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## **Identifying the carrier**

- The effect and validity of demise- and identity of carrier clauses in bills of lading –  
– A comparative study –

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. in approved courses and a minor dissertation.

The other part of requirement for this degree was the completion of a programme of courses.

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

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## Introduction

'It would strike one unfamiliar with maritime law 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 bills of lading contracts....'<sup>1</sup>

This comment illustrates that the proper identification of the carrier under bills of lading remains to be a problem, which is not resolved.

The shipper as party to the contract of carriage however has an interest in knowing who the carrier is and accordingly whom to sue for loss or damage of cargo. Suing the wrong party may incur unnecessary costs and the possible dismissal of the civil action.<sup>2</sup> Furthermore, the claimant runs the risk of becoming time barred.<sup>3</sup>

The problem of the identity of the carrier usually occurs where a vessel is time chartered as both the charterer or the shipowner could be carrier.

The problem occurs mostly where as bills of lading often do not clearly identify who the carrier is or may in some cases even contain contradictions as to this question. Furthermore, the question of the identity of the carrier may influence the place of suit as jurisdiction clauses often incorporated in bills of lading refer to demise and identity of carrier clauses.<sup>4</sup>

The Hague and Hague-Visby Rules, governing most of the world's contracts of carriage by sea, do not offer a clear definition of the term carrier.

This dissertation sets out to elaborate on the question who the carrier is under different jurisdictions with its underlying principles and concepts.

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<sup>1</sup> Colman J in *Homburg Houtimport B.V. v. Agrosin Private Ltd and Others* ("The Starsin") [2000] 1 Lloyd's Rep. 89.

<sup>2</sup> Dabelstein p. 2; Solaguren *Haftung im Seefracht und ihre gesetzliche Fortentwicklung in den skandinavischen Staaten* 62.

<sup>3</sup> Pejovic The Identity of Carrier Problem Under Time Charters (2000) 31 *Journal of Maritime Law and Commerce* 379; Williams *Chartering Documents* 120.

Giaschi C 'Who is Carrier? Shipowner or Charterer' <<http://www.admiraltylaw.com/papers/Carrier.htm>

<sup>4</sup> A jurisdiction clause may read: "Any dispute arising under this Bill of Lading shall be decided in the town and under the law, where the carrier has his principle place of business" quoted in Wodrich/Suhr *Identity of Carrier Klausel* (1976) 27 *Versicherungsrecht* 21.

Special consideration will thereby be given to the effect and validity of demise and identity of carrier clauses in bills of lading, which may influence the question of whether a bill of lading is a shipowners or a charterers bill of lading.

This is especially the case where demise and identity clauses contradict the signature or heading of the bill of lading. In other words: where the face of the bill of lading purports to be a charterers bill whereas the standard clauses incorporated on the back of the bill aim to hold the shipowner liable as carrier under the bill of lading.

It will be shown, that there is no uniform approach regarding this problem under international law and will comment on the necessity of bringing about changes in international maritime law.

## **Part A**

### **I. The identity of the carrier problem**

Cargo owners may be able to identify the flag of the vessel by obtaining a certificate of the ship registry from her country. It cannot however, be identified whether the ship is demise chartered, time chartered or voyage chartered as this is a matter of private contract which has to be distinguished from the carriage contract entered into by the cargo owner and the contractual carrier.<sup>5</sup>

The Hague and Hague/Visby Rules as the most widespread convention governing the law of carriage by sea as well as the domestic laws of carriage of maritime powers such as the U.S., GB, Japan and Germany do not specifically identify the carrier under bills of lading.

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see for example the Canadian case of the *Jian Sheng Co.Ltd. v. Great Tempo S.A. and others*  
Website of the Office of the Commissioner for Federal Judicial Affairs  
<http://reports.fja.gc.ca/fc.src/shtml/1998/pub/v3/1998fc22317.shtml> Reference: [1998] 3 F.C. 418.

<sup>5</sup> Satori 'The Camfair' (1993) *Japan Shipping Exchange Bulletin No. 36* website of the Japan Shipping Exchange Inc. <http://www.jseinc.org/en/buletin/bulletin36/camfair.htm>.

## 1. Definition of the term “carrier”

### 1.1 Hague and Hague/Visby Rules

The Hague<sup>6</sup> and Hague Visby Rules<sup>7</sup> merely provide that:

‘...Carrier<sup>8</sup> includes the owner or the charterer who enters into a contract of carriage with a shipper....’<sup>9</sup>

As the Rules merely provide that, the term “carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper. This is not a particularly clear or exhaustive definition. Under this definition, the “carrier” could be the owner or the charterer or both<sup>10</sup>.

Furthermore, bills of lading often do not identify the carrier and the Hague and Hague Visby Rules do not specifically define who the carrier is.

### 1.2 Charterers and Shipowners

The use of the word “includes” also implies that the carrier could be some other person or entity who is neither owner or charterer....<sup>11</sup> This rather broad definition of the term carrier which does not limit the application the Hague or Hague-Visby Rules to shipowners or charterers is also called the “practical”<sup>12</sup> or “multicarrier” approach.<sup>13</sup> It is uncertain however, if entities not party<sup>14</sup> to the contract should be included in this

<sup>6</sup> Adopted by the CMI in 1924 Tetley Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ‘99’ (2003) 28 *Tulane Maritime Law Journal* 2

<sup>7</sup> Ibid

<sup>8</sup> Prior to the adoption of the Hague Rules in 1924 the shipowner was the dominant figure besides the master of the vessel. The Hague Rules first introduced the term “carrier” instead of shipowner as the charterer was to be given the same position. See Becker *Klauseln des Seefrachtgeschäfts* 181.

<sup>9</sup> Art. 1 (a) of the Hague Rules. See for example: 46 U.S.C. § 1301 (a), art. I (a) South African Carriage of Goods by Sea Act 1 of 1986.

<sup>10</sup> This has view has mainly been taken by American courts See: Waguespack J ‘COGSA Rules the Seas: Why Bailment Should Be Jettisoned in COGSA’ (2002) 1 *Loyola Maritime Law Journal* 103-116.

<sup>11</sup> Giaschi C supra, fn. 3

<sup>12</sup> COGSA carriers are accordingly delineated as entities being involved in transportation and engaged in actions that led to the loss (or damage) of cargo. *Tradearbed, Inc. v. M/V Agia Sofia*, 1997 AMC 2838, 2840 (D.N.J. 1997) quoting *Hyundai Corp. U.S.A. v. Hull Ins. Proceeds of the M/V Vulca*, 800 F. Supp. 124, 132, 1993 AMC 434, 445 (D.N.J. 1992).

<sup>13</sup> Charest ‘A Fresh Look at the Treatment of Vessel Managers under COGSA’ (2004) 78 *Tulane Law Review* 895.

<sup>14</sup> It is commonly agreed among U.S. courts that an owner may be considered carrier either as party to the contract of carriage or indirectly by giving authority to the charterer to sign bills of lading ‘for the master’. *Hale Container Line, Inc. v. Houston Sea Packaging Co.*, 137 F.3d 1455, 1464-1465 (11<sup>th</sup> Circuit 1998). Quoted by Charest *ibid* at p. 895.

definition.<sup>15</sup> It may however, be fair and ‘...in keeping with the realities that ...shipper as plaintiffs...face in bringing a cargo claim...’ as the tangle of relationships between those involved may be unclear.<sup>16</sup>

The term charterer also encompasses slot charterers, which merely reserve slots on a vessel instead of chartering a vessels entire cargo space.<sup>17</sup>

### 1.3 Carriers other than charterer or shipowner

As the term is not exhaustive, it could also include other entities besides the shipowner and/or the charterer.

#### 1.3.1 Freightforwarders/ Non Vessel Operating Common Carriers (NVOCC's)

The question arises with respect to freightforwarders. Traditionally freightforwarders would act, as agents for the owner by arranging contracts of carriage but without issuing own bills of lading.<sup>18</sup> This traditional role played by freightforwarders has changed considerably over the last decades.<sup>19</sup> Nowadays they assume responsibilities for cargo delivery and issue bills of lading.<sup>20</sup> The American Shipping Act 1984 therefore distinguishes between an ocean freightforwarder<sup>21</sup> and a Non Vessel Operating Common Carrier.<sup>22</sup> Accordingly an NVOCC issuing own bills of lading<sup>23</sup> is

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<sup>15</sup> As against a freightforwarders it has been held that, as they only arrange for the transportation of cargo by securing cargo space without issuing (own) bills of lading they do not assume the role of a carrier see: *Prima U.S. Inc v. Panalpina, Inc.*, 223 F.3d 126, 129, 2000 AMC 2897 (2d Cir. 2000).

<sup>16</sup> Charest, supra, fn. 13 at p. 895

<sup>17</sup> Chapman, Voyles ‘Cargo Litigation: A Primer on Cargo Claims and Review of Recent Developments’ (2003-2004) 16 *University of San Francisco Maritime Law Journal* 5.

<sup>18</sup> Robertson, Sturley ‘Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits’ (2003) 27 *Tulane Maritime Law Journal* 521-522

<sup>19</sup> Clott, Wilson ‘Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation’ (1999) 26 *Transportation Law Journal* 210.

<sup>20</sup> Robertson, Sturley, supra, fn. 18 at p. 521-522

<sup>21</sup> Internationally the term “freightforwarder” would not only describe an “ocean freightforwarder” in the American sense of the term but rather entities known as “ocean transportation intermediaries”. This may lead to practical difficulties where the carriage originates overseas. See: Robertson, Sturley Ibid at p. 523

<sup>22</sup> Hereinafter referred to as NVOCC.

<sup>23</sup> The NVOCC is liable under his own bill of lading see: *Yang Ming Marine Transp. Corp. v. Okamoto Freighters Ltd.*, 259 F.3d 1086, 1089, 2001 AMC 2529 (9<sup>th</sup> Cir. 2001) cited in Chapman, Voyles, supra, fn. 17, at p. 6.

‘...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 carrier....’<sup>24</sup>

The NVOCC thus performs a double role as a (common) carrier under COGSA in relation to the shipper<sup>25</sup> and as agent of the shipper as against underlying ocean carriers.<sup>26</sup> Consequently a “traditional” freightforwarder merely arranging contracts of carriage will only be liable for his negligence and not as a COGSA carrier.<sup>27</sup>

If one follows the “practical” approach as mentioned above, even vessel managers may be subject to COGSA provisions and liable as carriers as long as they take part in the performance of the contract of carriage.<sup>28</sup>

### 1.3.2 The vessel *in rem*

Under common law even a vessel itself may be considered to be a carrier<sup>29</sup> and consequently action may be taken against the vessel in an *in rem* action.<sup>30</sup> Under

<sup>24</sup> 46 U.S.C. app. § 1702(17)(B).

<sup>25</sup> *Ins. Co. of N. Am v. M/V Ocean Lynx*, 901 F.2d 934, 937 n.2 (11<sup>th</sup> Cir. 1990) cited in Forwarderlaw.com <http://www.forwarderlaw.com/cases/nvocrole.htm> accessed 11th August 2004 see also Clott, Wilson ‘Ocean Shipping Deregulation and Maritime Ports: Lessons Learned from Airline Deregulation’ (1999) 26 *Transportation Law Journal* 210 citing Stanley O. Sher & John A. DeVierno, Maritime Reform, American Shipper, Apr. 1984, at 11-22, at fn. 19.

Radisch ‘Die Beschränkung der Verfrachterhaftung beim Überseetransport von Containern’ 57-58;

<sup>26</sup> *Orion Ins. Co. v. M/V “Humacao”*, 851 F. Supp. 575, 577-578 (S.D.N.Y. 1994);

Kiantou-Pampouki *Multimodal Transport* 16-17.

<sup>27</sup> *Weintraub & Sons, Inc. v. E.T.A. Transportation, Inc.* (S.D.N.Y.: 2003) (not yet officially reported) <[http://www.onlinedmc.co.uk/weintraub\\_v\\_eta\\_transportation.htm](http://www.onlinedmc.co.uk/weintraub_v_eta_transportation.htm)>

<sup>28</sup> Charest, supra, fn. 13 at p. 898.

<sup>29</sup> According to the court in *Hale Container Line, Inc. v. Houston Sea Packaging Co.*, 137 F.3d 1455 (11<sup>th</sup> Circuit 1998) a vessel may be a COGSA carrier where: (1) the ship transported and discharged the cargo (2) the bill of lading was issued for the master (3) no contractual relationship absolving vessel from liability for cargo existed. see: Glenn, Marling *Admiralty Law* (1999) 50 *Mercer Law Review* 855.

As soon as the vessel sails with the shippers cargo the master, representing not only the shipowner but also the vessel, is deemed to have ratified the contract of carriage. *Pioneer Import Co. v. Lafcomo* 138 F.2d 907, 1943 AMC 1943 (2 Circuit 1943). Cited in Tetley ‘whom to sue’ Website of McGill University <<http://www.mcgill.ca/maritimelaw/mcc4th/>>

<sup>30</sup> *Hale Container Line, Inc. v. Houston Sea Packing Co.* 137 F.3d 1455, 1465, 1999 AMC 607 (11<sup>th</sup> Circuit 1998). Cited in Chapman, Voyles, supra, at p. 5;

*Cactus Pipe and Supply Co. v. M/V Montmartre* 756 F.2d 1103, 1112, 1985 A.M.C. 2150, 2161 (5<sup>th</sup> Circuit 1985). See also: Schoenbaum *Admiralty and Maritime Law* 312;

Waguespack, supra, fn 10, at p. 110.

The Theory of personification has been criticised for being outdated, artificial and anomalous. See Davies ‘In Defense of Unpopular Virtues: Personification and Ratification’ (2000) 75 *Tulane Law Review* 338.

Under English law suit against a vessel *in rem* can only be brought where the owner or demise charterer is held liable *in personam* simultaneously. Under American law the liability of the vessel *in rem* is independent of the *in personam* liability of the shipowner.

civilian jurisdictions this possibility does not exist but there will usually be a maritime lien for damage or loss of cargo.<sup>31</sup>

## Conclusion

As shown above the term carrier is not exhaustive and it appears to be interpreted more extensively as courts in different jurisdictions come to acknowledge that the realities of the steamship era set forth in the Hague Rules are not apt to describe the situation of modern shipping but warrant a wider definition of the term.

## 2. Time charters

### 2.1 Relevance of time charters

The risk of not being able to identify the carrier occurs especially where a vessel is time chartered. The time charter is a contract between the charterer and the owner (or disponent owner) ‘...for the exclusive use of cargo carrying spaces on board a ship for a fixed period of time...’<sup>32</sup> and has to be distinguished from the contract of carriage between the shipper and the carrier. It is commonly acknowledged, that time charters are of great commercial importance in modern shipping.<sup>33</sup>

The problem for cargo interests in case of damage or loss of cargo is that, with a number of parties involved in the venture, more than one person or entity may potentially qualify as carrier under the Rules.

The commercial purpose of the time charter is the division of the duties associated with the carriage of goods by sea.<sup>34</sup> As shown above the shipper and especially a third party to which a bill of lading is transferred will often be unaware of the relationship between owner and charterer and that the vessel is actually time chartered.<sup>35</sup> However, even if the shipper knew the facts he would, under certain circumstances find it difficult to identify the carrier.

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Pejovic, *supra*, fn. 3, at p. 388.

<sup>31</sup> Tetley, *supra*, fn.29

<sup>32</sup> Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 588.

<sup>33</sup> Lorenz-Meyer *Reeder und Charterer* 25

<sup>34</sup> Pejovic, *supra*, fn.3 at p. 382.

<sup>35</sup> *Ibid*, at p. 380

## 2.2 The Division of the ships management

One of the reasons for the difficulty of identifying the carrier under time charters is the division of the vessels management. While the shipowner retains navigational control, the commercial control is handed to the charterer, which means that he can determine the ports of call to which the shipowner is bound to proceed<sup>36</sup>

The charterer is free to use the vessel to facilitate the transport of his own goods or transporting the cargo of others thereby becoming a common carrier.<sup>37</sup> While in theory navigational and commercial control over a vessel may be clearly distinguished it proves to be difficult in practice as the two components may be mixed.<sup>38</sup> It is suggested thus that both, navigational and commercial control of the vessel ‘...largely coincide in actual performance....’<sup>39</sup>

It is asserted thus, that the obligation to perform the voyage is not only towards the charterer but also towards the shipper of the goods.<sup>40</sup>

The division of the vessels management is one of the arguments brought forward in support of the notion that the carriage of goods under a time charter is effectively a joint venture and consequently should lead to a joint and several liability of the “actual” and the “performing” carrier.<sup>41</sup>

## 3. Means of identifying the carrier

### 3.1. Bills of lading

When being faced with the necessity of identifying the carrier courts have ‘...traditionally looked to the bill of lading....’<sup>42</sup> which often may be the only means of identifying the carrier available to the shipper. The question whether a bill of lading is an owners or a charterers bill has been found to be one of construction of the bill itself although other documents such as charterparties and other extraneous circumstances have partly influenced the decisions on this topic.<sup>43</sup>

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<sup>36</sup> Ibid, at p. 380.

<sup>37</sup> Ibid, at p. 380

<sup>38</sup> Ibid, at p.381.

<sup>39</sup> Ibid, at p. 381.

<sup>40</sup> Tetley, supra, fn. 29.

<sup>41</sup> Ibid

<sup>42</sup> Waguespack, supra, fn. 10, at p. 105.

<sup>43</sup> Reynolds, Treitel *Carver on Bills of Lading* 127-128.

Especially in cases where the bill of lading is subsequently endorsed to a party not originally party to the contract the bill of lading may often be the only document available in order to determine who the carrier is.<sup>44</sup>

One of the main objects of a bill of lading is its function as a document of title against which letters of credit are issued. Therefore, not only the original shippers of the goods have but also documentary credit bankers have an interest in identifying the carrier.<sup>45</sup>

The identity of the carrier may be ascertained under principles of agency law. Therefore the signature in bills of lading plays an important role, especially under common law jurisdictions. This problem however, shall not be covered in depth in this dissertation.

### 3.2 Extraneous circumstances

Some decisions have held that not only the bill of lading but also the “wider context” or “surrounding circumstances” such as charterparty terms may play a role in determining whether the bill is a charterers or a shipowners bill of lading.<sup>46</sup> A clause authorising the charterer to sign bills of lading on the masters behalf may well ‘... suggest that the shipowner was intended to be the carrier....’<sup>47</sup>

There is no doubt that where the relevant terms are incorporated into the bill of lading it will be legitimate to take recourse to them in order to identify the carrier.<sup>48</sup>

Where these terms are not expressly incorporated into the bill of lading this seems less certain and usually the surrounding circumstances will usually be given less weight.<sup>49</sup>

It thus seems fair, to determine this question by merely referring to the bill of lading as cargo interest, in general, cannot be required to scrutinise the underlying

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<sup>44</sup> Poetschke *Die Haftung des Reeders für Ansprüche aus Konnossementen unter einer Zeitchartere nach deutschem und englischem Recht* 26.

<sup>45</sup> Richardson *The Hague and Hague Visby Rules* 16.

<sup>46</sup> Reynolds, *supra*, fn. 43, at p. 137.

<sup>47</sup> Bassindale *The Identity of the Carrier under Bills of Lading* (1992) 11 *Clifford Chance Maritime Review* 5

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid* at p. 7

relationship of shipowner and charterer, especially in cases where the bill of lading was transferred and they are unaware of its terms.<sup>50</sup>

The terms should therefore be irrelevant, as the construction would ‘... run counter to the policy of keeping the doctrine of constructive notice out of commercial affairs....’<sup>51</sup>

### **3.3 Other terms of the bill of lading**

#### **3.3.1 demise clause**

A standard clause which may have an impact on the identification of the carrier is the demise clause, frequently incorporated in bills of lading. Its effect and validity are disputed.

##### **3.3.1.1 History and Origin**

The demise has its origin in the U.S. law of carriage where the clause surfaced as a bills of lading clause without carrying the name/being known as “demise clause” during World War II.<sup>52</sup> Its standard text reads:

“Limitation of Liability: The Carrier shall be entitled to the full benefit of, and right to, all limitations of, or exemptions from, liability authorized by any provisions of sections 4281 to 4286 of the Revised Statutes of the United States and amendments thereto and of any other provisions of the laws of the United States or of any other country whose laws shall apply. If the ship is not owned by or chartered by demise to the War Shipping Administration or the Company designated herein (as may be the case notwithstanding anything to the contrary) this Bill of Lading shall take effect only as a contract with the owner or demise charterer, as the case may be, as principal, through the agency of the (War Shipping Administration) or the Company designated herein which acts as agent only and shall be under no personal liability whatsoever in respect thereof. If, however, it shall be adjudged that any other than the owner or

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<sup>50</sup> Where the charterparty contains clauses identifying the carrier and it can be proven that the holder of the bill of lading was fully aware of the said terms, it may be possible to take them into account. See Bassindale 5;

The terms of the charterparty may however, be given effect as between the owner and the charterer. See: Schoenbaum, supra, fn. 30 at p. 314.

<sup>51</sup> This policy was stated in *Manchester Trust Ltd. v. Furness Withy & Co.* 1895 2 Q.B.

<sup>52</sup> Dabelstein, supra, fn. 5

demise charterer is carrier and exonerations from liability provided by law or by the terms hereof shall be available to such others".<sup>53</sup>

The first part of the clause is concerned with the carriers limitation of liability who shall be entitled to limit his liability according to §§ 4281 to 4286 of the Revised Statutes of the U.S. Limitation of Liability Act. As these provisions would be enforceable in any case the first part of the clause may seem to be obsolete.<sup>54</sup>

The second part of the clause could explain the first part in stating that if the vessel is not owned or chartered by demise to the War Shipping Administration or the company designated in the bill of lading only the demise charterer or owner of the vessel shall be held liable as carrier. In this case the (demise) clause declares the bill of lading to be the contract of carriage with the shipowner or demise charterer represented by the War Shipping Agency or the Company issuing the bill of lading as agents only.

It therefore is clear, that the issuer of the bill of lading does not want to be held liable as carrier if the vessel is not owned or demise chartered by him. As the issuer of the bill of lading may either have been the War Shipping Administration or a company the effect of the demise clause on both shall be briefly scrutinised for this purpose.

### **3.3.1.2 The War Shipping Administration**

The War Shipping Administration was established during the second world war. During this period the U.S. built a huge fleet of commercial vessels to facilitate its transports and supplies.<sup>55</sup> This fleet was operated by the War Shipping Administration.

#### **3.3.1.2.1 The War Shipping Administration as shipowner**

Formally officers and crews of these vessels were under the command of the War Shipping Administration in practice the duties were performed by private companies which were obligated as against the government by general agency agreements.<sup>56</sup>

The government therefore retained all rights as owner of the vessels. The bills of ladings however, were signed and issued by the private companies.

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<sup>53</sup> Schaps, Abraham *Das Seerecht in der Bundesrepublik Deutschland* 753.

<sup>54</sup> Dabelstein, *supra*, fn. 2, at p. 9

<sup>55</sup> Herber *Seehandelsrecht* 293.

<sup>56</sup> Dabelstein, *supra*, fn. 2 at p. 10

The demise clause therefore aims specifically at limiting the liability of the carrier. It is questionable however, whether this was the War Shipping Administration or the companies performing the carriage.

One could conclude that the demise clause was in favour of the shipping companies issuing the bills of lading. It can be presumed, however, that the U.S. government did not want to be held liable as carrier. The first part of the demise clause therefore has to be seen as protecting the companies.<sup>57</sup>

### **3.3.1.2.2 The War Shipping Administration as charterer**

As the own vessels could not sufficiently cover the demand for tonnage the U.S. government simultaneously chartered vessels instead of requisitioning them. The vessels were either time or demise chartered. The shipowners however, retained navigational as well as commercial control over the vessel.

In France on the other hand shipowners were compelled to charter their vessels to the state. While the shipowners retained control a bill of lading clause declared them to act as agents.<sup>58</sup>

In French decisions courts took the view that the state was to be held liable.<sup>59</sup>

### **3.3.1.2.3 Interest in the demise clause**

As opposed to France the (demise) clause in the U.S. bills of lading attempted to construct a reverse representation due to the different nature of interests involved. The (demise) clause aimed at shifting liability from the War Shipping Agency or its agents on the shipowners or demise charterers.<sup>60</sup> The reason was that the War Shipping Agency as charterer could not rely on §§ 4281 to 4286 of the Revised Statute which would have meant that the War Shipping Agency would have been unable to limit liability.<sup>61</sup>

Interestingly the Supreme Court of the U.S. held that, the War Shipping Administration was to be seen as shipowner or demise charterer in respect of the entire fleet, as the state was at all material times employer of the officers and crews.<sup>62</sup>

<sup>57</sup> Dabelstein, *supra*, fn. 2, at p. 11

<sup>58</sup> Sotiropoulos *Die Beschränkung der Reederhaftung* 110.

<sup>59</sup> Cases quoted in Sotiropoulos *Die Beschränkung der Reederhaftung* 110.

<sup>60</sup> Becker, *supra*, fn. 8 at p. 183.

<sup>61</sup> Herber, *supra*, fn. 55 at p. 293

<sup>62</sup> Sotiropoulos, *supra*, fn. 58, referring to *Cosmopolitan Shipping Co. v. Mc Allister*, 1949, 337 U.S. 783

Even where the ships were time chartered the War Shipping Administration was to be considered demise charterer for this purpose with the effect of a limited liability under § 4286 of the Revised Statute.

It may be concluded thus that the U.S government was liable at all times but on the other hand never at risk of unlimited liability.

### **3.3.1.3 The National Shipping Authority**

The successor of the War Shipping Administration was the National Shipping Authority, founded in 1951.<sup>63</sup> It continued the chartering of its vessels by private companies on the basis of general agency agreements and an unaltered version of the demise clause in their bills of lading.<sup>64</sup> Through the continuing usage of their bills of lading the (demise) clause surfaced in the transport of private Lines. U.S. time charterers compared their role to the War Shipping Administration and saw advantages in taking over the demise clause in their own bills of lading.<sup>65</sup>

This practice was soon copied by foreign charterers and a number of different alternations of demise clauses although not always named demise clause appeared in bills of lading.<sup>66</sup>

### **3.3.2 Identity of carrier clause**

Another clause commonly found in bills of lading is the identity of carrier clause. It can be said, that the identity of carrier clause is not only related to the demise clause but rather a variation of the same clause.<sup>67</sup>

It commonly reads as follows:

“The contract evidenced by this Bill of Lading is between the Merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that said shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel’s seaworthiness. If, despite the foregoing, it is adjudged that any other is the carrier and/or

<sup>63</sup> Dabelstein, supra, fn. 2, at p. 18

<sup>64</sup> Sotiropoulos, supra, fn. 58, at p. 210.

<sup>65</sup> Dabelstein, supra, fn. 2, at p. 18

<sup>66</sup> Ibid at p. 19.

<sup>67</sup> Schaps, Abraham, supra, fn. 53, at p. 753; Wodrich/Suhr, supra, fn. 4, at p. 21

bailee of the goods shipped hereunder, all limitations of, and exonerations from liability provided 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 and 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".<sup>68</sup>

According to this clause the contract evidenced by the bill of lading is between the merchant and the owner of the said vessel, which in turn means that only he shall be liable for any occurring damages or loss. The shipowner would then invoke the right to limit his liability and thereafter be indemnified by the charterer who would thus enjoy the benefits of limited liability.<sup>69</sup> Although the aim of the demise and the identity clause are the same they differ in a number of points:

Amongst others the identity of carrier clause does not list the shipowner and the demise charterer alternatively but only the shipowner as party to the contract. The bill of lading itself is not seen as being the contract of carriage but rather evidencing a contract of carriage.

### 3.3.3 The validity of the demise and identity of carrier clause

After the ratification of the Convention for limitation of liability, 1957, the demise clause as well as the identity of carrier clause became obsolete<sup>70</sup> as under art. 6 sec. 2 of the Convention the possibility to limit liability was extended to parties of the contract other than the shipowner.<sup>71</sup> Art 6 (2) of the Convention reads:

'...Subject to paragraph (3) of this Article, the provisions of this Convention shall apply to the charterer, manager and operator of the ship, and to the Master members of the crew and other servants of the owner, charterer,

<sup>68</sup> Poetschke, *supra*, fn. 44 at p. 42

<sup>69</sup> Pejovic 'The Problem of the Validity of Identity of Carrier Clauses' (1995) 30 *European Transport Law* 300

<sup>70</sup> Becker, *supra*, fn. 8, at p. 184;  
Puttfarken *Seehandelsrecht* 42;

Sotiropoulos, *supra*, fn. 58, at p. 361.

<sup>71</sup> Schwörbel *Die Beschränkung der Reederhaftung nach dem Brüsseler Abkommen vom 10.10.1957* at p.47; Puttfarken *Beschränkte Reederhaftung – Das anwendbare Recht* 10;  
Hoffmann *Die Haftung des Verfrachters nach deutschem Seefrachtrecht* 64.

In Germany the convention entered into force in 1972. See: Poetschke, *supra*, fn. 44, at p. 43.

manager or operator acting the course of their employment, in the same way as they apply to an owner himself....<sup>72</sup>

In Germany the convention came into force in 1972.<sup>73</sup> Interestingly, German courts even prior to the enactment of the convention by virtue of the German Commercial Code held that charterers could limit their liability.<sup>74</sup>

The clause however, remains in use<sup>75</sup> although consequently the original purpose of the clause only continues to exist in jurisdictions where the Convention has not been enacted.<sup>76</sup>

### 3.3.4 General position on the effect and validity of demise and identity of carrier clauses

The fact that demise and identity of carrier clauses are obsolete has to be distinguished from the question whether they are valid stipulations. Nowadays the demise and identity of carrier clause are used to construct a contractual relationship between the shipowner and the shipper.<sup>77</sup>

The main arguments brought forward against the validity of the clauses are that they are ineffective either under common law principles or as in some Canadian decisions<sup>78</sup> under Art. III (8) of the Hague/Visby Rules, as they purports to lessen or probably avoid liability<sup>79</sup> of the carrier.<sup>80</sup>

<sup>72</sup> The Convention on Limitation of Liability for Maritime Claims 1976 further extended the possibility to limit to persons and entities such as Salvors, art. 1 (3). See Bundesgesetzblatt 1986 II, p. 786.

<sup>73</sup> Gesetz zur Aenderung des HGB und anderer Gesetze vom 21.06.1972.

<sup>74</sup> OLG Hamburg judgement delivered on 13.3.1969 (6 U 149/68) cited in (1969) 20 *Versicherungsrecht* 662;

In an *obiter dictum* the same court ruled that, if this became the prevailing view that charterers could limit their liability in analogy to the shipowner, identity of carrier clauses became obsolete. See: OLG Hamburg judgement delivered on 22.5.1969 (6 U 59/68) cited in (1970) 21 *Versicherungsrecht* 80. The decision was subsequently upheld by the German Supreme Court (BGH) Urteil des BGH vom 28.6.1971 [Revisionsentscheidung zu dem in *Versicherungsrecht* 69, 660 abgedr. Urteil des OLG Hamburg v. 13.3.1969 (6 U 149/68)] cited in (1971) 22 *Versicherungsrecht* 833.

<sup>75</sup> F.M.B.R. 'The Demise Clause and The Hague Rules' (1987) *Lloyd's Maritime and Commercial Law Quarterly* 260; Herber *Seehandelsrecht Systematische Darstellung* 244.

<sup>76</sup> Pejovic, *supra*, fn. 69, at p. 300

In Germany this was the case until 1972. As the charterer could not limit his liability under the German Commercial Code. See: Herber, *supra*, fn. 55, at p. 244.

<sup>77</sup> Solaguren, *supra*, fn. 2, at p. 61.

<sup>78</sup> *Carling O'Keefe of Canada Ltd. v. C.N. Marine Inc.* (The Newfoundland Coast) [1990] 1 F.C. 483. see also *Canficorp v. Cormorant Bulk-Carriers* 1985 A.M.C. 1444 (Fed. C.A.).

<sup>79</sup> Prüssmann, Rabe *Seehandelsrecht* 615;

Dubischar *Grundriss des gesamten Gütertransportrechts* 143.

<sup>80</sup> Reynolds F.M.B. 'The Demise Clause' (1988) *Lloyd's Maritime and Commercial Law Quarterly* 285

It is asserted that principles of the law of agency are inapplicable due to the concept of a time charter as a joint venture between shipowner and charterer.<sup>81</sup>

Further reasons against the validity of demise and identity of carrier clauses will be addressed below.

The main arguments brought forward for the validity of these clauses is that they only identify the carrier instead of purporting to lessen the carrier's liability. The New South Wales Court of Appeal for example took this view.<sup>82</sup>

As will be shown below there have been contrasting approaches and it cannot be convincingly stated that even under the same jurisdiction this problem is solved in a uniform manner.

## **Conclusion**

The bill of lading will usually be the only document available to the consignee to identify the carrier. It thus seems fair to conclude that extraneous circumstances and terms not expressly incorporated in the bill of lading should generally not be determinative on the question of the identity of the carrier.

We can conclude that demise and identity of carrier clauses are obsolete nowadays although they remain in use.

As will be shown, there is no uniform manner in dealing with these clauses under different jurisdictions.

## **Part B**

### **I. The Identity of the carrier problem under different jurisdictions**

#### **1. Common Law Jurisdictions**

##### **1.1 The United States of America**

###### **1.1.1 Applicable Law**

In the U.S. the law of carriage is governed by U.S. COGSA<sup>83</sup> incorporating the Hague Rules including the Visby amendments of 1968 which entered into force in 1977 and the Harter Act, 1893.

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<sup>81</sup> Tetley, *supra*, fn. 29

COGSA applies to ‘...all contracts for carriage of goods by sea to or from ports of the United States in foreign trade....’<sup>84</sup> This requires that the carriage is performed under a bill of lading or a similar document of title.<sup>85</sup>

The Harter Act governs the carriage of goods by sea between U.S. ports as well as inland water carriage under bills of lading.<sup>86</sup> As opposed to the Hague-Visby Rules which only cover the period from tackle to tackle the Harter Act applies ‘...from the time of discharge to the time of delivery....’<sup>87</sup> Neither of both acts providing rules for the carriage of goods by sea clearly identifies the carrier.

### 1.1.2 General position on the identity of carrier problem

American decisions on this topic have been rather inconsistent. As opposed to the general position in England American courts have held that there may be more than one carrier under COGSA<sup>88</sup> including entities other than shipowner or charterer.<sup>89</sup>

The notion of a joint and several liability also has been expressed by American courts and authorities. In *Joo Seng Hong Kong Co., Ltd v. S.S. Unibulkfir* the court ruled that there is a

‘...strong statutory support for treating, except in exceptional situations, all owners and charterers involved in the carriage of goods at issue as COGSA carriers who are potentially liable to cargo interests under the bill of lading....’<sup>90</sup>

Consequently the loss would then be apportioned among the parties found to be carriers under COGSA.<sup>91</sup>

<sup>82</sup> *Kaleej International Pty Ltd. v. Gulf Shipping Lines Ltd.* (1986) 6 N.S.W.L.R. 569

<sup>83</sup> The U.S. COGSA was adopted in 1936. See: Waguespack ‘COGSA Rules the Seas: Why Bailment Should be Jettisoned in COGSA Actions’ (2002) 1 *Loyola Maritime Law Journal* 103.

<sup>84</sup> 46 U.S.C. app. § 1312

<sup>85</sup> 46 U.S.C. app. § 1301 (b)

<sup>86</sup> Chapman, Voyles, supra, fn. 17, at p. 14.

<sup>87</sup> *Crowley Am. Transp., Inc. v. Richard Sewing Mach. Co.*, 172 F.3d 781, 785 n.6, 1999 AMC 1723 (11<sup>th</sup> Circuit 1999) cited in Chapman, Voyles, supra, fn. 17, at p. 14.

<sup>88</sup> Waguespack, supra, fn. 10, at p. 108.

<sup>89</sup> This “multicarrier approach” going even beyond the notion of joint liability, has been adopted mainly by the Southern District Court of New York. It has to be noted however, that this view has not been endorsed by the U.S. Courts of Appeal as yet See: Reilly ‘Charter Party Symposium: Identity of The Carrier: Issues Under Slot Charters’ (2001) 25 *The Maritime Lawyer* 509.

<sup>90</sup> *Joo Seng Hong Kong Co., Ltd. v. S.S. Unibulkfir*, 483 F.Supp. 43 (S.D.N.Y.1979) quoted in Schoenbaum *Admiralty and Maritime Law* 313.

<sup>91</sup> *Ibid* at 313.

### 1.1.3 The demise and identity of carrier clauses under American Law

The clauses have been held both, valid or invalid stipulations by different American courts.

The prevailing view on the validity of demise and identity of carrier clauses however is that, as a matter of public policy, they are unenforceable under American law.<sup>92</sup>

In *Complaint of Damodar Bulk Carriers, Ltd.*<sup>93</sup> the plaintiff cargo owners sued the vessel, its owner and charterers for damage to the cargo. The goods were shipped under charterers bills of lading and contained a demise clause. The charterer invoked the demise clause thereby trying to avoid liability as carrier. In an obiter dictum the court held, that it had found no ‘...circuit authority....’invalidating a demise clause.<sup>94</sup>

In *Yeramex International v. S.S. Tendo*<sup>95</sup> cargo was shipped under bills of lading containing a reverse identity of carrier clause which declared the charterer to be the carrier. The court held that the charterer was liable as a carrier. The decision was based on the fact that the terms of identity of carrier clause were clear but mainly that he assumed carriers responsibilities with regard to the issuance of the bill of lading as well as the handling of the cargo.

It is asserted that this decision is of little or no authority for the question concerned as it was a reverse clause and its validity was not argued. Furthermore the decision was to a great extent founded on the construction of the surrounding circumstances such as the charterparty, not so much however, on the bill of lading.<sup>96</sup>

Other American decisions have been less favourable of demise clauses.

In *Thyssen Steel Co. v. M/V Yerakas*<sup>97</sup> the court held a demise clause to be an attempt to lessen the carriers liability under U.S. COGSA. It was therefore considered to be an invalid stipulation.<sup>98</sup>

<sup>92</sup> Pejovic, supra, fn. 3, at p. 387.

<sup>93</sup> *Complaint of Damodar Bulk Carriers, Ltd. v. Peoples Insurance of China* 903 F.2d 675, 682, 1990 AMC 1544 (9. Circuit 1990).

<sup>94</sup> *Complaint of Damodar Bulk Carriers, Ltd.* Cited in Tetley, supra, fn. 29

<sup>95</sup> *Yeramex International v. S.S. Tendo* 595 F.2d 947-948, 1979 AMC 1282 (4<sup>th</sup> Circuit 1979).

<sup>96</sup> Tetley ‘The Demise of the Demise Clause?’ at p. 815.

<sup>97</sup> *Thyssen Steel v. M/V Kavo Yerakas* 50 F.3d 1349 at 1353, 1995 AMC 2317 at 2322 (5<sup>th</sup> Circuit 1995).

<sup>98</sup> Tetley, supra, fn. 29

## Conclusion

It appears that the situation concerning the effect and validity of demise clauses is not handled in uniform way by the various courts. The tendency seems to be that courts refute the effectiveness and validity of these clauses.

## 1.2 Great Britain

### 1.2.1 Applicable law

The English law of carriage is governed by the Merchant Shipping Act 1995.<sup>99</sup> The Hague Visby Rules were enacted into English law in 1971 by virtue of the Carriage of Goods by Sea Act 1971.

Under English law, the both, the signature as well as demise and identity of carrier clauses including appendices plays an important role play an equally important role in identifying the carrier.

As a principle under English law, the bill of lading is seen as an 'owner's bill of lading' as opposed to German law where as a general rule the bill of lading is perceived to be a carriers bill of lading.<sup>100</sup> The ship and its owner are therefore more prominent under common law jurisdictions. The master of the vessel is seen as servant of the owner. His signature plays an important role in determining who the carrier is.<sup>101</sup> As a general customary rule under English common law the master signs bills of ladings for the owner. Equally bills of ladings signed by the charterer as authorised by the master will usually bind the shipowner.<sup>102</sup>

The identity of the carrier is influenced by the strong link between the carriage contract and the bill of lading under English law.<sup>103</sup> In identifying the carrier the question of who is obligated to perform the carriage is of less importance than the question of who issued the bill of lading.<sup>104</sup> The signature on the bill of lading therefore plays a more significant role under English law as opposed to German law.<sup>105</sup>

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<sup>99</sup> Ibid

<sup>100</sup> Poetschke, supra, fn. 44, at p.134.

<sup>101</sup> Ibid

<sup>102</sup> Boyd et al *Scrutton on Charterparties and Bills of Lading* 80.

<sup>103</sup> Poetschke, supra, fn. 44, at p 134.

<sup>104</sup> Ibid, at p 135.

<sup>105</sup> Ibid, at p 154.

### 1.2.2 General position under English law

Under English law, there traditionally been no objections against the validity of the identity of carrier clause.<sup>106</sup> The identity of carrier clause is seen as a means of identifying the carrier rather than discharging the charterer from liability thereby eliminating any ambiguity.<sup>107</sup>

The clause highlights the fact that the vessel may be on charter and the owner in this case possibly be party to the contract of carriage with the charterer assuming the role of the owners agent.<sup>108</sup>

In English law as under German law the clause is assessed by the principles of agency law. The question is whether the issuer of the bill of lading acts with authority and obviousness. The authority of the charterer to sign bills of lading for the shipowner will usually derive from an employment clause frequently contained in the charter party.<sup>109</sup> Under English law the employment clause encompasses the right to sign bills of lading containing identity of carrier clauses<sup>110</sup> Where the charterer signs bills of lading containing an identity of carrier clause without authority the owner will not be bound.<sup>111</sup>

### 1.2.3 English cases

#### • The Berkshire

In the Berkshire the plaintiff shippers sued the owners of the vessel *Lancashire* for damages.<sup>112</sup> The vessel was at all material times on time charter.<sup>113</sup> A bill of lading which contained a demise clause was issued on the charterers agents printed form and signed by the sub-agents of the charterer.<sup>114</sup> The shippers contended that the owner was liable for the damages as carrier while the owner asserted that the contract of carriage was between the charterers and the shippers.<sup>115</sup> The court had to decide firstly, whether the contract as ‘...evidenced by the bill of lading was a contract between the shippers and the shipowners...’ and

<sup>106</sup> Prüssmann/Rabe *Seehandelsrecht* 617.

<sup>107</sup> See the Australian decision in *Kaleej International Pty v. Gulf Shipping Lines Ltd* (1986) 6 *New South Wales Law Reports* 574 (The Sun Diamond Voyage 19).

<sup>108</sup> Poetschke, supra, fn. 44, at p 161.

<sup>109</sup> Trappe *Zur Frage der Zeichnung der Konnossemente unter einer Zeitcharter* (1972) 20 *Versicherungsrecht* 520.

<sup>110</sup> The Berkshire [1974] 1 *Lloyds Rep.* 183.

<sup>111</sup> Poetschke, supra, fn. 44 at p. 162.

<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> Ibid

secondly, if so, whether the charterer and his sub-charterer were authorised to issue the bill of lading on the shipowners behalf.<sup>116</sup>

The court firstly gave effect to the demise clause and held, that the bill of lading intended to evidence a contract between the shipper and the shipowner.<sup>117</sup> The express wording of the clause clearly was said to encompass the agent charterer in whose name the sub-agent signed the bill of lading.<sup>118</sup> Furthermore it was undisputed, that the vessel was not owned or demise chartered to the said company, but by the shipowners.<sup>119</sup> On the first point the judge therefore held, that ‘...the contract contained in or evidenced by the bill of lading purports to be a contract between the shippers and the shipowner and not one between the shippers and the charterers....’<sup>120</sup>

The second question was also answered in the affirmative. The court held, that the effect of demise clauses in bills of lading are ‘...well settled....’ and not extraordinary as it merely spells out that the bill of lading is intended to be a shipowners bill of lading in unequivocal terms and therefore has to be seen as ‘...entirely usual and ordinary....’ in this context<sup>121</sup> As the clause was not extraordinary the charterers had authority to sign the bill of lading containing a demise clause by virtue of the employment clause (clause 8) of the charterparty.<sup>122</sup> They were furthermore entitled to appoint sub-agents to sign on their behalf.<sup>123</sup> The shipper therefore had title to sue the shipowner upon the bill of lading contract evidenced by the bill of lading.

It has been noted however, that the words ‘and not between the shippers and the charterers’ were *obiter dictum* as only the shipowner was sued<sup>124</sup>

It is argued, that the charterer could as well have been sued by the consignees as he had issued the bills of lading and the judgement merely spelled out that the shipowner was liable under a charterers bill by virtue of the Bills of Lading Act, 1855.<sup>125</sup> *The Berkshire* however remains to be one of the main authorities on the validity of demise and identity of carrier clauses.<sup>126</sup>

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<sup>116</sup> Ibid, at p. 187.

<sup>117</sup> Ibid, at p. 188.

<sup>119</sup> Ibid, at p. 188.

<sup>120</sup> Ibid

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> Ibid

<sup>124</sup> Tetley ‘The Demise of the Demise Clause?’ (1999) 44 *McGill Law Journal* 819.

<sup>125</sup> Ibid

- **The Venezuela**

In *The Venezuela*<sup>127</sup> the bill of lading was the charterers usual form and signed by the charterers agents 'as agents for the master. The vessel was at all material times on time charter. The bill of lading contained an identity of carrier clause which provided that either the charter (C.A.V.N.) or the sub-charterer (F.M.G.) depending on who was operating the vessel at the material time was to be regarded carrier.<sup>128</sup> In any case the owner of the vessel should not be held liable under the contract evidenced by the bill of lading. The identity of carrier clause was therefore rather unusual. The court held the time charterer (C.A.V.N.) to be the carrier under the bill of lading. Although the court found that the bill of lading was a shipowners bill of lading due to the fact that it had been signed for the master, it was held, that effect had to be given to the identity of carrier clause, meaning that only the charter or the sub-charterer and no other company could be regarded as carrier under the bill of lading.<sup>129</sup> As there was no indication on either side of the bill of lading that another company was carrier under the bill of lading the charterer had to be regarded as "contracting carrier".<sup>130</sup> The identity of carrier clause was therefore held to be valid and effective.

- **The Rewia**

In *The Rewia* it was held, that "a bill of lading signed for the master cannot be a charterers 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 not the owners...."<sup>131</sup>

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<sup>126</sup> Ibid

<sup>127</sup> *The Venezuela* [1980] 1 Lloyd's Rep. 393.

<sup>128</sup> The clause reads as follows: 'Carrier...is...Comapania Anonima Venezolana de Navegacion or the Flota Mercante Grancolumbiana S.A. depending on whichever of the two is operating the vessel carrying the goods covered by the Bill of Lading....', Ibid

<sup>129</sup> Ibid, at p. 397.

<sup>130</sup> Ibid

<sup>131</sup> *The Rewia* [1991] 2 Lloyd's Rep. 333. C.A.;  
Boyd et al. *Scrutton on Charterparties and Bills of Lading* 81.

## The Ines

In the *Ines*<sup>132</sup> the vessel was on time charter to charterers operating a liner service under the name of Maras Linja. Bills of lading were issued on the form of the charterer and were ‘...signed as agents for the carrier Maras Linja...’.<sup>133</sup> The bills of lading contained *inter alia* a (demise clause cl. 19).<sup>134</sup> The issue again was whether the bills were owners or charterers bills. The signature itself was ambiguous as it named the charterer as carrier. The court however was of the opinion that it was right to examine the bill of lading as a whole and also to consider the whole contractual context.<sup>135</sup> Relying on the judgement in *The Berkshire Clarke J* gave effect to the demise clause.<sup>136</sup> It was held that, as a matter of construction the bill had to be regarded as an owners bills of lading.<sup>137</sup> The consideration of the whole context did not lead to a different result.<sup>138</sup> The owner was therefore considered carrier. While the court gave effect to the demise clause, it did not comment on the its validity. It does not seem far fetched to assume however, that the same result would also have been reached in the absence of the demise clause as it was only one of the indicators on which the court relied in holding that the bills were owners bills of lading.

Commenting on this case *Prof Tetley* concluded that it was only an *obiter dictum* and should therefore not be recognized.<sup>139</sup>

### • The Flecha

In *The Flecha* the cargo owners sued the owners of the vessel for damages.<sup>140</sup> The vessel was at all material times on time charter to Continental Pacific Shipping Ltd and bills of lading were issued on the charterers form containing *inter alia* an identity of carrier clause (cl. 33) and a demise clause (cl. 35).<sup>141</sup> The bills of lading were signed by different agents for Continental Pacific Shipping as carrier.<sup>142</sup> The bill of lading owners sued the owner of the vessel for damages. The court had to answer

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<sup>132</sup> *M.B. Pyramid Sound N.V. v. Briese Schiffahrts GmbH and Co. KG. M.S. "Sina" and Latvian Shipping Association Ltd.* (The "Ines"), [1995] 2 Lloyd's Rep. 144.

<sup>133</sup> *Ibid*, at p. 149.

<sup>134</sup> *Ibid*, at p. 145.

<sup>135</sup> *Ibid*, at p. 150.

<sup>136</sup> *Ibid*, at p. 149.

<sup>137</sup> *Ibid*, at p. 150.

<sup>138</sup> *Ibid*

<sup>139</sup> Tetley, *supra*, fn. 124, at p 820.

<sup>140</sup> *Fetim B.V. and Others v. Oceanspeed Shipping Ltd.* ("The Flecha" ), [1999] Lloyd's Rep. 612.

<sup>141</sup> *Ibid*

<sup>142</sup> *Ibid*, at p. 614.

the question whether the bills of lading were owners or charterers bills.<sup>143</sup> While taken by themselves the signatures on the bills may indicate that the charterers (Continental Pacific Shipping Ltd) were contractual carriers Mr. Justice Clark held as in *The Ines* the whole contract had to be looked at in a wider context and not limited to the construction of the bill alone.<sup>144</sup> Under the charter party the charterers had the right to sign bills of lading on behalf of the owner, which meant that the owners would be bound by the signature of the charterers and that this also reflected in the bill of lading terms namely in encompassed in the demise and identity of carrier clause.<sup>145</sup> To identify the charterer as carrier would require a ‘...positive indication that the charterers are undertaking a personal liability in contradiction to that which appears from these various forms of signature....’<sup>146</sup> The court did not find the signatures loosely describing Continental Pacific Shipping as carrier to go ‘...far enough to make it clear that the parties intended...them to be...contracting in place of the owners contrary to all the terms of the bill of lading....’<sup>147</sup> The loose usage of the terms “carrier” was thus held to be insufficient to ‘...displace the clear terms of the bill of lading....’<sup>148</sup> The court therefore held, that upon examination of the document as a whole the owners were carriers as the signatures did not constitute a clear intention to the contrary.<sup>149</sup>

#### • The Hector

In the *Hector* the vessel was time chartered to US Express Lines (“USEL”).<sup>150</sup> The charterparty provided inter alia ‘...master to authorise charterers...to sign bills of lading on their behalf in conformity with mates receipt....’<sup>151</sup> Subsequently, the vessel was sub chartered to the defendants Uvisco. The bill was signed “for and on behalf of the owner” and on the face appeared the typed words “CARRIER: U.S. EXPRESS LINES”.<sup>152</sup> The bill of lading contained an identity of carrier clause on the reverse

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<sup>143</sup> Ibid, at p. 612.

<sup>144</sup> *The Flecha*, supra, fn. 140, at p. 618.

*The Ines*, supra, fn. 132, at p. 150

<sup>145</sup> *The Flecha*, supra, fn. 140, at p. 618.

<sup>146</sup> *The Flecha*, supra, fn. 140 at p. 618/619.

<sup>147</sup> Ibid

<sup>148</sup> Ibid, at p. 619.

<sup>149</sup> Ibid

<sup>150</sup> *Sunrise Maritime Inc. v. Uvisco Ltd.* (The “Hector”), [1998] 2 Lloyd’s Rep. 287.

<sup>151</sup> Ibid

<sup>152</sup> Ibid, at p.. 290.

which identified the owner as carrier.<sup>153</sup> The court had to decide *inter alia* whether the bill of lading was an owner's or s charterer's bill of lading.<sup>154</sup> Relying on the authorities *Justice Rix* found it difficult to determine whether the identification of the carrier was to be ascertained merely by construction of the bill of lading or depended on '...all the circumstances of the case...'.<sup>155</sup> As negotiable documents bills of ladings may be relied on by third parties not privy to the contract of carriage and therefore ignorant of the original circumstances.<sup>156</sup> Justice Rix adopted the approach of Justice Clark by first construing the bill of lading and subsequently considering whether or not the '...surrounding circumstances support or detract from that conclusion....'.<sup>157</sup>

It appears that the judgement of *The Hector* is only the second decision where a bill of lading was signed for the master and yet the charterer was held to be the carrier.<sup>158</sup> It furthermore is the first case where a bill containing an identity of carrier clause was held to be a charterer's bill.<sup>159</sup> Upon construction of the bill Mr. Justice Rix held, that the fact that USEL is stipulated to be the carrier is not ambiguous. The term 'carrier' has to be understood as a technical term in this context not merely indicating that USEL was operating the vessel but rather that USEL was the company actually carrying out the obligation set forth by the contract of carriage as evidenced by the bill of lading.<sup>160</sup> Furthermore the bill of lading was subject to the Hague Rules which define carrier as including the owner as well as the charterer.<sup>161</sup> The only party expressly identified by name is USEL as carrier. Cl. 17 stipulates that the owner is carrier. Upon pure construction of the bill of lading it therefore appears that USEL are both owners and carriers.<sup>162</sup> Mr. Justice Rix came to the conclusion that either the '...USEL stipulation, the signature and cl. 17 – can be regarded as consistent with one another...' meaning that they are both owners and carriers or that the typed stipulation of USEL as carrier supersedes cl. 17 on the reverse of the bill.<sup>163</sup>

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<sup>153</sup> Waldron 'Owners or charterer's bill of lading? The mystery deepens' (1999) *Lloyd's Maritime and Commercial Law Quarterly* 1.

<sup>154</sup> *The Hector*, supra, fn. 150, at p. 287.

<sup>155</sup> *Ibid*, at. p. 293.

<sup>156</sup> *Ibid*

<sup>157</sup> *Ibid*, at p. 294.

<sup>158</sup> Waldron, supra, fn. 153, at p. 2.

<sup>159</sup> *Ibid*.

<sup>160</sup> *The Hector*, supra, fn. 150, at p. 294.

<sup>161</sup> *Ibid*

<sup>162</sup> *Ibid*

<sup>163</sup> *Ibid*

Mr. Justice Rix furthermore held that even under consideration of the wider context it had to be concluded that the contract was between Uvisco and USEL as carrier.<sup>164</sup>

It has to be noted that the court did not give effect to the identity of carrier clause without commenting on its validity. It furthermore has been remarked that the decision does not contemplate the possibility of both, the charterer and the shipowner being carrier under the bill of lading with the effect of joint and several liability.<sup>165</sup>

### • The Starsin

In *The Starsin* the vessel was time chartered to the defendants Continental Pacific Shipping Ltd.<sup>166</sup> Under Bills of Ladings consignments of timber and plywood were shipped from Malaysia for discharge at Antwerp and Avonmouth.<sup>167</sup> The bills of lading were liner bills on the form of Continental Pacific Shipping Ltd. Under cl. 1 “carrier” was defined ‘...as the party on whose behalf the bill of lading was signed. All bills were signed by agents for ‘Continental Pacific Shipping as carrier....’.<sup>168</sup> The bill of lading contained an identity of carrier clause (cl. 33)<sup>169</sup> and a demise clause (cl. 35).<sup>170</sup> Upon discharge the bills of lading holders sued the shipowners under the bills of lading contract.<sup>171</sup> One of the main issues in this case was *inter alia* whether the bills were charterers or owners bills of ladings.

Although *Mr. Justice Colman* asserted that the demise clause has become unnecessary since the enactment of the Convention on Limitation of Liability for Maritime Claims, 1976 by s. 186 of the Merchant Shipping Act, 1995 he did not question its validity in this context.<sup>172</sup> With regard to the identity of carrier and demise clause the court relied on the judgements in *The Flecha* and *The Ines* thereby

<sup>164</sup> Ibid, at p. 295.

<sup>165</sup> Tetley ‘The Demise of the Demise Clause’ (1999) 44 *McGill Law Journal* 821

<sup>166</sup> *Homburg Houtimport B. V. v. Agrosin Private Ltd. and others* (The “Starsin”) (2000) 1 *Lloyd’s Law Report* 85 Q.B.

<sup>167</sup> Buckley ‘The Starsin [2003] 3 *Shipping and Trade Law* 1.

<sup>168</sup> *The Starsin*, supra, fn. 166, at p.85.

<sup>169</sup> The identity of carrier clause is in common form *The Starsin* C.A. 466.

<sup>170</sup> The (restated) demise clause reads as follows: ‘35. If the Ocean vessel is not owned by or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appeared to the contrary) this Bill of Lading shall take effect only as a contract of carriage 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 solely as agent and shall be under no personal liability whatsoever in respect thereof.’ Cited in *Homburg Houtimport v Agrosin* [2001] 1 *All ER* 467.

<sup>171</sup> *The Starsin*, supra, fn. 166 at p. 85.

<sup>172</sup> Ibid, at p. 89.

holding that the clear indication that the shipowner is the carrier could only be displaced in case the additional writing clearly showed that the charterer assumed ‘...the obligations of carriage under that contract...’<sup>173</sup>

The question therefore was whether the content in the signature box describing Continental Pacific Shipping Ltd as “the carrier” or “as Carrier” would supersede the printed terms of the identity of carrier and the demise clause.<sup>174</sup> In order to ascertain who the carrier was Mr. Justice Colman saw no reason to depart from the approach of the authorities in *The Ines* and *The Rewia* according to which it was necessary to consider the wider contractual context.<sup>175</sup>

Firstly however the judge looked at the express wording of the bill thereby construing the document as a whole.<sup>176</sup> If as in this case liner bills of lading are issued it is certain that only the issuer of the bill and the shipper are involved thus the shipper can be expected to know that the charterer may have authority to bind the shipowner.<sup>177</sup> The court would only resort to a further investigation of the wider context where the construction of the bill holds the shipowner to be undertaking the carriage of goods especially where the authorization of the charterer by the shipowner is an issue.<sup>178</sup>

In this case the carrier is understood to be ‘...the party on whose behalf this Bill of Lading has been signed...’ which does not ascertain whether this is the owner or the charterer.<sup>179</sup> In any case it would be understood to be the person responsible for the carriage.<sup>180</sup> The second sentence in the identity of carrier clause however spells out that this may not be the owner.<sup>181</sup> This would be the case where there was something contradicting written on the face of the bill.<sup>182</sup> In marked contrast to the judgement in *The Flecha* the House of Lords held that the term “carrier” had an obvious meaning and was not loosely used to describe a liner company and therefore to vague and uncertain as to displace clause 33 and 35.<sup>183</sup> *Colman J* therefore agreed with the judgement of *Rix J* in *The Hector* where the bills of lading

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<sup>173</sup> Ibid, at p.. 90.

<sup>174</sup> Ibid

<sup>175</sup> *The Ines*, supra, fn. 131, at p. 149-150; *The Rewia*, supra, fn. 132, at p. 333.

<sup>176</sup> *The Starsin*, supra, fn, 166, at p. 92

<sup>177</sup> Ibid

<sup>178</sup> Ibid

<sup>179</sup> Ibid

<sup>180</sup> Ibid, at p. 93

<sup>181</sup> Ibid

<sup>182</sup> Ibid

<sup>183</sup> Ibid

were held to be charterers bills and therefore not binding on the shipowner. The court did not however hold the demise and identity of carrier clauses to be invalid.

The Court of Appeal reversed the decision of Colman J in part with Rix LJ dissenting.<sup>184</sup>

As a general rule under English law ‘...written, stamped or typed words are prima facie to be given a superseding effect as against printed words...’ in documents such as bills of lading. A point, which had not previously been raised during proceedings at first instance, was whether the demise clause (cl. 35) and especially the words in parenthesis reading ‘...as may be the case notwithstanding anything to the contrary...’ were to be seen as a paramount clause and therefore had to be given priority over the contradicting signature. Elaborating on this question Rix LJ submitted that cl. 35 was in fact to be considered ‘...a form of paramount clause...’ but that the said words in parenthesis did not apply to ‘...the making of the contract, but to the possibility that the vessel is not owned or demise chartered to the liner company which issues the bill...’.<sup>185</sup> In other words the demise clause takes effect where the charterer acts as agent for the owner or demise charterer. It does not prevent the charterer from accepting personal liability as a carrier in the said context.<sup>186</sup> According to Rix LJ, it can be concluded, that where a time charterer wanted to undertake a personal liability as against the shipper the demise clause would not have the effect of purporting the shipowner to be carrier and the demise clause in this case would therefore not be considered a paramount clause.<sup>187</sup> Rix LJ furthermore submits that this conclusion was consistent with the findings in other cases where the demise clauses were never held to be paramount clauses.<sup>188</sup> In accordance with *Colman J Rix LJ* therefore contends that the bills were charterers bills.

He however raised the question of a joint liability of both the charterer and the shipowner as an undisclosed principal, thereby relying on *Scrutton* as authority<sup>189</sup>, and based on the argument that the bills were unauthorised due to the fact that they

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<sup>184</sup> *Homburg Houtimport BV v Agrosin Private Ltd. and others* (“The Starsin”) [2001] 1 All ER 455.

<sup>185</sup> *Ibid*, at p. 473.

<sup>186</sup> *Ibid*, at p.474.

<sup>187</sup> *Ibid*, at p. 474.

<sup>188</sup> Rix LJ commenting on *The Berkshire* and *The Vikfrost*, *Ibid* at p. 475.

<sup>189</sup> *Boyd, Burrows Scrutton on Charterparties and Bills of Lading* 81.

were not signed on behalf of the master but instead for CPS as carrier. While he argued that there was a possibility of a joint and several liability it was not made the subject of this decision as it was not formally appealed.<sup>190</sup>

It has to be noted though, that Rix LJ did not hold the demise clause as such to be invalid<sup>191</sup> but that, in this context the signature on the face of the bill took precedence over the contradicting demise clause.

*Chadwick LJ* on the other hand placed considerable weight on the fact that in distinction to the case of *The Hector* the bill in *The Starsin* contained both an identity of carrier clause as well as a demise clause. He concluded that, where both clauses were included in the same bill they had to be construed on the basis that each of them was intended to cover an own specific situation rather than being a mere repetition although they may well overlap.<sup>192</sup> While he asserted that the identity of carrier clause only applies to cases where the bill is signed ‘for and on behalf of the master’ the demise clause covers cases where as here the bill is not signed ‘for and on behalf of the master’ but for example by port agents.<sup>193</sup> Put in other words the identity of carrier clause warrants the actual or ostensible authority of the shipowner or demise charterer to sign on his behalf while the demise clause also covers the case where the charterer signs bills without the authority of the shipowner.<sup>194</sup> As to the words in parenthesis *Chadwick LJ* submitted that their intention was to give effect to the demise clause in cases where at first glance it appeared that the party issuing the bill was the shipowner but with the relevant background knowledge, as in the present case, it was obvious that the issuing party was not the shipowner.<sup>195</sup> *Chadwick LJ* reached this conclusion without commenting on the issue of the paramount character of the demise clause or the question whether precedence be given to the written over the printed terms on the bill but merely by construing the bill as a whole. Consequently the bills would be qualified as shipowners bills of lading. *Morrit V-C* reached the same conclusion as *Chadwick LJ*. Relying on the principle that parties may stipulate that written provisions are not to override printed conditions he gave effect to the demise clause.<sup>196</sup> Construing the bill of lading as a whole the

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<sup>190</sup> *The Starsin*, supra, fn. 184, at p. 477.

<sup>191</sup> Commenting on the *Vikfrost* Rix LJ contended that ‘...there was no reason why the clause should not have been given its straightforward effect....’, *Ibid*, at p. 474.

<sup>192</sup> *Ibid*, at p. 502.

<sup>193</sup> *Ibid*

<sup>194</sup> *Ibid*, at p. 503.

<sup>195</sup> *Ibid*, at p. 504.

<sup>196</sup> *Ibid*, at p. 508.

demise clause would therefore ‘...take effect notwithstanding...the contradicting ...words...’ in the signature box.<sup>197</sup> He further contends that when these words are overridden by the demise clause additionally the identity of carrier clauses takes effect providing for the owner of the vessel to be the carrier.

*Morrit V-C* similarly reached the conclusion that the bills were in fact shipowners bills of ladings.

On the question whether the bills were charterers or shipowners bills the decision of *Colman J* at first instance was reversed by majority vote.

On appeal the House of Lords did not follow the decision of the Court of Appeal which held that the bills of ladings were shipowners bills. The Lord Judges unanimously held, that the bills were charterers bills. The question raised was whether greater weight should be given to the specially chosen words on the face of the bill in contrast to the standard terms printed on the reverse side of the bill.<sup>198</sup> As a general rule under English Law it can be said that primacy be given to written words over standard terms thereby placing greater weight on the intent of the parties rather than standard terms which may be applicable to many voyages as opposed to standard terms used for a particular voyage only.<sup>199</sup> Lord Millet also referred to § 305b of the German Civil Code which equally spells out that ‘...specific stipulations of the parties override clauses contained in standard form contracts....’<sup>200</sup>

A further point to consider in the judgement was market practice. To ascertain which meaning had to be given to the bill as a legal document by a reasonable person with the ‘...background knowledge which is available to the person or class of persons to whom the document is addressed....’<sup>201</sup> The question therefore was to whom the bill would usually be addressed. A bill of lading serves different purposes being a document of title which may be transferred to third parties or given as security for financial credits. These advances will usually be made by a letter of credit and the presentation of the bill will often be a precondition for payment by the bank. The reasonable reader can therefore be expected to know that bills of lading may be addressed to bankers. While certain details and clauses on the bill of lading will

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<sup>197</sup> Ibid, at p. 509.

<sup>198</sup> Per Lord Steyn in *Homburg Houtimport B.V. v. Agrosin Private Ltd. And others* (“The Starsin”) [2003] 1 Lloyds Rep. 583

<sup>199</sup> Per Lord Millet, Ibid, at p. 615.

<sup>200</sup> Per Lord Millet, Ibid 615 see also OLG Hamburg, Judgement delivered on 15 December 1988 (6 U 11/88), cited in (1989) 2 *Transportrecht* 70.

<sup>201</sup> Per Lord Hoffmann, Ibid, at p. 588.

warrant legal advice by a lawyer there are others which may be ascertained by the banker himself and without consulting a lawyer.<sup>202</sup> As a matter of fact bankers will usually not resort to the back of the bill to examine the contractual terms<sup>203</sup> This has been reinforced by art. 23 of the ICC Uniform Customs and Practice for Documentary Credits (UCP 500). Art. 23 states that banks will not examine the contents on the back of the bill of lading.<sup>204</sup> It is suggested that this view conforms with the need for prompt decisions in international trade.<sup>205</sup> As far as the charterers contends that art. 23 of the UCP was irrelevant with regard to the interpretation of the bill by the parties in the present case it was held that anyone versed in the shipping trade would have the knowledge that bills of lading are potentially addressed to banks and that a reasonable reader would not expect that a different meaning be given to the bill either by banks or parties to the contract of carriage.<sup>206</sup> To ascertain who the carrier for this purpose is only the front of the document containing details concerning the goods, vessel and voyage will be relevant.<sup>207</sup> Where as in the present case therefore it is plain from the face of the bill who the carrier is a reasonable reader would not construe the bill as whole but would rely on the facts stated on the face of the bill. Where however the front of the bill appears to be obscure it can be expected that legal advice be sought by the addressee in order to construe the bill as whole including the demise and identity of carrier clause.<sup>208</sup>

The term carrier as used in the present case is therefore understood to be a technical term with the legal meaning attached to it and not as in *The Flecha* loosely used to describe the charterer.<sup>209</sup>

The possibility of a joint liability between owners and charterers was raised but the Lords unanimously held that from the wording in the signature box in the present case the '...bill of lading contemplated a single carrier....'<sup>210</sup>. Commenting on this point Lord Bingham further stated that the fact that this suggestion was raised by a member of the Court of Appeal made this contention less credible.<sup>211</sup>

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<sup>202</sup> Ibid

<sup>203</sup> *National Bank of Egypt v. Hannevig's Bank Ltd.* [1919] 3 L.D.A.B. 213 at 214; *British Imex Industries Ltd. v. Midland Bank Ltd.* [1958] 1 Q.B. 542. At 551, 552

<sup>204</sup> *The Starsin*, supra, fn. 198, at p. 589.

<sup>205</sup> Ibid at p. 584.

<sup>206</sup> Per Lord Hoffmann, Ibid, at p. 589.

<sup>207</sup> Per Lord Steyn, Ibid, at p. 584.

<sup>208</sup> Per Lord Hoffmann, Ibid, at p. 589.

<sup>209</sup> See *The Flecha*, supra, fn. 140, at p. 619

<sup>210</sup> Per Lord Hoffmann *The Starsin*, supra, fn. 198, at p. 590.

<sup>211</sup> Per Lord Bingham, Ibid, at p. 577. commenting on the decision of the Court of Appeal in the same case. [2001] 1 Lloyd's Rep. 437 at p. 452, par. 75.

While the Judgement in *The Starsin* clearly changed the way in which bills of lading are to be construed thereby reducing the relevance of demise and identity of carrier clauses in cases where from the face of the bill it appears plain who the carrier is, it has to be noted that the validity and effect of the demise clause as such was not questioned by the House of Lords. *Lord Hobhouse* held the demise clause to be a standard clause and found that ‘...one would have been surprised not to find it in these bills of lading....’<sup>212</sup>

The defendant shipowners alleged that there was an inconsistency between the role assigned to CPS as carrier and the descriptions elsewhere in the text of the bill and that ‘...preponderant importance....’ was to be given to the terms written into the contract by the parties over standard printed terms thereby relying on the judgement of the House of Lords in *Universal Steam Navigation Ltd. v. James McKelvie and Co.*<sup>213</sup>

*Lord Bingham* suggested that a business sense be given to business documents, which would usually be a straightforward sense.<sup>214</sup> The fact that the suggestion of a joint liability by the shipowners was only submitted during the appeal made it a less credible option.

Great weight was furthermore placed on the fact that the bill was obviously not signed by the master but by the agents for CPS as carrier. The term carrier was understood to have an ‘...old and familiar meaning....’ in maritime trade.<sup>215</sup>

It was held that a shipper could not be expected to resort to the conditions on the reverse of the bill containing *inter alia* a demise and an identity of carrier clause where the face of the bill clearly and unambiguously indicated who the carrier was. He found this view fortified by art. 23 of the ICC Uniform Customs and Practice for Documentary Credits providing guidance for banks when dealing with credits covered by a bill of lading. Under art. 23 (v) it is made clear that banks will generally not resort to the terms and conditions on the back of the bill. In the present case CPS could be

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<sup>212</sup> Per Lord Hobhouse, *ibid* at p. 597.

<sup>213</sup> [1923] A.C. 492, 499-500.

<sup>214</sup> *The Starsin*, *supra*, fn. 198, at p. 577.

<sup>215</sup> *Ibid*, at p. 578.

unambiguously identified from the face of the bill and therefore was held to be the carrier.<sup>216</sup>

#### 1.2.4 Comments on the *Starsin*

The ruling of the House of Lords in *The Starsin* has come under criticism from authorities such as *Prof. Tetley*. He submits that in cases such as the present the question of who is liable as a carrier under bills of lading should not be exclusively decided as between the shipowner and the charterer but both the shipowner and the charterer should be held responsible jointly.<sup>217</sup>

He asserts that Art. 3(8) of the Hague/Visby Rules which reads:

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

is a provision is of ‘...a public policy/order nature....’ and therefore cannot be contracted out.<sup>218</sup> As set out above the problem surfaces especially in cases of time charters where the ships management is divided between the shipowner and the charterer<sup>219</sup> and both share responsibilities as provided for in articles 2, 3, and 4 of the Hague/Visby Rules which cannot be contracted out under article 3 (8) of the Hague/Visby Rules.<sup>220</sup> Demise and identity of carrier clauses purport to deny any responsibility on the part of (usually) the charterer and according to *Tetley* are ‘...effectively non-responsibility clauses....’ contravening the mandatory application of the Hague/Visby Rules and should consequently be invalid by virtue of article 3 (8).<sup>221</sup>

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<sup>216</sup> *Ibid*, at p. 578.

<sup>217</sup> *Tetley* ‘Case Comment: The House of Lords decision in *The Starsin*’ (2004) 35 *Journal of Maritime Law & Commerce* 122.

<sup>218</sup> *Ibid*, at p. 122.

<sup>219</sup> *Pejovic*, *supra*, fn. 3, at p. 381.

<sup>220</sup> *Tetley*, *supra*, fn. 217, at p. 123.

<sup>221</sup> Website of McGill University: <http://www.tetley.law.mcgill.ca/maritime/ch10.pdf> (accessed on 25 November 2004).

See also: F.M.B.R. The Demise Clause and the Hague Rules (1987) *Lloyds Maritime and Commercial Law Quarterly* 300.

It is furthermore submitted that demise and identity of carrier clauses not only contravene the mandatory provision of article 3 (8) of the Hague/Visby Rules but also should be invalid as against third parties who would have to bear the burden of ascertaining the relationships between the shipowner and the charterers.<sup>222</sup>

*Prof. Tetley* asserts that the House of Lords did not raise cases of foreign courts especially those which held the demise clause to be violating art. 3 (8) of the Hague/Visby Rules.<sup>223</sup> It has to be noted however, that *Lord Millet*<sup>224</sup> referred to the German BGH in the above mentioned decision of the *MS Planet I* where the court in applying § 305b BGB held that the identity of carrier clause was overridden by the charterers name printed on the face of the bill of lading and the signature of the charterers agent.<sup>225</sup> While the issue of a joint liability according to *Schmidt* was raised the court held, that in the present case the bill of lading was issued by the time charterer and there was no indication that the charterers agent also signed as agent for the shipowners.<sup>226</sup> Thus the bills were charterers bills of ladings. A decision which therefore appears to be in line with the judgement of the House of Lords in *The Starsin*.

The decisions of other nations arguably were not given much weight in the decision of *The Starsin*. It has to be noted though that judgements of other nations appear to be conflicting as will be shown with respect to the situation in Japan where in a recent decision a demise clause was deemed to identify the carrier and did not contravene Art. 15.1 of the Japanese COGSA (Art. 3 (8) of the Hague/Visby Rules). While the Hague/Visby Rules are an international convention it cannot be convincingly stated that there is an ‘...internationally accepted meaning of the rules....’<sup>227</sup> which may enable a court to construe the rules accordingly.

The ruling of the House of Lords does therefore not contravene the Vienna Convention which stipulates in art. 31 (1) that a treaty ‘...A treaty shall be interpreted

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<sup>222</sup> Tetley, supra, fn. 29

<sup>223</sup> Tetley, supra, fn. 217, at p. 124, 128

<sup>224</sup> Per Lord Millet in *The Starsin*, supra, at p. 615.

<sup>225</sup> BGH, Judgement delivered on 5.2.1990 (II ZR 15/89, Hamburg) cited in (1990) 41 *Versicherungsrecht* 503, 504.; Herber *Seehandelsrecht* 294.

<sup>226</sup> *Ibid.*

<sup>227</sup> Tetley, supra, fn. 217, at p. 126.

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....<sup>228</sup>

It is furthermore asserts that identity of carrier and demise clauses are technically inconsistent with the UCP 500 which provides that the carrier be named on the face of the bill of lading.<sup>229</sup>

In the present case, the bills *prima facie* appear to meet the requirements of the UCP 500. The bills however, only mentioned the charterer as carrier and did not mention the shipowner. According to *Prof. Tetley*, the bills did not reflect the identity of the carrier and were therefore inconsistent with art. 23 (a) (i), UCP 500<sup>230</sup>.

It firstly has to be noted though, that the UCP 500 are neither an international convention nor do they have the force of law in England.<sup>231</sup> While it may be inconsistent with certain clauses in bills of lading this merely represents a factual argument as against the effect of demise or identity of carrier clauses which will probably change the design and the way bills of lading will be regarded after the decision of the House of Lords in *The Starsin*.

Secondly, to assume that the signature mentioning only the charterer as carrier was inconsistent with the provisions of art. 23 (a) (i) of the UCP 500 requires, as a precondition, that one shares the view of *Prof. Tetley* which is that, by virtue of art. 3 (8) of the Hague/Visby Rules both, the shipowner and the charterer are jointly liable as carriers as they share obligations under the contract of carriage.

It cannot be submitted that this raises a further argument against the validity of demise clauses as it already presupposes that both shipowner and charterer are jointly liable as carriers for the above-mentioned reason. Claiming that art. 23 of the UCP 500 '...raises another argument for the invalidity of demise and identity of carrier clauses....'<sup>232</sup> is, may I respectfully suggest, a circular argument and does not support *Prof. Tetley's* conclusion.

Furthermore, the wording of art. 23 (a) (i) of the UCP 500, contrary to the submissions of *Prof. Tetley*, seems to take into consideration that there might be contradictions if the whole of the bill was to be construed. The provision thus aims to

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<sup>228</sup> Website of the United Nations <http://www.un.org/law/ilc/texts/treaties.htm> (accessed on 24.05.2005)

<sup>229</sup> *Tetley*, supra, fn. 217, at p. 127.

<sup>230</sup> *Ibid*

<sup>231</sup> Documentary Credits – The New UCP 500 (1993) 14 *Clifford Chance Maritime Review* 21.

<sup>232</sup> *Tetley*, supra, fn. 217, at p. 127.

simplify the situation by merely demanding the bank to examine the face of the bill in order to verify the identity of the carrier.

Arguably, demise clauses are incompatible with the UNIDROIT Principles of International Commercial Contracts, 1994. It is argued that demise clauses are contrary to the stipulations in art. 1.7 (1) which provides that contracting parties

‘...act in accordance with good faith and fair dealing in international trade....’<sup>233</sup> The reasons for this assumption are the above mentioned.

One may argue that, under certain jurisdictions such as the Canadian, the demise and identity of carrier clauses may violate art. 3 (8) of the Hague/Visby Rules. The other arguments in the author’s humble opinion do not seem to be imperative.

## Conclusion

As shown above a number of courts have held demise and identity of carrier clauses to be valid as merely identifying the carrier. The main argument for this conclusion being that where the shipper submits a bill of lading containing said clauses for signature thereby agrees to be bound by it.<sup>234</sup> Where however, the bill of lading follows an agreement, courts have held, that these may override standard clauses in bills of lading.<sup>235</sup>

## 1.3 Canada

### 1.3.1 Applicable Law

As in the other jurisdictions discussed, Canadian legislation has adopted the Hague/Visby Rules by virtue of Schedule I to the Carriage of Goods by Water Act, SC 1993 and the Hamburg Rules.<sup>236</sup> The later were not put into force.<sup>237</sup>

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<sup>233</sup> Ibid, at p. 128.

<sup>234</sup> Reynolds, *The Demise Clause and The Hague Rules* p. 261.

<sup>235</sup> Ibid

*S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)* [1951] 1 K.B. 55

<sup>236</sup> Tetley ‘The Demise of the Demise Clause’ (1999) 44 *McGill Law Journal* 844

<sup>237</sup> Ibid p. 845.

### 1.3.2 Canadian cases

The subject of the validity of demise and identity of carrier clauses is not treated in a uniform manner by Canadian courts.

While earlier rulings held these clauses to be invalid or at least ineffective as against the carrier<sup>238</sup> two recent decisions have seemingly rehabilitated them.<sup>239</sup>

Early Canadian decisions held demise and identity of carrier clauses to be valid.<sup>240</sup>

However, they mostly relied on the decisions of the Canadian Supreme Court in *Paterson Steamships v. Aluminium Co. of Canada*<sup>241</sup> and *Aris Steamship v. Associated Metals & Minerals*<sup>242</sup> although both cases did not involve demise clauses. Furthermore they invoked the *obiter* dictum of Brandon J in *The Berkshire*. In *The Berkshire* as well as in *Paterson* the charterer was not defendant to the action.<sup>243</sup>

In *Canadian Klockner v. D/S A/S Flint (The Mica)* however, the Federal Court of Canada held the identity of carrier clause invalid as violating the mandatory provision of art. 3 (8) of the Hague Rules thereby allowing suit against the charterer.<sup>244</sup>

In *Canficorp v. Cormorant Bulk-Carriers*<sup>245</sup> the Federal Court of Appeal held the charterer to be carrier. The facts of this case were unusual however, as the shipper was sued by the time charterer and it was the shipper who tried to invoke the identity of carrier clause in order to establish that the charterer was not party to the contract of carriage.<sup>246</sup>

The identity of carrier clause was however not determinative as to the identification of the carrier but rather the fact that the charterer performed carriers duties.

'...Of some significance is the fact that the respondent loaded and discharged the goods....'<sup>247</sup>

<sup>238</sup> Reynolds, 'The Demise Clause Again' (1990) *Lloyd's Maritime and Commercial Law Quarterly* 494.

<sup>239</sup> Tetley 'The Demise of the Demise Clause' (1999) 44 *McGill Law Journal* 807.

<sup>240</sup> *Delano Corp. of America v. Saguenay Terminals, Grace Kennedy & Co v. Canada Jamaica Line* cited in Tetley, *Ibid*

<sup>241</sup> *Paterson Steamships v. Aluminium Co. of Canada* [1951] S.C.R. 852 at 854

<sup>242</sup> *Aris Steamship v. Associated Metals & Minerals* [1980] 2 S.C.R. 322 at 328.

<sup>243</sup> Tetley, *supra*, fn. 239, at p. 828.

<sup>244</sup> *Canadian Klockner v. D/S A/S Flint* 1974 A.M.C. at p. 467.

<sup>245</sup> *Canficorp v. Cormorant Bulk Carriers* 1985 A.M.C 1444

<sup>246</sup> *Canficorp v. Cormorant Bulk Carriers* cited in Tetley, *supra*, fn. 239.

<sup>247</sup> *Canficorp v. Cormorant Bulk Carriers*, *supra*, fn. 246, at p. 1446.

In *Carling O'Keefe Breweries v. C.N. Marine*<sup>248</sup> the decision of the Trial Court was affirmed by the Federal Court of Canada which held *inter alia* that the demise clause violated art. 3 (8) of the Hague/Visby Rules.

In *Canastrand Industries Ltd. v. Lara S (The)* (T.D.)<sup>249</sup> Judge Reed J referred to Prof. Tetley in holding that:

'...Usually, suit is valid against both the owner and the charterer...Carriage of goods is effectively a joint venture owners and charterers (except in the case of a bareboat charter) and, consequently, they should be held jointly and severally responsible as carriers.

The logic of holding both the shipowner and the charterer liable as carrier seems entirely reasonable under a charter such as exists in this case. The master will have knowledge of the vessel and any peculiarities which must be taken into account when stowing goods thereon. He supervises that stowage. He has responsibility for the conduct of the voyage and presumably also has knowledge of the type of weather conditions it would be usual to encounter. In such a case it seems entirely appropriate to find the master and therefore, his employer, the shipowner jointly [and severally]<sup>250</sup> liable with the charterer for damage arising out of inadequate stowage....'

It thus can be said that Canadian decisions prior to 1997 generally held demise and identity clauses to either be invalid or at least ineffective as against the shipper or as in the case of *Canficorp v. Cormorant Bulk Carriers* against the charterer.

In *Methanex New Zealand Ltd. v. Kinugawa (The)* (T.D.)<sup>251</sup> the effect of a jurisdiction clause in the bill of lading and the question whether litigation was to take place in Japan or in Canada was at issue. The judge summed up the arguments of counsel

<sup>248</sup> *Carling O'Keefe Breweries v. C.N. Marine* [1990] 1 F.C. 483.

<sup>249</sup> Website of the Office of the Commissioner for Federal Judicial Affairs of Canada: <http://receuil.cmf.gc.ca/fc/1993/pub/v2/1993fca0386.html>; Reference [1993] 2 F.C. 553

<sup>250</sup> It seems as if an error was committed in omitting the words 'and severally', as Reed J refers directly to Tetley *Marine Cargo Claims*, 3<sup>rd</sup> ed. 1988 at p. 242.

<sup>251</sup> *Methanex New Zealand Ltd v. Kinugawa (The)* (T.D.) Website of the Office of the Commissioner for Federal Judicial Affairs <http://reports.fja.gc.ca/fc/src/shtml/1998/pub/v2/1998fc1932.shtml>

for the plaintiffs which referred to *Carling O’Keefe Breweries Company Ltd. v. C.N Marine Inc.* where the demise clause was held to be invalid under art. 3 (8) of the Hague Rules.

Counsel for the plaintiffs however, did not argue that this is the general view under Canadian law, but that the question of who the carrier is, is a question of fact. According to this submission the carrier may either be the charterer, the shipowner or both. The court did not decide whether or not the demise clause is valid but reached the result that

‘...reference to the Court in Japan would be a lessening of liability to the ship owner and thus become a distinct advantage to the defendant....’

as under Japanese Law only the shipowner is carrier.<sup>252</sup>

This view has changed considerably with findings of Canadian Courts in the most recent decisions of *Union Carbide*<sup>253</sup> and *Jian Sheng*<sup>254</sup> both of which rehabilitated demise and identity of carrier clauses under Canadian law.

In *Union Carbide* the time charterer, Fednav Ltd., was sued by the plaintiff shipper for damage sustained to a cargo of synthetic resin shipped from Montreal to the far east under bills of lading. The time charterer invoked an identity of carrier clause in defence. The court held that:

‘...unless there is a clear undertaking by the time charterer, that he will carry the shipper’s goods, the shipowner is the carrier....’<sup>255</sup>

According to the court there was no such undertaking on the part of the time charterer. Thus the identity of carrier clause would not be invalidated by the court and therefore be binding on the shipowner as the bills of lading were owners bills.

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<sup>252</sup> *New Zealand Ltd v. Kinugawa* (The) (T.D.) Website of the Office of the Commissioner for Federal Judicial Affairs <http://reports.fja.gc.ca/fc/src/shtml/1998/pub/v2/1998fc1932.shtml>

<sup>253</sup> *Union Carbide v. Fednav Ltd.* Website of the Federal Court of Canada <http://decisions.fct-cf.gc.ca/cf/1997/t-2403-81.html> accessed on May 11<sup>th</sup> 2005.

<sup>254</sup> *Jian Sheng Co.Ltd. v. Great Tempo S.A. and others* Website of the Office of the Commissioner for Federal Judicial Affairs <http://reports.fja.ga.ca/fc.src/shtml/1998/pub/v3/1998fc22317.shtml> Reference: [1998] 3 F.C. 418.

<sup>255</sup> *Union Carbide v. Fednav. Ltd*, supra, fn. 253

*Nadon J* furthermore denied the notion that art. 1 (a) of the Hague Visby Rules as implemented by the Canadian COGSA confirms Prof. *Teteley's* theory of a joint venture, and thus joint and severall liability, which he held to be unsound:

'...there cannot be a joint venture between owners and charterers unless there has been a meeting of the minds between the parties to the joint venture....'<sup>256</sup>

Consequently, according to *Nadon J*, the general rule under art. 1 (a) of the Hague Visby Rules would be that shipowner and charterer are not jointly and severally liable.

The action against the defendant time charterer would therefore be dismissed.

In *Jian Sheng Co. v. Great Tempo S.A.*<sup>257</sup> the notify party of a consignment of lumber shipped under a standard liner bill of lading from British Columbia to Taiwan, sued the shipowner, the charterer and others interested in the Ship *Trans Aspiration*. The bill of lading contained an identity of carrier clause stipulating that the contract of carriage was between the Merchant and the vessel owner. It also contained a jurisdiction clause providing that

'...any disputes arising under the bill of lading would be decided in the country where the carrier has its principal place of business....'<sup>258</sup>

The question in this case was whether the jurisdiction clause was void for uncertainty.

At first instance *Hargrave J* held that both shipowner and charterer were jointly and severally liable '...notwithstanding any identity or demise clauses....' and that the jurisdiction clause was void for uncertainty.<sup>259</sup>

The Federal Court, Trial Division, reversed the pronothary's denial of stay of proceedings thereby giving effect to the identity of carrier clause. The judge followed

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<sup>256</sup> Ibid

<sup>257</sup> *Jiang Sheng Co.Ltd v. Great Tempo S.A. and Others* [1998] 3 F.C. 418.

<sup>258</sup> Ibid, at p. 424.

<sup>259</sup> *Jiang Sheng Co.Ltd v. Great Tempo S.A. and Others* (1997) 129 F.T.R.

the decision of *Union Carbide* where the notion of a joint and several liability was rejected.<sup>260</sup>

Consequently the jurisdiction clause was not void for uncertainty, as only the shipowner Great Tempo S.A. and not the time charterer could be considered carrier .

The case subsequently referred to the Canadian Federal Court of Appeal. ‘...The issue was whether the jurisdiction clause was void for uncertainty as a matter of principle or in the circumstances....’<sup>261</sup>

In order to do so however, the court implicitly had to determine the identity of the carrier and thereby the validity of the identity of carrier clause.

The judge held, that

‘...This type of jurisdiction clause should not be declared invalid for uncertainty as a matter of principle....[as]...there was no ambiguity in this case...[and]....it meant exactly what it said....’<sup>262</sup>

He further submitted that standard clauses such as jurisdiction and identity of carrier clauses have been applied in the industry and the courts for ages and that it is too late to alter their usage.<sup>263</sup> He furthermore denied the approach which, according to the plaintiffs counsel, would be more in conformity with international consensus on this issue and which is set out in art. 21 of the Hamburg Rules. He asserted however that this convention has not been signed by maritime powers such as France, Germany or the U.S. and that it cannot be stated that a consensus on this issue exists. He consequently found that the jurisdiction was not invalid in principle.<sup>264</sup>

On the question of voidness for uncertainty in the circumstances he held that:

‘...in shipowners bills of lading, there is a presumption that the shipowner is the carrier. In charterers bills of lading, on the other hand, the presumption is that the demise charterer is the carrier. Any other can be

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<sup>260</sup> Tetley, *supra*, fn 239, at p. 834.

<sup>261</sup> *Jiang Sheng Co. Ltd. v. Great Tempo S.A. and Others* Website of the Office of the Commissioner for Federal Judicial Affairs <<http://reports.fja.gc.ca/fc/src/shtml/1998/pub/v3/1998fc22317.shtml>>

<sup>262</sup> *Ibid*

<sup>263</sup> *Ibid*

<sup>264</sup> *Ibid*

the carrier only where the above presumptions have been rebutted, and such rebuttal occurs only where there is evidence that such other has actually assumed the role of carrier under the contract of carriage with the shipper....'<sup>265</sup>

He furthermore held that the concept of joint and several liability as promoted by *Prof. Tetley* was an “American influenced principle” and ‘...incompatible with the gist of the decisions of the Supreme Court in *Paterson SS* and in *Aris Steamship*...’. He agreed with the findings of *Nadon J* in *Union Carbide* who held that the said concept was “unsound”.

The jurisdiction clause was upheld. The court did not definitely rule on the validity of the identity of carrier clause.

### 1.3.3 Comments on the *Jiang Sheng* and the *Union Carbide*

The decision of the *Jiang Sheng* and the *Union Carbide* have come under criticism from Canadian authorities. Besides the arguments generally raised against the validity of demise and identity of carrier clauses there are also specific arguments brought forward against the two said decisions.

Prof Tetley remarks that neither of the two decisions mentioned art. 3 (8) of the Hague Rules.<sup>266</sup> He furthermore asserts that in the decision of the *Jian Sheng* the validity of the clause was not considered in principle.<sup>267</sup>

Considering the decision of *Union Carbide Marler D* takes the same position. He submits that the signature on the bill of lading “for and on behalf of the master” does not exclusively limit liability to the shipowner but rather extend it to the shipowner in addition to the charterer who agreed to carry the cargo. According to *Marler* the Masters signature merely evidences ‘...the quantity and condition of the cargo loaded...’.<sup>268</sup> The judge therefore erred in relying on *Paterson* and *Aris*.<sup>269</sup>

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<sup>265</sup> Ibid

<sup>266</sup> Tetley, supra, fn. 239, at p 837.

<sup>267</sup> Tetley, supra, fn. 239, at p 837.

<sup>268</sup> Marler ‘The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading’ (2002) 26 *Maritime Lawyer* 599.

<sup>269</sup> Ibid, at p. 603.

## Conclusion

It can be said that the situation regarding this issue is uncertain under Canadian law as judgements are conflicting. It seems though that demise and identity of carrier clauses are being reinstated.

## 2. Civil Law Countries

### 2.1 Germany

#### 2.1.1 Applicable law

The German law applicable to claims under bills of lading disputes is the German Commercial Code (Handelsgesetzbuch).<sup>270</sup> Under German law there is no definition of the term carrier (Verfrachter).<sup>271</sup> Carrier is the party having concluded the contract of carriage with the shipper in his own name.<sup>272</sup>

#### 2.1.2 General position

The carrier under German law is obliged to issue a bill of lading under § 642 (I) HGB. He then is liable under the bill of lading. According to § 642 (IV) HGB the master of the vessel or any other person authorised by the owner may sign bills of lading with effect for the contractual carrier.<sup>273</sup> The masters signature will therefore bind the contractual carrier whether or not he is identical with the owner of the vessel. Only in cases where the name of the owner is explicitly mentioned as such and therefore indicates that owner and carrier are not identical will the the masters signature bind the owner of the vessel.<sup>274</sup> Usually the charterer will be bound as carrier.<sup>275</sup> Appendices to the signature such as “for and on behalf of the owner” do not have an impact on the question of the identity of the carrier.<sup>276</sup>

#### 2.1.3 The German position in respect of Demise or Identity of Carrier clauses

##### Purpose of the IOC clause

The original purpose of the identity of carrier clause was to enable the charterer as contractual carrier the benefit of limiting his liability which prior to the first HGB

<sup>270</sup> German Commercial Code 1897 (RGBl. 219) hereinafter referred to/cited as HGB.

<sup>271</sup> Luo-Lan *Die Haager/Visby-Regeln im Seefrachtrecht Singapurs im Vergleich mit der Bundesrepublik Deutschland* (1992) 67.

<sup>272</sup> Abraham *Das Seerecht in der Bundesrepublik Deutschland* 142.

<sup>273</sup> Therefore Pejovic's translation of § 642 (IV) HGB is wrong as he translates the term 'Verfrachter' meaning carrier as meaning shipowner. See Pejovic, *supra*, fn. 3, at p 9.

<sup>274</sup> Poetschke, *supra*, fn. 44, at p.30.

<sup>275</sup> Pejovic, *supra*, fn. 3, at p. 388.

amending act of 1972 was only available to the owner. Consequently earlier judgements would acknowledge the possible validity of identity of carrier clauses.<sup>277</sup> As the charterer could henceforth rely on the limitation of the Hague Rules the original justification for the existence of the identity of carrier clause had vanished. It was suggested then, that the identity of carrier clauses would gradually lose significance.<sup>278</sup> This assumption however, proved to be wrong.

### 2.1.3.1 Validity of demise and identity of carrier clauses

Originally, the validity of identity of carrier clauses under German law was merely a question of authority. Nowadays the problem lies in the compatibility with the Standard Contracts Act 1976 (AGBG), now implemented into the German Civil Code (Bürgerliches Gesetzbuch, 1896)<sup>279</sup>

#### 2.1.3.1.1 Agency Law

The question would be whether the charterer acted as representative for the owner. As a necessary precondition under German agency law the charterer would have to sign bills of lading in the name of the owner and with authority or approval, § 164 BGB. This was disputed as the charterer usually issues own bills of lading under his name. It would therefore appear from the face of the bill of lading that the person signing would sign for the charterer rather than the owner.<sup>280</sup> This was perceived/understood to be as (a) problem of obviousness with regard to § 164 I S. 2 BGB. A further problem was seen in the authority of the charterer to bind the owner.<sup>281</sup> Originally the tendency among German courts was mostly to deny the validity of identity of carrier clauses. While the possibility of representation was generally acknowledged the courts mostly held, that the charterer was not authorised by the owner<sup>282</sup> or lacked obviousness.<sup>283</sup> Courts nowadays hold, that the owner of the vessel is easily discernible through Lloyd's Register which in turn means that

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<sup>276</sup> Poetschke, supra, fn. 44 at p.33.

<sup>277</sup> Hanseatisches OLG Hamburg, Judgement delivered on 15.2.1966 – 6 U 174/65 cited in MDR 20 (1966) 680.

<sup>278</sup> Poetschke, supra, fn 44, at p.43.

<sup>279</sup> Hereinafter referred to as BGB.

<sup>280</sup> Poetschke, supra, fn. 44, at p 44.

<sup>281</sup> Ibid

<sup>282</sup> The court did not comment on the validity of the identity of carrier clause OLG Hamburg Judgement delivered on 22.5.1969 cited in *Versicherungsrecht* 21 (1970) 79.

<sup>283</sup> OLG Hamburg judgement delivered on 9.1.1975 cited in *Versicherungsrecht* 26 (1975) 826.

obviousness is no longer regarded as a problem in this context.<sup>284</sup> Furthermore the charterer will regularly be authorised to sign bills of lading with binding effect for the owner through clauses in the charter party.

### 2.1.3.1.2 Identity of carrier clauses and the German Standard Terms Act (German Civil Code)

As mentioned above the problem at present lies with the question whether identity of carrier and demise clauses contravene the standard terms act. German courts had the opportunity to rule on this issue. It was concluded that the German Standard Terms Act was applicable with regard to bills of lading.<sup>285</sup>

In the more recent decision of the *MS Planet I* the Regional Appeal Court of Hamburg<sup>286</sup> had to deal with the validity of identity of carrier clauses.<sup>287</sup> The vessel was at all material times on time charter and bills of lading for the containers loaded were duly issued to the shippers. The bills of lading were issued under the name of the charterer and signed by its agent as agent for the charterer<sup>288</sup>. The shippers sued the owner. The court had to answer the question whether the owner of the vessel was liable as carrier under the contract of carriage as evidenced by the bills of lading.<sup>289</sup> It is generally accepted under German law that clauses under bills of lading are subject to the Standard Contracts Act<sup>290</sup>. As a necessary precondition under German law the owner would have had to impose the conditions of the standard contract on the shipper<sup>291</sup>. The court held that the owner imposed the standard-contract terms by authorising the charterer to issue bills of lading including the identity of carrier clause. Under the rule concerning uncertainty the respective term within the bill of lading as a standard contract has to be construed on imposers account<sup>292</sup>. The reason being that the wording on the face of the bill of lading identified the charterer as carrier and thus contradicted clause 21 on the back of the said bill of lading, which purported the owner to be the carrier with regard to the

<sup>284</sup> HOLG Hamburg MDR 1967, 499, see also Rabe p. 81, 85.

<sup>285</sup> BGHZ 72, 174, 176.

See also: Schmidt *Handelsrecht* 940.

<sup>286</sup> Hereinafter referred to as OLG.

<sup>287</sup> OLG Hamburg, Judgement delivered on 15 December 1988 (6 U 11/88), cited in (1989) 2 *Transportrecht* 70.

<sup>288</sup> Herber 'Die IoC-Klausel: Ein Aergernis der Kautelarpraxis' (1990) *TranspR* 147.

<sup>289</sup> Schmidt 'Identity of the Carrier' (1989) *Transportrecht* 42.

<sup>290</sup> *Ibid*, at p. 41.

<sup>291</sup> *Ibid*, at p. 42.

<sup>292</sup> OLG Hamburg, 1989 *Transportrecht* 70.

contract evidenced by the bill of lading<sup>293</sup>. The effect being that the beneficial construction as against the recipient would prevail<sup>294</sup>.

The claimant therefore had title to sue the owner as carrier<sup>295</sup>. The court held that, the claim against the owner was justified on the grounds that the identity of carrier clause in the bill of lading contravened § 5 of the Standard Contracts Act 1976.<sup>296</sup> as there was uncertainty on whether the charterer or the owner were obliged to deliver the goods.<sup>297</sup> The appeal court did not question the validity of clause 21 under German law<sup>298</sup>. The competent court held that, unlike the House of Lords finding in the *Starsin*, it made no difference that the clause was printed on the back page of the bill of lading and consequently had to be construed as a whole<sup>299</sup>. The charterer through its agents had the necessary authority to bind the owner according to § 164 (I) BGB as he was disclosed by clause 21<sup>300</sup>. Although the owners name was not contained in the bill of lading explicitly, the court held that through the vessels name mentioned in the bill of lading the owner could have been clearly identified through the Lloyd's Register in London<sup>301</sup>.

The judgement was reversed by the German Federal Supreme Court (Bundesgerichtshof)<sup>302</sup>. The court held that § 5 AGBG was not applicable as there was no ambiguity within the bill of lading as evidence of the standard contract<sup>303</sup>. Clause 21 made it clear that the contract was between the shipper and the owner<sup>304</sup>. The ambiguity between the facts gathered from the face of the bill of lading and the clause on the back page did however not constitute an ambiguity necessary for the application of § 5 AGBG<sup>305</sup>. The Court gave effect to § 4 AGBG which states that non-standard agreements shall prevail over the standard agreements<sup>306</sup>. In this case it could be gathered from the face of the bill of lading that the charterer assumed the role of the carrier as he was to ship the said goods<sup>307</sup>. The court held that this was a

<sup>293</sup> Schmidt, supra, fn. 289, at p. 42.

<sup>294</sup> OLG Hamburg p. 72.

<sup>295</sup> OLG Hamburg, supra, fn. 293, at p. 70.

<sup>296</sup> This Act has now been implemented into the German Civil Code (Bürgerliches Gesetzbuch) hereinafter cited as BGB. Formerly known as AGBG.

<sup>297</sup> Herber, p. 148.

<sup>298</sup> OLG Hamburg p 72.

<sup>299</sup> Ibid

<sup>300</sup> Ibid

<sup>301</sup> Ibid

<sup>302</sup> Hereinafter cited as BGH (Bundesgerichtshof)

<sup>303</sup> BGH (1990) p 165.

<sup>304</sup> Ibid

<sup>305</sup> Ibid

<sup>306</sup> Ibid

<sup>307</sup> Ibid

non-standard term which prevailed over the clause 21 being a standard term<sup>308</sup>. The clause on the back of the bill of lading was therefore invalid under § 4 AGBG as it contravened the non-standard agreement evidenced by the face of the bill of lading. The court did not however comment on the validity of identity of carrier clauses in general but made it clear that with regard to this case, clause 21 would not be applicable with regard to the identification of the carrier as it clearly contravened what the court found to be a non-standard agreement due to its specific character. The court therefore held that, the claim as against the owner was unfounded. The BGH was therefore in line with the later decision of the House of Lords in the *Starsin*<sup>309</sup>.

### 2.1.3.2 Comment

These latest judgements of the OLG and the BGH have received a mixed reception among German authorities.

*Herber* submits that there was no ambiguity within the bill of lading itself.<sup>310</sup> He states that from the statement of the facts of the OLG decision it appeared that there was no indication that the charterer merely wanted to represent the owner as carrier which in turn meant that there was no explicit ambiguity derived from the terms of the bill of lading itself but rather from the construction of the bill of lading in this specific case.<sup>311</sup> Only an explicit ambiguity between the mentioning of the non-standard term on the face of the bill of lading and the demise clause he asserts, could lead to an application of § 4 AGBG.<sup>312</sup> He accords with the findings of the OLG that, as a general rule under German law the owner is represented by the charterer as his identity can be ascertained through Lloyds Register in London.<sup>313</sup> Even if the charterer lacks explicit authority to bind the owner he has the power of representation by acquiescence.<sup>314</sup> *Herber* draws a distinction between the liability of the vessels owner under the bill of lading and the contract of carriage concluded with the charterer.<sup>315</sup> He therefore does not rule out the possibility that the cargo owners may

<sup>308</sup> Herber 'Die IoC-Klausel: Ein Aergernis der Kautelarpraxis' (1990) *Transportrecht* 148.

<sup>309</sup> *Homburg Houtimport B.V. v. Agrosin Private Ltd. and other* (The *Starsin*), [2003] 1 Lloyd's Rep.571.

<sup>310</sup> Herber, *supra*, fn. 308, at p. 147

<sup>311</sup> *Ibid*, at p 148

<sup>312</sup> *Ibid*, at p 148

<sup>313</sup> Palandt-Heinrichs *Buergerliches Gesetzbuch* 168.

<sup>314</sup> Baumbach/Duden/Hopt *Handelsgesetzbuch*, Ueberblick 2 vor § 48.

<sup>315</sup> Herber, *supra*, fn. 308, at p 149.

sue the charterer under the contract of carriage.<sup>316</sup> His conclusion in the case of the *MS Planet I* is that the cargo owners have title to sue the shipowners as carriers under the bill of lading.

With regard to the judgement of the OLG Hamburg stated above *Schmidt* submits that the charterer has to be held as the imposer of the standard terms contract.<sup>317</sup> The question under German law would therefore be whether the shipowner can at least be jointly held as the imposer of the standard contract alongside the charterer.<sup>318</sup> *Schmidt* accords with the findings of the OLG, which held that this was the case. He however disagrees with the OLG's application of § 5 AGBG<sup>319</sup> Firstly, clause 21 itself is not ambiguous as the owner is named as carrier under the bill of lading and his identity may be ascertained easily<sup>320</sup> giving effect to the demands of § 164 (I) BGB.<sup>321</sup> Secondly, there is no contradiction/ambiguity between clauses but merely an ambiguity between the identity clause and the construction of the bill of lading as a whole.<sup>322</sup> *Schmidt* however asserts that the situation would be if the charterer was to be sued under the bill of lading and was to rely on the identity of carrier clause to avoid liability as the identity of carrier clause may then be classified as a hidden clause, which is forbidden under the AGBG.<sup>323</sup> In the case of the *MS Planet I* however, *Schmidt* does not accord with the OLG's application of § 5 AGBG. For *Schmidt* the problem lies with the question who is entitled and bound by the issuing of the bill of lading.<sup>324</sup> Is it the shipowner, the charterer or both? He asserts that the bill of lading signed by the charterers agent is unclear as it cannot be determined who the carrier is. As shown above the problem under German law is a problem of authority. The agent firstly signs for the charterer whom he is authorised to represent.<sup>325</sup> The bill of lading however, also encompasses the identity of carrier clause. The question is whether this entitles the charterers agent to bind the owner as well. The risk of suing the wrong party being on the shippers as claimants. *Schmidt* believes that this case calls for an additional

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<sup>316</sup> Ibid

<sup>317</sup> *Schmidt*, supra, fn. 289, at p. 41

<sup>318</sup> Ibid, at p. 42.

<sup>319</sup> Ibid, at p. 42.

<sup>320</sup> Ulmer/Brandner/Hansen 'AGB Gesetz' § 5 Nr. 25.; *Schmidt* 'Offene Stellvertretung' 27 (1987) *Juristische Schulung* 431.

<sup>321</sup> *Schmidt*, supra, fn. 289, at p. 42.

<sup>322</sup> Ulmer/Brandner/Hansen/ 'AGB Gesetz' § 5 Nr. 28.

<sup>323</sup> *Schmidt*, supra, fn. 289, at p. 42.

<sup>324</sup> Ibid, at p 43.

safeguard to ensure that both, the charterer and the owner are bound.<sup>326</sup> Schmidt tries to solve the problem by giving effect to § 644 HGB.<sup>327</sup> It is however debatable whether this provision is meant to solve the abovementioned problem as the problem is not that no carrier is named in the bill of lading.<sup>328</sup> According to *Schmidt* the purpose of § 644 HGB is to force the shipowner to comply with the identity of carrier clause.<sup>329</sup> The Shipowner can therefore not claim that he was not represented by the charterer due to a lack of obviousness, § 164 (II) BGB. Even if, as in the case of the *MS Planet I* there is an identity of carrier clause there is a lack of obviousness which shall be prevented by the provision of § 644 HGB. This is gathered from a liberal interpretation of the said provision.<sup>330</sup> According to Schmidt the shipowner would therefore be liable under § 644 HGB. § 644 HGB protects the interests of the cargo owner and does not prevent him from suing the charterer under the contract of carriage.<sup>331</sup> In this case the cargo owner can however only sue the shipowner as carrier under the bill of lading. Notwithstanding the general rule of § 644 HGB the charterer may be sued as carrier under a bill of lading if he assumes the role of a carrier which may often be the case under time charters. *Schmidt* characterizes the function of § 644 HGB as protecting the cargo owner by holding that the shipowner is liable as a carrier under a bill of lading.

Accordingly two possibilities may be distinguished.

Firstly, as far as no contractual carrier can be identified § 644 HGB provides that the shipowner is to be deemed carrier.

Secondly, if a contractual carrier other than the shipowner can be identified as carrier under a bill of lading § 644 HGB does not have the power to change the identity of the so found carrier. In this case the charterer as contractual carrier cannot rely on the identity of carrier clause to avoid liability.<sup>332</sup> The cargo owner can however, sue the shipowner under § 644 HGB.<sup>333</sup>

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<sup>325</sup> Ibid, at p 44

<sup>326</sup> Ibid

<sup>327</sup> Sentence 1 of § 644 HGB states that the shipowner shall be deemed carrier if the owner name is not contained

in the bill of lading issued by the master or by another representative of the owner.

<sup>328</sup> Schmidt, supra, fn. 289, at p 43.

<sup>329</sup> Ibid, at p 44.

<sup>330</sup> Ibid, at p. 46.

<sup>331</sup> LG Hamburg, Transportrecht 1985, 296, 298.;

<sup>332</sup> Schmidt, supra, fn. 289, at p 46.

<sup>333</sup> Ibid, at p.45.

While the shipowner can always be held liable under § 644 HGB the charterer may be held liable under the bill of lading if he is to be identified as carrier. Although the term 'carrier' is generally avoided there is a difference. Technically, § 644 HGB establishes a legal fiction in favour of the shipper which does not make the shipowner a carrier under a bill of lading governed by the Hague Rules or a valid identity of carrier clause as *Schmidt*<sup>334</sup> puts it. He therefore promotes a joint and several liability of the shipowner and the charterer similar to *Tetley*.<sup>335</sup> Although strictly speaking the owner does not assume the role of a carrier under the bill of lading where § 644 HGB is liberally applied it further has to be construed that, as according to § 644 HGB the 'owner is deemed to be carrier' he may rely on the package limitations of the Hague Rules. *Schmidt* faces significant criticism among German authorities. Even *Schmidt* admits that his extensive interpretation of the provision does not conform with the will of the historic legislator.<sup>336</sup> In general § 644 HGB is not as extensively interpreted and shall therefore only apply in the abovementioned case where the name of the carrier is not indicated on the bill of lading.<sup>337</sup> Although it is claimed that this causes inequities.<sup>338</sup> Historically cargo owners could additionally sue the shipowner *in rem*, § 754 Nr. 7 HGB. The provision however, was cancelled in 1972. It seems to be widely accepted that even if the provision applies the charterer as contractual carrier cannot be held liable under a bill of lading.<sup>339</sup>

Only according to *Schmidt* can there be a joint liability under the Hague Rules as shown above. *Schmidt* tries to establish this rule by taking recourse to cases where managers represented closely associated businesses without properly disclosing the principals identity.<sup>340</sup> *Rabe* states that the cases under German law stated by *Schmidt* are significantly different from this case.<sup>341</sup> He argues that the responsibility of the agent is to procure shipments and sign carriage contracts and bills of ladings.<sup>342</sup> Without knowledge of the details of the charterparty the agent will generally be ignorant of the fact whose vessel is being loaded even if the charterer

<sup>334</sup> Schmidt 'Geklaerte und offene Fragen der IoC-Klausel' p.219.

<sup>335</sup> Tetley however, holds that both the contracting and the acting carrier are carriers under the Hague Rules. See: *Tetley Marine Cargo Claims* 234

<sup>336</sup> Rabe 'Die IOC-Klausel – Lösung oder Diskussion ohne Ende?' 87

<sup>337</sup> Wriede *Zur Rechtsstellung des Inhabers eines Konnossements ohne Verfrachterbezeichnung. Aus dem Hamburger Rechtsleben* 242.

<sup>338</sup> Ibid, at p. 243.

<sup>339</sup> Schapps and Abraham *Das Seerecht in der Bundesrepublik Deutschland*, 778;

*Rabe 'Die IOC-Klausel – Loesung oder Diskussion ohne Ende?' 88.*

<sup>340</sup> Schmidt 'Offene Stellvertretung' (1987) 27 *Juristische Schulung* 431.

<sup>341</sup> Rabe, supra, fn. 339, at p. 88.

<sup>342</sup> Ibid

was authorised to represent the owner.<sup>343</sup> He only has a contractual relationship with the charterer.<sup>344</sup> Only the charterer can therefore be bound by his agents signature. Others assert that a joint and several liability of both, charterer and owner fails on different grounds. Firstly, the ruling of the BGH in the said decision cannot be considered to justify a joint and several liability as the court merely held, that the charterer is liable under the contract of carriage although the owner is liable under § 644 HGB. The court however, did not rule that the charterer also remains liable under the bill of lading.<sup>345</sup> As mentioned above there is a strict distinction between the contract of carriage and obligations arising out of the bill of lading.

Secondly, the grammatical interpretation of the said provision does not allow for a joint liability as only the owner is deemed to be the carrier.<sup>346</sup> The purpose of § 644 HGB is only to guarantee the negotiability of the bill of lading.<sup>347</sup> Thirdly, a joint liability approach is not supported by a contextual interpretation of the provision as the master lacks authority to bind both the owner<sup>348</sup> Fourthly, the equitable construction of § 644 S. 1 HGB does not warrant the notion of joint and several liability. The purpose of § 644 HGB to protect the bill of lading holder is already achieved by deeming the owner to be carrier.<sup>349</sup>

Under current German law the judgement of the BGH in the *Planet I* would appear to be right. From the face of the bill of lading the bill of lading holder will have the impression of the charterer being the (contractual) carrier. This however clearly contravenes the identity of carrier clause on the back of the bill of lading within the meaning of § 4 AGBG. The details on the face of the bill of lading have to be qualified as non-standard agreements which will be given precedence over standard agreements such as the identity of carrier clause.

#### **2.1.4 The identity of carrier clause in blank bills of lading**

If carrier is apparent from the face of the bill of lading there can be no contradiction to the identity of carrier clause as provided for in § 4 AGBG. Bills of lading require written form, § 126 BGB. The bill of lading holder has to rely on the facts laid down in the bill of lading, § 656 HGB. Facts not apparent from the bill of

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<sup>343</sup> Ibid

<sup>344</sup> Ibid

<sup>345</sup> Poetschke, supra, fn 44, at p 40.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid

<sup>348</sup> Ibid, at p. 41.

<sup>349</sup> Ibid, at p. 41.

lading such as non-standard oral agreements cannot be considered. Consequently § 4 AGBG will not apply and it appears that the identity of carrier clause in the case of a blank bill of lading would be valid under German law.<sup>350</sup>

The identity of carrier clause will only bear relevance where the legal fiction of § 644 HGB does not apply. Where the master or another authorised agent of the owner signs the bill of lading the owner will be deemed carrier and held liable under § 644 HGB without taking recourse to the identity of carrier clause.<sup>351</sup>

§ 644 HGB will however not apply where the charterer or his agents sign blank bills of lading unless they act with the authorisation of the owner.<sup>352</sup> Otherwise the identity of carrier clause remains relevant.<sup>353</sup>

## Conclusion

Where the owner is liable under an identity of carrier clause the consequence is comparable to the case of § 644 HGB.<sup>354</sup> The owners liability only extends to rights and obligations under the bill of lading not however as party to the contract of carriage which under German law has to be distinguished from the contract of affreightment. Neither the terms of the contract nor the person of the carrier can be replaced or changed through the bill of lading. Although most German authorities agree that a joint liability may be desirable<sup>355</sup> the majority opinion is, that this goal can only be achieved by the ratification and transfer of the Hamburg Rules into German law.<sup>356</sup>

## 2.2 Japan

### 2.2.1 Applicable law

Under Japanese Law, the carriage of goods by sea is regulated by the Commercial Code, 1897<sup>357</sup> applying merely to inland navigation and the Carriage of goods by sea act, 1992 which is based on the Hague-Visby Rules, and applies to '...international movements....'.<sup>358</sup>

<sup>350</sup> Ibid, at p 52.

<sup>351</sup> Ibid, at p 52

<sup>352</sup> OLG Hamburg judgement delivered on 26.3.1970 – 6 U 141/69 cited in *Versicherungsrecht* 21 (1970) 664.

<sup>353</sup> Poetschke, supra, fn. 44 at p. 52.

<sup>354</sup> Ibid .

<sup>355</sup> Rabe, supra, fn. 336, at p. 88.

<sup>356</sup> Wriede p. 247; *Herber Konnossement und Frachtvertrag* 81.

<sup>357</sup> The Japanese Commercial Code is based on German law

<sup>358</sup> Pejovic, supra, fn. 3, at p. 388.

## 2.2.2 General rule under Japanese Law

The view on the effect and validity of demise and identity of carrier clauses under Japanese law has changed in recent decisions

### 2.2.3 Japanese Cases

#### • The Jasmin

Under the Japanese Law of carriage it was traditionally conceived that ‘...there could only be one carrier....’<sup>359</sup> Under Art. 2 (2) the carrier may be the shipowner, lessee, or the charterer<sup>360</sup> ‘...In the case of a time charter party...however..., the carrier was the time charterer....’<sup>361</sup> It thus came as a surprise when the Tokyo District Court in the 1991 decision of the *Jasmin*<sup>362</sup> recognized the validity of a demise clause under Japanese law.<sup>363</sup> In this case the shipowner was sued by the voyage charterers letting the vessel from the time charterers. The rule established prior to this case in the case of *the R.D. Tata* necessarily implied that demise clauses were invalid under Japanese law.<sup>364</sup> Although the view that there could only be one carrier under Japanese law was upheld, the competent court found that the parties could agree on the identity of the carrier.<sup>365</sup> Both, the Tokyo High Court<sup>366</sup> and the Supreme Court<sup>367</sup> later affirmed the judgement. In this case the plaintiffs sued the shipowner and the time charterer in respect of damage to the cargo. The contract of carriage evidenced by bills of lading was governed by Japanese law and contained a demise clause on the reverse of the bill of lading. The bill of lading was signed with the expression ‘For the Master’ which according to the competent court generally indicates that the shipowner is party to the contract of carriage and therefore carrier.<sup>368</sup> The Chief Justice firstly held that the fact that the charterers name was printed in block letter at

<sup>359</sup> Margolis ‘Validity of the demise clause under Japanese Law and the consequences for enforcement abroad of claims under Japanese bills of lading’(1993) *Lloyd’s Maritime and Commercial Law Quarterly* 164.

<sup>360</sup> Pejovic, supra, fn. 3 at p. 393.

<sup>361</sup> In *R.D. Tata & Co. Ltd v. Taiyo Shipping Co. Ltd.* (1931) cited in Margolis, supra, fn. 359, at p. 164. This view was supported by two Hong Kong decisions applying Japanese law. It was thereby held that under Japanese COGSA there can only be one carrier. See *The Griesheim* and *The Dong Ho* in Margolis p 166-167.

<sup>362</sup> *R.D. Tata & Co. v. Taiyo Shipping Co.*(The *Jasmin*), cited in Margolis, *Ibid* at p. 164.

<sup>363</sup> *Ibid*, at 165.

<sup>364</sup> Although this view was debatable after the enactment of the Hague Rules into Japanese law see: *Ibid*, at p 165.

<sup>365</sup> *Ibid*, at p 164.

<sup>366</sup> Satori ‘The *Camfair*’ (1993) *Japan Shipping Exchange Bulletin No. 36* website of the Japan Shipping Exchange Inc. <http://www.jseinc.org/en/buletin/bulletin36/camfair.htm>.

<sup>367</sup> Judgement published in 6 *Kaiji-ho Kenkyu Kaishi* 52 (Sup.Ct. 1998) quoted in Pejovic, supra, fn. 3 at p. 394.

the head of the bill of lading was in itself not sufficient to make him the carrier as ‘...it is common in the shipping industry for bills of lading which are not charterer’s bills to contain the name of the charterer at the top....’<sup>369</sup> Secondly it was held that the ‘...shipowner retains a residual responsibility in respect of the specialised and technical aspects such as loading, stowing and safe-keeping and discharge of the cargo....’<sup>370</sup> It thus cannot be said that under Art. 3.1. of the Japanese COGSA the charterer would necessarily have to be the carrier.<sup>371</sup> Thirdly the court was of the opinion that the demise clause did not have the effect of reducing the liability of the carrier but ‘...merely specified his identity....’<sup>372</sup> The demise clause thus cannot be construed as contravening Art. 15.1 Japanese COGSA which gives effect to Art. III (8) of the Hague Rules as enacted into Japanese law.<sup>373</sup> The Chief Justice furthermore found that, in case of a claim the maritime property of the shipowner would constitute the best security and thus best protect the interests of the claimants.<sup>374</sup> It is asserted however, that before the said decision the plaintiffs could claim against the charterer, usually being a reputable company without having to arrest the carrying vessel in Japan which may prove difficult.<sup>375</sup> The reception among Japanese authorities in respect of this judgement has therefore not been an overall positive one. It can be said however, that the decision of the *Jasmin* put Japanese law ‘...in line with the Judgements in the leading English cases....’<sup>376</sup>

#### • The *Camfair*

In the more recent judgement of the *Camfair* which was lost (off the southern end of Luzon Island) in December 1998, insurers commenced litigation against the defendant time charterers after the rights of the bill of lading holders were subrogated to them.<sup>377</sup> The Tokyo District Court held the demise clause contained on the reverse

<sup>368</sup> Satori, supra, fn. 366

<sup>369</sup> Margolis, supra, fn. 359, at p. 168.

<sup>370</sup> Ibid

<sup>371</sup> Ibid

<sup>372</sup> Similarly in an Australian decision the New South Wales Court of Appeals held in an *obiter dictum* that, the demise clause did not aim to limit liability but merely defined the carrier. See *Kaleej International Pty. Ltd. v Gulf Shipping Lines Ltd.* [1986] 6 New South Wales Law Report 596, Ibid, at p. 168.

<sup>373</sup> Art. 15.1 of the Japanese COGSA provides that, ‘any special agreement unfavourable to the consignor, consignee or to the holder of the bill of lading and contrary to the provisions [of the principle articles of the Act] are void’, Ibid

<sup>374</sup> Satori, supra, fn. 366 at p.7.

<sup>375</sup> Margolis, supra, fn. 359, at p.170.

<sup>376</sup> Satori, supra, fn. 366, at p.7

<sup>377</sup> Ibid, at p.2

side of the bill of lading to be ineffective.<sup>378</sup> The court held that, the demise clause contravenes Art. 15.1 of the Japanese COGSA. (see footnote) as its intention is ‘...to discharge the defendant from liability as a carrier and it is a special agreement unfavourable to the consignor, consignee or the holder of the bill of lading....’<sup>379</sup> The court saw no reason to refute the liability of the shipowner as he voluntarily assumed carrier’s liability.<sup>380</sup> The effect being that both, the shipowner and the time charterers are liable as carriers.<sup>381</sup> The reasoning therefore was in sharp contrast to the reasoning in the case of the *Jasmin*. (see above) According to the court however, the case differed from the case of the *Jasmin* (where the shipowner was held to be the carrier) as the agent of the voyage charterer was independent from the time charterer involved ‘...and signed with with the wording FREIGHT PAID for and on behalf of the Master/Owner on the bill of lading.’<sup>382</sup> In the case of the *Camfair* some of the clauses on the reverse side of the bill of lading such as clause 13 stipulating that the defendant had a right to claim freight and have a lien on the cargo contradicted *inter alia* the demise clause. The court therefore held that the carrier could not be identified ‘...by these clauses alone....’<sup>383</sup> The court placed weight on the consideration that the charterer has the right to claim freight under clause 13 which may exceed the time charter hire and ‘...substantially belongs to the defendant....’ as the owner agreed not to claim the difference from the time charterer.<sup>384</sup> The defendant charterer therefore was to be regarded carrier.<sup>385</sup>

## Conclusion

We can therefore conclude, that the validity and role of demise and identity of carrier clauses as a means of identifying the carrier under Japanese law has not been finally decided as yet.

### 2.2.4 Comments

Commenting on the aforementioned decisions concerning the demise and identity of carrier clause respectively, Japanese scholars such as *Satori* assert that Japanese

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<sup>378</sup> Ibid, at p. 1

<sup>379</sup> see Fn on Art. 15.1 Japanese COGSA

<sup>380</sup> Satori, supra, fn. 366 at p. 6

<sup>381</sup> Ibid

<sup>382</sup> Ibid

<sup>383</sup> Ibid, at p.5

<sup>384</sup> Ibid, at p.6

<sup>385</sup> Ibid

judges and academics have moved away from ‘...actual shipping practice....’.<sup>386</sup> While it may be possible to identify the owner by the flag and a certificate of the vessels national registry or through the Lloyd’s Register of Shipping it cannot beyond doubt be established whether or not the vessel is demise<sup>387</sup>, time or voyage chartered.<sup>388</sup> Furthermore, a shipper cannot be expected to investigate all the underlying relationships which are not available to the public.<sup>389</sup> These relationships however, may bear some relevance for the shipper as shown above. He opts for an interpretation from the bill of lading holders perspective and proposes that where the name of the charterer is mentioned ‘...at the top of the bill of lading and the bill of lading is signed for the master by the charterers agent....’ the shipper may hold the charterer to be the carrier.<sup>390</sup> *Satori* submits that when construing the bill of lading, special consideration should be paid to the intentions and the perspective of the parties involved.<sup>391</sup> His approach therefore is quite similar to the one of the House of Lords in the *Starsin* where consideration was given only to the wording on the face of the bill of lading. *Satori* asserts that clauses intended to disfavour the shipper should not be enforceable due to the fact that they are unfair terms.<sup>392</sup> He however does not hold demise clauses to be invalid in general.

Commenting on the decision in the *Jasmin Margolis* points out that decisions where demise clauses were held to be ‘...entirely usual and ordinary....’ under English law (*The Berkshire*) should be seen in the legal context where an *in rem* action is available to the shipper.<sup>393</sup>

*Pejovic* accords with the findings of the court in the case of the *Jasmin* He asserts that the identity of carrier clauses does not intend to lessen the carriers liability but rather to shift liability and is therefore not contrary to Art. 3(8) of the Hague Rules.<sup>394</sup>

## Conclusion

It can be concluded that even among courts in the same country, neither under Common law nor under Civil law jurisdictions, the problem of identifying the carrier

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<sup>386</sup> Ibid at p.10.

<sup>387</sup> Margolis, supra, fn. 359, at p. 170.

<sup>388</sup> Satori, supra, fn. 366, at p. 10.

<sup>389</sup> Ibid

<sup>390</sup> Ibid

<sup>391</sup> Ibid, at p. 9

<sup>392</sup> Ibid, at p.11

<sup>393</sup> Margolis, supra, fn. 359, at p. 170.

especially with regard to demise and identity of carrier clauses is solved in a uniform manner.

The question therefore is, whether international attempts at standardising and harmonising international carriage law with regard to this problem are bound to succeed.

## Part C

### I. Seatransport

#### 1. The 1978 Hamburg Rules

Zambia was the twentieth country to ratify the Hamburg Rules in October 1991 which subsequently entered into force internationally in November 1992.<sup>395</sup>

Art. 1 (1) reads:

‘...“Carrier“ means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper....’<sup>396</sup>

The Hamburg Rules took a further step in recognizing the modern realities of shipping by widening its scope thereby introducing the concept of the “actual carrier”.<sup>397</sup>

Art. 1 (2)

‘...“Actual carrier” means any person to whom the performance of the carriage of the goods, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted....’<sup>398</sup>

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<sup>394</sup> Pejovic, *supra*, fn. 69, at p. 302

<sup>395</sup> Bassindale ‘The Identity of the Carrier under Bills of Lading’ at p. 7

<sup>396</sup> United Nations Convention on the Carriage of Goods by Sea (1978) in Magnus *Global Trade Law* 261.

<sup>397</sup> Charest, *supra*, fn. 13, at p. 907.

The distinction between “carrier” and “actual carrier” as well as their joint and several liability is taken over from the Guadalajara Convention, 1961, art. 1; 2 which exemplifies a development in international transport law. See: Kienzle *Die Haftung des Carrier und des Actual Carrier nach den Hamburg Regeln* 6-7.

<sup>398</sup> Magnus, *supra*, fn. 396, at p. 261.

In consequence the carrier remains liable throughout the voyage whereas the actual carrier only bears responsibility for the part of the carriage which is performed by him.<sup>399</sup>

One of the main consequence of art. 10 (1) combined with art. 10 (4) provide for a joint and several liability of both the carrier and the actual carrier where they are both liable<sup>400</sup>.

Under Art. 15 (1) (c) the bill of lading must furthermore name the carrier and his place of business.

Art. 23 (1) of the Hamburg Rules provides that:

‘Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit or insurance of the goods in favour of the carrier, or any similar clause, is null and void. ‘

This provision by some is understood as rendering invalid demise and identity of carrier clauses in bills of lading as they purport to lessen the liability of the carrier under Art. 14 (2) and Art. 10 of the Hamburg Rules.<sup>401</sup>

This approach however, is influenced by Canadian decisions in the scope of application of the Hague Rules where the courts held the identity of carrier clauses to be null and void.<sup>402</sup>

Others assert that these clauses are systematically not contractual stipulations purporting to lessen the liability of the carrier under a mandatory regime but rather serve the purpose of identifying the carrier and therefore rather are a problem of

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<sup>399</sup> *Sze Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* 27.

<sup>400</sup> Lüddecke/Johnson *The Hamburg Rules* 24.

<sup>401</sup> CMI Vienna Colloquium/Cadwallader at p. 50 quoted in Kienzle *Die Haftung des Carrier und des Actual Carrier nach den Hamburg Regeln* 264;

Tetley, *supra*, fn. 6 at p. 12

<sup>402</sup> Kienzle *Die Haftung des Carrier und des Actual Carrier nach den Hamburg Regeln* 264.

authority. The question who is liable under the bill of lading is not answered by the rules.<sup>403</sup>

Still however, the Hamburg Rules improve the situation for cargo interest in case of suit. Firstly, as not only the party obligated under the bill of lading is liable but already the carrier with which the shipper has entered into a contract of carriage. Secondly because Art. 1 (1) introduces the principle of obviousness into the law of carriage by sea and thirdly because the shipowner will mostly be liable as an actual carrier under Art. 1 (1) of the Hamburg Rules.<sup>404</sup>

We can therefore conclude that the Hamburg Rules do improve the situation of cargo interests in case of suit but arguably do not render invalid demise or identity of carrier clauses.

It is further suggested that under art. 10 of the Hamburg Rules both the carrier as well as the actual carrier should be held liable jointly and severally for the entire carriage.<sup>405</sup>

A major drawback to this convention is, that it has not been adopted by most of the worlds maritime nations such as the U.S. or England and the situation is unlikely to change in the future.<sup>406</sup>

## 2. The 1991 Civil Code of the Netherlands

Article 442 of Book 8 of the Civil Code of the Netherlands provides for a joint and several liability similar to the Hamburg Rules.<sup>407</sup> Article 461 goes even further by stipulating that ‘...any person who signs a bill of lading, or whose form is used in issuing it, is deemed to be a carrier, and that a time or voyage charterer who is the last party in a chain of contracts will also be deemed to be a carrier....’<sup>408</sup>

It may thus be concluded, that demise and identity of carrier clauses purporting to lessen liability of the broad definition of carrier under Dutch law, would be invalid stipulations.

<sup>403</sup> Pejovic, *supra*, fn. 69, at p. 298.

<sup>404</sup> Kienzle *Die Haftung des Carrier und des Actual Carrier nach den Hamburg Regeln* 274.

<sup>405</sup> Sze *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* 31.

<sup>406</sup> Sturley The United States Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress (2003) 39 *Texas International Law Journal* 66.

<sup>407</sup> Tetley, *supra*, fn. 124, at p. 844.

<sup>408</sup> *Ibid*

### 3. 1994 Nordic Maritime Code

Although the Scandinavian countries have not ratified the Hamburg Rules parts of it were taken into account in the reformed Nordic Maritime Code of 1994.<sup>409</sup> (Under the Code demise and identity of carrier clauses are null and void as it provides for a joint and several liability of charterer and shipowner.<sup>410</sup>

### 4. The 1999 Draft United States Senate COGSA

The proposal for a Carriage of Goods by Sea Act of 1999 as a replacement for the U.S. COGSA of 1936 provides for a broad definition of the term carrier comprising the “contracting carrier”, the “performing carrier”<sup>411</sup> as well as the “ocean carrier” meaning a performing carrier owning, operating or chartering a ship used for the purpose of carriage of goods by sea.<sup>412</sup> The notion of a joint and several liability as stipulated under the Nordic Maritime Code or the Hamburg Rules is not provided for in the Draft.<sup>413</sup>

It may be concluded that demise and identity of carrier clauses would be rendered invalid.<sup>414</sup>

### 5. The CMI UNCITRAL Draft

Unlike the Hamburg Rules the Draft does not distinguish between the “actual carrier” and the “contracting carrier” and furthermore approves of the validity of demise and identity of carrier clauses.<sup>415</sup>

#### 5.1 Paris declaration

During the CMI’s proceedings in Paris the question of the identity of carrier was raised. It was concluded that as a matter of construction a party merely performing

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<sup>409</sup> Sea Carriers Liability (2002) Marine Newsletter 4 Website of If Industrial Insurance Ltd.  
<<http://www.if-insurance.com>>

<sup>410</sup> Williams *Chartering Documents* 122.

<sup>411</sup> Means any party “that performs, undertakes to perform, or procures to be performed any of a contracting carrier’s responsibilities under a contract of carriage”, and “acts, either directly or indirectly, at the request of, or under the supervision or control of, a contracting carrier”, art. § 2 (a) (3) (A) (i)-(ii), at 2. The performing carrier need not be party to the contract of carriage. See Tetley ‘Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ‘99’ (2003) 28 *Tulane Maritime Law Journal* 22.

<sup>412</sup> Tetley, *supra*, fn. 6 at p. 22.

<sup>413</sup> Tetley, *supra*, fn. 124 at p. 846-847.

<sup>414</sup> *Ibid* at p. 847.

<sup>415</sup> Tetley, *supra*, fn. 6 at p. 12.

the carriage without being party to the contract of carriage could not be held liable under art. 1 (a) of the Hague/Visby Rules.<sup>416</sup>

Following a comparison with the definition of the term carrier in other transport conventions such as Warsaw Convention (including the Guadalajara Convention supplementary to the Warsaw Convention, 1961), the Athens declaration and the Hamburg Rules the Comité Maritime International (CMI) recommended an amendment of the Hague/Visby Rules to allow cargo interests to sue the “performing” carrier thereby extending the scope of the Rules.<sup>417</sup>

## 5.2 Singapore declaration

Under the Singapore declaration, 2001 the term of the performing carrier is introduced.<sup>418</sup> A contracting carrier carrying out the contract with his own means may be considered both a contracting as well as a performing carrier.<sup>419</sup> It would appear thus, that this is the contrary situation to the Hamburg Rules where there can be no identity between carrier and actual carrier. This conclusion is derived from Art. 1 (2) of the Hamburg Rules where the actual carrier is a person or entity different and from the carrier.<sup>420</sup>

## 6. The UCP 500.

The Uniform Customs and Practice for Documentary Credits (UCP 500) which came into effect in 1994 *inter alia* deals with bills of lading in art. 23.<sup>421</sup> It provides that the name of the carrier must appear on the face of the bill of lading.<sup>422</sup> While the UCP 500 is not a convention or given the force of law it certainly will have an impact on how bills of lading will be signed and issued<sup>423</sup> especially as a result of the judgement of *The Starsin*.

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<sup>416</sup> Eilenberger-Czwalinna ‘*Haftung des Verfrachter nach dem Zweiten Seerechtsaenderungsgesetz*’ 167.

<sup>417</sup> Ibid at p.167.

<sup>418</sup> Martin-Clark ‘After Singapore, where now?’ (2001) 1 *Shipping and Trade Law* 7

<sup>419</sup> Ibid at p. 7

<sup>420</sup> Kienzle at p. 52.

<sup>421</sup> Clifford Chance ‘An Agents Authority to Sign Bills of Lading (Part Three)’ (1994) 6 *P&I International* 10

<sup>422</sup> Bassindale ‘Documentary Credits-The New UCP 500’ (1993) 14 *Clifford Chance Maritime Review* 1, 24.

<sup>423</sup> Clifford Chance, supra, fn. 421 at p. 10

## II. Warsaw Convention

While under the Warsaw Convention, 1929 amended by the Hague Protocol 1955, as well as the Montreal Convention 1999, the term “carrier” is not defined, courts in the U.S. have ruled that entities performing functions of carrier such as baggage handlers or freight forwarders to be carriers under the Warsaw Convention.<sup>424</sup>

The Guadalajara Convention, 1961<sup>425</sup>, supplementary to the Warsaw Convention under art. I (c) defines the actual carrier.

The contracting carrier is defined as:

‘...other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof of the contrary....’

The Convention therefore provides that passengers can either sue the contracting carrier, the actual carrier or both.<sup>426</sup>

## Part D

### Conclusion

The Hague and the Hague Visby Rules do not clearly specify who the carrier is under bills of lading. As it is the major convention enacted by maritime powers such as the U.S., GB, Japan and Germany the question is still not solved and without changes to the convention will continue to produce contradicting judgements in the future.

The problem lies with the fact that the interpretation of The Hague Rules, especially when it comes to bills of lading and the effect and validity of demise and identity of

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<sup>424</sup> Website of Forwarderlaw <http://www.forwarderlaw.com/feature/condomtl.htm> (accessed on October 15 2004.)

<sup>425</sup> Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, Signed in Guadalajara on 18 September 1961.

<sup>426</sup> Atherton ‘Unlimited liability for air passengers: the position of carriers, passengers, travel agents and tour operators under the IATA passenger liability agreement scheme’ (1997) 63 *Journal of Air Law and Commerce* 408.

carrier clauses, is dominated by the idiosyncrasies of national jurisdictions, which do interpret the topic differently, and, with regard to the standard of unification of international law in this field are free to do so.<sup>427</sup>

It is plain however, that the law of carriage, being truly international, needs uniformity. The only way to reach uniformity in international law is by way of a new convention which addresses this problem thereby leaving little space for interpretation through domestic laws.

The way in this field is lead by the conventions on air transport. Although the situation differs from the carriage of goods by sea due to the more complex structure of charters in the later, the definition of the terms carrier may be interpreted in much the same way.

Current initiatives in international law seem to point in this direction.

The notion of a joint and several liability as laid down by the Hamburg Rules is to be incorporated in a new or the amendment of existing conventions.

It appears that due to the complexity of the structure of, especially, time charters this would best serve the purpose of protecting cargo interests and leaving the charterer little room to escape liability.

The current regime does not support the notion of a joint and several liability from a legal point of view. Arguably, the Hamburg Rules although weakening the effect of these clauses similarly do not invalidate them.

A new convention or the amendment of an existing convention should therefore expressly invalidate demise and identity of carrier clauses in order to reach uniformity in the international law of carriage of goods by sea.

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<sup>427</sup> Herber *Konnossement und Frachtvertrag* 68.