CHAPTER FIVE

THE LIABILITY OF CARRIERS TO CARGO OWNERS

Introduction : Shipowners and charterers can incur liability to a cargo owner for damage to cargo suffered during performance of the contract of carriage. The shipper who makes a contract of carriage either with a shipowner or a charterer can sue for breach of that contract of carriage. Liability will depend on the terms and conditions of that contract. Terms, which may be express or implied by statute or common law, cover a wide range of issues such as deviation, seaworthiness and cargoworthiness. Provisions may seek to exclude or limit liability.

The law concerning the applicability of the contract of carriage in respect of third parties to the contract of carriage is complicated. Privity of contract is a basic requirement of English common law which states that only the parties to a contract can sue under a contract. Furthermore an agreement not supported by consideration is not legally enforceable at common law. **Thompson Dominy,**[1] established that under the common law a bill of lading did not originally transfer any contractual rights under the contract of carriage between a shipper and a carrier to the endorsee of the bill of lading. For this reason, Parliament had to pass the Bills of Lading Act 1855 to create a statutory implied contract to enable an endorsee of a bill of lading to sue a carrier for post shipment damage to cargo covered by the bill of lading. The 1855 Act had a number of defects and to remedy these Parliament passed The Carriage of Goods by Sea Act 1992, s2 of which enables the lawful holder of a bill of lading to exercise rights of suit under the contract of carriage as set out in the bill of lading. against the carrier in respect of post shipment damage to cargo. The common law also developed an implied contract based on the bill of lading in **Brandt v Liverpool Brazil & Riverplate S.S. Co**.[2] This is still available but is largely superfluous today, especially since the implied contract only exists where consideration flows from the endorsee of the bill to the carrier and will not work if all the goods are lost at sea and nothing is delivered.

Any person, who is owed a duty of care in the tort of negligence, who suffers damage to his legal interest as a consequence of a breach of that duty of care, which damage is not deemed to be too remote, can recover damages for that loss as demonstrated by **Donoghue v Stevenson**.[3] This can enable someone to sue for damage to cargo who is not a party to a contract of carriage but a legal interest in the cargo at the time the damage is caused is necessary as demonstrated by The Aliakmon. Statements made in bills of lading which are relied on can also give rise to an action in tort if loss is suffered by relying on a misstatement which is made negligently as established by **Hedley Byrne v Heller**.[4]

The mere fact that a contractual relationship exists does not prevent a litigant suing in either contract or in tort and selecting the course of action which provides the best procedural advantages or the most appropriate remedies. This was established by **White v Jones**[5] and **Henderson v Merrett Syndicates.**[6] However, the terms of a contract can exclude a tortious duty of care preventing such an action. This is most likely to happen where a contract contains exclusion clauses and limitation clauses. Such exclusions must satisfy either the Unfair Contract Act 1977 or the common law requirements of reasonableness under **Photo Productions v Securicor**.[7] Most standard form charterparty and bill of lading exclusions and those under the Hague Visby Rules are reasonable. Since establishing a contract is valuable to carriers, shipowners and charterers rarely seek to evade the implied contractual relations. Carriage contracts often exempt the carrier from liability for the actions of third parties such as stevedores.

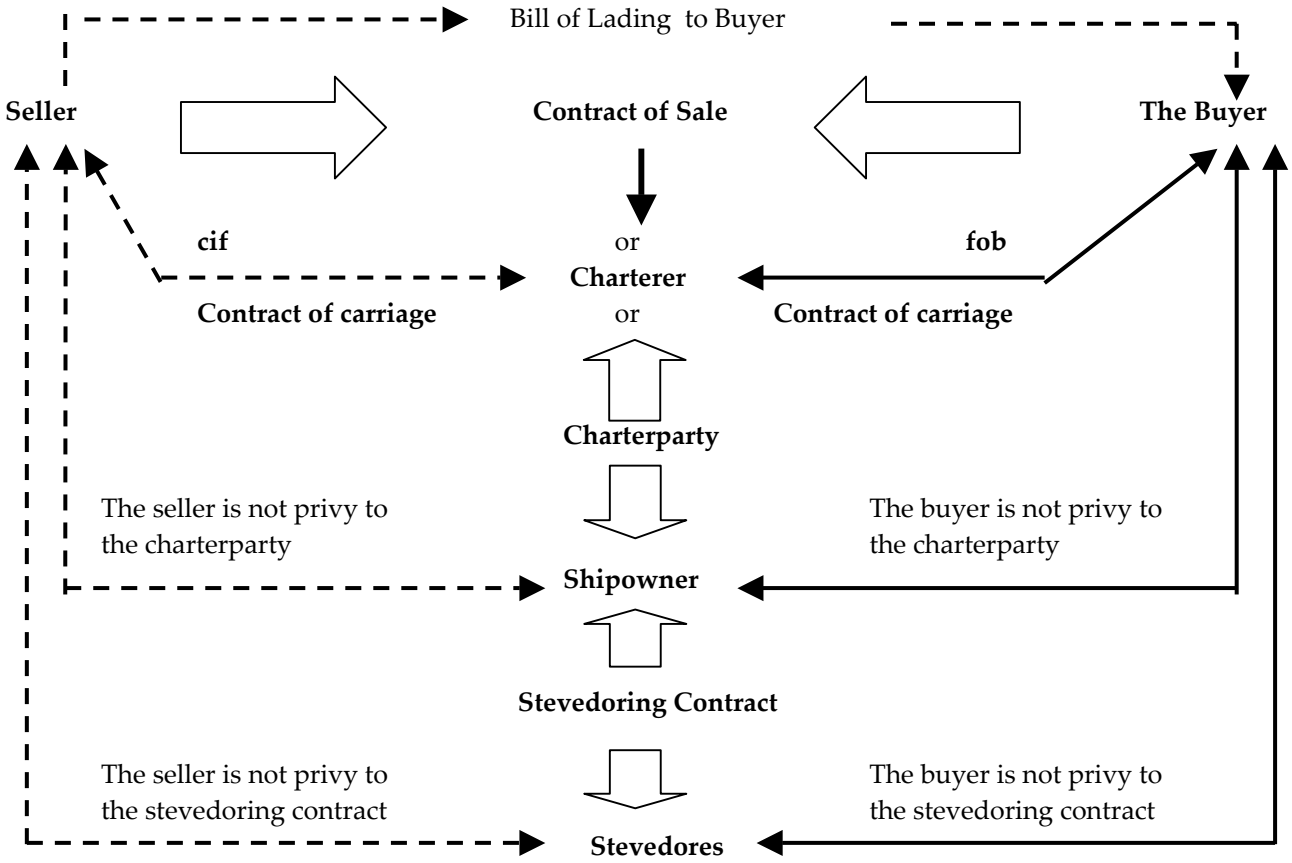
Since stevedores are not privy to the contract of carriage they did not automatically benefit from such exclusion clauses, even where the benefit of the clause was said to be extended to them, as demonstrated by **Scruttons v Midland Silicones.**[8] The same was true of the employees and crew of a carrier, as demonstrated by **Adler v Dixon : The S.S. Himalaya**.[9] Where Article IV bis, Hague Visby Rules Carriage of Goods By Sea

1 **Thompson Dominy** (1845) 14 M & W 403
2 **Brandt v Liverpool Brazil & Riverplate S.S. Co**. [1924] 1 K.B. 575.
3 **Donoghue v Stevenson** [1932] A.C. 562.
4 **Hedley Byrne v Heller** [1964] AC 465.
5 **White v Jones** [1995] 2 A.C. 207. House of Lords
6 **Henderson v Merrett Syndicates** [1994] 3 All. E. R. 506. House of Lords
7 **Photo Productions Ltd v Securicor Transport Ltd** [1980] A.C. 827
8 **Scruttons v Midland Silicones**. H.L. [1962] 1 All.E.R. 1.
9 **Adler v Dixon : The S.S. Himalaya** (1955) 1 Q.B. 158.

Act 1971 applies the crew are now protected, though it should be noted that under the U.C.T.A. 1977 and the Athens Convention it is not possible to exclude liability for death or personal injury under English law. In special circumstances a carrier may act as an agent for third parties such as stevedores, so that the cargo owner as principal can be contractually obliged to afford benefits of such exclusions to stevedores as demonstrated by **The Eurymedon, New-Zealand SS. v Satherwaite.**[10] Since the Contract (Third Parties Rights) Act 1999 if the crew or stevedores are mentioned as a class as benefiting from contractual terms, then if English Law applies, they will be able to take the benefit of any exclusion clauses made in their name.

The shipper under a strict f.o.b. contract will not be privy to the contract of carriage between the carrier and the buyer despite the original finding in **Pyrene v Scindia.**[11] Any action by the shipper would have to be based in tort. If there is a contract limiting the carriers liability to the shipper it will be founded in bailment.

As to whether a cargo owner can sue a shipowner or charterer this may well depend on terms of any contractual relationship between the parties. A Demise Clause can stipulate who is liable to cargo owners and this will probably not offend the Hague or Hague Visby Rules, as in **The Caspiana : Renton v Palmyra.**[12]



10 **The Eurymedon, New-Zealand SS. v Satherwaite** [1975] A.C. 154.
11 **Pyrene v Scindia** [1954] 2 Q.B. 402.
12 **The Caspiana : Renton v Palmyra** [1957] A.C. 149.

CHAPTER FIVE

THE CARRIER'S LIABILITY IN BAILMENT

Receipts for delivery of goods to carriers. A received for shipment bill of lading or mate's receipt acts as a receipt that goods have been received for loading. It is issued by the ship's master, loading broker, or the charterer's agent. Usually the ship's master is acting as agent for the shipowner but may act for the charterer. It is likely that the bill of lading will contain a description of the goods including the quantity to be loaded. Responsibility for the accuracy of these statements lies with the shipper who fills in these details himself on the received for shipment bill of lading. Even at this stage the intended port of loading and discharge will be recorded. Presumably this was the original function of a bill of lading, as a receipt.

This relationship is important regarding pre-shipment damage to goods during storage, for any damage during carriage which the shipper remains interested in either because he is also the consignee of the goods, or in respect of ex-ship contracts where risk remains with the shipper until delivery, or because the sale contract falls through and property does not pass to the buyer. In each of these cases the other aspects of the bill of lading are irrelevant. Of course, where the goods are actually shipped the shipper will probably exchange the received for shipment bill of lading for a shipped bill of lading. Statements as to quantity and quality in the shipped bill of lading now become the responsibility at least of the master or other person signing the shipped bill of lading and provided within the actual and ostensible authority of that person, the responsibility of the person on whose behalf they have been signed, normally the shipowner but sometimes the charterer. Bailment is firstly governed by the common law.

The classic statement about the six categories of bailment and the rights and liabilities of the bailor and bailee are contained in **Coggs v Bernard.**[13] If a man undertakes to carry goods safely and securely he is responsible for any damage they may sustain in the carriage through his neglect even though he was not a common carrier and was to receive no reward for the carriage. A warehouseman carried and stored six 6 barrels of brandy in a cellar without payment. Through his negligence a barrel was staved and the contents lost. He was found liable for the loss. He then sought a motion for arrest of judgement on the grounds of lack of consideration and because he was not a common carrier. Judgement was made by Holt C.J. The questions for the court were : Does a bailment action rest on the mere promise alone or on the fact of a reward ? Holt CJ discussed six distinct categories of bailment, namely :-

1 Bare or naked bailment, to be kept goods safe for the depositor, free of charge. Classified as 'depositum' as epitomised by **Southcote's Case**.[14] There is no liability for theft without fault. Liability is consequent on gross neglect. Southcote overruled. The duty to care for the bailed goods as subjectively one care for ones own. Therefore the bailor relies on his own judgement of the calibre of the bailee. See Bracton.

2 Goods lent free of charge for the borrowers use. Classified as 'commodatum'. The law imposes the standard of strictest care. Consideration is provided by the bailee being allowed to have the use of the goods so it is not a gratuitous bailment as it at first sight appears. The bailee is liable for the slightest neglect but there is no liability for unforeseeable theft and irresistible force.

3 Goods loaned on hire for use by the borrower. Classified as 'locator and conductor. The standard imposed is as in (2) above.

4 Pawn or pledge as in pawner and pawnee. The pawnee cannot use non durable consumer goods. Livestock may be managed to pay for its own upkeep.

5 Storage and carriage for reward is a bailment for profit. A contrast should be made between the common carrier and the purely private person. The Common Carrier The common carrier is deemed to be the insurer against all events except Act of God and King's enemies. This is a policy decision.
In **Forward v Pittard,**[15] it was held that a common carrier who undertakes for hire to carry goods, is bound to deliver them at all events, except damaged by act of God, or the King's enemies, even though the jury expressly find that they were destroyed without any actual negligence in the defendant. A common carrier is in the nature of an insurer. The defendant was a common carrier who had a load of hops burnt due to a fire at a hostel at which he overstayed the night.

13 **Coggs v Bernard**.(1703) 92 ER 107.
14 **Southcote v Bennett** (1601) 4 Rep 83b
15 **Forward v Pittard** (1785) 1 T.R. 27

The fire started off in a building 100 yards away and the defendant was in no way responsible. Mansfield L discussed whether or not a common carrier is responsible for damage by fire. This depended on whether or not the fire was an Act of God. Since the fire caused by someone negligence even though not the defendants he was nonetheless liable. The Uncommon Carrier. The private storeman or carrier is subject to the terms and conditions of the contract of carriage or storage.

6 Shipper and gratuitous carrier. This is in one way a gratuitous bailment but in another respect it probably is not in that someone else is probably paying for carriage or storage of the goods. The bailee is liable in the tort of negligence for damage to goods. This covers subsequent owners of goods not party to the bailment and strict f.o.b. shippers as in **Pyrene v Scindia.**

The terms and conditions of bailment agreements are discussed in **The Pioneer Container K.H.Enterprise (Cargo owners) v Pioneer Containers (owners).**[16]. This is an important case since it highlights the relationship between shipper and second carrier in transshipment situations and subsequently the relationship of owners of cargo subject to terms and conditions in a bill of lading. The court held that a person who voluntarily took another person's goods into his custody held them as bailee of the owner. He could only invoke terms of a sub-bailment under which he received the goods from an intermediate bailee as qualifying or otherwise affecting his responsibility to the owner if the owner consented to them. The contract with freight forwarders (one of which was contained in a bill of lading) permitted transshipment on any terms agreed between the freight forwarder and the carrier. The sub-bailment bill of lading agreement between a bailee and sub-bailee, contained a Taiwanese Jurisdiction clause. The Privy Council held that the parties to the freight forwarding agreements had consented to the choice of jurisdiction clause in the sub-bailment covered by the feeder bill of lading and were therefore bound by it. Lord Goff held that two related questions were involved. Identification of the relationship between the owner and sub-bailee and whether a sub-bailee could invoke against an owner terms agreed between himself and the bailee.

Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd.[17] held on the authority of **Morris v Martin**,[18] that a sub-bailee owed the holder of a bill of lading a duty to exercise due care for the safety of goods, despite the absence of contractual relations or attorment, as a bailee of the goods for reward on behalf of the owner. The fact of reward for the service makes it a bailment for reward and this categorisation is not dependent on the owner paying the reward direct to the sub-bailee. To make it a bailment by reward between bailee and sub-bailee but a bare bailment between the owner and sub-bailee would result in different standards of care and would be inconsistent.

Where there is an express or implied consent to the sub-bailment Lord Denning in **Morris v Martin** considered obiter that an owner is bound by terms of the sub-bailment. This however was not followed in **Johnson Matthey v Constantine Terminals.**[19] Bailment is not founded in contract and the doctrines of privity and consideration do not apply. The mere fact of consent, express or implied to the sub-bailment does not make the bailment on the terms of the sub-bailment as between the owner and the sub-bailee. Knowledge of and thus implied or express consent as to the terms is also required. Furthermore the sub-bailee only assumes responsibility to another besides the bailee if he knows of their existence. Where necessary and appropriate the sub-bailee could invoke against the bailee the principle of warranty of authority. Presumably sub-carriers will always know that goods covered by negotiable bills of lading could be owned by other persons and therefore know of their existence and will also be aware that the original carrier is unlikely to be the owner of the goods.

Bailment and consignees. A shipped bill of lading acts as a receipt that goods have been loaded on board a vessel or at least that the goods have been received for loading (a received for shipment bill of lading). A clean bill of lading states that when loaded the goods were in apparent good order and condition. If it is a shipped bill of lading it will also contain the date of shipment, the name of the carrying vessel, the port of loading and intended port of discharge. At common law even where the bill of lading transferred ownership

16 **The Pioneer Container K.H.Enterprise (Cargo owners) v Pioneer Containers (owners)** [1994] 2 All.E.R.250. Privy Council.
17 **Gilchrist Watt and Sanderson Pty Ltd v York Products Pty Ltd** [1971] 1 W.L.R. 1262
18 **Morris v Martin** [1966] Q.B 716
19 **Johnson Matthey v Constantine Terminals** [1976] 2 Lloyds Rep 215.

in goods to the endorsee it did not without more transfer bailment rights against the carrier to the endorsee as confirmed by **Thompson v Dominy,**[20] though the endorsor could bring an action for the benefit of the endorsee. As with any other form of agreement bailment can be legally assigned following proper procedures as confirmed by **British Overseas Traders v Brooks Wharf**.[21]

Even if the bailment agreement itself was not transferred, providing ownership is transferred the owner of goods has rights against a bailee or carrier for any damage caused whilst that person owns the goods which can be enforced by an action in tort today.[22] The right is limited in that it does not cover pre-ownership damage and legal ownership is essential. Thus in **Lickbarrow v Mason,**[23] Buller J observed that 'if the bill of lading transfer the property an action of trover against the captain for non delivery is the proper form of action'. [24]

In **The Pioneer** the carrier becomes a sub-bailee for reward to owners of goods on the terms of his feeder bills of lading. Does the judgement cover subsequent owners of the cargo namely consignees or is it limited only to the consignor ? Goff L declines to extend the case to consignees on the basis that only consignors were involved. Nonetheless the extracts from **Gilchrist Watt & Sanderson v York Products**[25] appear to cover consignees. Pearson L concluded[26] that although there was no contract or attornment between the plaintiffs and the defendants, the defendants by voluntarily taking possession of the plaintiff's goods, in the circumstances assumed an obligation to take due care of them and are liable to the plaintiffs for their failure to do so. The obligation is at any rate the same as that of a bailee, whether or not it can with strict accuracy be described as being the obligation of a bailee. In a case such as this, the obligation is created by the delivery and assumption of possession under a sub-bailment."

If **The K.H.Enterprise** covers consignees, even if not under the same bailment as agreed with the shipper, the bailment between consignee and carrier would be a bailment on the same terms and conditions as the original bailment, where there is consent to such terms. Providing these terms are contained in the bill of lading then consent would be established. This would solve the problem of assigning bailment rather neatly and apply to sub-carriers and transshipment. Of course, if the terms of the sub-bailment were different then they would not apply. Again this would fit in well with the notion of transferred rights under the contract of carriage under C.O.G.S.A 1992 justifying Goff's view that the result is both principled and just.

The outcome is that the rights and liabilities regarding owners of goods and carriers implicit in bailment are in some respects remarkably similar to those in respect of the contract of carriage. If these notions had been applied earlier then Brandt v Liverpool may not have been needed. The limitations of that implied contract regarding consideration are obviated. Furthermore, since K.H.Enterprise does not rely specifically on bills of lading, merely on implied consent through knowledge then such bailment rights and liabilities would arise in respect of any new forms of shipping document. The principle has the ability to adapt and evolve without statutory intervention. It is also more attractive than the statutory provisions under C.O.G.S.A. 1992 in that liabilities of the owner would not be backdated to cover omissions of the shipper as well. However, it fulfils the requirements of certainty under international conventions if terms and conditions of The Hague or Hague Visby Rules are incorporated into such documents. The requirement of ownership is once more centre stage and earlier discussions regarding passing of property become important in this respect. Now that the Sale of Goods Amendment Act 1995 has solved the problem of part bulk ownership the bailment action becomes very attractive since practically all types of international sale of goods can be embraced by the action.

The Law of Bailment cannot be used by a subsequent cargo owner to avoid terms in a contract of carriage where a bill of lading is involved, since the carrier gets rights under s3 C.O.G.S.A 1992 which the carrier can

20 **Thompson v Dominy** (1945) 14 M & W 4093

21 **British Overseas Traders v Brooks Wharf** [1967] 2 Lloyd's Rep 51.

22 See **Lee Cooper v Jeakins** [19671 2 Q.B. 1

23 **Lickbarrow v Mason** (1794) 5 T.R. 75

24 See also the discussion in D.Glass & C.Cashmore 'lntroduction to The Law of Carriage of Goods, Sweet & Maxwell pages 10 and 164.

25 **Gilchrist Watt & Sanderson Pty v York Products Pty Ltd** [1970] 3 All ER 825

26 at p832 e-f

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assert wherever a holder of a bill of lading relies on the bill of lading. The cargo owner would need to assert his rights und6r the bill of lading in order to establish the bailment relationship and by so asserting opens the door to the application of s3 C.O.G.S.A. 1992. At first sight it might appear that the concept of bailment achieves, or at least could so achieve, if it extends to consignees, all that is required by receivers of goods and therefore the Bill of Lading Act 1855 was not really needed and likewise the Carriage of Goods By Sea Act 1992 was not really needed either, to protect consignees of goods. However, a number of reservations need to be drawn about the scope of and usefulness of bailment actions.

What comes of the prior assertion that transfer of bailment requires attornment or assignment under the rules laid down by the Law of Property Act 1925 ? Were these assertions based on false premises as to the legal form of bailment agreements ? Or, is the distinction based on the requirement of 'consent' stipulated in **The K.H.Enterprise** ? The scope of the case may be limited to situations where consignees of goods covered by bailment documents become owners before the sub-bailment occurs. In the light of Goff L's view that carriers should be able to ensure that all cargo carried on board would be subject to similar terms regarding jurisdiction to avoid legal uncertainty and chaotic litigation such a distinction would be undesirable

Nicholas Curwen,[27] concentrates on the bailment aspects of bills of lading and possible wrong turns in judicial decisions since the last century. The significance of bailment is highlighted by the fact that banks as pledgees and holders of bills of lading might seek actions in conversion against those who wrongfully interfere with goods covered by the bill of lading. Whilst the Carriage of Goods By Sea Act 1992 provides remedies against sea carriers, problems can arise in transshipment and through carriage situations where goods are no longer in the possession of the sea carrier during post shipment storage and during the final land leg of carriage of goods to final destination. A broad or generous reading of **The K.H.Enterprise** could cover such land carrying sub-bailees. Curwen points out that whilst the old action in detinue is abolished, the action is now subsumed into conversion. The old rules regarding detinue are not abolished, they are merely now enforced by way of conversion, and the Torts (Interference with Goods) Act 1977 regulates the rights and liabilities implicit in conversion actions. The unacknowledged defect that Curwen highlights is that it would appear that the courts have glossed over the fact that ownership by the plaintiff consignee prior to loss or damage to goods is needed. The very issue avoided again in **The K.H.Enterprise**. Curwen suggests that if the courts were to accept that the tortious right of assignment can be assigned then the problem would disappear. This could be achieved by a custom of the trade or by express words in standard form contracts. This would then place contractual and tortious rights and duties on the same footing in a satisfactory way without the contrived and mistaken reformulations of old law epitomised by **Bristol Bank v Midland Railway Co**.[28] Since bailment, as an action is now pursued under tort procedures it should be noted that a bailment action is subject to the defence of contributory negligence, whereas a contract action based on the contract of carriage whether as shipper or endorsee of bill of lading is not. The Law Commission's recommendations on contributory negligence as a defence to contract would place both actions on the same footing.

The consignee of goods not covered by a bill of lading : What rights of action appertain to owners of goods who do not have a bill of lading, but merely a shippers document, as in **The Gosforth,** if goods are damaged or misdelivered ? The action in **The Gosforth** suffered from two defects. The consignees held mere merchants bills of lading and the sales contracts concerned part purchases of undivided bulk which by virtue of s16 Sale of Goods Act 1979 resulted in property in the whole remaining with the first seller, which in turn prevented s1 Bill of Lading Act 1855 from applying. s16 S.O.G.A. as amended by the Sale of Goods Amendment Act 1995 permits property in part purchases of bulk to pass to sub-buyers. The Carriage of Goods By Sea Act 1992 would not pass rights and liabilities onto the sub-buyers in the absence of carriers' bills of lading. As part owners of the cargo such buyers might seek to assert rights against the carrier under a **K.H.Enterprise** type implied bailment.

However, if consent to the new relationship is required by both parties it might well be that the merchant's bill of lading would once more be the missing link which prevents such an implied relationship coming into

[27] Nicholas Curwen : 'An Unacknowledged Defect in Bills of Lading'

[28] **Bristol and West of England Bank v Midland Railway Company** [1891] 2 Q.B. 653.

being. The solution to this might be, that since the initial bill of lading or receipt may be stated as being deliverable to order, the carrier and subsequent carrier would be aware that subsequent owners of goods may enter the scene and that no actual notice of changes of ownership need be given since in **The K.H.Enterprise** the owners did not have to be given notice of the actual existence of the new carriers, nor of the terms on which the goods were taken over. The mere authorisation of the right to enter such agreements on any terms was sufficient. Such generosity could be permitted to flow in both directions.

Rights of a sub-bailee against consignees : Gilchrist Waif & Sanderson Pty v York Products and **The K.H.Enterprise** indicate that the sub-bailment relationship imposes rights and liabilities on both parties. The extent of the liabilities of a consignee / endorsee of a bill of lading to the port authorities on discharge is currently subject to judicial consideration in **Poortman v Port of Felixstowe**,[29] before the High Court. A London Food Importer bought a cargo of £100,000 of lentils c.i.f. out of Turkey. The seller shipped the goods aboard the M.V.Eurotrader. The carrying vessel's owners, Euronave, a Belgium Company have gone into liquidation and owe the Port of Felixstowe £80,000 for unpaid dock charges accumulated over a long period of time. The standard terms of the port include a term stating that cargo aboard vessels may be seized by the authorities who can exercise a lien over such cargo and off set it against debts owed to the port by operators. Mr Justice Clarke has so far implied that the port is correct in its assertion that the clause allows it to restrain such goods.

It would have been done much to clarify the law on this question is the case had gone forward to trail. However, it would appear that the case did not proceed and may well have been settled out of court. We therefore do not know whether or not there was a contract between the consignee and the dock. There was no privity and C.O.G.S.A. 1992 does not transfer rights to the port in such circumstances. Bailment is the only possible form of action unless the court can find a collateral contract or an Eurymedon style agency contract, but this would then have been between the seller / shipper and carrier as agent and would need to be transferred with the bill of lading. This would not presumably happen as only the contract of carriage is transferred under C.O.G.S.A. 1992.

If it is a bailment then consent is necessary. The Port Authority argues the terms and conditions are well known. Presumably the bill of lading contains the standard demurrage clauses. What is not clear at present is whether the bill of lading had any device in it regarding liabilities of the carrier to the Port beyond standard demurrage. Cargo owners can be liable for general average to cover the losses of others but this only applies to a general sacrifice. It would be quite extra-ordinary that a bill of lading could make cargo owners guarantors for the debts of ship owners and carriers as the Port of Felixstowe claims. Even if it did, one wonders whether such terms are fair under Photo Productions v Securicor, though if in the bill of lading the endorsee on payment may have impliedly waived any breach by acceptance and payment.

In **The Olib,**[30] an endorsee was held liable to pay demurrage and storage costs before a shipowner would release goods subject to a contractual lien for non-payment of freight and disbursements. The court held this is not coercion or duress and under C.O.G.S.A. 1992 it is clear this would still be the case even c.i.f. where freight is pre-paid to the shipper by the buyer if the shipper fails to pay the carrier. However, in **Industrie Chimiche Italia v Alexandra Tsavliris,**[31] the court held that a carrier, master or ship owner has no authority to bind a cargo owner to the terms of a salvage contract where no general average was involved. Even more so therefore it would appear that a carrier would have no authority to bind a cargo owner to terms and conditions of a port making the cargo owner for general debts of the shipowner to the port, over and beyond unpaid dock charges and freight in relation to the cargo concerned.

The Law Commission Consultation paper on Privity of Contract and Contract for the benefit of Third Parties 1991 provides a wide ranging analysis of all aspects of the privity rule and in particular devotes a large amount of coverage to bailment, contracts of carriage, bills of lading, stevedores, port authorities, shipowners and carriers. The Commissioners consider contracts burdening third parties and contend that whilst in general the privity rule is an unfortunate doctrine in English Law regarding the enforcement of

29 **Poortman v Port of Felixstowe** (1995) Times 8 & 11 November 1995

30 **The Olib** [1991] 2 Lloyds Rep 108

31 **Industrie Chimiche Italia v Alexandra Tsavliris** (1991) Times 24th March

third party rights the general rule prohibiting the imposition of duties on strangers to a contract is self evidently desirable.[32]

The case of **Lord Strathcona SS. Co. v Dominion Coal Co**.[33] is held out as a peculiar exception to this rule which has attracted criticism. The enforcement of a jurisdiction clause as in **The K.H.Enterprise** is somewhat different from imposing liability for someone else's debts, which are unrelated to one's own interest and it is hoped that the Commissioner's views are taken into account if and when as similar case to **Poortman** arises again in the future. Since The Contract ({Privity) Act 1999 has entered into force a rerun of **Poortman** is more than possible.

An alternative way of approaching **Poortman** could be if the Port Authority can establish that the carrier acts as agent for the cargo owner to make a contract between the cargo owner and the Port authority using the system employed in The Eurymedon. Since the ship owner knew where he was delivering the cargo and the standard terms of the port this would be possible. However, without more information on the case, it is not clear whether there were any references to this relationship in the bill of lading or the contract of carriage. Similarly, for the Contract Act 1999 to work a clear statement of third party rights would be required.

Common and uncommon carriers. Where a general shipper holds himself out as a professional carrier of any goods at a price and he employs his ship as a general ship he is deemed to be a common carrier. He undertakes to carry the goods at his own absolute risk except for losses due to a) Act of God b) King's enemies and c) Inherent vice of the goods.[34] In **Coggs v Bernard,**[35] Holt C.J. clearly identified the carriage of goods as an example of bailment and reaffirmed the decision in **Forward v Pittard**.[36] that the Common Carrier is to be held strictly but not absolutely liable for damage to goods in his care. The carrier's status is in the nature of an insurer, namely that he is subject to no fault liability. Mansfield L addressed the question as to whether or not a common carrier be held responsible for damage by fire. This depended on whether or not the fire was an Act of God. Mansfield held that the fire in that case was caused by someone's negligence. The carrier was liable as a common carrier.

In the U.K. shipowners quickly moved away from the concept of the common carrier. Few vessels today operate on this basis. As an uncommon carrier the operator of a vessel can chose whether or not to carry any particular cargo. The trend was to exempt liability for practically all risks inherent in the Carriage of Goods by Sea. The notion of the common carrier is not however defunct, since any carrier of goods who does not do so on a contractual basis is still treated by the courts as a common carrier. This can occur by operation of law in circumstances where the owner of goods is entitled to avoid the contract of carriage for example due to an unlawful deviation but where the defacto carriage of goods has already occurred or where carriage is an ongoing process.

To redress the bias away from the absolute protection of shipowners and in order to protect exporters and cargo owners The Harter Act, The Hague Rules (C.O.G.S.A. 1932) and subsequently the Hague Visby Rules have been developed. The rules provide a limitation on the liability of shipowners so that the merchant and the shipowner have to share the loss for certain types of loss not involving misbehaviour on the part of the shipowner. The rules contain a list of circumstances when the shipowner will or will not be liable. Art IV(2)(a)-(q). Table of immunities. The Hamburg Rules replace The Hague and Hague Visby Rules in respect of signatory states to the Hamburg Rules.

32 At Section 12 Para 4.33 page 92

33 **Lord Strathcona SS. Co. v Dominion Coal Co** [1926] A.C. 108

34 For further reading see The Law of Carriage of Goods. Glass and Cashmore p12

35 **Coggs v Bernard** (1793) 2 Ld Raym 909 at 913 : 92 ER 107.

36 **Forward v Pittard**. (1785) 99 E.R. 953.

CHAPTER FIVE

CONTRACTUAL LIABILITY UNDER THE CONTRACT OF CARRIAGE

Introduction : The legal liability of a carrier to a shipper under the contract of carriage for damage to goods resulting from a breach of the contract of carriage is relatively straightforward. The contract of carriage sets out the respective rights and liabilities of the parties to the contract. Apart from the express terms, the common law implies certain terms in the absence of provisions to the contrary, such as seaworthiness and direct transit. Statute, where applicable may imply terms as where for instance the Hague Visby Rules apply to the contract. In all other respects the contractual relationship between the carrier and interested parties is governed by the basic rules and principles of the common law and in particular the law of contract, the law of tort and bailment.

Once a third party acquires a legal interest in the cargo covered by the initial contract of carriage the legal position becomes altogether more complicated. Three separate but closely related phenomena fall to be discussed. The mechanism which enables third parties to acquire rights of suit against the carrier, the relationship between bills of lading and contracts of carriage and the relationship between contracts of carriage including those evidenced by bills of lading and charterparties. A further complication arises if the relationship involves more than one charterparty as where there is a head and a sub-charterparty. In such situations it is necessary to consider which of the two charterparties may have implications for the contract of carriage.

Privity and cargo buyers : The privity issue today is addressed by the Carriage of Goods by Sea Act 1992. Whilst the privity problem remains in respect of carriage contracts involving documentation that falls outside the scope of the Act such instances are likely to be rare. The Act has a two way process. It provides holders of relevant shipping documents rights of suit against the carrier and enables carriers to enforce rights under the contract of carriage against such holders as and when a holder asserts rights as holder of the relevant documents. The provisions of the Act are quite complex. Care needs to be taken regarding the documents to which it applies under s1 COGSA 1992 and must be read in conjunction with s5 COGSA 1992 which defines some of the terminology used in the Act, for the purposes of applying the Act. The rights of suit under s2 COGSA 1992 differ depending on the documents involved. The rights of the carrier against holders of the various types of document are set out in s3 COGSA 1992. The provisions of s4 COGSA 1992 seek to correct certain anomalies in the common law regarding the authority of ship's masters to issue bills of lading.

Which Contract of Carriage? The relationship between the contract of carriage and bills of lading issued subsequent to it differs depending on whether, a) the bill of lading is in the hands of the Original Shipper / Seller or b) the bill of lading is in the hands of an endorsee or c) the shipper is also the charterer, and if so, on whether the shipper is the consignor or the consignee of the bill of lading. The bill of lading is not like a charterparty. The charterparty is the contract of hire of the vessel for a voyage or for a specific period of time. Nearly all charterparties are written documents, usually Standard Forms such as G.E.N.C.O.M. This is not strictly necessary. They could be oral but this is rare. Under the parole evidence rules, when a contract is reduced to writing, oral terms cannot normally be pleaded.

Whether the bill of lading is issued after goods are loaded on board a vessel as a shipped bill of lading or on receipt of goods by the ship owner it must nonetheless have been issued some time after the contract of carriage was made. Therefore, all a bill of lading represents is a statement by the person issuing the bill of lading of his view of what the terms of the contract of carriage are. If terms made in the contract of carriage are different from those expressed in the bill of lading then nothing in the bill of lading can alter the already agreed contract of carriage since otherwise, one party to a contract would then be allowed to unilaterally alter the contract of carriage without the consent of the other party to the contract and without additional consideration being supplied by the issuer to the other party for such alteration. If the shipper and the carrier have had regular dealings over a period of time using the same terms then there is an inference that the contract of carriage is on bill of lading terms. If the bill of lading terms are standard and usual then there is an inference that both parties have contracted on that basis. **McCutcheon v David MacBrayne Ltd**.[37]

[37] **McCutcheon v David MacBrayne Ltd** [1964] 1 All.E.R. 430.

If the shipper and the carrier have clearly agreed to differ in that the bill of lading differs from the contract of carriage who is subject to the altered contract ? **The Ardennes**,[38] concerned the shipment of Mandarin Oranges, from Spain to England. Before the contract was completed the ship owner promised the shippers that the oranges would arrive in the U.K. on or before the 30th November 1947. This was important for the shippers as, from 1st December import duties were to be imposed on Mandarin Oranges by the British Government. It became a term of the contract of carriage. The bill of lading contained no such stipulation. By contrast it contained a clause, usual in contracts of carriage, permitting deviation. The ship duly deviated and subsequently arrived in England on the 5th December. Import duty was payable on the oranges by the importer / buyer who claimed the duty as damages from the shipper I seller and the seller had to pay him. The shipper then successfully claimed the damages back from the carrier. The oral agreement was a term of the contract of carriage. The bill of lading was not.

If the shipper agrees terms with the carrier which differ from bill of lading terms and the terms so agreed are more favourable to the carrier and the endorsee of the bill of lading is ignorant of such pre-shipment promises, and subsequently the endorsee becomes a party to the contract under s2 C.O.G.S.A. 1992, then it is clear that the endorsee takes on bill of lading terms. The endorsee is not bound by terms which are more favourable to the carrier before shipment. It would be unfair if he was so bound since he has no knowledge of the terms. This is clear from **Leduc and Co v Ward,**[39] an important deviation case. There was no clause in the bill of lading allowing the carrier to deviate. However, the shipper had orally agreed that the carrier could deviate. The vessel sank during the voyage. The carrier wished to avoid liability by relying on the excepted perils contained in the contract of carriage. These stated that the carrier was not liable for loss of cargo resulting from the ordinary perils of the sea. The rationale behind such exclusions is that it is not the carrier's fault that the sea is such a savage environment to operate in. It is not desirable that the carrier be forced to act as insurer for such perils. However, once there has been an unlawful deviation there can be no reliance on the exceptions clauses contained in the contract of carriage since that contract is destroyed. It is a strict term of the contract of carriage that any unlawful deviation is a breach of contract which enables the other party to terminate the contract and he can also sue for damages for that breach. The court had to decide if there was, as a question of fact, a deviation and if so, whether or not it was justified and permitted by the bill of lading. Permission to deviate was only contained in a promise of the shipper made before the bill of lading was issued. The Court of Appeal held that the endorsee takes on bill of lading terms only. No prior terms would be admitted.

The justification for this decision was based on waiver or estoppel and the B.L.A. 1855. The Act enabled the endorsee and the carrier to take legal actions against each other. The contract on which each could sue was contained in the bill of lading and it was the bill of lading that set out the rights and duties of the parties to that implied contract. C.O.G.S.A. 1992 reproduces these provisions.

This presented a problem in that there is no actual contract in the bill of lading. The bill of lading is merely evidence of the contract of carriage. Theoretically it was still on the contract of carriage that such actions were based. Compare this with the **Brandt v Liverpool** contract where a new implied but wholly separate contract comes into being on delivery of the goods based on the terms of a bill of lading. s5 Carriage of Goods by Sea Act 1992 makes it clear that the endorsee assumes rights and liabilities on bill of lading terms only.

Similarly the endorsee of a bill or lading or ship's delivery order can sue under a Brandt v Liverpool contract. The bill of lading or delivery order could have different terms to those in the charterparty or some other discrepancy as in **The Dona Mari** but the endorsee only has the evidence in the document given to him.

Where the Charterer is also the Shipper. There is no problem when the charterer is also the shipper of goods. If the charterparty and the bill of lading are expressed in different terms it is clear that the charterparty governs and the bill of lading does not since it is the charterparty which is the contract of

[38] **The Ardennes** [1951] 1 K.B. 55

[39] **Leduc and Co v Ward** [1888] 20 Q.B.D. 475. C.A

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carriage and not the bill of lading.

Where the Charterer is Endorsee. If the endorsee of the bill of lading is also the charterer of the vessel there may be a problem. This is quite usual where governments do the trading and charter vessels themselves in order to control the use of foreign currency and where oil companies use their own vessels and charter vessels in during busy periods. It would appear that there are two contracts. One contained in the charterparty, the other being the bill of lading contract.

Under the rule in **Leduc v Ward** the endorsee takes on bill of lading terms, so which contract governs the relationship ? The charterer endorsee may rely on statements made by the captain in the bill of lading regarding apparent condition of the goods but can reliance extend to the terms on which the goods are carried?

In **The Dunelmia**,[40] a charterparty contained an arbitration clause but there was no arbitration clause in the bill of lading partly because the charterparty had not been incorporated into the bill but also because none was mentioned. The charterparty stipulated that the ship's master should sign the bill of lading without prejudice to the charterparty. The endorsee of the bill of lading was also the charterer and so there were two versions of the contract of carriage, one with an arbitration clause, the other without one. The endorsee / charterer sought arbitration. The ship owner did not want to go to arbitration, not because he preferred arbitration, but because there was a time bar for court action, whereas there was not for arbitration. Without arbitration the charterers would lose. The C.A. held that the charterparty governs, not the bill of lading and since the arbitration clause was contained in the charterparty it was effective.

Compare the views of Scrutton[41] and Carver[42] in relation to this issue. They had previously, regarding hypothetical arguments on the same issue, reached opposite conclusions to the court in **The Dunelmia**. They had believed, on the basis of prior authority that the bill of lading would prevail because by taking up the bill of lading the endorsee is agreeing to a variation of the contract. The C.A. rejected these views and stated that they were incorrect and that the charterparty terms prevail. Carver admits the C.A. was right. Scrutton admits that the position may be different where the bill of lading is issued without prejudice to the charterparty. Therefore, under Scrutton's view, unless there was a "Without Prejudice" clause the old cases might still have applied.

Both Denning and Edmund Davies said they were laying down general principles for ANY charterparty and bill of lading relationship, on the basis that the endorsee has no choice on taking up a bill of lading and so one cannot infer any additional terms from those expressed in the charterparty when taking up a bill of lading, regarding prior agreement of terms. It is submitted that this is A BETTER RULE. Furthermore in support of Carver's view, remember that variation of a contract requires consideration from both parties.

The Carriage of Goods by Sea Act 1992 makes no reference to this issue and the commissioners in the Law Commission Report No 196 do not discuss it either. The shipper has rights under the contract of carriage. This would presumably be made with the charterer. He then looses them in respect of an endorsed bill of lading. Presumably the commissioners accept that the shipper also retains his liabilities and since the Carriage of Goods by Sea Act 1992 does not transfer rights to the shipper there is no reason why the discussion above does not continue to be valid. The Carriage of Goods By Sea Act 1992 transfers rights of suit based on a charterparty to lawful holders of bills of lading but the charterer always retains his rights and liabilities under the charterparty. This is essential since the charterparty will normally continue to operate long after the various bills of lading issued whilst the vessel is chartered have ceased to have any importance to the charterer and the ship owner. The same logic would appear to apply to **Brandt v Liverpool** Implied Contracts. There is no reason why it should be different. The purchaser has no choice but to present the bill of lading in this situation either.

Choice of Law, Jurisdiction and Arbitration Clauses. The courts have also ruled that in order for a contract to incorporate jurisdiction, choice of law and arbitration clauses contained in one contract into another, a

40 **The Dunelmia : President of India v Metcalf** [1970] 2 Q.B. 289.

41 Scrutton on Charterparties. 19th Ed Sweet & Maxwell

42 Carver : Charterparties. British Shipping Law. Stevens.

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mere cross reference to that other contract is insufficient. Such clauses must be specifically referred to because otherwise they are regarded as being personal to the parties to the original contract and not transferable.[43] This is confirmed by the Arbitration Act 1996 though the language employed is rather convoluted.

s6(2) Arbitration Act 1966 provides that the reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement. Thus where as in the above cases the courts have held that it is not such a reference as would make that clause part of the agreement incorporation would still fail.

s7 Arbitration Act 1996 on the severability of arbitration clauses ensures that a claim by the holder of a bill of lading against a common carrier by default, following an unlawful deviation where the innocent party repudiates the contract, must still go to arbitration where the original contract contained an arbitration clause and bill of lading incorporates that arbitration clause.

Relationship between carriage contracts and bills of lading. A shipper arranges with a charterer for the carriage of goods by sea. The shipper and the charterer conclude a contract of carriage. If the shipper suffers loss as a result of a breach of that contract it would appear that the charterer would be the appropriate person for the shipper to seek damages from. In as much as the shipper makes a claim against the charterer for such breach, it is clear from **The Ardennes,**[44] that the contractual relationship is governed by that contract of carriage and not subsequent statements in any bill of lading issued in respect of goods shipped under the contract. This does not mean that the bill of lading has no significance whatsoever. Whilst it cannot, as between shipper and charterer alter the terms of the contract of carriage, it still retains its role as a receipt for the goods. In as much as the bill of lading will inevitably contain terms, the relationship governed by the bill of lading thus created is as a bailment on terms, as opposed to a common carrier bailment. In consequence it is necessary to determine on whose behalf the bill of lading is issued, the carrier or the ship owner. The bill of lading may be issued by the ship owner or his servants and agents either on his own behalf or on behalf of the carrier. Alternatively, the bill of lading may be issued by the charterer, his servants or agents, on his own behalf or on behalf of the ship owner. It is necessary therefore to determine on whose behalf the bill of lading is issued.

Closely allied to, but not necessarily the same question arises as to who is the carrier, the ship owner or the charterer. Where the ship owner and his crew operate the vessel the ship owner is the "actual carrier" even though the contract of carriage is made with the charterer. The actual carrier" is not necessarily the carrier in law. This division of responsibility is acknowledged by the Hamburg Rules. The ship owner, apart from his responsibilities as a bailee ,could be liable in tort to a shipper for negligent damage to the shipper's cargo.

Despite the fact that there are a number of different potential causes of action either against the shipowner or charterer, bailment and tort actions are seldom pursued in the courts. Where cargo is shipped, by a person to another country for his own benefit, the shipper can usually claim against either the charterer under the initial contract of carriage or against the ship owner. Where cargo is shipped by a seller, and a buyer wishes to claim for damages, a claim can be made against the party on whose behalf the bill of lading is issued. Occasionally an additional reason, such as the bankruptcy of the ship owner or the charterer, provides the incentive to proceed against a particular party. In **The Nea Tyhi,**[45] the ship owner was sued since the charterer had gone into liquidation. In **Manchester Trust v Furness Withy,**[46] the cargo was stolen by the charterer who then disappeared. The charterer had persuaded the master to unload the cargo and then sold it to a third party. Again, the cargo owner if he was to recover anything at all needed to make a claim against the ship owner.

43 See **The Varenna** [1983] 2 Lloyds Rep 529; **The Annefield** [1971] P168; **The Nai Matteini** [1988] 1 Lloyds Rep 452; **The Garbis** [1982] 2 Lloyd's Rep 283; **The Federal Bulker : Federal Bulk Carriers Inc v C.Itoh & Co Ltd** [1989] 1 Lloyd's Rep 103 ; **The Miramar : Miramar Maritime Corp v Holborn Oil Trading Ltd** [1984] 3 W.L.R. 1 **; The Mahkutai** [1996] 2 Lloyds Rep 1.

44 **The Ardennes S.S. Cargo Owners v : Ardennes Owners** [1951] 1 K.B. 55,

45 **The Nea Tyhi** [1982] 1 Lloyd's Rep 606.

46 **Manchester Trust v Furness Withy & Co Ltd** [1895] 2 Q.B. 282

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The possibility of different causes of action against different persons on different terms is undesirable. As much as possible charterers and ship owners will normally try to ensure, that the same terms and conditions and in particular arbitration, jurisdiction and exclusion clauses apply to the bill of lading, the contract of carriage and where applicable the charterparty and that all actions lie against the same person. The charterparty will inevitably contain additional terms setting out the respective rights and liabilities of the charterer and the ship owner and the inclusion of Employment and Indemnity clauses will require the parties to indemnify each other for losses for which they alone are responsible.

Demise Charterparties and the contract of carriage. The relationships are clear as far as demise charterparties are concerned. The parties do not need to do anything additional to achieve clarity. In a demise or bareboat charterparty the carrier hires the entire vessel. The master and crew are the charterers servants for the duration of the charterparty. The contract of carriage is made with the charterer. Often the ship owner is a finance company or there is a nominal owner such as a bank, which explains why the vessel is demised chartered.[47] The master signs the bill of lading on behalf of carrier, not the ship owner. Even if a bill of lading is incorrectly issued bearing the ship owners name and purporting therefore to be issued on behalf of the ship owner nothing changes. There is no right for the charterer to issue such a bill of lading. It is as ineffective as a purported sale of Buckingham Palace by a fraudster would be.

The privity of contract rule has a two edged sword. Whilst the normal application concerns the unenforceability of third party rights the corollary is that burdens cannot be thrust upon third parties either. The "Nemo Dat Quod Non Habet" rule prevents a person from pledging other person's rights and without authority. The only exception to this is where an agency exists and it can be shown that the third party or in this instance the ship owner, was in reality the principal. The person conducting the negotiations, the charterer, exercising actual or ostensible authority binds the ship owner principal. Under a demise charterparty no such authority would exist.[48]

The contract of carriage and simple charterparties. There is nothing inherent in the simple charterparty arrangement to shield the shipowner from responsibility for cargo care. The shipowner is potentially liable as bailee for damage to cargo, in tort for negligent care of cargo in his capacity as actual carrier or for breach of the bill of lading contract of carriage. The simplest way for the ship owner to address these various forms of potential liability is to issue the bill of lading and to wholeheartedly embrace the role of carrier. The ship owner then protects his interests by incorporating as many exclusion clauses as the law permits, frequently by adopting The Hague or Hague Visby Rules. The scope of his liability is then easily quantifiable.

In the absence of any indication to the contrary there is a presumption regarding simple time and voyage charterparties that the bill of lading is issued on behalf of the ship owner not the charterer. The presumption is more easily rebutted in respect of time charterparties than in respect of voyage charterparties. The reason for this is that the voyage charterparty terms have more relevance to bill of lading relationships than time charterparty terms. In a voyage charterparty the ship owner will be concerned to recover demurrage where additional expense is caused through delay in loading and discharge and the warehousing of cargo. Whilst the ship owner can recover demurrage for excess loading time beyond the lay days from the charterer it is often easier to recover warehousing costs from cargo owners. Demurrage provisions in the charterparty are therefore of relevance to the bill of lading. Frequently, the contracts of sale and carriage will place all additional post shipment costs on consignees. The contract of carriage can stipulate that the carrier must make all subsequent claims against the consignee. The presumption therefore quite logically is that under voyage charterparties the contract of carriage under the bill of lading is made between cargo owner and ship owner.

Whilst the same presumption is applied to simple time charterparties the logic is less compelling. Time charterparties do not contain demurrage clauses. By contrast clauses in respect of safe ports, off hire, the payment of hire and the like are not appropriate for bill of lading contracts of carriage. It is quite common for time charterparties to be expressly issued on behalf of the charterer, especially if the charterer is the

47 See **Baumwoll Manufacturing Von Carl Schreiber v Furness** [1893] A.C. 8 and **Aries Tanker Corporation v Total Transport Ltd** [1977] 1 W.L.R. 185.

48 See **Baumwoll v Gillcrest & Co.** [1892] 1 Q.B. 253.

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owner of a fleet and adds to the fleet by chartering in additional tonnage during a busy trading spell. For example, under a Liner Time '80 charterparty the charterer is able to paint a ship's funnel in his own colours. In such circumstances it would be true to say that it is usual for the presumption to be rebutted.[49]

Who issues the bill of lading, ship owner or charterer is a poor guide to rebuttal. It is more likely under the **Manchester Trust v Furness Withy** type situation that there will be a rebuttal of the presumption if the bill of lading is issued by the charterer's agent. Even then the fact that the charterers agent issued the bill of lading is not conclusive. In **The Nea Tyhi,**[50] the carrier's agent issued the bill of lading but still there was no rebuttal.

It is usual to expressly provide in the bill of lading on whose behalf a bill of lading is issued. The governing factor is not the company logo under which the bill of lading is issued but who, if any one, it is stated to be issued on behalf of, as carrier. For example, clause 15 New Zealand Southbound Trade Bill of lading 1978 states "If the vessel is not owned by or chartered by demise to the Company or Line by whom the bill of Lading is issues the Bill of Lading shall take effect only as a contract with the Owner or Demise Charterer as the case may be as Principal made through the agency of the said Company or Line who act as Agents only and shall be under no personal liability whatsoever in respect thereof. By contract, the P & 0 Containers Bill of Lading carries a space for a signature on behalf of the carrier who is clearly identified in clause 1 as P & O whether the goods be carried on board a P & 0 vessel or transshipped aboard someone else's vessel.

A clause which allocates responsibility for bill of lading liability to the shipowner or the charterer is called a demise clause, since it has a similar effect to a demise charterparty. Where a charterparty allocates responsibility to the charterer or the ship owner it is usual for the bill of lading to echo the provision. Indeed many charterparties will require the bill of lading to be issued without prejudice to the charterparty. Bills of lading are frequently stated to be issued subject to the terms and conditions of a charterparty. Some bills of lading duplicate all the terms and conditions of the charter party, others do not. It is wise none the less for the bill of lading to at least reproduce the demise clause.

The demise clause must be in the bill of lading in order to be effective. Thus, in **The Boston City,**[51] the ship owner attempted to avoid liability for damage to cargo by inserting a demise clause in the charterparty placing liability on the charterer. Unfortunately for the ship owner, the bill of lading did not incorporate the demise clause. The C.A. held, adopting the reasoning of the Commercial Court at first instance, (the best report to read) that the demise clause was ineffective. The ship owner was party to the contract in the bill of lading despite the express clause in the charterparty. The demise clause was effective only between the ship owner and the charterer so the ship owner could then reclaim any damages paid to the cargo owner from the charterer. In the circumstances however this was not possible. This was a classic charterparty fraud case. The vessel called at Rio De Janeiro instead of Buenos Aries. The charterer sold the cargo and disappeared with the proceeds of sale. The Commercial Division of the High Court and subsequently the C.A. held that the ship owner was liable for the buyer's loss.

The Boston City is often used as an example of limiting the ostensible authority of the master to sign bills on behalf of the ship owner. The ship owner cannot, on behalf of a cargo owner, limit that ostensible authority, except by giving notice that the master's authority is so limited. Had the demise clause also been incorporated into the bill of lading the position would have been different because the cargo owner would have had notice of its terms.

Free in and out (Demise) **Clauses and Article III Carriage of Goods by Sea Act 1971** (Hague and Hague Visby Rules). Article III (8) Hague Visby Rules : 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. A benefit of insurance in favour of the carrier or similar clause shall be a clause relieving the carrier from liability.

49 See **Elder Dempster v Patterson, Zochonis & Co** [1924] A.C. 522 and **The Oakhampton** [1913] Probate 137 which was chartered for a voyage by a fleet owner.

50 **The Nea Tyhi** [1982] 1 Lloyds Rep 606.

51 **The Boston City : Manchester Trust v Furness Withy** [1895] 2 Q.B. 282.

In **The Mica,**[52] a fleet owner chartered in additional tonnage. The time charterer purported to rely on the demise clause in the bill of lading to relieve himself of responsibility, claiming that the carrier was the ship owner. Heald J. held, in the Federal Court Canada, that a demise clause shifting liability from the ship owner to the charterer is an attempt to lessen the ship owner's liability and as such would be void under Article III (a) of the Hague Rules. The court could adduce evidence of rebuttal of the presumption that the ship owner was charterer since there was an express demise clause in the bill of lading which reaffirmed that the ship owner was the carrier. The decision is by a foreign court and so is of persuasive authority only. The Mica has not been followed by the English Courts. Even if **The Mica** is correct, if The Hague or Hague Visby Rules are not applicable as where goods are shipped out of Argentina there is no problem with a demise clause in bill of lading. By contrast, in **The Berkshire**,[53] a cargo owner sued the ship owner. There was no problem with Article III (8) Hague Visby Rules. The terms of the demise clause imposed liability on the ship owner. The court held that there is nothing in the Hague Rules preventing the imposition of liability on any one. Contrast this with agreements to decrease liability, which are not allowed.

Is a demise clause invalidated by The Hague Visby Rules ? A demise clause allocates responsibility; it does not increase or decrease it. Compare free in and out terms.[54] If it only shifts responsibility from one person to another rather than reducing it so Art III. (8) H.V.R. should apply to demise Clauses. Article III.(8). Hague and Hague Visby Rules renders void any term of a carriage contract, which purports to limit the obligation to a lower standard than that required by the Rules. Article III.8 Hague and Hague Visby Rules does not prevent changing the location where that duty is to be carried out nor does it prevent the responsibility being allocated to someone else besides the ship owner, such as the carrier where the ship owner and carrier are different persons, provided someone bears liability for a failure to meet the standard.[55] Furthermore, the legality of "free in and out" clauses where the consignor and consignee respectively undertake to load and discharge cargo are permitted. Thus, a free in and out clause relieves the carrier of responsibility under Article 2 Hague Visby Rules.

It is unclear what the effect is under the Hamburg Rules. Hamburg places liability on the carrier and the actual carrier, which cannot be excluded but Hamburg recognises that liability for the carrying vessel is linked to ownership. Does this ensure that the demise ship owner is not affected by the Hamburg Rules Liability?

Sub-Charterparties and the contract of carriage. Where a bill of lading incorporates the terms of a charterparty which charterparty governs the contract of carriage, the head or the sub-charterparty. There are no problems if the bill of lading states which charterparty is to be incorporated. Many charterparty bills of lading provide a place to fill in though sometimes they are left blank. If this happens, which charterparty is incorporated ? The general position is that if there is no reference in the bill of lading as to which is incorporated the head charterparty will be incorporated and not the sub-charterparty. The reason for this is that the action is between the purchaser and the ship owner and the ship owner is subject to the head charterparty not the sub charterparty. However, often the head charterparty is a time charterparty not a voyage charterparty. Many of the terms of a time charterparty are not suitable for inclusion in a bill of lading, for example, off hire clauses. Therefore, where the head charterparty is a time charterparty the general position is reversed and it is the sub-charterparty that is incorporated.

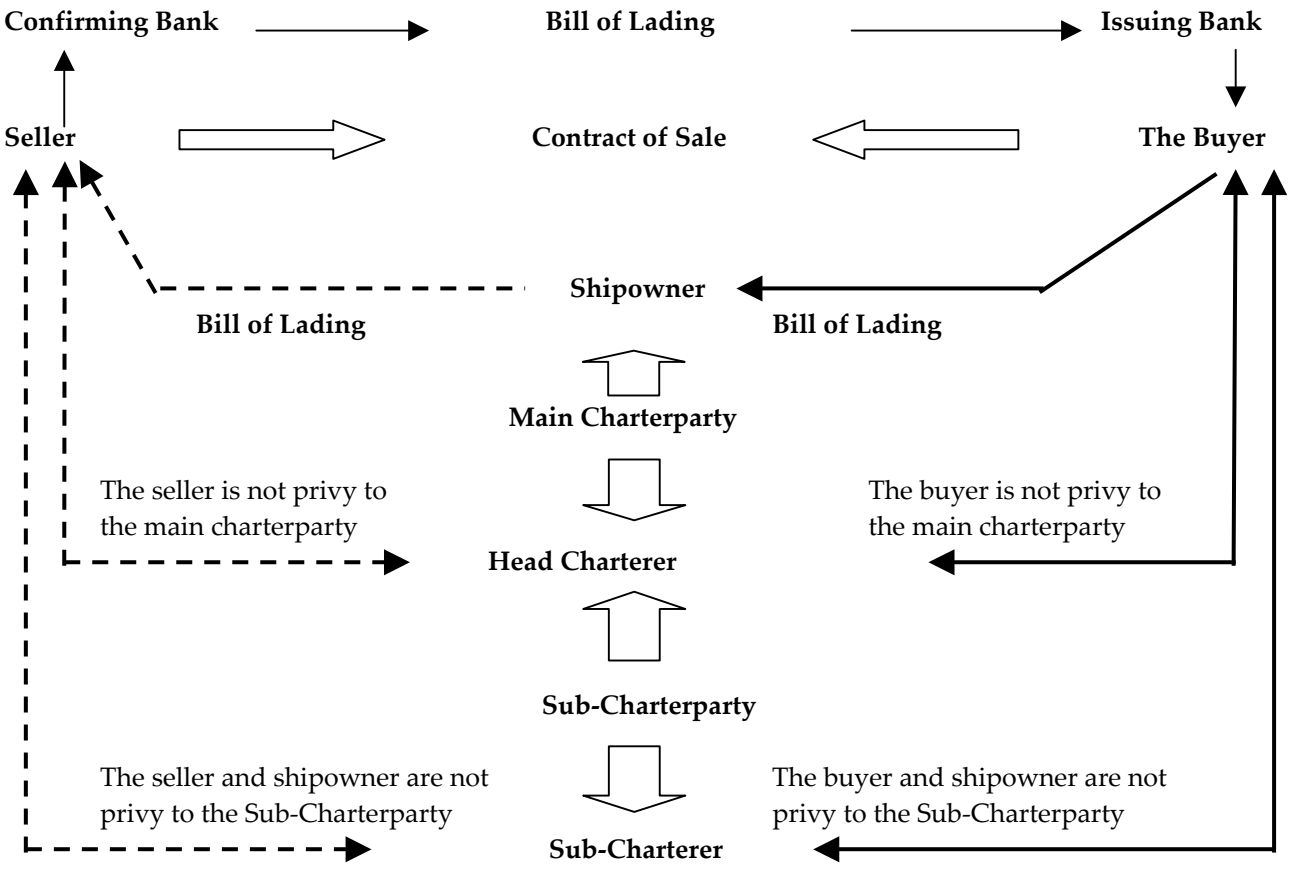
Wherever the contract fails to make it clear whether the charterparty to be incorporated is the head or sub-charterparty, leaving the courts with the job of deciding which applies, wherever possible the court will choose to incorporate the voyage charterparty rather than the time charterparty. In **S.L.S. Everest**,[56] a cargo of 20,000 tons of phosphate of lime, was lost when water entered the engine room and the ship sank. The ship owner claimed on a hull policy and the cargo owners sued the ship owners for damages and sought a Mareva Injunction to prevent removal of monies from the jurisdiction. The cargo owners had to show that the contract of carriage was governed by English law. The bill of lading stated that freight and other

52 **The Mica** [1973] 2 Lloyd's Rep 478
53 **The Berkshire** [1974] 1 Lloyd's Rep 185.
54 see **The Caspiana : Renton v Palmyra** [1957] A.C. 957
55 **The Caspiana : Renton v Palmyra** [1957] A.C. 149.
56 **The S.L.S. Everest** [1981] 2 Lloyd's Rep 389.

conditions were as per _____ including the exoneration clause. The blank was never filled in. The head charterparty was governed by French law whilst the sub-charterparty (a voyage charterparty) was governed by English Law. The court held that the contract of carriage was governed by English law. Terms of the sub-charterparty prevailed over those of the head charterparty. Denning stated, following The San Nicholas that the blank can be filled with the words 'Charter party.' In this case the voyage or sub-charterparty. The situation is less clear where the head charterparty is incorporated and it is a time charterparty.

The San Nicholas,[57] and **The Sevonia Team**,[58] make it clear that the incorporation of a sub-charterparty is an exception to the rule that the head charterparty is the charterparty which is usually incorporated and is only done where the head charterparty is inappropriate. This situation arose in **The Nei Matteini.**[59] The Head Charterparty was a 13 year consecutive voyage charterparty incorporating an arbitration clause governing the relations between the ltalian shipowner and the Italian head charterer subject to Italian law. A sub-charterparty to Saudi Arabian Maritime Co was made subject to English Law. The court held that the head charterparty applied but the terms regarding arbitration were not intended to govern the bill of lading relationship.

Bills of Lading and the Buyer / Seller / Sub-Charterer / Charterer / Shipowner Matrix



[57] **The San Nicholas** [1976] 1 Lloyd's Rep 8.
[58] **The Sevonia Team** [1983] 2 Lloyd's Rep 640
[59] **The Nei Matteini** [19881 1 Lloyd's Rep 452

CHAPTER FIVE

THE LIABILITY OF CARRIERS FOR STATEMENTS IN BILLS OF LADING

What is a Bill of lading? The Law Commission Working Paper No 112 glossary of terms defines a bill of lading as: "A document issued by or on behalf of a sea carrier (whether ship owner or charterer) to the shipper of the goods i.e. the person with whom the carrier has contracted to carry the goods. Broadly speaking it is evidence of receipt of the goods by the carrier, it evidences the contract of carriage between shipper and carrier and under certain conditions, is a document of title". See also 2:11 page 9.

The Law Commission Report No198 chose not to provide a statutory definition n the Carriage of Goods By Sea Act 1992. The Hamburg Rules provides the only statutory or convention based definition. The Hague and Hague Visby Rules also avoid providing a definition. All other definitions are derived from case law.

Article 1(7) Hamburg Rules : "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.

The words "Taking over or loading" means the Hamburg definition covers shipped and received for shipment bills of lading. It also covers negotiable and non-negotiable bills of lading without the C.O.G.S.A. 1992 redefinition of non-negotiable bills of lading as sea way bills.

Both these definitions embrace several distinct and separable concepts. The bill of lading acts : as a receipt from the carrier to the shipper, as a form of contract of carriage, as a device to enable goods to be delivered and as a method of transferring title to goods Analysis of the bill of lading is complicated because these concepts do not necessarily complement each other or even serve the same parties in carrying out these functions.

The mate's receipt or received for shipment bill of lading is issued by the carrier or ship owner for the benefit of the shipper. The respective legal rights and liabilities of the parties are founded in common law bailment for profit and the contractual bailment implicit in the contract of carriage. Where a sale is not involved this relationship continues until delivery to the consignor who is also the consignee and similarly regarding ex-ship delivery contracts. If there is a sale the relationship continues at least until endorsement of documents when risk is backdated to the time the goods pass the ship's rail and provided nothing else goes wrong the shipper will not be concerned about any later cargo damage.

Any statement as to terms of the contract of carriage only concern holders of the bill of lading in due course and the carrier. Delivery of goods and negotiability of documents involve the security of banks and the consignee of the goods. A number of factors affect the legal status of statements in the bill of lading, which have implications regarding the various functions of the bill. If a statement recorded on a bill of lading cannot be relied upon legally then the interests of the shipper, the endorsee and others relying on the security of the bill of lading might be jeopardised. The terms of any contract contained in the bill of lading affect the endorsee and those others relying on the security that the bill represents. The common law, C.O.G.S.A. 1971 and C.O.G.S.A. 1992 regulate the various aspects of the bill of lading. The provisions have not been developed in a coherent manner but rather to address perceived problems at specific points in time.

Statements in Bills of Lading. Bills of lading provide a degree of security to the international trading community. Consequently, a shipped bill of lading must indicate that the goods have been loaded in accordance with the contractual terms. If not, it must be claused to indicate problems with the cargo such as damp smells, leaking casks etc. Such indications would render it an unclean bill of lading. Unclean bills of lading are not good tender c.i.f. & f.o.b. A bill of lading may be a received for shipment bill of lading or a shipped bill of lading. The value of the later to purchasers of goods who rely on documents is clear. A received for shipment bill of lading can only indicate an intention to ship in accordance with contractual terms and is therefore less of an assurance to a buyer though it can indicate that goods have been received in good order and condition.

Where a clean bill of lading is presented to a bank, payment must be made, but the buyer I endorsee has no reason to trust the seller / shipper. Regarding bulk cargoes etc the buyer and seller may never have had dealings with each other especially if there have been multiple sales during the voyage. The buyer wants the

best evidence possible that shipment complies with the terms of the contract of sale before making payment and similarly if there is a Bankers Documentary Credit the bank will want the best possible evidence of compliance with the terms of the documentary credit. The safest method for the buyer is to pay only on discharge when he can physically inspect the goods. This is not good for the seller. Why should he trust the buyer ? Payment against a bill of lading exists to protect the seller in the first place and is the main reason for its existence and why a Banker's Documentary Credit is used because the bank, not the seller takes the risk of the buyer's solvency.

Under a c.i.f. sales contract, the seller's obligation is to ship goods according to the contract. The sellers obligation regarding the goods cease once the goods are on the vessel. If the goods are lost at sea, or on board the vessel even before it sails they are at buyers risk and the buyer has to pay for them. The only qualification to this is the possible negative duty imposed on a c.i.f. seller not to prevent the goods reaching their destination, such as where a time charterer is also a c.i.f. seller. The seller would be in breach of contract if he ordered the ship owner to deviate to other ports on the way to the delivery port. Under the f.o.b. sales contract the obligations of the seller/shipper vary with the type of contract. Usually the seller is under an obligation to ensure that the goods are loaded on board the vessel and usually the seller's obligations cease once goods are loaded on board. Most f.o.b. and c.i.f. contracts require the seller to tender a shipped bill of lading and a received for shipment bill of lading will not suffice. The authority for this regarding f.o.b. contracts was provided by **Yelo v S.M. Machado.**[60] It is not completely clear whether or not the rule applies for f.o.b. contracts. Sellers J stated that strong evidence is required of a custom regarding a 'received for shipping bill of lading' so that it may rebut the need for a 'shipped bill of lading'. In the case in question it was considered that a received for shipping bill of lading was not good tender since the custom was not established by strong enough evidence.

Regarding c.i.f. sales the same rule is set out by Macardi J in **Diamond Alkali Export Corp v Bourgeois**.[61] There can be no exceptions to the rule envisaged regarding c.i.f. because where as a shipped bill of lading did, a received for shipping bill of lading does not, come within the ambit of s1 Bills of Lading Act 1855 but it does now come within C.O.G.S.A. 1992 so has the position changed ? The contract of carriage c.i.f. is made between the seller and the carrier. If goods are damaged at sea the risk is on the buyer not the seller. The seller will be paid in any case. The seller has no interest to sue the carrier and suffers no loss in any case and so could not receive substantial damages. The aim of s1 Bills of Lading Act 1855 was to transfer the rights and obligations under the contract of carriage from the seller to the buyer at the time when the bill of lading is transferred, thus enabling the buyer to sue the carrier on a statutory implied contract. If there are subsequent chain sales the rights transfer to each buyer in turn. Since s1 Bills of Lading Act 1855 applied only to the shipped bill of lading, such bills of lading were ALWAYS required c.i.f.

Apparent good order and condition. The master must state goods in good order and condition. He cannot say they are actually in good order and condition since he has no way of telling whether or not they actually are in such a condition. He can only state that they are in Apparent Good Order and Condition. If the master makes statements regarding the quality of the goods these statements do not bind the ship owner since such statements are outside the apparent, ostensible and or actual authority of the master to act on the Ship Owner's behalf. This was established in **Cox Patterson & Co v Bruce & Co**.[62] This rule is not affected by s4 C.O.G.S.A. 1992.

A clean bill of lading indicates that the goods were loaded in apparent good order and condition. A clause may indicate subsequent damage. This does not render the bill of lading unclean. A shipped bill of lading states that the goods were in apparent good order and condition On Loading. What happens after loading is the buyer's responsibility NOT the seller's responsibility.

60 **Yelo v S.M. Machado** [1952] 1 Lloyd's Rep. 183.
61 **Diamond Alkali Export Corp v Bourgeois** [1921] 3 K.B. 443 per Macardi J.
62 **Cox Patterson & Co v Bruce & Co** [1886] Q.B.D. 147.

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The Galatia,[63] involved a variation on the standard c.i.f. contract for sugar, shipped and loaded in good condition. A fire occurred on board the vessel before it wailed. The bill of lading was caused to indicate that some sugar had been discharged because of fire damage after loading. The Court of Appeal held that it was nonetheless a clean bill of lading. The buyer had to accept it and pay against it. The action arose between the buyer and seller on the contract of sale.

Banks may be subject to stricter rules. The contract between the bank and the buyer is nearly always on the terms of the Universal Customs and Practices of Documentary Credits. The banks will reject a bill of lading containing a clause or notation. The Court of Appeal held in **The Galatia** that the buyer could not reject the bill of lading. The Court did not say that the bank was justified in rejecting the bill. Donaldson J said that in an action between the seller and the buyer the terms of the Uniform Custom & Practice are irrelevant because one is looking at the sale contract not the commercial credit contract and therefore the Universal Customs and Practices of Documentary Credits could in theory enable the bank to demand stricter terms, but he also thought that in fact Art 34 of the 1983 Revision referred only to 'clauses which relate to goods on shipment.' and therefore that the position between the seller and the bank is the same as the position between the seller and the buyer (this was not discussed in the Court of Appeal and is accordingly a weak authority). The new replacement Art 32 U.C.P. 500 1993 appears to have the same effect.

Not all Bill of Lading terms are contractual. Are statements as to the shipment date and whether goods are in apparent good order and condition actually contractual terms ? If they are not actually contractual terms, even if they are wrong as for instance where the goods are stated to be in apparent good order and condition but are not in fact in apparent good order and condition at the time of shipment, no subsequent holder of the bill of lading can sue the carrier for breach of contract according to **The Skarp**.[64] However, if the carrier states that the goods were loaded in good order and condition and the purchaser of a cargo relies on the statement when taking up the bill of lading when otherwise he would not have done so then the carrier will be estopped from denying the statement. So, where as statements are not contractual, they give rise to estoppel.[65]

Regarding statements as to the date of shipment, such a statement is likely to induce a purchaser to accept documents which would otherwise be rejected if the true date of shipment were known to the purchaser in situations where the actual shipment date was outside the specified period in the contract of sale. In such a situation the misrepresentation results in a loss of the right to reject the documents which gives rise to the actionable tort established in **Kwei Tec Chao v British Traders and Shippers Ltd**.[66]

It was stated in **Cox v Bruce**,[67] that a ship's master has no authority to make statements regarding the actual order and condition of the goods. A bill of lading may state that quality and condition are unknown but such statements are construed contra preferentem the carrier as in **The Tromp,**[68] though clearly sealed containers would prevent a carrier from being able to aver more than that the container is sound and sealed. Where a bill of lading states that weight and quantity unknown, the burden of proving shipment is placed on the cargo owner as in **New Chinese Antimony v Ocean Steamships**,[69] and **Compagnia Vascogranda v Churchill & Sim,**[70] though again this may well be the case regarding sealed containers. It was stated in **Grant v Norway,**[71] that a ship's master has no authority at common law to make statements regarding the fact of shipment of goods that are not actually shipped. s4 Carriage of Goods by Sea Act 1992 provides rules to mitigate this and these are discussed at length latter.

63 **The Galatia** [1980] 1 W.L.R. 495.

64 **The Skarp** [1935] Probate 134.

65 See in particular **Brandt v Liverpool**; **The Dona Mari** [1971] 1 W.L.R. 341 and **Silver v Ocean S.S.** [1930] 1 K.B. 416. See also **The Saudi Crown** [1986] 1 Lloyd's Rep. 261 regarding misrepresentation and **The Nea Tyhi** [1982] 1 Lloyd's Rep 606 regarding breach of contract.

66 **Kwei Tec Chao v British Traders and Shippers Ltd** [1954] 2 Q.B 459.

67 **Cox v Bruce** (1886) 18 Q.B.D. 147.

68 **The Tromp** [1921] P. 337.

69 **New Chinese Antimony v Ocean Steamships** [1917] 2 K.B. 664,

70 **Compagnia Vascogranda v Churchill & Sim** [1906] 1 K.B. 273,

71 **Grant v Norway** (1851) 20 L.J.C.P. 93

Duration of the Bill of Lading. A bill of lading should ideally cover the entire voyage, from port of shipment to destination, so the buyer always has an action against the carrier. The ideal solution regarding transshipment is The Through Bill of Lading. It is possible to have a separate bill of lading for each shipment but the seller cannot negotiate the documents until all the bills of lading have been received. Where a Through Bill of Lading is employed, one of the carriers assumes responsibility for the entire voyage. If goods are damaged on the other part of the voyage the main carrier is still liable to the holder of the bill of lading and he himself can then reclaim from the sub-carrier.

The Lords approved the principle of the "Through Bill of Lading" c.i.f. and f.o.b. as valid tender in **Hansson v Hamel & Horley.**[72] The bill of lading was held not to be a through bill of lading because it did not cover the entire voyage. It is not known whether s1 B.L.A. 1855 applied to, or C.O.G.S.A. 1992 applies to, through bills of lading or not but the Law Commissioner's hoped the courts would give it this interpretation. See Law Commission Report No 196.

Validity of charterparty bills of lading. If a bill of lading incorporates the terms of a charterparty it is valid even if the charterparty has not been presented with the bill of lading, according to **Finska v Westfield Paper Co.**[73] provided it is usual in the trade concerned. In Finska it was the only one in that particular trade, namely a Rustwood Charterparty. It is therefore possible that a charterparty bill of lading would not be valid tender if the terms contained in it were not usual in that trade or it contained strange terms.[74]

What charterparty terms are incorporated into the bill of lading ? Not all terms of a charterparty are appropriate for direct inclusion in a bill of lading. Most could be incorporated direct but there are problems with some terms such as arbitration, choice of law and choice of jurisdiction clauses, and loading and discharge clauses, which place obligations of loading, discharge and salvage on the charterer.

Charterparty Arbitration Clauses. These normally place a time limit on the arbitration, the most common period being one year. If proceedings are outside the time they are time barred. No proceeding is possible. Where cases occur they are usually because the purchaser is out of time under the arbitration clause but within the six year limitation period for a court hearing. It the arbitration clause is incorporated the purchaser will be out of time. In **The Varenna**,[75] Hobhouse J held that arbitration clauses are not terms, conditions or exception clauses. A bill of lading stating 'all conditions and exceptions of charterparty incorporated into bill of lading' does not incorporate an arbitration clause. The Hamburg Rules reinforces this concept. Article 22(2) Hamburg Rules states that charterparty arbitration clauses must be annotated in the bill of lading to be effective. Even then the clause may not restrict the endorsee's rights to avail himself of The Hamburg Rules choice of forum rights under Article 23(1). By virtue of Article 22(4) Hamburg Rules the arbitrator is required to apply the Hamburg Rules.

Charterparty Jurisdiction and Choice of Law Clauses. Such clauses are separate collateral contracts creating rights and duties between the parties to the collateral contract. The reason for this is that under arbitration law, arbitration clauses are regarded as separable from the main contract, ensuring that the jurisdiction of the arbitrator is not undermined by claims that the main contract was "void ab initio." The arbitrator, his jurisdiction thereby safeguarded, has jurisdiction to rule on whether or not the primary contract is valid or not. The Arbitration Act 1996 reinforces this by stating that the arbitrator has the power to rule on his own jurisdiction reversing a trend for parties to seek to circumvent the arbitration provisions by going to court to challenge the jurisdiction of the arbitrator.

72 **Hansson v Hamel & Horley** [1922] 2 A.C. 36.

73 **Finska v Westfield Paper Co** [1940] 4 All E.R. 473. Note that whilst Incoterms 1990 required the production of charterparties incorporated by virtue of the bill of lading, Incoterms 200 has dropped this requirement.

74 Banks would not usually accept charterparty bills of lading before 1993 because of Art 26(3) U.C.P. 400 1982 Revision. However, a new provision contained in Article 25 U.C.P. 500 1993 Revision now permits charterparty bills of lading if specified in the credit as per the sales contract, though the U.C.P. makes it clear that the bank will not examine the charterparty even if supplied with the bill of lading and refuses to accept responsibility for its contents.

75 **The Varenna : Skips v Syrian Petroleum** [1983] 1 Lloyd's Rep 286 and [1983] 2 Lloyd's Rep 529.

In consequence, the arbitration clause is not a clause at all but is in reality a separate contract. In order to incorporate it into another contract it must therefore be specifically referred to. A mere reference might comply with the Contract (Third Parties Rights) Act 1999 but even so, because it seeks to impose limitations on third parties, whilst the third party might rely on the collateral contract, to go to arbitration, but the third party could not be forced to accept it. The result is that for all parties to be bound by an arbitration clause it needs to be specifically incorporated into the Bill of Lading. This means that no purchaser will be subject to an arbitration clause of which he is unaware. These issues are discussed in **The Annefield,**[76] **The Nei Matteini**,[77] **The Garbis**[78] and **The Federal Bulker**.[79] The same principles are set out in respect of choice of law and jurisdiction in **The Pioneer** [80]and **The Mahkutai.**[81]

Charterparty Demurrage Clauses. The demurrage provisions in charterparties are far more extensive, covering the global cost of vessels exceeding lay days whereas additional costs incurred during loading and discharge involve not only potential liability for demurrage but also additional expense in loading and discharging cargo, particularly where bad packaging has caused problems and regarding storage charges. It is better to design specific provisions to cover such situations. **The Miramar**[82] makes it clear that the court is not prepared to manipulate demurrage clauses to make them fit the bill of lading.

Loading, discharge and stowage. This concerns clauses such as the Free in and out clause. If terms of the charterparty are incorporated into the bill of lading and goods are damaged in the loading process, can the shipowner evade responsibility in an action by the holder of the bill of lading ? Are such clauses affected by the Hague and Hague Visby Rules since they appear to contravene these rules ? The conclusion appears to be that there is no reason why loading, discharge and salvage clauses cannot be incorporated into the bill of lading contract and that such clauses do not infringe the Rules in that they do not seek to lower or displace the Rules and so are not contrary to Article X. It is possible that the mandatory items under Article 15 Hamburg must be specifically listed on the bill of lading and mere incorporation of a charterparty containing these items would not be enough to satisfy the requirement. Article 15(1) states that the bill of lading must include the following..

Assessor Clauses in Charterparties and Bills of Loading. Such clauses state that the receiver of goods becomes liable on any freight due, unless prepaid and for demurrage due on discharge (if any). The ship owner can, s3 COGSA 1992 and must, proceed against the holder of the bill of lading on discharge and not against the charterer / carrier. Article 15(1)(k) Hamburg states that the extent of freight due and demurrage must be included in the bill of lading or some other indication that freight is due is required. Article 16(4) Hamburg states that in the absence of such a statement proof to the contrary is not admissible against a consignee in good faith. Whether or not incorporation of 'Charterparty Terms' would amount to 'some other indication' is not clear.

Issuing Bills of Lading in triplicate. The basis of a bill of lading as a document of title of goods is that only the holder of a bill of lading can demand delivery of the goods at the destination. However, bills of lading are usually issued in sets of 3 originals. The reason is historical. In the days of poor communications, especially regarding land travel, by which the bill of lading would have had to travel, there was no guarantee that the bill of lading would arrive at the port of destination at all, so three were dispatched in the likelihood that at least one would arrive. The practice has continued. There is an obvious difficulty in that if there is fraud an unscrupulous holder of three bills of lading could negotiate them separately and be paid three times by separate buyers ! What is the ship owner to do when presented with a bill of lading ? **Sanders Bros v McClean**,[83] held that unless the contract of sale requires three bills of lading to be tendered to him the shipper need only tender one original. A buyer wishing to protect himself would have to insert a clause

76 **The Annefield** [1971] Probate 168
77 **The Nei Matteini**, [1988] 1 Lloyd's Rep 452.
78 **The Garbis [1982] 2 Lloyd's Rep 283.**
79 **The Federal Bulker : Federal Bulk Carriers Inc. v C.Itoh & Co Ltd**. [1989] 1Lloyd's Rep 103.[
80 **The Pioneer Container : KH Enterprise Cargo Owners v The Pioneer Owners** [1994] 2 A.C. 324.
81 **The Mahkutai** [1996] A.C. 650.
82 **The Miramar : Miramar Maritime Corp v Holborn Oil Trading Ltd** 1984] 3 W.L.R. 1
83 **Sanders Bros v McClean** [1883] 11 Q.B.D. 327.

requiring tender of all three. The ship owner is entitled to deliver to the first tender of a bill of lading and need not enquire where the other bills of lading are or whether the holder of the bill of lading is actually the true owner of the goods. **Glyn Mills Currie v East and West India Dock Co**.[84] held that since the shipowner gets no benefit from the issue of the bills of lading he should not be penalised by the issue of triple bills. There maybe a duty placed on the ship owner to inter-plead if he knows of more than one bill, or if the ship owner suspects fraud.

Delivery of goods without production of the Bill of Lading. If the ship owner delivers against no production of bill of lading he is liable to the owner of the bill of lading for the full value of the goods. Exemption clauses in the bill of lading will not protect him since he goes outside the terms of the contract of carriage. There is a potential action for conversion. The buyer does not need to rely on the contract of carriage. A ship owner could issue a non-negotiable Weigh Bill. The problem is that the shipper is entitled under Art III Hague and Hague Visby Rules to demand a shipped bill of lading if he so requires. Since under C.O.G.S.A. 1992 the lawful holder even of a received for shipment bill of lading now gets rights the Weigh Bill may in future prove to be even more acceptable to buyers. Seaway Bill holders also get rights under C.O.G.S.A. 1992 so they benefit from the best of both worlds. A ship owner may charge more for a shipped bill of lading because of the greater risk of loss to him either by hanging around or for delivery on non-production, since he effectively acts as insurer to the consignee for wrongful delivery, but it may not be economically viable or competitive to do so. Alternatively a ship owner might insist on a bank guarantee or indemnity if he delivers against non-production of the bill of lading. There are problems with each of these solutions. Weigh bills are not possible in respect of oil shipments. There are often a number of re-sales during the voyage and where this occurs the bill of lading needs to be negotiable through the banks and this process takes time. The ship owners are often under pressure from the port authorities to discharge quickly. Consequently some ship owners never require shipped bills of lading before delivering cargo and in fact deliver on the instructions of the charterer of the vessel. The charterer usually knows who is entitled to the cargo. He may also be the shipper and have personally resold to the consignee.

There may be a problem with a resale and the bank may object to the credit. The carrier may not know anything about this. In **The Sagona**,[85] a bank rejected tender of a bill of lading in respect of a contract subject to a Bankers Documentary Credit. Property in the goods remained in the shipper. The ship owner was instructed to deliver to the 'buyer by the carrier, who thought that the purchaser had become the owner. There was no actual direct instruction to deliver on non-production of the bill of lading. Rather, he was instructed to deliver in accordance with 'usual practice' and since in the 15 years the captain had been on board he had never seen a 'Received for Shipping bill of lading' he delivered to someone who did not in fact own the goods because of the bank's rejection. An action by the owner of the goods was eventually settled but not before the ship owner suffered his vessel being arrested and after he had lost freight and other charges. The ship owner sued the charterer on the indemnity clause in the charterparty and succeeded. Had the charterer in **The Sagona** said 'deliver whether there is a bill of lading produced or not' then the ship owner would have been left without redress against the charterer because it would have been an unlawful order. A shipowner cannot protect himself by way of an indemnity clause against the consequences of obeying a clearly illegal order. In **Sze Hai Tong v Rambler Cycles**,[86] the bank admitted liability on the indemnity. Arguably, it would not have been enforceable on the grounds of public policy since it could represent a fraud on the true owner. Another argument is that it would represent obedience to unlawful instructions. The ship owner is responsible for his own loss. In **The Sagona** a normal indemnity clause was relied on. It was not expressly taken out for illegal purposes and so it worked.

84 **Glyn Mills Currie v East and West India Dock Co** [1882] 7 App Cas 591.

85 **The Sagona** 1 Lloyd's Rep 194.

86 **Sze Hai Tong v Rambler Cycle Co** [1959] A.C. 576, Privy Council. The case creates difficulties for ship owners. There are no problems if the documents arrive before the ship. Frequently however the vessel arrives first. What must the ship owner do? Does he hang about and loose freight ? Obviously he will not and so he will deliver against non-production of the bill of lading.

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It is a common practice for shipowners in certain trades to carry one of the bills of lading on the voyage, while the other bills of lading are negotiated, presumably to a bank, and to deliver that bill of lading to a named consignee, who in turn redelivers the bill of lading to the ship owner and receives the goods from him in exchange for the bill of lading and an indemnity against any bank claim made against the ship owner. Is the ship owner protected by the rule in **Glyn Mills Currie v East and West India Dock Co.** ? The shipowner acts as a postman for the bill of lading. Is there a duty to inter-plead ? The rationale behind the protection given in **Glynn Mills Currie** is questionable in such situations because the multiple bills of lading have now been issued for the ship owner's benefit.

What if the bank refuses to pay the indemnity or if the buyer does not repay the bank what happens if the bank claims the goods as security? The bank may have an action against the ship owner. Is the indemnity enforceable ? This is more doubtful than in the situations where there has been delivery against non-production cases because there is no reason to presume the consignee is not owner. There is a risk that he is not the owner of the cargo but there is no deliberate fraud by any of the parties. However in this situation the ship owner keeps the bill of lading on board. He knows the other bills of lading are to be separately negotiated. Arguably it is a potential fraud situation. Should the indemnity be void for public policy as a fraud ? This issue has never been tested in the courts.

The bill of lading as a document of title. The label 'document of title' is not strictly accurate. In as much as property can pass on endorsement of documents c.i.f. some of the facets of a document of title are fulfilled. However, it can never be a fully fledged document of title since the consignee I endorsee cannot acquire a better title than the consignor / endorsor at common law. The buyer is subject to the same rights and liabilities as the consignor / endorsor. Indeed, this is reinforced by the Carriage of Goods By Sea Act 1992 which makes the endorsee on presentation liable to the carrier for liabilities that attach to the goods during transit by virtue of the contract of carriage. The bill of lading will not give a purchaser absolute ownership of stolen goods simply because an international sale involving a bill of lading has taken place. Rather, the bill of lading represents, adopting the analogy of S**anders v Maclean**,[87] which the Law Commission Report No196 was so taken with, 'the keys to the warehouse'. [88]

The purchaser of goods in good faith involving a bill of lading is not however liable to account to another purchaser of the goods, where the seller has wrongfully obtained the bill of lading, as in **Cahn v Pocketts Steamships.**[89] The result is that the transfer of the document itself transfers the constructive right of possession in the goods to the holder. This also makes it possible for the shipper to deal with goods and pledge them to a bank merely by transfer of the Bill of Lading. The reason it does this is because only the holder of a bill of lading can claim the goods from a ship at port of destination. Transfer of constructive possession of the goods may also transfer property in the goods but does not always do so. Delivery of goods without production of the relevant bill of lading entitles the endorsee or pledgee to pursue an action for conversion against the carrier / bailee of the goods.

The security value of the bill of lading is enhanced by s21(1) Sale of Goods Act 1979[90] which provides that where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

87 S**anders v Maclean** (1883) 11 Q.B.D. 327 at 342

88 See also, in this respect D.Glass and C.Cashmore, Introduction to the Law of Carriage of Goods at page 163.

89 **Cahn v Pocketts Steamships** [1899] 1 Q.B. 643.

90 see also The Factors Act 1889

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The Ship's Master and Bills of Lading : Whilst a shipped bill of lading successfully acts as a guarantee that goods, that have been received and shipped, were in apparent good order and condition at the time of shipment, it has not been so successful regarding goods merely received for shipment but not actually shipped. s1 Bills of Lading Act. 1855 required a shipped bill of lading. To the extent that by virtue of s2 and s4 Carriage of Goods by Sea Act 1992, a received for shipment bill of lading now transfers rights to a lawful holder, matters are considerably simplified, but does not entirely solve the problem regarding the authority of the ship's master to issue the bill of lading in the first place. There has been a chequered history of legislative incompetence to solve this problem.

s3 Bills of Lading Act 1855 provided that regarding a bill of lading in hands of consignee, etc., "conclusive evidence of shipment as against master etc - Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or the holder, or some person under whom the holder claims."

Article III (4) Carriage of Goods by Sea Act 1971 (The Hague Visby Rules) provides that "... a bill of lading shall be prima face evidence of the receipt by the carrier of the goods therein described in accordance with paragraph 3(a) (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

s4 Carriage of Goods by Sea Act 1992 provides that – "A bill of lading which -

a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel and
b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bill of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of the receipt for shipment."

The Rule in **Grant v Norway,**[91] held that a ship's master has no authority, actual or ostensible to bind a ship owner for goods which are not loaded aboard the vessel. If some or all the goods are left behind, for whatever reason, then in spite of the fact that a shipped bill of lading has been issued for the whole cargo by the master, the ship owner is not liable to a subsequent holder of a bill of lading for the inevitable short delivery of goods. In **Rasnoimport v Guthrie,**[92] a cargo was received by the carrier and a mates receipt for 225 bales of rubber issued. With the connivance of the tally clerk, who drew up the mates receipt, some of the cargo was stolen. Only 90 bales were loaded on board the vessel. The loading broker did not know of the theft and issued a bill of lading for 225 bales. The court held that the ship owner was not liable to the holder of the bill of lading for the difference. The same principle also applies to other persons acting in the same capacity as the master e.g. charterer's agents and loading brokers when issuing bills of Lading. Where the carrier is a charterer, not a ship owner, the charterer is also protected in the same way.

Implications of the Rule in Grant v Norway. This is or at least was, an inconvenient rule for cargo owners. If some of the cargo is not shipped, the endorsee of the bill of lading will not know of the short tall on taking up the bill of lading. However, because of the rule in **Grant v Norway** he could not sue for that short fall prior to the Carriage of Goods by Sea Act 1992. The loss is not a risk covered by Marine Insurance since the goods have never been loaded, so the only method of recovery for a shipper / cargo owner is against the ship owner / carrier provided this is possible.

91 **Grant v Norway** [1851] 10 C.B. 665.

92 **Rasnoimport v Guthrie** [1966] 1 Lloyd's Rep 1

If the contract is c.i.f. or f.o.b. then the endorsee of the bill of lading can sue the seller because the goods have never been shipped. However, the whole point of a bill of lading is that it does not leave the buyer with nothing more than a contractual right against the seller, whom he does not know and who may be in a different country governed -'by different legal rules etc. The whole point of a bill of lading is to give the buyer an action against other more easily accessible persons. The endorsee may be able to sue the master personally or the loading broker (who is more likely to be a substantial firm) but such actions are problematic.

Actions against the shipowner based on Grant v Norway. The general law of agency has changed somewhat since this case was decided. Consequently Grant v Norway looks anomalous today, especially regarding provisions extending vicarious liability in the tort of negligence. One would expect ostensible authority in these circumstances. However, there is sufficient legal authority to confirm that the rule in Grant v Norway still stands, albeit as an exception to the modern rules of agency - providing its application is not displaced by statute. It is unlikely that the courts would now over rule it since it has become entrenched as an exception to the General Principles of agency. The court they may feel that the general intention of the Carriage of Goods by Sea Act 1992 was to overrule it completely, but if the history of strict interpretation applied to s1 Bills of Lading Act 1855 and to Article III(4) Carriage of Goods by Sea Act 1971 is continued it may well be that **Grant v Norway** is not in fact completely dead.

It was held by Esher in the Court of Appeal in **Cox v Bruce**,[93] that statements in a bill of lading regarding the actual quality of goods, apart from statements about apparent good order and condition do not bind the ship owner. This is purportedly based on Grant v Norway though it deals with a slightly different situation. As such it would be possible to distinguish it from the classical **Grant v Norway** scenario.

There is no reason why the master should know of the actual condition of goods. It is reasonable to bind the ship owner regarding statements as to apparent good order and condition. It is not surprising that the C.A. found that the master had no actual authority to bind the ship owner for statements regarding actual condition of the jute. But the master should know if the goods have been loaded. **Cox v Bruce** can be justified on the general principles of agency and reliance on **Grant v Norway** was unnecessary for the court to reach its decision. By contrast, **Grant v Norway** is not justifiable under the general principles of agency.

The House of Lords in **George Cavanna v Whitechurch,**[94] reaffirmed **Grant v Norway** and purported to apply it, when it held that a company secretary can bind the company. The result of this diverse case law is that **Grant v Norway** is established firmly as a common law exception to general agency principles. All the authorities are reviewed in **The Nea Tyhi,**[95] and again in **The Saudi Crown**,[96] by Sheen J who accepted that **Grant v Norway** was good authority. Whilst **The Nea Tyhi** is no longer a good authority on the tort issue since that aspect of the case has been subject to considerable judicial consideration since it is still valid in respect of this issue.

Legislative attempts to oust Grant v Norway. The legislature has attempted three times to over rule / mitigate the rule in **Grant v Norway**. The first attempt achieved nothing. The second is effective, bar in one situation and the third attempt has probably solved all the existing problems but has possibly created some new ones.

s3 Bills of Lading Act 1855 provided that a bill of lading which states that goods had been shipped was conclusive evidence against the master or other persons signing the same, even where goods have not in fact been shipped. It was intended to affect **Grant v Norway** but it failed. It provides no action against the ship owner. It is concerned only with the master and since **Grant v Norway** protects the ship owner not the master or others signing the bill of lading if has no effect. What action then, did it provide against the master? No action was specified at all. It only stated that there was conclusive proof. One needs a cause of action before the section is of any use, but no action existed which could have been helped by the section. Generally the master does not sign the bill of lading in a personal capacity. He signs as agent of the ship

93 **Cox v Bruce** [1886] C.A. 18 Q.B.D. 147. Per Esher in the C.A.
94 **George Cavanna v Whitechurch** [1902] A.C.
95 **The Nea Tyhi** [1982] 1 Lloyd's Rep. 606
96 **The Saudi Crown** [1986] 1 Lloyd's Rep. 261. See also [1986] N.L.J. 508

owner, not as master of the ship per se, and so does not sign in a personal capacity. The only possible basis for liability that existed was for breach of the master's duty as bailee of the goods. However, if the goods are never loaded the master never becomes a bailee in the first place. Thus, if the goods are not shipped there would be no cause of action. If the goods are loaded he becomes a bailee - but since the goods are not lost there is no problem. **Parsons v New Zealand S.S**.[97] and **Rasnoimport v Guthrie**,[98] both confirmed that s3 BLA 1855 did not work. Alternatively the master may by issuing the bill of lading be falsely implying that he has authority and thus be liable in tort for negligent misrepresentation.

Article III (4) Carriage of Goods by Sea Act 1971[99] that a bill of lading stating that a quantity of goods has been shipped, referring back to Article III(3), shall be conclusive evidence against the ship owner, proof to the contrary shall not be admitted if the bill of lading is transferred to a third party in good faith. It protects the endorsee against the ship owner. The Hague Visby Rules are incorporated into the contract of carriage. Therefore in order to incorporate Article III(4) a contract of carriage is essential.

There are no cases on Article III (4) but a possible problem exists. Since Article III states that a bill of lading shall be 'Conclusive evidence of receipt of goods,' not of 'shipment', what effect if any does this wording have ? It is not clear, but the carrier must issue a bill of lading or at least a receipt on taking charge of goods. What happens if no goods are shipped and there is no pre-shipment contract, as in **Heskell v Continental Express** ? [100] Goods were sent to the dock without a prior arrangement, to be put on the first vessel going to the right place, but were not actually loaded though a bill of lading was issued saying they were. The purchaser paid for the goods and sued the seller. He obtained the purchase price back from the seller. The seller then tried to sue the ship owner and the loading broker. The action against the ship owner failed on **Grant v Norway** principles and because no goods were loaded and because no previous contract of carriage was made. Therefore no contract of carriage existed. The bill of lading was a nullity. Even if the Hague Visby Rules had applied in 1950 there would have been no contract of carriage. The Hague Visby Rules need a contract of carriage for them to be incorporated into, so without such a contract the bill of lading is a nullity. Therefore it is not such a bill of lading within Article III(4). Without such a valid bill of lading Article III(4) has no effect. If some goods are shipped the situation is different, as in **Rasnoimport,** where the Hague Visby Rules applied. There was a contract of carriage. Therefore the bill of lading was not a nullity, so it acted as evidence of the terms of the contract of carriage. The carrier would have been prevented by The Hague Visby Rules from denying shipment of ALL the goods once some had been shipped.

Can one bring an action against the master or loading broker? Even if one could not bring a contract action or a bailment action there, may be another action independent of Article III. Hague Visby Rules. If the master has no authority to issue the bill of lading for goods not shipped it follows that by issuing such a bill of lading he is claiming that he has authority when he hasn't got it. Does this claim amount to a 'warranty' that he has such authority ? If so, he is breaking that 'warranty' that he has authority to issue such bills of lading?. To whom is he warranting that he has this authority, to the shipper, or is it a **Carlill v Carbolic Smoke Ball Co** type offer to anyone who takes up the bill of lading? For there to be an action by the cargo owner against the master for breach of contract the next question must be 'what consideration moves from the endorsee to the master ?' This is not clear and has never been discussed.

What would be the damages for breach of warranty? Loss as a result of not having an effective action against the ship owner as in **Rasnoimport** where the holder of the bill of lading should have had an action against the ship owner, but because the master had no authority, the holder of the bill of lading in fact had no action. He suffers loss because of trusting in the warranty of authority given by the master. He successfully claimed the shortfall from the master as damages. or

If no goods are shipped as in **Heskell** and hence there is no contract of carriage. Even if the bill of lading was issued at a full board meeting it would make no difference. There would be no cause of action. Therefore breach of warranty would cause no loss. An Action against the loading broker it a possibility, but without

97 **Parsons v New Zealand S.S.** [1901] 1 K.B. 548

98 **Rasnoimport v Guthrie** [1966] 1 Lloyd's Rep. 1.

99 Hague Visby Rules amending Hague Rules

100 **Heskell v Continental Express** [1950] 1 AII.E.R. 1033.

loss there can be no award of damages The action is only useful if some goods have been shipped if this analysis is correct.

In **Rasnoimport**, Mocatta J thought that Devlin was wrong in the earlier case, but note that they are both high court cases. The damage suffered is the loss due to the lack of authority, because if he had had the authority the goods would have been shipped in any case (since the only time he has such authority is when the goods have been shipped). The loss is due to the lack of authority which the loading broker warranted he possessed. The logic of this is based on the fact that the only way the master can have authority, and the only authority the master has, is to certify on behalf of the ship owner that the goods have been shipped when they have in fact been shipped. In effect the master is warranting that the goods have been shipped. Both views still exist ! The issue has not been resolved!

Since there have been no recent decisions, apart from **Rasnoimport**, it remains open as to whether an action under **Hedley Byrne v Heller** would exist for negligent misstatement in situations where the master signs the bill of lading for goods not on board. Supposing the master is liable under Hedley Byrne v Heller, is the ship owner vicariously liable ? One needs to show that the ostensible authority principles in tort and under contract are different since **Grant v Norway** is an exception to the general principles of agency and ostensible authority in contract law. **The Ocean Frost,**[101] has prevented this. The test is the same for actions in contract and tort, the House of Lords held, at least regarding fraud. The Court of Appeal said the same but did not qualify it. However, the House of Lords would not decide whether or not there was fraud in that particular case. It might just possibly still exist as an action if no fraud is involved.

s4 Carriage of Goods by Sea Act 1992 provides that a bill regarding goods shipped or received for shipment signed by a master or other person with express, implied or apparent authority of the carrier shall in favour of a person 'who has become' the lawful holder of the bill, be conclusive evidence against the carrier of shipment or receipt. The result is that anyone lawfully holding a bill of lading can use that bill of lading as proof that goods were received or shipped, in an action against the carrier even if the goods were not so received or shipped . The carrier will not be able to deny the authority of the person signing the bill of lading to so sign, thus it becomes a validly issued bill of lading for the purposes of s2 Carriage of Goods by Sea Act 1992 and affords such holder all the rights assigned to him by s2.

Grant v Norway, s4 COGSA 1992 and shippers. Whilst the shipper holds the bill of lading he has no problems, since s4 protects him even if the goods are never actually received by the carrier or are never shipped (and even if as in **Heskell** there was no pre-shipment contract) because there is a scam operated by delivery drivers to the docks or the goods are misappropriated pre-shipment. Since the shipper is privy to the pre-shipment contract of carriage or to the **Heskell** type bill of lading contract of carriage he can sue the carrier for breach of contract for failure to ship the goods. The carrier could claim that there were no goods to ship and offer to return freight payments to the shipper. The shipper could refuse to accept and prove the carrier had received and shipped the goods using the bill of lading as proof and then sue in contract or in tort for loss of the goods.

Once the shipper has endorsed the bill of lading over to the buyer he looses his right to a contract action - s2(5) C.O.G.S.A. 1992 - and as long as the buyer is solvent and in existence the shipper can sue the buyer leaving the buyer to claim against the carrier. The shipper could alternatively sue in tort, provided he has an interest in the goods for example as an ex-ship shipper retaining risk and property or if there is a reservation of title clause. However, he may have a problem under the Rule in **Grant v Norway** in establishing that the carrier / ship owner has received / shipped the goods. s4 provides conclusive evidence for a person who 'has become' a lawful holder of the bill of lading of receipt for shipment by the carrier of the goods. Does this mean that :-

a) one has to be the lawful holder to benefit from the section - or
b) once having been a lawful holder, is such a person thus enabled to use past lawful holding as conclusive evidence of receipt or shipment ? and
c) does one have to have actual possession of the bill of lading in order to produce it as conclusive evidence ? The Law Commission Report No 196 states that it should be, in the hands of the claimant.

[101] **The Ocean Frost** [1986] 2 W.L.R. 1063

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s2(5) Carriage of Goods by Sea Act 1992 only extinguishes the shipper's transferred rights, so if b) is the correct view he is not denied the benefit of s4 by the operation of s2(1).

Article 3(4) of Carriage of Goods by Sea Act 1971 only provides prima face evidence vis-à-vis the shipper so it would be rebuttable and so permit the operation of **Grant v Norway** as a defence to a claim in tort by the shipper.

If a) or c) are correct then the Rule in **Grant v Norway** could still be relied upon by a carrier / ship owner to deny receipt of the goods and thus liability in tort to the shipper who does not lawfully possess the bill of-lading. It is not difficult to imagine situations where the buyer is unwilling or not available to return the bill of lading to the shipper. Mere return may not be enough, it could be that one has to hold the bill of lading as a person entitled to demand delivery. Alternatively, the shipper could ask the buyer to act under s2(4) Carriage of Goods by Sea Act 1992 and sue on his behalf but again it is possible to imagine situations where the buyer would not be able willing or available to do so.

Since s4 Carriage of Goods by Sea Act 1992 only applies to Bills of Lading, as does Article III(4) Carriage of Goods by Sea Act 1971, the rule in **Grant v Norway** could still apply to Sea Way Bills and other non-bill of lading documents signed by the master. The rule in **Grant v Norway** has been much criticised and the Law Commission declared that the aim of s4 Carriage of Goods by Sea Act 1992 was to abolish it. Courts could therefore firmly declare that it only ever concerned shipped bills of lading refuse to extend the rule in any way whatsoever to other documents and that it has no effect on bailment relationships. The result would be that carriers would then be liable at all times for the care of goods covered by any form of receipt, weigh bill or bill of lading whether or not such goods had actually been received into the hands of the carrier.

LIABILITY OF CARRIERS FOR MISLEADING DOCUMENTS

If the documents are faulty the buyer can refuse to take up the documents and he can refuse to pay the price. If the buyer takes up the documents which appear to be in order and it later appears that the goods, when loaded aboard the vessel , did not conform to the contract description, he can nonetheless reject the goods and claim the price even though he has taken up the documents by virtue of s13 and s14 Sale of Goods Act 1979. The carrier is unaffected by this.

A problem occurs if, when the documents are tendered they appear on their face to be in order, but at the time the buyer either thinks or knows that there is something wrong with the goods. Can the buyer reject the documents and refuse to pay ? This was permitted in **Couturier v Hastie,**[102] where a cargo had perished before the C & F Sales Contract was made. The court held that the buyer could reject the documents and refuse to pay even though the documents were in order. This however, was an exceptional case. Usually the contract is made before shipment, and so **Couturier v Hastie** would not normally be applicable, though of course the case also has implications for chain sales. In essence, in order to apply the goods must cease to exist before the contract is made.

It was held in **Gill and Duffus v Berger**,[103] that if in a c.i.f. contract the documents tendered are in order, the buyer has to accept and pay the price even if the goods are faulty. The only exception is if the seller was fraudulent in obtaining the clean documents. This is a clear authority regarding c.i.f. contract sales that if the goods deteriorate after shipment the buyer cannot reject the goods or the documents since the goods are at his risk. In **Gill and Duffus v Berger** 500 tons of Argentine Bolita Beans were sold c.i.f. Only 440 tons arrived. 60 tons were shipped elsewhere. This irregularity had nothing to do with the seller who had a clean bill of lading for 500 tons. There was nothing wrong with the bill of lading or the Insurance Certificate. The contract provided for a quality certificate to be issued on discharge. The seller failed to obtain one and the buyer used this as an excuse not to take up the Documents. However, the real reason for the buyer's refusal was that the market price had fallen. He had made a bad bargain, which he subsequently wished to wriggle out of. The court held that the absence of a quality certificate was no ground for rejection as it was not a shipping document. It was issued too late to fulfil that function. The seller had tendered a clean bill of lading and the buyer had no right to reject on those grounds. If the seller had been properly advised they

102 **Couturier v Hastie**

103 **Gill and Duffus v Berger** [1984] A.C. 382 H.L.

might have accepted breach of contract and sued the buyer for the price, but did not wish to do so, as the beans had fallen in price. The seller tendered the documents again and got a quality certificate for 440 tons but the buyer refused again. The documents were now clearly in order. It later transpired that the goods were not of the contract description, since Argentine Bolita Beans are white, but a number of coloured beans were included and therefore the seller had no option but to sue for repudiation for wrongful rejection. His action succeeded as the buyer cannot, merely because goods turn out to be not of contract description when loaded, reject the documents and refuse to pay against them, when the documents are themselves in order.

The result is curious and rather hard in situations where goods are not loaded in accordance with contract, but as pointed out by Diplock the law has to take account of the implications for chain sales of goods on board vessels at sea. Consider the following situation. A sale and re-sale based on facts similar to **Gill & Duffus v Berger** and where Buyer No 2 takes up the documents not knowing that the goods do not accord to contract description because the facts are not recorded on the Bill of lading. Buyer No2 should be able to judge the goods by the bill of lading. What if Buyer Nol had discovered by the time the resale took place that the goods contained coloured beans? Had **Gill & Duffus v Berger** gone the other way Buyer No2 could reject Documents on re-sale.

Such a decision would be necessary for otherwise it would cause immense legal problems especially where Bankers Confirmed Documentary Credit are involved. The decision represented a policy decision regarding re-sales since the court felt that it had to enhance the negotiability of Bills of Lading and so represents an exception to normal contract rules.

The American Accord,[104] involved a similar decision to that in **Gill & Duffus v Berger** about Bankers Documentary credits regarding the tender of documents to a Bank. Thus, the decision in **Gill & Duffus v Berger**, according to Diplock, limits cases whether or not a bank is involved. The only exception to **Gill & Duffus v Berger** and **The American Accord** is if the seller has been fraudulent since public policy is brought into consideration, because the seller cannot bring an action to support that fraud. This is an application of general principles, which does not reduce the negotiability of the bill of lading since it only affects the seller and buyer Nol. On resale from buyer No 1 to buyer No2 it is not fraudulent unless unusual facts occur.[105]

The value of the right of rejection. Damages in contract seek to put the injured party into the same position that he would have been in had the contract been properly performed. If the market is static and he rejects the goods and sues for damages the result is the same as if the contract had been performed. Consider a contract for the sale of Argentine Bolita Beans for £100,000 where 20% of the beans are coloured and worthless so that only £80,000 of beans are supplied at the current market price instead of £100,000 in the following situations. In a static market, if the buyer rejects the goods, he can buy elsewhere for the same price therefore his only loss is administrative. If the buyer accepts the documents and sues for damages his damages would be the difference between £80,000 and £100,000, i.e. £20,000 damages plus expenses. The result is the same each time. In a falling market, for example where the price halves between the contract date and the shipment date and the buyer had made a bad bargain. The buyer agreed to pay £100,000 for what is now merely £50,000 worth of beans. The good beans (80%) would be worth 80% of £50,000 i.e. £40,000 which is £60,000 less than the price. If he sued for damages in contract he would receive the difference between the value he has got, i.e. £40,000 and the beans he would have had if 100% of the beans had been shipped in accordance with the contract, i.e. £50,000. So he only gets £10,000 in damages. If he rejects the documents and refuses to pay the price he is £50,000 better off than if he sues for damages since he could the go out into the market and buy the beans he needs for £50,000. The seller would have to bear the loss. Therefore in a falling market the buyer will use any excuse to get out of contract, rather than pay and sue for damages. The same logic applies to the contract of carriage.

Kwei Tec Chao v British Traders & Shippers Ltd.[106] shows that 'The Right to reject the Documents' and 'The Right to reject the goods' are separate and distinct rights. Merely because the buyer accepts the documents does not mean that he has accepted the goods and conversely acceptance of the goods does not mean the

104 **U.C.M v Royal Bank of Canada : The American Accord** [1983] A.C. 168

105 See Reynolds (1984) 2 L.M.C.L.Q. 191 & Treitel (1984) 4 L.M.C.L.Q. 565

106 **Kwei Tec Chao v British Traders & Shippers Ltd**. [1954] 2 Q.B. 459 Per Devlin J.

buyer has accepted the documents. The case concerned a sales contract for a chemical called 'Rongalite C' c.i.f. Hong Kong out of London. The Contract of Sale required the Rongalite C to be shipped on or before the 1st October 1951. It was in fact shipped during the first week of November. However, the bill of lading was altered and forged to indicate that shipment was made in October. It was not proved that the seller was fraudulent, since it was possible that the bill of lading had been altered by agents of the seller without his knowledge or collusion. The market price of the chemical Rongalite C fell and therefore the sales contract represented a bad bargain for the buyers. In fact there had been a catastrophic drop in the value of the commodity. When the documents were presented they appeared to be correct. The buyer thought he had no choice but to accept, and did so, paying the price. By the time the goods arrived the buyer knew that the goods had in fact been shipped late and that the bill of lading had been altered and that they could have rejected the goods when they arrived. The buyer claimed the price back since because of the late shipment the documentary sale of goods did not correspond to terms of the sales contract. The buyer decided not to leave the goods on the dock and instead resold at an enormous loss in Hong Kong and then sued for damages for Breach of Contract. The seller agreed that the contract had been broken since the goods had been shipped late, but claimed that even if they had been shipped on the 1st October, they would still have been worth very little because of the crash in the market of Rongalite C. He therefore claimed that the buyer was entitled only to the value of the goods at the current market price which he had already received by the resale and so the buyer was entitled to nominal damages only.

The buyer won and obtained damages based on the contract price for the loss of the right to reject the documents. The buyer successfully claimed that if the bill of lading had shown the correct shipment date he would not have accepted it and paid for such highly devalued chemicals. There was a breach of contract by the seller in that the bill of lading contained a false shipment date, and because of that false statement the right to reject the goods was lost. This shifted the loss back onto the seller.

Thus when the buyer sues for breach of contract for the presenting of a bill of lading with an incorrect shipment date, he sues on the alteration to the bill of lading. He does not sue for the late shipment. Thus even though the buyer accepts the goods and the documents he can still claim his full losses. Compare this with an action for breach of contract for late shipment which would only cover those damages which caused by the late shipment. The cause of action is founded in the torts of either fraud or negligence for misrepresentation. The person to sue is the person making the misrepresentation so the potential defendants are either the seller, the carrier or the master / loading broker making the incorrect statement in the bill of lading.

How wide is the applicability of the case? Firstly, it is dependent on the buyer being ignorant of the true position when accepting the document. If the buyer knew the true shipment date when accepting the document this would infer a waiver of the right of rejection or equally the buyer would be estopped in equity from claiming that ground of rejection. Secondly, the buyer must not later do anything at all to infer acceptance. Note that mere acceptance of goods and resale do not infer 'Acceptance' but some other acts might amount to acceptance.

Waiver of the right to reject. If the buyer does anything to indicate that he is not going to enforce his right to reject since this can be interpreted as a waiver of that right, provided that he was aware of or should have been aware of the right to reject at the relevant time.[107] **Panchaud Freres v Etablissements General Grain Co.** involved a c.i.f. contract for 5 1/2 tons of Brazillian Yellow Maize to be shipped between June 1 July 1965. The grain shipped in August but the bill of lading falsely dated. Under the contract a certificate of quality was required on shipment. An examination by the buyer of the Quality Certificate would have shown what the date of shipment was. The court held that by taking up the document and paying, the buyer was subject to the rules of waiver and estoppel. The buyer could not treat late shipment as a ground for rejection. He could not later say "I would have rejected had I known the date" because he could have known or ought to have known true shipment date. The buyer rejected the goods. Was this rejection wrongful ? The court held that it was. Furthermore there was no loss of right to reject. All that was available to the buyer was an

[107] See **Panchaud Freres** [1970] 1 Lloyd's Rep. 53 ; **Kleinjan & Holst v Bremer** [1972] 2 Lloyd's Rep. 11 and **The Eurometal** (1981) 3 ALL E.R. 533.

ordinary claim for breach of contract for late shipment. Since late shipment had not caused the loss the buyer could get no substantial damages.

It was held in **Kleinjan & Holst v Bremer,** that nonetheless, ordinary damages are still available (if any) at current market value. Thus if the fall in market price occurs after the normal date of arrival which would have resulted from shipment at the correct time then the damages would still be the same in any case. In **The Eurometal** documents were tendered late and the goods were defective. Therefore the buyer could reject the documents and or the goods. Instead the buyer asked for the cargo to be fumigated. It was held that this conduct inferred that he had accepted the documents and the goods. It is important under Kwei Tec that the buyer does nothing to infer acceptance.

What notice is required to constitute waiver? The Manila,[108] is authority for the fact that the buyer will not be treated as having waived his right to reject, unless he had available to him clear information regarding his right to reject and nonetheless went on to act in a manner which indicated to the seller that he wished to waive that right. The case involved an appeal from a G.A.F.T.A. arbitration (Grain & Feed Trade Association) regarding what is required to create a waiver & estoppel. It concerned a contract c.i.f. Rotterdam out of the Phillipines for two lots of copra cake. The buyer paid additional securities to the ship owner to ensure the goods were shipped because the ship owner was in financial difficulties. The buyer paid out on presentation of the documents, despite the fact that a survey report (which was not contractually required) indicated that the vessel had not been loaded until eleven days after the shipment date indicated on the bill of lading. The contract stated that the bill of lading should be dated on the day of loading. The seller was in breach of contract. When the goods arrived late and the buyer realised that loading had taken place eleven days late, he claimed damages.. The seller claimed that the buyer had waived any claim by taking up the bill of lading since he should have known from the survey report of the late loading. The court held that the information in the survey was not clear enough to constitute notice of the breach of contract and so there was no waiver of the right to reject the bill of lading or of the right to claim damages for breach of contract.

The Seller / Carrier Indemnity. It is important for the seller to obtain clean documents from the carrier. If there is something obviously wrong or doubtful regarding the goods the seller may to try to persuade the carrier to issue a clean bill of lading in any case. However if the carrier issues clean documents and the goods are not in fact up to standard, the carrier lays himself open to an action by the buyer. Such actions have succeeded many times in the past. However, the seller then promises to indemnify the carrier against such losses in order to induce him to issue clean documents. **Brown Jenkinson v Percy Dalton**,[109] states that this amounts to a fraud against the buyer by the seller and the carrier and is not enforceable. However, it is debatable whether this was in fact a fraud on the buyer. The carrier compensated the buyer so he suffered no loss. The Court of Appeal observed that legal actions against carriers are not as good as actions against the seller. In an action against the seller there is strict liability. The buyer has nothing to prove. However, if the buyer sues the carrier and the action is on the Contract of Carriage it is subject to the Hague Visby Rules which only permit an action if there has been a lack of due diligence by the carrier. If the buyer sues in tort on the other hand he has to prove negligence, i.e. fault of the carrier must be proved. Contrast this with an action against the seller where the seller's fault does not have to be proved. The court opined that it is a better option for the buyer to reject the documents and not to pay for faulty goods. If he is induced to accept, he is buying a law suit for the provision of defective goods with all the vagaries and expense that that involves.

The Rules Relating to Remoteness of Damages. These centre around reasonableness regarding contemplation of what was in the parties' minds. It is difficult to foresee if and how a market will drop. **Kwei Tec Chao** was not an action against the carrier. However, despite the fact that the discussion regarding the carrier was merely obiter, it was stated that if the goods were not clearly defective and the carrier had doubts about the good order and condition of the goods, but was not certain that the goods were defective, then if the seller assured the carrier that the goods were fine and asked for a clean bill of lading

[108] **The Manila** : **Proctor & Gamble v Peter Cremer :** [1988] 3 All.E.R. 843.

[109] **Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd** [1957] 2 Q.B. 621.

and promised that if the buyer did sue that he would indemnify then this indemnity would probably be all right, there being doubt not fraud in the mind of the carrier. **Brown Jenkinson v Percy Dalton** applies where both carrier and the seller know.

Delivery by shipowner without production of a bill of lading. Where the ship arrives before the documents the carrier has a problem. He can only safely deliver to a holder of the bill of lading. However, if he waits for the documents to arrive then he may suffer a loss of freight in that his vessel is tied up. So the ship owner has to ask for an indemnity from the collector of the goods. This left the buyer and any bank guarantor with a problem, as in **The Delfini**,[110] since no rights in suit could be acquired under s1 BLA 1855 unless property passed by endorsement of the bill of lading. The buyer's and bank's problem is effectively dealt with by C.O.G.S.A. 1992. As lawful holders of a bill of lading, at any time, even after the goods have been unloaded, whichever of them holds the bill of lading has a right of suit against the carrier to claim for damage to cargo incurred during the voyage. Whilst C.O.G.S.A. 1992 does not specifically legitimise the concept of the carrier taking an indemnity from a bank it nonetheless facilitates it, but is the process a licence for abuse ? The answer is "probably not". The main reason the bank issues an indemnity is because the banking process has failed for some reason or another to make the bill of lading available to the buyer in time for collection of goods on arrival of the vessel. The bank knows who its client is and the degree of trust that it has in the client. Providing the bank uses the client as postman for the indemnity it should not fall into the wrong hands so third party fraudsters should not be able to take advantage. If the client defaults then the bank will have made an error or judgement and will suffer the consequences.

E & I Clauses and delivery without production of bill of lading. Sometimes shipowners acting under charterer's orders deliver cargo to non holders of bills of lading in exchange for an indemnity from the charterer. Charterparties often include a standard Employment and Indemnity clause that the ship owner will indemnify the ship owner for the consequences of following the charterer's instructions in relation to bills of lading. If goods are miss-delivered to a non-holder of a bill of lading the lawful holder sues and recovers from the ship owner who in turn reclaims the money from the charterer under the E & I clause. Would the **Brown Jenkinson v Percy Dalton** principles apply to such indemnities ? If so would the indemnity be unenforceable ? It was assumed that the indemnity would be enforceable by the Privy Council in **Sze Hai Tong**. **v Rambler Cycle Co**.[111] A carrier delivered the goods to a buyer who had not paid and without production of the bill of lading after a bank indemnity was issued to the carrier by the bank for any liability the carrier might suffer from such delivery. The bank assumed that if the carrier was liable then the Bank would also be liable, but the issue was never argued in court. The carrier was inevitably found liable following **Glyn Mills Currie v East & West India Bank,**[112] and the bank fulfilled its indemnity. However because the issue was not argued it is still an open question as to what a court would decide if the issue came up for judicial consideration.

International Conventions and terms and conditions of Carriage. The Hague Rules, The Hague Visby Rules and The Hamburg Rules impose duties on sea cargo shippers and carriers and confer rights on the parties, in respect of cargo care during carriage and in respect of the clear and safe labelling of cargo before shipment. These rights become terms of the contract of carriage by incorporation into shipping documents. The International Conventions are discussed in the following chapter.

110 **The Delfini** [1990] 1 Lloyd's Rep 252.
111 **Sze Hai Tong Bank Ltd v Rambler Cycle Co. Ltd** [1959] A.C. 576..
112 **Glyn Mills Currie v East & West India Bank** [1882] 7 App Cas 591