Chapter 70

CARRIER'S IDENTITY

Identification of the carrier may be problematic where goods are carried on a chartered vessel and the bill of lading is in the hands of a shipper or receiver who is not himself party to the charterparty. In this situation, a contract of carriage will exist between the shipowner and the charterer in the form of a charterparty, and between the cargo interest and the 'carrier' in the form of a bill of lading. In the former, one may clearly identify the parties to the contract as being the shipowner and the charterer. In the latter, however, the position may not be as clear because the 'carrier' could be either the shipowner or the charterer, or perhaps even a sub-charterer, as commercial reality often results in the vessel being sub-chartered. Therefore, a vital issue for a cargo claimant often relates to identifying the 'carrier' and thus establishing whom to look to as regards performance of the contract and whom to sue if the cargo is lost or damaged.

The normal rule in English law is that only one party can be liable as a 'carrier' under any individual carriage contract. In contrast, the recent trend in some American courts is to impose 'carrier' status under the Carriage of Goods by Sea Act 1936 (COGSA 1936) on more than one party. Nevertheless, liability for loss or damage under COGSA 1936, as well as for breach of contract, can only be assessed against those defined as a 'carrier' under that Act.

It is therefore important for a claimant in either jurisdiction to decide whether an action should be taken against the charterer or the shipowner (or both under American law) as time and expense may be wasted if the wrong party is pursued or, where applicable, the advantage of suing more than one is ignored. The severity of the problem, in both jurisdictions, will become more acute if the contract is governed by the Hague or Hague Visby Rules because

the passage of time may result in the claimant being time barred due to the one year limitation period provided by Art.III r.6 of the Rules.

Ironically, it may be in the interest of the shipowner or the charterer to be deemed a 'carrier' as it might affect matters such as their right to exercise a lien over the cargo or their ability to maintain a claim as a bailee. Moreover, in the absence of 'carrier' status, such a party will lack any contractual privity between itself and the cargo claimant. Faced with an action in tort or bailment, a subcontractor will be unable to rely on the exemption and limitation clauses in its contract of carriage with the head contractor, or those afforded by the mandatory application of the Hague and Hague Visby Rules. It is therefore important for both the shipowner and the charterer to correctly determine their legal status at an early stage and, if necessary, anticipate an action framed in tort or bailment by including certain terms in their contract of carriage with the head contractor.

Of course, the rights of all the parties may also be affected by the identity of the 'carrier' where the charterer (or indeed the owner himself) becomes insolvent before the goods reach their destination.

However, due to the ambiguous definition of a 'carrier' in the Hague and Hague Visby Rules,. the complicated and often misleading documents used by the parties, and the conflicting case law that has derived therefrom, one may only describe English and American law regarding the identity of the 'carrier' as being incomprehensible and, to a certain extent, unpredictable.

In Samuel v. West Hartlepool. It was stated obiter that while the authorities in this area appear conflicting, the apparent conflict is a result of the carriers identity being essentially "a question of fact depending upon the documents and circumstances in each case". (Emphasis added)

Justice Walton then clearly defined the parameters of the problem by illustrating an example at each end of the legal spectrum and where the

carrier's identity is virtually free of doubt. At one end lies a demise charter and at the other - a charterparty where it is agreed that the charterer shall do no more than undertake that a full cargo shall be shipped, guarantee payment of a certain freight and, upon fulfilment of these obligations, the charterer's liability is to cease. In the former, it is reasonably clear that the contract of carriage is between the charterer and the shipper; whereas in the latter, the shipper would ordinarily have a contract of carriage with the shipowner. However, between the two extremes lie a great variety of 'intermediate cases', of which this particular case was said to be an example.

By applying Walton J's analysis, the case law relevant to this area can be divided into two categories. In the first category are cases where the identity of the carrier is unclear (the intermediate cases) and in the second, are cases that provide examples of the situations in which the carrier can be clearly identified.

In The Rewia, Justice Legatt doubted whether the analysis made by Walton J was relevant today and stated that the case law in this area, rather than being conflicting, illustrates a clear pattern. The court concluded that the identity of the contractual carrier depended upon the 'construction' of the bill of lading only and rejected an argument that further investigation into the circumstances of its issue might yield different results.

It is submitted, however, that the case law (in the intermediate category) does not illustrate a clear pattern and will continue to appear conflicting. Thus, while the issue as to the carriers identity is primarily one of construction, a case may warrant (in certain circumstances) a departure from the 'ordinary' principles applied by the court when construing bills of lading. As a result, one should not infer from The Rewia that the carriers identity will never be affected by the circumstances of a case, which in turn suggests that some conflict is inevitable because a decision reached by the court may ultimately depend upon the case's own individual facts and not the 'ordinary' principles

of construction. One must therefore doubt any commercial certainty that may be derived from the application of The Rewia in this area.

Furthermore, it is argued that the ambiguous definition of a 'carrier' in the Hague Visby Rules and the confused state of the case law in this area has been, and will continue to be, manipulated by the court in certain circumstances so that a fair result can be achieved. In this respect, an analysis of the case law suggests that in the event of there being more than one possible carrier, and where suing one of them is unrealistic, the English courts are likely to find that the party sued by the claimant is the 'carrier' as long as one can point to a recognisable link connecting the claimant to that defendant.

It is therefore important to establish the connecting factors which have been recognised by the courts as legitimate in identifying the actual defendant as the carrier. Thus, in the case of voyage or time charterparties, one should start with the presumption that the claimant contracts with the shipowner as he is the employer of the master and crew that actually performed the voyage (Sandeman v. Scurr). However, such a presumption can be rebutted by the following considerations:-

1 Even where the master signs the bill of lading, the charterer may still be identified as the 'carrier'.

A master is generally deemed to have the implied authority to enter into contracts of carriage on behalf of the shipowner. Thus, without evidence to the contrary, a master who signs the bill of lading does so as agent for, and on behalf of, his employer.

However the courts, while normally attaching considerable weight to the 'construction' of the document, have in appropriate cases taken into consideration the conduct and the role of the charterer in determining whether he can be identified as the 'carrier'. Thesiger L.J. stated that "It is

open to the [cargo claimant] to negative the presumption of the liability of the [shipowner].....by showing that [the charterers] had so conducted themselves or so contracted with the shippers of the goods as to make themselves personally liable".

This is further illustrated by Elder Dempster v. Paterson Zochonis in which the defendant, a well known shipping line, time chartered a vessel in order to supplement its fleet. The shipper had no idea that the vessel was chartered and naturally believed that he was shipping with the charterer. It was held that as the charterer's bill of lading had been used and the masters signature had not been qualified, the contract of carriage, unless clearly indicating otherwise, should be regarded as being with the defendant charterer.

Nevertheless, in the majority of cases where the master has signed bills of lading in his own name, such a signature is likely to result in a contract of carriage existing between the cargo interest and the shipowner. Moreover, Paterson Zochonis must be treated with some care, particularly in light of Justice Legatt's judgement in The Rewia.

2 Where the charterer's form of bill of lading is used.

Samuel v. West Hartlepool illustrates that the court will examine the relevant documents applicable to each case. Therefore, if the bill of lading is on a form commonly used by and associated with the charterer, such evidence will be a factor in the determination of the 'carrier' under that bill of lading.

However, it is clear that the above evidence is not always conclusive and just because the name of the charterer or shipowner is at the top of the document, it does not necessarily mean that the court will find them to be the carrier. In fact banner headings are given little weight in decisions where other factors, such as mode of signature, indicate something different .

3 Where the charterer or his agent signs the bill of lading.

Unlike the master, the charterer will have no authority to sign a bill of lading on behalf of the owner unless he has actual or ostensible authority to do so. As a result, when a charterer or his agent signs the bill of lading it may be unclear as to whether he is signing for himself or the owner and much may depend upon the form of his signature.

In The Okehampton the Court of Appeal questioned whether the charterer, in signing the bill of lading, was acting as the agent of the shipowner or on his own behalf acting as principal under the contract of carriage. The court acknowledged that a bill of lading signed by the charterer may be on behalf of the shipowner despite the fact that it was signed in the charterers name. However, by examining the documents and the circumstances of the case, it was held that the charterer was in fact signing on his own behalf. In reaching that decision the court made reference to the fact that the goods were in the hands of the charterer until the vessel arrived and were subsequently placed on board by the charterer's stevedores. Furthermore, the fact that the charterers were well known carrying contractors and were just supplementing their fleet on this occasion also influenced the conclusion that the charterer, and not the unknown owners of the foreign vessel, was the carrier.

Nevertheless, the mere signature of the charterer without any qualifications as to whether it was signed in a representative capacity will not always render the charterer as the 'carrier'. In The Nea Tyhi for example, a cargo claimant sued the shipowner for damage that resulted from the cargo being carried on deck when, under the bill of lading, it should have been carried under deck. The shipowner denied liability by arguing that the charterer's agent had no authority to sign bills of lading claused "shipped under deck" when in fact the goods were not so carried.

In identifying the shipowner as the 'carrier', the court concluded that although the charterer and their agents had no actual authority to make such statements

on behalf of the shipowners, they had ostensible authority to do so because the shipowner had represented or permitted it to be represented that they had.

However, it is submitted that while the decisions in The Okehampton and The Nea Tyhi appear conflicting, the apparent inconsistency is merely a result of a common underlying theme, ie - a desire to provide an innocent claimant with some form of compensation. Thus, one may argue that the main determinant in The Nea Tyhi was the fact that the charterer had gone into liquidation. In deciding who should bear the loss resulting from the charterers insolvency, Sheen J stated that it should be the shipowner and not the innocent third party as the former had contracted with the charterer and put trust and confidence in him to the extent of authorising the charterer's agents to issue and sign bills of lading. In The Okehampton, the charterer was in fact the claimant in the action, and the defendant was the owner of the vessel which had collided with that chartered by the charterer. As a result, had the charterer not been identified as the 'carrier', it would have lacked sufficient possessory interest in the ship and the goods to mount a claim as bailee for the bill of lading freight lost due to the collision. By contrasting the decisions and the facts of these two cases, it would appear therefore that the court has, in a given set of circumstances, indicated a clear bias towards the innocent claimant.

4 Where the charterer or his agent signs the bill of lading "for the master".

If the charterer qualifies his signature by signing the bill of lading "for the master" (or words similar to that effect) the court would ordinarily find the shipowner to be the carrier. In Tillmans v. Knuttsford it was held that by including the words "for captain and owners" the charterers had effectively issued a bill of lading as if it had been signed by the master himself and, in so doing, had rendered the shipowner liable as the 'carrier'.

However, according to The Venezuela, the charterer's signature may bind him as the carrier despite the qualification "for the master". The court held that just because the sub-charterparty contemplated that the charterers agents may issue and sign bills of lading for the master, it would not prevent the defendant charterer from making a contract of carriage on its own behalf. From the facts it was clear that the bill had been signed by the defendants agents and that the definition of 'carrier' within the bill 'suggested' that the contract of carriage was with the defendant. Furthermore, Sheen J stated that there was no indication that the vessel had been chartered and if the defendant did not wish to contract as the carrier, he should have made it clear in the bill of lading. The court concluded that until the shipper or holder of the bill of lading knew that the vessel had been chartered there was nothing indicating that the defendant was not the contracting carrier despite the fact that the signatory was expressed to be "as agents for the master".

In particular, Sheen J emphasized that the cargo claimant would otherwise face many difficulties in pursuing a Venezuelan action against a Panamanian one ship company, especially if the ship did not enter the jurisdiction of the Venezuelan court. It is therefore apparent that the court took into consideration the fact that suing the shipowner would be an unrealistic option for the cargo claimant.

While the decision in Tillmans v. Knuttsford would appear to offer a more practical and logical explanation as to the effect of the charterer signing the bill "for the master", it would seem to conflict with that in The Venezuela. One can only reconcile the conflict by distinguishing the cases on their facts and concluding, perhaps, that the facts of The Venezuela provide an exception to an otherwise sensible rule.

The Court of Appeal decision in The Rewia 1991 suggests that the correct principle to apply is that illustrated in Tillmans. The cargo claimant in the former sought to obtain English jurisdiction to hear his claim by applying the

EU Convention on Jurisdiction and Judgements 1968. If he was successful in identifying the charterer as the 'carrier' the English court would have jurisdiction by virtue of an article 17 agreement and the claimant would be able to join the shipowner in the English action by applying article 6. The bills of lading were signed "for the master" by the charterer's agents.

The claimant argued that as the bills were issued by and were in the name of a container line operated by the defendant, there was nothing in those documents to qualify the assumption that it made, ie - that the charterer's were the proper defendants. By applying The Venezuela it would seem that, despite the charterer signing for the master, the claimants argument might succeed if the documents and circumstances of the case warranted such a conclusion. In fact Sheen J at first instance held, for those reasons, that the contract of carriage was with the charterers and not the shipowners.

However the Court of Appeal did not take that view. Rejecting the claimants request for further investigation into the circumstances in which the bills were issued; the court doubted the proposition in Scrutton, except in so far as it was illustrated by Harrison v. Huddersfield Steamship Co, that a masters signature "may in some cases bind the charterer and not the owner". In the latter however, it was specifically agreed that the master was to be the agent of the charterer and would not have any authority to sign on behalf of the shipowner. Furthermore, the words "as Master" had been struck out and were substituted with "as agent for time charterers". Thus, the master in Harrison v. Huddersfield was clearly not signing for the shipowner and had no authority to do so.

In doubting whether Walton J's analysis of the problem could be applied today; Legatt LJ stated that the cases since Samuel v. West Hartlepool, instead of being conflicting, illustrate a clear pattern. He concluded:

"A bill signed for the master cannot be a charterer's bill unless the contract was made with the charterer's alone, and the person signing has authority to sign, and does sign, on behalf of the charterer and not the shipowner". (Emphasis added)

One may therefore imply from Legatt J's judgement that the court's ability to exercise a discretion with regard to the documents and circumstances of each case, and thus consider the merits of the action, has been removed. However, it is submitted that while the actual decision in The Rewia is correct on its facts, the reasoning provided to substantiate it cannot be described as an accurate analysis of the case law in this area. As a result, Justice Legatt's conclusion should be treated with care as it fails to take into consideration the influence which the circumstances of a case might have on the principles applied by the court when construing bills of lading.

In the writers opinion, the Court of Appeal was correct to ignore the circumstances in which the bills were issued (ie. prior negotiations) because the claimant in The Rewia was an indorsee. Thus a bill of lading, in the hands of a consignee or indorsee, should be treated as conclusive in regards the contract of carriage as such a party is unlikely to have access to that type of information and may be unfairly prejudiced by it. However, one should not infer from this decision that the circumstances of a case will never have a bearing on the carriers identity. For example, had the claimant in The Rewia been a shipper, one might have argued that they should have been allowed to provide evidence of a contract of carriage existing before the bill of lading was issued. Authority for this proposition can be found in The Ardennes 1951, where Lord Goddard CJ stated that a bill of lading, in the hands of the shipper, is not conclusive as to the contract of carriage but only excellent evidence of its terms. In holding the carrier bound by an oral promise made by its agent to a shipper, the court confirmed that a contract of carriage may be partly oral and partly written. On this basis, had the claimant in The Rewia been a shipper, any prior negotiations between itself and the charterer should

not have been ignored as it may have constituted sufficient circumstances to warrant a departure from the 'ordinary' principles applied by the court in construing bills of lading. Nevertheless, the extent to which the court will allow such evidence to be used in identifying the carrier, when it may only serve to complicate matters, remains unclear.

One must also note that the Court of Appeal did not overrule nor doubt the decision in The Venezuela and, for those reasons, The Rewia and The Venezuela would appear to be in conflict with each other. However, the facts of The Rewia, unlike those in The Venezuela did not concern an innocent third party faced with an unrealistic claim. On the contrary, the claimant was trying to use the lack of clarity in the case law to its own advantage. Furthermore, neither of the potential 'carriers' in The Rewia were single ship companies based in jurisdictions where it may have proven difficult to bring an action. In fact, both the charterer and the shipowner were domiciled within the European Union and, as a result, the enforcement or recognition of a judgement could have easily been established. One may therefore draw a distinction between the two cases by highlighting the potential difficulties faced by the claimant in The Venezuela and concluding that, in those circumstances, a departure from the 'ordinary' principles of construction was justified - but not, however, in The Rewia.

Thus if one accepts, contrary to the view expressed in The Rewia, that the authorities are conflicting and then contrast the decisions in Paterson Zochonis, The Okehampton, The Nea Tyhi and The Venezuela; one may argue that the court will, in certain circumstances, do its utmost to ensure that a fair result is achieved. Nevertheless, it would appear that the courts discretion may only be applied in circumstances which merit its indulgence. However this begs the question of whether there are any circumstances involving an innocent claimant faced with an unrealistic claim that would not be considered meritorious?

If Justice Walton's analysis is dissected and then applied to the case law discussed above it would appear that, in the 'intermediate cases', there are two main factors which the court will take into consideration when identifying the contractual 'carrier'. The first factor concerns the documents used and will therefore include; banner headings; clauses defining the 'carrier' or specifying who the contract of carriage is with; and finally, who signed the bill of lading and how (ie qualifications to the signature). However, with the exception of clauses identifying the contractual carrier, the above indicators will not be conclusive individually nor as a group when pointing to a particular party because they may all be defeated by the second factor. This second factor concerns the circumstances of the case and the commercial background to the issue of the bill of lading, it appears to be based upon fairness and represents the underlying consideration of the innocent third party's need for a remedy.

Irrespective of whether the above analysis is accepted, The Ines 1995 illustrates that the court will still need, in certain circumstances, to consider both the documents and the circumstances as a whole. While stating obiter that a bill of lading signed "for the Master" would ordinarily be a shipowners bill, Clarke J held that the signature "as agents for carrier Maras Linja" was ambiguous and failed to clearly identify the contractual carrier.

Below the signature was the following: "p.p. Eimskip [the charterer's agents] - Rotterdam", and underneath that, "as agents only". On both sides of the documents the words Maras Linja appeared in large capital letters. The shipowner argued that the signature should be interpreted to mean that the carrier was Maras Linja, namely the charterer, and that the person who signed did so on behalf of Eimskip as agents for Maras Linja the carrier. The charterer's on the other hand contended that the signature was on behalf of Eimskip as agents of Maras Linja, who were in turn, agents for the carrier.

Clarke J stated that both constructions were arguable and, on balance, if it were only a matter of construing the words in the signature box, the charterer would have been identified as the carrier. However, by examining the 'whole document' and considering the 'whole context' in which it came into existence, the court imposed 'carrier' liability on the shipowner.

In relation to the documents, the court found three pointers which indicated that the shipowner was the contractual carrier. The first was an indemnity clause in the charterparty which was interpreted as giving the charterer and their agents implicit authority to sign bills of lading on behalf of the shipowner. The second pointer was the words "In witness whereof the Master or agent of the said vessel has signed...", which were on the face of each bill and the natural meaning of "agent of the vessel" was interpreted by the court to be "agent of the owners of the vessel". The third pointer was a similar indication found in Clause 19 which contained the following: "the contract evidenced by this bill of lading is between the shipper and the owner of the vessel".

In relation to the context in which the bills came into existence, the court emphasised two factors which reinforced the conclusion that the shipowner was the carrier. Firstly, it was clear that the draft bills of lading and the three copies marked "not negotiable" did not pose any such problems as the signature box contained the printed words "Signed (for the master) by"; and secondly, it was only due to the threat of the carrying vessel being late that the received for shipment bills containing the ambiguous wording were issued.

One may therefore draw two clear points from the decision in The Ines. The first is that evidence of prior negotiations can, when the bill of lading is in the hands of a shipper, play an important role in the identification of the carrier. The second point is that even if one follows Justice Legatt's conclusion in The Rewia as to the decisive effect of signing "for the master", it is clear that other

modes of signature may, at the very least, need to be assessed in the light of the whole document and the context in which it came into existence.

5. Charterparty Terms

As between the charterer and the owner, one might be able to establish their intentions as to who would be the contractual carrier, and thus resolve the uncertainty in the 'intermediate cases', by examining the terms of the charterparty. For example, a clause authorising the charterer to sign bills of lading on behalf of the master without prejudice to the charterparty may suggest that it was intended that the shipowner should be the 'carrier'. Furthermore, if the relevant charterparty clauses are expressly incorporated into, and are consistent with, the remaining terms of the bill of lading they will be regarded as part of that contract and therefore legitimate indicators as to the identity of the contractual carrier. This will apply irrespective of whether the bill of lading holder has seen a copy of the charterparty.

However, where the relevant charterparty terms are not expressly incorporated into the bill of lading the position remains unclear. Obiter dicta by Lord Esher in Baumwoll v. Furness and the decision in Manchester Trust v. Furness would suggest that, irrespective of whether the bill of lading holder had notice of the charterparty, the terms of that agreement would be irrelevant if the holder of the bill was unaware of their content. Nevertheless, if it can be shown that the holder was fully aware of those terms, the court may take them into account in identifying the intentions of the parties especially where the bill of lading is itself ambiguous.

Where the identity of the carrier is clear

The second category of cases are those which are illustrative of the circumstances in which the carrier can be clearly identified. Thus, the following situations are likely to give rise to carrier liability:-

1 Where a 'demise charterparty' exists, the charterer is the carrier.

In determining whether or not the shipowner is the carrier one must examine the charterparty and consider the relationship it creates between the parties. It is clear that the charterparty need not be strictly speaking a 'demise charterparty' in order to relieve the shipowner of 'carrier' liability provided that "the agreement places the vessel altogether out of the power and control of the shipowners and vests it in the charterer's" .

In Baumwoll v. Furness the court distinguished between a shipowner being the registered owner and thus having an absolute right to the ship and a charterer who is given, for a limited time, all the rights of ownership from which he may equally be spoken of as the owner. Furthermore, the court acknowledged that while a charterparty may provide the charterer with full power to deal with the vessel and determine its voyage etc, the master and crew may nevertheless remain the true servants of the shipowner who would therefore be open to 'carrier' liability.

However in Baumwoll, the charterer had employed and paid the master and crew, gave them orders, and dealt with the vessel in the adventure. As a result, all the rights and obligations of the real owner were transferred to the charterer who therefore became liable, during that period, as the 'carrier' under the bill of lading.

2 Estoppel by silence

Where the 'actual' defendant has held himself out as the carrier and thus cheated the cargo owner of success against the 'proper' defendant, the 'actual' defendant will be deemed the carrier. This is illustrated by The Henrik Sif 1982 in which bills of lading issued by the charterer to the claimant contained a demise clause, the effect of which, rendered

the shipowner as the carrier and thus the 'proper' defendant. The claimant, however, brought an action against the charterers through the charterer's agents who, aware that a demise clause was in the bill of lading, continued to deal with the claim as if the charterer was the correct defendant and arranged various extensions of time. The claimant eventually issued proceedings against both the shipowner and the charterer, and while the shipowner was successful in claiming that the proceedings against him were time barred, the charterer's claim (that they were not the carrier) was denied.

It was held that as the agents knew the effect of the demise clause, they were under a duty to alert the claimant of their mistake instead of arranging extensions of time from the wrong party. By holding out the charterer as the proper defendant they had represented that the charterers would not enforce their strict legal rights against the claimants and thus prevented the charterer, on the basis of estoppel, from denying that they were the 'carrier' under the bill of lading.

3 Where there is a 'demise clause' in the bill of lading the shipowner will be the carrier .

A 'demise clause' may be inserted in the bill of lading, the effect of which is to clearly identify the shipowner or demise charterer as the carrier under that particular contract of carriage. It should be distinguished from an identity of the carrier clause which may name either the shipowner or charterer as the carrier. The latter, however, has the same purpose as a demise clause and therefore the same arguments may be used against it.

There are two ways of looking at demise clauses. One is that they merely clarify the carriers identity and are therefore extended definition clauses which offer a positive attempt to fix the shipowner with

liability. The other, is that they are really a form of exception clause which seek to remove the potential liability of the charterer.

Some jurisdictions have taken the second view and consider the demise clause as a derogation from the Hague/Hague Visby Rules because it seeks to reduce or remove the liability of a charterer who, but for the clause, might be considered a 'carrier'. Professor Tetley has described them as "misleading, anomalous and invalid" and other writers consider them to be a trap for the unwary as they are often on the back of a form which otherwise indicates that the shipowner is not the carrier. However, in England and Australia the demise clause has been warmly received as a provision eradicating any uncertainty as to the carriers identity.

In The Berkshire, a bill of lading on the charterers agents form signed by the charterers sub agents without the qualification "for the master", was found to be a shipowners bill due to the existence of a demise clause. The validity of the demise clause was also upheld in both The Vikfrost and The Jalamohan, and one may assume from the decision in The Henrik Sif that such a clause would have been effective in transferring carrier liability to the shipowner. Hirst J in The Jalamohan confirmed what had been assumed to be the English position and specifically rejected an argument based on Professor Tetley's views by concluding that there was nothing anomalous about demise clauses, they merely "spell out in unequivocal terms that the bill of lading is intended to be a shipowners bill". Furthermore, an identity of the carrier clause was found to be a contributing factor which rendered the shipowner in The Ines liable as the carrier.

Nevertheless, although there is no authority to indicate otherwise, a word of caution about the use of demise clauses must be raised. In this respect one may argue that, despite the above authority, it remains open in the English courts to challenge the validity of such clauses where they are used by a party, at the detriment of the claimant, to avoid the liability which it would

otherwise have. In each of the cases cited above, the validity of the clause was upheld to the advantage of the cargo interest and did not therefore result in the prevention of a remedy. Thus, the cargo owner in The Berkshire was seeking to make the shipowner liable and the question as to the charterer's liability did not arise. The carrier in The Vikfrost would have been liable even in the absence of the demise clause and there was no issue as to whether the charterer could have been the carrier. If the shipowner was not found to be the carrier in The Jalamohan, the shipper would have had to pay the same amount of freight twice; and the identity of the carrier clause in The Ines was only used as one of the indicators that pointed to a decision which probably would have been reached in its absence. Furthermore, although Webster J in The Henrick Sif assumed that a demise clause in a charterers bill of lading would be effective to transfer carrier liability to the shipowner, its detrimental effect to the cargo interest was avoided because the court estopped the defendant from relying on it and, as a result, the question as to the validity of the demise clause did not arise.

An objection to demise clauses could be made on the basis of Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd by arguing that the bill of lading provides inadequate notice of an unreasonable and extortionate clause. The question which should then be asked is, "whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual or stringent nature". The same quaere was also raised by Scrutton to which Roskill has replied that "the very purpose of the words in brackets was to put the bill of lading holder on express notice of the possibility that the ship concerned was chartered". Nevertheless whether such a clause, predominantly on the back of a bill of lading, complies with the requirements of sufficiency of notice is a question yet to be decided by an English court. F.M.B. Reynolds concludes that "room must...remain for argument as to whether the clause should always be effective".

On the other hand, if a shipowner wished to ensure that the charterer was clearly identified as the carrier in the bill of lading he could insert a clause in the charterparty placing an obligation on the charterer to clearly identify himself as such. Furthermore, by the use of an incorporation clause in the bill of lading, a term in the charterparty identifying the charterer as the carrier could be expressly incorporated. However, such a clause is likely to conflict and therefore fail to be consistent with the remaining parts of the document if a demise clause has also been included in the bill of lading, which in turn, would render the conflicting part of the incorporation clause ineffective. Nevertheless it is theoretically possible that one could insert a 'hierarchy' clause into the bill of lading stating that, in the event of conflict between an incorporated term from the charterparty and a provision in the bill of lading, the term in the charterparty is to take precedence.

1. Apart from the three situations described above, the carrier cannot be identified with any degree of certainty under English law and one may only look for indications. In practice, a cargo claimant should sue all the possible defendants and although the court will only find one of these parties to be the true carrier, it will not be clear at the initial stage who is solvent and who is not, who's got assets and where. Upon acquisition of these facts one can fine tune and focus on a particular defendant. Once a defendant has been chosen it will still be necessary to identify that party as the carrier; one must therefore apply the above indicators to the particular circumstances of the case and for this purpose the case law can be used to highlight those links which best suit the claimants cause.

2. A demise clause is valid under English law. However it is arguable that, despite cases such as The Berkshire and The Jalamohan, one may challenge the validity of a demise clause when it is used by a charterer to avoid a liability which it would otherwise have.

3. It is advisable to sue all parties in contract and the Tort of negligence and, whenever possible, take an action in rem against a vessel in order to provide security. However, the ability to arrest a vessel under English law is dependent upon the owner or demise charterer of that vessel being held liable in personam.

The effect of the UCP 500

The vast majority of documentary credits incorporate the terms of the Uniform Customs and Practice for Documentary Credits published by the ICC. The latest edition of these terms are contained in the UCP 500 which, under Art. 23, provide specific requirements relating to the identification of the carrier in 'non-charterparty bills of lading'. If the bill of lading issued does not comply with these requirements, the shipper may be unable to tender it under the credit and, as a result, will not be entitled to payment.

However, the UCP is not an international convention, nor is it given force of law by any legislation in England and will not therefore directly affect the legal principles discussed above. Nevertheless, it is likely to affect the appearance of bills of lading and the way in which they are signed in cases where the shipper needs to tender them against a documentary credit. This may in turn affect how the legal principles from the above cases are to be applied to any such document in the future.

The requirements of Art.23 have been listed as follows:-

(a) The bill of lading must appear on its face to indicate the name of the carrier; and

(b) The bill of lading must have been signed by any of the following:-

(i) the carrier, identified as such; or

(ii) a named agent for the named carrier, identified as such; or

(iii) the master, identified as such; or

(iv) a named agent for the named master, identified as such.

In relation to condition (a), it would appear that a banner heading bearing the carriers name would be sufficient to satisfy this requirement. However such a method would not, in itself, render that party liable as the contractual carrier under the bill of lading as it will be given little weight where other factors pointing to the carriers identity indicate something different.

In the absence of a banner heading or something similar to that effect, the bill of lading will need to have the name of the carrier indicated "on its face" elsewhere. This could be achieved by the inclusion of a clause identifying a particular party to be the carrier which, under the principles discussed above, is likely to render that party liable as the contractual carrier. In this sense, compliance with the UCP 500 will encourage the use of such clauses which may in turn increase the certainty with which the contractual 'carrier' can be correctly identified. Nevertheless, there is an argument that the validity of such clauses should not always be upheld and, as a result, the certainty of the carriers identity may not always be guaranteed. Moreover, banner headings and demise or identity of the carrier clauses are not the only means in which condition (a) can be satisfied, and of course condition (b) must also be fulfilled in order to comply with Art.23.

It would appear, however, that both conditions would be satisfied through either (b)(i) or (b)(ii). In this respect, the bill of lading would bear either the signature of the carrier who would also be identified as such (b(i)), or the signature of his agent who would not only have to name himself but also identify the carrier as the principal (b(ii)). Nevertheless, as most carriers are likely to be companies and therefore incapable of signing documents other than through agents, the type of signature described in (b)(i) is unlikely to be relevant. Furthermore, while the type of signature in (b)(ii) may clearly satisfy the requirements of Art.23 and perhaps enhance the likelihood of the carrier

being correctly identified, it will not always render the identity of the carrier free from doubt. Thus, the signature:

> "as agents for carrier Maras Linja
> p.p. Eimskip - Rotterdam
> as agents only"

is likely to be passed by the opening bank as complying with Art.23 but yet fail to clearly identify the contractual carrier (The Ines).

It is also unclear as to what action the bank will take when faced with such a signature indicating the name of one party as the carrier and additional factors, such as banner headings or clauses for example, indicating otherwise. In this context, C. Debattista suggests that these provisions will need to be relaxed in practice if unnecessary rejections are to be avoided. Further to this, Debattista argues, that Art.20(d) "may well be a convenient counterfoil, stating as it does that any condition as to signature will be satisfied if on its face it appears to be so satisfied".

While the type of signature in either (b)(i) or (b)(ii) will, in themselves, satisfy both conditions under Art.23; a signature under (b)(iii) or (b)(iv) will not. In the latter, the carrier will remain unidentified on the face of the bill which would therefore need to contain either a banner heading or a clause indicating "on its face" the name of the carrier for the said requirements to be fulfilled. Again however, mere compliance with Art.23 will not necessarily enable the 'carrier' to be identified in a legal sense. Thus, while the signature of the master or an agent signing on his behalf will ordinarily render the shipowner liable as the carrier, there is authority for the proposition that this will not always be the case.

One must also note that despite the bill of lading appearing "on its face" to indicate the name of the carrier, confusion as to the carrier's identity may

result by the inclusion of a clause in the bill of lading incorporating a term or terms from a charterparty which indicate something different.

It would appear therefore that Art.23 will have a very limited effect on the interpretation of the case law relating to the identity of the carrier and the way in which it is applied to bills of lading conforming with the UCP 500