the freight forwarder is the agent for the shipper, the consignee acquires contractual rights under the bill of lading,³⁶¹ however where the freight forwarder is the principal, “there is no contractual relationship between the person carrying the goods and the person ultimately suffering loss of, or damage to, the goods.”³⁶² An absence of privity may lead in many circumstances to actions outside the Hague or Hague-Visby Regime.³⁶³ Although, in certain circumstances legislation has rectified the problem of privity, for example, by virtue of section 2(4) of the U.K. Carriage of Goods Act, freight forwarders may take suit for damages on behalf of the owner of the goods lost or damaged.³⁶⁴

Whether a freight forwarder is an agent or a principal is generally a factual matter.³⁶⁵ “The position of the forwarders as an intermediary between carrier and shipper

³⁵⁹ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)” (1976) 7 JMLC 615, at p. 630, footnote 193. See *J.C. Penny Co. v. American Express Co.* 102 F.Supp. 742 (S.D.N.Y. 1951).

³⁶⁰ See Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed.*, at p. 31 in the context of discussion concerning the freight forwarder as principal, notes that the freight forwarder, depending on the jurisdiction concerned, is bound by the Hague, Hague-Visby or Hamburg Rules, for loss or damage between loading and discharge. See also *Comalco Aluminum v. Mogul Freight Services (The Ocean Trader)* (1993) 113 A.L.R. 667 (Fed. Ct. Aust.), where the federal court characterized the contract between the shipper and the freight forwarder as a contract of carriage, but was unable to apply the Hague Rules as the damage has occurred prior to loading. The federal court therefore awarded damages on the basis of the negligent stuffing of the container, and did not have to address the thorny issue of if the damages had occurred during the sea leg, did the misrepresentation remedy overlap with the scheme of liability provided for in the Hague Rules. For further discussion on actions outside the scheme of the Rules see section 8 *infra*.

³⁶¹ See Livermore, J. “Current Developments Concerning the Form of Bills of Lading - Australia” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 81 noting that under present Australian bills of lading legislation the consignee acquires the rights under the bill of lading where the freight forwarder is the agent of the shipper.

³⁶² Livermore, J. “Current Developments Concerning the Form of Bills of Lading - Australia”, *supra* note , at p. 81. See also Davies, M. “The Elusive Carrier: Whom Do I Sue and How?” [1991] A.B.L.R. 230, at p. 231.

³⁶³ See section 8 *infra*, discussing actions outside the Hague and Hague Visby Regime.

³⁶⁴ Carriage of Goods Act 1992, c. 50 (U.K.)

³⁶⁵ See *Ocean Projects v. Ultratech* [1994] 2 SLR 369 (C.A. Singapore), at p. 375 noting “A freight forwarder may act as principal or agent depending on the facts of the case and the construction of the contract in question.” See also Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed.*, at p. 4; Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391.

is not always easily ascertained, and must often depend upon careful of the facts of each individual set of circumstances.”³⁶⁶ Professor Tetley has provided a list of criteria to assist in determining whether the freight forwarder is an agent or a principal, which had been utilized by the Federal Court of Canada: “(a) the manner in which the forwarder characterizes its obligations on the contractual documents; (b) the manner in which the parties have dealt with each other in the past; (c) whether a bill of lading was issued; (d) whether the shipper knew which carrier would actually carry the goods; (e) the mode of payment: did the forwarder charge an amount calculated upon the freight and other expenses and then charge a further amount or a percentage as a fee? Or did the forwarder charge an all-inclusive figure?”³⁶⁷ Other authors have proposed similar lists.³⁶⁸ As have courts in other jurisdictions.³⁶⁹ In a recent Beijing maritime arbitration award, where the issue of whether the freight forwarder was a carrier, the arbitral tribunal held: “As to whether the person who was entrusted with the transportation of the cargo should be treated as the carrier, the following factors were commonly considered in China and in the international community: whether the person entered into the transport contract with the shipper or cargo owner in his own name or in the name of the carrier, whether the

³⁶⁶ Hill, D. *Freight Forwarders* (1972) Steven & Sons, London, at p. 69.

³⁶⁷ *Bertex Fashions v. Cargonaut Canada* (1995) 95 F.T.R. 192 (Fed. Ct. Can.), at p. 196, quoting Tetley, W. *Marine Cargo Claims* 3rd ed., however the identical list may now be found with updated footnotes in Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, at p. 6 – 7.

³⁶⁸ See Jones, P. “The Forwarder – Principal or Agent, Carrier or Not?” in *Bankruptcy: Present Problems and Future Perspectives* (1986) R. de Boo, Toronto, at pp. 162-163, also quoted in *Bertex Fashions v. Cargonaut Canada* (1995) 95 F.T.R. 192 (Fed. Ct. Can.), at p. 195-196: “(a) has the forwarder performed apt of the transport using his own employees? (b) Did the customer (or its agent) receive a bill of lading issued by another party? (c) Did the customer choose the carrier, possibly at the time that costs of transport by different carriers were presented to him for his selection? (d) Did documentation given to the customer prior to his delivery of the goods for transport give a reasonable explanation of the role played b the freight forwarder? (e) Was there a course of dealings prior to the shipment in question? (f) How did the forwarder charge for his services? Was the charge characterized as freight?”

³⁶⁹ In *Zima Corp. v M.V. Roman Polanski*, 493 F. Supp. 268 (S.D.N.Y. 1980), at p. 273, the District Court gave the following criteria: “(1) the way the party’s obligation is expressed in documents pertaining to the agreement, although the party’s self-description is not always controlling; (2) the history of dealings between the parties; (3) issuance of a bill of lading, although the fact that a party issues a document entitled ‘bill of lading’ is not always in itself determinative; (4) how the party made its profit in particular, whether the party acted as ‘agent of the shipper...procuring the transportation by carrier and handling the details of shipment’ for fees ‘which the shipper paid in addition to the freight charges of the carrier utilized for the actual transportation.” See also Tetley W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, at p. 8 citing *Zima Corp v. M.V. Roman Pazinski*, along with several other Southern District New York cases that support and follow the criteria.

person collected the freight on his own behalf or on the carrier's behalf."³⁷⁰ The tribunal held that the freight forwarder was not a carrier on the basis of the fact that he did not issue the bill of lading, simply booked the space on the vessel and then passed on the freight to the party who carried the goods.³⁷¹ Notably, this issue would not arise today as the Maritime Code of the People's Republic of China has since come into force,³⁷² and addresses the issue of the "multimodal transport operator".³⁷³ Where the freight forwarder is not a carrier, and provided they exercised reasonable care when the goods were in their custody, then they are not liable for damage or loss during carriage.³⁷⁴ Conversely, in *Bertex Fashions*, the Federal Court of Canada held the freight forwarder to be the carrier, and thus liable, on the basis that the bill of lading led the shipper to believe the forwarder would be carrying the goods and the freight charged was an all inclusive figure that could not be considered a commission.³⁷⁵ Similarly in *Singer Co*, the English commercial court found the freight forwarder to be the principal on the basis that he "undertook responsibility 'for crating and delivering to the U.K. port. A lump sum consideration was to be payable, without any breakdown of the consideration for particular services. In essence [the cargo owners] were looking for a complete package of services, leaving it to the [freight forwarder] to subcontract when necessary."³⁷⁶ A Singapore Court of Appeal decision found that where the cargo owners had established a

³⁷⁰ Shujian, L. "Beijing Maritime Arbitration Awards 1994-1996" [1997] LMCLQ 572, at p. 575. Shujian at p. 574-576 translates and summarizes the decision of the tribunal in the matter of Sinotrans Q.

³⁷¹ *Ibid*, at p. 576. See also *Freight Systems v. Korea Shipping Corp. (The Korea Wonis-Sun)* (1990) LMLN 290, where a freight forwarder had been held to not to be the carrier but rather an agent, and therefore despite the fact that he had issued a house bill and paid out to the cargo claimant, he could not recover from the carrier on the grounds that he was not the principal. This is seemingly an unjust consequence of being regarded as not a carrier. Arguably, if both may be viewed as carriers, contribution between those liable would have been possible.

³⁷² See section 11.1, *infra*, entitled: "Maritime Code of the People's Republic of China" for further discussion on the Code and its contents.

³⁷³ Article 102 provides that the multimodal transport operator "means the person who has entered into a multimodal transport contract with the shipper either by himself or by another person acting on his behalf." Under the multimodal transport operator assumes responsibility for the performance of the contract, and it has been postulated that Sinotrans Q in the above arbitral award would not fall under the definition (Shujian, L. "Beijing Maritime Arbitration Awards 1994-1996" [1997] LMCLQ 572, at p. 575).

³⁷⁴ See *The Maheno* [1977] 1 Lloyd's Rep. 81 (Sup. Ct. N.Z.), where the New Zealand court at p. 87 determined that the freight forwarder was simply "an arranger" and "neither the plaintiffs nor their agent nor the defendant envisaged that the defendant would carry by sea as there is only one service to New Zealand". The court held at p. 89 that as the forwarders were not negligent with regards to packing or locking the container, they were not liable.

³⁷⁵ *Bertex Fashions v. Cargonaut Canada* (1995) 95 F.T.R. 192 (Fed. Ct. Can.), at p. 196.

³⁷⁶ *Singer Co. v. Tees and Hartlepool Port Authority* [1998] 2 Lloyd's Rep. 164 (Q.B.), at p. 167.

letter of credit in favour of the freight forwarder for the full freight, under which the forwarder was to tender a clean bill of lading, and the cargo owners had only learnt of the existence of an actual carrier after the damage occurred, the freight forwarder was therefore the carrier with respect to the cargo owner.³⁷⁷ The legal situation with regard to freight forwarders as carriers has become rather complex in Australia. In *The Cape Comorin*, the Court of Appeal of New South Wales characterized a freight forwarder as both an agent and a principal.³⁷⁸ Stevedors who damaged the cargo sought to benefit from either or both of the Himalaya clauses in the two bills of lading were issued, a house bill and an ocean bill. The Court of Appeal determined that vis-à-vis the consignee the forwarder was the principal, but when carrying out the instructions to ship the goods the forwarder was acting as agent, which included as part of his mandate, to obtain the bill of lading from the actual carrier. One author finds that this decision to be of great advantage to carriers in that “previously there was a very real risk that carriers could not obtain any contractual benefit from their own bills of lading as against consignees (because of the interposition of another ‘carrier’, namely the freight forwarder), the carrier can now do so, provided it can be established that the freight forwarder had a mandate from its client to ship the goods and as part of that mandate could obtain a bill of lading from the actual carrier.”³⁷⁹ Arguably, the analysis of shifting agent and principal is awkward, and although lauded for its result, one may express dismay that such an approach is required due to the fact that the actual carrier is thus not longer a ‘carrier’ because there is a contractual carrier. A holding similar to the Australian court can be found in a recent U.S. Supreme Court judgment, where a freight forwarder contracted with a carrier who then subcontracted with an inland carrier who damaged the goods.³⁸⁰ The holding with respect to the freight forwarder, ICC, has been succinctly summarized by one commentator as: “It declared that ICC was a principal in its own right, but at the same time an agent for the purposes of creating Himalaya protection accorded to Norfolk Southern [the inland carrier]. The Court presented two lines of support for this conclusion, reliance on

³⁷⁷ *Ocean Projects v. Ultratech* [1994] 2 SLR 369 (C.A. Singapore), at p. 375.

³⁷⁸ *Carrington Slipways Pty. v. Patrick Operations Pty. (The Cape Comorin)* (1991) 24 N.S.W.L.R. 745 (C.A. N.S.W.).

³⁷⁹ Hetherington, S. “Freight Forwarders and House Bills of Lading” [1992] LMCLQ 32.

³⁸⁰ *Norfolk Southern Railway Co. v. James N. Kirby Pty*, 2004 AMC 2705 (U.S. S.C. 2004).

precedent and policy considerations.”³⁸¹ Finally, in certain instances American courts have taken a restrictive view of COGSA, holding that it is only applicable to “carriers” and not freight forwarders, thus denying the freight forwarders the package limitation.³⁸² The characterization of a freight forwarder, therefore, is therefore a complex inquiry.

The Continental legal systems have in many instances incorporated the notion of a freight forwarder into their various codes. This negates in many respects the above discussion of whether or not a freight forwarders is ‘the carrier’, by imposing either a separate legal regime or specifically mandating how such parties will be characterized. Under the German Commercial Code (HGB),³⁸³ section 407 provides for a “Spediteur” who is one who undertakes to conclude a contract of carriage in his own name but for his client’s account.³⁸⁴ Similar to a freight forwarder as agent, the “spediteur” must only exercise due diligence in selecting and instructing carriers.³⁸⁵ Belgium has a similar legal situation under the Code de Commerce,³⁸⁶ as does Italy under the Civil Code.³⁸⁷ France has two entirely separate regimes: the “commissionnaire de transport” which coincides to the freight forwarder as a principle, and the “transitaire” which is simply a freight forwarder agent.³⁸⁸ The “commissionnaire de transport” has an *obligation de resultat*,³⁸⁹

³⁸¹ Theis, W. “Third-Party Beneficiaries in Multimodal Contracts of Carriage: Norfolk Southern Railway v. James N. Kirby” (2005) 36 JMLC 201, at p. 210.

³⁸² *Sabah Shipyard v. M/V Harbel Tapper*, 984 F.Supp. 569 (S.D. Tex. 1997), at p. 574; *Hoffman-LaRoche v. M/V Jefferson*, 731 F.Supp. 109 (S.D.N.Y. 1990), at pp. 110-111.

³⁸³ For a further discussion on the German HGB see section 11.7. entitled “German Commercial Code”.

³⁸⁴ Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391, at p. 400.

³⁸⁵ *Ibid.*

³⁸⁶ The Code de Commerce of Belgium, arts. 91 to 108, contain provisions governing the “commissionnaire de transport” which is distinct from the carrier, and although he enters into the contract in his own name his activities are ancillary to the carriage, such as booking, sending and receiving goods, and therefore he is not responsible for the acts or omissions of the actual carrier. (*Ibid.*, at p. 401).

³⁸⁷ The Italian Civil Code article 1737 provides for a “spedizionere”, which in certain respects is in essence similar to the German “spediteur”. (*Ibid.*, at p. 400). Italy also has a “vettore”, which is a carrier, although defined as a person who undertakes either to perform or procure the transport, and thus where there is a “spedizionere-vettore” he will be liable as a contracting carrier. But where the entity is characterized as a “spedizionere-mandataire” he will not be responsible as a carrier, thus similar to the “spediteur”. (*Ibid.*, 401-402).

³⁸⁸ See Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391, at p. 401-402, however one should note that the Code de Commerce was updated in 2000, and although the new codal provisions are in substance similar to the old provisions and therefore Ramburg’s discussion remains instructive, the numbering has changed. Previously 96 to 102 of the Code de Commerce were applicable, now articles L.132-3 to L.132-9 are applicable. For the text of the new Code de Commerce online visit <http://big.chez.tiscali.fr/adroit/commerceetconsommation/html/commerce.htm>. See

and although Ramburg comments that “the only exception being *force majeure*”,³⁹⁰ in fact the commissionaire may also invoke the defences and limitations of the carrier,³⁹¹ as well as “the limitations contained in the standard trading conditions of freight forwarders’ associations.”³⁹² The “transitaire” on the other hand, has an *obligation de moyens*, and therefore must simply exercise due diligence and reasonable care in carrying out the instructions given.³⁹³ These continental systems have essentially solved in most respects the issue of whether a freight forwarder is ‘the carrier’.

Finally, a discussion of NVOCCs is warranted. NVOCC, or Non-vessel operating common carriers are in many respects similar to freight forwarders, and are often considered under the heading of freight forwarders.³⁹⁴ They are a construct of the United States, and are defined in the *Shipping Act of 1984* as “ ‘non-vessel-operating common carrier’ means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.”³⁹⁵ Under U.S. law they have a dual role. “The law treats the NVOCC as a hybrid. With respect to shippers, the NVOCC is a common carrier that must file a rate tariff with the Federal Maritime Commission. With respect to the vessel and her owner, the NVOCC is a shipper and a customer.”³⁹⁶ NVOCC’s are treated as carriers and are

also Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, at pp. 32-38 for an in-depth discussion of legislation and jurisprudence relating to the two major categories of freight forwarders in France

³⁸⁹ Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier”, at p. 401; Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, at p. 33-34.

³⁹⁰ Ramburg, *ibid*.

³⁹¹ *Cour d’Appel de Rouen*, May 24, 1995, DMF 1996, 369.

³⁹² Tetley, W. “Chapter 33: Responsibility of Freight Forwarders”, in *Marine Cargo Claims, 4th Ed*, at p. 35.

³⁹³ *Ibid*, at p. 36.

³⁹⁴ See Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, who considers NVOCCs in his chapter, and Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at pp. 281-282.

³⁹⁵ *Shipping Act of 1984*, 46 U.S.C. Appx. 1702(17)(B).

³⁹⁶ Schoenbaum, T. *Admiralty and Maritime Law: Practitioner’s Ed.* (1987) West Publishing, Minn, at p. 282.

thus subject to the laws governing carriers, such as U.S. COGSA,³⁹⁷ and have been allowed by the courts to benefit from the limitations and exclusions therein.³⁹⁸

7.7. Vessel Manager

Vessel management companies are a more recent feature of the sea carriage industry. The ownership and management structure of fleets has changed considerably in recent decades, mostly as a result of the attempt to limit risks and exposure to liability.³⁹⁹ It is therefore this “break up of the traditional shipping companies in the past five decades [that] has resulted in the emergence of large ship-management companies which have taken responsibility for the technical management of many ships.”⁴⁰⁰ Certain authors hold a more critical view of management companies, or vessel managers, as is evident by their characterization of the practice; “In many cases, the registered owner of a ship is a company with no assets other than the ship itself. The true owners take profit out of such one-ship companies through devices such as management fees paid by the shipowning shell to a ship management company.”⁴⁰¹ Conversely, management companies have been simply described as providing services wherein “[t]he owner will thus entrust to another

³⁹⁷ See Tetley, W. “Chapter 33: Responsibility of Freight Forwarders” in *Marine Cargo Claims, 4th Ed*, at p. 12. See *Hartford Fire v. Novocargo USA Inc. (M/V Pacific Senator)*, 257 F.Supp. 2d 665 (S.D.N.Y. 2003), where an NVOCC was held jointly and severally liable with a liner company for cargo damage.

³⁹⁸ Tetley, *ibid*, at p. 31. For a French case dealing with NVOCCs, see Cour d’Appel de Versailles, April 4, 2002 (The Peninsular Bay and the Singapore Bay), DMF 2002, 944, where the Cour d’Appel held that even though a NVOCC bill of lading was issued, the shipowner was nevertheless responsible.

³⁹⁹ See Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 888 – 889, commenting on the modern tendency of individual ships in fleets to be owned by separate one-ship companies, with their beneficial owner being a parent or holding company, as a method of reducing risks with regard to the fleet. See also Mandaraka-Sheppard, A. “The Beacons of Wise Men and Management of Legal Risks” (1999) 30 JMLC 63, at p. 65, commenting on the common practice of establishing one-ship companies for the purposes of limitation of liability and risk as well as noting the court’s acceptance of the practice as a legitimate method of ship operation.

⁴⁰⁰ Drewry Shipping Consultants in “Fleet Management: The New Paradigm” as quoted by Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 889. Gorton, L. et al. *Shipbrokering and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 94, notes that the role of vessel managers have become increasingly important and prevalent for several reasons: “Because of the recent shipping depression some owners have gone bankrupt and the receiver normally has no knowledge of shipping, and then the commercial activity may be entrusted to a manager for a period of time. Similarly, several shipyards have become important shipowners, when the buyer under a shipbuilding contract has been unable to or has refused to take delivery of the vessel under construction. Furthermore, investors in some countries have bought second hand tonnage without sufficient knowledge of the shipping business and for a period they may entrust the ship to a manager waiting for second-hand prices to go up so that she may be sold at a profit... [t]hus the shipowner’s motives for management services may vary.”

⁴⁰¹ Davies, M. “In Defence of Unpopular Virtues: Personification and Ratification (2000) 75 Tul. L.R. 337, at p. 363.

person (the manager) one or several of his functions. It may be that the manager will maintain, inspect, man and equip the vessel, keep books, attend to the claims, make calculations and otherwise attend to the commercial operation of the ship.”⁴⁰² Generally, vessel managers can vary between taking responsibility for the operational aspects of the vessel or providing services that “encompass the entire operational and business aspects of a fleet of ship.”⁴⁰³ Admittedly, the exact role of the vessel manager is difficult to define with complete consistency given the potential differences among management agreements. Regardless, the general characterization of vessel managers with respect to uniform carriage law has been varied, leaving their role in the legal regime uncertain and in need of clarification.

There are several ways to approach the question of vessel managers. In English law, it has been noted that the vessel manager is the agent of the shipowner, and therefore it is the shipowner who bears the legal and commercial risk.⁴⁰⁴ Conversely, the Chinese courts have held the vessel manager, also described as a ship operator, to be a carrier.⁴⁰⁵ In the United States, the handling of vessel managers is more varied. As mentioned above, in certain instances the vessel manager has been found to be jointly liable with the shipowner.⁴⁰⁶ One author has noted that the U.S. courts “tend to address the question of vessel managers’ position within the COGSA rubric in one of four ways: (1) vessel managers are simply not carriers and are excluded from COGSA; (2) vessel managers are agents of the carriers and excluded from COGSA; (3) vessel managers, if they are party to the bill of lading, are included under COGSA; or (4) vessel managers, if they are incorporated by a Himalaya clause, are included in COGSA.”⁴⁰⁷ Nevertheless, the vessel

⁴⁰² Gorton, L. et al. *Shipbroking and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 94.

⁴⁰³ Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 890.

⁴⁰⁴ Gorton, L. et al. *Shipbroking and Chartering Practice 4th Ed.* (1995) LLP, London, at p. 94.

⁴⁰⁵ See for example *People’s Insurance Co. of China Property v. Shanghai Pujiang Transport* (2003) Summarized in Li, K. “Chinese Maritime Law 2003-2004” [2005] LMCLQ 383, at p. 390. In this instance the court held that all three defendants, the charterer who was characterized as the contractual carrier, the shipowner and ship operator who were characterized as actual carriers, to be jointly liable for damage to the cargo. For further discussion on Chinese carriage law, see section 12.2, *infra*, entitled: “Maritime Code of the People’s Republic of China”.

⁴⁰⁶ See section 4 *supra*.

⁴⁰⁷ Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 893.

manager has become an entity that has in certain instances joined the ranks of parties able to be characterized as ‘the carrier’.⁴⁰⁸ What tends to be problematic is that given that the shipowner is generally a party to the action, from a single carrier point of view, the vessel manager despite having in essence acted as carrier, is generally left without protection. It has been noted “the absence of privity of contract between the shipper and the ship manager has been successfully argued against affording the ship manager the protection of COGSA’s limitation of liability by extension.”⁴⁰⁹ For example, in *The M/V Captain Nicholas I*, where the cargo claimant had taken suit against the vessel owner, time charterer, voyage charterer, and the vessel manager for rust damage to steel cargo, the court found that the vessel manager was not the carrier and held that the plaintiff’s claim against him was not limited in any way by COGSA.⁴¹⁰ The court found that “[a]s a consequence of not being a carrier, the Court finds that the clause does not extend any COGSA limitation...[to] the manager of the vessel.”⁴¹¹ Similarly in *The M/V Lake Marion*, the shipowner was entitled to benefit from COGSA’s \$500 package limitation, but the vessel manager was liable for full damages without the benefit of any limitation of liability.⁴¹² It has been noted that “[i]n view of the broad range of ‘shipowning’ responsibilities a manager may undertake, and of the fact that managers do not enjoy ‘carrier’ status under the Carriage of Goods by Sea Act, managers are ripe for suing.”⁴¹³

⁴⁰⁸ *Thyssen Inc. v. S.S. Atlantic Forest*, 1987 AMC 1873 (S.D.N.Y. 1985), where the vessel manager was held liable for damages under COGSA. As well, in *Intersteel v. M/V Federal Huron*, 1988 WL 70123 (E.D. La. 1988) the court determined that the vessel managers were COGSA carriers on the basis that the master who had signed the bill of lading was employed by the vessel managers.

⁴⁰⁹ Sweeney, J. “Crossing the Himalayas: Exculpatory Clauses in Global Transport” (2005) 36 JMLC 155, at p. 183.

⁴¹⁰ *Steel Coils v. M/V Captain Nicholas*, 197 F. Supp 2d 560 (E.D. La. 2002), at p. 568. For further discussion on other aspects of the judgment see Leary, M. “Vessel Manager Liability in Tort Actions: Steel Coils v. M/V Captain Nicholas I” (2003) 27 Tul. Mar. L.J. 645. Leary, at p. 652, supports the court’s finding, and suggests that if vessel managers desire protection then they must insist on being specifically enumerated in the Himalaya clause. For an example of a vessel manager benefiting from a Himalaya clause see *Ferrex International v. M/V Rico Chone*, 718 F.Supp. 451 (D. Md. 1988), the vessel manager was permitted to limit his liability in accordance with COGSA on the basis of a Himalaya clause in the bill of lading that had been incorporated into the dock receipt.

⁴¹¹ *M/V Captain Nicholas*, *ibid*, at p. 568.

⁴¹² *Steel Coils v. M/V Lake Marion*, 2001 WL 1518302, 2002 AMC 1680 (E.D. La. 2001). Affirmed 331 F.3d 422 (5 Cir. 2003). The 5th Circuit Court of Appeals, at p. 438-439 noted that the vessel manager had based their arguments in the fact that the realities of maritime commerce justifies the use of one-ship corporations without employees that must therefore use vessel managers, rather than simply arguing that they benefited from the protection of the Himalaya clause. Arguably this was an oversight on the part of the attorneys, that demonstrates the necessity of the Himalaya argument for the protection of vessel managers.

⁴¹³ Greenman, D. “Limitation of Liability Unlimited” (2001) 32 JMLC 279, at p. 309.

The exclusion of vessel managers from the protective umbrella of COGSA has been criticized; “[t]o exclude those that perform the duties of the carrier from the operation of the very statute designed to regulate exactly those actions is a flawed approach on its face...courts should include vessel managers within the definition of “carriers” to the extent that their participation warrants such inclusion.”⁴¹⁴

⁴¹⁴ Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 910.

8. THE PROBLEM OF MULTIPLE DEFENDANTS: WHAT TO DO WITH THE PARTY WHO IS NOT THE CARRIER?

In the majority of instances, courts have determined that there is one ‘carrier’ in any given factual situation. Regardless of whether this is accomplished by virtue of a disjunctive interpretation of the language in art. 1 of the Hague Rules, or by reliance on a demise clause, what remains is the predicament where one, or several, of the defendant parties involved in the carriage operations is not the ‘carrier’ but nonetheless has caused or contributed to the loss or damage of the claimant’s goods. In essence, this has proved to be an incredibly contentious and complex area of carriage law, which surprisingly enough continues to be so even eighty years after the advent of the Hague Rules. One would have thought that a certain measure of uniformity and certainty would have emerged in this area, however, this is not the case. Legal remedies concerning parties deemed not to be the carrier, therefore remains a problematic area of carriage law. One must note however, that the problem of circumvention of the Hague and Hague-Visby Rules via action in tort or bailment as discussed below is not a problem linked solely to remedies against the party who is not ‘the carrier’. Actions in bailment and tort have also been launched successfully against “the carrier” causing one leading British commentator to observe that “it might be thought logical that where the international Convention applied, e.g. the Hague Rules, the courts would take that to be the basis, possibly the sole basis on which liability rules would be assessed. Unfortunately the Hague Rules have been regarded as an encrustation on the common law and the two do not sit easily together...Accordingly, standard English pleadings in cargo claims will not allege a breach of the Convention alone, but may invoke bailment, negligence, or conversion in addition to contract.”⁴¹⁵ This has also been the case in certain districts of the U.S. which require privity in order for a defendant to be considered a carrier; “those involved in handling the cargo who are not in privity of contract with the plaintiff – including a shipowner or charterer who is not in privity with the cargo owner under the bill of lading

⁴¹⁵ Gaskell, N et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 270. Gaskell uses the example of Lord Diplock in *Barclays Bank v. Customs and Excise* [1963] 1 Lloyd’s Rep. 81 at p. 89 describing the contract for carriage of goods by sea under a bill of lading as a combined contract of bailment and transportation.

– may nevertheless be subject to an action in tort or bailment. Depending on the existence and wording of a Himalaya clause, an action against a third party may produce an even higher recovery than an action against the contracting carrier. Accordingly, a cargo damage complaint will typically include allegations of negligence and breach of bailment (in addition to allegations of breach of the contract of carriage).”⁴¹⁶

On a preliminary note, this area of the law is arguably where the breakdown of the Hague and Hague-Visby system is particularly evident. As discussed above, the object of introducing uniform carriage law was to institute a compromise or bargain involving shipping and carrier interests such that the legal relations between them would be regulated and predictable.⁴¹⁷ In this respect, holding that the charterer, the shipowner, or any other prominent party to the carriage is not the ‘carrier’ creates the undesirable situation wherein the uniform law is circumvented and thus its purpose is undermined. This results in windfalls and hardships on both sides of the carriage equation. An unfortunate cargo claimant may find that the entity that they believed they were contracting with and that appeared for all intents and purposes to be the carrier, was in reality a contractual stranger to the transaction. In essence, to require a claimant to “unravel the web of ownership interests” prior to claiming within the short time frame allowed demonstrates a profound unfairness and a substantial obstacle given the realities faced when bringing a cargo claim.⁴¹⁸ Conversely, a time charterer issuing bills of lading including a jurisdiction clause or a vessel management company may find themselves in an entirely different jurisdiction, subject to non-contractual causes of action and unprotected by the mandated limits of liability. This practice has been noted to be undesirable in that “it overturns the allocation of risk agreed upon by the original parties to the contract of carriage and permits the cargo owners to sue in tort or bailment the persons who actually performed the work, thereby evading those contractual limitations,

⁴¹⁶ Sturley, M. “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L.J. 263, at p. 271.

⁴¹⁷ Newell, R. “Privity Fundamentalism and the Circular Indemnity Clause” [1992] LMCLQ 97, notes at p. 102, that “the purpose of the Hague Rules was to bring about not only some form of international uniformity but an appropriate compromise between shipowning and cargo interests.”

⁴¹⁸ Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 895-896.

exceptions, and other terms.”⁴¹⁹ The effectiveness of the system of uniform law as regulating bill of lading contracts is therefore decreased by the ability of plaintiffs to forum shop and circumvent the limits of liability with respect to certain defendants, and equally, by the ability of certain parties to the carriage endeavor to contractually exonerate themselves from responsibility to the cargo claimant. It is therefore this notion, that there exists only a single carrier in the act of sea carriage, which necessitates the following discussion of the causes of action potentially involved with regard to a party who is not the ‘carrier’. An exhaustive discussion of each cause of action, however, is beyond the scope of this dissertation given that each topic is in itself a vast area of law. The aim of this section, is therefore to simply demonstrate the multiplicity of legal problems and legal complexities that can arise where one is forced or taken outside the regime into other causes of action.

8.1. Contract

As discussed above rendering parties liable in accordance with the obligations, defences and limits of the contract of carriage is arguably the ideal. Where this is not the case, there are in fact other contractual remedies that have been utilized to render such parties liable to the shipper or consignee. In *Brandt v. Liverpool*, the plaintiff whom had had the goods consigned to him as a pledgee presented the bill of lading, paid the freight and took delivery of the goods, but no contractual rights were transferred under the Bills of Lading Act 1855.⁴²⁰ The Court of Appeal determined that a new contract ought to be inferred between the shipowner and the plaintiff which arose upon receipt of the goods and payment of the freight, thus entitling him to claim in respect of damage to the goods.⁴²¹ The principle of implied contract as determined by the Court of Appeal has been subsequently applied and has become known as the *Brandt v. Liverpool* implied contract.⁴²² *Carver* has noted that “this type of contract can arise between carrier and consignee (even though the latter is not, and has not become, a party to the bill of lading

⁴¹⁹ Nossal, S. “Bailment on Terms, Himalaya Clauses, and Exclusive Jurisdiction Clauses: The Decision of the Privy Council in the *Mahkutai*” (1996) 26 Hong Kong L.J. 321, at p. 329.

⁴²⁰ *Brandt v. Liverpool, etc., Steam Navigation Co.* [1924] 1 K.B. 575 (C.A.).

⁴²¹ *Ibid.*

⁴²² See *Sonicare International v. East Anglia Freight Terminal* [1997] 2 Lloyd’s Rep. 144, where this was one of the heads of claim.

contract) on the discharge of the goods and their delivery by the carrier to the consignee against presentation of a bill of lading or of certain documents.”⁴²³ Although, the implied contract is distinct from the contract of carriage,⁴²⁴ nevertheless the terms tend to be those of the bill of lading.⁴²⁵ Arguably, the implied contract doctrine is one that arose to allow a party that would otherwise be unable to take suit. Nevertheless, it has been a device employed in order to protect a shipowner who was not a party to the contract.⁴²⁶ The Court of Appeal, in implying a contract between a shipowner and a consignee where there was a voyage charter, stated “there would seem to us very powerful grounds for concluding that it is necessary to imply a contract between BP and the shipowners to give business reality to the transaction between them and create the obligations which, as we think, both parties plainly believed to exist.”⁴²⁷ It would appear therefore that implied contracts are actually in effect rendering the Rules applicable where they would otherwise not be as a result of privity, and are thus not necessarily a tool for claimants attempting to circumvent the Rules, but rather a device used to ensure the Rules govern situations that they were intended to but cannot on due to restrictive interpretation.

8.2. Tort of Negligence

⁴²³ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 280. For further discussion of implied contract under British law see Carr, M. “Current Developments Concerning the Form of Bills of Lading – Great Britain” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at pp. 173-174.

⁴²⁴ See *The St. Joseph* [1933] P. 119 holding that the law of the new contract will depend on the intention of the parties and not on the law of the original contract of carriage. See Colinvaux, R. *Carver’s Carriage by Sea 12th Ed.* (1982) Stevens & Sons, London, at p. 72.

⁴²⁵ In *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.), at p. 168, Lord Wilberforce stated “The consignee is entitled to the benefit of, and is bound by, the stipulations in the bill of lading by his acceptance of it and request for delivery of the goods thereunder. This is shown by *Brandt v. Liverpool S.N. Co.*”

⁴²⁶ In *Carver’s* discussion of the notion of implied contract he argues that one of the interpretations of the *Elder Dempster* judgment is that “an implied contract was directly concluded between the shippers and the shipowners, without any intervening agency of the charterers” (Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 279-280). Briefly, in *Elder, Dempster Co v. Paterson, Zochonis & Co* [1924] A.C. 522 (H.L.), the plaintiff took suit for damaged palm oil against the shipowner who had time chartered the vessel, however the House of Lords held that the shipowner was protected by the terms of the bill of lading for bad stowage.

⁴²⁷ *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos 2)* [1990] 2 Lloyd’s Rep. 345 (C.A.), at pp. 402-403 where the Court of Appeal referred to a *Brandt v. Liverpool* implied contract, and proceeded to imply a contract based on the bill of lading terms between the shipowner and consignee where the vessel has been under voyage charter. See conversely *Mitsui & Co. v. Novorossiysk Shipping (The Gudermes)* [1993] 1 Lloyd’s Rep. 311 (C.A.), where the Court of Appeal was unwilling to find an implied contract as it was a matter of fact, which on the facts in this instance did not merit implying a contract.

In the *Nicholas H*, Lord Steyn expressed policy concerns surrounding recovery in tort outside the Rules: “The dealings between shipowners and cargo owners are based on a contractual structure, the Hague Rules, and tonnage limitation, on which the insurance of international trade depends... The result of a recognition of a duty of care in this case will be to enable cargo owners, or rather their insurers, to disturb the balance created by the Hague Rules and the Hague-Visby Rules as well as by tonnage limitation provisions, by enabling cargo owners to recover in tort against a peripheral party to the prejudice of the protection of shipowners under the existing system...”.⁴²⁸ Admittedly, the *Nicholas H* concerned the liability of a classification society, however the same considerations arise where claimants circumvent the contractual carrier to sue the shipowner, or circumvent the contractual carrier to sue a time or voyage charterer. It has been noted that cargo claimants prefer to sue in tort “simply so as to overcome the exceptions and limitations of liability which the contracting carrier could invoke in a contractual action.”⁴²⁹

In the United States, the 1898 Supreme Court judgment *The John G. Stevens*, established that an admiralty claim could be brought in tort, regardless of whether there was a contract governing the carriage of the goods.⁴³⁰ The ability to launch suit in tort was expanded in the middle of the 20th century, to no longer require the plaintiff to be privy to the contract on which the duty was founded. In *The President Monroe*, the court considered the situation where both the shipowner’s and the shipbuilder’s negligence damaged the plaintiff’s goods, opining: “It was, for a great many years, a well-established rule at both common law and maritime law that privity of contract had to exist for the maintenance of a tort action that involved negligence when the liability of the defendant appeared to depend upon the breach of a contractual obligation to the plaintiff... Since *Sieracki* [*Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946)] a long line of cases make clear that the determination of negligence liability of a tortfeasor, or of joint tortfeasors, to one injured in person or in property in the maritime law is now based upon the long-established principles of duty of care, foreseeability and proximate cause, and is unaffected

⁴²⁸ *Marc Rich & Co. AG v. Bishop Rock Marine Co. (The Nicholas H)* [1996] A.C. 211 (H.L.) at p. 239-240.

⁴²⁹ Tetley, W. “Chapter 9: Proving the Contract or Tort” in *Marine Cargo Claims*, 4th Ed. Online at: <http://tetley.law.mcgill.ca/maritime>, at p. 27.

⁴³⁰ *The John G. Stevens*, 170 U.S. 113 (1898), at p. 117.

by the presence or absence of privity on a contractual relationship.”⁴³¹ As seen more recently however, tortious actions against parties not under the umbrella of COGSA are not as prevalent given the expansive view of the COSGA carrier. The U.S. does provide for perfect study, as where privity is not a requirement for ‘carrier’ under COGSA, we tend to see less tortious litigation outside COGSA, in essence demonstrating that the ‘practical approach’ is very much a solution in this instance. It is interesting to note however, that an action in tort in the United States is sometime employed by claimants to obtain other benefits, such as a higher maritime lien ranking.⁴³²

Under English law, “should the claimant succeed in establishing both its title to sue and a breach by the shipowner of its duty of care, then recovery for physical loss or damage to the cargo will be made in full.”⁴³³ The seminal case in English law regarding the availability of tort actions in carriage of goods situations is *The Aliakmon*, where the claimants sued the shipowner after the time charterer had damaged the goods.⁴³⁴ The House of Lords considered the factual situation where the risk has passed to the buyers of steel coils on shipment, but the property in the coils did not pass until after shipment. The buyers or claimants in this instance could not rely on an implied contract on the principle of *Brandt v. Liverpool* as discussed above due to the rather complex facts in this instance where the buyers when having claimed delivery from the carrier were doing so as the agents of the seller, a fact which the carrier was aware of.⁴³⁵ Nor were the buyers able to rely on the Bills of Lading Act 1855, as they were neither consignees named in nor endorsees of the bills of lading, thus leaving the buyers to claim in tort. Lord Brandon determined that “in order to enable a person to claim in negligence for loss caused to him by reason of loss or of damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage

⁴³¹ *Sears Roebuck v. American President Lines (The President Monroe)* [1972] 1 Lloyd’s Rep. 385 (N.D. Cal. 1971), at p. 391.

⁴³² Tetley, W. “Chapter 9: Proving the Contract or Tort” in *Marine Cargo Claims*, 4th Ed. Online at: <http://tetley.law.mcgill.ca/maritime>, at p. 27, footnote 129.

⁴³³ Baughen, S. “Charterers’ Bills and Shipowners’ Liabilities: A Black Hole for Cargo Claimants?” (2004) 10 JIML 248, at p. 251.

⁴³⁴ *The Aliakmon* [1986] 1 A.C. 785 (H.L.).

⁴³⁵ One may not establish the existence of an implied contract under *Brandt v Liverpool* if delivery was taken when acting as an agent for another person.

occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.”⁴³⁶ This remains the law today, as the House of Lords in *The Starsin* held that where the damage to cargo occurred before title passed to the cargo owners, there is no cause of action in tort.⁴³⁷ As discussed previously, the function of the Himalaya clause is to prevent performing carriers from being liable in tort without the protection of the bill of lading, and therefore in actions in tort where possible the clauses have been employed to do so.⁴³⁸ The policy issue that shipowners would not be able to benefit from the protections of the Rules in tort actions was recognized in *The Aliakmon*, however, the decision turned on other grounds.⁴³⁹ Nevertheless this has not prevented shipowners from becoming liable in tort for damages,⁴⁴⁰ or other parties where the Himalaya clause did not cover them.⁴⁴¹

In Singapore, the approach is decidedly English as demonstrated in *The Golden Lake*, where the consignee was held not to be able to sue the shipowner in contract on the

⁴³⁶ *The Aliakmon* [1986] 1 A.C. 785 (H.L.), at p. 809.

⁴³⁷ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.), at pp.586, 590-591, and 603. Lord Hoffman stating “It is well established that a claim in negligence for damage to property is only maintainable by a person who had either the legal ownership of or a possessory title to the property at the time when the damage occurred.” (*Ibid*, at p. 586). For an explanation of the facts of *the Starsin* in relation to the multiple plaintiffs and their situation in relation to ownership of the goods see Andrewartha, J. & Riley, N. “English Maritime Law Update: 2001” (2002) 33 JMLC 329, at pp. 362-364 (although their review of *The Starsin* pertains to the Court of Appeal decision).

⁴³⁸ See *The Mahkutai* [1996] 2 Lloyd’s Rep. 1 (P.C.) and *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.). See also Wilson, J. “A Flexible Contract of Carriage – The Third Dimension?” [1996] LMCLQ 187, who after a discussion of the negative effects of privity on contract of carriage, at p. 200, advocates that parties who would otherwise be found not to be parties to the contract use the Himalaya clause to protect themselves from the harsh effects of privity preventing them from benefiting under the contract.

⁴³⁹ *The Aliakmon* [1986] 1 A.C. 785 (H.L.), at p. 801: “a shipowner accepts goods for carriage in the reasonable anticipation that whoever becomes the owner of them is covered by the contract of carriage in the bill of lading which will be governed by the Hague Rules. It is not possible to make the alleged duty of care award in tort subject to the Hague Rules.” For a discussion of the policy considerations in the judgment see Treitel, G. “Bills of Lading and Third Parties” [1986] LMCLQ 294, at pp. 301-303.

⁴⁴⁰ *Hispanica de Petroleos v. Vencedora Oceanica Navegacion (The Kapetan Markos)* [1987] 2 Lloyd’s Rep. 321 (C.A.), at p. 332-333, where the shipowners were found liable in tort (as the vessel had been chartered) for the breach of a duty of care with regard to the goods. See also *The Forum Craftsman* [1985] 1 Lloyd’s Rep. 291 (C.A.), at p. 296, where in an action in tort, due to the fact that the shipowner was not a party to the bill of lading he was not entitled to benefit from the exclusive jurisdiction clause

⁴⁴¹ See for example *Steel Coils v. M/V Captain Nicholas*, 197 F. Supp 2d 560 (E.D. La. 2002), where the wording of the Himalaya clause did not cover the vessel manager.

basis of privity, but whose action in tort was upheld.⁴⁴² The Singapore High Court found that “on the evidence before me, the defendants are the carriers. They are not a party to the contract evidenced by the bill of lading and they cannot be a party as it does not purport to make them a party. The bill of lading was not signed on their behalf or for their benefit. The defendants are common carriers and liable to the plaintiff for the full measure of their loss.”⁴⁴³

The Canadian approach is not as restrictive with regards to who can sue in tort as the one found in the United Kingdom. It has been noted that “there is a difference of opinion between the courts in Canada and those in England on the question of whether the buyer without either title or possession can sue in negligence a carrier of the goods through whose negligence the goods may have been damaged...In Canada therefore, the scope of a third party’s liability to a non-owner, who is in the process of acquiring title to goods which he is buying would appear to be much wider than in England.”⁴⁴⁴ As opposed to the English court in *The Aliakmon*, the Federal Court of Appeal has commented “...a buyer of goods has been held to have a cause of action in tort against a carrier notwithstanding that he did not own the goods at the time of the loss.”⁴⁴⁵ Certain Canadian courts have explicitly rejected the English approach concerned that it is too narrow a view with respect to duties of care.⁴⁴⁶ The Canadian perspective has also restrained the action in tort such that a plaintiff may not circumvent the Rules for a greater recovery. The Federal Court, in considering a claim against a shipowner found not to be ‘the carrier’ in tort, opined “[a] rule which hinges a right to sue on whether or

⁴⁴² *Fuji Electronics and Machinery Enterprise v. New Necca Shipping (The Golden Lake)* [1982] 2 Lloyd’s Rep. 632 (H.C. Singapore).

⁴⁴³ *Ibid*, at p. 636.

⁴⁴⁴ Fridman, G. *Sale of Goods in Canada 3rd Ed.* (1986) Carswell, Toronto, at p. 443-444.

⁴⁴⁵ *St. Lawrence Construction Limited v. Federal Commerce and Navigation Co.* [1985] 1 F.C. 767 (Fed. C.A.), at p. 786.

⁴⁴⁶ *Triangle Steel & Supply Co. v. Korean United Lines* (1985) 63 B.C.L.R. 66 (B.C.S.C.), where the British Columbia Supreme Court had rejected the British approach and refused to follow the decision of the English Court of Appeal in *The Aliakmon*, as well as other English authorities. In *London Drugs v. Kuehne & Nagle Intl* [1992] 3 S.C.R. 299 (S.C.C.), the Supreme Court of Canada opined that a narrow English view was not the law in Canada such that in Canada “our law of negligence has long since moved away from a category approach when dealing with duties of care. It is now well established that the question of whether a duty of care arises will depend on the circumstances of each particular case, not on pre-determined categories and blanket rules as to who is, and who is not, under a duty to exercise reasonable care.” (*Ibid*, at p. 408).

not a plaintiff in a case such as the present can prove whether property in the goods passed before or after the cause of action arose is not an attractive one. It may be that claim should be subject to limitations and defences comparable to those set out in the Hague Rules. A defendant is expected to be responsible for foreseeable damage cause to the plaintiff. I see no reason why a plaintiff, such as the holder of a bill of lading, should not as against a shipowner, similarly, be restricted to recovering on the basis of “expected liability”. As a matter of fact, no greater amount of damages is being claimed, in this case, against the shipowner in tort than could be recovered under the bill of lading.”⁴⁴⁷ One notable improvement in Canadian law, over such jurisdictions as Singapore, is the notion that the shipowner is protected by “expected liability” rather than exposing the shipowner to full liability as a common carrier. In Canada, therefore, the proprietary interest in the goods is not a prerequisite for suit against the carrier as thus the action in tort is more widely available to the cargo claimant. The Australians have also rejected the narrow approach in the United Kingdom.⁴⁴⁸

The utilization of an action in tort to circumvent the limits of liability and exclusions where an action exists in contract was also a problem in Italy. The Italian

⁴⁴⁷ *Canastrand Industries v. Lara S* [1993] 2 F.C. 553 (Fed. Ct. Can.), at p. 608.

⁴⁴⁸ See *Caltex oil (Australia) Pty. v. The Barge Willemsted* (1976) 136 C.L.R. 529 (H.C. Aus), at p. 568-569: “No doubt to discard the element of physical injury to person or property as a prerequisite to the recover of damages in negligence means that its effect of tending to ensure that compensable damage is restricted to that which is immediately consequential upon tortious act also disappears; there then looms the spectre, described by Cardozo C.J. in *Ultramares Corporation v. Touche* as that of ‘liability in an indeterminate amount for an indeterminate time to an indeterminate class’...A feature of the suggested exclusionary rule is the importance placed upon the existence in the plaintiff of some proprietary or possessory interest in property which suffers physical injury; such an interest will suffice to make recoverable any consequential economic loss but without it economic loss which is in all other respects identical will not be recoverable...No doubt risk and property are usually coincidental but, where they are not, a denial of recovery of the risk bearer’s economic loss consequential upon injury to a chattel the property in which is in another, and the consequence that such economic loss must go uncompensated for simply because of this division of risk and property, seems neither just nor expedient.” Livermore, J. “Current Developments Concerning the Form of Bills of Lading - Australia” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 71 has noted that the more expanded view of proximity in Australian law would mean that *The Aliakmon* would not be followed in Australia.

Supreme Court has allowed plaintiffs to chose between an action in contract restricted by the Hague Rules, and an action tort which is not.⁴⁴⁹

The use of an action in tort to circumvent the Rules has been restricted in the English courts on the basis of ownership. Where it has been expanded, in Canada for example, the judicial doctrine of ‘expected liability’ has been employed to protect the terms that the parties expected to be bound to by contract. Nevertheless, it remains in many jurisdictions a tool for claimants to circumvent the terms on which they contracted.

8.3. Bailment and Sub-Bailment on Terms

Bailment has a long association with carrier liability for the loss or damage of goods. In the 17th century English courts imposed strict liability on common carriers. It has been argued that the origin and legal foundation of that strict liability was bailment.⁴⁵⁰ Bailment is predominantly seen in English carriage of goods jurisprudence. It has even been noted to be “the secret weapon of the common law.”⁴⁵¹

The law of bailment and sub-bailment has received a fair amount of attention from the English judiciary in the past decade or so.⁴⁵² Professor Palmer has characterized

⁴⁴⁹ Berlingeri speaking during the drafting session on June 11, 1963 of the CMI Committee on Bills of Lading Clauses, preparing the draft text of Article IV Bis. Verbatim record of Berlingeri’s comments found in Comite Maritime International, *The Travaux Preparatoires*, at p. 604.

⁴⁵⁰ In *Nugent v. Smith* (1876) 1 C.P.D. 423 at p. 430, Cockburn C.J. opined that “the strict liability of carriers was introduced by custom in the reigns of Elizabeth I and James I as an exception to the ordinary rule that bailees were bound to use ordinary care.” (Boyd, S. *Scrutton on Charterparties and Bills of Lading, 20th Ed.* (1996) Sweet & Maxwell, London, at p. 203). Note though that this view on the origin of strict liability is not without controversy. The view based on bailment was opposed by Oliver Wendell Holmes who argued that strict liability actually predates the law of bailment, and thus the present liability of common carriers is a survival of the old law (Holmes, O. *The Common Law* (1881) Little Brown, Boston, at p. 184). Nevertheless several authors do characterize carrier liability as arising from the breach of a bailment relationship (See Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 11). For a comprehensive and in-depth discussion of the different theories surrounding the origin of carrier liability see Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at pp. 2 – 9.

⁴⁵¹ Reynolds, F. “Maritime and other influences on the common law” [2002] LMCLQ 182, at p. 184.

⁴⁵² *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos 2)* [1990] 2 Lloyd’s Rep. 345 (C.A.); *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.); *M.B. Pyramid Sound v. Briese Schiffahrts (The Ines)* [1995] 2 Lloyd’s Rep. 144 (Q.B.); *Hispanica de Petroleos v. Vencedora Oceanica Navegacion (The Kapetan Markos)* [1987] 2 Lloyd’s Rep. 321 (C.A.); *Mitsui & Co. v. Novorossiysk Shipping (The Gudermes)* [1993] 1 Lloyd’s Rep. 311 (C.A.); *Sonicare*

bailment as “a legal relationship distinct from both contract and tort”, while Bell has concluded that “bailment has to be recognized as a *sui generis* source of obligations.”⁴⁵³ The key element of bailment is possession.⁴⁵⁴ Where bailment has become prominent in cargo claims is in the notion of bailment on terms. The concept that a non-contractual party such as a shipowner may benefit from the terms arose in *Elder Dempster* where the shipowner sought to take advantage of the bill of lading where the goods had been carried by charterers.⁴⁵⁵ Lord Sumner, in his often quoted speech,⁴⁵⁶ stated “in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated bill of lading.”⁴⁵⁷ This notion was re-examined in *The Pioneer Container*, where cargo owners took suit against a shipowner, the bills of lading were issued by another party, yet the shipowner sought to

International v. East Anglia Freight Terminal [1997] 2 Lloyd’s Rep. 48 (C.L.C.C.); *Spectra International v. Hayesook* [1997] 1 Lloyd’s Rep. 153 (C.L.C.C.); *The Forum Craftsman* [1985] 1 Lloyd’s Rep. 291 (C.A.); *The Future Express* [1993] 2 Lloyd’s Rep. 542 (C.A.); *The Owners of Cargo Lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container (The Pioneer Container)* [1994] 2 A.C. 324 (P.C.); *Fort Sterling v. South Atlantic Cargo Shipping (The Finnrose)* [1994] 1 Lloyd’s Rep. 559 (Q.B.).

⁴⁵³ Palmer and Bell quoted by McMeel, G. “The Redundancy of Bailment” [2003] LMCLQ 169, at p. 171.

⁴⁵⁴ Note that a key element of bailment is possession, therefore in *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos 2)* [1990] 2 Lloyd’s Rep. 345 (C.A.), at p. 404-406 where the Court of Appeal considered the instance of a consignee, voyage charterer and shipowner, bailment was of little use as “it is elementary that there can be no bailment without possession in the bailee. It can, we think, truly be said that PEAG consented to the terms on which the goods were bailed to the shipowners, but unless PEAG bailed the goods to that bailor (which in our view they plainly did not) it makes no difference.” (*Ibid*, at p. 405). See also *Spectra International v. Hayesook* [1997] 1 Lloyd’s Rep. 153 (C.L.C.C.), at p. 155 on the requirement of physical possession. For the notion that the bailment will end when possession ends, see *M.B. Pyramid Sound v. Briese Schiffahrts (The Ines)* [1995] 2 Lloyd’s Rep. 144 (Q.B.), at p. 156 holding that “the bailment to the charterers came to an end when the goods were delivered to the [ship]owners. The owners then became the bailees (not sub-bailees) of the goods for carriage to St. Petersburg.”

⁴⁵⁵ *Elder, Dempster Co v. Paterson, Zochonis & Co* [1924] A.C. 522 (H.L.)

⁴⁵⁶ *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.), at p. 601; *The Owners of Cargo Lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container (The Pioneer Container)* [1994] 2 A.C. 324 (P.C.), at p. 340; McMeel, G. “The Redundancy of Bailment” [2003] LMCLQ 169, at p. 197; Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 294.

⁴⁵⁷ *Elder, Dempster Co v. Paterson, Zochonis & Co* [1924] A.C. 522 (H.L.), at p. 564. See conversely, *Fuji Electronics and Machinery Enterprise v. New Necca Shipping (The Golden Lake)* [1982] 2 Lloyd’s Rep. 632 (H.C. Singapore), where the High Court of Singapore, distinguishing *Elder Dempster*, held at p. 636 that the benefit of the exemption clause was not expressly conferred upon the shipowner. For of exemption clauses as they relate to bailment and sub-bailment see Liang, C. “Benefits and Burdens of Third Parties Under Exception Clauses in Bills of Lading” (1999) 24 Tul. Mar. L.J. 225, at p. 227-234.

benefit from the exclusive jurisdiction clause in the bill of lading.⁴⁵⁸ Lord Goff phrased the issue as follows: “Their Lordships are here concerned with a case where there has been a sub-bailment – a bailment by the owner of the goods to a bailee, followed by a sub-bailment by the bailee to a sub-bailee – and the question has arisen whether, in an action by the owner against the sub-bailee for loss of the goods, the sub-bailee can rely as against the owner upon one of the terms upon which the goods have been sub-bailed to him by the bailee.”⁴⁵⁹ In finding that the shipowners could rely on the clause, Lord Goff opined “that the relevant clause in the sub-bailment would be in accordance with the reasonable commercial expectations of those who engage in this type of trade, and that such incorporation will generally lead to the conclusion which is eminently sensible in the context of carriage of goods by sea...”.⁴⁶⁰ In a subsequent judgment the Privy Council appeared to restrict the use of sub-bailment on terms by linking it to the Himalaya clause.⁴⁶¹ Nevertheless, Lord Hobhouse in *The Starsin*, demonstrated that

⁴⁵⁸ *The Owners of Cargo Lately on Board the Vessel K.H. Enterprise v. The Owners of the Vessel Pioneer Container (The Pioneer Container)* [1994] 2 A.C. 324 (P.C.).

⁴⁵⁹ *Ibid.*, at p. 335.

⁴⁶⁰ *Ibid.*, at p. 347. For further discussion on the Hong Kong Court of Appeal judgment, which the Privy Council upheld, see Swadling, W. “Sub-bailment on Terms” [1993] LMCLQ 9. Swadling at p. 13 expressed the sentiment that “*The Pioneer Container* has the potential to become the most important bailment case decided this century.” For commentary on the Privy Council’s judgment see Bell, A. “Sub-bailment on Terms: A New Landmark” [1995] LMCLQ 177, and particularly at p. 178-180 for a discussion on the thorny issue of consent as it relates to sub-bailment.

⁴⁶¹ *The Mahkutai* [1996] 2 Lloyd’s Rep. 1 (P.C.). In this instance, the shipowner sought to rely on an exclusive jurisdiction clause in the same manner as in *The Pioneer Container*, however, the Lords determined at p. 10, that the Himalaya clause allowed the shipowners as sub-contractors to benefit from certain terms in the bill of lading but those terms, according to the Lords, did not include the exclusive jurisdiction clause. Therefore “their Lordships find it impossible to hold that, by receiving the goods into their possession pursuant to the bill of lading, the shipowner’s obligations as bailees were effectively subjected to the exclusive jurisdiction clause as a term upon which they implicitly received the goods into their possession. Any such implication must, in their opinion, be rejected as inconsistent with the express terms of the bill of lading.” (*Ibid.*, at p. 10). For discussion on the judgment as contrasted with *The Pioneer Container* see MacMillan, C. “Elder, Dempster Sails On: Privity of Contract and Bailment on Terms” [1997] LMCLQ 1. See also Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 300-301 discussing the holding of the Privy Council resulting in the strange situation where the bailee shipowner was in a worse position where the contract contained a Himalaya clause as opposed to where the contract did not. See Nossal, S. “Bailment on Terms, Himalaya Clauses, and Exclusive Jurisdiction Clauses: The Decision of the Privy Council in the *Mahkutai*” (1996) 26 Hong Kong L.J. 321, at p. 331-332 discussing the policy considerations at play in the judgment, and arguing that “the reasonable commercial expectations of the parties in *The Mahkutai* would have been that the terms of the bills of lading, issued by the charterers under authority from the shipowners, would govern the rights and liabilities of the parties involved in the adventure.” See also *Lotus Cars v. Southampton Cargo Handling (The Rigoletto)* [2000] 2 Lloyd’s Rep. 532 (C.A.), considering the interaction between an action in bailment and the Himalaya clause, where a sports car had been stolen from the possession of stevedores. In *Lotus*, the stevedores were held not to be bailees, but for a contrasting approach see *Nippon Yusen Kaisha v.*

bailment and sub-bailment on terms is alive and well in English law.⁴⁶² Lord Hobhouse considered the situation where the owners of the goods had no contract with the shipowner as the time charterer was ‘the carrier’, and opined: “(1) in situations such as the present there is bailment and sub-bailment; (2) no attornment by the sub-bailee to the goods owner is necessary; (3) notwithstanding that there is no contract between them, the sub-bailee owes to the goods owner the duties of a bailee for reward; (4) but the sub-bailee may rely upon the terms upon which he took possession of the goods from the bailee; (5) the fact that there is a Himalaya clause in the contract between the goods owner and the bailee does not oust the sub-bailee’s right to rely upon the terms of the sub-bailment.”⁴⁶³ Lord Hobhouse concluded that the claimants would have been able to hold the shipowners liable as bailees or sub-bailees and the shipowners would have been able to rely on the terms under which the goods had been taken into their possession.⁴⁶⁴ It appears that bailment may have certain advantages over tort actions. From a claimant’s prospective, it has been noted that there are four critical differences between a claim in bailment and one in tort, that make bailment the more attractive choice: “First, the burden of proof is reversed...liability will be imposed on the bailee unless it can prove that it took reasonable care of the goods...Secondly, a defendant owes no duty of care in negligence to take positive steps to prevent theft by third parties of the claimant’s goods which are in its possession. Thirdly, a bailee will be liable for the defaults of any independent contractors...Fourthly, recovery in respect of pure economic loss is possible

International Import and Export (The Elbe Maru) [1978] 1 Lloyd’s Rep. 206 (Q.B.), at p. 209 where sub-contractors after discharge had goods stolen from them and were considered bailees. Bailment has also been used in Canadian law. See *Hiram Walker & Sons v. Dover Navigation Co.* [1950] 83 Ll. L. Rep. 84 (K.B.), concerning the liability of the shipowner’s as bailees (Canadian law was applicable, and the plaintiff was Canadian, even though the forum for the action was England).

⁴⁶² *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd’s Rep. 571 (H.L.).

⁴⁶³ *Ibid.*, at p. 602. It is important to note that the issue of attornment appears to be settled with regard to bailment in this respect. It had proven to be a contentious issue in the past. See Baughen, S. “Bailment’s Continuing Role in Cargo Claims” [2001] LMCLQ 393, at p. 396-398. See also Baughen, S. “Charterers’ Bills and Shipowners’ Liabilities: A Black Hole for Cargo Claimants?” (2004) 10 JIML 248, at pp. 248-250. For judgments where attornment was an issue see *Sonicare International v. East Anglia Freight Terminal* [1997] 2 Lloyd’s Rep. 48 (C.L.C.C.), particularly at p. 52-52, and *The Future Express* [1993] 2 Lloyd’s Rep. 542 (C.A.), particularly pp. 550-551.

⁴⁶⁴ *The Starsin, ibid.*, at p. 602. Lord Hobhouse continued: “Further, by way of comment, the cargo-owners could, by relying upon the goods owner/sub-bailee relationship, have put the burden on the shipowners to excuse their failure to deliver the goods undamaged. But at trial they did not. They relied upon a *Donohue v. Stevenson* claim [tort] and had to discharge the burden of proof which that entailed.” (*Ibid.*, at p. 603) Ouch...I would not want to be the claimant’s solicitor the morning that judgment was released.

in a bailment action.”⁴⁶⁵ Nevertheless, it would appear that bailment is in certain instances a successful way of creating a parallel regime to the Rules, with the same effect, for instances where “the reasonable commercial expectations” of those involved in the transaction would expect to be covered by those terms.

Bailment is not restricted to the commonwealth however, and has been used in the United States. Arguably it is comparatively rare given the expansive definition of ‘carrier’ in the U.S., nevertheless it has been pleaded. In *Schnell v. The Vallescura*, the U.S. Supreme Court held that the shipowner was liable to the cargo owner as a bailee when cargo entrusted into his care and custody.⁴⁶⁶ The 5th Circuit Court of Appeals, in reviewing authorities in the context of claims in bailment, has determined that “(1) when applicable, COGSA provides the exclusive remedy for cargo damage against carriers; and (2) general maritime law applies when COGSA is inapplicable to a particular party or under particular circumstances.”⁴⁶⁷ In *Otto Wolf*, where the plaintiff attempted to render the shipowner liable as a bailee where the plaintiff’s contract was with the charterer, the court found that bailments are contractual in nature and therefore no bailment situation could be found.⁴⁶⁸ In *The M/V Naimo*, the court held that “fairness dictates that the law of bailment be an available remedy to a shipper where the owner is not bound to the contract of carriage.”⁴⁶⁹ The bailment contract is therefore not necessarily the contract of carriage. Bailment in the context of carriage law has been characterized as the delivery of goods to the bailee in trust, under an express or implied contract which requires that the bailee perform the trust and either redeliver the goods or dispose of them in accordance with the

⁴⁶⁵ Baughen, S. “Bailment’s Continuing Role in Cargo Claims” [2001] LMCLQ 393, at p. 395. See *Salmond and Spraggon v. Port Jackson Stevedoring (The New York Star)* [1979] 1 Lloyd’s Rep. 298 (H.C. Aus), at p. 325-326, for a discussion on stevedor’s as bailees and the duty to take reasonable care of the goods.

⁴⁶⁶ *Schnell v. The Vallescura*, 293 U.S. 296 (U.S. S.C.). The Supreme Court, at p. 304, held that that the carrier was “a bailee entrusted with the shipper’s goods, with respect to the care and safe discharge of which the law imposed upon him an extraordinary duty [because] discharge of the duty [was] particularly within his contract”

⁴⁶⁷ *Thyssen Steel Co. v. M/V Kavos Yarakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1354.

⁴⁶⁸ *Otto Wolf Handelsgesellschaft v. Sheridan Transportation Co.*, 800 F. Supp. 1359 (E.D. Vir. 1992), at p. 1366. The cargo claimant’s suit was then dismissed (*ibid*, at p. 1367).

⁴⁶⁹ *Tuscaloosa Steel Co. v. M/V Naimo*, 1992 WL 477117 (S.D.N.Y. 1992). The Court relied on *Nichimen Co. v. M/V Farland*, 1972 AMC 1573 (2 Cir. 1972), as having allowed a claim in bailment in addition to a claim under COGSA. Actually, the 2nd Circuit in *Farland* simply stated that the shipper had established a prima facie claim in bailment, but never actually determined whether they were liable in bailment and whether it was a remedy alongside COGSA or whether COGSA was an exclusive remedy.

trust.⁴⁷⁰ The bailee must have exclusive possession of the bailed property in order for bailment to arise.⁴⁷¹ Claims in bailment have therefore failed where claimants have been unable to demonstrate an express or implied bailment contract and where the goods were not in the exclusive possession of the defendant during carriage.⁴⁷² In the United States, although several bailment claims have been pleaded and been successful,⁴⁷³ bailment is not as frequently an issue as in the United Kingdom given the tendency to subsume most parties under the Rules.

8.4. Concurrent Liability: Tort and Contract

With regard to English law, the position with respect to concurrent liability is well settled.⁴⁷⁴ “Concurrent liability in contract and tort is now firmly established in English law. That a plaintiff has a cause of action in contract does not preclude that plaintiff from bringing an action in tort in respect of the same set of facts.”⁴⁷⁵ The issue was firmly settled by the House of Lords in the nineties in *Henderson v. Merrett Syndicates*.⁴⁷⁶ This is also the state of the law in commonwealth nations such as Canada and Australia.⁴⁷⁷ This, however, is not the position in civil law jurisdictions. “*Cumul*”, or rather the joinder

⁴⁷⁰ *T.N.T Marine Service Inc. v. Weaver Shipyards & Drydocks*, 702 F.2d 585 (5 Cir. 1983), at p. 588.

⁴⁷¹ *Ibid.*

⁴⁷² *Otto Wolf Handelsgesellschaft v. Sheridan Transportation Co.*, 800 F. Supp. 1359 (E.D. Vir. 1992), at p. 1366; *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349 (5 Cir. 1995), at p. 1355.

⁴⁷³ *Polo Ralph Lauren v. Tropical Shipping*, 215 F.3d 1217 (11 Cir. 2000), allowing bailment but denying the tort claim; *Cargill Ferrous Int'l v. M/V Sukarawan Naree*, 1997 U.S. Dist. LEXIS 13102 (E.D. La. 1997), where bailment was pleaded but was not successful on the basis that the defendant never had exclusive possession of the goods.

⁴⁷⁴ Previously there was a school of thought which held that “as a general rule, the law did not recognize concurrent liability in negligence where there was a breach of a contractual duty of care unless the tort duty arose ‘independently of the contract’.” (Swanton, J. “Concurrent Liability in Tort and Contract: The Problem of Defining the Limits” (1996) 10 J. Cont. L. 21, at p. 22). See *Jarvis v. Moy, Davies Smith Vandervell* [1936] 1 K.B. 399 (C.A.), at p. 405, concerning the concurrent liability of stockbrokers. Notably, in certain instances, bailees and ‘common carriers’, were exempt from the restrictions that tort actions had to arise independently of contractual actions. (Swanton, *ibid.*, at p. 22, footnote 11).

⁴⁷⁵ Smith, S. “Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement” (1999) 115 L.Q.R. 245.

⁴⁷⁶ *Henderson v. Merrett Syndicates* [1995] 2 A.C. 145 (H.L.).

⁴⁷⁷ See the judgment of the Supreme Court of Canada in *Central Trust Co. v. Rafuse* (1986) 21 D.L.R. (4th) 481 (S.C.C.), and the holding of the High Court of Australia in *Bryan v. Maloney* (1995) 69 A.L.J.R. 375 (H.C. Aus.), concerning the liability of builders.

of delictual and contractual actions, is prohibited.⁴⁷⁸ This is the case in such civilian jurisdictions as France⁴⁷⁹ and Quebec.⁴⁸⁰

The ability to launch suit in tort and contract, and arguably bailment, renders the law in this area increasingly complex, especially when one considers the nature of tortious liability in the common law as encompassing many torts.⁴⁸¹ Actions may thus be founded in various torts, for example, the tort of conversion,⁴⁸² tort of negligent misrepresentation,⁴⁸³ tort of deceit,⁴⁸⁴ or tort of negligence.⁴⁸⁵ Arguably, if an action is available in contract on the basis of the contract of carriage, the action should be routed through contract to fall under the Hague Rules regime. Unfortunately, in certain instances this is not always the case.⁴⁸⁶ Nevertheless, where one may find a particular tendency to launch suit in both tort and contract is where there is the potential that the time limitation has elapsed. In *The Finnrose*, a cargo of tissue paper was damaged by rain and the owner

⁴⁷⁸ Tetley, W. “Chapter 9: Proving the Contract or Tort” in *Marine Cargo Claims, 4th Ed*, at p. 28. Online at: <http://tetley.law.mcgill.ca/maritime>.

⁴⁷⁹ See for example the *Cour d’Appel de Paris*, October 28, 1960, DMF 1961, 342, holding that “*le cumul de la responsabilité délictuelle et de la responsabilité contractuelle est impossible.*”

⁴⁸⁰ Civil Code of Quebec, article 1458 provides: “every person has a duty to honour his contractual undertaking. Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.”

⁴⁸¹ The law of torts in the common law developed in a very compartmentalized fashion resulting in a series of torts, for example one may still take suit under a *Rylands v. Fletcher* tort, the tort of nuisance, tort of deceit, or tort of negligent misrepresentation. The common law developed many different separate torts, and arguably it is only after the seminal case of *Donahue v. Stevenson* [1932] AC 562 (H.L.), with the development of the tort of negligence, that one can begin to see a general obligation not to harm another, or duty of care, crystallizing in the common law. See Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) Oxford University Press, Oxford, particularly “Chapter 4: The Substantive Law of Torts”, and “Chapter 9: The Law of Torts in the Nineteenth Century: The Rise of the Tort of Negligence”.

⁴⁸² See Gaskell, N et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 270 noting that standard English pleadings invoke the tort of conversion as well as bailment, negligence, and contract.

⁴⁸³ See for example, *Comalco Aluminum v. Mogul Freight Services (The Ocean Trader)* (1993) 113 A.L.R. 667 (Fed. Ct. Aust.), where the Federal Court of Australia considered whether the remedies for misrepresentation and those under the Hague Rules should both be available, holding in the end that the act of stuffing the container would be governed by tortious liability, while the act of carrying it, by the liability scheme in uniform law.

⁴⁸⁴ See for example, *Standard Chartered Bank v. Pakistan Nation Shipping Corporation and Others (No. 2)* [2000] 1 Lloyd’s Rep. 218 (C.A.), where the carrier was held liable in the tort of deceit for antedating bills of lading in exchange for a letter of indemnity.

⁴⁸⁵ As discussed above, see section 8.2.

⁴⁸⁶ See section 8.5, *infra*, entitled Visby Protocol Art. 4 bis 1, and particularly the discussion of *The Gregos*.

of the cargo claimed against the shipowner in contract and tort of negligence.⁴⁸⁷ The cargo owner's claim was dismissed,⁴⁸⁸ but nevertheless, tortious and contractual claims are generally launched in such instances.⁴⁸⁹ In the United States, launching a suit in tort and contract concurrently is unproblematic as well. In *The President Monroe*, the claimants' cargo was wetted when ballast water entered the hatch covers and suit was launched against the shipowner alleging negligence and unseaworthiness under contract.⁴⁹⁰ The court found the shipowner liable under contract for breach of the obligation to furnish a seaworthy vessel,⁴⁹¹ but also found the shipowner liable for negligence after the evidence at trial had shown that "the crew of the *President Monroe* conducted the ballasting operation in a negligent and careless manner."⁴⁹² One can therefore see, how the multiplicity of actions on which to potentially found liability increases the complexity of the law in this area, fostering the tendency of claimants attorneys or solicitors to simply launch all possible actions in the hopes that one will apply.

8.5. The Visby Protocol, Article. IV Bis 1

It had become evident after sometime that the stipulated limits of liability and prescription period mandated by the Hague Rules could be circumvented in respect of goods damaged or lost by an action in tortious or delictual liability. Evidently this was viewed as undesirable, and therefore the Visby Protocol of 1968⁴⁹³ attempted to remedy

⁴⁸⁷ *Fort Sterling v. South Atlantic Cargo Shipping (The Finnrose)* [1994] 1 Lloyd's Rep. 559 (Q.B.), at p. 561.

⁴⁸⁸ *Ibid.*, at p. 576.

⁴⁸⁹ See *The Amazona* [1989] 2 Lloyd's Rep. 130 (C.A.) and *The Nordglimt* [1987] 2 Lloyd's Rep. 470 (Q.B.), both addressing the issue of time bars, where in *The Nordglimt*, the action was commenced after the year expiry, while in *The Amazona*, the action was commenced in time, but if the action was dismissed in favor of arbitration the cargo owners raised concerns that it would be time barred, which the court assuaged by holding the arbitration would not be.

⁴⁹⁰ *Sears Roebuck v. American President Lines (The President Monroe)* [1972] 1 Lloyd's Rep. 385 (N.D. Cal. 1971), at p. 386-387. Suit was also launched against the shipbuilder on the basis of implied warranty of fitness alleging that the hatch covers were defective.

⁴⁹¹ *Ibid.*, at pp. 386 and 387.

⁴⁹² *Ibid.*, at p. 388. The shipowner was held jointly and severally liable with the shipbuilder. For further discussion on this, see section 4 on joint and several liability.

⁴⁹³ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, February 23, 1968.

this problem.⁴⁹⁴ The report by the Committee on Bills of Lading Clauses presented at the CMI 1963 Stockholm Conference addressed the issue of circumventing the Rules: “The Sub-Committee was aware that attempts have been made – and often successful ones – to get around the limitations and exemptions of the B/L Convention...thus in some countries a contracting party may sue in contract but also in tort. Therefore if sued in tort, the carrier may find himself deprived of the benefit of limitation and of the one year prescription period etc.”⁴⁹⁵ The draft Article IV Bis 1 presented in the report read: “Any action for damages against the carrier, whether founded in contract or in tort, can only be brought subject to the conditions and limits provided for in this Convention.”⁴⁹⁶ It has been noted that during the drafting meetings some of the participants had in mind the situation where the receiver brings an action in tort against the carrier to avoid the Hague Rules, while others present supported the provision as having wider implications and reaching beyond the bill of lading holder.⁴⁹⁷ For example, the delegate from Finland was very critical noting that the provision does not regulate “an action in tort that can be taken against the carrier without having reference to the Convention ...for this reason, the whole paragraph is useless...”.⁴⁹⁸ The text of the provision was subsequently amended at the Stockholm Conference without any explanation as to the reasoning from the relevant committee,⁴⁹⁹ and no reference or discussion concerning the change can be found in the travaux préparatoires.⁵⁰⁰ The adopted text of Article IV Bis 1 stipulates: “The defences and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort.” Despite the fact that *prima facie* the wording of

⁴⁹⁴ Berlingieri, F. “The Hague-Visby Rules and Actions in Tort” (1991) 107 LQR 18, at p. 18, who notes that Article IV *Bis* 2 was plainly directed at the problem of actions in tort used to evade the protections of the Hague Rules.

⁴⁹⁵ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 596.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Berlingieri, F. “The Hague-Visby Rules and Actions in Tort” (1991) 107 LQR 18, at p. 20. Mr. Belingeri represented Italy in a portion of the drafting meetings for the Committee, see Comité Maritime International, *The Travaux Préparatoires*, at p. 604.

⁴⁹⁸ Comité Maritime International, *The Travaux Préparatoires*, at p. 607.

⁴⁹⁹ Berlingieri, F. “The Hague-Visby Rules and Actions in Tort” (1991) 107 LQR 18, at p. 20.

⁵⁰⁰ Comité Maritime International, *The Travaux Préparatoires*, cover the drafting and adoption of Article IV bis in pp. 595 – 633, and no reference in those pages can be found that may shed light on the amendment of the provision.

the article would seem to resolve the issues discussed above and bring most of those claims within the umbrella of the Hague-Visby Rules, this ultimately proved not to be case.

Initially, there was a divergence of opinions as to the meaning and scope of the provision. One interpretation was that the provision only applied with respect to the parties to the contract, or in other words, “the words [in] Art. IV bis (1) merely mean that a person who is a party to the contract of carriage cannot improve his position by disregarding the contract and suing in tort.”⁵⁰¹ The interpretation of the article as only applying where privity of contract already exists between the plaintiff and the defendant has been described shortly after the implementation of the Protocol by one commentator as “not right”.⁵⁰² Conversely, it was viewed that the scope of the article was more expansive in that it could encompass the situation where the owner or charterer, whomever was the party to the carriage contract, was being sued by a third party, thus someone not a party to the bill of lading.⁵⁰³ Other authors have adopted the view as well, arguing that “any action in tort against the contracting carrier in respect of loss of or damage to goods covered by a contract of carriage to which the Rules apply is subject to the Rules, whether brought by a party to the contract of carriage or not.”⁵⁰⁴ When considering what is arguably viewed as a more expansive interpretation of the provision, one should note that this still fails to encompass the situation where charterer’s bills are issued and the claimant takes suit against the shipowner, or vice versa where the charterer is not a party to the contract by virtue of the bills being owner’s bills. Arguably, this is the heart of the problem. The possibility was noted not long after the article came into force that one interpretation available was to give the actual carrier the benefit and protection of the Hague-Visby Rules despite the fact he is not a party to the bill of lading

⁵⁰¹ Treitel, G. “Bills of Lading and Third Parties” [1986] LMCLQ 294, at p. 304.

⁵⁰² Diamond, A. “The Hague-Visby Rules” [1978] LMCLQ 225, at p. 248.

⁵⁰³ *Ibid.* Diamond used two examples of a scenario where a third party would take suit against the carrier who is party to the contract. The first being where a bank with security in the goods never becomes party to the contract as the bank was never able to take delivery given that the goods were lost. This example was modeled on *Brandt v. Liverpool* [1924] 1 K.B. 575. The second example is where a shipper contracts with a freight forwarder who consolidates his shipment with others and receives a single bill of lading for the entire shipment, and when the goods are lost the shipper sues the carrier to avoid the limits of liability in the freight forwarding contract.

⁵⁰⁴ Berlingieri, F. “The Hague-Visby Rules and Actions in Tort” (1991) 107 LQR 18, at p. 20.

contract.⁵⁰⁵ It was argued however that “[t]his is a bold construction. There is little in the wording of the new Rule or in art. 1(a) to support the wider proposition, however attractive it may seem in the abstract.”⁵⁰⁶ On the basis of a textual interpretation however, there is support for the proposition that the defendant need not be party to the contract, as the provision simply stipulates that the goods must be covered by a contract of carriage, no where indicating that the carrier must be party to that contract. Nevertheless, one may argue that failing to adopt an interpretation of the provision that protects both shipowners and charterers from suit in tort, allows the mischief made possible by the narrow interpretation of the notion of ‘carrier’ to continue. With respect, there is a coherence that is lacking in the second interpretation discussed above, in that the plaintiff need not be party to the contract of carriage to fall within the scope of article IV bis 1, yet the defendant must be a party to the contract of carriage otherwise he fails to benefit from the protection afforded and obligations imposed by the article, and thus the Rules.

The English Court of Appeal has, to a large extent settled the debate. In *The Captain Gregos*, the Court of Appeal that Article IV Bis 1 only applied with respect to plaintiffs who are parties to the contract of carriage.⁵⁰⁷ The Court adopted the view that the article ensured that a cargo owner would be no better off taking suit in tort than if he had taken suit in contract: “The only reason why the cargo-owners seek to found on the

⁵⁰⁵ Diamond, A. “The Hague-Visby Rules” [1978] LMCLQ 225, at p. 249.

⁵⁰⁶ *Ibid.* Diamond justifies this comment by stating at p. 249, footnote 66, that the difficulties of arguing such an interpretation are “(a) The action must be against “the Carrier” who is defined as “includes the owner or charterer who enters into a contract of carriage with a shipper.” The word “includes” may signify “means and includes”; see “comprend” in the French text...(b) Even if the definition is not all embracing, the defendant must be someone, even though not an owner or charterer, “who enters into a contract of carriage with a shipper.”” Respectively, one may suggest that Diamond’s view of the article IV bis 1 is tainted by the assumption that the definition of ‘carrier’ in the Rules is limited to one carrier. If one is to consider that there may be several carriers, than the objections to an expansive interpretation of article IV bis 1 are reduced. One might also consider the fact that no where in the wording of article IV bis 1 does it stipulate that it is restricted to the carrier who entered into the contract, rather, the wording simply states any ‘action against the carrier’ and requires that the goods be ‘covered by a contract of carriage’. Nor is the article subject to any of the other articles in the Rules, thus why would one limit the scope of the article by referring to other portions of the rules.

⁵⁰⁷ *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos)* [1990] 1 Lloyd’s Rep. 310 (C.A.), at p. 318, per Lord Justice Bingham: “If [the Rules] had been intended to regulate relations between non-parties to the bill of lading contract, it is hard to think the language would not have been both different and simpler.” As well, at p. 318, per Lord Justice Slade: “These provisions, in my judgment, by themselves show fairly clearly that the purpose of all the articles is to govern the relationship of *the parties to the contract* under a contract of carriage of goods by sea.”

shipowners' alleged misconduct rather than on the breaches of the rules is, as I infer, that for whatever reason they let the year pass without bringing suit. That is in my view precisely the result the rules were intended to preclude."⁵⁰⁸ This narrow view of view of the provision has been criticized. Berlingeri has criticized the decision by referencing the original CMI wording of the article, quoted above, noting that the intent was to cover all actions in tort regardless if the plaintiff was a party to the contract, and therefore Lord Justice Bingham should not have interpreted the article restrictively based on the reference made to the contract of carriage.⁵⁰⁹ An important criticism of the decision is the fact that when Lord Justice Bingham interpreted article IV bis 1 he was guided by the doctrine of privity, reasoning that "[w]hatever the law in other jurisdictions, the general principle that only a party to a contract may sue on it is well established here. If the draftsmen of the 1924 and 1971 Acts had intended that respective rules to infringe that principle or appreciated that that was their effect, I think they would have sought to make that clear in the Acts. It would be strange if so fundamental a principle were to be so inconspicuously abrogated."⁵¹⁰ That privity would play such an important role in the interpretation of the provision is both surprising and disappointing given that the aim of uniform law is to provide some measure of uniform interpretation. In this instance, Lord Macmillan's plea for an international interpretation of the Act appears to have been disregarded; "It is important to remember that the Act of 1924, was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts, it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance."⁵¹¹ In his judgment, Lord Justice Bingham did acknowledge that such an interpretation may lead to different

⁵⁰⁸ *Ibid*, at p. 316, per Lord Justice Bingham. The Lord Justice, at p. 315, relied "on the learned editors of Scrutton" when adopting the view that the principle object of the article was to ensure contractual claimants were not in a better position by launching a tort claim.

⁵⁰⁹ Berlingieri, F. "The Hague-Visby Rules and Actions in Tort" (1991) 107 LQR 18, at p. 19-20.

⁵¹⁰ *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos)* [1990] 1 Lloyd's Rep. 310 (C.A.), at p. 318.

⁵¹¹ *Stag Line v. Foscolo, Mango & Co.* (1931) Ll. L. Rep. 165 (H.L.), at p. 174. See also Gaskell, N et al. *Bills of Lading: Law and Contracts* (2000) LLP, London., at p. 270 expressing his disappointment that the statutes based on the Hague Rules were interpreted in light of the common law and blended with common law actions, rather than having the Convention be the sole basis for the carrier's liability.

results in different jurisdictions, but nevertheless opted for a privity based interpretation.⁵¹² Commentary on the judgment of Lord Justice Bingham, has expressed disapproval over the lack of consideration of the international character of the rules; “Special consideration must in any case be given to the fact that the two Acts implemented international conventions, which have to be seen against the background of many different legal systems. Attention should surely be paid, therefore, to interpreting the relevant conventions against their international backgrounds. It seems, with respect, odd to proceed on the basis that such a convention should be interpreted rather strictly against the background of English law...”⁵¹³ Nevertheless, article IV bis 1, has been given a narrow interpretation in English law, which although undesirable, is arguably consistent with the narrow interpretation English law has given to other articles in the Hague-Visby Rules. It is regrettable that given the proliferation of actions launched outside the Hague-Visby regime, the Lord Justices did not use the opportunity to streamline the law in this area and ensure that a greater number of claims were routed back under the umbrella of uniform law. In any event, the Lord Justices’ holding appear to have been the desired route in England, as despite the attempts to deal with tort action in Visby Art. 4 bis 1, “the Law Commission rejected any suggestion that the Carriage of Goods Act 1924 should abolish any action against a carrier in tort.”⁵¹⁴

8.6. Conclusion

It would appear from the proliferation of actions outside the Hague-Visby scheme, that arguably violence is being done to the regime that was intended to regulate liability between the carrier interests and shipper interests. To some extent it has reached a level that is almost absurd, with the cargo claimant in *Sonicare International v. East Anglia Freight Terminal* founding the action in contract, simple bailment, bailment by

⁵¹² *Compania Portorafi Comerciales v. Ultramar Panama (The Captain Gregos)* [1990] 1 Lloyd’s Rep. 310 (C.A.), at p. 317: “We are again (no doubt unavoidably) obliged to resolve this issue without the help which the decisions or opinions of foreign Judges or Jurists might have given us. I have not for my part found it an easy question. I am particularly concerned that idiosyncratic legal rules on privity might yield different results in different countries. But on a balance I prefer the cargo-owners argument.”

⁵¹³ Berlingieri, F. “The Hague-Visby Rules and Actions in Tort” (1991) 107 LQR 18, at p. 21.

⁵¹⁴ Gaskell, N et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 270.

attornment, *Brandt v. Liverpool* implied contract and the common law duty of care.⁵¹⁵ Nevertheless, certain causes of action outside the Rules, specifically bailment and implied contract, are arguably being used by the courts to duplicate what would be the terms of the contracts of carriage in efforts to deal with the narrow application of the Rules.

⁵¹⁵ *Sonicare International v. East Anglia Freight Terminal* [1997] 2 Lloyd's Rep. 144, at p. 52 Justice Hallgarten lists Sonicare's causes of action noting "during the course of the hearing, subject to the title issue, no fewer than five possible ways were canvassed whereby Sonicare might be in a position to hold EAFT accountable for the loss."

9. A TEAM OF CARRIERS? THE INCREASING NUMBER OF PARTIES INVOLVED IN CARRIAGE

The uniform law with regard to carriage of goods by sea has become in certain, and arguably many, respects outmoded. Over the past 80 years since the birth of uniform carriage law, the shipping industry has fundamentally changed. “Where once the carrier and the shipper, mutually exclusive parties who together comprised the sum of the shipping world, where the only two players, the current production is an ensemble cast of role-players and specialists, each playing his part in pursuit of the ultimate goal: the efficient transportation of goods by sea.”⁵¹⁶ It has been noted that today “[i]t is impossible for the carrier to perform carriage alone due to the increase in his commercial relations and to specialize in the whole transportation area owing to the development in shipping technique and procedure. As a result of developments in maritime commerce the loading, handling, stowage, carriage, custody and discharge of goods by experts have become necessary. Nowadays, almost all segments of carriage are carried out by third parties rather than the contracting carrier.”⁵¹⁷ “The subcontracting of cargo-related services has developed to such an extent that the traditional ocean carrier is now subcontracting even the ocean carriage itself. Under vessel sharing arrangements among ocean carriers, called “slot charters”, shipper may never contract with an actual shipowner, much less with the owner of the carrying vessel. Ocean carriage by subcontract is now performed not only for traditional ocean carriers but for the NVOCC, an entity that may become a carrier to cargo owners or a shipper to shipowners. All other traditional functions of ocean carriage – pre-loading storage, examination, weighing or measuring, packaging, loading, stowage on board, fumigation, documentation, unloading and warehousing – can be expected to be carried out, at least in part, by subcontractors or the carrier. Thus the concept of “carrier” – on which twentieth century modal regimes were based – has lost most of its traditional meaning.”⁵¹⁸ The multiplicity of parties has

⁵¹⁶ Charest, D. “A Fresh Look at Treatment of Vessel Managers Under COGSA” (2004) 78 Tul. L. Rev. 885, at p. 877.

⁵¹⁷ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 85.

⁵¹⁸ Sweeney, J. “Crossing the Himalayas: Exculpatory Clauses in Global Transport” (2005) 36 JMLC 155, at p. 171-172.

not only turned the spotlight on the identity of the carrier problem, as illustrated by more recent uniform law attempts and domestic legislation, but it has also increased the complexity of the problem. What was a problem of multiple performing parties with regard to ocean carriage has now become a multimodal problem. Thus the issue of performing parties has now become complicated by the myriad of issues surrounding multimodalism. This, as seen below, renders the process of modernizing uniform law with regard to 'carriers' infinitely more difficult than if ocean carriage were the sole concern.

10. A STILL BORN SOLUTION: THE HAMBURG RULES

Interestingly enough, despite the fact that the existing regime failed to properly handle instances where multiple parties performed the carriage, the dissatisfaction with the Hague Rules regime stemmed primarily from other sources. The fact that ‘the carrier’ had become invariably split in practice into carriers was a problem for the commercial interests involved in carriage, whereby the impetus for the Hamburg Rules were problems more along the political lines. By the time UNCITRAL was preparing to consider reforming the rules of carriage in the late 1960’s, the interests involved in shipping differed greatly from those involved during the 1920’s. The drafters and the negotiators of the Hague Rules were commercial parties. Among the 44 delegates at the ILA Conference at the Hague, only four were affiliated with political or diplomatic interests, while the remainder were from the private commercial sector.⁵¹⁹ These individuals included a coal merchant, shipowners, barristers and lawyers, an underwriter, the chairman of Lloyd’s, the managing director of Produce Brokers, an adjuster, shippers, bankers, and professors.⁵²⁰ Conversely, the Hamburg Rules conferences were an entirely political affair.⁵²¹ In the intervening years, shipping had taken on an important role in the economies of developing nations, as exports had begun to account for a high percentage of their gross national product.⁵²² By the early 1970’s, the developing nations accounted for approximately 65 percent of all maritime shipments, while owning only 7.6 percent of the world’s maritime fleet.⁵²³ While the dissatisfaction with the Hague Rules had become, for the traditional maritime nations,⁵²⁴ centred around the rules for unit

⁵¹⁹ *Hague Conference Report*, at p. 168-74, also found in Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 88, f.n. 23.

⁵²⁰ *Ibid.*

⁵²¹ For a discussion on the political nature of the Hamburg Rules conferences and the role of developing nations in the process see Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 107.

⁵²² Frederick, *ibid.*, at p. 107.

⁵²³ Frederick, *ibid.*, at p. 103, citing Haiji, “UNCTAD and Shipping” (1972) 6 World Trade L. 58, at p. 58; Karan, *The Carrier’s Liability*, *supra* note , at p. 32, noting the reverse statistic, that while newly independent nations were responsible for 65% of the shipments in maritime commerce, industrialized nations owned 93% of the mercantile fleet.

⁵²⁴ Although notably it was such cargo-oriented states as the U.S., Canada, Australia and France, that pushed for improvements. See Herber, R. “The Hamburg Rules: Origin and Need for the New Liability

limitation of liability (the monetary value as well as the rules determining the unit), time bars, and the law of agency in the context of non-delegable duties and the use of carrier defences,⁵²⁵ conversely, the developing nations had focused their ire on other issues. Their dissatisfaction revolved around the carrier's 17 exculpatory provisions, including the "catch-all" exemption, and in particular the existence of the fire and nautical fault defences.⁵²⁶ Essentially, it was viewed by the developing nations that the allocation of risk was slanted heavily in favour of the carrier.⁵²⁷ Sweeney has described this view in a slightly more dramatic fashion; "Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of world trade) impairs the balance of payments position of developing states so as to insure

System" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 44.

⁵²⁵ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 72-73. With respect to the agency complaints, they centered around two judgments: *The Munster Castle (Riverstone Meat Co. v. Lancashire Shipping Co* [1961] 1 Lloyd's Rep. 57 (H.L.), which rejected the carrier's assertion that hiring a competent repairer or inspector was sufficient to demonstrate due diligence), and *The Himalaya (Adler v. Dickson* [1955] 1 Q.B. 158, [1957] 2 Lloyd's Rep. 267 (C.A.)) this judgment opened the door for use of such Himalaya clauses to extend the benefit of the carriers exemptions to other parties in the maritime transaction, such as stevedores as exemplified in *Scruttons v. Midland Silicons* (1962) A.C. 446 (H.L.)). The traditional maritime states were concerned about the non-delagable nature of the seaworthiness obligation and preferred to implement a duty to make a careful selection of repairers or inspectors (Sweeney, *ibid*). Secondly, there was concern about the extent of the use of the carriers defences, particularly where willful acts were involved and where it is extended beyond the crew, for example to the stevedores (*Ibid*).

⁵²⁶ Shah, M. "The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 5; Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 73-74. Other contentions regarding carrier's potential liability revolved around the limits of liability, the possibility of over-all limitation and the fact that Article 3 was subject to Article 4 (Sweeney, *ibid*).

⁵²⁷ An UNCITRAL report from the last UN session of 1969 describes the statements of the representatives from the developing countries: "[They] stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of the shippers." (Report of the United Nations Committee on International Trade Law on the work of its Second Session, para 26, U.N. Doc. A/7747, quoted in Werth, D. "The Hamburg Rules Revisited – A Look at the US Options" (1991) 22 JMLC 59, at p. 64. Shaw makes an interesting correlation noting that: "some fifty years after the adoption of the Hague Rules, we find, again, primarily the users of shipping services, in this case the developing countries, raising at the political level practically the very same complaints generated earlier by shipper interests in the then British Dominions, Western Europe and United States – excessive exemptive privileges for carriers, exoneration from negligence in key shipowner operations such as navigation, and restrictive jurisdiction clauses in Bills of Lading." (Shah, M. "The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 6).

continued poverty and perpetual under-development in an industrial age.”⁵²⁸ It was this state of affairs that initiated a re-examination of the uniform law on carriage of goods by sea, and therefore not the fact that the notion of the carrier in the Hague Rules was wholly inadequate for application in modern carriage.

To produce the draft convention, a Working Group on International Legislation on Shipping, was convened by UNCITRAL and composed of seven members.⁵²⁹ Due to objections, however, the working group was expanded to twenty on members in March of 1971.⁵³⁰ The working group held six sessions from January 1972 to February 1975 wherein the Draft Convention on Carriage of Goods by Sea was prepared.⁵³¹ Despite the fact that the definition of ‘carrier’ and allocation of responsibility in the instances of multiple parties to the carriage endeavour, were not the impetus for the Hamburg Rules, it was evident to all parties, developing nations and traditional maritime states, that this was a problematic area of carriage and in need of reform. This is evident partially by the fact that during the Working Group sessions, certain aspects proved to be a fairly non-contentious.⁵³² Extending the defences of the carrier to others was one such issue. The discussion centred predominantly around the choice of language, but consensus soon developed in favour of retaining the language used in the Brussels, or Visby, Protocol.⁵³³ On the other hand, the issue of transshipment proved to be contentious and

⁵²⁸ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 73; quoted in Yancy, B. “The Carriage of Goods: Hague, COGSA, Visby and Hamburg” (1983) 57 Tul. L. Rev. 1238, at p. 1250.

⁵²⁹ Chile, Egypt, Ghana, India, U.S.S.R., U.K. and U.S.A. (Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 77).

⁵³⁰ Sweeney, “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 77. The members of the working group for all sessions were: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Tanzania, U.S.S.R., United Kingdom, U.S.A. and Zaire. Spain attended the first few meetings but was then replaced by the Federal Republic of Germany. (*Ibid*). Of the ten largest shipowning nations, Japan, Norway, U.K., U.S.S.R., U.S.A., and Germany, were in the working group, while Liberia, Greece, Panama, and Italy were not. (*Ibid*).

⁵³¹ Sweeney, “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 523.

⁵³² As opposed other issues, such as the basis of carrier liability, or the fault provision, which was discussed often contentiously, five out of the six sessions. See Sweeney, “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 103-117, and see also Sweeney, “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 524.

⁵³³ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)” (1976) 7 JMLC 327, at p. 340-341.

controversial.⁵³⁴ With respect to the topic at hand, multiple parties acting as ocean carriers, certain portions of the debate, which took place predominantly during the fifth session,⁵³⁵ are relevant. Norway had prepared a proposal regulating transshipment that provided for the contracting carrier's liability to cover the entire carriage unless exempted where the goods are in the charge of another, and that where both are liable their liability is joint and several.⁵³⁶ There were objections from Australia on the basis of the exculpatory clauses and that the shipper would not know whom to sue or where the damage occurred.⁵³⁷ An alternative was suggested based on a provision in the Secretariat's report that did not provide for the exemption from liability,⁵³⁸ however it was met with mixed results.⁵³⁹ Subsequent drafts were proposed with the central issue being the wording relating to the ability of the contracting carrier to exempt himself from liability for loss or damage to the goods.⁵⁴⁰ The main concern, particularly on the part of

⁵³⁴ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)" (1976) 7 JMLC 327, at p. 341.

⁵³⁵ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)" (1976) 7 JMLC 327, at p. 341.

⁵³⁶ Norway's proposal provided:

1) *Optional Transshipment or Substitution*

If, according to an option contained in the contract of carriage, the entire carriage or a part thereof has been performed by a person other than the contracting carrier, the contracting carrier shall remain responsible according to the provisions of the convention as if he himself had performed the entire carriage. The person performing the carriage shall be deemed an agent of the contracting carrier.

2) *Transshipment or Substitution according to Agreement*

If, according to agreement, the entire carriage or a designated part thereof shall be performed by a person other than the contracting carrier, the contracting carrier shall remain responsible according to the provisions of the convention as if he himself had performed the entire carriage. The person performing the carriage shall be considered an agent of the contracting carrier. However, the contracting carrier may exempt himself from liability for any loss or damage caused by events occurring while the goods are in the charge of such person.

3) *The Liability of the Person Performing the Carriage or a Part Thereof*

The person performing the carriage of a part thereof shall be responsible for the carriage performed by him according to the same rules as the contracting carrier. In cases where such person and the contracting carrier are both liable, their liability shall be joint and several. The aggregate amounts recoverable from them shall not exceed the limits provided for in the convention.

(Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)" (1976) 7 JMLC 327, at p. 342-343).

⁵³⁷ Sweeney, *ibid*, at p. 343.

⁵³⁸ "If the contract of carriage is performed by more than one carrier, the first carrier shall be responsible to the owner of the goods for performance of the contract of carriage. Any intermediate carrier shall be responsible for performance of that part of the contract of carriage undertaken by him." (*Ibid*).

⁵³⁹ It was supported by Australia, Brazil, Singapore, Tanzania, Nigeria, the United States and Argentina, but Poland, Japan, Belgium and the United Kingdom disapproved of the language in the provision. (*Ibid*).

⁵⁴⁰ See the amended proposal by Norway and the subsequent proposal by the United States, *ibid*, at pp. 343 – 345.

the United States, was avoiding the possibility of overly broad exculpatory clauses.⁵⁴¹ Conversely, several nations led by Norway, and supported by the CMI, expressed concern that carriers if made liable for the entire carriage would not want to issue bills of lading covering the entire transit.⁵⁴² By the end of the working group sessions, the carrier was allowed to exonerate himself from liability subject to several conditions.⁵⁴³ During the sixth session, the working group considered the definition of the carrier. The definition, or definitions, was drafted in the context of having considered the problems of transshipment in the previous session.⁵⁴⁴ The delegates, in the previous session, had approved of the language that rendered the contracting carrier responsible for the entire carriage, and that responsibility was shared between the contracting carrier and the actual carrier, therefore it was necessary to carefully draft definitions.⁵⁴⁵ The following definition of carrier was proposed by France: “The carrier is the person or the enterprise which takes charge of particular goods and undertakes to move them in order to direct them to their ports of destination. It is that person or enterprise which issues in his or its name the title document which serves as a receipt against handing over of the goods.”⁵⁴⁶ Norway and the U.K. objected to the provision on the basis that it was too cumulative and there could not be more than one carrier at the same exact time.⁵⁴⁷ One may beg to differ, that in modern carriage where the duties of a carrier are split, that there may certainly be more than one carrier at a time. Arguably, the rigid single carrier model exemplified in English jurisprudence was also being put forward in the working group negotiations. The United States responded to the U.K. and Norway by saying that “that was the exact nature of the problem of a single definition; one must not force the cargo interest to chase phantom “carriers” when there were in fact many participants in the movement of a

⁵⁴¹ *Ibid*, at p. 344. Although, the U.S. opinion was shared by France, Tanzania, Australia, India, Singapore, Argentina, Brazil and Nigeria.

⁵⁴² “The CMI observer noted that if the carrier were made responsible for the entire transit on a through bill of lading the carriers would stop issuing such bills and would issue a bill of lading only for its own leg of the transit while new bills of lading would have to be issued at each transshipment port, thereby impeding international trade through greater amounts of paperwork.” (*Ibid*, at p. 345, footnote 127).

⁵⁴³ *Ibid*, at pp. 345-346, providing the draft of Article E, which the U.S. had proposed, still containing the carrier’s ability to exonerate himself, but provided only where the actual carrier had been subject to legal or arbitral proceedings by cargo interests.

⁵⁴⁴ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)” (1976) 7 *JMLC* 615, at p. 628.

⁵⁴⁵ *Ibid*, at p. 629.

⁵⁴⁶ *Ibid*.

⁵⁴⁷ *Ibid*.

single shipment. Of course cargo was not entitled to double recovery, but the rights of the cargo interest must be made interchangeable so that the cargo owner was certain of recovery from either an actual carrier or the contracting carrier.”⁵⁴⁸ Another cumulative definition was suggested: “Carrier: includes but is not limited to anyone who enters into a contract of carriage with the shipper and anyone who undertakes to perform the contract of carriage.”⁵⁴⁹ It became apparent fairly soon that the transshipment problems would not be able to be solved through a single article, therefore the following article was proposed and approved: “1. “Carrier” or “contracting carrier” means any person who in his own name enters into a contract of carriage of goods by sea with the shipper. 2. “Actual carrier” means any person to whom the contracting carrier has entrusted the performance of all or part of the carriage of goods.”⁵⁵⁰ The various drafts of the above provisions were altered at the conference sessions, but generally, the aim remained the same. The Diplomatic Conference was held in Hamburg from 6 – 31 March 1978.⁵⁵¹ The entire text of the new convention was voted on at midnight on March 30, 1978,⁵⁵² and was signed on Friday, March 31, 1978,⁵⁵³ and therefore became the Hamburg Rules.⁵⁵⁴

The Hamburg Rules appear at first glance to provide a solution to the complexities that have arisen as a result of Hague Rules definition of ‘carrier’. “The Hamburg Rules aim to address the problems posed by charterers’ bills of lading by expressly distinguishing the contracting carrier from the actual carrier where they are different parties.”⁵⁵⁵ Article 1(1) defines ‘carrier’ as “any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.” Article 1(2) defines “actual carrier” as “any person to whom the performance of the carriage of

⁵⁴⁸ *Ibid.*, at p. 630.

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*

⁵⁵¹ Herber, R. “The Hamburg Rules: Origin and Need for the New Liability System” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 40.

⁵⁵² Of the seventy eight states present, sixty eight voted in favor, none opposed and three abstained.

⁵⁵³ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 *JMLC* 511, at p. 529.

⁵⁵⁴ United Nations Convention on the Carriage of Goods by Sea, Hamburg, March 31, 1978 (Hamburg Rules).

⁵⁵⁵ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 27.

goods, or of part of the carriage, has been entrusted by the carrier, and includes any person to whom such performance has been entrusted.” At first glance the definition is evidently much more encompassing than the previous definition, and it has been noted that “by not referring specifically to ‘the owner or charter’, as in the Hague Rules, it is clear that the term may include a person such as a freight forwarder or an NVOCC (non-vessel operating common carrier).”⁵⁵⁶ It has also been noted that “an independent contractor employed by the actual carrier may become an actual carrier...being another person to whom such performance has been (further) entrusted.”⁵⁵⁷ The definition of actual carrier however will not include servants or agents.⁵⁵⁸ One may question however, what becomes of a party such as the shipowner, where for example the demise charterer has issued the bill of lading and the time charterer has performed the actual carriage. In Hamburg, concepts such as “due diligence” and “seaworthiness” have been eliminated,⁵⁵⁹ and therefore would the shipowner have any obligations that would enable him to be characterized as an actual carrier? Or in such instances would the shipowner fall outside the regime?⁵⁶⁰ One author has interpreted the provisions as follows: “The starting point is the contracting carrier; if he does not actually perform the contract, anyone involved in the contract as a shipowner or ship operator or as an “intermediary” will be included within the term “actual carrier”.”⁵⁶¹ It has been concluded by some however that “[t]he

⁵⁵⁶ Force, R. “A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)” (1996) 70 Tul. L. Rev. 2051; Force, R. “A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 375.

⁵⁵⁷ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 28.

⁵⁵⁸ Ping-fat, S. *ibid*, at p. 27-28, who supports this assertion with the argument “that joint and several liability [between carrier and actual carrier] can only exist as between independent contractors as opposed to master and servant or principal and agent.”

⁵⁵⁹ Compare Article III and IV of the Hague Rules, specifically the obligation of seaworthiness found in III(1)(a), with Article 5 of the Hamburg Rules providing a general basis for liability.

⁵⁶⁰ Arguably, this is a somewhat of an academic and rhetorical question given that in practice if the shipowner had not obligations or involvement with the carriage, it would be impossible to found suit against him as a defendant, evidently leaving the topic of an in rem action aside.

⁵⁶¹ Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391, at p. 393. Ramburg illustrates his statement with the following example: “A shipowner has let the ship to a time charterer, who has entered into consecutive voyage charterers with a shipping line; this shipping line in turn has a standing arrangement with a with a general transport contractor who has accepted the cargo for shipment from a freight forwarder who, under the circumstances, is deemed to have entered into a contract of carriage. In these circumstances the freight forwarder becomes the “carrier” and all the other parties will be “actual carriers”. However, under art. 10(2) of the Convention, no responsibility will devolve on any of these “actual carriers” unless the carriage has been performed by them.”

definitions in the Hamburg Rules have not yet completely eradicated the problem of identifying of identifying the carrier and leaves uncertain what is meant by “performance of the carriage”, but on the whole cargo owners should have an easier task determining from whom to recover losses.”⁵⁶²

Article 15(1) stipulates that “The bill of lading must include, inter alia, the following particulars:...(c) the name and principal place of business of the carrier.” The confusion with regard to contradictory statements on the face and on the reverse of the bill of lading is therefore resolved by ensuring the carrier is identified. Interestingly enough, though, the Rules do not appear to provide a sanction or penalty for the instance where 15(1)(c) is not complied with.⁵⁶³ Although it would appear that the aim of the provision is noble, there is thus uncertainty about its effects in practice. One commentator has argued that the Rules should have included a provision protecting the cargo interests where they are unable to identify the liable party to the contract.⁵⁶⁴ The suggestion is that “where the bill of lading or any other transport document does not clearly show the carrier’s name and his principal place of business, the registered owner of the ship by which the contract of carriage by sea is performed ought to be presumed to be the carrier unless he discloses the carrier’s name and his principal place of business. Again, where the bill...is issued by an agent in a principal carrier’s name without clearly indentifying the principal...the agent should also be presumed to be the carrier unless he reveals the carrier’s name and principal place of business. Even if the carrier’s name and principal place of business are disclosed, the carrier and the registered shipowner or the agent ought to be made jointly and severally liable for all expenses incurred by the claimant due to unnecessary litigation brought against the registered shipowner or the agent, and

⁵⁶² Kindred, H. et al. *The Future of Canadian Carriage of Goods by Water Law* (1982) Dalhousie Ocean Studies, Halifax, at p. 10. ⁵⁶³ Ramburg, J. “The Vanishing Bill of Lading & The Hamburg Rules Carrier” (1979) 27 Am. J. Comp. L. 391, at p. 393, asks what does performance mean, and queries whether when the time charterer simply gives order with regards to employment to the shipowner’s master, is this performance? Ramburg also questions at p. 399, whether the freight forwarder performs, or whether he simply procures the performance of the contract?

⁵⁶³ Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 168 notes that “no penalties are provided for omitting such information and no mention is made of the consequences of giving incorrect information.”

⁵⁶⁴ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 414.

the period for suit should not run until the contracting carrier is identified.”⁵⁶⁵

Nevertheless, the result of the provision is questionable, leading one author to mention that the lack of sanction is unfortunate as there is “no point in adding to the administration expenses of shipowners if no real benefits are likely to accrue to cargo.”⁵⁶⁶

Liability of the carrier and the actual carrier is regulated by article 10. By virtue of 10(1) the contracting carrier is liable for the entire carriage: “Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.” This eliminates the need on the part of the claimant to institute proceedings against all parties involved in order to be certain of having taken suit against the proper defendant. Admittedly a prudent claimant would nevertheless commence proceedings against the actual carrier or carriers as well to guard against insolvency on the part of the contracting carrier or limited resources if the contracting carrier is a single ship company. Nevertheless this article is equitable, as it would be unfair for the plaintiff to bear the burden of sorting out all the parties to the carriage. In the context of a discussion on responsibility of the contracting carrier for others, Karan has argued “[w]hen the carrier contracts to carry goods in his custody, it is not important for cargo interests to find out whose service has been used to fulfill such undertaking. They prefer the contracting carrier to be held liable for breach of the contract by third parties. A rise in the number of people engaged for the performance of carriage increases the possibility of loss or damage to goods. It would not be fair to put all the risks arising therefrom on the aggrieved party’s shoulders.”⁵⁶⁷

⁵⁶⁵ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 414 – 415.

⁵⁶⁶ Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 *JMLC* 151, at p. 168.

⁵⁶⁷ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 86.

While the carrier is responsible for the entire carriage, despite the goods having been in the custody of the actual carrier, the converse is not true. By virtue of article 10(2), “all the provisions of the Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.” The actual carrier, therefore, is only liable for portions of the carriage that he has actually performed. Where the responsibilities of the carrier and the actual carrier overlap, the claimant may recover from either party, as stipulated in article 10(5) “Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several.”⁵⁶⁸ A practical example would be where “a forwarding agent has promised an unrealistic delivery or accepted dangerous goods for carriage, the shipowner as the actual carrier will be deemed to have knowledge of such undertaking and rendered liable towards the cargo-owner accordingly.”⁵⁶⁹ Although, the practical effect of the provision has been questioned; “it is indeed doubtful how the “joint and several” liability could be worked out if their respective responsibilities were not identical.”⁵⁷⁰ It would have been preferable for the Hamburg Rules to hold the carrier and actual carrier jointly and severally liable for the entire carriage, rather than this qualified joint and several liability. The ability of plaintiffs to determine which party had possession of the goods when the damage occurred when there are multiple performing parties, is limited. Regardless, some authors view the problem of multiple defendants as being solved under Hamburg. It was noted that under the Hague regime where there were several actual carriers “the consequent problems that may arise for an owner of damaged cargo can be immense [as the situation] may force the cargo owner to take suit against all the carriers and cargo handlers in numerous far flung jurisdictions if he is to recover compensation. Such multiplicity of litigation is a wasteful expense for all involved, but especially to the cargo owner. The Hamburg Rules offer simple, if sweeping remedy [in Article 10].”⁵⁷¹ One author has commented with regard to multiple carriers that where “Hague ignores this

⁵⁶⁸ Despite multiple parties, by virtue of article 10(6) the claimant will not be able to exceed the limits of liability: “The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention.”

⁵⁶⁹ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 27.

⁵⁷⁰ *Ibid.*, at p. 29.

⁵⁷¹ Kindred, H. et al. *The Future of Canadian Carriage of Goods by Water Law* (1982) Dalhousie Ocean Studies, Halifax, at p. 59-60.

important area of modern ocean transport which is consequently left to divergent local case-law; Hamburg addresses these problems and provides uniform international rules.”⁵⁷²

Article 10 has been characterized as having the effect of eliminating the benefit of the demise clause.⁵⁷³ This has been welcomed: “The use of a demise clause in a bill of lading is rendered ineffective introducing a much needed degree of international uniformity following the uneven approach adopted by national courts to demise clauses under the Hague and Hague/Visby Rules.”⁵⁷⁴ The regime in place in article 10 essentially eliminates confusion surrounding the notion of ‘who is the carrier’. “The claimant therefore does not now need to unravel the complicated contractual relations between the charterers and vessel owner before taking suit.”⁵⁷⁵ It has been noted however that Article 11, governing through carriage, “would take away that which Article 10 gives, by seemingly allowing the carrier to avoid liability ‘while the goods are in the charge of the actual carrier’, provided the actual carrier was named in the contract.”⁵⁷⁶ Certain commentators have therefore been critical of the allowances in Article 11 with the reasoning that “[c]onsidering present day practice, particularly regarding containers in which minibridge and through services are used, disputes would be certain to arise, with significant injustices taking place when the carriers who would be responsible could hide behind an insolvent carrier.”⁵⁷⁷ Another author has termed the article a “porte de sortie”

⁵⁷² Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 88.

⁵⁷³ Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 284. See also Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 843, noting that this article would solve the problem of the demise and the identity of the carrier clauses.

⁵⁷⁴ Waldron, A. “The Hamburg Rules – A Boondoggle for Lawyers” (1991) Journal of Business Law 305, at p. 307.

⁵⁷⁵ Tetley, W. “The Hamburg Rules – A Commentary” [1979] LMCLQ 1, at p. 6.

⁵⁷⁶ Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 284. Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 29, states “article 11 virtually exempts the contracting carrier from any liability...”

⁵⁷⁷ Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 284.

or escape hatch, by providing a dangerous exception to article 10.⁵⁷⁸ The UNCTAD secretariat in a 1976 report for this reason recommended that article 11 either be deleted or be clarified,⁵⁷⁹ a call echoed by certain authors.⁵⁸⁰ Interestingly enough, other commentary has suggested expanding the carrier's powers of shifting responsibility to the actual carrier in Article 11(1), by allowing the carrier to inform the consignee at a later time of the name and place of business of the actual carrier.⁵⁸¹ This extension would arguably render Article 10(1) ineffective, as it stands to reason that no carrier would decide to remain contractually liable for the entire carriage if at any time they transfer the goods to a third party they could simply avoid liability by calling, faxing or emailing the consignee the third party's information. Nevertheless, one author argues that the issue of demise clauses is far from settled and suggests "that demise clauses will continue to be inserted into bills of lading (signed by the charterer or his agent as contracting carrier), and enforced, with a view to holding the shipowner or demise charterer (as actual carrier) solely responsible for the carriage."⁵⁸²

Article 7 (1) addresses the problem that article IV *bis* 1 of the Visby Protocol attempted to solve. The article provides: "The defences and limits of liability provided for in the Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise."⁵⁸³ While article 7(2) addresses himalaya clauses in a similar fashion to article IV *bis* 2, with a slight difference

⁵⁷⁸ Tetley, W. "The Hamburg Rules – A Commentary" [1979] LMCLQ 1, at p. 10, referring to article 10 as "an essential corner stone of the Hamburg Rules" and lamenting the fact that the article may provide no protection to cargo interests due to the exception found in article 11.

⁵⁷⁹ Tetley, *ibid.*

⁵⁸⁰ Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 31, stating "in light of its repugnance to the provision of article 10, it is submitted that article 11 should be deleted in favour of cargo interests."

⁵⁸¹ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 414, states: "Since the carrier might be unaware of the actual carrier's name in the beginning, and wishing to escape from liability for an occurrence taking place while the goods are in the actual carrier's charge, he ought to be allowed in Article 11(1) of the Hamburg Rules to inform the consignee of the actual carrier's name and principle place of business later as soon as the goods are taken over by the actual carrier. Unless the carrier provides such information, he should remain liable for the loss."

⁵⁸² Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 28.

⁵⁸³ Article 7(1).

in wording. The Visby Protocol specifically excluded independent contractors, while the Hamburg Rules stipulate “servant or agent” but do not specifically exclude independent contractors. Arguably, this may prove to be an inconsequential difference given that one would presumably then interpret the terms ‘agent’ and ‘servant’ to not include independent contractors.

The Hamburg Rules have been far from successful.⁵⁸⁴ The Rules came into force in November of 1992, fourteen years after it was agreed upon, once having reached the requisite number of twenty ratifications. At the time Hamburg came into force, fifteen of the states that had ratified it were from the Continent of Africa,⁵⁸⁵ making sixteen with Cameroon joining shortly thereafter, and with a fair proportion of them being land locked.⁵⁸⁶ Subsequent ratifications have not improved the situation or the desirability of the Hague Rules.⁵⁸⁷ One commentator noted with regard to the countries willing to accept the Hamburg Rules, “[they are] hardly an imposing group of trading nations and not a list to get too excited about because they do not include the world’s major seafaring and industrial nations. In fact these nations control no more than 2% of the world shipping tonnage and most probably even less of the world’s trade.”⁵⁸⁸ In 1994, a conference entitled “The Hamburg Rules: A Choice for the EEC?” concluded with one observer remarking that “the general feeling of the speakers at this Symposium [was that]

⁵⁸⁴ Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 151, remarked: “Like a stranger in a remote village, the Hamburg Rules have undergone a long period of isolation and suspicion.”

⁵⁸⁵ Botswana, Burkina Faso, Egypt, Guinea, Kenya, Lesotho, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania. See also Delwaide, L. “The Hamburg Rules: A Choice for the EEC? Conclusion” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 215.

⁵⁸⁶ Such as Botswana, Lesoto, Uganda, Zambia, Burkina Faso, Burundi, Malawi.

⁵⁸⁷ According to UNCITRAL, as of September 30, 2005, the 30 parties to the Hamburg Rules are: Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Malawi, Morocco, Nigeria, Romania, Saint Vincent and the Grenadines, Senegal, Syrian Arab Republic, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania, Zambia. Also accession has been given by Paraguay as of 19 July 2005, and it will enter force on 1 August 2006. Available at:

www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html.

⁵⁸⁸ Kisteman, K. “The Hamburg Rules: A Marine Underwriter’s Viewpoint” Paper presented at the Seminar on The Hamburg Rules (Gold Reef City, South Africa, 20 September 1991), at p. 1.

the Hamburg Rules are not acceptable and not good enough as such.”⁵⁸⁹ The objections to the Hamburg Rules and the obstacles faced with regard to their implementation did not involve their attempt to solve the problem of multiple parties involved in the carriage of goods. Rather, the downfall of the Hamburg Rules, which were extensively criticized, resulted more from issues such as its alteration of the liability structure,⁵⁹⁰ concerns about increased litigation⁵⁹¹ and the increased costs of insurance and freight.⁵⁹² Nevertheless,

⁵⁸⁹ also Delwaide, L. “The Hamburg Rules: A Choice for the EEC? Conclusion” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 215.

⁵⁹⁰ The liability structure was viewed by many commentators as a one-sided alteration in favour of cargo interests. Opponents of Hamburg have argued that the supporters of the new liability structure fail to recognize the valid reaction from shipowners in refusing to support Hamburg: “Why should we? What’s in it for us?” (Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 45). The alteration of the liability structure was argued to have a “notable impact on the carrier’s position and finds no compensation in an introduction of new exemptions or defences.” (*Ibid.*) Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 191 “In contrast to the carrier’s enhanced cargo liabilities, his possibility of recovery from sub-contractors where their negligence has brought about those liabilities, remains restricted...It looks rather inconsistent and unbalanced...and indeed unjust.”

⁵⁹¹ Goldie, C. “Effect of the Hamburg Rules on Shipowners’ Liability Insurance” (1993) 24 JMLC 111, at p. 115, notes “the old certainties of the Hague Rules, certainties of interpretation and meaning which have been produced by decades of laborious litigation, will disappear as the commercial world has to start again and try to make sense of the Hamburg Rules.” Tetley, W. “Article 9 to 13 of the Hamburg Rules” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 207, noted “the drafting is also vague and the meaning of many articles will not be known without litigation so that the delicate balance between carriers and shippers has been replaced by a new and confusing relationship.” Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 95, notes that with respect to the implications of the Hamburg Rules, “if the carrier were to be liable in respect of loss or damage to the goods carried arising out of faults in the navigation of the vessel, litigation would increase enormously without any real advantage for anybody.”

⁵⁹² Several opponents of the Hamburg Rules have argued that with increased liability for the carrier under the Hamburg Rules the cost of P&I insurance will increase, and therefore the freight rates will increase correspondingly. See Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 11; Kimball, J. “Shipowner’s Liability and the Proposed Revision of the Hague Rules” (1975) 7 JMLC 217, at p. 250; Williams, B.K. “The Consequences of the Hamburg Rules on Insurance” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 259. See also Honour, J.P. “The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London. Honour, the General Manager for the West of England Ship Owners Mutual Insurance Association, argued at pp. 240 and 249 that alterations in the law such as the Hamburg Rules that increase the liability of the shipowner, “are bound to increase the cost of insuring the risk, and such increase may be fairly substantial...One is led to the conclusion that the new Convention will, to what extent it is impossible to say, increase the cost of goods to the consumer arising from the increase in freights which will be inevitable as a result of the increase in the cost of P&I Insurance to the shipowner.” For a comprehensive

the fact that so few decisions exist under the Hamburg Rules,⁵⁹³ is unfortunate from the perspective of multi-carrier liability. The fact that the scheme for carriers and actual carriers is in practice untested almost three decades after its creation, has not allowed us to evaluate whether it had in essence solved the problems that arose under the Hague regime.

treatment of the various arguments put forward with regard to the potential increase in insurance, see also Sturley, M. "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 JMLC 119. Sturley, at p. 148-149, argues that although advocates on both sides of the Hamburg debates have 'predicted' what the effect of the change in liability scheme will be, there is no empirical evidence to support such assertions and concludes that without such empirical evidence, "making an argument about what will happen in real-world transactions if certain changes take place in the legal rules governing those transactions" is a futile endeavor. Nevertheless, the insurance arguments made, whether rooted in evidence or not, contributed to the downfall of the Hamburg Rules.

⁵⁹³ Karan, in this text of 2004, notes really only two decisions of significance, in the 14 years after Hamburg came into force. (Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, a p. 401).

11. NATIONAL SOLUTIONS: LEGISLATION

By the 1980's and 1990's, and particularly after it was evident that the Hamburg Rules were not a success, many nations found themselves with wholly outdated carriage regimes and began to turn to domestic solutions. Much of the resulting domestic legislation proved to be inspired by both the Hague Visby and the Hamburg Rules. In particular however, many states took the opportunity to address the issue of 'the carrier' that had plagued jurists and commentators for decades.

11.1. Maritime Code of the People's Republic of China

Over the past 30 years, China has rapidly become a heavy player in the shipping industry. By 1990, well over ninety percent of China's import and export goods were transported by sea,⁵⁹⁴ and her fleet was rapidly expanding.⁵⁹⁵ China, however, is not a party to any of the international conventions,⁵⁹⁶ nor did it have a domestic maritime law and therefore the law as applied to maritime matters prior to the Maritime Code were simply the principles of China's civil law.⁵⁹⁷ The legislators approved the Maritime Code on November 7th, 1992, and on July 1st, 2003, the Chinese Maritime Code came into force.⁵⁹⁸ The Maritime Code "appears to have been the first major effort to draw from both the Hague-Visby Rules and the Hamburg Rules."⁵⁹⁹

China drew heavily from the Hamburg Rules when drafting the articles concerning the parties involved in carriage. Article 42(1) of the Maritime Code defines "carrier" and is drawn verbatim from the Hamburg Rules.⁶⁰⁰ Article 42(2) defining

⁵⁹⁴ Zhang, L. "Shipping Law and Practice in China" (1990) 14 Tul. Mar. L.J. 209, at p. 209.

⁵⁹⁵ In 1974, China's fleet was ranked twenty-third in size in the world, but by the end of 1984, China ranked ninth (Zhang, *ibid*, at p. 210.).

⁵⁹⁶ Chen, X. "Chinese Law on Carriage of Goods by Sea under Bills of Lading" (1999) 8 Currents Int'l Trade L. J. 89, at p. 90; Li, L. "The Maritime Code of the People's Republic of China" [1993] LMLCQ 204, at p. 205-206, noting that China has never ratified the main shipping treaties, including the Hague Rules and Hague-Visby Rules.

⁵⁹⁷ Li, L. "The Maritime Code of the People's Republic of China", *supra* note , at p. 204.

⁵⁹⁸ *Ibid*, at p. 204-205.

⁵⁹⁹ Sturley, M. "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 JMLC 553, at p. 561.

⁶⁰⁰ Maritime Code of the People's Republic of China, Article 42(1): "Carrier" means the person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper." There is a

“actual carrier” is almost identical to Hamburg in language, although it specifies that it “means the person to whom the performance of carriage of goods, or part thereof, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted *under a sub-contract*.”[Emphasis added]. One may presume that the use of the word “includes” would mean that actual carrier includes those entrusted with the goods under a sub-contract or by assignment from the carrier, but it not limited to such a situation. Given the difficulties faced when interpreting “includes” under the Hague Rules definition of carrier, that presumption however may be dangerous. The effect may possibly be therefore that where the time charter is found to be the carrier under the Maritime Code, the shipowner would not be the actual carrier as the goods are not entrusted to him under a sub-contract, and thus we find ourselves again in the situation where the shipowner is exposed. Although there appears to be no commentary on this textual difference, in practice there does not appear to be a problem considering the shipowner to be an actual carrier. In a 2003 judgment, a Chinese court determined that the charterer of the vessel was the contractual carrier, while the ship owner and the ship operator were actual carriers.⁶⁰¹ As in the Hamburg Rules article 10(1), the Maritime Code article 60 stipulates that the carrier shall be responsible for the entire carriage.⁶⁰² Similar to the Hamburg Rules as well, the Chinese Maritime Code in Art. 73(2),

slight difference between the language of the Chinese provision and the Hamburg Rules provision in that in the Maritime Code stipulates “the person” where as the Rules provide “any person”. Arguably, the textual difference is inconsequential and would have no effect in practice.

⁶⁰¹ *People’s Insurance Co. of China Property v. Shanghai Pujiang Transport* (2003) Summarized in Li, K. “Chinese Maritime Law 2003-2004” [2005] LMCLQ 383, at p. 390. In this instance the court held that all three defendants, the charterer, the shipowner, and ship operator were jointly liable for damage to the cargo.

⁶⁰² Although article 60 provides that where there is an express term in the contract of carriage, the carrier may be relieved of liability with respect to damage done by the actual carrier, if the said carrier was named in the contract. Maritime Code article 60 reads:

“Where the performance of the carriage or part thereof has been entrusted to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Chapter. The carrier shall be responsible, in relation to the carriage performed by the actual carrier, for the act or omission of the actual carrier and of his servant or agent acting within the scope of his employment or agency.

Notwithstanding the provisions of the preceding paragraph, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named actual carrier other than the carrier, the contract may nevertheless provide that the carrier shall not be liable for loss, damage or delay in delivery arising from an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage.”

stipulates that the carrier must be identified in the contract of carriage, thus ensuring that the claimant has a concrete answer with regard to the enquiry as to who is the carrier.

With regard to the joint and several liability of the parties involved in carriage, article 63 of the Maritime Code provides: “Where both the carrier and the actual carrier are liable for compensation, they shall jointly and severally be liable within the scope of such liability.” It has been noted therefore the where a voyage or time charter is involved, “[g]enerally speaking, both the shipowner and the charterer shall be liable under the bill of lading. In other words, the shipper may sue either the shipowner or charterer and both are liable jointly and severally.”⁶⁰³ This is exemplified by *A Holland Insurance v. An English Liner Co. & China Chartering Agency* where suit was taken against both the charterer and the vessel owner.⁶⁰⁴ Although the wording of article 63, ‘where both the carrier and the actual carrier’, implies two parties only, this provision has been given a much wider application in practice. In *People’s Insurance Co. v. Shanghai Pujiang Transport*, the court found two actual carriers and one contractual carrier and then proceeded to hold all three defendants jointly liable for the damage to the cargo.⁶⁰⁵

Article 58 of the Maritime Code addresses the problem of suit taken in tort, with a similar provision to Article IV bis 1 of Hague-Visby, but with an important distinction: “The defence and limitation of liability provided for in this Chapter shall apply to any legal action brought against the carrier with regard to the loss of or damage to or delay in delivery of the goods covered by the contract of carriage of goods by sea, whether the claimant is a party to the contract or whether the action is founded in contract or tort.”⁶⁰⁶ Essentially, the Maritime Code stipulates that the claimant need not be a party to the

⁶⁰³ Chen, X. “Chinese Law on Carriage of Goods by Sea under Bills of Lading” (1999) 8 Currents Int’l Trade L. J. 89, at p. 94.

⁶⁰⁴ *Holland Insurance v. An English Liner Co. & China Chartering Agency* (1995) Summarized in Chen, X. “Chinese Law on Carriage of Goods by Sea under Bills of Lading” (1999) 8 Currents Int’l Trade L. J. 89, at p. 94.

⁶⁰⁵ *People’s Insurance Co. of China Property v. Shanghai Pujiang Transport* (2003) Summarized in Li, K. “Chinese Maritime Law 2003-2004” [2005] LMCLQ 383, at p. 390.

⁶⁰⁶ Article 58, second paragraph, stipulates “The provisions of the preceding paragraph shall apply if the action referred to in the preceding paragraph is brought against the carrier’s servant or agent, and the carrier’s servant or agent proves that his act was within the scope of his employment or agency.” Cargo claimants may therefore not circumvent the rules by action in tort against servants or agents of the carrier.

contract, thus avoiding the difficulties faced in English law as a result of *The Captain Gregos*.⁶⁰⁷ The fact that article 58 does not address whether the carrier must be a party to the contract or not, is not problematic given the existence in the Maritime Code of the notion of an actual carrier, not a party to the bill of lading contract. Article 61 specifically provides that “the provisions with respect to responsibility of the carrier contained in this Chapter shall be applicable to the actual carrier,”⁶⁰⁸ which include the benefit of the defences in the event of an action in tort. This is found to be the case in practice when Chinese courts apply the Maritime Code.⁶⁰⁹

Although the available translated and summarized Chinese jurisprudence is not terribly extensive, it would appear from what is available that the difficulties faced with respect to parties not viewed to be ‘the carrier’ have been overcome. As well, paired with the fact that the ability of claimants to successfully pursue actions outside the carriage regime, has been negated, one may surmise that the Chinese Maritime Code exemplifies a successful solution with respect to the problem of the legal characterization of parties involved in the carriage of goods.

11.2. Korean Commercial Code

The Korean Commercial Code, enacted in 1962, contained a section on Korean Maritime Law, which was recently revised and came into force on January 1, 1993.⁶¹⁰ Similar to China, trade and maritime commerce in Korea has expanded rapidly in the past several decades, with international trade having “increased more than 1000 fold, from about \$30 million in 1962 to about \$115 billion in 1989, and the tonnage of Korean-owned vessel has increased more than 80 times in this period from about 100,000 G/T in 1962 to about 8.3 million G/T in 1989.”⁶¹¹ With these developments, a substantial

⁶⁰⁷ See section 8.5 *supra* for further discussion.

⁶⁰⁸ Article 61, second paragraph, stipulates “Where an action is brought against the servant or agent of the actual carrier, the provisions contained in paragraph 2 of Article 58 and paragraph 2 of Article 59 of this Code shall apply.”

⁶⁰⁹ See *People’s Insurance Co. of China Property v. Shanghai Pujiang Transport* (2003) Summarized in Li, K. “Chinese Maritime Law 2003-2004” [2005] LMCLQ 383, at p. 390.

⁶¹⁰ Yu, R. & Peck, J. “The Revised Maritime Section of the Korean Commercial Code” [1993] LMCLQ 403, at p. 403.

⁶¹¹ *Ibid.*

revision and modernization of the maritime section of the Commercial Code was undertaken to bring the Code into line with modern shipping practices. In particular, with regard to difficulties concerning the carrier or carriers, Korean law had in the past sanctioned tort actions against the carrier. “[T]he Supreme Court precedents seem to stand for the proposition that, unless a limitation clause appears in the bill of lading, liability may not be limited in a tort case.”⁶¹² The revised Commercial Code rectifies the situation by ensuring that limitations are applicable in tort-based actions, with Article 789-3(1) providing: “The provisions regarding the liability of the carrier in this chapter shall be applicable also to the carrier’s liability for damages arising out of the carrier’s tortious act.”⁶¹³ Article 746 provides: “Shipowner may limit its liability...regardless of the basis upon which the claim is brought.”⁶¹⁴ It is notable that the Korean provisions are in no way as extensive as the Chinese provisions, and although the problem of circumventing the limits in the Rules through tort actions has been addressed, it is regrettable that more was not done given the models that were available when Korean legislators decided to revise the code.

11.3. Nordic Maritime Codes

Several nations following the failure of the Hamburg Rules opted to modernize their carriage law by drawing from the preferred elements of Hamburg and while maintaining many of the general elements found in Hague Visby Rules. The Nordic countries are the prime example as they have incorporated large portions of Hamburg into their maritime codes, but they have retained a few favoured elements of the Hague-Visby Rules.⁶¹⁵ The Nordic countries are considered to be Denmark, Finland, Iceland,

⁶¹² *Ibid.*, at p. 410.

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.* This article however, is with respect to tonnage limitation, therefore a carrier seeking to limit his liability to a specific package limit or assert a time bar in cases of cargo damage would utilize article 789 – 3(1).

⁶¹⁵ For example, the Nordic Codes adopted the format of the Hamburg Rules liability scheme with presumed fault, yet retained the two enumerated defences of Hague-Visby, which are fire and nautical fault which can be found in the Swedish and the Finnish Maritime Codes, at Chapter 13, Section 26.1, whereas in the Norwegian and Danish Codes it is found at section 276.1. A translation of The Finnish Maritime Code, Chapter 13: Carriage of Goods by Sea, can be found as Appendix 1 in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 421. Note that although the codes are in substance the same, the numbering system differs. See Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of

Norway and Sweden, however in the context of the Maritime Codes, Iceland is not included.⁶¹⁶ The Nordic countries have a history of cooperation with respect to legislation,⁶¹⁷ and on October 1st, 1994, the Nordic countries respectively adopted four maritime codes.⁶¹⁸ The codes can collectively be referred to as the Nordic Maritime Code, given that in substance the codes are identical.⁶¹⁹

With respect to the identity of carrier issue, the Nordic Maritime Code addresses the issue in a similar fashion to the Hamburg Rules. Although, it should be noted the notion of a contracting carrier and an actual carrier was pre-existing in Nordic law. “As a matter of fact, the Nordic countries had introduced similar principles on a national basis already in previous reform in the early 1970’s together with the implementation of the [Hague-Visby Rules]. The joint and several liability of the carrier and actual carrier as introduced in the Hamburg Rules in 1978 was nothing other than repetition of existing Nordic law.”⁶²⁰ The liability of the contracting carrier and actual carrier had therefore been previously addressed in s. 123 of the 1893 Maritime Code, in a fashion similar to Hamburg.⁶²¹ Nevertheless, the current regime with regard to the identity of the carrier in the Nordic Maritime Code is heavily modelled on the Hamburg Regime.

Maritime and Commercial Law, Abo, at pp. 23-24; Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, in Preface.

⁶¹⁶ Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 15.

⁶¹⁷ Honka, *ibid*, who notes that Nordic cooperation in legislation exists for many reasons including historical, cultural and political similarities, for example, the languages spoken in Denmark, Norway and Sweden, all have a common ground. This common ground results in a long history of cooperation, for example “a Maritime Code was introduced in Sweden-Finland in 1667 and it contained stipulations, among others on the bill of lading, which are easily readable and understandable to a large extent even at the end of the 20th century.” (*Ibid*, at p. 16).

⁶¹⁸ The four Maritime Codes, were presented to their respective governments in 1993-1994, and all four entered into force on October 1, 1994. (Honka, *ibid*, at p. 17).

⁶¹⁹ They differ slightly in structure however. “The structure of the Finnish and Swedish versions of the Code are identical, with the provisions divided into chapters and sections. The carriage of goods by sea is treated in Chapter 13, ss. 1 – 61. The Danish and Norwegian versions of the Code are identical, with the provisions divided into sections. The carriage of goods by sea is treated at ss. 251-311 inclusive.” (Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 845, footnote 193).

⁶²⁰ Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 22. Honka notes that with respect to the carrier and actual carrier approach as found in the Hamburg Rules, it was in fact the Nordic countries that had exercised influence in order to procure that formulation. (*Ibid*, at pp. 22-23).

⁶²¹ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 263.

The Nordic Maritime Code stipulates that “1) carrier means any person who concludes a contract with a shipper for the carriage of goods by sea, 2) actual carrier means any person who has been entrusted by the carrier to perform the carriage or part of it.”⁶²² The carrier, thus the contracting carrier, must be identified on the bill of lading, including providing his principal place of business.⁶²³ The Nordic Maritime Code then proceeds to regulate the responsibilities and liabilities with respect to carriage as between the carriers. The contracting carrier’s liability does not cease despite the fact that the goods may be in control of the actual carrier, therefore the contractual carrier remains liable for the entire carriage.⁶²⁴ The converse is not true however. “The rules contained in s. 285 and 286 (13:35 and 13:36) cause the contracting carrier X to become liable for the actual carrier Y, but not vice versa. For example, cargo is damaged while in the custody of contracting carrier X and is further damaged while being reloaded to Y’s ship. In this situation, X will be solely liable for the initial damage, while both X and Y will be liable for the latter incident.”⁶²⁵ Where both carriers are liable, their liability will be joint and several but only such that the combined liability does not exceed the limitation amount as proscribed in the Nordic Maritime Code.⁶²⁶ This scheme does solve the previous

⁶²² Quoted from Chapter 13, section 1 of the Finnish Maritime Code. Translation of The Finnish Maritime Code, Chapter 13: Carriage of Goods by Sea, found in Appendix 1 in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 421. Although the Codes are in substance the same, translations and perhaps wording does differ slightly. The Norwegian Maritime Code in Section 251 provides: “Carrier, the person who enters into a contract with a sender for the carriage of general cargo by sea; sub-carrier, the person who, pursuant to an assignment by the carrier, performs the carriage of part of it.” The English translation of the Norwegian Maritime Code is available online at <http://folk.uio.no/erikro/WWW/NMC.pdf>. The Norwegian Maritime Code can also be accessed online through www.lovdato.no/info/lawdata.html. The above article defining carrier/actual carrier and carrier/sub-carrier, would be found in Chapter 13, section 1 of the Swedish Maritime Code, and in section 251 of the Danish Maritime Code.

⁶²³ Chapter 13, section 46 of the Finnish and Swedish Maritime Code. Section 296 of the Norwegian Maritime Code: “A bill of lading shall contain statements on: ...3) the name and principal place of business of the carrier.”

⁶²⁴ Chapter 13, section 35 of the Finnish and Swedish Maritime Code. Section 285 of the Norwegian Maritime Code: “Liability of the Carrier for the Sub-Carrier: If the Carriage performed wholly or in part by a sub-carrier, the carrier remains liable according to the provisions of this Chapter as if the carrier had performed the entire carriage him- or herself.”

⁶²⁵ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 338. Chapter 13, section 36 of the Finnish and Swedish Maritime Code. Section 286 of the Norwegian Maritime Code provides: “A sub-carrier is liable for such part of the carriage as he or she performs, pursuant to the same rules as the carrier.”

⁶²⁶ The carrier and actual carrier are jointly and severally liable by virtue of Ch. 13, section 37, paragraph 1, while the limitation amounts can be found in Ch.13, section 30 of the Finnish and Swedish Maritime Code. Section 287 of the Norwegian Maritime Code provides: “If both the carrier and sub-carrier are liable, they shall be jointly and severally liable.” Section 280 provides the limits of liability: “The carrier’s liability

difficulties in Nordic law determining which party is bound by the bill of lading, and thus who is the carrier. In 1903 the Norwegian Supreme Court determined that the contract of carriage, the bill of lading, bound the actual carrier.⁶²⁷ The Norwegian Supreme Court in 1955⁶²⁸ and the Swedish Supreme Court in 1960⁶²⁹ addressed the question of “who is bound by a bill of lading signed by the performing ship’s master?”⁶³⁰ Both Supreme Courts determined that that the master’s employee, the shipowner, is the only one bound by the bill of lading,⁶³¹ which is a difficult principle in practice given generally the existence of a charterer or a liner service that the cargo claimant believes to be his contracting party. In contrast to the Norwegian and Swedish courts, the Denmark Commercial Court in the 1960s was more open to allowing the claimant to pursue the charterer or the liner.⁶³² It has been noted that both the Norwegian Supreme Court and the Swedish Supreme Court decisions would be decided differently under the Nordic Maritime Code.⁶³³ Under the current regime, the employer of the master is not necessarily the party bound by the bill of lading, as the Nordic Maritime Code provides that a bill of lading signed by master is deemed to be signed on behalf of the carrier, meaning the contracting carrier.⁶³⁴ In many instances the contractual carrier may very well be a time or a voyage charterer who issues the bill of lading.⁶³⁵ Where parties, such as shipowners or demise charterers are not the contractual carriers, they would likely be

shall not exceed 667 SDR for each package or other unit of the goods or 2 SDR for each kilogram of the gross weight of the goods lost, damaged or delayed. The limit of liability which results in the highest liability shall be applied.”

⁶²⁷ ND 1903.331 NSC (Gerdt Meyer case) summarized in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 338.

⁶²⁸ ND 1955.81 NSC LYSAKER, summarized in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 338.

⁶²⁹ ND 1960.349 SSC LULU, summarized in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 338.

⁶³⁰ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 337.

⁶³¹ *Ibid.*

⁶³² So-og Handelsrettidende 1965.246 DCC (The Dominion Line), and ND 1966.170 DCC Ara, as cited in Falkanger, *ibid.*, at p. 337.

⁶³³ Honka, H. “Who is the Carrier? Old Question, New Solutions” in 8th *Aaxel Axson Johnson Colloquium on Maritime Law* (1998) Swedish Maritime Law Association, Stockholm, at p. 78, as referenced in Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 846, footnote 200.

⁶³⁴ Ch. 13, section 45 of the Finnish and Swedish Maritime Code. Section 295 of the Norwegian Maritime Code entitled “Master’s Bill of Lading” provides: “A bill of lading signed by the master of the ship carrying the goods shall be deemed to have been signed on behalf of the carrier.” See also Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 846, and Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 337.

⁶³⁵ Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 846.

characterized as actual carriers, given that some involvement must exist in order to found suit. Carriers and actual carriers, and their employees and agents, are protected under the Nordic Maritime Code even if the action is brought in tort and are thus able to benefit from all the limitations and protections available to the carrier under contract.⁶³⁶

The Nordic Maritime Code, therefore has provided a workable solution to the who is the carrier, or who are the carriers, dilemma. The only drawback perhaps, is the fact that the liability of the actual carrier is only engaged where it can be demonstrated that the damage occurred while in his care. This may not be a large hurdle in practice where there is the straight forward contracting carrier and then a sub-charterer performs the entire carriage leg, however, where there is a series of sea legs and transshipments, and therefore multiple carriers, this may prove to be onerous for the cargo claimant.

11.4. Civil Code of the Netherlands – Book 8

In the late eighties and early nineties, the Netherlands was in the process of re-codifying their civil law, much of which dated primarily from Napoleonic times.⁶³⁷ Book 8, entitled “Means of Traffic and Transport”, entered into force on April 1, 1991, as part of the Civil Code of the Netherlands, or *Burgerlijk Wetboek*.⁶³⁸ The new Code deals with the issue of who is the carrier in a fairly effective and novel manner. Arguably, the issues that arise as a result of the narrow and restrictive interpretation given to the Hague Rules ‘carrier’, have been resolved in the Civil Code.

⁶³⁶ Ch. 13, section 32 and section 36 of the Finnish and Swedish Maritime Code. Section 282 of the Norwegian Maritime Code entitled “Liability not Based on the Contract of Carriage” provides: “The provisions relating to the carrier’s defences and the limits of the carrier’s liability shall apply even if the claim against the carrier is not based on the contract of carriage.

The provisions relating to the carrier’s defences and the limits of the carrier’s liability apply correspondingly if the claim is brought against anyone for whom the carrier is responsible, and that person shows that he or she acted in the performance of his or her duties in the service or to fulfill the assignment. The total liability which can be imposed on the carrier and the persons for whom the carrier is responsible shall not exceed that limits of liability according to Section 280.”

Section 286 of the Norwegian Maritime Code provides: “A sub-carrier is liable for such part of the carriage as he or she performs, pursuant to the same rules as the carrier. The provisions of Sections 282 and 283 shall apply correspondingly.”

⁶³⁷ Japikse, R. “Current Developments Concerning the Form of Bills of Lading – The Netherlands” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 229.

⁶³⁸ Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 843, footnote 189.

It has been noted that with regard to the issues of who is the carrier, demise and identity of carrier clauses, the complex structure of carriage arrangements, and bills of lading without headings and indistinguishable signatures, “[t]he Dutch legislature has now done away with such kinds of much criticized practices (or rather the consequences thereof) in a fairly drastic manner.”⁶³⁹ As well, one of the most notable and problematic issues addressed is the notion of the single carrier. The system devised for multiple carrier liability is found in Article 461:

“(1) Without prejudice to the remaining paragraphs of this article, the person who signed the bill of lading, the person for whom another person signed, as well as the person whose form was used for the bill of lading are deemed to be carriers under the bill of lading.

(2) If the captain signed the bill of lading or another person for him, that time- or voyage-charterer who is the carrier in the last contract in the chain of contracts of operation referred to in Section 1 Title 5, is deemed to be the carrier under the bill of lading in addition to the persons mentioned in the first paragraph. If the vessel has been leased under a bare-boat charter, the last bare-boat charterer too is deemed to be the carrier under the bill of lading, in addition to this possible time- or voyage-charterer. If the vessel has not been leased under a bare-boat charter, the shipowner too is deemed to be the carrier under the bill of lading, in addition to this possible time- or voyage-charterer.”⁶⁴⁰

The Article encompasses and addresses all entities including those who have signed the bill of lading, on whose behalf it was signed, whose form has been used, the last bare-boat charterer, the shipowner, the time and voyage charterer. It would appear therefore that the Dutch notion of “carriers under the bill of lading” ensures that the parties to the carriage endeavor fall under the legal carriage regime. There is in the article

⁶³⁹ Japikse, R. “Current Developments Concerning the Form of Bills of Lading – The Netherlands” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 232.

⁶⁴⁰ The English version of the text of the provision may be found in Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 *JMLC* 379, at p. 403, footnote 69; Tetley, W. “The Demise of the Demise Clause?” (1999) 44 *McGill L.J.* 807, at p. 844; or in Haanappel P. & Mackaay, E. *New Netherlands Civil Code, Book 8: Means of Traffic and Transport* (1995) Kluwer, the Hague.

a distinction between charterers on the basis of the notion of “chain of contracts”. This has been explained as “the succession of contracts with regard to the operation of a vessel and the carriage of goods by it; the chain ranges from the owner up to and including the shipper of the goods. Schematically, and in a more extensive form, one could have a chain running like: owner → (bareboat charterer) → bareboat charterer → (time charterer) → time charterer → (voyage charterer) → voyage charterer → (bill of lading or other contract of carriage) → shipper.”⁶⁴¹ In this example, the charterer classifying as a carrier under the last contract of carriage in the chain of contracts would be the last voyage charterer.⁶⁴² Not only the voyage charter would be a carrier, as it would also include the party on whose form the bill of lading was, and on whose behalf it was signed, as well in addition to those parties, the last bareboat charterer would also be a carrier. One author likens this solution to the Hamburg Rules notion of “carrier” and “actual carrier”,⁶⁴³ although one may argue that the Dutch solution is far more comprehensive. The bareboat charterer, for example, may be found to be a carrier, despite the fact that bills of lading were issued on the first time charterer’s form indicating his name and place of business, signed by the master under the authority of the first charterer for the second time charterer who issued the bills, and the vessel was voyage chartered. Under such an example, the bareboat charterer would not be the ‘carrier’ nor the ‘actual carrier’ under Hamburg, yet would be a Dutch ‘carrier’. Where the Dutch regime is similar to Hamburg, is in Article 442 the Code provides for joint and several liability between the carriers.⁶⁴⁴ It should be noted that by virtue of article 461(3), if the owners or the bareboat charterers present themselves as being the exclusive carrier, or the sole carrier, in the bill of lading, then the other parties to the carriage endeavor will be absolved from their status as carriers.⁶⁴⁵ Finally, the Dutch system in 461 and 462 are

⁶⁴¹ Japikse, R. “Current Developments Concerning the Form of Bills of Lading – The Netherlands” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 233.

⁶⁴² Japikse, *ibid.*

⁶⁴³ Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 844.

⁶⁴⁴ Japikse, R. “Current Developments Concerning the Form of Bills of Lading – The Netherlands” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 233.

⁶⁴⁵ Japikse, *ibid.* Should the bareboat charterer wish to be the exclusive carrier, his precise identity must be added otherwise the stipulation will have no effect (*Ibid.*).

compulsory, and any stipulations providing otherwise are by virtue of article 461(5) considered null and void.⁶⁴⁶

11.5. Commercial Code of Belgium

The Commercial Code, Book II, Title II, governs the carriage of goods by sea under bills of lading. The Commercial Code originally incorporated the Hague Rules in 1928, but has since been amended several times, with the last amendment taking place in 1989.⁶⁴⁷ The Commercial Code has in certain respects ameliorated the situation with regard to who is the carrier. This is facilitated by the Belgium courts who have a tendency to hold the charter and owner jointly and severally liable vis-à-vis the consignee.⁶⁴⁸ When interpreting Article 91 of the Commercial Code, which governs the liability of the carrier, the Courts have in effect invalidated both the demise and the identity of carrier clauses. The notion of joint and several liability between shipowners and charterer is not new to Belgian law, as in the 1970's the Belgian Court of Appeal had found that the charter remained jointly and solidarily liable with the owner despite an identity of carrier clause.⁶⁴⁹ The result is that under the Commercial Code, demise clauses and identity of carrier clauses are invalid as the charterer and shipowner will be held jointly and severally liable despite assertions to the contrary in the bill of lading.⁶⁵⁰ This is however the case only with regard to the shipowner, or demise charterer, and the party found to be the 'carrier'. The law with regard to parties to the carriage endeavor in Belgium is therefore not as expansive as other nations, such as the Netherlands. Nevertheless, the regular practice of ensuring that the carrier party to the bill of lading

⁶⁴⁶ Tetley, W. "The Demise of the Demise Clause?" (1999) 44 McGill L.J. 807, at p. 844; Japikse, R. "Current Developments Concerning the Form of Bills of Lading – The Netherlands" in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 234.

⁶⁴⁷ Bernauw, K. "Current Developments Concerning the Form of Bills of Lading - Belguim" in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 87.

⁶⁴⁸ Bernauw, *ibid*, at p. 108.

⁶⁴⁹ *Hof Van Beroep te Brussel*, Mar. 13, 1970; [1970] E.T.L. 398, *Hof Van Beroep te Brussel* Mar. 3, 1972; [1972] E.T.L. 992, as cited in Tetley, W. "Identity of the Carrier – The Hague Rules, Visby Rules, UNCITRAL" [1977] LMCLQ 519, at p. 528.

⁶⁵⁰ Bernauw, K. "Current Developments Concerning the Form of Bills of Lading - Belguim" in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 108.

and the shipowner, or demise charter, are jointly and severally liable is a vast improvement over the more restrictive interpretation of the Hague Rules carrier.

11.6. U.S. COGSA 1999

In the United States, there has been long standing frustration at the out-moded carriage regime still in force.⁶⁵¹ In the 1980's Congress was unwilling to act, as underwriters, carriers and the Maritime Law Association (MLA) favoured Visby, while the cargo interests favoured Hamburg.⁶⁵² As the government was unwilling to be caught in the middle of the dispute between the various commercial interests, other bodies attempted to resolve the deadlock.⁶⁵³ The American Bar Association, with the support of the MLA, proposed in 1987 that the Visby protocol be ratified, but that further changes should also be implemented, for example, the elimination of the nautical fault defence.⁶⁵⁴ The proposal failed when major cargo interests declined to support it.⁶⁵⁵ These failures, coupled with the failure of the Hamburg Rules to provide an acceptable international regime, resulted in calls in the early 1990's for a domestic solution to the problem.⁶⁵⁶ In 1992, the MLA convened an Ad Hoc Liability Study Group "to attempt to reach a commercial compromise that could be presented to Congress with consensus support from the industry."⁶⁵⁷ The process took four years.⁶⁵⁸ The study group's final proposal was submitted to the MLA in 1996, and was presented as a bill before the Senate's Sub-

⁶⁵¹ Which is COGSA 1936, based on the Hague Rules, given that the United States never ratified the Visby Protocol.

⁶⁵² Force, R. "A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules" in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 373, noting that the state of affairs was such that "neither the carrier interests who favoured Visby amendments nor the shipper interests which favored Hamburg had enough support to prevail." Congress would have admittedly enacted any changes that the major interests agreed on, but it was a stalemate between the two sides.

⁶⁵³ Sturley, M. "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 JMLC 553, at p. 569.

⁶⁵⁴ Sturley, *ibid*, at p. 569; Sturley, M. "Proposed Amendments to the Carriage of Goods by Sea Act" (1996) 18 Hous. J. Int'l L. 609, at p. 614-615.

⁶⁵⁵ Mendelsohn, A. "Why the U.S. Did not Ratify the Visby Amendments" (1992) 23 JMLC 29, at p. 52.

⁶⁵⁶ One U.S. commentator, Chandler, in response to the question "Is there a way out of this impasse?" replied: "The answer is yes, if we follow what we did for the Harter Act; when faced with an unsatisfactory international situation, seek a commercial solution among U.S. commercial interests." (Chandler, G. "After Reaching a Century of the Harter Act: Where Should We Go From Here?" (1993) 24 JMLC 43, at p. 46).

⁶⁵⁷ Sturley, M. "Proposed Amendments to the Carriage of Goods by Sea Act" (1996) 18 Hous. J. Int'l L. 609, at p. 616.

⁶⁵⁸ For a detailed discussion on the process of drafting the proposal see Sturley, *ibid*, at pp. 616-621.

Committee on Surface Transportation and Merchant Marine on April 21st, 1998.⁶⁵⁹ The Senate Sub-committee, while consulting the U.S. MLA Carriage of Goods Sub-committee, drafted a new text, altering several provisions and the numbering, thus producing COGSA 99.⁶⁶⁰

The draft COGSA 99 adopts an entirely new approach with regard to identifying the carrier, and governing the parties involved in the carriage endeavour. The draft provides for three types of ‘carrier’, in essence encompassing all parties to the carriage contract. There is the familiar “contracting carrier”, however the draft introduces two new variations, the “performing carrier” and the “ocean carrier”.⁶⁶¹ The draft defines performing carrier in the following manner: “The term ‘performing carrier’ – (A) means a party (including a contracting carrier) who performs, or undertakes to perform, any of a contracting carrier’s responsibilities under a contract of carriage, including any party that performs, or undertakes to perform or procures to be performed any incidental services to facilitate the carriage of goods, regardless of whether it is a party to, identified in, or has legal responsibility under the contract...; and (B) includes (but is not limited to) ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers, warehousemen, and their servants, agents, contractors and subcontractors.”⁶⁶² While the term “ocean carrier” means “a performing carrier that owns, operates, or chartered a ship used in the carriage of goods by sea.”⁶⁶³ The definition of carrier under the draft is therefore the most encompassing to date. Arguably, all conceivable parties involved in the carriage endeavour are covered, although with certain exceptions for inland

⁶⁵⁹ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 *Transp. L.J.* 43, at p. 49-50.

⁶⁶⁰ Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 *JMLC* 595, at p. 597.

⁶⁶¹ Articles 2(a)(2), 2(a)(3), and 2(a)(4) respectively. See Sturley, M. “Proposed Amendments to the Carriage of Goods by Sea Act” (1996) 18 *Hous. J. Int’l L.* 609; Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 *JMLC* 595; and Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] *LMCLQ* 126.

⁶⁶² Article 2(a)(3).

⁶⁶³ Article 2(a)(4).

transport,⁶⁶⁴ but nevertheless, the draft would appear to solve the problems addressed in earlier sections with regard to the Hague Rules ‘carrier’. The definition of carrier, particularly with respect to the performing carrier, has been described as “extremely wide”.⁶⁶⁵ One author, in separate publications, has argued that the definition “is arguably too wide”⁶⁶⁶ and too complicated.⁶⁶⁷ Although, no justifications or reasoning was given for this criticism, aside from pointing out that the definition differs from the ‘two carrier’ solution found in the Hamburg Rules and in the Nordic Maritime Codes.⁶⁶⁸ Admittedly, the definition is extremely wide and differs from other regimes. In consideration of this, arguably from a judicial and litigious perspective the definition will inevitably be inconvenient as prior case law will be inapplicable and it will require a period of uncertainty before the boundaries and meanings will have been tested and interpreted by the courts. This however is the natural by-product of any new wording or novel provisions in legislation or conventions, and arguably does not found a basis for an objection to the proposed provision or instrument.⁶⁶⁹ The definition at first glance also appears to simply the law in this area, for example, the demise clause would evidently be irrelevant. As well, it has been noted that “the himalaya clause of a bill of lading would no longer be necessary with the proposed changes to COGSA.”⁶⁷⁰ For the most part this statement is correct, however, given the fact that inland rail and road carriers are not governed by the regime, such a clause may still prove to be useful.⁶⁷¹ The draft also

⁶⁶⁴ Interstate motor and rail carriers are not governed by the draft regime by virtue of s. 3(b), unless where such carriers are also “the contracting carrier in an intermodal contract involving sea carriers” (Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 128).

⁶⁶⁵ Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 128.

⁶⁶⁶ Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 846, footnote 205.

⁶⁶⁷ Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 JMLC 595, at p. 598.

⁶⁶⁸ *Ibid.*

⁶⁶⁹ With regard to the opposition of the Hamburg Rules on the basis of the new wording found in many of the provisions, one author commented: “[t]o argue against the Hamburg Rules on the principle ground that they will herald a period of uncertainty and confusion is, with respect to those who advance this argument, a little like refusing to update computer software because it takes a certain investment in to learn the new program and derive the full benefits from the innovation.” (Nicol, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 179)

⁶⁷⁰ Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 Currents Int’l Trade L.J. 32, at p. 35.

⁶⁷¹ See section 6 above discussing the judgment in *Kirby*, where the U.S. Supreme Court held that a Himalaya clause in an ocean bill of lading that should be extended to cover a railroad who had

resolves the problem of actions outside the regime. By virtue of section 3(c) and (d) “the draft legislation provides exclusively for rights, liabilities and remedies in any action against any carriers and ships involved in performing the contract, without regard to the form of the action. Apart from contractual claims, this includes cargo claims in tort/delict against a performing unimodal carrier, as well as actions *in rem*.”⁶⁷² There is however a problematic area of the draft with regard to carrier liability. The issue of joint and several liability of the carriers appears to be unclear. It has been noted that unlike the Hamburg Rules and the Nordic Maritime Code, the draft does not declare the carriers to be jointly and severally liable,⁶⁷³ and some commentators have observed that “whether different ‘performing’ carriers would be liable jointly or alternatively is not entirely clear.”⁶⁷⁴ Under the draft, the contracting carrier is liable from the time they receive the goods until the time of delivery,⁶⁷⁵ while the performing carriers “bear the same responsibility from the time they receive or take the goods in charge until the time they ‘relinquish control’, but also ‘at any other time to the extent that they participate in any of the activities contemplated by the contract’.”⁶⁷⁶ The question therefore arises, is the performing carrier jointly and severally liable with the contracting carrier, and where there are several performing carriers participating concurrently are they jointly and severally liable? Upon review of the draft, it has been questioned, “[w]hat happens if in the course of an intermodal contract goods are damaged during discharge by stevedores engaged by a sub-contracting ‘performing’ sea carrier? Can only the stevedore be sued or is the shipowner also responsible? Similar questions arise where a vessel...operates under a charterparty and the charterer bears some contractual responsibility for loading or discharge

subsequently damaged the goods. *Norfolk Southern Railway Co. v. James N. Kirby Pty*, 2004 AMC 2705 (U.S. S.C. 2004)

⁶⁷² Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 128. See also Sturley, M. “Proposed Amendments to the Carriage of Goods by Sea Act” (1996) 18 Hous. J. Int’l L. 609, at footnote 78, quoting the draft legislation: “the defences and limitation of liability provided for in this Act and the responsibilities imposed by the Act shall apply with the force of law in any action against a carrier or a ship without regard for the form or theory of the action or the court or other tribunal in which it is brought.” The draft therefore specifically provides for instances where the claim is being arbitrated.

⁶⁷³ Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 JMLC 595, at p. 599.

⁶⁷⁴ Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 129.

⁶⁷⁵ Section 5(a)(b).

⁶⁷⁶ Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 129. Responsibilities and liabilities of the performing carrier are found in section 5(a)(c).

operations. Both shipowner and charterer are ‘performing’ carriers and would seem to be responsible for their services.”⁶⁷⁷ The draft is unclear on this point, however, if past treatment of parties involved in the carriage endeavour is an indicator, the courts appear to be quite receptive to the notion of joint and several liability for carriers found responsible. In practice therefore this may not have been problematic, for the judiciary would have likely read into the draft joint and several liability where the draft is silent in the issue.

In early 2000, it appeared that the proposed legislation would be put through Congress as it has the requisite support. “Senator Hutchinson [had] indicated to the press that she was firmly behind the U.S. COGSA proposal by the United States Maritime Law Association, and that she was prepared to see it through. Furthermore, the proposal [had] obtained significant support from such organizations as NITLeague and the American Institute of Marine Underwriters.”⁶⁷⁸ It had been anticipated that Senator Hutchinson would have been able to push the proposed legislation through Congress during the 106th Session, in 2000, however, she was reassigned from Chairman of the Surface Transportation and Merchant Marine Subcommittee to chair another committee.⁶⁷⁹ “The Senator was a supporter of U.S. COGSA reform, well-versed in maritime cargo shipping concerns and not easily replaceable in such matters.”⁶⁸⁰ The Senator’s departure slowed the progress of the reform, and by 2002 “the COGSA reform effort was focused on negotiating the elements of the International Cargo Liability Convention drafted by the [CMI] at the request of [UNCITRAL].”⁶⁸¹ It has now been agreed that “it seems unlikely

⁶⁷⁷ Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 129, footnote 28.

⁶⁷⁸ De Orchis, “Speech to the Maritime Administrative Bar Association Regarding Status of Cargo Liability Regimes” January 26, 2001. Available at: www.marinelex.com/marinelex/statuscargo.cfm. Note that the NITLeague, is the National Industrial Transportation league, which is a group of shippers and associations of shippers that conduct industrial and commercial enterprises of all size throughout the United States (Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 Currents Int’l Trade L.J. 32, at p. 37).

⁶⁷⁹ Papavizas, C. & Kiern, L. “1999-2000 U.S. Maritime Legislative Developments” (2001) 32 JMLC 349, at p. 368.

⁶⁸⁰ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 50.

⁶⁸¹ Papavizas, C. & Kiern, L. “2001-2002 U.S. Maritime Legislative Developments” (2003) 34 JMLC 451, at p. 477. For a discussion on the new UNICTRAL draft convention see section 12 *infra*.

that this bill will be of congressional priority in the near future,”⁶⁸² or even at all.⁶⁸³ With regard to solving the dilemma associated with parties to the carriage endeavour, this turn of events is unfortunate. The notion of the ‘carrier’ under the draft would arguably have solved the vast majority of problems, despite the uncertainty concerning the issue of joint and several liability. Given the U.S. courts propensity in the past to hold carriers jointly and severally liable, it would have been arguably likely, that in the face of uncertainty in the legislation the parties would be found jointly and severally liable. It is notable however, that in consideration of other issues, such as international uniformity, the failure of the draft was undoubtedly welcomed in many circles.⁶⁸⁴

11.7. German Commercial Code (HGB)

In Germany, the 5th Book, ss. 476 seq., of the Commercial Code “Handelsgesetzbuch” (HGB)⁶⁸⁵ deals with maritime matters.⁶⁸⁶ Prior to the adoption of the Hague Rules, “the carrier was not defined in the Commercial Code and the charterer was usually considered [to be] the carrier.”⁶⁸⁷ The Commercial Code was amended in line with the Hague Rules in 1937,⁶⁸⁸ and therefore the notion of “the carrier as a separate

⁶⁸² Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 *Transp. L.J.* 43, at p. 50.

⁶⁸³ Papavizas, C. & Kiern, L. “2001-2002 U.S. Maritime Legislative Developments” (2003) 34 *JMLC* 451, at p. 478, noting that “[a]lthough many in the maritime industry consider that COGSA’s sixty-seven years puts it past retirement age, COGSA will likely live to celebrate more birth-days beyond the 108th Congress if COGSA reform is to wait for the UN convention.”

⁶⁸⁴ For strong objections to the United States unilateral efforts in draft COGSA see Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 *JMLC* 595. See also Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 *Currents Int’l Trade L.J.* 32, who devotes several pages to noting where support for the new draft lay, and where opposition was found. Particularly BIMCO, the Baltic and International Maritime Council, was a vocal opponent. (*ibid*).

⁶⁸⁵ The HGB entered into force on January 1st, 1900, and was based almost entirely on its forerunner, the “Allgemeine Deutsche Handelsgesetzbuch” of 1861. (Herber, R. “German Law on the Carriage of Goods by Sea” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 343).

⁶⁸⁶ Herber, R. “Current Developments Concerning the Form of Bills of Lading - Germany” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 161, notes that the statutory regulations that govern the carriage of goods by sea are contained in s. 556 to 663 HGB, and the bill of lading is governed by the provisions 642 to 662 HGB.

⁶⁸⁷ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 *JMLC* 379, at p. 392. This approach was based on article 510(1) of the HGB which the courts applied by analogy to apply to time charterers. (*Ibid*).

⁶⁸⁸ Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana., at p. 51.

party was introduced.”⁶⁸⁹ In 1986, when it became clear that the German law on carriage was in serious need of modernization, the debate ensued as to whether to adopt the Hamburg or the Visby Protocol.⁶⁹⁰ It became evident that the Hamburg Rules were unlikely to be adopted by the major maritime states, as well, German shipowners were strongly opposed to them, therefore amendments based on the Visby Protocol were made to the Commercial Code, or HGB.⁶⁹¹ It is unfortunate that when Germany modernized, to a certain extent, her law on carriage, that steps were not taken to rectify the difficulties surrounding the notion of who is the carrier under German law. The HGB does contain provisions that are aimed at the problem, although they are at best minimal improvements over the general Hague-Visby system. Article 643 HGB addresses the contents of the bill of lading, stipulating that it should contain “the name of the carrier”.⁶⁹² The compliance with the article in this respect however is not compulsory, and thus the absence of the name of the carrier does not affect the validity of the bill of lading.⁶⁹³ This is regrettable, and arguably renders the stipulation in article 643 irrelevant. This ineffective provision stands in contract to the mandatory requirement for carrier identification in article 15(1)(c) of the Hamburg Rules, and it is thus surprising that Germany would not have rendered the article mandatory. Article 644 HGB does however aid with the identification of the carrier in practice, in that it provides that “if a bill of lading is signed by the master or shipowner’s agent does not contain the carrier’s name, it shall be presumed that the carrier is the shipowner.”⁶⁹⁴ Articles 643 and 644 are not unique to Germany, as the

⁶⁸⁹ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 392.

⁶⁹⁰ Herber, R. “German Law on the Carriage of Goods by Sea” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 346.

⁶⁹¹ Herber, *ibid*. The amendments were brought in by The Law to Amend the Commercial Code and Other Law (Second Maritime Law Amendment Act) of 25 July 1986 (Ashton, R. “A Comparative Analysis of the Legal Regulation of Carriage of Goods by Sea Under Bills of Lading in Germany” (1998) Available at: www.mlaanz.org/docs/99journal7d.html). Germany has a history of domestically incorporating law based on the uniform law, but in a hybrid form. The Law of August 10th, 1937, amended the Commercial Code with the principles from the Hague Rules, but with modifications such as the fact that it applies to all contract for the carriage of any cargo from the time the goods are taken into the custody of the carrier until their delivery to the consignee (Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana., at p. 51).

⁶⁹² Herber, R. “Current Developments Concerning the Form of Bills of Lading - Germany” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 162.

⁶⁹³ Herber, *ibid*, at p. 163.

⁶⁹⁴ Pejovic, C. “The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law” (2000) 31 JMLC 379, at p. 392. Although, this provision is rendered inapplicable where the bill of

Greek Code of Private Maritime Law contains almost identical provisions, with the same effect.⁶⁹⁵ German courts have also aided claimants with the respect to the identity of carrier issue by failing to recognize the validity of identity of carrier clauses when the charterer's name is printed in the heading of the bill of lading.⁶⁹⁶ The state of the law with respect to parties involved in the carriage endeavor in Germany was not particularly exemplary with regard to solving the 'identity of the carrier' problem, however, this was rectified with an amendment to article 437, which now stipulates that the acting carrier shall be liable as the carrier for loss or damage to the goods during carriage, he will benefit from all defences and will be held jointly and severally liable with the carrier.⁶⁹⁷

11.8. Other Nations

Japan, Australia and New Zealand all amended and to a certain extent modernized their carriage acts in the 1990's without altering the definition of carrier or attempting to

lading is not signed by the master or another agent of the shipowner, therefore in such instances where the bill is signed by an agent of the charterer or where it is the charterer who sign the bill for the master. (*Ibid*).

⁶⁹⁵ The Greek Code of Private Maritime Law in article 125(2)(a) stipulates that the carrier should be identified on the bill of lading, but although required by the Code, it is not mandatory. (Kiantou-Pampouki, A. "Current Developments Concerning the Form of Bills of Lading - Greece" in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 209).). If the carrier is not identified on the bill of lading, article 105(3) presumes by law that the ship is being operated by the shipowner, unless there has been a declaration of assignment of the ship's operation entered into the ship's registry, in which case the carrier will be the ship's operator (*Ibid*). Article 105(3) however is only a presumption and "is rebuttable and can be overturned by anybody having a legal interest. In any case, the carrier shall be the one who actually undertakes obligations and responsibilities of the contract for sea carriage." (*Ibid*). The notion that the carrier is the party who actually undertakes the obligations was upheld in Decision 2422/1990, issued by the One-Member District Court of Piraeus, END 1991 61 (63). (*Ibid*). Arguably, Greek law, similarly to German law, does little beyond what is found in the Hague and Hague-Visby Rules to clarify the law with respect to parties to the carriage endeavor. This is unfortunate as Greece recently, in 1992, ratified the Hague Rules and Visby Protocols, and therefore was presented with an opportunity to overhaul the existing law. Rather, the legislators simply provided in the enacting law that the Maritime Code provisions "which are irrelevant to the ratified texts, to be exact, the provisions of articles 168-173 shall not be affected by the application of the texts ratified by this law." (*Ibid*).

⁶⁹⁶ BGH (Feb 4, 1991), 26 Eur. Transport L. 512 (1991); BGH (Nov. 20, 1990), [1991] TranspR 65, as cited in Pejovic, C. "The Identity of Carrier Problem Under Time Charters: Diversity Despite Unification of Law" (2000) 31 JMLC 379, at p. 393.

⁶⁹⁷ Article 437 of the Commercial Code provides: "Acting Carrier (1) Where a shipment is carried or totally or partially by a third party (acting carrier), this carrier shall be liable as the carrier for the damage arising out of loss or damage to the goods or exceeding the term for delivery during the shipment carried out by him. Contractual agreements between the shipper or the consignee by which the carrier expands his liability shall be effective against the acting carrier only to the extent that he had consented to these in writing. (2) The acting carrier may assert all the defences which the carrier could assert based on the freight agreement. (3) Carrier and acting carrier shall be jointly and severally liable." (as quoted by Lord Hobhouse in *Homburg Houtimport v. Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571 (H.L.), at p. 604).

resolve identity of carrier or demise clause issues. These nations would be examples of arguably what was a missed opportunity.

In 1994, New Zealand enacted a new Maritime Transport Act, which is predominantly Hague-Visby, but has been modified to cover sea waybills.⁶⁹⁸ It does little to solve identity of carrier issues, in fact by repealing the old Sea Carriage of Goods Act, it will be, according to one New Zealand commentator, “ensuring that the legal status and effect of demise and identity of carrier clauses will once again become live issues in respect of international carriage.”⁶⁹⁹ Interestingly enough though, identity of carrier clauses are not problematic in the context of domestic carriage in New Zealand. By virtue of sections 11 and 29 of the Carriage of Goods Act 1979, claims may be brought against the actual carrier or carriers where the contracting carrier is insolvent or cannot be found by exercising reasonable diligence.⁷⁰⁰ Notably, section 15 governing the limitation of carrier liability provides for the joint liability of actual carriers.⁷⁰¹ It is regrettable that New Zealand has adopted a multicarrier regime including joint liability for domestic purposes, while retaining a single carrier model for its international regime.

In 1991, the Australian Carriage of Goods by Sea Act,⁷⁰² which provided for the implementation of the Hague-Visby Rules, came into force. The Act contained a provision that brought the Hamburg Rules into force in late 1994, unless steps were taken to delay their entry.⁷⁰³ Australian cargo interests supported the Hamburg Rules, while the carriers supported the existing regime, and thus the Australian government in search of alternative regimes, consulted with members of the shipping community prior to the 1994

⁶⁹⁸ Maritime Transport Act 1994, Public Act 1994 No. 104 (New Zealand).

⁶⁹⁹ Myburg, P. “Current Developments Concerning the Form of Bills of Lading – New Zealand” in *Ocean Bills of Lading: Traditional Forms, Substitutes and EDI Systems* (1995) A.N. Yiannopoulos (Ed.), Kluwer Law Intl, The Hague, at p. 252.

⁷⁰⁰ Carriage of Goods by Sea Act 1979, Public Act 1979 No. 43 (New Zealand), available online at: www.maritimelaw.orcon.net.nz/carriag.html.

⁷⁰¹ Section 15(c) governing joint liability for actual carriers, and (d) concerning joint and several liability of successive carriers.

⁷⁰² Carriage of Goods by Sea Act, No. 160 of 1991, in force Oct. 31, 1991.

⁷⁰³ Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] LMCLQ 12, at p. 12.

deadline.⁷⁰⁴ The trigger was delayed for another three years in 1994,⁷⁰⁵ and the Minister then directed that discussions should be held “with a view to developing a [cargo liability] regime which provides fair and reasonable protection for both shippers and carriers.”⁷⁰⁶ The Department of Transport gathered experts from carriers, cargo interests, marine insurance, and legal advisors, and by 1995 a report was released, and then endorsed by industry.⁷⁰⁷ The Ministry of Transport sought further industry comments on the suggested changes to Australia’s carriage regime in 1996.⁷⁰⁸ In order to buy time, in 1997 the Carriage of Goods by Sea Amendment Act, repealed the trigger mechanism thus ensuring that the Hamburg Rules would not come into force.⁷⁰⁹ Amendments to the carriage regime were made, and on July 1st, 1998 the Carriage of Goods by Sea Regulations 1998, came into force.⁷¹⁰ One can only lament that given the extent of the amendments and the fact that Australia was terribly close to implementing the Hamburg Rules, that it is surprising issues relating to the carrier were not dealt with. The period of responsibility of the carrier has been extended, deck cargo is included, as is liability for delay in certain circumstances, and the amendments cover EDIs and sea waybills by including a new definition of “contract of carriage”.⁷¹¹

Perhaps Japan is the worst of the three culprits. Japan amended its carriage of goods regime and ratified the Hague-Visby Rules in 1992, bringing the new legislation

⁷⁰⁴ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 *Transp. L.J.* 43, at p. 51.

⁷⁰⁵ Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] *LMCLQ* 12, at p. 12.

⁷⁰⁶ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 *Transp. L.J.* 43, at p. 51.

⁷⁰⁷ Davies, M. “Australian Maritime Law Decisions 1997” [1998] *LMLCQ* 394, at p. 394-395; Thornton, *ibid*, at p. 52; Hetherington, *ibid*, at p. 12.

⁷⁰⁸ Hetherington, *ibid*, at p. 13.

⁷⁰⁹ Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 *JMLC* 595, at p. 611; Hetherington, *ibid*, at p. 13; At the time, it was thought unlikely that the Hamburg Rules would ever be implemented in Australia in their entirety, and the piecemeal nature of their implementation had been noted: “on the Hamburg Rules [Ian Davis] said it is still a very long way from achieving international recognition as its adoption has so far been piecemeal and tentative.” (“Halfway to Hamburg: Australia to amend COGSA” [1997] *Fairplay* 10th July, at p. 22.).

⁷¹⁰ A copy of the Carriage of Goods by Sea Regulations 1998 with the old provisions and the new amendments can be found online at the Australian Government Federal Register of Legislative Instruments (FRLI) website: <http://frli.law.gov.au>, with the Regulations listed as FRLI number 1998B00160.

⁷¹¹ Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] *LMCLQ* 12, at p. 13-14.

into force in June 1993.⁷¹² Japan made several significant changes and thus the legislation includes liability for delay, and extended period of responsibility, and applies to both inbound and outbound shipments.⁷¹³ Japanese COGSA also adopts a new definition of carrier in article 2(2): “In this law the term ‘carrier’ means a shipowner, a lessee of a ship, or a charterer carrying goods according to the previous Article.”⁷¹⁴ That Japan bothered to amend the provision without rendering the term carrier plural is disappointing. Article 7 entitled “Issuing a Bill of Lading” is helpful: “1. The bill of lading must state the following particulars... (6) The carrier’s full name or trade name.”⁷¹⁵ Article 7(1), has in fact been helpful with regard to the identification of the carrier. In *The Camfair*, the Tokyo District court suit was taken against the shipowner and the time charterer for the loss of cargo.⁷¹⁶ The charterer argued that he was not the carrier as the time charterer’s signature “for the master” rendered the shipowner responsible.⁷¹⁷ The Tokyo court examined the bill of lading finding that the shipowner’s name was not on the bill of lading as per article 7(1) which was determined to mean “a specific individual’s full name or trade name”.⁷¹⁸ The Tokyo court therefore determined that as the shipowner was not represented, the stipulation “for the master” had no legal effect.⁷¹⁹

11.9. Conclusion

Having canvassed the relevant national legislation and codes on the issue, it becomes evident that there is a general recognition that the state of affairs with regard to the identity of the carrier, or carriers, as dealt with in international uniform law is

⁷¹² Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 5. Available online from the Canadian Maritime Law Association website at: www.cmla.org/papers/2004/TransportReport-Oct.4,%202004.pdf.

⁷¹³ Transport Canada, *ibid*, at p. 5.

⁷¹⁴ Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489, at p. 493, footnote 17, provides an English translation for article 2, Japanese COGSA.

⁷¹⁵ *Ibid*, at p. 493, footnote 18, provides an English translation for article 7, Japanese COGSA.

⁷¹⁶ *Anuk Fire and Marine v. Shinwa Kaiun Kaisha (The Camfair)* (30 September 1997) Tokyo District Court, summarized and discussed extensively in Satori, K. “The Demise Clause in Japan” [1998] LMCLQ 489.

⁷¹⁷ *Ibid*, at p. 493.

⁷¹⁸ *Ibid*, at p. 495.

⁷¹⁹ *Ibid*. The shipowner and the time charterer were subsequently held jointly liable for the loss as “carriers” as the court found that the time charterer’s right to receive freight meant that he was a carrier, while the demise clause on the back of the bill of lading evidenced the shipowner assuming obligations and therefore was liable as well as the charterer (*Ibid*, at p. 495-496).

unsatisfactory. Some national legislatures have adopted approaches much more in line with the realities of the modern shipping industry. Arguably, it is not a coincidence that those nations who have most embraced the notion of multiple carriers and joint and several liability are those with civilian traditions, while nations such as Britain and Canada have remain steeped in a single carrier ethos. Despite the failure of the Hamburg Rules, and therefore the lost opportunity to test those articles in practice, the principles adopted in the Rules have now found testing grounds in Codes such as the Nordic Maritime Codes and the Chinese Maritime Code. This allows one to measure the success of those provisions with respect to solving and addressing the issues relating to multiple parties involved in the carriage endeavor. Such domestic solutions will be of great importance for both future uniform law, as discussed below, and the provision of potential models for nations seeking to update or amend outmoded carriage regimes. Nevertheless, domestic legislation in this regard does offer a piece meal solution to what is a larger issue. One commentator has argued that the solution is not a national one, but rather an international one: “the question of liability or non-liability of non-carriers is too important, from the view point of public policy, to be abandoned to the contractual drafting of interested parties...In the age of global business the question is not even for Congress. It is clearly an international issue that requires an international solution.”⁷²⁰

⁷²⁰ Sweeney, J. “Crossing the Himalayas: Exculpatory Clauses in Global Transport” (2005) 36 JMLC 155, at p. 199.

12. UNCITRAL DRAFT INSTRUMENT

The uniform carriage of goods regime created by the Hague Rules, had become fragmented with many carriage regimes in place, from Hague, to both versions of Hague-Visby, to Hamburg, to the growing both of domestic legislation being implemented. Despite the widespread applicability of the Hague and Hague-Visby system, it was recognized that they failed to meet “the world’s needs for a modern, uniform law on the subject.”⁷²¹ In other words, they were outdated. Evidently Hamburg had failed to unify the carriage regime,⁷²² as well, twenty years of consultations on the reform of the Hague-Visby Rules were unproductive,⁷²³ and therefore a new process began.

12.1. The Modernization of Carriage Law: The Involvement of CMI

There was a general recognition in the 1990s that the uniform system of carriage of goods had begun to fracture to the point where action needed to be taken. In May 1994, the Executive Council of the CMI decided that carriage of goods by sea required the further attention of the CMI and appointed a working group to consider the problem.⁷²⁴ The working group sent out questionnaires to the national associations to compile their views on the necessary direction to take.⁷²⁵ In response to the question as to whether the CMI should push for adoption of the Hamburg regime, all but one association, Spain, replied in no uncertain terms, no.⁷²⁶ Rather, the option most favourable was to amend the Hague-Visby regime,⁷²⁷ and interestingly enough the

⁷²¹ Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 *Tex. Int’l L.J.* 65, at p. 67. See also Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 *JMLC* 553, examining the diverse legal regimes in place and advocating the need for uniform law on carriage of goods.

⁷²² See section 10 *supra*.

⁷²³ Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.” (2003) 28 *Tul. Mar. L.J.* 1, at p. 15, noting that after twenty years of consultations and negotiations with pressure groups, CMI’s consideration of reforming the Hague-Visby Rules, was finally abandoned in 1998 without so much as a vote or a final text.

⁷²⁴ Comité Maritime International, *CMI Yearbook 1995*, Scandinavian University Press, Stockholm, at p. 107.

⁷²⁵ *CMI Yearbook 1995, ibid.*. There were twenty eight national maritime associations that replied to the questionnaire, as did the International Chamber of Shipping. (*Ibid*, at p. 115). The Questionnaire comprised seven questions primarily related to assessing which regimes the associations preferred and what amendments might be suggested to improve the various regimes. (*Ibid*, at p. 111).

⁷²⁶ *Ibid*, at pp. 123-138.

⁷²⁷ *Ibid*, at pp. 158-170.

majority of respondents were opposed to a new convention.⁷²⁸ Question 5 enquired as to whether steps should be taken to modernize the Hague-Visby Rules, and if so, what changes should be made.⁷²⁹ The majority of respondents who suggested improvements to the existing rules suggested amendments dealing with the identity of the carrier problem, or dealing with responsibility of the carrier and the actual carrier.⁷³⁰ It was therefore viewed as a pressing area in need of reform. After receiving the replies from the various national associations, in May 1995 an International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea was established,⁷³¹ with the aim of studying “the most relevant issues with proposals as to the best manner in which they should be solved with a view to obtaining international uniformity.”⁷³² The International Sub-Committee identified 19 issues, including definitions, identity of the carrier, and liability of the performing or actual carrier.⁷³³ Over the course of two years, the International Sub-Committee met four times during which these issues were discussed.⁷³⁴ In the first and third session the definition of carrier and actual carrier was debated.⁷³⁵ The identity of the

⁷²⁸ *Ibid.*, at pp. 170-173. Ireland and Indonesia were in favour of a new convention, while the United States and Switzerland gave positive responses that were qualified.

⁷²⁹ *Ibid.*, at p. 111.

⁷³⁰ *Ibid.*, at pp. 158-169. See particularly Canada, who specifies the solving the carrier/actual carrier problem; Australia and New Zealand, who suggest adopting the U.S. MLA proposals for a new COGSA, which deal with the identity of the carrier and performing carriers; Finland suggests Hamburg style improvements; France would add provisions on actual carriage; Ireland would include the notion of actual carrier and extend cover of the rules while the goods are in his care; Italy suggest Art. 1 should be amended in the style of Hamburg; Korea stipulates finding a solution to the actual carriers problem; South Africa suggest solving the identity of carrier problem; U.K. suggested dealing with the identity of carrier and problems of actual and performing carriers; Venezuela suggested a model based on the Nordic Maritime Codes and the Chinese Maritime Code.

⁷³¹ *Ibid.*, at p. 107.

⁷³² Comité Maritime International, *CMI Yearbook 1997*, Scandinavian University Press, Stockholm, at p. 288.

⁷³³ See the “Report on Consideration of Certain Issues Relating to the Carriage of Goods by Sea”, in Comité Maritime International, *CMI Yearbook 1996*, Scandinavian University Press, Stockholm, at p. 346. It was viewed the a new definition of ‘carrier’ was required, including a definition of actual carrier (*Ibid.*, at p. 346). Identity of the carrier referred to the problem of actually identifying the carrier where his name is not properly on the transportation document (*Ibid.*, at p. 348). It was felt that the liability on the part of the actual or the performing carrier should be the same as the contracting carrier, but limited to the parts of the carriage performed by him (*Ibid.*, at p. 350).

⁷³⁴ . Report of the First Session in *CMI Yearbook 1995*, at p. 229; Report of the Second Session in Comité Maritime International, *CMI Yearbook 1996*, Scandinavian University Press, Stockholm, at p. 360; Report of the Third Session in *CMI Yearbook 1996*, *ibid.*, at p. 384; Report of the Fourth Session in *CMI Yearbook 1996*, *ibid.*, at p. 403.

⁷³⁵ In the first session the majority of the participants favoured adopting the Hamburg solution or a variation thereof, however Ireland felt there were some problems with the Hamburg definition, but acknowledged that a definition of ‘carrier’ must include an actual carrier. (*CMI Yearbook 1995*, at p. 231).

carrier was discussed in the first three sessions.⁷³⁶ Finally, the liability of the performing or actual carrier was discussed in the first and the third session.⁷³⁷ The third issue was actually the least contentious, and it was agreed unanimously after little debate that while the performing carrier would be subject to the rights, liabilities and responsibilities found in the Rules, his liability would be joint and several with the contracting carrier.⁷³⁸ In 1997, the International Sub-Committee released a report detailing the discussions on the various aspects of carriage.⁷³⁹

During the time that the CMI was studying carriage reform, UNCITRAL decided it was also time to modernize the law of carriage. At the twenty-ninth session of the Commission in 1996, “it was proposed that the Commission should include in its work programme a review of current practices and laws in the area of the international carriage

In the third session, certain participants, such as the three United States representatives, suggested having the term contracting and performing in the definition of the carrier, while the two Chinese representatives disliked contracting and preferred actual to performing. (*CMI Yearbook 1996*, at p. 385). Berlingieri, requested an informal vote on the term performing vs. actual, with the result that 5 preferred the word actual while 5 preferred the term performing.

⁷³⁶ It was noted that the Hamburg Rules were ineffective on this point as there is no sanction, and under the Rules virtually anyone may sign the bill of lading (*CMI Yearbook 1995*, at p. 237-238). A majority of the delegates were in favour of having a presumption that the contracting carrier was liable, while certain others such as Portugal and Ireland suggested a rebuttable presumption that the shipowner is liable (*Ibid*). During the session it was felt by Prof. Berlingieri that the identity issue posed a significant problem (*CMI Yearbook 1996*, at p. 375) The discussion extended the implications of identifying the carrier to issues of joint and several liability, and parties not responsible with identity of carrier clauses (*Ibid*). The majority view in the identify clauses should be abolished or held invalid as a basis of liability, and the contracting carrier should be jointly and severally liable with the performing carrier (*Ibid*). During the third session it was strongly recommended by the U.S. that the work should conform to UCP 500 terminology. (*Ibid*, at p. 391). Many solutions were suggested including; allowing cargo to proceeds against the contracting or the actual carrier, a presumption that the registered shipowner was the carrier, imposing penalties for contracting carriers not named in the bill of lading, and even a suggestion by Sturley of the U.S. that the contracting carrier should be rebuttably presumed to be the shipper (because he accepted a deficient bill of lading). (*Ibid*, 393). In an informal vote, the most popular option with seven votes was a presumption that the registered shipowner is the contracting carrier, unless having proved that another perform performed the carriage, and the second most popular solution with 6 votes was simply that the shipowner is responsible. (*Ibid*, at p. 393-394).

⁷³⁷ In the first session it was suggested that the contracting carrier be liable where the performing carrier is not named, amended by another suggest that this should be a presumption paired with the joint and several liability of the performing and the contracting carrier (*CMI Yearbook 1995*, at p. 242). During the third session several delegates favoured joint and several liability of the contracting and the performing carriers (*CMI Yearbook 1996*, at p. 396). Although it was considered that the contractual provisions of the bill of lading should not extend to the performing carrier, although the rules or regime should. (*Ibid*). It was agreed by consensus that all the provisions of the rules – rights, liabilities, and responsibilities – should apply to the performing carrier and that the contracting carrier and the performing carrier should be jointly and severally liable. . . there were no objections (*Ibid*).

⁷³⁸ *CMI Yearbook 1996*, at p. 396. See above footnote for further discussion.

⁷³⁹ *CMI Yearbook 1997*, at p. 288, with the report found at pp. 291-356.

of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.”⁷⁴⁰ This has been credited as the starting point for UNCITRAL’s work on the draft instrument on transport law.⁷⁴¹ In the proposal, UNCITRAL noted that with regard to information gathering CMI, among other organizations, should be consulted.⁷⁴² In 1998, CMI welcomed the invitation to cooperate with the Secretariat,⁷⁴³ and set up a structure to organize the project and carry out a study on the issues,⁷⁴⁴ nevertheless they incorporated the pre-existing International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea.⁷⁴⁵ In 1999, the CMI working groups sent out questionnaires to all the CMI member organizations with a view to collecting information that would be used to harmonize the law of carriage of goods.⁷⁴⁶ Originally, when the CMI considered the project in 1998 issues of liability were not included, however in 1999 CMI recommended that the project be extended to draft provisions relating to liability.⁷⁴⁷ The previous work by the CMI on carrier liability was therefore

⁷⁴⁰ “Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session 28 May-14 June 1996”, reprinted in *CMI Yearbook 1996*, at p. 354-355.

⁷⁴¹ UNECE “Comments to the UNICTRAL draft Instrument on Transport Law”(2002) Document A/CN.9/WG.III/WP.21/Add.1, at p. 3.

⁷⁴² “Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session 28 May-14 June 1996”, reprinted in *CMI Yearbook 1996*, at p. 355.

⁷⁴³ At the thirty-first session, in 1998, CMI made a statement to the effect that it welcomed the invitation to cooperate in soliciting views and preparing an analysis of the information, and that the analysis would allow the Commission to make an informed decision (UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, at p. 4).

⁷⁴⁴ Comité Maritime International, “Issues of Transport Law: Report of the CMI Steering Committee” in *CMI Yearbook 1998*, Scandinavian University Press, Stockholm, at p. 109-110. A Steering Committee was established to oversee the various Working Groups and International Sub-Committees and dialogue with other international organizations involved. A Working Group and International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea (liability aspects), a Working Group on Issues of Transport Law, and a Working Group on EDI were convened (*Ibid*).

⁷⁴⁵ *Ibid.*

⁷⁴⁶ UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, at p. 5.

⁷⁴⁷ Comité Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html; Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.” (2003) 28 Tul. Mar. L.J. 1, at p. 4. “The report of the 29th session [of UNCITRAL] makes clear that a review of the liability regime was not the main objective of the project and within the CMI it was at that time the subject of the work being undertaken by the International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea (“the Uniformity Sub-Committee) chaired by Professor Francesco Berlingieri. . . . However, it became clear from consultation with the international organizations. . . that there was a strong desire that liability issues should be developed and that Professors Berlingieri’s report on the work of the Uniformity Sub-Committee should not be put to one

incorporated into the project.⁷⁴⁸ The CMI's International Sub-Committee's terms of reference were: "To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability."⁷⁴⁹ After four meetings in 2000, the International Sub-Committee had prepared a draft Outline Instrument by the end of the year.⁷⁵⁰ The draft contained a definition of carrier,⁷⁵¹ contracting carrier⁷⁵² and performing carrier.⁷⁵³ The drafting of "performing carrier" happened at an early stage in the drafting due to the fact that as one commentator noted "the delegations are fully aware that the concept of a single 'carrier' entity, carrying out all the traditional liner carrier responsibilities, has ceased to exist."⁷⁵⁴ The explanatory note by the drafters of the 'performing carrier' definition note that the definition is similar to Hamburg's 'actual carrier' but it is clearer and "includes not only the contracting carrier's sub contractor, but an entire line of subsidiary persons who perform the contract."⁷⁵⁵ The draft Outline Instrument also provided for the liability of contracting and performing carriers, allowing the performing carrier to benefit from the limits of liability and defences but rendering him subject to the

side." (Beare, S. "Liability Regimes: Where we are, how we go there, and where we are going." [2002] LMCLQ 306, at p. 307).

⁷⁴⁸ See quotation from Beare, *ibid.*

⁷⁴⁹ Comité Maritime International, "Issues of Transport Law" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 112.

⁷⁵⁰ Comité Maritime International, "Draft Outline Instrument" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at pp. 122

⁷⁵¹ Article "1.2 Carrier means a contracting carrier or a performing carrier." Comité Maritime International, "Draft Outline Instrument" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 1222

⁷⁵² Article "1.3 Contracting Carrier means the person who enters into a contract of carriage with the contracting shipper." *Ibid.*

⁷⁵³ Article "1.4. Performing Carrier means a person who performs, or undertakes to perform, or procures to be performed any of a contracting carrier's responsibilities under a contract of carriage, to the extent that the person acts, either directly or indirectly, at the request of, or under the supervision or control of, the contracting carrier, regardless of whether that person is a party to, or identified in, or has legal responsibility under the contract of carriage. The term "performing carrier" does not include any person (other than the contracting carrier) who is retained by a shipper or consignee, or is an employee, servant, agent, contractor, or subcontractor of a person (other than the contracting carrier) who is retained by a shipper or consignee." *Ibid.*, at p. 123.

⁷⁵⁴ Sweeney, J. "Crossing the Himalayas: Exculpatory Clauses in Global Transport" (2005) 36 JMLC 155, at p. 198.

⁷⁵⁵ "Draft Outline Instrument" in *CMI Yearbook 2000*, at p. 123.

responsibilities, as well providing for the joint and several liability of the carriers.⁷⁵⁶ The contracting carrier is also liable for the entire carriage, and actions against both the contracting and the performing carriers are governed by the instrument and cannot be brought in tort.⁷⁵⁷ The provision was based both on the CMI discussions above and on the proposed amendments to the U.S. COGSA.⁷⁵⁸ The draft Outline Instrument also created a presumption that where the transport document is ambiguous as to who the contracting carrier is, the registered owner of the vessel that the goods were loaded on shall be presumed to be the contracting carrier.⁷⁵⁹

The draft Outline Instrument was discussed at the CMI Conference in Singapore in February 2001.⁷⁶⁰ During the Conference, the delegates considered the definition of “performing carrier”, and were asked to consider whether the definition should include only the person engaged to carry or whether it should be supplemented with a Himalaya provisions to protect other sub-contractors.⁷⁶¹ “Some speakers argued forcibly that the concept of performing carrier should be excluded altogether from the draft instrument,

⁷⁵⁶ Article “5.3 Liability of Contracting and Performing Carriers.

5.3.1. A performing carrier is subject to the responsibilities and liabilities under this Instrument, and is entitled to the rights and immunities provided by in this Instrument (a) during the period it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

5.3.2 Subject to 5.3.4 a carrier shall be responsible for the acts and omissions of any performing carrier who performs, undertakes to perform, or procures to be performed any of that carriers responsibilities under the contract of carriage as if such acts or omissions were its own.

5.3.3 Responsibility is imposed on a carrier under 5.3.2. only when the performing carrier’s act or omission is within the scope of its contract, employment or agency, as the case may be.

5.3.4 If an action is brought against a performing carrier who proves that it acted within the scope of its contract, employment or agency, as the case may be, the performing carrier is entitled to the benefit of the defences and the limitations of liability available to the contracting carrier under this Instrument.

5.3.5 To the extent that both the contracting carrier and performing carrier are liable, their liability is joint and several but only up to the limits provided for in [5.4], 5.6 and 5.7.

5.3.6. Without prejudice to the provisions of 5.8, the aggregate liability of the contracting carrier and performing carriers will not exceed the overall limits of liability under this Instrument.

(“Draft Outline Instrument” in *CMI Yearbook 2000*, at p. 134 –135).

⁷⁵⁷ *Ibid.* See also explanatory note under the provision.

⁷⁵⁸ *Ibid.*, at p. 134.

⁷⁵⁹ Article 7.4.2, *ibid.*, at p. 151-152. Nevertheless, the article provides that the owner may defeat the presumption by proving that the ship was under bareboat charter at the time, to a charterer who accepts the contractual responsibility for the carriage of goods. The explanatory note to this provision noted that the issue remained controversial.

⁷⁶⁰ UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, introductory discussion at p. 7.

⁷⁶¹ Girvin, S. “The 37th Comite Maritime International Conference: a report” [2001] LMCLQ 406, at p. 415.

while others expressed doubts about the drafting of the definition.”⁷⁶² The majority however preferred to narrow the definition of performing carrier for the purpose of performer’s liability, and have a Himalaya provision to protect a wider class of parties.⁷⁶³ The issue of the presumption regarding the contracting carrier in an ambiguous transport document remained controversial, with some proposing that the owner of the vessel named in the document should be subject to the presumption rather than the owner of the vessel that performs the carriage, and others even questioning if a presumption should affect the registered owner.⁷⁶⁴ The International Sub-Committee pursuant to the discussion at the Conference continued work and revision on the draft instrument, including circulating a draft for comment to all the national associations and amending the draft on the basis of replies and comments.⁷⁶⁵ The definition of “performing carrier” was changed considerably, and that party was renamed the “performing party”.⁷⁶⁶ This was a contentious issue, with some advocating an extremely broad provision encompassing any party that performs any portion of the carrier’s responsibilities, thus any person who could possibly be a defendant in a tort, bailment or other non-contractual action for cargo loss.⁷⁶⁷ Conversely, some viewed that performing party should be excluded entirely,⁷⁶⁸ resulting in the compromise seen in the draft provision wherein the language covers “those that are involved in the carrier’s core responsibilities – carriage, handling, custody, or storage of the goods. Thus ocean carriers, inland carriers,

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

⁷⁶⁵ Comite Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html.

⁷⁶⁶ 1.17 Performing party means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibilities under the contract of carriage. The term “performing party” does not include any person who is retained by the shipper or consignee, or is an employee, agent or contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.” (CMI Draft Instrument on Transport Law, December 10, 2001 [2002] LMLCQ 418-441, at p. 419).

⁷⁶⁷ See explanatory note to the provision 1.17.

⁷⁶⁸ Explanatory note, *ibid.* See also Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 Tex. Int’l L.J. 65, at p. 81, noting that at the CMI’s sub-committee meetings FIATA proposed that no liability should be placed on performing parties. The World Shipping Council representing liners serving the U.S. market, and the National Industrial Transportation League argued that the contracting carrier along should be liable for loss or damage to cargo. (Sturley, *ibid.*).

stevedores, and terminal operators... In contrast a security company that guards a container yard... would not be included.”⁷⁶⁹ As well, the ‘contracting carrier’ was renamed as ‘carrier’, and the format of the liability section was revised.⁷⁷⁰ The final revision took place in November 2001, with the finished document adopted by the CMI Executive on December 10, 2001, after three and a half years of intensive work.⁷⁷¹

The CMI Draft Instrument on Transport Law⁷⁷² was in essence a template. “[I]t is important to emphasize that the Draft Instrument is not a final draft in the traditional sense. There are two reasons for this. First, the CMI no longer has the role of preparing draft Conventions for consideration at a diplomatic conference... Secondly, UNCITRAL did not ask for a final draft.”⁷⁷³ Rather, UNCITRAL wanted a preliminary working document,⁷⁷⁴ and the terms of reference of the International Sub-Committee were simply “to prepare the outline of an instrument... [and] drafts provisions.”⁷⁷⁵ Nevertheless, in under a month, the CMI draft Instrument on Transport Law had been converted by UNCITRAL into its working instrument.

12.2. The Next Phase: The UNCTRAL Draft Instrument

In 2003, the president of the CMI, Patrick Griggs, commented that the UNICITRAL draft convention “seems to be the best, and probably the last, chance of restoring international uniformity in th[e] area [of carriage of goods].”⁷⁷⁶ After the CMI

⁷⁶⁹ *Ibid.*

⁷⁷⁰ See 1.1 for ‘Carrier’, and article 6.3 governing liability of performing parties, although in essence the provision is the same. As well, the presumption that the registered owner of the performing vessel remains although it is now located in article 8.4.2. (*Ibid.*, at p. 418, 425, and 432).

⁷⁷¹ Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.”, at p. 4-5; Comite Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html; Beare, S. “Liability Regimes: Where we are, how we go there, and where we are going.” [2002] LMCLQ 306, at p. 308.

⁷⁷² CMI Draft Instrument on Transport Law, December 10, 2001 [2002] LMLCQ 418-441; Comite Maritime International, *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 532; Available online at: www.comitemaritime.org. It should be noted that the version published in Lloyd’s Maritime and Commercial Law Quarterly contains only the provisions of the draft instrument, while the versions in the CMI Yearbook and online contain explanatory notes on each provision.

⁷⁷³ Beare, S. “Liability Regimes: Where we are, how we go there, and where we are going.” [2002] LMCLQ 306, at p. 308.

⁷⁷⁴ *Ibid.*, at p. 309.

⁷⁷⁵ Comite Maritime International, “Issues of Transport Law” in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 112.

⁷⁷⁶ Griggs, P. “Obstacles to Uniformity of Maritime Law” (2003) 34 JMLC 191, at p. 195.

draft instrument was delivered to UNCITRAL in December of 2001, the draft, with only minor changes was converted into the UNICITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea, dated January 8, 2002.⁷⁷⁷ UNCITAL then established a working group, Working Group III (Transport Law), to whom the draft was referred.⁷⁷⁸ In April 2002, the Working Group, during the 9th Session considered certain elements of the draft instrument.⁷⁷⁹ The definition of ‘carrier’ was considered, and it was mentioned that the position of freight forwarders was unclear, as they were arguably carriers.⁷⁸⁰ Again the issue of ‘performing party’ was contentious, with the suggestion that the entire definition be deleted to channel liability to the contracting carrier.⁷⁸¹ Nevertheless, wide support was expressed for retaining the provision as narrowed to include those who “physically perform”, with the Himalaya style protection of those parties being viewed as essential.⁷⁸² In the 10th Session, held September 2002, the issue of the liability of performing parties arose, and there was disagreement as to whether performing parties would or would not be liable in tort.⁷⁸³ The entire instrument was re-drafted and released in September of 2003.⁷⁸⁴ Several provisions had been altered, and the draft has been renumbered and reorganized, nevertheless, the definition of performing party, now article 1(e), remains essentially the same, as does the performing party liability provisions.⁷⁸⁵ What has transpired in the past two years that concerns the liability of carriers, is the introduction of the notion of maritime and non-maritime performing parties by the United

⁷⁷⁷ UNCITRAL, “Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea”, January 8, 2002, UN Doc. A/CN.9/WG.III/WP.21. Available online from UNCITRAL website: www.uncitral.org/en-index.htm.

⁷⁷⁸ Comite Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html;

⁷⁷⁹ UNCITRAL, “Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002)”, 7 May 2002, UN Doc. A/CN.9/510. Available online from UNCITRAL website: www.uncitral.org/en-index.htm.

⁷⁸⁰ *Ibid*, at p. 26.

⁷⁸¹ *Ibid*, at p. 32.

⁷⁸² *Ibid*.

⁷⁸³ UNCITRAL, “Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)”, 7 October 2002, UN Doc. A/CN.9/525. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at p. 21. It was argued that tortious liability on the part of the performing party was a matter of national law to which the draft instrument did not extend.

⁷⁸⁴ UNCITRAL, “Draft instrument on the carriage of goods [wholly or partly] [by sea]”, 4 September 2003, UN Doc. A/CN.9/WG.III/WP.32. Available online from UNCITRAL website: www.uncitral.org/en-index.htm.

⁷⁸⁵ *Ibid*, at p. 8. The words “fails to perform in whole or part” are shown as deleted with a line through them in the new draft. The liability provisions are now at Article 15 (*Ibid*, at p. 26).

States.⁷⁸⁶ The suggestion was discussed at the 12th Session in October 2003, with the Working Group in almost unanimous support of the exclusion of non-maritime performing parties from the liability regime, and thus definitions of “maritime performing party” and “non-maritime performing party” were suggested.⁷⁸⁷ In early 2004, the definitions were re-drafted slightly, with “maritime performing party” now defined as: “a performing party who performs any of the carrier’s responsibilities during the period between arrival of the goods at the port of loading [or, in the case of trans-shipment, at the first port of loading] and their departure from the port of discharge [or final port of discharge as the case may be]. The performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties.”⁷⁸⁸ The essential element of the definition of “performing party” as “a person other than the carrier that physically performs any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control,” was retained.⁷⁸⁹ The Working Group in the 13th Session in May 2004, debated the liability of performing parties.⁷⁹⁰ Concerns were raised that “the common law concept of “joint and several” liability’ might not be interpreted as strictly equivalent to such civil law concepts as “*responsabilité solidaire*” or “*responsabilidad solidaria*” which, in turn, differed from such notions as “*responsabilité conjointe*” or “*responsabilidad mancomunada*”.”⁷⁹¹ In October 2004, the provision was re-drafted and therefore the joint and several liability of the carrier and maritime

⁷⁸⁶ UNCITRAL, “Transport Law: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by the United States of America”, 7 August 2003, UN Doc. A/CN.9/WG.III/WP.34. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at pp. 3-4. Thus the United States did not want the instrument to create liability for parties such as a trucker or a railroad, and proposed that that should be left to existing law.

⁷⁸⁷ UNCITRAL, “Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003)”, 16 December 2003, UN Doc. A/CN.9/544. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at pp. 7-11.

⁷⁸⁸ UNCITRAL, “Transport Law: Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session”, 23 March 2004, UN Doc. A/CN.9/WGIII/WP.36, at p. 3.

⁷⁸⁹ The definition of performing party was altered accordingly to stipulate that it includes maritime and non-maritime performing parties. (*Ibid*, at p. 3).

⁷⁹⁰ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004)” 24 May 2004, UN Doc. A/CN.9/552, at p. 4-6.

⁷⁹¹ *Ibid*, at p. 5.

performing parties reads “Article 15 bis: 1. If the carrier and one or more maritime performing party(ies) are liable for the loss of, damage to, or delay in the delivery of the goods, their liability is joint and several [, such that each such party shall be liable for compensating the entire amount of such loss, damage or delay, without prejudice to any right of recourse it may take against other liable parties,] but only up to the limits provided 16, 24 and 18. 2. Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.”⁷⁹² In September of 2005, the most recent version of the draft instrument was released.⁷⁹³ The draft has maintained the definitions of performing party, maritime performing party and non-maritime performing party.⁷⁹⁴ The liability of maritime performing parties is found in article 20,⁷⁹⁵ while article 21 governs joint and several liability.⁷⁹⁶ It should also be noted that the new draft instrument also governs non-contractual claims, thus ensuring that the defences and limits provided for in the instrument apply in any action against the carrier or a maritime performing party whether the action is founded in contract, in tort, or otherwise.⁷⁹⁷

⁷⁹² UNCITRAL, “Transport Law: Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its thirteenth session”, 4 October 2004, UN Doc. A/CN.9/WGIII/WP.39, at pp. 3-4.

⁷⁹³ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 8 September 2005, UN Doc. A/CN.9/WG.III/WP.56. Available online from UNCITRAL website: www.uncitral.org/en-index.htm.

⁷⁹⁴ *Ibid*, at p. 7-8: article 1(e), 1(f), 1(g). There are slight variations from the provisions drafted in 2004. Notably “maritime performing party” now stipules that “in the event of a transshipment, he performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading are not maritime performing parties.” Where as previously they were deemed not to be maritime performing parties.

⁷⁹⁵ *Ibid*, at p. 22. Article 20: “1. A maritime performing party is subject to the responsibilities and liabilities imposed on the carrier under this Convention, and entitled to the carrier’s rights and immunities provided by this Convention, if the occurrence that caused the loss, damage or delay took place (a) during the period in which it has custody of the goods; or (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.” Articles 20(2)-20(4), govern a voluntary increase in liability by contract, the maritime performing party’s liability for acts or omissions of any person whom it has delegated the carrier’s responsibilities, and that the maritime performing party is entitled to the limits and defences if it acted within the scope of its contract, employment or agency.

⁷⁹⁶ *Ibid*, at pp. 23-24. The provision is identical to Article 15 bis as quoted above with the exception of the article numbers referred to.

⁷⁹⁷ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 8 September 2005, UN Doc. A/CN.9/WG.III/WP.56. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at p. 12: “Article 4. Applicability of defences and limitation. 1. The defences and limitations of liability provided for in this Convention and the responsibilities imposed by this Convention apply in any action against the carrier or maritime performing party for loss of, or damage to, the goods covered by a contract of carriage and delay in delivery of such goods, or for the breach of any other obligation under this Convention, whether the action is founded in contract, tort, or otherwise.” Previously, Article 15, in

The issue of performing parties and their liability is a complex and contentious one as demonstrated above by both the work of the CMI and UNICTRAL. Sturley has referred to the drafting of a performing party definition as “one of the most controversial aspects of the project.”⁷⁹⁸ The debate surrounding performing parties is intimately tied with the on-going debate on the scope of the instrument, as door-to-door or a network system, or limited network system,⁷⁹⁹ which is beyond the scope of the discussion at hand. The above discussion, therefore, is in no way a complete picture of all the complexities involved with regard to performing parties, multimodal transportation and scope of the coverage of the instrument, rather the aim was to highlight issues that bore directly on the issue of liability of shipowners, charterers and other parties discussed in previous sections who might otherwise be “the carrier”. In the context of the discussion at hand, it would appear that despite arguments by some groups in the shipping industry for narrower provisions,⁸⁰⁰ the definition and liability provisions as they exist at present are expansive enough in scope to resolve the problem of the single carrier definition of the Hague Regime. The debate of whether the shipowner, time charterer, or voyage charterer is ‘the carrier’ should no longer arise under the new draft instrument as it stands, thus rendered useless by the notion of performing parties and maritime performing parties. As well, the issue of circumvention of the regime via an action outside contract in tort or bailment is also resolved. What is arguably an improvement is that the carrier and maritime performing parties are more likely to be held jointly and severally liable under Article 21, as opposed to the joint and several liability as found in Hamburg and the domestic legislation of several nations. This would arise from the more

UNCITRAL, “Transport Law: Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its thirteenth session”, 4 October 2004, UN Doc. A/CN.9/WGIII/WP.39, at p. 11, with a few alterations.

⁷⁹⁸ Sturley, M. “Scope of Coverage under the UNCITRAL Draft Instrument” (2004) 10 JIML 138, at p. 149.

⁷⁹⁹ For a discussion on the various national proposals with regard to the scope of the instrument, and their affects on the liability of performing parties generally, see Sturley, M. “Scope of Coverage under the UNCITRAL Draft Instrument” (2004) 10 JIML 138, at pp. 148-154. See also Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 Tex. Int’l L.J. 65, at pp. 76-90.

⁸⁰⁰ See footnote 786 above, on the arguments by FIATA, WSC, and NITL with regard to reduced or eliminated liability on the part of performing parties.

expanded definition of the maritime performing party's liability.⁸⁰¹ Interestingly enough, the underlying notion of joint and several liability based on performing the carrier's obligations or sharing the responsibilities of the carrier found the new draft instrument is in accordance with Professor Tetley's "joint venture" argument and the U.S. "practical approach" or "multi-carrier approach". It would appear therefore that the drafters of the new draft instrument have recognized the validity, simplicity, and fairness of such an approach. Performing parties and their liability was not discussed in the 15th Session held in April 2005,⁸⁰² nor is it on the provisional agenda of topics to consider for the 16th Session in December 2005.⁸⁰³ Issues relating to maritime performing parties are however on the plan for future work of the 17th Session to be held in April 2006.⁸⁰⁴ It will therefore remain to be seen whether the approach adopted in the last draft will be present in the final instrument due out in 2007.⁸⁰⁵ Finally, with regard to parties such as freight forwarders, they are much more contentious under the new instrument given that they may very well fall within the non-maritime performing party definition.⁸⁰⁶ Given the complex and hotly debated issue of liability for non-maritime performing parties and

⁸⁰¹ Where in Hamburg Rules 10(2), the actual carrier is liable for "carriage performed by him", in the new draft instrument 20(1) covers the time that he had custody of the goods, as well as any other time that he is participating in the performance of any of the activities contemplated in the contract of carriage. An argument can be made that inherently the wording of the new provision is broader in scope and can be used to bring all parties involved within such a definition. It would be hard to imagine a potential defendant not falling within the liability provision.

⁸⁰² UNCITRAL, "Report of Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)", 13 May 2005, UN Doc. A/CN.9/576. Available online from UNCITRAL website: www.uncitral.org/en-index.htm.

⁸⁰³ UNCITRAL, "Annotated Provisional Agenda: Sixteenth Session", 22 August 2005, UN Doc. A/CN.9/WG.III/WP.48. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at p. 8, para 25.

⁸⁰⁴ See "Schedule of next meeting: 17th session, 3-13 April 2006, New York" at www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html.

⁸⁰⁵ UNCITRAL, "Annotated Provisional Agenda: Sixteenth Session", 22 August 2005, UN Doc. A/CN.9/WG.III/WP.48. Available online from UNCITRAL website: www.uncitral.org/en-index.htm, at p. 7, describing that at the 38th session of the Commission, it was agreed that 2007 would be a desirable goal for the completion of the project, but the issue of establishing a deadline for its completion would be revisited during the 39th session in 2006. It has been argued however, that the draft is too long and complex to be adopted anytime soon, and thus a "fast track" approach should be taken for issues that need solving right away such as the "actual and performing carrier" issue (Tetley, W. "Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99." (2003) 28 Tul. Mar. L.J. 1, at p. 7).

⁸⁰⁶ 'Non-maritime performing party' means a performing party who performs any of the carriers responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge." (UNCITRAL, "Transport Law: Provisional redraft of the articles of the draft instrument considered in the Report of Working Group III on the work of its twelfth session", 23 March 2004, UN Doc. A/CN.9/WGIII/WP.36, at p. 4).

inland parties, a discussion of the issue of freight forwarders as carriers with regard to the new draft instrument is beyond the scope of the discussion at hand.⁸⁰⁷

⁸⁰⁷ For a discussion involving through contracts and freight forwarders see Nikaki, T. “The UNCITRAL Draft Instrument on the Carriage of Goods [Wholly or Partly] [By Sea]: The Treatment of Through Transport Contracts” (2004) 31 *Transp. L. J.* 193, who discusses the necessity for due diligence obligations under the new draft instrument for parties acting as freight forwarders, and suggests, at p. 212 a redrafting of article 9 of the draft instrument governing mixed contracts of freight forwarding and carriage. See also

13. CONCLUSION

“Maritime Law should be the child of commerce rather than the father.”⁸⁰⁸ It would be trite to comment that this area of the law is outdated and in need of reform, for that point is known to all. What remains incomprehensible however, is how the judiciaries of several nations have allowed such a narrow interpretation of the Hague Rules to be perpetuated when it is so evidently out of touch with the commercial realities of the modern shipping industry. One also marvels at how an interpretation of the Rules, so at odds with its aims and so heavily influenced by domestic legal constructs, can be perpetuated for so long. The interpretive mandate in the Vienna Convention on the Interpretation of Treaties has evidently been ignored in this instance.⁸⁰⁹ What is equally incomprehensible, is where legislatures have amended and revised outmoded laws or have implemented new carriage acts, and have failed to resolve the issue, or even to partially address it. In instances where the legislatures have not intervened to rectify the situation, a judicial solution is required in this instance. The fact that over eight decades after the drafting of the Hague Rules cases such as *The Starsin* are being pleaded to the House of Lords, where the uniform law is being circumvented through actions in tort against a shipowner and certain claimants find themselves without a cause of action for lack of title in the goods at the time of the loss, is an affront to the whole purpose of establishing uniform carriage law. Parties to the carriage endeavor, either parties with interest in the goods or parties who perform aspects of the carriage, must be found to fall within the regime. Many of the difficulties, if not most, would be resolved if courts adopted the view that parties performing carriage by sea are ‘carriers’, thus holding them jointly and severally liable. This has been accomplished to a certain degree in jurisdictions more open to the concept, such as the United States, but for the most part, the judiciary of the commonwealth nations have neglected to adopt this approach, and in certain cases even outright rejected it. Even after a detailed examination of this issue, one remains left with the question: Why is there such resistance to the notion of “carriers”

⁸⁰⁸ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)” (1976) 7 JMLC 615, at p. 615.

⁸⁰⁹ Article 31(1) of Vienna Convention on the Interpretation of Treaties, 1969, reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

and joint and several liability for parties involved in the carriage of goods? The above discussion reveals that adopting this approach would; a) simplify the law in this area immeasurably, b) ensure that the mandatory uniform carriage regime is being imposed on parties whose relations it was arguably created to regulate, c) bring the law in line with the modern commercial practice of shipping, and d) have the effect of harmonizing the law of certain nations with those who have legislated in order to address the issue. Despite a detailed examination of the topic, this author fails to comprehend the judicial resistance to this solution given all the factors weighing in its favour, and thus the question must unfortunately remain unanswered. Unless a paradigm shift on this issue is experienced within the judiciary, it is almost certain that the solution will be a legislative one, either domestically or through the adoption of a new international instrument. Until that time, one is left with parties operating in a modernized industry who are burdened with categories created two centuries ago.

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