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Stuck in the Middle: Freight Forwarder – Forwarding Agent or Contracting Carrier?

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Declaration

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

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§ 1 Liability of a freight forwarder

The freight forwarder has always played an important role in commerce and international carriage of goods. Traditionally the freight forwarder was the link between the owner of the goods and the carrier, and provided forwarding or clearing services. The forwarder acted as the agent for the cargo owner, and in some cases at the same time for the carrier.¹ Forwarding agents would have co-operating partners in other countries, to whom they direct instructions for the receipt of the cargo at destination and for customs clearance. With the advent of containerisation the forwarder undertook activities such as packing and cargo consolidation on his own account – as principal. In modern days the freight forwarder has adopted a new role in which he is not only assisting the parties in the transportation of goods, but in ‘undertaking’ the carriage by his own means of transport or by making arrangements with other transport providers.² In the role of a principal, the freight forwarder is known by many names, eg Non-Vessel Owning/ Operating Common Carrier (NVOCC), Multimodal Transport Operator (MTO), logistics service provider, etc.³

In a broad sense the activities of a freight forwarder fall under the classical Roman contract type of *mandatum*, but nowadays a distinction has to be made between the three different roles a forwarder can fulfil.⁴ A freight forwarder can act as a mere *agent* on behalf of his customer or the performing carrier, as the *contracting carrier* assuming carrier liability without performing the carriage himself or as the *performing carrier*.⁵ The liability of the freight forwarder depends on its role and the governing legal regime.

The purpose of this paper is to examine the legal determination of the different functions of a freight forwarder and its potential liability in the context of the proliferation of multimodal transport involving sea carriage. Therefore it is necessary to lay out the duties and liabilities of a forwarder in its classical role as forwarding agent and in its modern role as MTO. Furthermore legal principles and case law will show how to determine the role of a forwarder in each individual case. The possible claims, counter-claims and recourse actions in the triangle between the shipper, forwarder and actual carrier will be highlighted with special reference to the protection of sub-contractors via Himalaya clauses. Finally the transport documents issued by a forwarder and their legal meaning will be analysed.

¹ Ramberg ‘Unification of the Law of International Freight Forwarding’ (1998) 3 *Unif L Rev* 5.

² This is a fairly modern development. As late as 1965 it was still held to be exceptional for a freight forwarder to be a principal to a contract for sea carriage, cf *Langley Beldon v Morley* (1965) 1 *Lloyd’s Rep* 297, 306 as mentioned in Holloway ‘Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law’ (1986) 17 *J Mar L & Com* 243, 244.

³ UNESCAP ‘The Evolving Role of the Freight Forwarder’ p 1.

⁴ Ramberg ‘Unification of the Law of International Freight Forwarding’ (1998) 3 *Unif L Rev* 5.

⁵ *Ibid.*

I. Functions of a freight forwarder

1. Transshipment

Transshipment is an essential feature of modern container operations. Due to high operation costs, large container ships usually serve only a few so called 'hub ports'. The carriage from such ports to regional ports is for most of the time sub-contracted by shipping lines to local operators of feeder vessels.⁶ At the hub ports the containers are transhipped from the mother vessel to feeder vessels or vice versa. Furthermore, as a result of modern technological developments, such as post-Panamax containerships, improved cargo handling facilities at port terminals, roll-on/roll-off ships, and the invention of standardized containers, which permit their integrated use on various modes of transportation, are frequently transferred to other means of transportation (truck, train, airplane) for inland carriage.⁷ Where cargo passes in transit through a country, the freight forwarder co-ordinates the transfer of the cargo from one transport vehicle to another.⁸ This involves booking space on a transshipment vessel, discharging, sorting, loading and distribution of the cargo to various consignees. Transshipment agents generally act as agent for the shipper/consignee or another freight forwarder.⁹ Within the context of multimodal transport the forwarder might also act as contracting carrier.¹⁰

2. Packing, warehousing and distribution

The freight forwarder may arrange for packing, warehousing and distribution of cargo.¹¹ He keeps the goods in storage before export and subsequent to import whilst awaiting transportation or distribution. The freight forwarder can either operate his own warehouse and offer those ancillary services as principal to the shipper and other freight forwarders or function as an agent in procuring the service from independent contractors for his customers.¹² The fact that the freight forwarder does not own the warehouse, does not automatically lead to the conclusion that he offers the service as agent. In providing multimodal services the freight forwarder might act as principal and then sub-contract the physical performance.¹³ A contract of carriage can extend to

⁶ Cioarec 'Proper Completion of Bills of Lading involving Transshipment' 28 Nov 2007 *Forwarderlaw.com*.

⁷ Cf Palmer/DeGiulio 'Terminal Operations and Multimodal Carriage: History and Prognosis' (1989) 64 *Tul L Rev* 281, at pp 284, 285, 294; Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243.

⁸ *Id* at p 284.

⁹ UNESCAP 'The Evolving Role of the Freight Forwarder' p 2.

¹⁰ Herber 'Nochmals: Multimodalvertrag, Güterumschlag und anwendbares Recht' *TranspR* 2-2005, 59, 60; Drews 'Der multimodale Transport im historischen Zusammenhang' *TranspR* 5-2006, 177, 180.

¹¹ Masud 'Freight Forwarding: a Pakistani Primer - Part III: Forwarder as Agent' 28 July 2008 *Forwarderlaw.com*; Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 244.

¹² UNESCAP 'The Evolving Role of the Freight Forwarder' p 2.

¹³ *Ibid*.

storage services before and after discharge of the cargo awaiting custom clearance if so contemplated by the parties.¹⁴

3. Arranging cargo insurance

Freight forwarders are not cargo underwriters, but merely arrange cargo insurance, for a service fee, as agents for their customers.¹⁵ In fact, it is good practice for a freight forwarder to suggest to his customer to procure insurance cover for his cargo on a gratis basis.¹⁶ The selling of ancillary services, such as insurance, for a commission is a traditional source of income for freight forwarders. However, in some countries it is illegal to sell insurance unless special authority has been granted by the government. Following the EU Insurance Mediation Directive (IMD) 2002/92/EC this is now the case for most EU member states.¹⁷ Implementing the Directive the UK passed legislation in January 2005, requiring all sellers of insurance to be registered with the Financial Services Authority (FSA).¹⁸ UK freight forwarders are thus precluded from selling insurance to cargo.¹⁹

4. Documentation and customs clearance

The freight forwarder provides all necessary documentation for the import and export of goods having regard to legal- and customs requirements and the terms of the sales contract.²⁰ He performs this function as an agent of the customer.²¹

5. Payment of freight and local taxes

Also as agent of the shipper/consignee, the freight forwarder co-ordinates and effects payment of freight to the performing carrier and any local taxes, eg VAT or government service tax on behalf of his customers to avoid delays.²²

¹⁴ *The Izmir (infra)* 2004 SCOSA D211, 219 (D&C LD) ia relying on a statement by Lord Wilberforce in *Port Jackson Stevedoring (Pty) Ltd v Salmond and Spraggon (Australia) (Pty) Ltd (The New York Star)* (1980) 3 All ER 257, 264.

¹⁵ In the old case of *A Gagniere & Co v The Eastern Company of Warehouses* (1921) 1 *LI L Rep* 188, however, the forwarding agent was at the same time the insurer of the cargo.

¹⁶ Masud 'Freight Forwarding: a Pakistani Primer - Part III: Forwarder as Agent' 28 July 2008 *Forwarderlaw.com*.

¹⁷ UNESCAP 'The Evolving Role of the Freight Forwarder' p 2.

¹⁸ *Ibid.*

¹⁹ This has led to the growth of online insurance services such as www.gocargoinsurance.com where freight forwarders can redirect cargo owners. The freight forwarder will receive a commission providing the cargo owner nominates a referral by the freight forwarder.

²⁰ Masud 'Freight Forwarding: a Pakistani Primer - Part III: Forwarder as Agent' 28 July 2008 *Forwarderlaw.com*.

²¹ UNESCAP 'The Evolving Role of the Freight Forwarder' p 3.

²² *Ibid; Heskell v Continental Express* (1953) 83 *LI L Rep* 448, 449.

6. Transportation distribution analysis

The freight forwarder is considered the architect of transport in international trade.²³ He advises his customer - as principal - on the available transportation options and plans the most efficient route according to the customer's needs.²⁴

7. Transport arrangements

After the customer has decided on the route and mode of transportation, the freight forwarder makes the necessary bookings and dispatches the goods as an agent.²⁵ In his classic role he arranges contracts of carriage and establishes direct contractual relationships between his customer - the shipper - and the carrier.²⁶ He furthermore pays freight charges, insurance, packing, customs duties and then charges his customer a fee, usually a percentage of the total expenses.²⁷

In contrast, as will be discussed further below, the freight forwarder can act as principal contractor arranging the whole carriage in his own name.²⁸ As contracting carrier he charges the shipper a straight freight charge, instead of passing on the freight that the freight forwarder would pay to the performing carrier.²⁹ He then arranges to pay lower freight rates to the carrier and obtains his profit from the rate difference.³⁰ The forwarder's responsibility towards the shipper will be that of a performing carrier; it has the primary obligation to deliver the goods and the secondary obligation to accept liability for damages.³¹ If the freight forwarder performs the actual carriage himself, he acts as principal.³² Lastly, the freight forwarder can take a hybrid position acting as forwarding agent in arranging the ocean carriage, and contracting as principal for other portions of the transportation, eg the road leg.³³

²³ Masud 'Freight Forwarding: a Pakistani Primer - Part I: Introduction' 30 May 2008 *Forwarder-law.com*.

²⁴ UNESCAP 'The Evolving Role of the Freight Forwarder' p 3.

²⁵ *Ibid.*

²⁶ Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 244 citing *Jones v European and General Express* (1920) Com Cas 296 (KBD): It must be clearly understood that a forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as an agent for the owner of the goods to make arrangements with the people who do carry – steamships, railways and so on – and to make arrangements so far as they are necessary for immediate steps between the ship and the rail... per Rowlatt J; Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 3.

²⁷ Leung 'The Dual Role of the Freight Forwarder: Vastframe Camera Ltd v Birkart Globistics Ltd' (2007) 38 *J Mar L & Com* 97.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² Ramberg 'Unification of the Law of International Freight Forwarding' (1998) 3 *Unif L Rev* 5.

³³ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 504.

8. Cargo Consolidation and multimodal transport

The intermediate service of cargo consolidation is one of the key functions of freight forwarders today.³⁴ The container revolution has provided the perfect medium for grouping cargo and hence there has been a natural transition in moving away from small individual parcels to cargo consolidation.³⁵ The container and other developments provide for an integrated movement of using different transport modes rather than unimodal movement.³⁶ The freight forwarder collects and assembles parcel cargo from different shippers, who are often other freight forwarders, and combines the goods for shipment/ distribution to the respective receivers in the country of destination.³⁷ A container packed with parcel cargo from different shippers and intended for different consignees is known as 'LCL' (less than container load) in contrast to the container loaded with cargo from one shipper to one consignee, which is referred to as 'FCL' (full container load).³⁸ The consolidated cargo is packed and stowed in containers and dispatched to the different consignees at the place of destination by the freight forwarder, using the transport capacity it negotiated with various shipping lines or other carriers.³⁹ In these situations the freight forwarder enters into contracts of carriage with the performing carriers and his responsibility towards the shipper is often that of a contracting carrier.⁴⁰

II. Duties as forwarding agent

There are no international conventions in the field of freight forwarding and thus the duties and liabilities of a forwarding agent depend on national legislation.⁴¹

In common law countries the freight forwarder's rights and obligations are largely based on the concept of agency where he acts on behalf of the consignor or consignee in arranging the transport of their goods.⁴² As a general principle, an agency relationship will arise between two parties if they consent to the creation of such a

³⁴ UNESCAP 'The Evolving Role of the Freight Forwarder' p 1.

³⁵ *Ibid.*

³⁶ Palmer/DeGiulio 'Terminal Operations and Multimodal Carriage: History and Prognosis' (1989) 64 *Tul L Rev* 281, 285.

³⁷ UNESCAP 'The Evolving Role of the Freight Forwarder' p 1.

³⁸ Ramberg 'Unification of the Law of International Freight Forwarding' (1998) 3 *Unif L Rev* 5; Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 30.

³⁹ *Ibid.* Maximum capacity utilisation results in savings that benefit both the forwarder and the shipper, Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 3.

⁴⁰ Leung 'The Dual Role of the Freight Forwarder: Vastframe Camera Ltd v Birkart Globistics Ltd' (2007) 38 *J Mar L & Com* 97.

⁴¹ Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p. 2.

⁴² Masud 'Freight Forwarding: a Pakistani Primer - Part I: Introduction' 30 May 2008 *Forwarder-law.com*.

relationship between them.⁴³ The consent can either be express or can be implied from the conduct of the parties and the circumstances of their dealings.⁴⁴

The freight forwarder acting as an agent is subject to the established rules of agency like the exercise of due care in the performance of his duties, being loyal to the principal, obeying his reasonable instructions and being able to explain all transactions undertaken by him on behalf of his principal.⁴⁵ In turn, the forwarder is entitled to all defences and limitations of liabilities that are available to an agent.⁴⁶

1. Duty of skill and care

A degree of skill and care must be exercised, which is appropriate for the performance of forwarders' duties and consistent with the standard of a reasonable competent freight forwarder.⁴⁷ In determining the standard of care courts will have recourse to local customs and practices.⁴⁸

2. Duty to act with reasonable dispatch

A freight forwarder is under the obligation to perform his duties within a reasonable time, which might be determined by the industry norm or by a course of dealing between the parties. If the forwarder is unable to meet his primary obligation, he must inform the customer, so that alternate arrangements can be made.⁴⁹ However, when the forwarder acts as agent of the carrier, there is no general duty to inform the shipper about delays in the departure time of the carrying vessel.⁵⁰ A freight forwarder should avoid exposing himself to uncontrollable liability by guaranteeing arrival times to his customers, since the schedules of shipping lines never guarantee arrival or departure times.

⁴³ Reynolds *Bowstead & Reynolds on Agency* (18th Ed) states at § 2-028: 'Where there is an express agreement, whether contractual or not, between the principal and agent, this will constitute the relationship of principal and agent and the consent of both parties will be contained in it.'

⁴⁴ *Branwhite v Worcester Works Finance Ud* (1969) 1 AC 552, 587: 'While agency must ultimately derive from consent, the consent need not be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of facts upon which the law imposes the consequences which result from agency.', per Lord Wilberforce; Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at § 2-001.

⁴⁵ Masud 'Freight Forwarding: a Pakistani Primer - Part I: Introduction' 30 May 2008 *Forwarder-law.com*.

⁴⁶ *Ibid.*

⁴⁷ Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 23.

⁴⁸ Some freight forwarders advertise compliance with BS EN ISO 9002:1994 standards (Quality management system maintained by the International Organisation for Standardization applicable to the service sector) and some customers actually specify compliance with ISO standards in logistics services contracts. Such a term may be implied in relation to a substantial forwarding project especially where compliance with ISO requirements is common practice in the industry. UNESCAP 'The Evolving Role of the Freight Forwarder' p 4.

⁴⁹ *Id* at p 5.

⁵⁰ *The MSC Spain* (2007) SCA 12 (SCA SA) para 17.

3. Duty to follow principals instructions and to preserve his interests

Unless unlawful behaviour is requested, the freight forwarder must take his principal's instructions.⁵¹ A freight forwarder owes a duty to inform the principal of any loss of cargo and, if necessary to preserve the principal's right of suit against the carrier, notice of claim must be given.⁵²

4. Duty to select proper carrier and other service providers

The freight forwarder has a duty to select the carrier and other service providers with due care unless the customer requires the engagement of specific carriers.⁵³ But, once the selection is made, the forwarder is under no duty to supervise the actions of carriers whom he reasonably and properly expects to perform their normal obligations competently.⁵⁴ In arranging sea carriage as an agent for the shipper the forwarder fulfils his obligation in handing over the cargo to the eligible ocean carrier.

5. Duty to advise on insurance

There is no general duty at law for a forwarder to advise on insurance. However, it is good practice to advise the customer on the prudence of obtaining cargo insurance, particularly because recovery of the whole loss is unlikely where the carrier is able to limit his liability. A forwarder, who wants to avoid unnecessary litigation, will always advise his customer to take out insurance, because of the common misapprehension among shippers that forwarders are under the contractual obligation to reimburse their customer for any loss, however caused.

III. Liability as forwarding agent

1. Breach of duty

A breach of the aforementioned duties, except for the failure to advise on insurance, is likely to result in the freight forwarder being contractually liable to his customer for loss or damage. For instance, false statements as to the carrying vessel, the manner of loading and the actual shipping date constitute a breach of the fiduciary duty the forwarder has towards its principal.⁵⁵ If the freight forwarder promised to procure cargo insurance for his customer, but fails to do so, and the customer suffers a loss, the freight forwarder will be liable for that loss as well.⁵⁶

⁵¹ UNESCAP 'The Evolving Role of the Freight Forwarder' p 5; *The MSC Spain* (2007) SCA 12 (SCA SA) para 17.

⁵² UNESCAP 'The Evolving Role of the Freight Forwarder' p 5; *Marbrook Freight Ltd v KM1 (London) Ltd* (1979) 2 *Lloyd's Rep* 341 (implied term of contract), as mentioned in *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 24 n 139.

⁵³ *Ibid.*

⁵⁴ *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* (1971) 2 *Lloyd's Rep* 306 per Lord Phillimore.

⁵⁵ *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 21.

⁵⁶ UNESCAP 'The Evolving Role of the Freight Forwarder' p 5. In *Club Specialty (Overseas) Inc v United Marine* (1971) 1 *Lloyd's Rep* 482 a freight forwarder was led to believe that his

As an agent of the shipper the forwarder is only liable to the shipper for its own negligence or breach of contract including negligence in choosing incompetent carriers⁵⁷ or failure to pass along shipper instructions accurately.⁵⁸ When a forwarder selects someone to perform the transport services, that selection fulfils the forwarder's obligations in the absence of proof that the selection itself was negligent.⁵⁹ He is therefore not liable for failures of parties whom it contracts with on behalf of its principal, unless he knew of those failings or ought to have taken action either to remedy them or at least to inform its principal so that damage might be avoided or mitigated.⁶⁰

2. Loss of goods

A freight forwarder is liable for loss of- and physical damage to goods, if the event giving rise to the loss or damage was caused by the freight forwarder himself. A claim for negligence can be brought by the legal owner of the goods as well as anyone with a proprietary or possessory interest in the goods at the time the damage occurred.⁶¹ He may also be liable to his principal in contract to indemnify his principal against any loss or damage suffered as a result of the forwarder's act or omission.⁶²

Where the forwarder cannot be sued in contract, because the contractual relationship was established between the shipper and the actual carrier directly via the agency of the forwarder, the forwarder can still be liable in the same way carriers are liable for the acts of their sub-carriers in terms of bailment.⁶³ The argument that a company, who merely acted as forwarders could not be held liable for the damage of cargo while in the hand of a sub-carrier, since the goods were not in the forwarder's possession, was

customer took out insurance for the goods and was thus not liable for failing to advise on available insurance. In *1013799 Ontario Ltd v Kent Line International Ltd* (2000) 21 CCLI (3d) 312 (Ont SC) the forwarder was held liable for having omitted to inform his customer about the availability of an extended insurance cover ('all risks'). The shipper requested to arrange such an insurance and even though the forwarder had assured its client that obtaining such cover would not be a problem, the goods were still shipped under a standard insurance policy. Cf *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 23.

⁵⁷ *Zima Corp v M/V Roman Pazinski* 493 FSupp 268 (SDNY 1980); *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 456 (SDNY 2005); *Government of the United Kingdom of Great Britain and Northern Ireland v Northstar Services Ltd* 1 FSupp2d 521 (DMd 1998); Block 'Dangerous Goods and Ocean Transportation Intermediary Liability' 19 Nov 2005 *Forwarderlaw.com*.

⁵⁸ *Ingersoll Milling Machine Co v M/V Bodena* 1987 AMC 988 (SDNY 1985).

⁵⁹ *John Brown Engineering Ltd v Hermann Ludwig Inc* 1991 AMC 2540 (DSC 1991); *Prima US Inc v Panalpina Inc* 223 F3d 126, 130 (2nd Cir 2000).

⁶⁰ *Marston Excelsior Ltd v Arbuckle, Smith & Co Ltd* (1971) 2 *Lloyd's Rep* 306 per Lord Denning; cited in *The Maheno* (1977) 1 *Lloyd's Rep* 81, 87.

⁶¹ Mere contractual rights are not sufficient to establish a claim in tort. Cf only *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* (1986) 2 *Lloyd's Rep* 1.

⁶² UNESCAP 'The Evolving Role of the Freight Forwarder' p 6.

⁶³ Under bailment principles, the cargo owner (and in cases of attornment the holder of the bill of lading) is permitted to sue for compensation, not only its contractual partner but also each and every party to whom its goods were delivered for onward transport (the sub-bailee, and the sub-sub-bailee). Cf Colford 'Liabilities of North American Rail Carriers: one Continent but two systems' 25 Feb 2006 *Forwarderlaw.com*; Todd 'The bill of lading and delivery: the common law actions' (2006) *LMCLQ* 539, 552 et seq; *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 32.

rejected in the High Court of Australia.⁶⁴ A custodian for reward must exercise due and reasonable care for the safety of the articles entrusted to him.⁶⁵ The standard of care depends on the circumstances of the particular case.⁶⁶ Where goods have been lost the burden of proof is on the defendant to show that the loss was not caused by his negligence to use such care and diligence as a prudent man would exercise in relation to his own property.⁶⁷ With respect to theft, where the defendant cannot positively prove the actual point of time when the goods were stolen, it is sufficient to show that he exercised all reasonable precautions to guard against the crime.⁶⁸

3. Negligent advice and misrepresentation

In general, a freight forwarder may be held liable in tort (delict) for negligent advice or negligent misrepresentation where there is a sufficient proximate relationship between the party that suffers the loss and the freight forwarder and the loss is a reasonably foreseeable consequence of the negligent advice or misrepresentation.⁶⁹

To avoid liability for misrepresentation in cargo claims, contracting carriers should identify in their bills of lading all the carrying vessels and the parts performed by such vessels.⁷⁰ In *Sabo SA v United Arab Shipping Co*⁷¹ the bill of lading only evidenced the ports of loading and discharge and the mother vessel, without any reference to pre-carriage by a feeder vessel and the port of transshipment, to achieve compliance with the letter of credit (l/c) which did not allow transshipment. The feeder vessel sank and the cargo was destroyed. The court, although it did not have to decide on this point, stated that a carrier might be liable for misrepresentation in such a situation, since the omission could have been intended to deceive the paying bank and the endorsee of the bill of lading. As a further consequence the carrier might not be entitled to rely on Hague-Visby Rules (HVR) defences and the standard P&I insurance, which only covers the mother vessel.

⁶⁴ *Thomas National Transport (Melbourne) Proprietary Ltd v May & Baker (Australia) Proprietary Ltd* (1966) 2 *Lloyd's Rep* 347 (HC Aus). The court held that the forwarders had actual possession of the goods as bailees throughout the whole transit, either by their own servants or through a sub-contractor.

⁶⁵ *The Maheno* (1977) 1 *Lloyd's Rep* 81, 87.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, citing *J. Spurling Ltd v Bradshaw* (1956) 1 *Lloyd's Rep* 392 (CA) per Lord Denning.

⁶⁸ *Ibid.*, citing *Petersen v Papakura Motor Sales Ltd* (1957) NZ.L.R. 495, 496, citing Lord Wright in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* (1937) 1 KB 535, 538-539, quoting in turn from Lord Halsbury in *Morison Pollexfen and Blair v Walton* (unreported).

⁶⁹ The requirement for a proximate relationship restricts the categories of people to whom a freight forwarder owes a duty of care. The requirement for the loss to be 'foreseeable' limits the forwarder liability to losses which are within the reasonable contemplation of the freight forwarder. The foreseeability-test is an objective one and thus will not depend on the particular forwarder, but on a reasonable forwarder in those circumstances. Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at § 9-115; *Gran Gelato Ltd v Richcliff (Group) Ltd* (1992) Ch 560, 569; UNESCAP *The Evolving Role of the Freight Forwarder* p 6.

⁷⁰ Cioarec 'Proper Completion of Bills of Lading involving Transshipment' 28 Nov 2007 *Forwarderlaw.com*.

⁷¹ (2005) EWHC 307 (QBD(Comm)).

IV. Freight forwarder as carrier's agent

Traditionally the freight forwarder acts as an agent for the cargo interest.⁷² Today the freight forwarder might also act as an agent for the carrier, for example as a Liner Agent for an ocean carrier in arranging bookings of cargo space for shipping lines. The duties and obligations of the freight forwarder can differ depending on his specific role. The forwarding agent must be able to identify his principal to determine whose instructions must be followed. As a general rule, though not conclusive, the freight forwarder is the agent of the party that pays his charges.⁷³ Furthermore, special emphasis is placed on how forwarders conduct themselves towards other parties.

In the South African case *The MSC Spain* the shipper, acting through its forwarder, booked a consignment of perishable fruit for shipment on board of the *MSC Spain*, from Durban to Dubai.⁷⁴ The booking was made through the carrier's booking agents (MSC), who issued a bill of lading on behalf of the ocean carrier. The *MSC Spain* at the commencement of the voyage was redirected to the port of Durban to take on board cargo of a stricken sister ship. The cargo was offloaded some 20 days later than scheduled. The consignment was found to be deteriorated in consequence of the delay in completion of the voyage. In the bill of lading the carrier reserved the right to deviate and to change sailing and arrival dates without notice.⁷⁵ Because of these clauses the shipper would have had no claim against the carrier. He therefore instituted action against the booking agent in delict (tort) on the basis that the booking agent had negligently failed to inform the shipper that the estimated departure date was delayed and that the route had been changed.

The court a quo found that the booking agent's owed a duty of care to the shipper and that its failure to 'act' was therefore wrongful.⁷⁶ The Supreme Court of Appeal reversed the judgement and held that the booking agent did not owe a delictual legal duty to the shipper to take such steps as may have been reasonable to prevent the harm.⁷⁷ The introductory clause on the reverse side of the bill of lading stated that MSC was 'acting as agent for the carrier' in arranging the transport. The court agreed that MSC was the agent of the carrier and thus contractually bound to protect the interests of their principals. The court concluded that the legal duty - the shipper contents was owed to it by the booking agent - would accordingly be in conflict with the contractual obligations the latter owed to its own principal, the carrier.⁷⁸

⁷² *Kukje Hwajae Ins v The M/V Hyundai Liberty and Glory Express Inc* 294 F3d 1171, 1176 (9th Cir 2002).

⁷³ UNESCAP 'The Evolving Role of the Freight Forwarder' p 4.

⁷⁴ *Mediterranean Shipping Company v Tebe Trading Pty Ltd (The MSC Spain)* 2006 (4) SA 495 (N); reversed (2007) SCA 12 (SCA SA).

⁷⁵ (2007) SCA 12 (SCA SA) at para 16.

⁷⁶ *Ibid* at para 15.

⁷⁷ *Ibid* at para 16.

⁷⁸ *Ibid* at para 17.

V. Freight forwarder as dual agent

In issuing a dual agency house bill the freight forwarder may act as agent for the cargo interest to whom it confirms the transport arrangements and at the same time as agent of the carrier by informing that the transport is undertaken on the carrier's terms and conditions of carriage and obtain their consent to a direct contractual relationship. The forwarder executes the house bill 'as agent of the carrier'. Ocean carriers will in most cases be reluctant to pre-authorize the issue of dual agency house bills. In cases where there is no express authority of the carrier to issue the document on his behalf, the carrier can ratify the issue of the documents. As a result, he will be directly liable to the shipper in contract, but under his own terms and conditions.⁷⁹

However, the freight forwarder runs the risk of being held liable for breach of warranty of authority where the ocean carrier rejects to subsequently ratify the issue of the document.⁸⁰ It is arguably trade usage that if an agent acts for a principal who is not identified, the agent is, unless otherwise agreed, a party to the contract and personally liable⁸¹ in addition to his principal.⁸² It has also been held that a person who claims to be an agent, but has no principal, is liable on the contract on the basis that he is his own principal.⁸³

VI. Freight forwarder as contracting carrier

As mentioned above, the freight forwarder may act as a principal vis-à-vis his customer when undertaking some ancillary services in his own right. In this event, he is responsible to the owner of the goods for his own acts and omissions as well as the acts and omissions of his employees or any independent contractor or agent that he may use.⁸⁴

More importantly, the freight forwarder may also act as a principal when he undertakes to get the goods carried to a destination. There is no objection in principle to a forwarder being liable as a contracting carrier.⁸⁵ In order to meet the needs of commercial practice, a new type of party in the carriage of goods was created, the so called Multimodal Transport Operator (MTO). Multimodal transportation 'is characterised by the integration and coordination of various modes of transportation, commonly by

⁷⁹ Jones 'Dual Agency House Bill of Lading (last of Three commentaries)' 15 Jan 2000 *Forwarderlaw.com*.

⁸⁰ Jones 'The Evolution of the House Bill of Lading? (Second of Three commentaries)' 8 Jan 2000 *Forwarderlaw.com*.

⁸¹ Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at §§ 9-016 n 2, cites *ia Cory Bros v Shipping Ltd v Baldan* (1997) 2 *Lloyd's Rep* 58

⁸² *Id* at §§ 9-016, 9-045; *Center Optical (Hong Kong) Ltd v Jardine Transport Services (China) Ltd* (2001) 2 *Lloyd's Rep* 78 at para 42 per Stone J.

⁸³ Although this was doubted on the ground that the correct cause of action should be breach of warranty of authority. *Id* at §§ 9-019, 9-037, 9-081 n 52, 9-082, 9-085 n 95, 9-087 to 9-089.

⁸⁴ UNESCAP 'The Evolving Role of the Freight Forwarder' p 6.

⁸⁵ Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at § 9-024; *Elektronska Industrija Oour Tva v Transped Oour Kintinentalna Spedicna* (1986) 1 *Lloyd's Rep* 49, 50 and 52 (QBD(Comm)); *Hong Kong Hua Gang Industrial Co v Midway International Ltd* (2000) 2 HKC 348, 356 (HK CA) per Rogers JA; Block 'Dangerous Goods and Ocean Transportation Intermediary Liability' 19 Nov 2005 *Forwarderlaw.com*.

means of a metal shipping container, providing point-of-origin to point-of-destination transportation under a single set of shipping documents and based on a single through-freight rate charged to the shipper, regardless of how many modes of transportation are employed or how many carriers are involved.⁸⁶ The MTO accepts contractual liability for the entire carriage performed by several carriers and issues a Multimodal Transport Document (MTD), which covers the entire carriage.⁸⁷ Increasingly modern contracts are conducted on a door-to-door basis.⁸⁸ The service is most commonly offered by ocean carriers or NVOCCs. A freight forwarder in its modern role can act as a multimodal transport operator as well. In this function the forwarder sometimes issues its own bills of lading to the shipper whose cargo he is consolidating.⁸⁹ Multimodal transport contracts involve a series of different modes of carriage and a number of different carriers.⁹⁰ With the more frequent use of containers, the sea carriage only constitutes one leg of the multimodal transport contract.⁹¹

VII. Duties and liabilities of the forwarder in multimodal transport

In segmented transportation the shipper co-ordinates transportation and the carrier for each segment issues documentation for its segment to the shipper.⁹² Claims for loss, damage or delay are filed against the carrier at fault.

Where the freight forwarder, or a specific carrier acts as principal for one stage and as agent for another stage of the carriage, independent contracts of carriage would be entered into. For the leg which the forwarder undertakes as actual carrier, the document issued by the forwarder to the shipper will be a transport document.⁹³ Further transport documents would be issued by the other performing carriers to the freight forwarder, who receives these documents on behalf of the shipper.⁹⁴ Again, claims are filed against the carrier at fault.

In through transportation, one carrier arranges transportation for the other segments.⁹⁵ The ocean carrier issues a bill of lading covering the entire transport. The b/l is known

⁸⁶ Palmer/Degiulio 'Terminal Operations and Multimodal Carriage: History and Prognosis' (1989) 64 *Tul.L.Rev* 281, 283-284; Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p xx.

⁸⁷ Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' JBL 2001, 461, 677-478; De Wit *Multimodal Transport* p 3.

⁸⁸ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 97.

⁸⁹ Wood 'Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues' (1998) 46 *Am J Comp L* 403, 413.

⁹⁰ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 97.

⁹¹ Wilson *Carriage of Goods by Sea* (2nd Ed) p 237.

⁹² Wood 'Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues' (1998) 46 *Am J Comp L* 403, n 6.

⁹³ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 98.

⁹⁴ *Ibid.*

⁹⁵ *Id* at p 404 n7.

as a 'through bill of lading' since the cargo moves through the port of loading and through the port of discharge to the final destination.⁹⁶ The through bill of lading is a single document that evidences more than one contract of carriage.⁹⁷ Claims are filed against the carrier at fault. In issuing a through b/l the carrier represents that the goods have been received for carriage at an inland location, and accepts responsibility for ocean carriage, but does not accept responsibility for land carriage on both ends of the ocean leg. For those stages the ocean carrier will only commit to arrange contracts for the land carriage without responsibility for the actual performance.⁹⁸ Ocean carriers negotiate terms of service and freight charges with the land carriers they engage. The through bill of lading usually includes a clause that appoints the ocean carrier as the cargo owner's agent with authority to agree on behalf of the cargo owner to the land carrier's usual terms of carriage. Thus, when the land carrier accepts the cargo covered by a through b/l a contract of carriage arises directly between the land carrier and the shipper through the ocean carrier's agency.⁹⁹ The ocean carrier collects freight for the entire transport and assumes responsibility for payment of freight to land carriers. The land carrier in return has rights of retention and lien against cargo if the ocean carrier does not pay the freight.¹⁰⁰ Practical problems arise when the goods are damaged on the land leg, since they cannot be recovered from the ocean carrier and not easily from a land carrier operating in another country. However, the cargo interest can get insurance cover for this sort of risk.¹⁰¹ Another problem with through transportation is that cargo bears the risk of insolvency of the ocean carrier. Where the insolvent ocean carrier did not pay inland freight, the land carrier will exercise rights against the cargo owner, who has to pay that part of freight again to receive the cargo.¹⁰²

The classic role of a freight forwarder is comparable to that of a through transport contractor.¹⁰³ He makes arrangements with the carriers as agent for the cargo owner, who has a direct right of action against the responsible carrier, but will not have a claim for damages against the freight forwarder.¹⁰⁴

⁹⁶ Jones 'The 1980 Convention on Multimodal Transport Twenty Years Later!' *UNCTAD Expert Meeting* p 3.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503.

¹⁰⁰ Jones 'The 1980 Convention on Multimodal Transport Twenty Years Later!' *UNCTAD Expert Meeting* p 3.

¹⁰¹ *Ibid.*

¹⁰² *Id* at p 4. In such cases the courts have to decide whether the forwarder received the original payment on behalf of the carrier or as agent of the shipper. In general it can be said that where the shipper pays freight to the forwarder instead of to his true creditor (the carrier), he does so at his own peril and the burden of proving that the forwarder was actually authorised to receive the payment on the carrier's behalf rests on the shipper, *C P Ships v Les Industries Lyon Corduroys Ltée* (1983) 1 FC 736, 738-739 (FC Can), cited in Tetley *Marine Cargo Claims* (4th Ed) Ch 33 pp 14-15. That the bill of lading is marked 'freight prepaid' is not conclusive evidence to establish an agency relationship, *id* at pp 15-17.

¹⁰³ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503.

¹⁰⁴ *Id* at p 504.

In the 1950s, FIATA introduced its first generic document called the Freight Forwarders Certificate of Transport (FCT), which included the details necessary to identify the goods and the obligation of the forwarder to deliver the goods to the holder of the document.¹⁰⁵ However, the liability of the carrier was widely excluded.¹⁰⁶ The shipper did not have a claim against the carrier but had to seek compensation from the insurers, which foreclosed the acceptance of the document.¹⁰⁷ Where the forwarder did not wish to accept liability as the carrier, he could use the FCT or the Forwarder's Certificate of Receipt (FCR).¹⁰⁸ The documents never really gained any recognition and were finally replaced by the FIATA Combined Transport Bill of Lading in 1970.

During those times lack of generally accepted transport documents for the combined transport (through bills of lading) led freight forwarders to develop so called house bills of lading.¹⁰⁹ Because of the proliferation of container carriage on ocean vessels the first house b/l of combined transport were issued by ocean carriers involved in container transport and by Container-Lines.¹¹⁰ Over the time it was acknowledged for inland waterway-, land- and air-carriage.¹¹¹ The through b/l was limited in its use for multimodal transport since it could only be issued by ocean carriers, who in most cases would limit their liability to the leg actually undertaken.¹¹²

Today house b/l's still exist and can be divided in those comparable to the later introduced FIATA Bill of Lading (FBL)¹¹³, in which the forwarders assumes carrier responsibilities, and others, where the forwarder, acting as agent, rarely does more than to confirm the shippers instructions and to provide some information about the carrier it has engaged for the transport. A typical house b/l is issued by a forwarder as agent and incorporates the terms and conditions of a national freight forwarders association.¹¹⁴ It states the particulars of the transport arrangement similar to an ocean b/l, but it does not contain the promise of the forwarder to deliver at destination.¹¹⁵ Regardless of the type of document, the terms and conditions on which the forwarder offers its services can vary considerably, especially in an 'agent' house b/l.¹¹⁶ Furthermore the party receiving the house b/l might confuse it with an ocean b/l. *Jones* states: 'Some agent house bills of lading are a complete sham, issued to reinforce the forwarder's image in

¹⁰⁵ Hoffmann *FIATA Multimodal Transport Bill of Lading und deutsches Recht* p 18.

¹⁰⁶ *Id* at p 40.

¹⁰⁷ *Id* at p 18.

¹⁰⁸ Ramberg 'Unification of the Law of International Freight Forwarding' (1998) 3 *Unif L Rev* 5.

¹⁰⁹ Hoffmann *FIATA Multimodal Transport Bill of Lading und deutsches Recht* p 18.

¹¹⁰ Müller-Feldhammer 'Die Standarddokumente des kombinierten Transports – Hinwendung zum System der modifizierten Einheitshaftung' *TranspR* 7/8-94, 272.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ The FBL is a standard form negotiable multimodal transport bill of lading recommended by FIATA (International Federation of Freight Forwarders Associations), cf *infra*.

¹¹⁴ Jones 'What are the Value Added Benefits of Is a House Bill of Lading? (Final commentary)' 10 Jan 2000 *Forwarderlaw.com*.

¹¹⁵ *Ibid.*

¹¹⁶ Jones 'Is there still a place for a House Bill of Lading? (first of Four commentaries)' 4 Jan 2000 *Forwarderlaw.com*.

the eyes of the customer. The issue of this document confirms a customer's often-inaccurate belief that the forwarder will be responsible if something goes wrong.¹¹⁷ House bills rarely identify the actual carrier; at best they refer to a carrying vessel and confirm that cargo has been loaded on board.¹¹⁸ The vessel could be a feeder vessel and the goods could be transhipped onto a vessel subject to a space charter arrangement. Neither the owner of the feeder vessel nor the charterer will be liable under the agent house b/l that only imposes the obligation to arrange for the carriage of the cargo to the intended destination.¹¹⁹ Since the cargo interest will try to recover from the forwarder, he in return will try to avoid being held liable as a principal.¹²⁰

An important consequence of containerisation and improved transport technology was the introduction of multimodal transport contracts and the use of multimodal transport documents. Where the freight forwarder concludes a single contract with the shipper for multimodal door-to-door carriage, he becomes an MTO and is regarded as carrier. The MTO issues a multimodal transport document to the shipper, which is a receipt for the goods having been taken in charge and is evidence for the terms and conditions of the multimodal transport contract.¹²¹ It can be issued in a negotiable form, in which case it is intended to function in the same way as a bill of lading or in a non-negotiable form to function as a sea waybill.¹²² Claims for damages caused at any point of the journey are filed against the multimodal transport operator.¹²³ 'Shippers and consignees often prefer to deal with one party, who arranges for the transportation of goods from door to door and assumes responsibility throughout, irrespective of whether this is also the party that actually carries out the different stages of the transport.'¹²⁴

When multimodal transport first appeared it was known as combined transport. Through bills of lading were being replaced by generic bills of lading covering multimodal transport, such as the FIATA Combined Transport Document (CTD). The forwarder accepted the obligation to carry the goods door to door or to subcontract parts of it, and the liability for the whole transport. The document could be used for unimodal or multimodal transportation and could be issued as a negotiable or a non-negotiable document. As its successor the FBL, the CTD included standard trading conditions.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*; Whether acting as agent or principal the forwarder usually attempts to contract out of as much responsibility as possible, Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 4. The situation gets worse if hybrid standard trading conditions are used, cf *infra*.

¹²¹ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p xxi.

¹²² *Ibid.*; cf also *infra* § 2.

¹²³ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503.

¹²⁴ 'Development of Multimodal Transport and Logistic Services' *Report by the UNCTAD Secretariat* (TD/B/COM.3/EM.20/2, 15 July 2003) para I 3; cf also Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 245.

In 1973 the ICC Rules for a Combined Transport Document were adopted.¹²⁵ The Rules acknowledged the Combined Transport Operator (CTO), who acts as principal and not as agent of the seller, undertakes to perform or ensure the performance of the transport by two or more modes of transport and owns at least part of the means of carriage.¹²⁶ The CTO was carrier vis-à-vis the sender.¹²⁷ The CTD was able to serve as a document of title¹²⁸, since it could be issued negotiable form and remained under the control of the CTO throughout the transaction.¹²⁹ The introduction of the CTD led to changes in the traditional statements on the bill of lading. The 'on board' notation was replaced by 'taking in charge'; the 'place of receipt' and 'place of delivery' boxes were replaced or accompanied by 'port of loading' and 'port of discharge' boxes. The three new boxes for 'ocean vessel', 'port of loading' and 'port of discharge' were used to clarify that the forwarder acts as carrier and to turn the paper into a 'carrier-type document'.¹³⁰ Furthermore, since transshipment is anticipated by the parties in multimodal carriage the traditional prohibition was done away with.¹³¹ After the document was revised and amended, it became recognized as a letter of credit document by the ICC.¹³²

Combined Transport Documents were replaced by widely used multimodal transport documents such as the FIATA FBL 1992 and the 'Multidoc 95' of the Baltic and International Maritime Council (BIMCO).¹³³ Those standard form multimodal transport documents are equally functioning as a through bills of lading for combined transport involving several carriers, and can be issued as either negotiable or non-negotiable documents. Today they are subject to the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents.¹³⁴ The Rules are not mandatory and only apply if they have been accepted by the shipper and carrier as applicable to the contract of carriage.¹³⁵ They extend the responsibilities of the carrier, who accepts responsibility for the entire trans-

¹²⁵ International Chamber of Commerce (ICC) Publication 273 (1973). The Rules were amended in 1975, ICC Publication 298 (1975).

¹²⁶ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 102-103; Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243.

¹²⁷ Booysen *International Transactions and the International Law Merchant* p 267.

¹²⁸ Kozolchyk 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' (1992) 23 *J Mar L & Com* 206.

¹²⁹ Rule 3(f).

¹³⁰ Schimmelpennig 'Neues FIATA Combined Transport Bill of Lading FIATA FBL' *TranspR* 1988, 53.

¹³¹ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 103.

¹³² Cf Art 25(b)(iii) UCP 400, ICC Publication 400 (1983); Art 26(a)(iii) UCP 500, ICC Publication 500 (1993). Art. 26(b) UCP 500 provides that when a credit calls for a multimodal transport document, a bank will disregard conditions in the credit prohibiting transshipment provided the entire carriage is covered by one transport document.

¹³³ Haak/Hoeks 'Arrangements of intermodal transport in the field of conflicting conventions' 10 (2004) 5 *JIML* 422, 424.

¹³⁴ ICC Publication 481 (1992). Because the United Nations Convention on International Multimodal Transport of Goods 1980 failed and the ICC Uniform Rules had become outdated, the UNCTAD/ICC Rules for Multimodal Transport Documents 1992 were formulated. Cf Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p xx.

¹³⁵ Hoffmann *FIATA Multimodal Transport Bill of Lading und deutsches Recht* p 26.

port, including transport by contractors it has engaged for the land carriage. Under the UNCTAD/ICC Rules, the freight forwarder as principal for carriage or other services is liable according to the same rules which would apply if the customer had entered into a separate contract for such service or carriage.¹³⁶ If the transport involves a sea leg, a carrier has the same liability for loss of damage as in the Hague-Visby Rules. If no sea carriage is involved the Rules provide for an alternative limitation amount of 8.33 SDR per kilo. However, if the loss or damage occurs during a stage of transport that is subject to mandatory law, mandatory law will determine the liability. Where the point of loss can be localised, the carrier accepts liability for its sub-contractors on the basis that its liability is governed by the same mandatory laws that apply to its right of recourse against a sub-contracted carrier, who is responsible.¹³⁷ 'The liability of the issuer of a bill of lading incorporating the UNCTAD/ICC Rules is 'back to back' with the liability of the actual carrier.'¹³⁸ One of the critic points of the Rules is that it shifts the burden of proof for the place of loss or damage from the shipper onto the forwarder, who thus bears the risk of insufficient compensation in recourse actions against carriers and other sub-contractors.¹³⁹

The introduction of the MTD brought with it the necessity to distinguish the document from ocean b/l's. Bills of lading for container shipments usually show a 'place of receipt' and a 'place of discharge' in addition to a 'port of loading' and a 'port of discharge'.¹⁴⁰ If the places of receipt and delivery are the same as the ports of loading and discharge the bill indicates a port-to-port shipment; where they are different and either one or both of the places are situated inland, the bill evidences a multimodal transport. It has been suggested that the 'place of receipt' and 'place of delivery' boxes in an FBL should only be completed in cases where the bill is intended for multimodal carriage.¹⁴¹ The completion of these boxes when the goods are to be delivered ex-ship at the port can lead to unintended consequences. In *The Maersk Rotterdam* the court held that the completion of the place-to-place boxes by the carrier (even though the carriage was port-to-port) had turned the bill into a combined transport bill with the result that the carrier was unable to rely upon the post-discharge exclusion clauses which were by the bill of lad-

¹³⁶ With respect to freight forwarding services which do not engage the freight forwarder's liability as carrier, his liability is based on a duty to exercise due diligence and to take reasonable measures in performing the services, cf Art 6 (1)(1).

¹³⁷ Jones 'The 1980 Convention on Multimodal Transport Twenty Years Later!' *UNCTAD Expert Meeting* p 7.

¹³⁸ *Ibid.*

¹³⁹ According to the ICC Rules, the MTO has to compensate the shipper whether or not the place of damage can be localised. If the transport involves a sea leg the MTO is liable according to HVR limitations unless he can prove that the damage did not actually occur during sea carriage. A recourse action will only be successful if the forwarder can identify on which leg the cargo was damaged. For an example of such an unfortunate outcome, see *infra Bertex Fashions Inc v Cargonaut Canada Inc* 1995 CarswellNat 198 = 95 FTR 192 (FC Can).

¹⁴⁰ Cioarec 'Notations in respect of places of receipt and delivery' 29 June 2007 *Forwarder-law.com*.

¹⁴¹ Budgen 'Completion of Multimodal Transport Bills of Lading - Points to Remember' 6 April 2003 *Forwarderlaw.com*.

ing terms only applicable to port-to-port shipments.¹⁴² Another point in determining the nature of the bill of lading is the notation referring to the vessels name.¹⁴³

Consecutively the main legal problem arising from the evolving role of the freight forwarder, ie the determination whether the forwarder acts as agent of the shipper or as contracting carrier (principal), shall be discussed in more detail.

VIII. Freight forwarder - agent or principal?

Whether the freight forwarder is liable as agent or principal is relevant not only for reasons of liability and the right to delivery, but also for the question whether the freight forwarder can exercise his right as carrier and sue for freight.

The determination depends on the facts of each case and the law applicable in the forum.¹⁴⁴ One has to look at all the circumstances of the arrangement between the parties, such as contracts, correspondences, tariffs, previous dealings, transport documents issued, etc. between forwarder and sub-carrier and forwarder and shipper.¹⁴⁵

Scrutton addresses the position of forwarders as follows: 'Whether the forwarding agent has contracted as an agent or as a principal will turn on the construction of his contract with the shipper and the surrounding circumstances, particularly the relationship between the forwarding agent and the actual carrier. No single factor can be decisive, but the fact that the forwarding agent issues his own "house bills of lading," that he is remunerated by taking his profit from a "lump sum" freight rather than on a commission basis, that he has contracted for a lien in his own name,¹⁴⁶ that the carrying ship was owned by an associated company and managed by the forwarding agent, that the forwarding agent agreed "to collect" rather than "to arrange for the collection of goods from the shipper, and that the forwarding agent held himself out as

¹⁴² *East West Corp v DKBS 1912* (2003) QB 1509, 1514 and 1524 (CA).

¹⁴³ A MTD may contain solely the indication 'intended' or similar qualification with regard to the vessel's name, Art 19 UCP 600, ICC Publication 600 (2006). In contrast, a port-to-port b/l only indicates the 'intended vessel' and not the vessel on board of which the goods have been loaded, it must bear an 'on board' notation indicating the date of shipment and the name of the actual vessel, Art 20 UCP 600 (*supra*).

¹⁴⁴ Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 98; Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 4; D'Arcy *Schmitthoff's Export Trade* (10th Ed) p 606 § 27-025.

¹⁴⁵ Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 98; Wood 'Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues' (1998) 46 *Am J Comp L* 403; Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 4, cites *Tetroc Ltd v Cross-Con (International) Ltd* (1981) 1 *Lloyd's Rep* 192 (QBD) in which case the court analysed the telex messages between the freight forwarder and the sub-carriers, the correspondence between the forwarder and its client, the consignment note (CMR case) and the bill of lading.

¹⁴⁶ *Landauer & Co v Smits & Co* (1921) *LIL Rep* 557, 572.

a "haulage, wharfage and lighterage contractor" although not owing any lighters, have all been held to point towards the forwarding agent being a principal.¹⁴⁷

1. Legal principles

In ascertaining the contractual role of a freight forwarder by the interpretation of the issued transport documents and the conduct of the parties certain legal principles apply.

a) Terms of contract

Whether a person has acted as principal or agent is a matter of fact and depends on the intentions of the parties to be determined in each case as a matter of construction from the terms of the contract as a whole.¹⁴⁸ The decision whether a forwarder was a principal or an agent turns on the impression formed by the wording of the contract and the evidence of surrounding circumstances.¹⁴⁹ As a general rule it can be said that where a forwarder issues a MTD or a house b/l as an NVOCC he is more likely to have acted as principal.¹⁵⁰ But, merely because the freight forwarder issued a bill of lading does not mean that he acted as carrier.¹⁵¹ Where the freight forwarder issued a bill that expressly stated that the forwarder acts as agent only and the ocean carrier issued the master b/l, the forwarder was held to have acted as an agent.¹⁵² Where the forwarder names himself as shipper/consignee in the ocean b/l it is good evidence that the intention was to sub-contract as a principal.¹⁵³

¹⁴⁷ *Boyd Scrutton on Charterparties* (20th Ed) p 55. Similarly, according to the decision in *Zima Corp v M/V Roman Pazinski* 493 FSupp 268, 273 (SDNY 1980) the determination depends on the following criteria: '(1) the way the party's obligation is expressed in documents pertaining to the agreement, although the party's self-description is not always controlling; (2) the history of dealings between the parties; (3) issuance of a bill of lading, although the fact that a party issues a document entitled 'bill of lading' is not always in itself determinative; (4) how the party made its profit in particular, whether the party acted as 'agent of the shipper...procuring the transportation by carrier and handling the details of shipment' for fees 'which the shipper paid in addition to the freight charges of the carrier utilized for the actual transportation'; further similar lists are given by *Tetley and Jones* as cited in *Bertex Fashions Inc v Cargonaut Canada Inc* 1995 CarswellNat 198 = 95 FTR 192 (FC Can) at paras 23, 24 (*infra*); cf also *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 8.

¹⁴⁸ *Universal Steam Navigation Co v McKelvie* (1923) AC 492 (HL); *Ocean Projects v Ultratech* (1994) 2 SLR 369 (CA Singapore); *Reynolds Bowstead & Reynolds on Agency* (18th Ed) at § 9-036; *Boyd Scrutton on Charterparties* (20th Ed) pp 45, 54-55; Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 99; Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 506; *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 4; Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 245.

¹⁴⁹ *Hair + Skin Trading v Norman Air Freight* (1974) 1 *Lloyd's Rep* 443,445 per Bean J.

¹⁵⁰ UNESCAP 'The Evolving Role of the Freight Forwarder' p 7.

¹⁵¹ *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 5; *A Gagniere & Co v The Eastern Company of Warehouses* (1921) 7 *LIL Rep* 188, 189; *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 *NSWLR* 745, 751 (NSW CA); *Zima Corporation v M/V Roman Pazinski* 493 FSupp 268, 273 (SDNY 1980); *J C Penney Co v The American Express Co* 102 FSupp 742 (SDNY 1951).

¹⁵² *Zima Corp v M/V Roman Pazinski* 493 FSupp 268 (SDNY 1980).

¹⁵³ UNESCAP 'The Evolving Role of the Freight Forwarder' p 7.

An FBL constitutes an acceptance by the freight forwarder of legal responsibility as a principal for the entire carriage.¹⁵⁴ In contrast, the BIFA house b/l is a hybrid that can be used as an agent bill, a through b/l or a combined transport b/l.¹⁵⁵ The receiver of such a b/l will in each case have to determine on the facts the nature of the obligation assumed by the forwarder.

Furthermore, if the facts show that a person made a contract as agent, he may still be deemed to have contracted personally and to be liable in addition to his principal.¹⁵⁶ The question whether he did so, again depends on the intention of the parties to be expressed by in the nature and terms of the contract and the surrounding circumstances.¹⁵⁷

b) Signature

Where a person has signed a contract in his own name without qualification, he is deemed to have contracted personally unless a contrary intention plainly appears from other portions of the document.¹⁵⁸ Much weight is generally attached to the mode of signature.¹⁵⁹ Counter evidence must establish without obscurity or ambiguity that the person who signed without qualification did not intend to contract with personal liability.¹⁶⁰

c) *Contra proferentem*

The common law doctrine of *contra proferentem* means that in cases of doubt, a contract is construed against the interest of the author of the contract.¹⁶¹ A bill of lading is

¹⁵⁴ This is expressed in cl 2.1 and 6.1 of the Standard Trading Conditions (1992) governing the FIATA Multimodal Transport Bill of Lading, printed in Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 506; *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 300 F3d 1300, 1306 (11th Cir 2002); Tetley *Marine Cargo Claims* (4th Ed) p 6 n 26.

¹⁵⁵ Cf cl 4-6 of the British International Freight Association (BIFA) Standard Trading Conditions (2005 Edition); Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 506.

¹⁵⁶ Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 99.

¹⁵⁷ As in all matters of formation of contract, the test is an objective one. Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at §§ 9-005 citing *The Swan* (1968) 1 *Lloyd's Rep* 5, 12.

¹⁵⁸ *Id* at § 90 -037(a); Boyd *Scrutton on Charterparties* (20th Ed) p 45.

¹⁵⁹ Gaskell *Bills of Lading: Law and Contracts* § 3.10.

¹⁶⁰ *Internaut Shipping v Fercometal Sarl* (2003) 2 *All ER (Comm)* 760 (CA) per Rix LJ at paras 33, 34, 46, 47, 50-53; *The Frost Express* (1996) 2 *Lloyd's Rep* 375, 378, 379, 381 (CA) per Evans LJ; *Universal Steam Navigation v McKelvie* (1923) *AC* 492 (HL); *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* (2003) 2 *WLR* 711 (HL) at p 717 paras 7, 8; p 750 para 128; p 775 para 176.

¹⁶¹ Tetley 'Seven Rules of Interpretation (Construction) of Bills of Lading' in *Liber Amicorum Robert Wijffels* (2001) pp 359-379 at para II. 1); Lewison *The Interpretation of Contracts* (2nd Ed) pp 168-174 para 6.07, pp 316-319 para 11.05; *Vastframe Camera Ltd v Birkart Globistics Ltd* 2005 *AMC* 2864, 2877 at para 70 (HC HK 2005); *The Starsin (supra)* (2003) 2 *WLR* 711, 760 para 144; *Pera Shipping Corp v Petroship SA (The Pera)* (1985) 2 *Lloyd's Rep* 103.

construed by the courts in the same manner as any other contract.¹⁶² Especially where a particular b/l is a standard form printed by the carrier, it will normally be strictly construed against the carrier.¹⁶³

d) Front vs back of the bill of lading and small print

Thirdly, in determining the identity of a contracting carrier, statements on the face of a bill of lading are generally to be given greater weight than provisions printed on the reverse of the bill.¹⁶⁴ Handwritten or typewritten clauses take precedence over printed clauses¹⁶⁵ and will override the printed clause to the extent of inconsistency¹⁶⁶ where it stands in direct contradiction with the printed clause.¹⁶⁷

Small print on the back of bills of lading is usually declared valid.¹⁶⁸ However the court in *Crooks v Allan* held: 'The clause in question comes in about the middle of thirty closely packed small type lines, without a break sufficient to attract notice. If a

¹⁶² Tetley 'Seven Rules of Interpretation (Construction) of Bills of Lading' in *Liber Amicorum Robert Wijffels* (2001) pp 359-379 at para I, citing *Amaco Overseas Co v S T Avenger* 1975 AMC 782 (SDNY 1975); *Associated Metals & Minerals Corp v M/V Arktis Sky* 1991 AMC 1499, 1507 (SDNY 1991); reversed on other grounds, 1993 AMC 509 (2nd Cir 1992); *Union Steel America Co v M/V Sanko Spruce* 1999 AMC 344, 347 (D NJ 1998).

¹⁶³ *Id* at para II. 1), citing *The Caledonia* 157 US 124, 137 (1895); *Navieros Oceanikos SA v S T Mobil Trader* 1977 AMC 739, 746 (2nd Cir 1977); *Vistar SA v M/V Sea Land Express* 1986 AMC 2382, 2384 (5th Cir 1986); see also *Cart Ltd v Hong Kong Islands Line America SA* 940 F2d 530, 532 (9th Cir 1991).

¹⁶⁴ *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* (2003) 2 WLR 711 (HL) at pp 718-720 paras 11, 15, 16 per Lord Bingham; pp 728-729 paras 45, 47 per Lord Steyn; pp 734-738 paras 71-73, 75, 81-83, 85 per Lord Hoffmann; pp 757, 777 paras 178, 188 per Lord Millett.

¹⁶⁵ *Finagra v O T Africa Line* (1998) 2 *Lloyd's Rep* 622, 629; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* (2000) 1 *Lloyd's Rep* 85, 89-90 (QBD(Comm)); *Burdines Inc v Pan-Atlantic SS Corp* 1952 AMC 1942, 1944 (5th Cir 1952): 'It is a well established general rule that when a contract is partly printed and partly written, the writing controls. This rule extends to the use of a rubber stamp as a means of writing'.

¹⁶⁶ *G R Renton & Co Ltd v Palmyra Trading Corporation of Panama* (1956) 1 QB 462, 511 (CA) per Jenkins LJ: '(...) the court will limit or modify the conflicting printed condition to the extent necessary to enable effect to be given to such main object and intention, or in a case of complete repugnancy wholly reject it.' See also the House of Lords' judgment on this point, (1957) AC 149, 168 (HL) per Lord Morton of Henryton, citing *Margetson & Co v Glynn* (1892) 1 QB 337, 344 (CA) per Fry LJ.

¹⁶⁷ *Kum v Wah Tat Bank Ltd* (1971) 1 *Lloyd's Rep* 439, 445 (PC Mal), The printed term 'not negotiable' on a mate's receipt was not inconsistent with any written words on the document; so the receipt could not be treated as a negotiable document of title. In *Glebe Island Terminals Pty Ltd v Continental Seagrams Pty Ltd (The Antwerpen)* (1994) 1 *Lloyd's Rep* 213 (NSW CA), clear and explicit typed words on a printed bill of lading were ignored as they were inconsistent with the factual background. The Court called their inclusion a 'patent error'.

¹⁶⁸ *Paterson, Zochonis & Co v Elder, Dempster & Co* (1922) 13 *LI L Rep* 513 (CA), even though the court expressed its resentment for small printed clauses: 'Like many other Judges, I desire to protest against the extremely illegible condition of this bill of lading. Shipowners have had a good deal of warning from the courts; and some day they will find themselves deprived of the protection of their exceptions on the ground that they have not given reasonable notice of them as terms of the contract.' per Scrutton LJ at p 517; cf also *Wilson v Cie des Messageries Maritimes* (1954) 1 *Lloyd's Rep* 229, 235, where the Australian court recognized that the print on the back was illegible due to its size and the colour of the paper, but nonetheless upheld the terms, since the face of the bill of lading bore in large, clear and legible print a reference to the clauses and conditions on the back.

shipowner wishes to introduce in his bill of lading so novel a clause as one exempting him from general average contribution- (...) he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it.¹⁶⁹

The German Federal Supreme Court (*Bundesgerichtshof*) has ruled that bill of lading clauses which can only be read with the aid of a magnifying glass do not form part of the bill of lading contract even if they are standard clauses in the trade.¹⁷⁰

But, where the parties have previously done business using the same form of bill of lading and the bill, on its face, clearly refers to the small-print clauses on the back courts will usually uphold such small printed clauses.¹⁷¹

e) Surrounding circumstances

A bill of lading like any contract must be read in the context of the circumstances in which it was entered into.¹⁷² As a matter of fact the 'contract of carriage is rarely made

¹⁶⁹ (1879) 5 QB 38, 41.

¹⁷⁰ *Allianz v India Steamship Company*, German Federal Supreme Court, Decision dated 30 May 1983, II ZR 135/82, (1984) ETL 217. This was confirmed in *Dubai Electricity Co v Islamic Republic of Iran Shipping Lines (The Iran Vojdan)* (1984) 2 Lloyd's Rep 380, 383 (QBD(Comm)), where the court held that, under applicable German law, the exclusive jurisdiction clause in the bill of lading was invalid, because the conditions were not decipherable. Cf Tetley 'Jurisdiction Clauses and *Forum Non Conveniens* in the Carriage of Goods by Sea' at p 63.

¹⁷¹ *PS Chellaram & Co Ltd v China Ocean Shipping Co (The Zhi Jiang Kau)* (1991) 1 Lloyd's Rep 493 (NSW CA), the court refused to strike down illegible clauses, because they formed part of a standard-form bill of lading, cargo interest had received the same bill of lading in the course of previous dealings from the shipper without complaint, the front of the bill of lading clearly indicated that it was subject to conditions; and, thus, the cargo interest could have asked the shipper for a clear copy of the bill of lading; *Insurance Co of North America v M/V Ocean Lynx* 1991 AMC 64, 70-71 (11th Cir 1990), where the clause was only legible with a magnifying glass it was still upheld, since the shipper had dealt with the carrier on numerous prior occasions and had in his possession many copies of the relevant bill of lading and therefore sufficient opportunity to examine the terms.

¹⁷² Hill *Freight Forwarders* p 69; Tetley 'Seven Rules of Interpretation (Construction) of Bills of Lading' in *Liber Amicorum Robert Wijffels* (2001) pp 359-379 at para II. 5); *Reardon Smith Line v Hansen-Tangen (The Diana Prosperity)* (1976) 2 Lloyd's Rep 621, 624 (HL), held: 'No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'; *Frenkel v MacAndrews & Co* (1929) 33 *LIL Rep* 191, 193 (HL); *International Drilling Co v M/V Doriefs* 1969 AMC 119, 122-123 (SD Tex 1968); *Isthmian Steamship Co v California Spray-Chem Corp* 1962 AMC 1474, 1477 (9th Cir 1962), where it was held: 'in giving effect to the provisions of a bill of lading, the conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it, are to be taken into consideration'; *Francosteel Corp v M/V Pal Marinos* 1995 AMC 2327, 2331 (SDNY 1995), stated: 'To resolve the ambiguity in the bill of lading, the court must first turn to the extrinsic evidence offered by the parties regarding their intent in signing it.'

with any formality' and thus courts impute intention to the parties, based on whatever evidence is available.¹⁷³

f) Description by the parties

The way in which the parties describe themselves is not conclusive.¹⁷⁴ 'There is no magic in the word "agency". It is often used in commercial matter where the real relationship is that of vendor and purchaser.'¹⁷⁵ The substance of the matter is more important than the form.¹⁷⁶ The fact that a person is described as a 'freight forwarder' is of limited relevance where the underlying facts evidence that the forwarder is performing the functions of a carrier.¹⁷⁷ However, the burden of demonstrating any deviation from what freight forwarders usually do in the maritime context rests on the party who would show such deviation.¹⁷⁸

The description by the forwarder himself depends furthermore on the statutory definitions of transportation intermediaries in the country the company is based. For example in *Norfolk Southern RR v Kirby*¹⁷⁹ the US Supreme Court refers to the Australian company as 'freight forwarder' where the company clearly fitted the

¹⁷³ Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 245 quoting Devlin J in *Heskell v Continental Express* (1953) 83 *LI L Rep* 448.

¹⁷⁴ Reynolds *Bowstead & Reynolds on Agency* (18th Ed) at § 2-032 n 26; Tetley *Marine Cargo Claims* (4th Ed) p 6 n 32; see also *Elektronska Industrija Oour Tva v Transped Oour Kintinentalna Spedicna* (1986) 1 *Lloyd's Rep* 49, 52 (QBD(Comm)) per Hobhouse J.

¹⁷⁵ *Id* at § 1-032 n 95, citing *Ex p White, re Neville* (1871) LR 6 Ch App 397, 399, and at § 9-037(b).

¹⁷⁶ In *Claridge, Held & Co v King and Ramsay* (1920) 3 *LI L R* 197 (KBD) the forwarder, who pretended to own a ship, but instead hired carriers, had the legal status of a carrier. In *Salsi v Jetspeed* (1977) 2 *Lloyd's Rep* 57 (QBD) even though the plaintiffs knew that the defendant did not own any means of transport, the negotiations as a whole and especially the fact that the defendant issued its invoice 'without any suggestion that the charter, fixture or booking was with anyone else' showed that the defendants were contracting as principals, cf Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 245-247. In *Ocean Projects v Ultratech* (1994) 2 *SLR* 369 (CA Singapore) the forwarder was found to be the carrier, since the shippers treated it as such and no reference was made to the actual carriers engaged by the forwarder under separate contracts.

¹⁷⁷ Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 248 citing Marshall J in *Lee Cooper v Jeakins* (1964) 1 *Lloyd's Rep* 300, 308 (QBD): '(T)he mere fact that on the contractual documents (the freight forwarders) are described as forwarding agents does not and was not intended to constitute them as agents in law of the plaintiff. It is merely used as descriptive of the specialized services which (they) were qualified to provide.' In this case the conduct of the parties and the fact that the document did not specifically state that the forwarders were acting as agents led to the conclusion that they had contracted as principals; *Hong Kong Hua Gang Industrial Co v Midway International Ltd* (2000) 2 HKC 348 (HK CA); Tetley *Marine Cargo Claims* (4th Ed) Ch 33 p 5.

¹⁷⁸ Cf *Chicago, Milwaukee, St Paul & Pacific RR Co v Acme Fast Freight Inc* 69 SCt 692, 693 (SCt 1949).

¹⁷⁹ 125 SCt 385 (SC 2004).

definition of an NVOCC under US law. Under Australian law, however, the company was indeed a freight forwarder.¹⁸⁰

g) Custom and usage

Evidence of custom and usage is admissible to identify rights and responsibilities of the parties and to supplement written contracts in matters not expressly dealt with in that contract.¹⁸¹ In this context 'previous course of dealings' between the parties to a bill of lading is of importance.¹⁸² Where the shipper and carrier are 'sophisticated' business people who have concluded previous contracts of carriage, using the same bill of lading form, or who should be aware of the form, because of its common use in the trade concerned, they are treated as being familiar with the terms of that bill.¹⁸³

h) Charging method

The charging method is another factor that needs consideration in adjusting the freight forwarders contractual obligations.¹⁸⁴ Where the freight is charged at cost or together with a commission (all-inclusive rate) the forwarder appears to act as principal.¹⁸⁵ In contrast, where the forwarder receives a commission from the shipper or a brokerage fee from the carrier rather than making profit from the margin between his charges and his costs (difference in freight rates), the freight forwarder is likely to have acted as agent.¹⁸⁶ Courts have stated that charging an all-inclusive rate is inconsistent with the contract of agency.¹⁸⁷ However, since it is general practice of forwarders to invoice a flat rate including freight, the charging method alone should not be decisive.¹⁸⁸

¹⁸⁰ Block, S. 'Misleading Monikers for Middlemen' 24 May 2007 *Forwarderlaw.com*.

¹⁸¹ Tetley 'Seven Rules of Interpretation (Construction) of Bills of Lading' in *Liber Amicorum Robert Wiffels* (2001) pp 359-379 at para II. 4); *Brown v Byrne* (1854) 118 ER 1304; *Hutton v Warren* (1836) 150 ER 517, 521.

¹⁸² Tetley *Marine Cargo Claims* (4th Ed) pp 6-7 n 33, 29 n 167; *Tetroc Ltd v Cross-Con (International) Ltd* (1981) 1 *Lloyd's Rep* 192, 197 (QBD); *J C Penney Co Inc v American Express Co* 102 FSupp 742 (SDNY1951); *Prima US Inc v Panalpina Inc* 223 F3d 126 (2nd Cir 2000).

¹⁸³ Tetley 'Seven Rules of Interpretation (Construction) of Bills of Lading' (*supra*) at para II. 4).

¹⁸⁴ See *Elektronska Industrija Oour Tva v Transped Oour Kintinentalna Spedicna* (1986) 1 *Lloyd's Rep* 49, 53 (QBD(Comm)); *Hong Kong Hua Gang Industrial Co v Midway International Ltd* (2000) 2 HKC 348, 356 (HK CA); *Carrington Slipways Pty Ud v Patrick Operations Pty Ltd* (1991) 23 NSWLR 745, 753 (NSW CA).

¹⁸⁵ *Tetroc Ltd v Cross-Con (International) Ltd* (1981) 1 *Lloyd's Rep* 192, 197 (QBD); *Zima Corp v M/V Roman Pazinski* 493 FSupp 268 (SDNY 1980); *Bertex Fashions Inc v Cargonaut Canada Inc* 95 FTR 192, 196 (FC Can 1995); Tetley *Marine Cargo Claims* (4th Ed) Ch 33 pp 3, 7; UNESCAP 'The Evolving Role of the Freight Forwarder' p 7.

¹⁸⁶ Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 98.

¹⁸⁷ *Carrington Slipways Pty Ud v Patrick Operations Pty Ltd* (1991) 23 NSWLR 745, 753 (NSW CA), questioned the right of a forwarder, who is the agent of the cargo interest vis-à-vis the ocean carrier, to make a 'secret profit' by contracting as principal with its customer at one freight rate and subcontract with the actual carrier at a lower rate.

¹⁸⁸ UNESCAP 'The Evolving Role of the Freight Forwarder' p 7.

2. Case law

a) United Kingdom

In *A Gagniere & Co v The Eastern Company of Warehouses*¹⁸⁹ the cargo owners claim against the forwarder for the loss of the goods, which were confiscated in the country of destination by the Bolsheviks, was dismissed. It was held that an agent house bill of lading was not a contract of carriage. The document issued by the forwarders was on the form of a bill of lading, but construed properly as a whole merely evidenced a promise by the forwarders to arrange for carriage between cargo owners and steamship or railway line owners on the terms usual for each leg of the voyage. The court held the freight forwarders not to be liable under that contract for country damage in the country of destination, since the usual terms of the carriers would not make the carrier liable for 'acts of revolutionaries or the so-called Government'.¹⁹⁰ Even though the document was headed bill of lading, it was so unqualified that it did not evidence 'an undertaking by the defendants of an absolute character to carry the goods anywhere'.¹⁹¹

In *Singer Co (UK) v Tees and Hartlepool Port Authority*¹⁹² the forwarder was held to have acted as principal and not as agent of the cargo owners in contracting with the port authorities since it undertook responsibility for delivering the cargo to the port of discharge and charged the shipper a lump sum without listing the single amounts charged for the particular services. It was clear from the correspondence that the shipper was looking for 'a complete package of services' and left it to the discretion of the forwarder to subcontract if necessary. Furthermore, the shipping note showed that the forwarder would be responsible to the port authority for port charges and has warranted the accuracy of the description of the goods. The court found that none of the factors were decisive in isolation, but cumulatively, they strongly suggest that the forwarder contracted as principal. The argument that the forwarder's trading conditions described him as an agent of the shipper was rejected as contrary to the facts. The court stated that those conditions indicated no more than that the freight forwarder sometimes act as principals and sometimes as agents and were thus neutral in effect.¹⁹³

b) Australia

In *General Electric-Kirby Appliance Ltd v Alltrans Freight Ltd & Union Steamship Company of New Zealand Ltd*¹⁹⁴ the court also had to decide whether the freight forwarder acted as principal in relation to the carriage of goods, or merely as the seller's agent for arranging the carriage. The court looked at the charging method and held that the forwarder acted as principal and has engaged the ocean carrier as its sub-contractor. If

¹⁸⁹ (1921) 1 *LIL Rep* 188.

¹⁹⁰ The goods were seized in Petrograd Custom House by the Bolsheviks in December 1917.

¹⁹¹ (1921) 1 *LIL Rep* 188, 189.

¹⁹² (1988) 2 *Lloyd's Rep* 164 (QBD(Comm)).

¹⁹³ *Id* at p 167.

¹⁹⁴ Supreme Court of Victoria, Gray J, 24 October 1979 (unreported).

the forwarder had merely arranged carriage as an agent for the seller, the latter would have been liable to pay freight to the ocean carrier and the forwarder for its services. According to the facts the forwarder paid for freight and did not disclose the amount paid to its customer. The forwarder did not charge any fee for services as the customer's agent; the reward lay in the difference between freight paid and freight charged. The further submission that the parties knew that the forwarder did not own a ship and thus intended an agency relationship was rejected by the court.

In *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd* the rule was established that where the house bill covers land carriage at either end of the sea carriage (door-to-door carriage), the forwarder is more likely to have contracted as carrier.¹⁹⁵

c) Canada

In *Bertex Fashions Inc v Cargonaut Canada Inc*¹⁹⁶ the drafting of the house b/l was held to be unsuitable to exonerate the forwarder of the responsibilities of the carrier. The b/l bore the forwarders logo and was signed by its correspondent at the place of shipment. For the criteria to determine the role of the defendant the court relied on Professor Tetley, who states:

'There are no hard rules for determining whether the freight forwarder is acting as agent or as principal contractor. The forwarder's role will depend on the facts of each case. There are, however, several useful criteria which can assist in making that determination:

- (a) the manner in which the forwarder characterizes its obligations in the contract documents;
- (b) the manner in which the parties have dealt with each other in the past;
- (c) whether a bill of lading was issued;
- (d) whether the shipper knew which carrier would actually carry the goods;
- (e) the mode of payment: did the forwarder charge an amount calculated upon the freight and other expenses and then charge a further amount or a percentage as its fee? Or did the forwarder charge an all-inclusive figure?'¹⁹⁷

¹⁹⁵ *The Ocean Trader* (1993) 113 ALR 677 (FCA).

¹⁹⁶ 1995 CarswellNat 198 = 95 FTR 192 (FC Can).

¹⁹⁷ *Marine Cargo Claims* (3rd Ed) pp 694-695; cf also *id* (4th Ed) Ch 33 pp 6-7 for an identical list. The court at para 24 furthermore quoted Jones 'The Forwarder – Principal or Agent, a Carrier or not?' in *Meredith Memorial Lectures 1986*, who provides a similar list at pp 162-163: 'To determine whether a forwarder who has not issued a transport document is a carrier (because he has undertaken the responsibilities for the transport of other goods as a principal), there are a number of questions which the Court must resolve:

- (a) Has the forwarder performed part of the transport using his own employees?
- (b) Did the customer (or its agent) receive a bill of lading issued by another party?
- (c) Did the customer choose the carrier possibly at the time that the costs of transport by different carriers were presented to him for his selection?
- (d) Did documentation given to the customer prior to his delivery of the goods for transport give a reasonable explanation of the role played by the freight forwarder?
- (e) Was there a course of dealings prior to the shipment in question?
- (f) How did the forwarder charge for his services? Was the charge characterized as freight?'

In application of these criteria to the case at stake the court found that ‘a plain reading of the words which appear on the face of the bill of lading would lead a shipper or consignee to believe that the defendant undertook to carry the goods from the point of shipment to the point of delivery. The words “Carriage will be executed in accordance with the general conditions of carriers and/or other parties involved” are not sufficient, in my view, to convey to the contracting party that the Defendant is acting as agent only. These words signify that the defendant's performance of the contract of carriage will be governed by the terms and conditions of the sub-carriers' contracts.’¹⁹⁸ The court found there was nothing in the bill that indicated that the defendant is not assuming the role of the carrier.¹⁹⁹ Furthermore the customer was unaware of the sub-carriers and the forwarder had charged an all inclusive amount for freight.²⁰⁰ The court found that the defendant might be entitled to invoke in its defence any term or condition of the relevant sub-contracts.²⁰¹ However, since the forwarder could not establish which sub-contractor should be responsible, he had to bear the judgement itself.

d) Hong Kong

In *Vastframe Camera Ltd v Birkart Globistics Ltd*²⁰² the plaintiff sued the freight forwarder Birkart for misdelivery of a consignment of single use cameras. The claimant sold the goods on FOB terms to a French buyer (HPI).²⁰³ Vastframe arranged with Birkart to carry the goods from Hong Kong to Le Havre. Birkart made a booking for the carriage through Mitsui OSK Lines (Asia) Ltd (MOL), who in return sent Birkart a booking confirmation. The goods were shipped on a vessel operated by MOL.²⁰⁴ MOL issued a non-negotiable waybill to Birkart, who was named thereon as ‘shipper O/B Vastframe Camera Ltd’.²⁰⁵ Birkart issued an order-house b/l, naming Vastframe as ‘shipper’ and HPI as ‘notify party’.²⁰⁶ Birkart issued an invoice to Vastframe for terminal handling charges, export handling fee and documentation charge, but not for freight. The house bill stated ‘freight collect’. The freight for the ocean carriage was paid by Birkart. Pursuant to a co-operation agreement Birkart issued its local agent at destination (Moiroud) an invoice for profit share of \$ 150. The co-operation agreement provided for ‘50:50 profit/loss sharing for all shipments port to port’ and stated that the parties accept full responsibility ‘for delivery of goods against surrender of required shipping documents and collection of freight and disbursements’.²⁰⁷ HPI received the goods from Moiroud without production of a bill of lading and then refused to pay the purchase price. Vastframe sued Birkart for its loss. The house bill stated that application for delivery should

¹⁹⁸ 1995 CarswellNat 198 para 27.

¹⁹⁹ *Id* at para 29.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² 2005 AMC 2864 (High Court of Hong Kong 2005).

²⁰³ *Ibid* at para 4.

²⁰⁴ *Id* at p 2865 para 6.

²⁰⁵ *Ibid* at para 7.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at para 9.

be made to Moiroud (as agent of delivery for Birkart at destination). It was signed by Birkart without any qualifications.²⁰⁸ The printed form was headed with Birkart's name and the description 'through bill of lading'.²⁰⁹ The boxes 'place of receipt' and 'place of destination' were completed. The front of the bill showed Birkart's address and the following term: 'We hereby certify having taken over from the aforementioned shipper in external apparent good order and condition the consignment detailed below for irrevocable transportation according to consignee order. One of these Through-Bills of Lading must be surrendered duly endorsed in exchange for the goods.'²¹⁰ From the face of the bill and the manner in which it was signed, Birkart appeared to be the contracting carrier vis-à-vis Vastframe.

In contrast, the small print clauses on the reverse of the bill stated that Birkart did not act as a common carrier and principally acted as agent to arrange for transportation.²¹¹ Vastframe alleged, that the house bill evidenced a contract of carriage between the litigants. From Birkart's point of view the intent of the parties was to contract for the arrangement of carriage and not for the carriage of the goods, which is why Birkart did not act as contractual carrier, but as agent of Vastframe.²¹²

Birkart submitted that the fact that it had issued a document entitled 'bill of lading' represented 'an entirely neutral consideration', and that the general rule is that a house bill of lading issued by a freight forwarder is not technically a bill of lading.²¹³ The fact that a freight forwarder might perform different roles explains the creation of hybrid documents. However, the mere usage of versatile contractual documents cannot mean that those documents should be treated as evidencing a contract which the parties did not intend, simply because they could be used for a different purpose in different factual situations.²¹⁴

Alternatively, if Vastframe made any contract of carriage at all, it would have intended to contract with the ship owner to gain more effective rights over the goods and a direct

²⁰⁸ *Id* at p 2868 paras 32, 33.

²⁰⁹ *Id* at p 2867 paras 28, 29.

²¹⁰ *Id* at p 2868 para 34.

²¹¹ *Id* at p 2867 para 26. Birkart especially relied upon two clauses. Clause 10 stated that 'the Company is a private "freight forwarder" and/or "forward agent" and that "the Company does not accept any liability of a common carrier". Condition 3 states "the Agent is not a carrier (common or private, actual or contracting), and may on its sole and absolute discretion refuse to offer its service to any person. The agent does not contract hereunder for the carriage of goods (...) it is a forwarding agent whose principal business is to act as an agent in arranging the transportation of goods on behalf of Customers from Hong Kong to overseas destinations principally by means of air and sea transportation'.

²¹² *Id* at p 2868 para 36.

²¹³ *Ibid* at paras 36, 38. The forwarder relied on definitions in Tetley *Marine Cargo Claims* (3rd Ed) p 693, citing *Zima Corp v M/V Roman Pazinski* 493 FSupp 268 (SDNY1980): 'A house bill of lading issued by a forwarding agent acting solely in the capacity of an agent to arrange carriage is not a bill of lading at all, but at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. It is not a document of title nor within the Carriage of Goods by Sea Act 1992, and it is unlikely that it would ever be regarded as a good tender under a c.i.f. contract.', and in Boyd *Scrutton on Charterparties* (20th Ed) p 376, where it is said that '(m)erely because a forwarder issues a document entitled "bill of lading" does not necessarily mean that the forwarder is a carrier'.

²¹⁴ *Ibid* at para 40.

contractual right of action against the carrier including a right of action in *rem*. Furthermore an ocean bill of lading issued on behalf of the ship owner is always accepted as adequate tender under a letter of credit, where a house bill of a freight forwarder usually is not.

If at all, the contractual relationship between the parties should be determined as one of agency. The intention of the parties was evidenced by the reverse side of the house bill, which was intended to be a mere receipt for the goods. The term on the front of the bill merely indicated that Birkart, as a freight forwarder, had taken over the consignment in order to arrange shipment. Furthermore it would have been unnecessary for Birkart to sign the bill as agents since in their capacity as freight forwarders they were acting on their own behalf. The fact that it did not charge freight, but an all-inclusive fee for the services they provide as forwarders which was a small sum of HK \$185, and received only a sum of \$150 payable in terms of profit-share supported Birkart's argument that it did not act as contracting carrier.²¹⁵ It was relevant that Birkart obtained a seawaybill from MOL naming itself as shipper as there were many examples in the decided cases of freight forwarders, acting as agents, obtaining bills of lading naming themselves as shipper and in such cases, evidence might be given to show that the nominal shipper was in fact acting as agent for another party in which case the contract would be with the forwarder's principal.²¹⁶

The court rejected all of the defendant's arguments and held the forwarder liable as contracting carrier.²¹⁷ The house bill was found to be an order b/l issued by Birkart as principal, which had to be presented on delivery.²¹⁸ The court comments 'was the position to be otherwise, international carriage of goods could no longer function with the degree of certainty which international commerce demands.'²¹⁹ Birkart's intention not to appear as 'common carrier' was not inconsistent with its role as contracting carrier.²²⁰ Using the terms 'forwarder' or 'forwarding agent' in the fine print does not mean that the party is not signing the bill of lading as principal.²²¹ The court adopted the principle in *The Starsin* that when a bill of lading contains on its face an apparently

²¹⁵ *Ibid* at para 43.

²¹⁶ See *Evergreen Marine Corp v Aldgate Warehouse* (2003) 2 *Lloyd's Rep* 597, 602; *Carrington Slipways Pty Ud v Patrick Operations Pty Ltd* (1991) 23 *NSWLR* 745 (NSW CA). Furthermore as mentioned in *Tetley Marine Cargo Claims* (4th Ed) Ch 33 at p 6, referring to *Anglo Overseas Transport v Titan Industrial Corp* (1959) 2 *Lloyd's Rep* 152, 160 (QBD(Comm)): 'Even where the freight forwarder acts as agent of the shipper, it may be the reasonable custom in some places (e.g. the London freight market) that, in quickly finding space for its principal, the freight forwarder binds himself personally to the carrier. In such a case, the carrier can recover the dead freight from the freight forwarder when the cargo does not arrive on time at the place of shipment. The freight forwarder, in turn could recover from his shipper/principal.'; Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 107.

²¹⁷ 2005 AMC 2864, 2870 paras 45 -46. However, Birkart was not the ultimate bearer of the judgement, since Moiroud was held liable to indemnify Birkart against its loss.

²¹⁸ *Id* at p 2873 paras 60, 61.

²¹⁹ *Ibid*.

²²⁰ Leung 'The Dual Role of the Freight Forwarder: *Vastframe Camera Ltd v Birkart Globistics Ltd*' (2007) 38 *J Mar L & Com* 97, 103.

²²¹ 2005 AMC 2864, 2871 para 55.

clear and unambiguous statement of who is the carrier, the shipper usually will not and therefore is not obliged to resort to the detained conditions on the reverse of the bill in an attempt to discover with whom he was contracting. The fact that the signature on the house bill was unambiguous and did not bear any qualification, such as 'as agents', indicates the implicit agreement that obviously inconsistent clauses on the reverse must be regarded as overridden.²²² As a result of the ruling in *The Starsin* the fine print on the reverse of the house bill, in this case again virtually illegible, could not prevail over clear statements appearing on its face.²²³

e) South Africa

The booking agent of a carrier, even though it signs bills of lading, does so on behalf of the carrier/principal and thus merely acts as an agent and not as a principal itself, which in the aforementioned case of *The MSC Spain* was evidenced by the agency agreement between the agent and MSC as well as the charterparty concluded between MSC as charterer of the *MSC Spain* and the owners of the vessel. The court held that the claim in contract against the booking agents of the carrier was misconceived, since they have acted at all times as agents and therefore the contractual relationship was between the shipper and the carrier (MSC).²²⁴ The relationship between the agents and MSC is governed by a written agency agreement and the duties as agent include typically the acceptance of bookings and marketing of its principal's services. The agents were also authorised 'to issue, sign and stamp' bills of lading on behalf of its principal 'and/or the Master'.²²⁵ The *MSC Spain* was on time charter and the charterparty provided: 'The Master, Charterers and/or their agents are hereby authorized by Owners to sign Master's and/or Owners' behalf Bills of Lading as presented without prejudice of this Charter Party...' The court held that it was clear from this clause that the agents acted directly as owner's (ie the carrier's) agent in issuing the bills of lading.²²⁶

f) United States

Under US law freight forwarders and non-vessel operating common carriers are types of intermediaries that arrange for shippers the transportation of cargo aboard a vessel.

²²² *Ibid.* at para 57.

²²³ *Ibid.* Birkart's further argument that it only made a small profit and thus could not be expected to take over carrier liabilities was rejected without further comment. As the *FIATA Legal Handbook on Freight Forwarding* (3rd Ed) states on what is reasonable: 'The reality of the forwarding industry is that customers are price-conscious but forwarder's margins are small. So there is always a potential problem in defining what a customer ought to receive. Courts are not generally receptive to complaints that a forwarder was not paid enough to justify precautions, a point that forwarders should remember when quoting on their services.', at p 102.

²²⁴ *Mediterranean Shipping Company v Tebe Trading Pty Ltd (The MSC Spain)* (2007) SCA 12 (SCA SA) at para 1.

²²⁵ *Id* at para 2.

²²⁶ *Id* at para 3.

Although they perform similar roles, the legal status of the intermediary determines its liability to the shipper.²²⁷

'Freight Forwarders are travel agents for freight. They are no more liable to their customers for other providers no-no's than are vacation-planner intermediaries who book space for tourists in hotels or on cruise lines that later provide disappointing service'.²²⁸ A freight forwarder 'simply facilitates the movement of cargo to the ocean vessel. The freight forwarder 'secures cargo space ..., gives advice on governmental licensing requirements (and) proper port of exit and letter of credit intricacies, and arranges to have the cargo reach the seaboard in time to meet the designated vessel.'²²⁹

'NVOCCs, on the other hand, take much greater responsibility. They issue bills of lading to their shippers (thereby becoming carriers of record), and then receive bills of ladings from actual carriers (thereby becoming steamship line's shipper of record). If something goes wrong in the voyage, innocent NVOCCs can be liable to the same extent as the carrier that caused the loss.'²³⁰ An NVOCC does not merely arrange for transportation of goods, but takes on the responsibility of delivering the goods.²³¹

The terms are defined by federal statute: An NVOCC is defined as 'a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.'²³² The ocean freight forwarder 'dispatches shipments from the US via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers, and processes the documentation or performs related activities incident to those shipments.'²³³ A common

²²⁷ *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 455 (SDNY 2005).

²²⁸ Block 'Dangerous Goods and Ocean Transportation Intermediary Liability' 19 Nov 2005 *Forwarderlaw.com*.

²²⁹ *New York Foreign Freight Forwarders & Brokers Ass'n v Federal Maritime Commission* 337 F2d 289, 292 (2nd Cir 1964); *Prima US Inc v Panalpina, Inc* 223 F3d 126, 129 (2nd Cir 2000); *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 455 (SDNY 2005); see also 46 C.F.R. § 515.2 (US) listing freight forwarder duties.

²³⁰ Block 'Dangerous Goods and Ocean Transportation Intermediary Liability' 19 Nov 2005 *Forwarderlaw.com*.

²³¹ *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 455 (SDNY 2005).

²³² 46 USC App § 1702(17)(B). This definition also appears in 46 CFR § 515.2(o)(2). Where the NVOCC is treated as carrier and therefore subject to law governing carrier responsibilities such as US COGSA, it is in turn entitled to benefit from carrier limitations and exemptions contained therein, cf *Tetley Marine Cargo Claims* (4th Ed) Ch 33 pp 12, 32; *Hartford Fire v Novocargo USA Inc (M/V Pacific Senator)* 257 FSupp2d 665 (SDNY 2003), where the NVOCC was held jointly and severally liable with the actual carrier for cargo damages; *Halm Industries Co Inc v S/S Timur Star* 1985 AMC 391 (SDNY 1984) where the NVOCC was permitted to benefit from the \$ 500/package limitation under US COGSA.

²³³ 46 USC App § 1702(17)(A). Absent of any contractual arrangements, freight forwarders have been denied the protection under US COGSA limitation of liability and exemption provisions, which were held to be applicable only to 'carriers', *Sabah Shipyard v M/V Harbel Tapper* 984 FSupp 569, 574 (SDTex 1997), approved on appeal 178 F3d 400, 404 (5th Cir 1999) (In this case the forwarder was held to be a carrier, since it has issued a bill of lading, notwithstanding the fact that it held itself out to be a 'forwarding agent' in a letter to its client.); *Hoffman-LaRoche v M/V Jefferson* 731 FSupp 109, 110-111 (SDNY 1990); *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 22 n 126.

carrier 'assumes responsibility for the transportation from the port or point of receipt to the port or point of destination.'²³⁴

Because of these definitions the court in *Scholastic Inc v M/V Kitano* decided that the most fundamental difference between an NVOCC and a freight forwarder is that the NVOCC does issue a bill of lading.²³⁵ However, in *Zima Corp. v M/V Roman Pazinski*²³⁶ the defendant was held to be a freight forwarder even though he had issued a b/l. The ocean carrier had issued an ocean bill of lading as well, however, the contract between the shipper and freight forwarder explicitly provided that the latter acted only as agent.²³⁷

When the NVOCC consolidates cargo in a single container it issues a b/l to each shipper and then receives a b/l from the actual carrier for the whole container, which identifies the NVOCC as shipper.²³⁸ This has led to the assumption that the NVOCC acts as a 'hybrid'.²³⁹

The determination whether a forwarder acts as agent or principal can be difficult, especially where hybrids occur. Multimodal transport operators may not only carry the goods, but enter into booking arrangements with the cargo owners.²⁴⁰ The operator may own or operate all, some or none of the means of transport used to carry the goods.²⁴¹ He may contract as principal for the whole carriage or only those parts of it, for which he owns or operates the means of transport or he could contract as principal for some segments and as agent of the cargo owner for others.²⁴²

²³⁴ 46 USC App § 1702(6)(A).

²³⁵ 'It is from the bill of lading - the NVOCC's contract with the shipper that its liability to the shipper for its cargo derives.', *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 455-456 (SDNY 2005), referring to *Prima US Inc v Panalpina Inc* 223 F3d 126, 129 (2nd Cir 2000).

²³⁶ 493 FSupp 268 (SDNY 1980).

²³⁷ The court found further no basis for inferring that the related companies involved in the through-transportation acting in concert undertook to serve as a carrier even though the individual Panalpina companies did not. The situation was analogous to that in *J C Penney Co v The American Express Co (infra)* where several related American Express companies arranged to ship certain goods from a point inland to a port, booked passage on a carrying vessel, issued an in-house bill of lading covering the entire through trip, arranged to pick up the goods at the delivery port, and undertook to arrange for onward transportation of the goods to their final destination. Similarly, in this case the b/l issued by the forwarder (Panalpina Hamburg) named Panalpina Zürich as shipper and Panalpina South Carolina as receiver. The court held that, as in *J C Penney*, no carrier liability will attach to such an arrangement, *id* at p 276.

²³⁸ Figert 'Der Non-Vessel-Operating Common Carrier in der US-amerikanischen Rechtsprechung' *TranspR* 7/8-2006, 269, 270.

²³⁹ *Insurance Co of North America v S/S American Argosy* 1984 AMC 1547, 1550 (2nd Cir 1984); cf also Schoenbaum *Admiralty and Maritime Law: Practitioner's Ed* p 282: 'The law treats the NVOCC as a hybrid. With respect to shippers, the NVOCC is a common carrier that must file a rate tariff with the Federal Maritime Commission. With respect to the vessel and her owner, the NVOCC is a shipper and a customer.'

²⁴⁰ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 504.

²⁴¹ *Ibid.*; Jones 'The 1980 Convention on Multimodal Transport Twenty Years Later!' *UNCTAD Expert Meeting* p 5.

²⁴² Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503,504.

First, one has to determine the role of the forwarder vis-à-vis the shipper. The leading case in the United States is *Chicago, Milwaukee, St Paul Pacific RR Co v Acme Fast Freight*.²⁴³ The court explained that the term 'freight forwarder' was originally applied to persons who arranged for the transportation by common carriers of shippers' goods.²⁴⁴ The forwarder who simply procures transportation by the carrier and handles the details of shipment against a service fee payable by the shipper in addition to the freight rate charged by the carrier, is referred to 'forwarding agent'.²⁴⁵ *Acme* also discusses another class of freight forwarder, subject to liability as a common carrier. This type of forwarder picks up a less than carload shipment at the shipper's place of business and combines the shipment with others in carload quantities. The freight forwarder charged a rate covering the entire transportation and made its profit by consolidating the shipment with others in carload quantities to take advantage of the spread between carload and LCL rates.²⁴⁶ It held itself out not merely to arrange with common carrier for the transportation of the goods, but rather to deliver them safely to the consignee.²⁴⁷ This group of freight forwarders is subject to liability regardless of whether it or an underlying carrier was at fault for any loss or damage.²⁴⁸

In *J C Penney Co v American Express Co*²⁴⁹ the plaintiff brought a suit for cargo damages against its forwarder (American Express Company), which has been engaged by J C Penney to arrange for transportation over a period of five years. In this instance the forwarder was hired to arrange for four partial shipments of goods purchased by J C Penney from an Italian seller. The shipment with which the court was concerned was the second shipment. Ocean bills were issued to the forwarder for the first shipment from Genoa to New York. After a letter of credit had been issued, J C Penney asked the forwarder to arrange for onward shipment of the goods from New York to St Louis. The l/c was amended to stipulate that payment would be made against the forwarder's through b/l, evidencing shipment from Italy to St Louis via either New York or Boston.²⁵⁰ The second partial shipment was arranged in the same manner, except that this time Express Company grouped the shipment with another shipment consigned to them at New York. The vessel issued on-board bills of lading and forwarder issued its own b/l. The goods were shipped in good order and condition and turned out to be damaged by sea water on discharge in New York. The ocean carrier was held to be

²⁴³ 69 SCt 692 (SCt 1949), Jones 'The forwarder: Principal or Agent? The approach of the American Courts' 13 June 2005 *Forwarderlaw.com*.

²⁴⁴ 69 SCt 692, 701 (SCt 1949).

²⁴⁵ See also *J C Penney Co Inc v American Express Co* 102 FSupp 742, 746-47 (SDNY1951).

²⁴⁶ 69 SCt 692, 701 (SCt 1949).

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ 102 FSupp 742 (SDNY1951); affirmed 201 F2d 846 (2nd Cir 1953).

²⁵⁰ The reasons given by the forwarder for the suggested amendment were that 'when a shipment is covered by an American Express Company through bill of lading, our Milan office consign the shipments on the ocean bill of lading direct to the American Express Company at US Port of arrival and they send to us the original ocean bill of lading which enables us to make the In Bond entry and arranged the reforwarding to St. Louis upon arrival of the steamer, and delivery in St. Louis is made against surrender of the original through bill of lading issued by the American Express Company properly endorsed.'

liable for the damage. J C Penney furthermore sued American Express Company alleging that the forwarder had assumed carrier responsibility by issuing its own b/l. In applying the principles set out by the Supreme Court in two other cases the court found that American Express was not a carrier, but merely a forwarding agent and as such was only liable for its own negligence.²⁵¹ Express Company, as the agent of J C Penney, handled the details of the shipment, procured transportation by carrier, and paid all the charges of the carrier. J C Penney reimbursed Express Company and paid a fee for its services. The plaintiff contended that since Express Company consolidated two shipments on the one bill of lading, that it was the type of forwarder who assumed the liability of a carrier. The court disagreed. Although Express Company's correspondent did accept a bill of lading from the ocean carrier, which acknowledged receipt of two shipments, one of which was not J C Penney's, Express Company paid exactly the same freight for the Penney shipment that it would have paid had a separate bill of lading been issued for each shipment.²⁵² The fact that the l/c was modified to allow Express Company to issue its own bill of lading and to route the shipments through Boston as well as New York did not change the forwarder's status. Although it had more authority and discretion on the second shipment than it had on the first, the forwarder remained the agent of the plaintiff on this latter shipment.²⁵³ That this was the intention of the parties was evidenced by their correspondence and the fact that the forwarder had functioned as J C Penney's agent for many shipments in the past.²⁵⁴ The claim against the forwarder was dismissed.

In *Amdahl Corp v Profit Freight Systems Inc*²⁵⁵ a shipper attempted to hold a forwarder (Lep Transport) liable for damage to equipment during carriage from California to Ireland. The forwarder arranged for carriage in accordance with a Shipper's Letter of Instructions (SLI). The forwarder had received the cargo from the shipper and turned it over to a trucker for carriage to the port of loading. The trucker delivered the equipment to a warehouse operated by an NVOVCC (Atlas Consolidated Container), engaged by the forwarder to transport the cargo from there to Ireland. The NVOCC consolidated the equipment into a container with other cargo, booked the container with an ocean carrier, arranged for local delivery to the port of loading and issued a bill of lading to the

²⁵¹ *Chicago, Milwaukee, St. Paul Pacific RR Co v Acme Fast Freight* 69 SCt 692 (SCt 1949); *United States v American Union Transport Inc* 66 SCt 644 (SCt 1946).

²⁵² 102 FSupp 742, 746.

²⁵³ *Id* at p 747.

²⁵⁴ In its letter notifying Express Company that it had had the l/c modified, J C Penney had stated: 'We trust this arrangement will facilitate and expedite the handling of these shipments for our account.' Express Company's bill of lading contained a provision on its face which described the undertaking as follows: 'to act as shipping agent for the Shipper, and as such to make arrangements for the transportation of the property above described by service of railroad, ship, lighter, or any Carrier (...) to be designated by the shipper or in default of such designation to be selected by the company for and on behalf of the shipper, owner, consignee or holder of this document.' Thus, Express Company held itself out as a forwarding agent who would not assume liability of a common carrier. *Ibid*.

²⁵⁵ 65 F3d 144 (9th Cir 1995), on remand to 1997 WL 104953 (ND Cal 1997); affirmed by 141 F3d 1173 (9th Cir 1998); Jones 'The forwarder: Principal or Agent? The approach of the American Courts' 13 June 2005 *Forwarderlaw.com*.

shipper. The container was delivered to the forwarder's correspondent in Ireland, who arranged for deconsolidation and onward carriage to the shipper's premises. On arrival the shipper alleged that the cargo was damaged. The forwarder had charged freight to the shipper at a rate set by the NVOCC. The court noted that the shipment was governed by two written agreements, the SLI, which was held to be a bill of lading, and the NVOCC's bill of lading. The definition of a 'carrier' in the SLI included the forwarder. However, the SLI also referred to the forwarder as 'forwarding agent'. On the NVOCC's bill of lading, the forwarder was named as the 'forwarding agent' and the NVOCC as the carrier.

Because it was apparent that the forwarder merely arranged for transportation by contracting with other companies, who take care of containerisation, warehousing and carriage of the goods, the court held that the forwarder was neither a common carrier nor a freight forwarder subject to common carrier liability. Generally, bills of lading are strictly construed against the carrier.²⁵⁶ Here, however, the two documents referred to Lep Transport (forwarder) alternatively as carrier, freight forwarder, and forwarding agent. Therefore, the evidence was insufficient to meet the plaintiff's burden of proving that the forwarder was a common carrier. So the court decided that the forwarder acted only as a forwarding agent and dismissed the claim for lack of proof of the forwarder's own negligence.

In *Prima US Inc v Panalpina Inc* it was held that a freight forwarder, who does not issue a transport document in its own name, remains an agent even if he assures his customer that he would provide door-to-door care and supervision for the shipment.²⁵⁷ A transformer had to be shipped from Italy to Iowa and Panalpina, as freight forwarder, was to oversee the entire transportation, both on land and over sea. The forwarder stated to its customer (Westinghouse), 'rest assured your shipment will receive door to door our close care and supervision'. Panalpina's obligations under the contract included ensuring that the transformer was properly secured and lashed onto a flat-rack for ocean shipment. Westinghouse paid Panalpina \$21,785.00, for its services. As customary in the industry, Panalpina did not issue a b/l for the shipment. Westinghouse and Panalpina had done business on many occasions. Pursuant to the standard terms and conditions listed on the reverse side of its contract, Panalpina undertook to exercise 'reasonable care' in the selection of those who would actually carry, store or otherwise handle the goods. Panalpina hired a local stevedore (CSM) whose negligent lashing caused the transformer to break loose during the ocean carriage, damaging cargo belonging to Prima USA. The trial court held Panalpina liable, because of the statement made to its customer. The Court of Appeal ruled that Panalpina was not liable, because it acted as a forwarder instead of a carrier (NVOCC) and because it exercised 'reasonable care' in selecting the stevedore and carrier. As to Panalpina's

²⁵⁶ Cf *supra*; for the 9th Circuit cf only *Cart Ltd v Hong Kong Islands Line America SA* 940 F2d 530, 532 (9th Cir 1991).

²⁵⁷ 223 F3d 126 (2nd Cir 2000); Masud 'Freight Forwarding: a Pakistani Primer - Part III: Forwarder as Agent' 28 July 2008 *Forwarderlaw.com*; Jones 'Forwarder - carrier or forwarding agent? Licensing and Insurance Considerations' 1 Dec 2000 *Forwarderlaw.com*.

promise to provide door-to-door care and supervision, the court held: 'Because of the well-settled legal distinction between forwarders and carriers, that statement - mere puffing - cannot transform Panalpina into a carrier, and bestow liability upon it.'²⁵⁸

However, even if the forwarder acted as an NVOCC and thus was principal vis-à-vis the shipper, an NVOCC generally acts as the agent of the shipper in contracting with and receiving the b/l of an ocean carrier.

In *Bronislaw Tarnawski v Schenker Inc*²⁵⁹ the shipper (claimant) engaged the services of an NVOCC for the carriage of a consignment of vodka carried from Poland to Seattle, WA. The court held that the NVOCC had acted as a representative/agent of the shipper in creating the contract with the actual carrier. The court acknowledged that the acceptance by the NVOCC of the actual carrier's bill of lading required the agreement of the shipper. However, it was held that a prior agreement had been given. The actual carrier's 'liberty clause' allowed him to take all the steps necessary to get the cargo to its destination without getting specific agreement from all customers. The direct client was an NVOCC, who generally load many consignments together as 'FAK' (freight all kind), it was impractical to expect the actual carrier to approach each individual client of the NVOCC.

In *Kukje Hwajae Ins v The M/V Hyundai Liberty and Glory Express Inc*²⁶⁰ the court had to decide whether a cargo owner who contracted with an NVOCC is bound by the forum selection clause in the b/l issued by the ocean carrier to the NVOCC. The customer contracted with an NVOCC for shipment from Korea to the US. The NVOCC's b/l identified the customer as shipper and 'Hyundai Liberty' as exporting carrier. The ocean carrier's bill named the NVOCC's agent as shipper. The true shipper sued the ocean carrier in tort and contended he was not party to the bill of lading of the ocean carrier, hence not bound by the jurisdiction clause.

The court found that the forum selection clause could be enforced on the shipper. The commercial role of an NVOCC and the facts of the case have led to the conclusion that the NVOCC was the shipper's agent when it accepted the carrier's b/l; thus the shipper was bound by its terms. The court recognized that by statutory definition an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier for the shipment of the cargo owner's goods.²⁶¹ Even though the shipper was

²⁵⁸ 223 F3d 126, 130 (2nd Cir 2000).

²⁵⁹ 2003 AMC 2230 (WDWash 2003); Jones 'A case about Vodka - the approach under US LAW that customer of a forwarder/NVOCC is also in direct contractual relationship with the actual carrier engaged by the NVOCC' 15 April 2004 *Forwarderlaw.com*.

²⁶⁰ 294 F3d 1171, 1175-1177 (9th Cir 2002); cf Jones 'Conflict between US courts of Appeal on the relationship between a customer of a forwarder/NVOCC and a carrier who contracts with the NVOCC' 13 Aug 2003 *Forwarderlaw.com*.

²⁶¹ 46 USC App § 1702(17)(B).

not party to the bill of lading he must have anticipated that the NVOCC will engage other carriers for the transport of the goods.²⁶²

The court quoted *Davies* with approval: 'A non-vessel operating common carrier, or NVOCC, contracts with its customers as principal, agreeing to transport their goods on a voyage that includes an ocean leg. An NVOCC commonly issues bills of lading to its customers in its own name, even though it does not operate the ship that will carry the goods on the ocean voyage. It buys space on the carrying ship like any other customer, receiving a bill of lading from the owner or charterer of that ship when the goods are loaded on board. It commonly consolidates goods from several different shippers into a single container, receiving a bill of lading from the ocean carrier in relation to the container as a whole. The NVOCC is not authorized by the owner or master of the carrying ship to issue bills of lading that will bind the ship; indeed, the ocean carrier may have no idea that the party to whom it issues its bill is in fact an NVOCC that has issued bills of lading itself. The relationship between ocean carrier and NVOCC is therefore not one of agency, but is a contractual one embodied in the ocean carrier's bill of lading, under which the NVOCC is the shipper. The NVOCC does not contract with the owners of the goods as agent for the ship. Quite the reverse, it contracts with the ocean carrier as agent for the owners of the goods.'²⁶³ The cited case law further underlines this understanding.²⁶⁴

Since in the case at stake nothing suggested a deviation from the commercial norm; to the contrary the records had shown that the cargo owner intended the intermediary to act as its agent for the purpose of shipping the cargo, the NVOCC acted as agent of the shipper in contracting with the ocean carrier.

Jones in his comment on the citation of *Davies* noted that an ocean carrier operating a container vessel knows its customers and is aware that NVOCCs issue their own b/l's. In practice NVOCCs and large shippers do not buy space on ships like any other customers. The cases cited, which led the author to his concluding statement, did not analyse the commercial practice of NVOCCs in great length and were therefore 'suspect for generalization'.²⁶⁵ Furthermore, the ruling in *Kukje Hwajae* leads to the conse-

²⁶² *Id* at p 1177. The same argument was raised in *Pyrene Co Ltd v Scindia Navigation Co Ltd* (1954) QB 402, 428 (QBD).

²⁶³ *Davies* 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tul L Rev* 337, 395-96.

²⁶⁴ In *Insurance Company of North America v M/V Ocean Lynx* 1990 AMC 64 (11th Cir 1990) it was held that the cargo owner may treat the NVOCC as a common carrier for the purpose of COGSA, but underlying carriers treat the NVOCC as the cargo owner's agent. The court in *Insurance Company of North America v S/S American Argosy* 1984 AMC 1547 (2nd Cir 1984) found that: 'With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper.' The decision in *Orion Insurance Co v M/V Humacao* 1994 AMC 1922 (SDNY 1994) equally states that an NVOCC acts as the agent of the cargo owner when it agrees to the terms of the bill of lading issued by the vessel's owner.

²⁶⁵ *Jones* 'Conflict between US courts of Appeal on the relationship between a customer of a forwarder/NVOCC and a carrier who contracts with the NVOCC' 13 Aug 2003 *Forwarder-law.com*. *Davies* himself states in another passage of his article that commercial practice suggests that ship owners and master's are likely to be aware of the fact that they issue a b/l to an

quence that customers of NVOCCs are subject to direct claims of the ocean carrier although they have never dealt with that party or received their b/l.²⁶⁶

Other courts, too, have qualified the NVOCC, partly in relation to jurisdiction clauses, as an agent of the shipper vis-à-vis the performing carrier.²⁶⁷

With respect to limitation clauses the Supreme Court in *Norfolk Southern Railway Co v James N Kirby Pty Ltd*²⁶⁸ disagreed with the legal reasoning in *Kukje Hwajae* stated: 'We think reliance on agency law is misplaced here. It is undeniable that the traditional indica of agency, a fiduciary relationship and effective control by the principal did not exist.'²⁶⁹ However, in applying a limited agency approach, the Supreme Court came to the conclusion that the shipper is bound by the limitation clauses in an ocean carrier's b/l, even where the shipper engages an intermediary.

In this case Kirby engaged an NVOCC (ICC) to arrange for delivery of machinery from Australia to Huntsville, Alabama by end-to-end transportation. ICC issued a through b/l naming itself as carrier and Kirby as shipper, Savannah as the designated port of discharge and Huntsville as place of delivery. The b/l contained a limitation of liability clause²⁷⁰ and a Himalaya clause, extending the liability limitations to downstream parties including 'any servant, agent or other person (including any independent contractor)'. ICC hired Hamburg-Süd for the transport of the containers from Sydney to Huntsville. Hamburg-Süd issued its own through b/l (discharge port Savannah and place of delivery Huntsville), naming ICC as its shipper. It also included US COGSA default limitation and extended it in a Himalaya clause to 'all agents... including (inland) carriers... and all independent contractors.' Kirby was not a party to the Hamburg-Süd/ICC bill. Hamburg-Süd engaged Norfolk Southern Railway for land transport from Savannah to Huntsville. The derailment of the train caused damages to the cargo in the amount of \$ 1.5 mill.

The Court of Appeal held that Norfolk could not seek protection under the Himalaya clauses in the bills of lading, because 'the law requires privity between the carrier and

NVOCC, cf Davies 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tul L Rev* 337, 398.

²⁶⁶ Jones 'Conflict between US courts of Appeal on the relationship between a customer of a forwarder/NVOCC and a carrier who contracts with the NVOCC' 13 Aug 2003 *Forwarder-law.com*.

²⁶⁷ *M Prusman Ltd v M/V Nathanel* 1988 AMC 296 (SDNY 1987); *SPM Corporation v M/V Ming Moon* 1992 AMC 2409, 2420 n 9 (3rd Cir 1992); *Cigna Insurance Asia Pacific v Expeditors International of Washington* 2002 AMC 1085 (CDCal 2001); *Jockey International Inc v M/V Leverkusen Expresß* 2002 AMC 2377, 2389 (SDNY 2002), court of jurisdiction Hamburg; *Hartford Fire Insurance Company v Novocargo USA Inc* 2003 AMC 851 (SDNY 2003); *Glyphics Media Inc v M/V Conti Singapore* 2003 AMC 667, 679 (SDNY 2003) court of jurisdiction India; *Barbara Lloyd Designs Inc v Mitsui O S K Lines Ltd* 2003 AMC 2608, 2615 (NDDisCt 2003), court of jurisdiction Tokio.

²⁶⁸ 125 SCt 385 (SC 2004).

²⁶⁹ *Id* at p 399.

²⁷⁰ US COGSA limitation for the sea leg and a higher amount for the land leg.

the party seeking shelter in the Himalaya clause'.²⁷¹ Furthermore the Himalaya clause in the NVOCC b/l did not extend to 'inland carriers'.²⁷² Finally, Kirby was not bound by the Hamburg-Süd b/l provisions, since the NVOCC was not acting as the agent of the shipper when it received that bill.²⁷³ The Supreme Court reversed and remanded the judgement on the reason that 'a railroad like Norfolk was an intended beneficiary of the ICC bill's broadly written Himalaya clause'.²⁷⁴

To interpret the bill, the court applied principles drawn from the law of common carriage, stating: 'When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed. The intermediary is not the cargo owner's agent in every sense, but it can negotiate reliable and enforceable liability limitations with carriers it engages.'²⁷⁵ In so deciding, the court relied upon a very early precedent of *Great Northern Railway Company v O'Connor*²⁷⁶ over the objection of the defendant, who argued that general rules of agency should apply.²⁷⁷ The limited agency approach found in the *Great Northern* principle only requires treating the NVOCC as the shipper's agent for a single, limited purpose, ie when the NVOCC contracts with subsequent carriers for liability limitations.²⁷⁸

The court felt that a decision binding Kirby to the Hamburg Süd bill's liability limitation would not be 'disastrous for the international shipping industry'. The court was on the opinion that the limited agency rule tracks industry practices' whereas a decision for Kirby would have meant that 'carriers would have to seek out more information before contracting, so as to assure them that their contractual liability limitations provide true protection. That task of information gathering might be very costly or even impossible, given that goods often change hands many times in the course of intermodal transportation.' Secondly, 'if liability limitations negotiated with cargo owners were reliable while those negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates' resulting in discrimination in common carriage. Finally the decision

²⁷¹ 300 F3d 1300, 1309 (11th Cir 2002).

²⁷² *Id* at p 1308.

²⁷³ *Id* at p 1308.

²⁷⁴ 125 SCt 385, 389 (SC 2004). Another significant result of the decision is the extension of admiralty jurisdiction to door-to-door transport even where the damage occurred on the land leg. J. O'Connor introduces his opinion with the words 'This is a maritime case about a train wreck', at p 390.

²⁷⁵ *Id* at p 398.

²⁷⁶ 34 SCt 380 (SC 1914). In *Great Northern*, an owner hired a transfer company to arrange for the shipment of goods. Without the owner's express authority, the transfer company arranged for rail transport at a tariff rate that limited the railroad's liability to less than the value of the goods. The goods were lost and the owner sued the railroad. The court granted the railroad protection under the liability limitation in its tariff agreement with the transfer company. The railroad 'had the right to assume that the Transfer Company could agree upon the terms of the shipment'; it could not be expected to know if the transfer company had any outstanding, conflicting obligation to another party. The owner's remedy, if necessary, was against the transfer company.

²⁷⁷ 125 SCt 385, 398-399.

²⁷⁸ *Id* at p 398.

'produces an equitable result' because Kirby retains the right to sue ICC for any loss exceeding the liability limitation.²⁷⁹

The decision does not state that there cannot be, depending on the circumstances of each case, an agency between the shipper and the NVOCC.²⁸⁰ Another possibility would be to construe both bills of lading together as a 'pass through liability scheme' or a 'back to back agreement'.²⁸¹ Claims based on these constructions failed due to lack of sufficient submissions.²⁸²

The decision in Kirby has closed the door on claims against sub-contracting carriers to avoid limitation defences. As a likely result the existing trend to sue the intermediaries, who have accepted a more generous basis of limitation in their bills of lading as the prime defendants, will increase.²⁸³ In anticipation of this, NVOCCs operating in the US reject the Hague-Visby Rules limitation in favour of the \$ 500/package limitation of US COGSA and furthermore extend the COGSA limitation to land transport covered by their multimodal bill of lading.²⁸⁴

If more than one NVOCC is involved in the chain between the true shipper and the ocean carrier, each NVOCC functions as a shipper and a carrier at the same time. Each carrier can only claim against the NVOCC to which it has issued its b/l and owes the duties of a shipper.²⁸⁵ Against other NVOCCs in the chain he can only proceed in tort for negligence, negligent misrepresentation or fraud.²⁸⁶

²⁷⁹ *Id* at p 399.

²⁸⁰ Figert 'Der Non-Vessel-Operating Common Carrier in der US-amerikanischen Rechtsprechung' *TranspR* 7/8-2006, 269, 270.

²⁸¹ *Ibid*.

²⁸² *Intel Container Corporation v M/V Titan Scan* 1998 AMC 1965, 1968 (11th Cir 1998); *Glyphics Media Inc v M/V Conti Singapore* 2003 AMC 667, 677 n 12 (SDNY 2003).

²⁸³ Jones 'Kirby v Norfolk & Southern Railway - What does the US Supreme Court decision mean for the future?' 23 Oct 2004 *Forwarderlaw.com*.

²⁸⁴ *Ibid*; COGSA itself accommodates such extensions: 'Nothing contained in (COGSA) shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea', 46 USC App § 1307. The Carmack Amendment is not mandatory for through bills of lading, cf *Allianz CP General Ins Co Ltd v Blue Anchor Line* 2004 AMC 1266 (SDNY 2004). The decision in *Sompo Japan* 456 F3d 54 (2nd Cir 2006) is not applicable to NVOCC liability, cf *Rexroth Hydrauldyne BV v Ocean World Lines Inc* 2007 WL 541958, 2 (SDNY 2007); all *infra*.

²⁸⁵ *Yang Ming Marine Transport Co v Oceanbridge Shipping International Inc* 1999 AMC 1617, 1634-35.

²⁸⁶ However, under US law, such claims in cases of pure economic loss do not qualify as maritime claims. *Id* at p 1634: '(T)his Court agrees, that negligence claims for purely economic losses are barred in admiralty and maritime cases. *Channel Star Excursions Inc v Southern Pacific Transport Co* 1996 AMC 934, 1996 AMC 938 (*sic*), 77 F3d 1135, 1138 (9th Cir 1996) (there is no claim in maritime tort for economic damages without actual physical injury).'

IX. Freight forwarder as both agent and principal

It has been suggested that a freight forwarder can act as both principal and agent simultaneously.²⁸⁷

In *The Cape Comorin*²⁸⁸ the court found that the document issued by the forwarder and described as a bill of lading, was in fact not one, but a mere receipt in form of a delivery docket. In this case two bills of lading were issued for the same cargo, one by the forwarder and one by the time charterer on behalf of the vessel owner.²⁸⁹ Under the sales contract the buyer had to arrange carriage, for which he hired the forwarding agent. The l/c required ocean bills on the forwarder's forms, which evidenced shipment. The forwarder's bill was a 'received for shipment' bill with a stamped 'on board' notation, was signed by the forwarder's agents and held the forwarder out to be the actual carrier. It showed the consignee as shipper, consigned to his order and endorsed in blank. The ocean bill was a shipped b/l on the time charterer's form, showing the forwarder's agents as shipper and consigned to the forwarders. The Australian stevedores, who had damaged the goods on discharge, sought protection under the Himalaya clause in either or both b/l's.

The trial judge held that the stevedores are protected under the forwarder's bill, even though the forwarder had taken no steps to obtain discharge of the goods from the vessel and had no relationship with the stevedores. The charterer's bill could not be relied on, since the forwarder acted as principal and having issued a b/l as carrier was not entitled to engage the services of others.²⁹⁰

The Court of Appeal disagreed and held that the forwarder was acting as principal vis-à-vis the consignee as his customer, but at the same time, in carrying out his client's instruction to ship the goods, has acted as an authorised agent for an undisclosed principal and as part of his duties in carrying out its mandate from its client had obtained the issue of a b/l from the actual carrier.²⁹¹ The ocean b/l thus evidences a contract of carriage between the carrier and the shipper as undisclosed principal of the forwarder.²⁹²

²⁸⁷ Privity of contract between shipper and NVOCC and privity between shipper and ocean carrier enables the shipper to sue both or either one for loss or damage, Pryles, Waincymer & Davies *International Trade Law* (2nd Ed) at para 5.220, citing *Kukje Hwajae Ins Co Ltd v M/V Hyundai Liberty* 2002 AMC 1598 (9th Cir 2002): 'By recognizing that Glory Express acted as Doosan's agent when it accepted the Hyundai bill of lading, we do not mean to suggest that the relationship between Glory Express and Doosan was one of agent and principal for all purposes. It is clear from the Glory Express bills of lading, for example, that the parties intended that Glory Express would be independently liable, to some extent, for loss or damage to the lathe that occurred during shipping.' at p 1177; *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 300 F3d 1300, 1305 (11th Cir 2002): The NVOCC contracts as principal with both the export shipper and ocean carrier so there is no privity of contract between the export/import shipper and the ocean carrier; *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 NSWLR 745 (NSW CA).

²⁸⁸ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 NSWLR 745.

²⁸⁹ *Id* at p 748.

²⁹⁰ *Cf id* at p 749.

²⁹¹ *Id* at p 753.

²⁹² *Id* at p 753-754.

The decision improves the position of carriers, who previously ran the risk of not having any contractual benefits from their own bills of lading against the consignee, because of the interposition of another carrier, ie the freight forwarder.²⁹³ Now, where the ocean carrier can establish that the forwarder obtained the bill of lading under the mandate of its clients, the ocean carrier can rely on its bill in relation to the shipper.²⁹⁴

In *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd*²⁹⁵ the court distinguished the decision in *The Cape Comorin* for door-to-door transport on the basis that the freight forwarder in the Comalco case did not issue the transport document solely in the capacity of an agent to arrange carriage.²⁹⁶ The submission that the forwarder (Mogal) acted as an agent of the shipper (Comalco) in arranging sea carriage, and not as a principal, was rejected, because of the reading of the document as a whole. The consignment note made it clear that the forwarder contracted as principal to undertake the transportation of the goods from door to door. Condition 11 of the transport document conferred upon Mogal the right to employ an agent especially for the sea carriage of the goods. It was empowered to enter into a contract with a sea carrier either as principal or agent for Comalco. The court stated: 'There is no express evidence dealing with the question whether Mogal purported to enter into the contract with Oceania Shipping Corporation Limited as principal or agent but the ocean bill of lading which covered the carriage of goods in question was one in which Mogal is described as the consignor and its New Zealand agent as consignee. Furthermore, I think there is a real question (which I do not need to decide) whether Mogal could shed its own responsibility for delivering the goods by employing agents.'²⁹⁷

In *The Maheno*²⁹⁸ the plaintiff sued the forwarding agents for non-delivery of a consignment shipped on the vessel *Maheno* at Sydney for delivery at Wellington, New Zealand, which never arrived. The goods were to be delivered by the seller free on board the vessel at the port of Sydney. The plaintiff entered into a contract with the forwarding agents for the carriage of the goods from port to port, in which the plaintiff was named as consignee of the goods. The freight forwarders consolidated the cargo,

²⁹³ Hetherington 'Freight Forwarders and House Bills of Lading – The Cape Comorin' (1992) 1 *LMCLQ* 32.

²⁹⁴ To the detriment of the shipper, who in this construction is subject to direct claims of the ocean carrier without receiving its b/l. The same problem arises under US law where shippers engage an NVOCC, cf *Jones*' comment on *Kukje Hwajae* (*supra*) n 266.

²⁹⁵ (1993) 113 ALR 677 (FCA).

²⁹⁶ *Id* at p 699 para 40.

²⁹⁷ (1993) 113 ALR 677, 697. The decision quotes Schmitthoff *Schmitthoff's Export Trade* (8th Ed) p 249: 'A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers but the practice has changed and in modern circumstances they often carry out other services such as packing, warehousing, cartage, lighterage, insurance or, in container transport, the groupage or consolidation of parcels of various customers into one container. Often they act as carriers. It follows that, in law, they qualify more often as principals than as agents. Nevertheless, it has to be ascertained in every individual case in which legal capacity the forwarder acted. The answer depends on the construction of the contract between the forwarder and his customer and the facts of the case.'

²⁹⁸ (1977) 1 *Lloyds Rep* 81 (SC NZ).

issued a consignment note, which showed delivery instructions depot to depot, and received a bill of lading for the sea voyage. The freight was paid by the plaintiff. The container was provided by the shipping company, which also decided where the goods would be stored. The plaintiff did arrange insurance and received the customs invoice for clearance purposes.

The decision in this case again depended upon whether the contract entered into by the freight forwarder was to effect carriage depot to depot or was merely to arrange for carriage.²⁹⁹ The defendant contended that he acted as a hybrid who not only carried but arranged for the onward transmission of goods. The court acknowledged that the same person can act as freight forwarder and carrier at once and that the fact that a person describes himself as a forwarding agent is not conclusive.³⁰⁰ The court saw as relevant factors for the determination of the role of the defendant 'the nature of carriage, the language used by the parties in describing the role of the person concerned, and any course of dealing between the parties.'³⁰¹

The court found that - even though persons properly described as shipping and forwarding agents frequently act as carriers for parts of the carriage - that in this case the defendant merely acted as agent of the shipper in arranging carriage on the sea leg.³⁰² To determine the intended role of the defendant the court examined clauses of the consignment note. According to cl 11 the carrier was at liberty to arrange for the carriage by sub-contracting any part or parts of the carriage. Cl 13 stated that - where the carrying vessel is owned by the carrier - the carriage is subject to the terms and condition of the bill of lading issued by the carrier. Where the vessel is not owned by the carrier (as it was the case here) the carriage is subject to the terms and conditions of the ship owner's b/l and the carrier is exempted from liability for the time the goods are in custody of the actual carrier. Cl 15 contained a Himalaya clause by which the carrier contracted with the shipper as an agent of his servants and sub-contractors in respect of exclusion and limitation of liability clauses of the consignment note. Furthermore the carrier was supposed to act as agent for the consignor in entering into contracts of carriage with other carriers.

From the facts that the defendant did not own any ships engaged on the chosen trading route, that the defendant was the appointed agent of the consignor, though primarily in the context of the Himalaya clause, and the contract specified carriage by a particular ship, the court derived that it was the intent of the parties for the defendant to pack the goods in a container and then get them on the ship and have them delivered to its agents depot in New Zealand. From the outline of the contract and the surrounding circumstances it was clear that neither party envisaged the defendant to actually carry the goods by sea, but to enter into a contract of sea carriage as agent of the consignor subject to the terms of the bill of lading issued by the actual carrier. Thus the forwarder acted as carrier for the land segments and as shipper's agent for the sea leg.

²⁹⁹ *Id* at p 86.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Id* at p 87.

X. In *rem* liability under NVOCC's bills of lading

Another question is whether the shipper can sue the ship in *rem* in cases where the freight forwarder contracts with the carrier on behalf of the shipper. According to the procedural theory a ship – in the absence of a maritime lien - is only liable in *rem* if the ship owner is liable in *personam*.³⁰³ Under the personification theory however, a ship can be held liable in *rem*, whether or not the ship owner is liable in *personam*, by applying the doctrine of ratification.³⁰⁴ If a ship could ratify a bill of lading where an intermediary is interposed the shipper could sue the ship even if he has not contracted with the ship owner directly.

In *Insurance Company of North America v S/S American Argosy* the court relied on the agency theory to hold that a ship could not be liable in *rem* on a bill of lading issued by an NVOCC.³⁰⁵ The NVOCC issued a bill of lading to its customer for carriage of four cartons of tools from New York through to Hodeidah, Yemen. The NVOCC consolidated the cargo with other shipments in a single container, which it then shipped on board the *American Argosy*, receiving in return a bill of lading issued by the ship owner (USL). The USL b/l only covered carriage from New York to Rotterdam, but the cargo was damaged after discharge during transshipment in Rotterdam. The cargo insurers therefore unable to claim under the USL b/l, sued the *American Argosy* in *rem*, alleging that the ship had ratified the NVOCC's New York-to-Hodeidah b/l. The District Court agreed with the claimant and found the vessel liable in *rem* based on the ratification of the NVOCC b/l. The Court of Appeal reversed, relying exclusively on the agency theory.³⁰⁶ The court pointed out that the ocean carrier neither authorised the NVOCC to issue b/l's nor was it not aware that it had done so. In such a case the carrier has not ratified the b/l since 'one cannot ratify an unauthorized agreement of which one is wholly unaware'.³⁰⁷ The court distinguished cases in which the ratified bill of lading had been issued by a charterer and not an NVOCC. The difference was seen to be the knowledge and intention of the ship's master.³⁰⁸ If a vessel is on charter the master knows that the charterer issues b/l's. The ratification doctrine is based on the awareness of the master that a b/l exists and that even if he has not signed the b/l's himself the charterer has done so and that by sailing those b/l's are accepted. In a charter situation the master does not issue any bills of lading for the cargo himself. In the pre-

³⁰³ *Morgan v SS Castlegate* (1893) AC 38, 48 (HL). There can be no in *rem* liability under the procedural theory if the party liable in *personam* is the time charterer.

³⁰⁴ Cf only *Cactus Pipe & Supply Co v M/V Montmartre* 1985 AMC 2150, 2161-62 (5th Cir 1985); As a result the cargo owner may sue the ship in *rem* even if a time charterer is the contracting carrier directly responsible to the cargo owner on the bill of lading. By sailing with the goods on board, the ship is taken to have ratified the bill of lading, thereby becoming bound to the contract evidenced by it. Davies 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tul L Rev* 337, 378.

³⁰⁵ 1984 AMC 1547, 1555 (2nd Cir 1984); followed by *Ultimo Cabinet Corp v M/V Mason Lykes* 1991 AMC 1343, 1347 (SDNY 1991).

³⁰⁶ 1984 AMC 1547, 1552-55.

³⁰⁷ *Id* at p 1552.

³⁰⁸ *Id* at p 1553.

sent case the ship issued its own b/l and thus the master had no reason to suspect that any of his customers might issue a b/l for the carriage to Yemen.³⁰⁹

Davies notes that the assumption that a master has no reason to suspect that an NVOCC would issue a b/l is questionable, since '(m)any NVOCCs are large, well-known companies that regularly book space on liner services'.³¹⁰ The owner or master issuing a b/l might thus be well aware that the customer has issued its own b/l. The court in *Orion Insurance Company v M/V Humacao* concluded that the ocean carrier 'must have been aware' that the shipper named on the ocean bill was a NVOCC acting on behalf of an undisclosed principal.³¹¹ This must especially be the case where a straight b/l is issued naming the same company as consignee.³¹² However, even if the ship owner did know that the shipper was an NVOCC, the fact that the carrier issued its own b/l leads to the result that the ship is not liable in *rem* under the NVOCC's b/l.³¹³ The NVOCC acted as agent of the true shipper and therefore the carrier's b/l shapes the obligations of the carrier towards the shipper.³¹⁴

XI. Actual carrier's liability vis-à-vis the shipper

The freight forwarder does not only issues his own document to the shipper, but also negotiates separate contracts for the different legs with the actual carriers, from which he receives a further transport document for the same goods, which he accepts on the shippers behalf in cases where he acts as an agent of the shipper and on his own behalf where he acts as an MTO. Where the freight forwarder acts as MTO he is responsible for the safety of the goods to the shipper for the whole carriage. The shipper is only in contractual relationship with the MTO and not the actual carriers. His rights and obligations towards these carriers depend on the multimodal transport contract issued to him by the MTO. The merchant has primary remedies in contract against the NVOCC as contractual carrier and secondary remedies against the actual carrier in tort or bailment.³¹⁵ However, the merchant does not have a right to delivery against the actual carrier.³¹⁶

³⁰⁹ 1984 AMC 1547, 1553, quoting *The Blandon*, 287 F 722, 723 (SDNY 1922); *The Muskegon* 1924 AMC 1512, 1517-18 (SDNY 1924).

³¹⁰ Jackson 'In Support of Exempting Non-Vessel Operating Common Carriers from Tariff Filing' (1993) 1 *Geo. Mason Indep L Rev* 289, 297-98, as cited in Davies 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tul L Rev* 337, 398.

³¹¹ 1994 AMC 1922, 1926 n 5 (SDNY 1994).

³¹² Davies 'In Defense of Unpopular Virtues: Personification and Ratification' (2000) 75 *Tul L Rev* 337, 399.

³¹³ *Ibid.*

³¹⁴ The decision in *The American Argosy* applies the agency theory in a case where the ship owner itself had issued a b/l and the ship was thus not liable in *rem* under the NVOCC bill. The case does however not apply where only unauthorised b/l's exist. For the more complicated situation, in which a time charterer issues the b/l to an NVOCC and thus neither of the existing b/l's has been issued by the ship owner, cf *id* at p 400.

³¹⁵ Budgen 'A Fundamental Legal Aspect of NVOCC Operations' 22 Nov 2001 *Forwarder-law.com*.

³¹⁶ *Ibid.*

The actual carrier may be able to rely on his terms or those of the known and contemplated b/l issued by the contractual carrier.³¹⁷ In *Indemnity Insurance Co of North America v Schneider Freight Inc* the ocean carrier was sued by a shipper in tort.³¹⁸ The court found that an NVOCC issuing its b/l to the shipper and taking a b/l from the ocean carrier acts as an agent of the shipper and binds him to the terms of the ocean carrier's b/l. In addition to employing the agency theory the court found that the shipper is included in the definition of 'merchant' in the carrier's b/l and cannot evade this position by suing in tort.³¹⁹ The b/l indicated that the 'merchant' is bound by its conditions.³²⁰ The court relied on a case where the cargo owner was named as shipper in the NVOCC's b/l, but the b/l of the carrier did not mention any particular parties. The court looked at the definition of 'merchant' contained in that b/l and concluded that the plaintiffs, as cargo owners, were parties to the b/l as merchants and could thus sue the carrier in *personam*.³²¹ This carrier, however, has changed its clause in the meantime.³²² The outcome depends on the drafting of the merchant clause in each individual case.

A Himalaya clause in the NVOCC's b/l might confer immunity from suit or other rights on the actual carrier. Furthermore where the merchant has claims against a non-contracting party he might be precluded from the right to sue that party by a circular indemnity clause whereby the merchant agrees to indemnify the contracting carrier against recourse claims brought against the NVOCC by the actual carrier.³²³

XII. Himalaya & circular indemnity clauses

In departure of the strict principles of privity of contract English courts allow exception clauses in a bill of lading 'to inure for the benefit, not only of the carrier himself, but also for the benefit of the ship owner (if not the carrier), the master, the stevedores and any other persons who may be engaged in carrying out the services provided for by the contract'.³²⁴ However, protected parties are barred from raising the defence vis-à-vis the carrier seeking indemnification for claims brought against him by the cargo owner.³²⁵

³¹⁷ *Ibid.*

³¹⁸ 2001 AMC 2153.

³¹⁹ 2001 AMC 2153, 2159 citing *Kelso Enters Ltd v M/V Wisidia Frost* 1998 AMC 1351.

³²⁰ *Id* at p 2159.

³²¹ *All Pacific Trading Inc v M/V Hanjin Yosu* 1994 AMC 365; The clause read: "Merchant" includes the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this b/l'.

³²² It now reads: 'Merchant means any actual or previous holder of this Bill of Lading.', cf *Mitsui Marine & Fire Ins Co Ltd v Hanjin Shipping Co Ltd* 2004 AMC 577, 587.

³²³ Budgen 'A Fundamental Legal Aspect of NVOCC Operations' 22 Nov 2001 *Forwarder-law.com*.

³²⁴ *Adler v Dickinson & Another (The Himalaya)* (1954) 3 All ER 397 (CA) per Lord Denning.

³²⁵ *Biggin v Permanite (Wiggins & Co)* (1951) 2 All ER 191; for SA: *The Tigr No 1* 1995 (4) SA 49 (C); *Hare Shipping Law & Admiralty Jurisdiction in South Africa* p 403.

1. United Kingdom

In *Pyrene Co Ltd v Scindia Navigation Co Ltd* the court acknowledged that there is nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary.³²⁶ However, where a third party becomes privy to a contract by the act of an authorised agent, he cannot take the benefits without the burdens or enforce liability without limitations if provided for in the contract.³²⁷ Where the parties do not intend that one party acts as undisclosed principal the third party under the wider principle takes the benefits of the contract subject to its terms and conditions.³²⁸ It was said to be in the nature of a through transportation contract that the first carrier will not perform the entire carriage. The first carrier is thus vested with implied authority to tranship and hand over the cargo to another carrier, which includes the authority to enter into a contract with that carrier.³²⁹ However, 'the first carrier would not, in the absence of express words, have any authority from the shipper to make a contract with the second carrier on the shipper's behalf in terms less favourable to the shipper than those contained in the through bill.'³³⁰

The actual carrier as a sub-contractor of the freight forwarder can seek to rely on the terms of the freight forwarder's contract of carriage with the cargo owner if the contract contains a Himalaya clause extending the protection of the contract to employees and independent contractors. The carrier can also seek to rely on the terms of its own bill of lading issued to the freight forwarder, even though the cargo-owner is not a party to that contract, under the doctrine of sub-bailment on terms.

In *The Pioneer Container* the court considered the doctrine of sub-bailment, not in relation to a Himalaya clause, but in the context of an exclusive jurisdiction clause.³³¹ The cargo owners contracted with freight forwarders for the carriage of goods from Taiwan to Hong Kong. The forwarders issued bills of lading to the cargo owners providing that they were entitled to subcontract 'on any terms' the handling, storage and carriage of the goods. The carriage was sub-contracted to the ship owners, who issued feeder bills of lading which incorporated an exclusive jurisdiction clause which provided that any dispute was to be determined in Taiwan. The vessel sank with the loss of all cargo and the owners of the goods commenced proceedings in Hong Kong. The question was whether the cargo owners were bound by an exclusive jurisdiction clause in the ocean carrier's bill of lading. On appeal the Privy Council held that they were, even though they were not a party to the feeder bills.³³²

³²⁶ (1954) QB 402, 422 (QBD).

³²⁷ *Ibid.*

³²⁸ *Id* at p 426.

³²⁹ *Id* at p 428.

³³⁰ *Ibid.*

³³¹ *Owners of Cargo Lately Laden on Board the KH Enterprise v Owners of the Pioneer Container* (1994) 1 Lloyd's Rep 593 (PC (HK)), also known as *The K H Enterprise*.

³³² *Id* at p 598.

The court found that if a bailee sub-bails goods with the owner's authority, the relationship between the owner and sub-bailee was that of owner and bailee and the owner was bound by the terms of the sub-bailment if the owner had expressly or impliedly consented to the bailee making a sub-bailment on those terms.³³³ The terms of the contract between the cargo owners and the freight forwarders were wide enough to indicate that the cargo owners consented to the sub-bailing of the goods to the ocean carrier on its terms, including the exclusive jurisdiction clause.³³⁴

2. Australia

In Australia the operation of the doctrine of sub-bailment remains unclear. In *WMC Engineering Services Pty Ltd v Brambles Holdings Ltd*³³⁵ the court stated it could only be implied if both bailor and contemplated sub-bailee were engaged in the same trade, in which case the bailor would be aware of the precise nature of the terms on which sub-bailment would be made. In *Matthew Short & Associates Pty Ltd v Riviera Marine (International) Pty Ltd*³³⁶ where it was held that the doctrine of sub-bailment on terms does not apply when the freight forwarder does not take possession of the goods itself. In contrast to this decision the court in *Westrac Equipment Pty Ltd v The Ship Assets Venture*³³⁷ held that a forwarder who does not take possession of the goods is a quasi-bailee, and thus owes the same duty to the owner of the goods as does the actual bailee, the sea carrier.

However, with respect to Himalaya clauses it is understood that sub-contractors of the carrier are protected by the provisions contained in the ocean carrier's b/l vis-à-vis the shipper, even where the interposed freight forwarder had issued its own house bill of lading.³³⁸ The forwarder might act as principal towards the shipper, but in entering into the contract with the ocean carrier he acts as agent on the shipper's behalf, who in turn is bound by the Himalaya clause contained in ocean carrier's bill of lading as undisclosed principal.³³⁹

³³³ *Ibid*, following *York Products Pty v Gilchrist Watt & Sanderson Pty* (1970) 2 *Lloyd's Rep* 1 (NSW CA) and the Privy Council decision in *Morris v CW Martin & Sons Ltd* (1966) 1 QB 716.

³³⁴ The plaintiffs invoked that the ship owners were not sub-bailees at all, but only quasi-bailees, since the intermediary has never obtained actual possession of the goods; and there was no authority that the doctrine of sub-bailment on terms extended to quasi-bailments, *id* at p. 593. The court found that the ship owners became responsible as bailees to the cargo owners by receiving the goods into their possession even if the goods were never in the possession of the intermediary, *ibid*, referring to *Palmer on Bailment* (2nd Ed) pp 34 and 1292.

³³⁵ unreported, WA Sup Ct, Wheeler J, 31 October 1997, at p 73.

³³⁶ (2001) NSWCA 281.

³³⁷ (2002) 192 ALR 277 per Lee J.

³³⁸ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745 (NSW CA)

³³⁹ *Id* at p 754.

3. South Africa

The Himalaya clause was accepted in its own right in South Africa in *The Sanko Vega*.³⁴⁰ According to the relevant clause in the case the stevedores were 'deemed to be parties to the contract contained in or evidenced by the bill of lading' between the shipper and the carrier. The court upheld the clause, even though in conflict with the rule of privity of contract, since it was commonly used in the maritime field. In this case the extended agency doctrine was adopted as part of South African law provided it either conforms with the requirements of the *stipulatio alteri*³⁴¹ or meets three requirements namely: (1) the bill of lading makes it clear that the carrier intended by its terms to protect the defendant; (2) the carrier by the bill contracted for the defendant's protection as well as for his own; and (3) the authority of the carrier to act for the defendant in this respect, whether antecedently or by ratification, is made out.³⁴²

These rules were applied to altered circumstances in *The Bunga Mas Tiga*³⁴³ where an NVOCC ('ASL') was interposed between the actual carrier ('MISC') and the shipper. The cargo was damaged while in the custody of the defendant, a sub-contractor of the carrier. The cargo owners sued the sub-contractor in delict, who sought protection under the Himalaya clauses³⁴⁴ and time bar provisions contained in both the NVOCC and carrier bill of lading. Theron J ruled that the Himalaya clause is not applicable where a party is twice removed from a party to the contract.

The following defences were raised:

1. the NVOCC acted as an agent for the shipper,
2. the defendant (sub-contractor) authorised the carrier to contract for its protection,
3. the carrier ratified the NVOCC's action,
4. the carrier in sub-contracting container storage acted as an agent for the NVOCC, and because of the agency of the carrier privity exists between the defendant and the NVOCC,
5. *stipulatio alteri*.

The court held that the plaintiff contracted with the NVOCC and not with the NVOCC's sub-contractors and is therefore not bound by the carrier's b/l. The court stated: 'The right of the NVOCC to sub-contract for the performance of its obligations as carrier un-

³⁴⁰ *Santam Insurance Co v South Africa Stevedores Ltd* 1989 (1) SA 182 (D); *Hare Shipping Law & Admiralty Jurisdiction in South Africa* p 404.

³⁴¹ ie stipulation for another.

³⁴² 1989 (1) SA 182 (D), 189 (I) – 190 (B).

³⁴³ *Owners of the Cargo formerly laden on board the M/V Bunga Mas Tiga v Confreight Cargo Management Centre (Pty) Ltd* High Court of South Africa (D&C LD), Case No A104/98, 24 Sep 2001.

³⁴⁴ The 'no claims' clause was couched in broad terms and sought to protect 'the carrier's servants or agents, any independent contractor and his servants or agents, and all others by whom the whole or any part of the carriage whether directly or indirectly, is procured performed or undertaken', cf *id* at para 18.

der its house bill of lading, did not constitute any authority to the NVOCC to act as agent for the plaintiff and thereby to bind the plaintiff as principal or otherwise as a party to the sub-contract.' The authority to sub-contract was inconsistent with the relationship of principal and agent.³⁴⁵ The defendants relied on *The Cape Comorin*³⁴⁶ in submitting that the NVOCC had acted within its mandate from the plaintiff in contracting with the actual carrier, which made the plaintiff a party to the actual carrier's b/l. The court found that *The Cape Comorin* was distinguishable by the facts that in that case the freight forwarder was authorised to 'arrange freight of (the cargo) aboard' a specifically named vessel and on a specifically identified voyage. The freight forwarder issued a document in which it was named as the carrier. In entering into a contract with the ocean carrier the forwarder was performing its mandate and thus acted as agent in conformity with its mandate. In the present case, however, the plaintiff's freight forwarder concluded a contract of carriage for combined transport with the NVOCC, a separate entity from the freight forwarder, which in terms of its authority to sub-contract, contracted with the actual carrier. It was therefore not a case in which two bills of lading were issued for the same voyage and not one in which the freight forwarder had purported to contract with itself.

The court rejected the argument that the defendant authorised the actual carrier to contract for its protection and the NVOCC was authorised to contract for the carrier's protection, or that the carrier ratified the NVOCC's action.

Furthermore, the carrier did not act on the NVOCC's behalf in contracting with the defendant, which was evidenced in clause 4.1 of the carrier's b/l, which states: '(The) carrier shall be entitled to sub-contract on any terms the whole or part of the carriage'. Thus, the court concluded that in contracting with the defendant the carrier was not acting on anybody's behalf, but its own.

Even under the assumption that *stipulatio alteri* was given, the court found that the defendant had not accepted the stipulation, since there was no express communication. The defendant was liable in tort and could not be exempted under the Himalaya clauses in either bill of lading.

In *The Izmir* a broadly written Himalaya clause contained in the carrier's bill of lading extended immunity to 'every (...) servant or agent of the Carrier (including any stevedore, terminal operator or any other independent contractor)'.³⁴⁷ The cargo was off-loaded the carrying vessel owned by the carrier and was damaged while in storage awaiting customs clearance through the negligence of the sub-contractor (defendant), who performed storage services on behalf of the agent of the carrier. In applying English law the court relied on two leading cases which stress the commercial need for

³⁴⁵ citing *Sonicare International Ltd v East Anglia Freight Terminal Ltd and Neptune Orient Lines (Third Party)* (1997) 2 *Lloyd's Rep* 48 (CL CC).

³⁴⁶ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd* (1991) 24 *NSWLR* 745 (NSW CA), cf *supra*.

³⁴⁷ *LTA Construction Ltd v Mediterranean Shipping Company Depots (Pty) Ltd* 2004 SCOSA D211 (D&C LD); cf Wragge/Wagener 'South African Maritime Law Update: 2004' (2005) 36 *J Mar L & Com* 343, 356-357.

Himalaya clauses and granted the sub-contractor protection under the carrier's bill of lading, even though the sub-contractor acted on behalf of the carrier's agent and was thus in the words of Theron J 'twice removed' from the claimant.³⁴⁸

4. United States

US courts had to decide whether third parties who are not privy to the contract can benefit from limitation of liability clauses in either the NVOCC's or the performing carrier's b/l. In the relation between the NVOCC and the shipper this is determined by the decisions made in connections with Himalaya clauses.³⁴⁹ The only question with respect to intermediaries is whether a carrier, when sued by the shipper in tort, can rely on the Himalaya clause in the NVOCC b/l.

In *Delphi – Delco Electronics Systems v M/V Nedlloyd Europa*³⁵⁰ the court rejected this idea, because the clause did not include 'additional carriers or charterers'. The court was on the opinion that this question has not been decided before, overseeing the decision in *Halm Industries Co Inc v S/S Timur Star*.³⁵¹ In this case, the court granted the carrier the \$ 500/package limitation on the basis that the limitation of liability clause in the NVOCC's b/l included 'vehicle of transportation or its charterer'.

In *Allianz v Blue Anchor Line*³⁵² a truck carried a power wheel and at his fault collided with an overpass on an US interstate highway. The truck driver was killed and the wheel was a total loss. The cargo insurer paid out over \$ 1 mill and brought a subrogation action against the truck company (Distribution Express), who had issued a b/l for the carriage from the US port of discharge to Ohio, against the NVOCC (Blue Anchor Line), who had issued an FBL³⁵³ for transport of the power wheel from Thailand to Ohio and against a freight forwarder (Kühne & Nagel Belgium), who agreed to handle all shipments for a project contract and entered into a transportation contract with the owner. Distribution Express argued that Allianz was precluded from suing the trucker, because of the 'no claims' clause in the Blue Anchor b/l. Allianz responded that the limitation of liability in the b/l was pre-empted by the Carmack Amendment to the Interstate Commerce Act, which provided the shipper with a statutory right of recovery and

³⁴⁸ However, it must be noted that the MSC Depots (Pty) Ltd is a subsidiary of MSC (Pty) Ltd, who belongs to the parent holding company MSA SA Geneva. In addition to the Himalaya clause the preamble of the b/l issued by MSA SA Geneva did not only define the carrier but expressly stated: 'MSC shall act as agent for the owner or demise charterer in arranging the transport covered by this Bill of Lading.' The court held that even if MSC was not the carrier, as submitted by the plaintiff, but merely the agent of the ship owner, the provisions of the b/l would nonetheless apply.

³⁴⁹ Figert 'Der Non-Vessel-Operating Common Carrier in der US-amerikanischen Rechtsprechung' *TranspR* 7/8-2006, 269, 272.

³⁵⁰ 2004 AMC 1217, 1231 (SDNY 2004).

³⁵¹ 1985 AMC 391, 394 (SDNY 1984).

³⁵² *Allianz CP General Ins Co Ltd v Blue Anchor Line* 2004 AMC 1266 (SDNY 2004).

³⁵³ The FIATA b/l extends the benefit of its exemptions and limitations to third parties by virtue of a Himalaya clause.

is mandatory law, which cannot be departed from.³⁵⁴ The court held that the Carmack Amendment is not mandatory and does not apply to the shipment because the Blue Anchor Line b/l was a through b/l, which was issued in a foreign country to govern the shipment throughout the transportation from abroad to its final destination in the US.³⁵⁵ A through b/l applies to all connecting carriers whether they were party to the contract or not. The court rejected the further argument that Distribution Express was liable under Carmack because it had issued its own b/l. The court held that the Distribution Express b/l was void, because Distribution Express did not enter into a separate agreement with the cargo owner for the inland leg providing for separate consideration. Under the Blue Anchor b/l the plaintiff was prevented to impose upon 'any participating carrier' any liability whatsoever in connection with the goods. The court held that Distribution Express fell within the definition of 'participating carrier' and was thus relieved from liability. Blue Anchor Line was held to be liable for only \$ 500 (0.5% of the claim) since the b/l extended US COGSA to inland transport in the US. The claim against the freight forwarder was dismissed for want of in *personam* jurisdiction. The court stated that Allianz might have a valuable claim in contract against K&N, but that claim would have to be brought in Belgium.

In this case the NVOCC had directly employed the third party trucker. What remains unclear from the case is whether a sub-sub-contractor could rely upon this clause.

In the *Kirby* case the Court of Appeal refused to grant the as sub-sub-contractor (Norfolk), who was engaged in the transport from port of discharge to the final destination protection under the NVOCC b/l, because the railway had been engaged by the ocean carrier and not the NVOCC and the railway did not fall within the wording 'any independent contractor whose services had been used in order to perform the contract'.³⁵⁶ The Supreme Court reversed the judgement and held that the sub-contractor of the ocean carrier is protected by the Himalaya clause in the NVOCC b/l without being privy to that contract in order to benefit from the liability limitations in the ocean carrier's b/l.³⁵⁷ The word 'any' contained in the clause was broad enough to include the railroad

³⁵⁴ 49 USC § 11706.

³⁵⁵ 2004 AMC 1266 citing *Sompo Japan Insurance of America v Union Pacific Railroad Company* 2003 WL 22510361, 1 (SDNY 2003) (upholding limitation of liability found only in the through bill of lading with respect to the inland carrier, despite the fact that a separate bill of lading was issued for the inland portion of the carriage). The decision was reversed and remanded on appeal, cf *infra*.

³⁵⁶ Cf *supra* *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 300 F3d 1300, 1308 (11th Cir 2002).

³⁵⁷ Cf *supra* *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 125 SCt 385, 398 (SC 2004). The Supreme Court resolved a split in the various Circuit Courts of Appeal. *Akiyama Corp of America v M/V Hanjin Marseilles* 162 F3d 571, 574 (9th Cir 1998) (privity of contract is not required in order to benefit from a Himalaya Clause); *Mikinberg v Baltic SS Co* 988 F2d 327, 332 (2nd Cir 1993) (a contractual relationship is required); *Norfolk Southern Railway Co v James N Kirby Pty Ltd* 300 F3d 1300, 1308 (11th Cir 2002) (privity required); cf further Robertson/Sturley 'Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits' (2003) 27 *Tul Mar L J* 495, 568-569. The Supreme Court stated that the court of lower instance misread the Supreme Court's decision in *Robert C Herd & Co v Krawill Ma-*

as a sub-contractor of the carrier. Furthermore the language of the contract mirrored the parties' intention to contract for door-to-door carriage by various modes including inland carriage from the port of discharge to the place of receipt. From the fact that the parties have anticipated that a land carrier's service would be necessary for performance of the contract, the conclusion could be drawn that a railroad like Norfolk was an intended beneficiary of the broadly written Himalaya clause in the NVOCC's b/l.³⁵⁸ The decision was welcomed as both fair and practical.³⁵⁹

The US Court of Appeals held in *Sompo Japan Insurance Company of America v Union Pacific Railroad Company* that the Carmack Amendment applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country, thus denying the rail carrier the benefit of the limitation per freight unit under US COGSA to which he claimed entitlement under the Himalaya clause in the ocean bill of lading.³⁶⁰ Shipper Kubota booked with ocean carrier Mitsui (MOL) through transit of cargo from Japan to Suwanee, Georgia via the port of Long Beach, California. MOL issued through bills of lading to Kubota, and sub-contracted surface carriage from Long Beach to Georgia to Union Pacific Railroad (UP). As it is custom in the industry, UP offered MOL inland transportation pursuant to its electronic waybills.³⁶¹ The UP train derailed in Texas, damaging the subject freight.³⁶² The MOL through bills provided for US COGSA \$ 500/package limitation and a Himalaya clause extending this protection to MOL's agents and sub-contractors. It also provided Kubota with an opportunity to opt for full carrier liability, which was declined. However, MOL's through ocean bills of lading did not offer the shipper an option of 'full Carmack Liability'. The MOL bill of lading included a 'clause paramount' and a 'period of responsibility clause' which extended COGSA beyond its 'tackle to tackle' statutory applicability.³⁶³ The cargo insurer Sompo Japan sued UP in subrogation. The District Court found the railroad's liability was limited to

chinery Corp 79 SCt 766 (SC 1959) by requiring a more specific wording of the Himalaya Clause and privity to the contract: 'The decision simply says that contracts for carriage of goods by sea must be construed like any other contracts: by their terms and consistent with the intent of the parties. If anything, *Herd* stands for the proposition that there is no special rule for Himalaya Clauses.', at p 397.

³⁵⁸ 125 SCt 385, 397-398.

³⁵⁹ If decided otherwise, carriers would have to find out whether they are dealing with an intermediary/ intermediaries in order to ensure full protection for everyone. Furthermore where liability is limited in carrier/shipper contracts, but not in carrier/NVOCC contracts, carriers would want to charge intermediaries higher freight rates. Shippers can always ensure their possibility to sue someone by refusing to agree to their intermediaries' limitation of liability. Block 'Backtracking Through the Himalayas: The US Supreme Court Rules Connecting Railroad's Liability is Limited by Ocean Bills of Lading' 1 Jan 2005 *Forwarderlaw.com*.

³⁶⁰ 456 F3d 54 (2nd Cir 2006).

³⁶¹ The UP argues that its electronic data interchange receipts, or waybills are not separate domestic bills of lading. Brief and Special Appendix for Defendant-Appellant, *Sompo Japan Ins Co of America v Union Pacific Railroad Co* at pp 45-46.

³⁶² 456 F3d 54, 56.

³⁶³ *Ibid.*

\$500/package per the extended MOL b/l. It rejected Sampo Japan's contention that Carmack and the Staggers Rail Act of 1980³⁶⁴ governed UP's liability.³⁶⁵ The Court of Appeal disagreed and concluded that the contractual extension of COGSA to connecting rail carriers in intermodal transit cannot overrule Carmack as the mandatory cargo liability regime for surface transportation. COGSA only applies tackle-to-tackle and 'courts have consistently held that when COGSA is extended by contract beyond the tackles (...), the statute does not apply of its own force, or *ex proprio vigore*, but rather as a contractual term.'³⁶⁶ Carmack, on the other hand, does apply *ex proprio vigore*, and therefore must take precedence. Railroads may limit their liability, but must offer the shipper to opt for full Carmack liability coverage.³⁶⁷ The court, having concluded that Carmack governs the railroad's liability, reversed and remanded the question whether UP had provided the shipper with such an opportunity.³⁶⁸ While the UP's waybills adopted MOL's bill of lading,³⁶⁹ and the latter offered Kubota an opportunity to declare full value, 'it does not provide the option of full coverage under Carmack. (...) (Because) COGSA liability is grounded in negligence while Carmack liability is rooted in strict liability, (...) (the court) cannot assume that the shipper contracting with Union Pacific had the opportunity to choose among several types of liability coverage and opted not to pay a higher freight rate for full coverage under a strict liability rule.'³⁷⁰

Despite *Sampo Japan's* attempts to distinguish *Kirby*, the two decisions have different underlying facts and policy implications.³⁷¹ *Kirby* stands for a uniform policy of federal maritime law governing freight claims if terms in ocean through-bills are extended to connecting carriers. The court found this to be desirable from both industry and legal

³⁶⁴ 49 USC § 10502 (Staggers Rail Act of 1980) and 49 USC § 11706 (Carmack Amendment of 1906).

³⁶⁵ 456 F3d 54, 56, 59. The Second Circuit's opinion in *Sampo Japan* reviews the Staggers Act in some detail in connection with the requirement that railroads offer their shippers full liability options to enjoy limited liability under Carmack.

³⁶⁶ 456 F3d 54, 56, 69.

³⁶⁷ 'However, the combined effect of § 10502(e) (Staggers) and § 11706(a) (Carmack) is that rail carriers that wish to limit their liability must offer the shipper the option of full Carmack coverage, which includes both the Carmack version of strict liability and full coverage for loss', 456 F3d 54, 56, 60.

³⁶⁸ 456 F3d 54, 56, 75. The District Court found that the UP had not given Kubota an opportunity to opt for 'full Carmack liability', as its waybills were not that specific. The UP appealed that decision, which is now pending before the Second Circuit. In its pending appeal UP cites a number of federal appellate opinions that support *Kirby* in a manner incompatible with *Sampo Japan*, most notably, *Altadis USA Inc v Sea Star Line LLC* 458 F3d 1288 (11th Cir 2006). The US Supreme Court granted *certiorari* in *Altadis*, but the parties settled before argument. The fact that the High Court recognized a split in the Circuits suggests it is likely to grant *certiorari* in *Sampo Japan*, cf Block 'Kirby's wake? How the calm waters of ocean transportation intermediary and subcontractor liability suddenly became unpredictable' 1 Aug 2008 *Forwarderlaw.com*.

³⁶⁹ In the current appeal UP argues that its waybills had been 'succeeded by UP Exempt Circular 20-B at the time of the shipment at issue', and that Circular 20-B adopts the limitation of liability contained in the ocean carrier's bill of lading. Brief and Special Appendix for Defendant-Appellant *Sampo Japan Ins Co of America v Union Pacific Railroad Co*, at pp 12-13.

³⁷⁰ 456 F3d 54, 76.

³⁷¹ Block 'Kirby's wake? How the calm waters of ocean transportation intermediary and subcontractor liability suddenly became unpredictable' 1 Aug 2008 *Forwarderlaw.com*.

perspectives, recognising that parties may retain some element of control if they disfavour the 'default rule' it was establishing.³⁷² *Sompo Japan* is based on the principle that ocean carriers may not extend COGSA and the limited liability terms of their through bills of lading to surface carriers, who must limit their own liability in accordance with Carmack and Stagers.³⁷³ Second Circuit Courts, despite the dissatisfaction with the apparent conflict between *Kirby* and *Sompo Japan*, have necessarily applied and defended the *Sompo Japan* doctrine.³⁷⁴

5. Canada

The facts in *Boutique Jacob Inc v Pantainer Ltd*³⁷⁵ were practically identical to the Kirby case. Boutique Jacob requested its freight forwarder to arrange for a shipment of clothing from Hong Kong to Montreal. The freight forwarder engaged Pantainer Ltd to perform the transport, to which Pantainer agreed by issuing its bill of lading as carrier. Pantainer subcontracted the carriage to OOCL, which confirmed its undertaking by an EDI waybill. OOCL had made arrangements with Canadian Pacific Railway (CPR) to carry the container from Vancouver (port of discharge) to Montreal. The train derailed and part of the cargo was damaged. The cargo underwriters sued in subrogation against Pantainer, OOCL and CPR, principally because CPR denied liability and argued that if it was liable then it benefited from limitations of liability contained in its Tariff (\$ 250,000), the Confidential Rate Agreement with OOCL, and the US \$2/kilo limitation in the OOCL terms and conditions. Pantainer sought indemnity from OOCL and argued that it was not bound by OOCL's terms and conditions since the EDI waybill did not contain any terms and conditions on the back when it was printed. OOCL denied any contractual relationship with the shipper and denied any misconduct. Alternatively, it claimed limited liability under its regular terms and conditions which are publicly available on its website. One of the reasons that OOCL was sued was due to recourse under the law of bailment. Canadian Maritime Law recognizes that various parties in

³⁷² 125 SCt 385, 396: 'As COGSA permits, Hamburg Süd in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Süd would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.'

³⁷³ Block 'Kirby's wake? How the calm waters of ocean transportation intermediary and subcontractor liability suddenly became unpredictable' 1 Aug 2008 *Forwarderlaw.com*.

³⁷⁴ See e.g. *Swiss National Insurance Co v Blue Anchor Line* 2008 WL 2434124, 2 (SDNY 2008); *Federal Ins Co v Great White Fleet (US) Ltd* 2008 WL 2980029, 9 (SDNY 2008); and *Amazon Produce Network LLC v M/V LYKES OSPREY* 553 FSupp2d 502, 507 (EDPa 2008). Analysis also has been given to whether or how *Sompo Japan's* principles might be extended to slightly differing circumstances. *Rexroth Hydraudyne BV v Ocean World Lines Inc* 2007 WL 541958, 2 (SDNY 2007): 'But the issue of rail carrier liability is not presented here. The issue in this case is whether an NVOCC or other non-rail carriers are entitled to the benefit of the COGSA package limitation under the parties' contracts. Nothing in *Sompo Japan* sheds any light on that question. Indeed, apart from its mistaken reliance on the Carmack Amendment plaintiff suggests no convincing reason why it should not.'

³⁷⁵ 2006 CarswellNat 439, 2006 AMC 1940, 288 FTR 78 (FC Can); reversed 2008 CarswellNat 590, 2008 FCA 85, 2008 AMC 1638 (FCA Can); Colford 'Liabilities of North American Rail Carriers: one Continent but two systems' 25 Feb 2006 *Forwarderlaw.com*.

the chain only agree to perform subject to terms and those terms are opposable to the owner of cargo provided that the owner had agreed that its contractual partner could sub-contract on terms usual in the trade. In addition, if the contracting party protects its sub-contractors by a Himalaya clause, the contracting party's terms also applied. CPR argued that its tariff was incorporated into its Confidential Rate Agreement with OOCL and therefore was opposable, since it was a term upon which it agreed to carry the goods.

The court of first instance held that, when parties deal with each other regularly and use their websites, they are deemed to have had no knowledge of standard terms and conditions which appear on that website.³⁷⁶ OOCL as bailee did not only have a defence against Pantainer under its terms and conditions, but even if could not oppose its own terms against Boutique Jacob, it could invoke Pantainer's Himalaya clause to benefit from the exemption clause, which Pantainer had stipulated for itself, and for all its sub-contractors.³⁷⁷

The court held that a Confidential Rate Agreement only binds the immediate parties.³⁷⁸ Any other party who suffers damage arising from a railway accident is protected by section 137 of the Canada Transportation Act that bars any limitations of liability that are not in writing and signed by that party.³⁷⁹ CPR did not have a signed agreement with Boutique Jacob, and thus was unable to invoke its tariff.³⁸⁰

As a further result of s 137, CPR could neither invoke the Himalaya clause in OOCL's terms nor in Pantainer's bill of lading to claim the benefit of limitations of liability. This accords with the decision in *Sompo Japan* as opposed to the *Kirby* decision, under which CPR would have been entitled to invoke the US \$2/kilo limitation in OOCL's waybill conditions or the limitations in Pantainer's bill of lading.³⁸¹ The court dismissed the action against Pantainer and OOCL and held CPR solely responsible for all the damages.

The Court of Appeal disagreed with this conclusion as it considered the ocean carrier to be the shipper vis-à-vis the surface carrier in terms of the Canadian Transportation Act.³⁸² This interpretation of the word 'shipper' in terms of s 137, as found in *Sumitomo Marine & Fire Insurance Co v Canadian National Railway Company*³⁸³, restricts the notion of 'shipper' to that person who contracts for the use of carriage services by rail.

³⁷⁶ 2006 CarswellNat 439 para 30.

³⁷⁷ *Ibid* at para 37.

³⁷⁸ *Ibid* at para 49. The Confidential Rate Agreement was between OOCL and CPR and it was a document that was ordered sealed by the court to protect confidentiality and thus the shipper did not have any means of knowing its contents, *ibid* at para 48.

³⁷⁹ *Ibid* at para 50.

³⁸⁰ *Ibid* at para 45.

³⁸¹ Effectively amounting to \$1,976 against a potential liability for \$71,000, cf Colford 'Liabilities of North American Rail Carriers: one Continent but two systems' 25 Feb 2006 *Forwarder-law.com*.

³⁸² 2008 CarswellNat 590 para 47 (FCA Can); Jones 'Boutique Jacob - Appeal decision enforces Himalaya clause, limits railway's liability' 14 May 2008 *Forwarderlaw.com*.

³⁸³ 2007 CarswellQue 6228, 2007 QCCA 985 (QueCA 2007); Colford 'More on the Right to Claim against Railways under Canadian Law' 14 Aug 2007 *Forwarderlaw.com*.

Sec 137 contains a complete code governing the railway's liability towards the shipper, and incidentally only that shipper. Even if the shipper happens to be freight forwarder (or ocean carrier), it is nonetheless a shipper if the railway's contract is with this person. Therefore, according to s 137, the liability of the railway toward the shipper is determined by to the Confidential Rate Agreement. Furthermore, the owner of the cargo, who is not the shipper, has no cause of action against the railway in tort. Recourse to the common law of bailment was unnecessary, since the whole subject of carriage by rail is regulated by statutory law. Consequently, all discussion about Himalaya clauses became irrelevant.

The court held that CPR's tariff was incorporated in the confidential rate contract. As both the ocean carrier and the rail carrier accepted the Confidential Rate Agreement as a legally effective document, the statutory requirement of a signature was a formality only, and not a legal barrier to its enforcement.³⁸⁴ Thus, CPR was entitled to limit its liability under its tariff to an amount equal to that found in OOCL's b/l.³⁸⁵ Boutique Jacob knew or ought to have known that the contract of carriage undertaken by Pantainer might be sub-contracted to others whose terms and conditions would be applicable to it and was thus bound by the railway's terms and conditions.³⁸⁶

The court held further, that even if CPR could not rely on the limitation provisions of the tariff, it could, nonetheless, by reason of the Himalaya clauses found in both Pantainer's and OOCL's bills of lading, rely on the limitation provisions found in those bills of lading.³⁸⁷

XIII. Recourse against sub-contractors

Whether the forwarder, who reimburses cargo interests, can recover from its sub-contractors largely depends on his contractual role; chances can be exacerbated if the laws applicable in relation to the shipper differ from the ones applicable in relation to the carrier.

In *The Korea Wonis-Sun*³⁸⁸ the Hong Kong courts have held that a forwarder who had issued its own house bill and paid a claim to a consignee could not recover from the carrier as it has not contracted as principal, but as an agent.

In *Transcontainer v Custodian Security*³⁸⁹ Transcontainer undertook legal responsibility to carry cargo from France to England under a multimodal transport contract. It hired a road haulier (Crossland) to take the goods from the port of discharge to the cargo owner's warehouse. Since the warehouse was not able to receive the goods, Cross-

³⁸⁴ 2008 CarswellNat 590 at para 48 (FCA Can).

³⁸⁵ *Id* at para 55.

³⁸⁶ *Id* at paras 52, 55.

³⁸⁷ The rationale for this conclusion was the same as expressed by the trial judge in his reasons pertaining to OOCL's liability, *id* at para 59.

³⁸⁸ *Freight Systems Ltd v Korean Shipping Corp* (1990) LMLN 290; Hetherington 'Freight Forwarders and House Bills of Lading – The Cape Comorin' (1992) 1 LMCLQ 32, 33.

³⁸⁹ *Transcontainer Express Ltd v Custodian Security Ltd* (1988) 1 Lloyd's Rep 128.

land took it to the security park owned by Custodian, who provided a 24 hour security service. The goods were stolen and Transcontainer had to compensate the cargo owners for the loss. Custodian's only contractual partner was Crossland and Transcontainer therefore claimed to recover from Custodian in tort, alleging that Custodian was a sub-bailee for reward. The judge concluded that Custodian had not taken reasonable care of the cargo, resulting in its loss, but dismissed Transcontainer's claim on the ground that Custodian's duty of care extended only to those with a possessory or proprietary interest in the cargo, which Transcontainer did not have. Since Transcontainer did not have possession of the cargo when stolen, the appeal was dismissed.³⁹⁰

In *Princes Buitoni Ltd v Hapag Lloyd*³⁹¹ damage occurred upon the road leg in England, which was part of a multimodal transport of goods. The multimodal transport bill of lading contained two clauses concerning the applicable liability regime. Cl 2(b)(3) dealt with multimodal transport and provided that 'during road carriage in Europe' the CMR was to apply.³⁹² Cl 2(5) provided that during multimodal transport, except as provided for by cl 2(b)(3), the terms were to be those used by any sub-contractor performing inland transportation. The question was which of the two clauses applied. The judge applied the CMR and the carrier appealed, arguing that (1) the commercial sense of the arrangement indicated that the carrier was intended to have back-to-back liability with the sub-contractors; (2) the CMR Convention could not apply as, according to Art. 1, it only applied to road carriage between different countries. The court dismissed the appeal and held that the words 'during road carriage in Europe' were plain, unlimited and unqualified. The bill of lading provided that part of the terms of the multimodal transport should be derived from the CMR, which only applied as a matter of contract, and the context showed that the two clauses should be read together. As the loss occurred during road transport in England, cl 2(b)(3) applied. Thus, the MTO was liable according to the CMR, whereas the sub-contractor could rely on its own terms.

In this context it is of further importance to determine the law applicable to the process of transshipment, cargo handling and storage in the port area. Where the MTO is liable

³⁹⁰ For the first time on appeal, Transcontainer submitted that at the time of the theft it had had an immediate right to possession of the cargo. The court agreed that possessory title includes immediate right to possession, *id* at p 131, citing *The Hamburg Star* (1994) 1 *Lloyd's Rep* 399, 404, which relied on Lord Brandon in *The Aliakmon* (1986) 2 *Lloyd's Rep* 1, 4, who approved the decision of Roskill J in *The Wear Breeze* (1967) 2 *Lloyd's Rep* 315, 334. Transcontainer could therefore have established possessory title by proving that Crossland were their agents for the purpose of the physical possession of the goods or that they had the right to take possession at any time under their contract with Crossland, cf Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 517. However, as a matter of procedure, the court would only agree to such a new point being raised, if it was satisfied that no new evidence could have been adduced on the point. On the facts, it was perfectly possible that Custodian would have wanted to deal in evidence with the contractual arrangements between Transcontainer and its customer, so that Transcontainer was precluded from raising the point on appeal.

³⁹¹ (1994) 1 *Lloyd's Rep* 593.

³⁹² UN Convention on the Contract for the International Carriage of Goods by Road 1956. As part of English law applicable in South Africa via s 6 Admiralty Jurisdiction Regulations Act 105 of 1983.

to the shipper for damages and tries to recover its losses in recourse proceedings against the ocean carrier and/or the terminal operator, the sub-contractors might be able to limit their liability to a lesser amount vis-à-vis the MTO.³⁹³ The question which law applies to transshipment liability and its limitations depends on whether the act of transshipment forms an annex to the preceding, a prefix to the subsequent leg of the voyage or a separate leg. The prevailing opinion in the legal literature is that transport within a port during the course of transshipment creates a separate leg of carriage and is not an annex to the sea transport and thus not subject to Hague-Visby.³⁹⁴

In *Mayhew Foods v Overseas Containers*³⁹⁵ the goods were carried under a through b/l. The defendant forwarder claimed the HVR could not apply while the goods were on land during transshipment. The court ruled that HVR applied to all stages from the port of shipment to the final port of discharge and transshipment was merely incidental to the sea carriage.³⁹⁶

The Hamburg Higher Regional Court held for carriage under a MTD that transshipment within a port creates a separate (road) leg, because the transport of the cargo for 300 meter to another terminal after discharge was of sufficient own weight and could thus not be an annex of the sea carriage.³⁹⁷ The Supreme Court confirmed that the damage occurred during road transport, but disagreed with the reasoning that the trucking created a separate leg of transport. The court found it rather to have been part of the process of loading which must be considered as part of the following leg of the transportation.³⁹⁸ In an earlier decision the court had ruled that the ocean carriage ends with the loading of the goods onto the next transport vehicle. The discharge and cargo handling at the terminal however created an annex to the sea carriage, since it was closely connected to- and characteristic for the ocean carriage.³⁹⁹

In another decision the Hamburg Higher Regional Court established when the carriage by sea begins in multimodal transport. It was held that the storage of cargo whilst awaiting sea carriage for about three weeks was not sufficient to create a separate leg

³⁹³ Limitations for land transport are generally higher (under the CMR 8.33 SDR/kilo) than those applicable to sea carriage (under HVR 2 SDR/kilo).

³⁹⁴ Cf Boehlhoff 'Multimodal Transport – law applicable to losses occurring within a port during movement of cargo to transshipment terminal' 18 June 2005 *Forwarderlaw.com*. In *The Izmir (supra)* the contract of carriage extended to storage services, but the court expressly did not have to decide whether the HVR applied to the post-discharge period, at p D220.

³⁹⁵ (1984) 1 *Lloyd's Rep* 317; Julga 'Das Englische Konnossementsrecht unter Berücksichtigung der Leitentscheidungen' *TranspR*, 7-8 2005 269, 285.

³⁹⁶ Equally in *The Anders Maersk* (1986) 1 *Lloyd's Rep* 483 the court held that where the through b/l contained a right to tranship and stipulated for US COGSA limitations, the carrier could limit its liability according to the b/l provisions for the whole of the transport.

³⁹⁷ Higher Regional Court of Hamburg, Decision dated 19 August 2004, 6 U 178/03, *TranspR* 10-2004, 402-406.

³⁹⁸ German Federal Supreme Court, Decision dated 18 October 2007, I ZR 138/04 at para 19, *TranspR* 11/12-2007, 472-477.

³⁹⁹ German Federal Supreme Court, Decision dated 3 November 2005, I ZR 325/02, *TranspR* 1-2006, 41-43.

of the voyage, but was part of the subsequent sea carriage.⁴⁰⁰ Since in this case the handling and storage company has contracted with the sea carrier, the outcome might have been different where no such contract existed. MTOs should ensure in their contracts to have a full right of recourse against its sub-contractors in cases where it is liable to the shipper according to the law governing road carriage.

XIV. Counter-claims against the shipper

The carrier can claim against the shipper for container demurrage, freight and damages caused by the shipment of dangerous goods. To extend their right of recourse against third parties carriers often include a so called 'merchant clause' in their bills of lading.⁴⁰¹ However, for a third party to be bound by a bill of lading, some form of acceptance is necessary.⁴⁰² Some carriers have relied upon the same clause to pursue their claims against freight forwarders.

In *Malaysia International Shipping Corp Bhd v Visa Australia Pty Ltd*⁴⁰³ the ocean carrier sued to recover container demurrage charges from the forwarder pursuant to a merchant clause in its standard form bills of lading and waybills that imposed liability for late return of containers on the merchant. The defendant submitted that it was merely a freight forwarder and the containers in question were all actually delivered to and then detained by its customers. The court decided that the words merchant caught all those persons falling within the definition, who were parties to the contract of carriage. The forwarder's customers were not parties to the contracts of carriage and had no rights or obligations under them. Secondly, the container demurrage clause contained the condition '(i)f containers supplied by or on behalf of the Carrier are unpacked at the Merchant's premises.' In this case, all of the containers were unpacked at the premises of the cargo owners, who did not qualify as merchants for the purposes of the contracts. Although the forwarder did qualify as a merchant, no containers were unpacked at its premises. Accordingly, the condition was not fulfilled and the carrier had no claim against the forwarder based upon that clause.

If the container demurrage clause had been worded unconditionally the ocean carrier would have been entitled to recover from the forwarder as merchant and party to the contract. The forwarder has an obligation to the ocean carrier although it is unable to return the containers on time, because they are being held by its customers. *Davies*

⁴⁰⁰ Higher Regional Court of Hamburg, Decision dated 28 February 2008, 6 U 241/06, *Hamburger Seerechts-Report* 2008, 100 No 45; Eichhorn 'Is Cargo Handling and Storage at Port Terminal Part of Subsequent Sea Carriage?' 9 April 2008 *Forwarderlaw.com*.

⁴⁰¹ The clause usually reads: 'Merchant is defined as a Shipper, Consignee, Receiver of the Bill of Lading, Owner of the cargo or Person entitled to the possession of the cargo or having a present or future interest in the Goods and the servants and agents of any of these', Jones 'Who can a carrier sue under a bill of lading?' 20 March 2007 *Forwarderlaw.com*.

⁴⁰² *APL Co Pte Ltd v UK Aerosols Ltd Inc, U G Co Inc dba Universal Grocers Co, Kamdar Global LLC and Imp-Ex Solutions LLC* 2006 WL 3848784 (NDCal).

⁴⁰³ (2003) VSCA 64.

therefore advises that a forwarder should protect itself against this eventuality by inserting appropriate clauses in the carriage documents it issues to its own clients.⁴⁰⁴

In *Mediterranean Shipping Co SA Geneva v Royale Gulf Shipping Co Inc*⁴⁰⁵ the ocean carrier sued both the NVOCC with which it had contracted to carry the cargo and the actual shipper, which had contracted with the NVOCC, but not with ocean carrier. It was held that MSC cannot recover demurrage from the actual shipper as it had no contract with it. The shipper did not meet the definition of 'merchant' in the ocean carrier's b/l, since the NVOCC was the shipper in that b/l and the cargo owner was the consignee, which bought the goods from the shipper on CIF terms.⁴⁰⁶ The court found further that the NVOCC is entitled to indemnification from the actual shipper pursuant to the indemnity agreement between the parties, which was incorporated into the NVOCC's b/l. However, the shipper sold the goods to the consignee pursuant to their contract of sale, and thus was not liable for demurrage charges.⁴⁰⁷

Via the merchant clause a third party not named in the bill of lading can furthermore be liable for freight. In *Eimskip v Atlantic Fish Market Inc*⁴⁰⁸ an ocean carrier (Eimskip) issued bills of lading naming the seller as shipper and consigning the cargo to the 'order of shipper'. The co-defendant Atlantic Fish Market acted as agent on behalf of the buyer in negotiating the freight and booking space on the carrying vessel. In previous shipments of the seller, Atlantic had further paid the freight charges. When Eimskip sued for outstanding freight for this particular shipment, Atlantic defended on the ground that it was neither shipper nor consignee on the bill of lading and that under US COGSA only a party named in a bill of lading is liable for freight. The court found that US COGSA does not create a cause of action for- or regulate the collection of freight charges.⁴⁰⁹

The bills of lading provided that 'any merchant' had to indemnify the carrier for collection costs and incorporated a standard 'merchant' definition. The court found that Atlantic and the seller had both been shippers of the cargo. Because the seller was listed as the shipper and consignee on the bills of lading, it was presumptively primarily liable for the freight charges. In this instance, however, Atlantic was primarily liable because of Atlantic's multiple representations to both the seller and the carrier that it would be liable for the cargo and the course of dealings among the parties prior to the shipments at issue. The court found that both the seller and Atlantic were 'merchants' under the

⁴⁰⁴ Davies 'Bill of lading - Merchant responsible for container demurrage - freight forwarder not responsible to ocean carrier - containers not unpacked at forwarder's premises' 14 Dec 2004 *Forwarderlaw.com*; McQueen comments: 'The case reinforces the need for all forwarders who issue bills of lading/sea waybills as principals to ensure that the terms and conditions in those documents allow them to recover container detention charges from the "merchant" as defined in such circumstances as obtained in this case.', *ibid*.

⁴⁰⁵ 2002 AMC 2562 (SD Tex).

⁴⁰⁶ *Id* at p 2573.

⁴⁰⁷ *Id* at p 2574.

⁴⁰⁸ 2005 AMC 1817 (1st Cir 2005); Jones 'Hague Rules do not govern liability for freight' 15 Aug 2005 *Forwarderlaw.com*.

⁴⁰⁹ 2005 AMC 1817, 1820 (1st Cir 2005).

definition in the bill of lading.⁴¹⁰ Atlantic was liable for freight without regard to whether it was technically a party to the bill of lading: 'Two parties may each make themselves liable to a third party for payment of the same freight on a single shipment - one by a contract reflected in part by the bill of lading and the other by explicit promises and course of conduct independent of the bill of lading.'⁴¹¹

This ruling indicates that, even though a forwarder is described on the bill of lading as 'forwarding agent' only, where he made the booking and by agreement receives the carrier's freight invoice, he is liable for freight, especially where the forwarder had paid the carrier's invoices on prior occasions on behalf of his customers. Therefore freight forwarders should make it clear to carriers that in all cases where they expressly act as forwarding agents, they will assume no liability for freight even though the payments may be coming via them.⁴¹²

The forwarder might further be personally liable for freight where he acts for an undisclosed principal. In *Cory Brothers Shipping Ltd v Baldan Ltd*⁴¹³ a forwarding agent (Baldan) engaged Cory, who arranged for carriage and received an ocean b/l signed by the vessel's agents, which stated 'freight paid' and named the company '341' as shipper. The freight had not been paid by the shippers. Cory, who had paid the freight to the carrier without having obtained payment in advance, erroneously released the b/l to Baldan. Cory contended that it came under personal liability to pay the freight to the shipping agents and the forwarding agent in turn were personally liable to Cory. Baldan denied personal liability, contending that they were merely agents for the shippers. The court in allowing the claim held that there were two contracts: first a contract concluded between 341/Baldan and Cory under which Cory agreed as forwarding agents for the shippers to arrange for shipment and a second contract for the carriage of goods between the shippers and ship owners, in which Cory acted as agent for the shippers. The rights and liabilities of the first contract determined the present action.⁴¹⁴ It would have been clear in discussions between the parties that Baldan would not be acting as shippers or traders. There was usage that an agent who acted for an unknown shipper incurred personal liability for the freight.⁴¹⁵ The court found that for many years it was clear that in arranging for the shipment or air passage, even if forwarders disclose a (named) principal, they incur a personal liability to the shipping company or the air company for the freight.⁴¹⁶ If Baldan had given reasonable notice that they booked

⁴¹⁰ *Id* at p 1819.

⁴¹¹ *Id* at p 1821.

⁴¹² Cf comment by Chris Gillespie in Jones 'Hague Rules do not govern liability for freight' 15 Aug 2005 *Forwarderlaw.com*.

⁴¹³ (1997) 2 *Lloyd's Rep* 58 (CL CC).

⁴¹⁴ *Id* at p 61.

⁴¹⁵ Cf also Reynolds *Bowstead & Reynolds on Agency* (18th Ed) § 9-016.

⁴¹⁶ (1997) 2 *Lloyd's Rep* 58, 63. The court relied on the findings in *Anglo Overseas Transport v Titan Industrial Corp* (1959) 2 *Lloyd's Rep* 152 (QBD(Comm)) where forwarding agents had paid dead freight to the agents of the ship owners and then sought to recover that amount from the shippers, who had made the booking but had been unable to provide the relevant cargo. It was held that the plaintiffs had incurred liability to the ship owners having booked the space in their own name and not having disclosed the identity of the shippers. The court found that in

space 'as agents only' that would prevail over custom and usage and would exclude personal liability; but it did not give such notice before the formation of the first contract.⁴¹⁷ The court also found that - even in the absence of trade usage - Cory has proven facts from which an inference must be drawn that Baldan was personally liable, notwithstanding the fact that Cory knew that Baldan were contracting as agents. When Cory sent Baldan a freight quotation which named the forwarding agent as the customer, that could reasonably be said to lead to the inference that the forwarding agent was personally liable.⁴¹⁸

The carrier can claim against the shipper for damages caused by dangerous cargo.⁴¹⁹ Where the forwarder/NVOCC is considered the shipper vis-à-vis the carrier, he is as such strictly liable for damages resulting directly or indirectly from the shipment of dangerous goods, if neither the shipper nor the carrier had actual or constructive pre-shipment knowledge of the danger.⁴²⁰ The NVOCC must provide the carrier with all the details necessary for the issuance of a b/l. He may not raise the defence that he trusted the details given to him by another NVOCC, who issued a b/l for the same cargo to the shipper.⁴²¹ In cases where a fire on board of the ship resulting from the dangerous cargo causes damages of other cargo the NVOCC is liable for those damages as well.⁴²² Where the NVOCC can prove that the shipper failed to fully disclose in writing the nature and character of the dangerous goods and the b/l included an indemnity clause the NVOCC can seek recourse against the shipper.⁴²³

This was decided in *Scholastic Inc v M/V Kitano*⁴²⁴, in which case a forwarder (Navtrans) arranged for the carriage of impregnated activated Carbon. Navtrans co-brokered the freight to an NVOCC (Rose Containerline), which supplied a container, booked space with an ocean carrier (Hapag Lloyd) and issued a b/l which named Navtrans as the shipper. The flammable started burning and damaged other cargo and the vessel. The cargo owners settled a number of claims and sought indemnification from Navtrans. The court first discussed whether Navtrans acted as an NVOCC or freight forwarder or both in this case. Navtrans, as many companies in the industry, acted as both NVOCC and freight forwarder through different legal entities under its umbrella, several of which were involved in the case at stake.⁴²⁵ The court concluded that Navtrans was not liable regardless of its role. Even if Navtrans had qualified as an NVOCC

assuming this personal liability, the plaintiffs were acting within the scope of the authority given to them by the defendants, at p 63. Furthermore in *Perishables Transport Co v N Spyropoulos (London) Ltd* (1964) 2 *Lloyd's Rep* 379 (QBD) it was held that a forwarding and shipping agents, known to be acting as such, incurred personal liability to pay freight.

⁴¹⁷ *Ibid.*, citing *Kum v Wah Tat Bank Ltd* (1971) 1 *Lloyd's Rep* 439, 445 (PC Mal).

⁴¹⁸ *Id* at p 66.

⁴¹⁹ In terms of US COGSA, 46 USC App § 1304(6), and HVR, Art 4(3).

⁴²⁰ *Senator Line GmbH & Co KG v Sunway Line Inc* 291 F3d. 145 (2nd Cir2002).

⁴²¹ *Yang Ming Marine Transport Corp v Oceanbridge Shipping Intern Inc* 1999 AMC 1617, 1630 (C.D. Cal 1999); reversed and remanded on other grounds 259 F3d 1086 (9th Cir 2001).

⁴²² *Scholastic Inc v M/V Kitano* 362 FSupp2d 449, 457 (SDNY 2005).

⁴²³ *Ibid.*

⁴²⁴ *Id* at p 449.

⁴²⁵ Block 'Dangerous Goods and Ocean Transportation Intermediary Liability' 19 Nov 2005 *Forwarderlaw.com*.

and would have been primarily responsible for the damage as the ocean carrier's shipper of record, the Navtrans b/l provided that the cargo owner must indemnify Navtrans for losses brought on by the shipper.⁴²⁶ General Carbon argued further, that Navtrans as freight forwarder had failed to fulfil its affirmative obligation to identify hazardous cargo and had not processed the product information sheet and failed to provide a (moisture proof) container.⁴²⁷ The court stated that a freight forwarder is not obliged to investigate whether or to what extent the cargo is flammable, nor to inspect whether the container provided by the carrier is unfit for transportation of such cargo and thereby refused to expand its liabilities by imposing obligations on the forwarder, where the responsibilities belong to the shipper.⁴²⁸

§ 2 Documents issued by the forwarder

The documents issued by a freight forwarder serve as primary evidence of the contractual relationship entered into and the rights and obligations of the parties thereunder. It is therefore necessary to determine whether a house bill of lading and a multimodal transport document can function as an equivalent of an ocean bill of lading both under common law and statutory law.

I. House bill of lading

As a frequent practice in container transport, house bills are issued by freight forwarders, who consolidate cargo from different owners in one consignment to be shipped under a groupage bill of lading issued by the carrier to the freight forwarder.⁴²⁹ A house bill of lading issued by a forwarder, in which the forwarder promises to arrange for transportation without assuming liability as carrier, does not evidence a contract of carriage.⁴³⁰ The forwarder's undertaking to arrange for transportation does not constitute a contract of carriage, but merely a contract of agency.⁴³¹ Any document issued by the forwarder to the shipper in this function is not a bill of lading in a technical sense.⁴³² One of the functions of a bill of lading is that it is best evidence of the contract of carriage.⁴³³ Since the traditional house bill does not evidence a contract of carriage it cannot be a b/l under common law, even if the parties refer to the document as such. In *A Gagniere & Co v The Eastern Company of Warehouses*⁴³⁴ the forwarder issued a

⁴²⁶ 362 FSupp2d 449, 457 (SDNY 2005).

⁴²⁷ *Id* at pp 459- 460.

⁴²⁸ *Ibid*. It is settled that where the shipper has positive knowledge of the particularities of the cargo, the forwarder has no affirmative duty to discover the inherent characteristics of that cargo, cf *Tetley Marine Cargo Claims* (4th Ed) Ch 33 p 21 n 119 and at p 24 n 138 with further references.

⁴²⁹ D'Arcy *Schmitthoff's Export Trade* (10th Ed) p 279 § 15-029.

⁴³⁰ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 509.

⁴³¹ *Tetley Marine Cargo Claims* (3rd Ed) p 929.

⁴³² Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 98.

⁴³³ *The Ardennes* (1951) 1 KB 55; Hare *Shipping Law & Admiralty Jurisdiction in South Africa* p 549.

⁴³⁴ (1921) 7 *LIL Rep* 188.

document, which had the form of a bill of lading. However, the document stated only that the forwarder would arrange contracts between the cargo owner and the carriers for the several legs of the carriage. The court held that the form of the document was irrelevant, since the forwarder did not undertake the obligation to carry the goods anywhere.⁴³⁵

In *The Cape Comorin*⁴³⁶ the question was whether a transport document issued by the freight forwarder was an (ocean) bill of lading within the meaning of the Sea-Carriage of Goods Act 1924 (Cth) and held it was not.⁴³⁷ A document is not a bill of lading merely because the parties called it that.⁴³⁸ The court observed that there is no statutory definition of a bill of lading.⁴³⁹ It quotes *The Marlborough Hill*, in which case the court held that a received for shipment bill equals a traditional shipped on board bill for the purpose of s 6 Admiralty Court Act 1861 (UK).⁴⁴⁰ In the case at stake, the forwarder had signed a 'received for shipment' bill of lading bearing a stamped 'on board' notation, but without having received the goods and in the absence of authority to sign the bill on behalf of the carrier or the ship.⁴⁴¹ Thus, the court came to the conclusion that the forwarders bill was not a bill of lading, and in particular not an on board ocean bill within the definition laid out in the cited authorities.

The document evidenced a contract of affreightment with the forwarder and not with the ocean carrier and accordingly was not a document of title and not within the Bills of Lading Act 1855 or its New South Wales equivalents.⁴⁴² The forwarders bill, though an ocean bill on its face, was held to be a house b/l in fact. The court placed great emphasis on a passage by *Scrutton*, which states: 'A "house bill of lading" issued by a forwarding agent acting solely in the capacity of an agent to arrange carriage is not a bill of lading at all, but at most a receipt for the goods coupled with an authority to enter into a contract of carriage on behalf of the shipper. It is neither a document of title, nor within the Bills of Lading Act 1855, and it is unlikely that it would ever be regarded as a good tender under a CIF contract.'⁴⁴³

⁴³⁵ *Id* at p 189.

⁴³⁶ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745 (NSW CA), noted by Hetherington 'Freight Forwarders and House Bills of Lading – The Cape Comorin' (1992) 1 LMCLQ 32; Davies 'Australian maritime law decisions 1991' (1992) LMCLQ 351, 360; Faber 'The problems arising from multimodal transport' (1996) LMCLQ 503, 510.

⁴³⁷ This Act has been repealed and the current legislation is in the Carriage of Goods by Sea Act 1991 (Cth) (COGSA).

⁴³⁸ Citing *A Gagniere & Co v The Eastern Company of Warehouses* (1921) 7 LIL Rep 188, 189; *Zima Corporation v M/V Roman Pazinski* 493 FSupp 268, 273 (SDNY 1980).

⁴³⁹ The court relied on the definitions in *Mocatta Scrutton on Charterparties* (19th Ed) at p 2; *Sewell v Burdick* (1984) 10 AppCas 74, 105 (HL); *Hill Freight Forwarders* pp 185-186.

⁴⁴⁰ *The Marlborough Hill v Alex Cowan & Sons Ltd* (1921) 1 AC 444, 450-451 (PC HL): 'There can be no difference in principle between the owner, master or agent acknowledging that he has received the goods (...) awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail.'

⁴⁴¹ (1991) 24 NSWLR 745, 752.

⁴⁴² *Ibid*.

⁴⁴³ *Ibid*, citing *Mocatta Scrutton on Charterparties* (19th Ed) at p 384; cf also Schmitthoff *Schmitthoff's Export Trade* (10th Ed) p 280 § 15-029: 'A house bill of lading is a misnomer because

In the Canadian case of *Maurice Desgagnes*⁴⁴⁴ the court considered whether a forwarder's transport document was a bill of lading within that meaning in the Carriage of Goods by Water Act 1970 (Can). After reviewing various authorities on the nature of a bill of lading, the court came to the conclusion that the document was a mere non-negotiable receipt, because it was neither titled 'bill of lading' nor was it signed and therefore not negotiable.⁴⁴⁵

In *Emilio Clot v Compagnie Commerciale du Nord*⁴⁴⁶ the forwarder issued a received for shipment b/l to the seller in a CIF contract and undertook to forward the goods from London. The court found that the document was not a bill of lading, nor did the forwarders own or operate any ships; the parties called the document 'reception order' and it purported that the goods were received from the seller in good order and condition for shipment to the buyer. The document stated that the forwarders only undertook to forward the goods from London. The court held that under a CIF contract the buyer is entitled to a document that evidences a contract covering the entire transport, ie 'a document which would give plaintiffs a right of action in the event of damage accruing against the carrying right away from this country to Turin'.⁴⁴⁷ The document issued was not a bill of lading in that sense. However, this decision did not turn on the question how much of the transport must be covered in the contract evidenced by the bill of lading for the document to amount to a bill of lading in terms of the HVR.⁴⁴⁸

Another indicator that a house bill does not fulfil the same functions as a bill of lading is that the possession of a house b/l is not an assured means of controlling the goods for the shipper. Forwarders do not have possession of goods covered by the house b/l, which are under the control of the actual carrier.⁴⁴⁹ They do not even have a right of immediate possession against a carrier, who is exercising his right to retain the goods until further payment is made, such as container demurrage.⁴⁵⁰ That leads to the reduced value of a house b/l in banking practice. Banks prefer ocean b/l's and according to Art 30 UCP 500 can reject house b/l's as adequate tender 'unless otherwise authorised in the credit'. Even if the house b/l is made out to order, the intent of the issuer

such a document is not a bill of lading in the technical legal sense. It is not a document of title giving the consignee or assignee a right to claim the goods from the carrier. The provisions of the Bills of Lading Act 1855 which make bills of lading quasi-negotiable do not apply to it. It follows that a house bill of lading cannot be tendered under a c.i.f. contract as a proper bill of lading and, if the contract allows such a tender, the contract cannot be regarded as a proper c.i.f. contract.'

⁴⁴⁴ (1977) 1 Lloyds Rep 290 (FC Can).

⁴⁴⁵ *Id* at p 295-296.

⁴⁴⁶ *Emilio Clot and Ernest Wydler, Carrying on Business as Emilio Clot & Co v Compagnie Commerciale du Nord Societe Anonyme* (1921) 8 LI L Rep 380 (KBD).

⁴⁴⁷ *Id* at p 381.

⁴⁴⁸ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 511.

⁴⁴⁹ Jones 'Dual Agency House Bill of Lading (last of Three commentaries)' 15 Jan 2000

Forwarderlaw.com.

⁴⁵⁰ *Ibid*.

does not confer negotiability on the bill. It must also be a 'bill of lading' within the statutory meaning. There is no authority for a house b/l falling within this definition.⁴⁵¹

If the house b/l would be accepted as a negotiable, it could be a useful instrument. To confer negotiability on the document seems unfeasible, since the house bill is not symbolic of the title of goods.⁴⁵² It is doubtful whether the fact that the forwarder has the duty to exercise control over the goods on behalf of the unpaid seller is sufficient to overcome this prerequisite. The advantage of such a construction is that the issue of a negotiable ocean b/l would be unnecessary. Instead, the forwarder could request an ocean waybill, which does not have to be presented for the release of the cargo. The waybill names the forwarder's agent, ie correspondent at place of origin, as shipper and the forwarder as consignee and notify party. As consignee the forwarder can give delivery instructions to the ocean carrier. Once the house b/l is transferred in exchange for payment under a l/c, the forwarder must respect the right of the bank to give delivery instructions, and therefore the forwarder's right of control under the sea waybill must be exercised for the benefit of the holder of the house b/l.⁴⁵³

II. Multimodal transport document

In practice, different kinds of multimodal transport documents are in use. Some expressly provide for negotiability, which implies that they are intended to be documents of title and should fulfil a similar role in international trade as a bill of lading.⁴⁵⁴

1. Document of title

There are however objections against a MTD being a document of title under English law. The document is issued and signed by the freight forwarder and not the carrier. Multimodal transport documents are usually received for shipment bills, which are not issued on shipment, whereas ocean bills of lading are on board bills of lading.⁴⁵⁵ It is furthermore uncertain whether such a document shares the nature of a bill of lading or a land carriage document (consignment note), the latter of which being not a document of title.⁴⁵⁶

a) Issued by forwarding agent

Support for the argument that a MTD cannot be a bill of lading and thus not a document of title can be found in UCP 500, which entitles banks to refuse to accept a trans-

⁴⁵¹ FIATA acknowledges the problems with the use of house bills and suggests that forwarders use the FIATA Certificate of Transport (FCT) instead, cf *supra*.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' *JBL* 2001, Sep, 461, 478.

⁴⁵⁵ *Ibid.*; Clulow 'Multimodal Transport in South Africa' *UCT Dissertation*.

⁴⁵⁶ Clulow (*supra*).

port document issued by a freight forwarder, who is not acting as carrier.⁴⁵⁷ The objection does, however, not apply if the freight forwarder acts as carrier. This is the case with FBLs and other MTDs based on the 1992 UNCTAD/ICC Rules, Art 2(2). The MTO issues the document as principal and not as agent and is responsible for the whole carriage, just as the sea carrier is responsible for the sea carriage. The MTD can furthermore be issued in negotiable form. Art 30 UCP 500 states that banks accept freight forwarder documents, if so authorised in the credit, under the condition that the forwarder issues the document as carrier or MTO or as their agent acting on their behalf. It can be signed by the MTO or his named agent, Art 26(a)(i) UCP 500. A document signed by the freight forwarder as agent for the cargo owner without authority to sign for the MTO will not suffice.⁴⁵⁸

b) 'Received for shipment' vs 'on board' bill of lading

MTD are usually issued before shipment, when the goods are received into the custody of the MTO at inland terminals, which hinders the negotiable quality of such a document. Common law only recognises shipped bills of lading as documents of title.⁴⁵⁹ However, in *The Marlborough Hill* a received for shipment bill of lading was held to be a bill of lading for the purpose of s 6 Admiralty Court Act 1861 (UK) and *obiter* the Bills of Lading Act 1855 (UK).⁴⁶⁰ The court found: 'Under modern commercial practice documents acknowledging the receipt of goods for shipment are common, and are treated commercially as being bills of lading; to hold that they are not so would raise serious commercial difficulties. Documents of that description have frequently been assumed by English Courts to be bills of lading for the purpose of the Bills of Lading Act, 1855.'⁴⁶¹ In this particular case the parties agreed to call it a bill of lading, the obligations stated therein were like those in a bill of lading and the language in general such as the words 'delivered to the order of the shipper or consignee on payment of freight and charges' and payment of general average lien and the statement that US law governing bills of lading should apply, led to the conclusion that the document was a bill of lading.

The court in *Diamond Alkali Export Corporation v FI Bourgeois*⁴⁶² held that a received for shipment bill is not good tender under a l/c for a CIF contract, since it does not

⁴⁵⁷ *Ibid*. In cases of cargo consolidation the bill of lading issued by the forwarder are not bills of lading since they are not issued by or on behalf of the carrier (unless the forwarder at the same time acts as a loading broker), cf *The Maheno* (1977) 1 *Lloyd's Rep* 81; *Guest Benjamin's Sale of Goods* (7th Ed) p 1823 § 21-081.

⁴⁵⁸ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 514.

⁴⁵⁹ *Lickbarrow v Mason* (1787) 2 TR 63. A received for shipment bill of lading is not a document of title under common law, *Diamond Alkali Export Corporation v FI Bourgeois* (1921) 3 KB 443; *The Marlborough Hill v Alex. Cowan & Sons Ltd* (1921) 1 AC 444 (PC HL).

⁴⁶⁰ *The Marlborough Hill* (*supra*).

⁴⁶¹ *Id* at p 446, referring to *Elder, Dempster & Co v Dunn & Co* (1909) 15 Com Cas 49; *Morrison & Co v Shaw Savill & Albion Co* (1916) 22 Com Cas 81; *Bruce Marriott & Co v Houlder Line* (1916) 22 Com Cas 116; *Broken Hill Co v P&O Co* (1916) 22 Com Cas 178; *New Chinese Antimony Co v Ocean Steamship Co* (1917) 2 KB 664.

⁴⁶² (1921) 3 KB 443.

transfer the right to demand possession of the goods from the carrier. The bill stated that goods ought to be shipped on a certain vessel (*SS Anglia*), but with liberation to ship the goods on a 'following vessel'.⁴⁶³ Under a CIF contract the seller is obliged to tender a bill of lading.⁴⁶⁴ The received for shipment bill was held to be unsuitable for that purpose.⁴⁶⁵ It did not acknowledge the goods to be on board a specific ship, nor did it acknowledge a shipment on board at all. It left uncertain as to whether the goods will come by the *Anglia* or some following ship. The word; 'following' was too loose and ambiguous in itself. The document did not even say 'immediately following', nor did it indicate that the 'following ship' will belong to or be under the control of the person who issues the bill of lading. The document was thus a mere receipt for goods which at some future time and by some uncertain vessel were to be shipped.⁴⁶⁶ The buyer was left in doubt as to actual shipment and actual ship. The court distinguished *The Marlborough Hill*, which did only decide whether a received for shipment bill was a bill of lading for the purpose of s 6 Admiralty Court Act 1861 (UK). Furthermore the court disagreed with the statement that there is no difference in principle between the goods awaiting shipment and the goods actually being loaded on board.⁴⁶⁷ The judgement acknowledged the document as a 'shipping document' within the US Harter Act (1893), but denied it the status of a bill of lading within the CIF contract of sale.⁴⁶⁸

Whether a received for shipment document can be a document of title to pass ownership of goods was considered in *Ishag v Allied Bank*.⁴⁶⁹ In that case, it was alleged that the document in question was neither a 'shipped' nor a 'received for shipment' bill of lading, since all it did was to acknowledge that the goods are at the disposal of the vessel's agents, and there was no proof of custom that such a document can serve as a document of title.⁴⁷⁰ The court found that although the document did not expressly state 'received for shipment', the language used amounted to the same thing.⁴⁷¹ 'Intended to be shipped with' as used in the bill meant the same as 'for shipment'.⁴⁷² The goods were at the disposal of the agent of the shipping line (carrier), the document included terms relevant to maritime transport, it named an 'intended' vessel on which the goods were to be carried and thus the document was sufficient to satisfy the cus-

⁴⁶³ *Id* at p 447.

⁴⁶⁴ *Id* at p 448.

⁴⁶⁵ *Id* at p 451.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ 'With the deepest respect I venture to think that there is a profound difference between the two, both from a legal and business point of view. Those differences seem to me clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion, a mere receipt for goods at a dock warehouse for future shipment might well be called a bill of lading.', *id* at p 452.

⁴⁶⁸ *Id* at p 453.

⁴⁶⁹ *Ishag v Allied Bank International, Fuhs and Kotalimbora* (1981) 1 *Lloyd's Rep* 92 (QBD(Comm)).

⁴⁷⁰ *Id* at p 97.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

tom approved by *The Marlborough Hill*, ie that a received for shipment bill is a b/l and with that a document of title to pass ownership of goods.⁴⁷³

According to *Pejovic*, there is no reason why only shipped bills of lading should be documents of title.⁴⁷⁴ The MTD is issued by the person who exercises control over the goods and who undertakes to deliver the goods to the lawful holder of the document on presentation.⁴⁷⁵ For the same reason, it cannot be relevant whether the documents are issued on shipment.⁴⁷⁶ Thus, the MTD should qualify as a document of title where the obligation of the MTO to deliver the goods against surrender of the document is recognised by mercantile customs.⁴⁷⁷

In addition it would be possible to convert a received for shipment b/l into a shipped b/l through an 'on board' notation.⁴⁷⁸ Problems can arise in cases where on board notations are made on FBLs which are used in financial transactions. The usual representation in an NVOCC's b/l is 'taken in charge' which means the receipt of the goods and the right to exercise control over them, even though they are in the possession of a third party. Forwarders sometimes, against their better knowledge, incorporate an 'on board' notation in their bill of lading for compliance with the letter of credit conditions.⁴⁷⁹ Alike, ocean carriers include 'on board' notations in received for shipment bills even though the goods could still be at the receiving terminal. Under the principle of autonomy coupled with the UCP 500 banks are allowed to rely upon such statements without further evidence in support.⁴⁸⁰ A prudent forwarder should wait with the 'on board' notation until he receives the ocean carriers 'on board' bill.⁴⁸¹ Otherwise he will be liable for misrepresentation to the bank.

c) Land carriage or sea carriage document

The difference between a MTD and a bill of lading is that the latter is issued for sea carriage only. The question is whether a MTD should be regarded as a sea- or a land carriage document.⁴⁸² Again, there is no reason why only sea carriage documents and restrictively shipped b/l's should be documents of title. A bill of lading may be a docu-

⁴⁷³ *Id* at p 98.

⁴⁷⁴ *Pejovic* 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' JBL 2001, Sep, 461, 478-479.

⁴⁷⁵ *Id* at p 479.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ Carr 'International Multimodal Transport – United Kingdom' (1998) 4(3) *Int TLR* 99, 106; De-battista *Sale of Goods Carried by Sea* (2nd Ed) p 42 § 2-41; Guest *Benjamin's Sale of Goods* (7th Ed) p 1825 § 21-081.

⁴⁷⁹ Jones "'On Board" Letters of Credit' 7 Dec 2006 *Forwarderlaw.com*.

⁴⁸⁰ Under UCP 500 NVOCC bills and ocean bills enjoy an equivalent status.

⁴⁸¹ Jones "'On Board" Letters of Credit' (*supra*).

⁴⁸² A land carriage document (consignment note) is unlikely to be regarded as a document of title under common law. For a determination it has been considered unsatisfactory to qualify the legal nature of the document by the proportion of the sea carriage in contrast to the land carriage, Guest *Benjamin's Sale of Goods* (7th Ed) p 1824 § 21-081.

ment of title even though it provides for surface transportation.⁴⁸³ Commercial practice demands a MTD with the characteristics of a document of title, especially since door-to-door transport lasts longer than sea carriage. The length of the carriage was the original reason why a bill of lading was accepted as a document of title.⁴⁸⁴

In *Pyrene Co v Scindia Navigation Co* the court stated that where a single contract covers both land and sea transport, only the sea leg is governed by the Hague Rules.⁴⁸⁵ The court ruled that the Rules do not attach to a period of time, but to a contract or part of a contract.⁴⁸⁶ According to the court it is natural to divide a contract into periods of inland transport and sea transport.⁴⁸⁷ The opinion has been stated that this ruling could be seen as an indication for a multimodal transport document being a bill of lading or similar document of title in terms of the Rules.⁴⁸⁸

In *The Maheno* the consignment note issued by the forwarder showed that he acted as carrier for the land carriage and as agent of the shipper for the carriage by sea. The court found that the consignment note could therefore not be regarded as a through b/l, covering the whole transit.⁴⁸⁹ Firstly because the ship owner had issued its own b/l, and secondly, in this particular case evidence showed that delivery against the consignment note would have been refused by the shipping company. It was therefore doubtful that the consignment note was a document of title.⁴⁹⁰

d) Recognition by statutory law or mercantile custom

In order to acquire the legal status of a document of title a document must be recognised as such by statute or mercantile custom at common law.⁴⁹¹

At present the MTD is not regulated by statute. There are no provisions in the Hague, the HVR or the Hamburg Rules that deal with the legal status of the bill of lading.⁴⁹² A

⁴⁸³ *Johnson v Taylor Bros & Co Ltd* (1920) AC 144. This is however less clear for a document that in origin was not a sea document at all, Guest *Benjamin's Sale of Goods* (7th Ed) p 1293 § 18-166.

⁴⁸⁴ *Ibid*; cf also *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, 341: 'A cargo at sea in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the endorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.' per Bowden LJ.

⁴⁸⁵ (1954) QB 402, 415.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Id* at p 416.

⁴⁸⁸ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 510.

⁴⁸⁹ (1977) 1 *Lloyd's Rep* 81, 88.

⁴⁹⁰ *Ibid*.

⁴⁹¹ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 111; Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' *JBL* 2001, Sep, 461, 480; for recognition by mercantile custom cf also Carr 'International Multimodal Transport – United Kingdom' (1998) 4(3) *Int TLR* 99, 106; *Kum v Wah Tat Bank* (1971) 1 *Lloyd's Rep* 439 (PC Mal).

⁴⁹² Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 112.

definition can be found in statutes which deal with the transfer of ownership between sellers and buyers, ie the Factors Act 1889, s 1(4), which is incorporated by reference in s 6(1) of the Sale of Goods Act 1979.⁴⁹³ The definition reads as follows: The expression 'document of title' shall include any bill of lading, dock warrant, warehousekeeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby presented.'

In general a document of title can be defined as a document issued in the regular course of business by or addressed to a bailee, which covers the goods in the bailee's possession and evidences that the person in possession of it is entitled to receive, hold and dispose of the document and the goods covered by it.⁴⁹⁴ It becomes clear from those definitions, that a multimodal transport document can amount to a document of title in the common law sense where it is commonly used in the ordinary course of business.⁴⁹⁵

The MTD is issued by the MTO in the regular course of business and the MTO can be considered the bailee, since the consignor (bailor) entrusts the goods to the MTO under the multimodal contract of carriage. The MTO acknowledges that it has received the goods into his custody, including the obligation to deliver the goods to the legal holder of the MTD. However, the document must be transferable, viz 'to order'.⁴⁹⁶

In *Kum v Wah Tat Bank Ltd* the court held that 'mate's receipts'⁴⁹⁷ although treated by local Malaysian usage as documents of title equivalent to bills of lading, they were not in that case, because they carried the words 'not-negotiable', which was inconsistent with the custom.⁴⁹⁸

⁴⁹³ Girvin 'Bills of Lading and Straight Bills of Lading: Principles and Practice' *JBL* 2006, Jan, 86, 96; Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 513; Guest *Benjamin's Sale of Goods* (7th Ed) p 1827 § 21-083.

⁴⁹⁴ Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' *JBL* 2001, Sep, 461, 480.

⁴⁹⁵ Carr 'International Multimodal Transport – United Kingdom' (1998) 4(3) *Int TLR* 99, 106.

⁴⁹⁶ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 513; Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' *JBL* 2001, Sep, 461, 480.

⁴⁹⁷ A mate's receipt is not a document of title at common law, but only evidence of title, *FE Napier v Dexters Ltd* (1926) 26 *LI L R* 184, 189; *Kum v Wah Tat Bank* (1971) 1 *Lloyd's Rep* 439, 445 (PC Mal); *Nippon Yusen Kaisha v Ramjiban Serowgee* (1938) AC 429, 445 (PC Ind): 'The mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods, nor is its possession equivalent to possession of the goods. It is not conclusive, and its statements do not bind the shipowner as do the statements in a bill of lading signed within the master's authority. It is, however *prima facie* evidence of the quantity and condition of the goods received, and *prima facie* it is the recipient or possessor who is entitled to have the bill of lading issued to him.' per Lord Wright. One of the practical reasons for this rule is that, if subsequently a bill of lading is issued, there would be two documents of title for the same goods, cf Guest *Benjamin's Sale of Goods* (7th Ed) p 1293 § 18-166, *Kum v Wah Tat Bank (supra)* at p 446.

⁴⁹⁸ (1971) 1 *Lloyd's Rep* 439, 440. In *Hathesing v Laing* (1873) LR 17 Eq 92, 105 a custom of the port of Bombay to accept mate's receipts as negotiable was rejected as against common sense since captains of foreign ships could not be aware of it.

The FIATA FBL can be used as a negotiable document and thereby as a document of title.⁴⁹⁹ The holder of the MTD has possession and control of the goods and is entitled to dispose of the document and the goods, where the document is negotiable. The problem here is, that the holder might not have a direct right to claim delivery from the performing carrier, under whose custody the goods are. However, the customer has a right to claim against the MTO, who in turn has a direct right against the performing carriers.⁵⁰⁰

Even though the MTD is not recognised by any statute and it is unlikely that the document amounts to a document of title at common law, it can acquire such a status if it can be proved that under mercantile custom the possession of such a document equates to the possession of the goods.⁵⁰¹ The legal recognition of ocean bills of lading as documents of title originated in commercial practices as well.⁵⁰²

Guest states: 'The now common use of such documents, the increasing degree of their standardization may support the view that a custom, similar to that established in *Lickbarrow v Mason*, exists in relation to such documents, at least where they are issued by, or on behalf of sea carriers, but for the present it awaits judicial recognition.'⁵⁰³

There is persuasive evidence that the MTD amounts to a document of title under common law by mercantile custom.⁵⁰⁴ In commercial practice the MTD is accepted as a document of title, if issued in negotiable form, and fulfils the same functions as the traditional bill of lading.⁵⁰⁵

The ICC/UNCTAD Rules provides for multimodal transport documents which are documents of title. They do not have the force of law, but they can help prove the existence of a custom allowing the holder of such a document to acquire delivery of the goods.⁵⁰⁶ Multimodal transport documents are made acceptable in practice by buyers and banks due to their recognition in INCOTERMS⁵⁰⁷ and the documentary credit rules

⁴⁹⁹ Clause 3 read: 'This FBL is issued in a negotiable form unless marked "non-negotiable". It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.'; Clause 5.1 read: 'The Consignor shall remain liable even if the FBL has been transferred by him.'

⁵⁰⁰ Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' JBL 2001, Sep, 461, 480.

⁵⁰¹ Clulow 'Multimodal Transport in South Africa' *UCT Dissertation* p 7.

⁵⁰² *Lickbarrow v Mason* (1787) 2 TR 63; reversed (1970) H BI 357; restored (1793) 2 H BI 211 (HL). The court acknowledged that the bill of lading (at least the shipped bill of lading) is regarded by custom of merchants as a document of title at common law.

⁵⁰³ *Guest Benjamin's Sale of Goods* (7th Ed) p 1825 § 21-081, suggesting that the speed of container transport and the fact that containerised cargo is usually not sold afloat could be the reason why such recognition has not yet been sought.

⁵⁰⁴ Proctor *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* p 114; Debattista *Sale of Goods Carried by Sea* (2nd Ed) p 42 § 2-40; van Houtte *The Law of International Trade* p 270; *Guest Benjamin's Sale of Goods* (7th Ed) p 1827 § 21-082 n 27.

⁵⁰⁵ De Wit *Multimodal Transport* p 317.

⁵⁰⁶ Clulow 'Multimodal Transport in South Africa' *UCT Dissertation*; Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' JBL 2001, Sep, 461, 481; De Wit *Multimodal Transport* p 319.

⁵⁰⁷ International Commercial Terms ICC Publication 350 (1980); cf also latest version (6th revision) ICC Publication 560 (2000).

(UCP). INCOTERMS 1980 accepted MTDs as an alternative to bills of lading in container transport, even in a traditional CIF contract.⁵⁰⁸ That MTDs are now accepted as the 'usual' documents in container transport is furthermore supported by the developments in the UCP Rules. Before 1983 UCP expressly stated that banks should reject bills of lading issued by forwarding agents. Art 25 UCP 400 (1983) then made specific reference to FBLs to stir acceptance of such document in its nature of a carrier document. Art 30 UCP 500 (1993) stipulates that freight forwarder documents must show that the forwarder has undertaken the carriage in his capacity as carrier or MTO.⁵⁰⁹ The FIATA Multimodal Transport Bill of Lading 1992 shows that the forwarder acts as carrier with carrier liability under the 1992 UNCTAD/ICC Rules.⁵¹⁰ Furthermore, Art 26 UCP 500 authorises banks to accept MTDs unless otherwise agreed. If banks who advance money under documentary credits accept such documents, there can be little doubt, that they have acquired the legal status of documents of title by mercantile customs, since banks would not accept documents which are not capable of being subject to an effective pledge.⁵¹¹

2. Hague-Visby Rules applicability

Since the HVR most certainly apply to the contract with the ocean carrier, a pass through liability regime can only be created by applying the same rules to the contract between the forwarder and the shipper at least for the sea leg.⁵¹² It remains unclear whether the HVR only apply to order bills of lading or to a wider range of shipping documents. Absent of any definition in the Rules itself, the bill of lading has been defined as 'a document issued by or on behalf of a carrier of goods by sea to the person (usually known as shipper) with whom he has contracted for the carriage of goods, which serves as a receipt acknowledging that the goods have been delivered for carriage and which contains an undertaking to deliver them at the agreed destination upon presentation of the document by the rightful holder.'⁵¹³

⁵⁰⁸ Rule A 8 only obliges the seller to provide the buyer with the 'usual transport document for the agreed port of destination', which does not have to be a shipped b/l.

⁵⁰⁹ Art 30 UCP 500 is no longer included in UCP 600. Transport documents issued by a freight forwarder are still, however, acceptable through Art 14(l) UCP 600 which states quite simply that a transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of the rules. As long as a bill of lading issued by a freight forwarder satisfies the requirements of the new Art 20, the fact that the bill has been issued by a freight forwarder does not make the bill of lading unacceptable. Debattista 'The New UCP 600 – Changes to the Tender of the Seller's Shipping Documents under Letters of Credit' JBL 2007, JUN, 329, 353.

⁵¹⁰ ICC Publication 481.

⁵¹¹ Pejovic 'Documents of Title in Carriage of Goods by Sea: Present Status and Possible Future Directions' JBL 2001, Sep, 461, 480.

⁵¹² As envisaged by cl 7 of the FIATA Standard Conditions (1992) governing the FBL.

⁵¹³ De Wit *Multimodal Transport* p 287.

In some jurisdictions the applicability of the HVR is statutorily extended to non-negotiable receipts⁵¹⁴, but the position with regard to MTDs remains unclear. It has been proposed that the HVR could only apply to documents that fulfil all three functions of a bill of lading.⁵¹⁵ The first argument is the extension to non-negotiable receipts, which are not documents of title, by means of national legislation would be unnecessary, if the HVR applied to such documents in its own force. Secondly, the document which entitles to delivery must be issued by the actual carrier, which is evidenced by the words 'or similar document of title'. The qualification 'or similar document of title' is an indication that the Rules only apply to those bills of lading that are documents of title at common law, ie order bills.⁵¹⁶

On the other hand it has been suggested that a received for shipment document can be a bill of lading even though it is not a document of title.⁵¹⁷ The court in *The Rafaela S* went even further and held that the HVR apply to straight bills of lading.⁵¹⁸

A very wide interpretation led to the conclusion that where the forwarder is the contracting carrier (MTO) the issued transport document can come within the statutory definition of a bill of lading, even if the parties refer to the document as 'consignment note'. The Canadian Court in *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd*⁵¹⁹ held that the freight forwarder's document, which did describe itself as a consignment note was in fact a bill of lading within that meaning in the Canadian COGSA 1924. It came within the definition of contract of carriage in the HVR for a number of reasons, including that the forwarder contracted as principal, and retained the right to employ a carrier as its agent. Sheppard J held that the three essential elements of a bill of lading were satisfied. The consignment note was a receipt for the goods, because it specified the cargo and the numbers of containers into which the cargo were to be loaded. Even though, typically, the bill of lading is signed after the goods are loaded on board, the court found nothing in the stated authorities that suggest that a receipt given before loading renders the contract one that is not a b/l. The consignment note was also intended by the parties to be a document of title, because it was described as a negotiable delivery order and contained an unfilled box, which provided for endorsement. The 'Consignee-Receiver' box was filled out 'to order'. The consignee appeared as notify party. The court was on the opinion that the document, even though it provides for door-to-door carriage and not merely for port-to-port carriage, could still be a bill of lad-

⁵¹⁴ A non-negotiable receipt evidences a contract of carriage, but need not be presented for the release of the cargo.

⁵¹⁵ Clulow p 7

⁵¹⁶ Cf Girvin 'Bills of Lading and Straight Bills of Lading: Principles and Practice' *JBL* 2006, Jan, 86, 93.

⁵¹⁷ *Diamond Alkali* for US Harter Act, *The Marlborough Hill* for Australian statutory law, cf *supra*.

⁵¹⁸ *J I Macmillan Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* (2005) UKHL 11

(HL), cf also *Voss v APL Co Pte Ltd* (2002) 2 *Lloyd's Rep* 707 (HC Singapore).

⁵¹⁹ (1993) 113 ALR 677 (FCA).

ing, but even if that was incorrect, it came at least within the HVR definition of 'contract of carriage covered by a bill of lading or a *similar document of title*'.⁵²⁰

Uncertainty as to whether a multimodal transport document amounts to a document of title to trigger the applicability of the HVR is especially problematic where the contract incorporates the UNCTAD/ICC Rules.⁵²¹ The time limit to bring a claim under the UNCTAD/ICC Rules is nine months, whereas the HVR provide for a one-year time bar, Art 3(8). The reason for the shorter time bar in the ICC Rules is that a multimodal transport operator, who is sued by cargo interests should have the opportunity to bring an indemnity/recourse action against the ocean carrier to whom he sub-contracted the carriage.⁵²² If the HVR apply to a multimodal transport document, the mandatory law will supersede the UNCTAD/ICC Rules time bar (which is only of contractual force) and replace it with a one-year time bar. The multimodal transport operator, who receives a claim from the cargo owners, might find himself barred from claiming over against the actual carrier.

In *Bhatia Shipping v Alcobex*⁵²³ the court upheld a nine-month limitation included in the standard conditions on the reverse side of an NVOCC's multimodal transport document issued pursuant to the Indian Multimodal Transport of Goods Act 1993. The court applied English law and held that any claim of Alcobex against Bhatia was time barred. The court observed that since the relevant contracts were multimodal transport documents, the Hague/Hague-Visby Rules and the twelve-month time limit under those Rules were of no application. The claim, however, did not concern carriage by sea. Thus, the question whether the HVR would override the nine-month limitation where the claim clearly arose during sea carriage, remains open.

3. Title to sue and right to delivery

In 1883, Bowen LJ described the bill of lading as 'a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be'.⁵²⁴ He thereby described the role of the document as a document of title, ie that the holder of the bill of lading is entitled to take delivery of the goods from the vessel when they arrive at their destination, or to sue the carrier in the event of their non-delivery or misdelivery.⁵²⁵ A third party endorsee buys on the faith of a contract, to which he is not a party. The transfer of a right to sue the carrier to a non-

⁵²⁰ But, since the Hague-Visby Rules only apply tackle-to-tackle, they could not come to the assistance of Comalco, because the damage occurred prior to loading. *Id* at p 700.

⁵²¹ CI 10; CI 17 of the FIATA Standard Conditions (1992) governing the FBL.

⁵²² Faber 'The problems arising from multimodal transport' (1996) LMCLQ 503, 514; Holloway 'Troubled Waters: The Liability of a Freight Forwarder as a Principal Under Anglo-Canadian Law' (1986) 17 *J Mar L & Com* 243, 258.

⁵²³ *Bhatia Shipping & Agencies PVT Ltd v Alcobex Metals* (2004) EWHC 2323 (QBD(Comm)); cf also Jones 'English Court accepts Nine-Month Time Bar in Bill of Lading' 10 Dec 2005 *Forwarderlaw.com*.

⁵²⁴ *Sanders Bros v Maclean & Co* (1883) 11 QBD 327, 341.

⁵²⁵ Todd 'The bill of lading and delivery: the common law actions' (2006) LMCLQ 539.

contracting party without consent of the contractual debtor, was introduced by statutory law by way of an exception to the *nemo dat* principle.⁵²⁶ The Bills of Lading Act 1855 (UK) gave some transferees of ocean bills of lading the right to sue the carrier.⁵²⁷ However, the Act only applied to documents of title.⁵²⁸ The 1992 COGSA (UK) brought clarification to the difficult matter and most importantly a received for shipment b/l is included in the bill of lading definition, cf s 1(2)(b) of the Act, so that a MTD will be capable to fall within the scope of the Act.⁵²⁹ The right of suit vests in the holder of any transferable bill of lading, any sea waybill and any ship's delivery order.⁵³⁰

Where the contractual regime does not suffice, the holder of the b/l might still be entitled to sue in conversion or for breach of bailment (tort).⁵³¹

4. Presentation rule

The presentation rule equally applies to both 'order' and 'straight' bills of lading.⁵³²

Where the parties do not require a document to be surrendered they can use a sea waybill.⁵³³ If the cargo is delivered without production of- or against a false b/l, the car-

⁵²⁶ Girvin 'Bills of Lading and Straight Bills of Lading: Principles and Practice' *JBL* 2006, Jan, 86, 96.

⁵²⁷ Faber 'The problems arising from multimodal transport' (1996) *LMCLQ* 503, 515.

⁵²⁸ *The Delfini* (1981) 2 *Lloyd's Rep* 599, adopting *The Elafi* (1981) 2 *Lloyd's Rep* 679: 'The Act cannot apply if the endorsement and transfer of the bill of lading is in no way instrumental in conferring upon the endorsee either possessory or proprietary title.' per Phillips J; Clulow 'Multimodal Transport in South Africa' *UCT Dissertation*. While Lord Phillimore in *The Marlborough Hill* (*supra*) was on the opinion that a received for shipment bill of lading was capable of transferring the right to delivery in accordance with s 1 of the Bills of Lading Act 1855, others hold that such documents usually do not establish privity with the carrier. The majority, however, considered the Act to be applicable through special custom. Cf Debattista *Sale of Goods Carried by Sea* (2nd Ed) p 42 § 2-40 nn 7-9.

⁵²⁹ Bassindale 'Title to Sue under Bills of Lading: The Carriage of Goods by Sea Act 1992' (1992) 7(10) *JIBL* 414, 415; Debattista *Sale of Goods Carried by Sea* (2nd Ed) p 42 § 2-41.

⁵³⁰ Ss 1(1), 1(2)(a), 2(1).

⁵³¹ Todd 'The bill of lading and delivery: the common law actions' (2006) *LMCLQ* 539, 540. In case of loss or damage, where the consignee does not have any rights in contract, he might try to sue the carrier in tort. However, in *The Aliakmon* (1986) 2 *Lloyd's Rep* 1 the House of Lords stated that for such a claim to succeed the claimant must have been the owner of the goods or must have had possessory title/ immediate right to possession to them at the time when the loss or damage occurred; Bassindale 'Title to Sue under Bills of Lading: The Carriage of Goods by Sea Act 1992' (1992) 7(10) *JIBL* 414, 415; Todd 'The bill of lading and delivery: the common law actions' (2006) *LMCLQ* 539, 546.

⁵³² For order bills cf only *The Stettin* (1889) 14 PD 142, 147; for straight bills of lading: *Evans & Reid v Cornouaille* (1921) 8 *LI L Rep* 76, 77 (*obiter*); *Barclays Bank v Commissioners of Customs & Excise* (1963) 1 *Lloyd's Rep* 81, 89; *SA Sucre Export v Northern River Shipping Ltd (The Sormovskiy 3068)* (1994) 2 *Lloyd's Rep* 266, 274; *Kuwait Petroleum Corp v I&D Oil Carriers Ltd (The Houda)* (1994) 2 *Lloyd's Rep* 541, 550; *MB Pyramid Sound NV v Briese Schiffahrts GmbH & Co KG (The Ines)* (1995) 2 *Lloyd's Rep* 144; *East West Corp v DKBS 1912* (2002) 2 *Lloyd's Rep* 182 (QBD(Comm)); *Voss Peer v APL Co Pte Ltd* (2002) 3 *SLR* 176 (HC Singapore); *J I Macmillan Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* (2005) UKHL 11, 20 (HL) (*obiter*).

⁵³³ 'A sea waybill is the maritime version of a document that has long been in use in the context of land and air carriage. It operates as a receipt for goods received for shipment and evidences the contract of carriage. One significant difference between it and a bill of lading is that it is never ever a negotiable instrument and is therefore usually used on short sea routes and where neither the shipper nor the cargo receiver needs to pledge shipping documents in order to raise

rier or forwarder will be liable.⁵³⁴ The carrier has the right and the duty to refuse delivery without the production of a bill of lading.⁵³⁵ The carrier or forwarder will most likely be sued in conversion, a common law action for denial of the claimant's title.⁵³⁶ In conversion the wrongful interference with the right to possession must be voluntary.⁵³⁷ The delivery to a wrong person is usually voluntary and it is not necessary that the interference is intentional.⁵³⁸ In *Motis Exports Ltd v DKBS 1912* the court held that it did not matter that the ship owners did not know that the bills of lading were forged and therefore interfered with the claimants right's. It was enough that the delivery was intentional.⁵³⁹

In *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd (No 1)*⁵⁴⁰ a freight forwarder (Bright Fortune) who delivered cargo without production of a bill of lading was held liable for the tort of conversion. Bright Fortune was employed as a freight forwarder to ship goods from Hong Kong to Los Angeles. It issued a set of bills of lading, in which Carewins was named as shipper, Artist Fashion as consignee (straight b/l) and Bright Fortune as contracting carrier. The document did not include the usual presentation clause.⁵⁴¹ The goods were delivered to Artist Fashion without the surrender of an original b/l. Artist Fashion did not pay for the goods and Carewins sued Bright Fortune. The court held that straight bills are covered by the Hague Visby Rules and have to be presented. The carrier might know the consignee in a straight bill of lading, but he would have no knowledge about the underlying contract. The seller might hold back the b/l, because the buyer has not yet paid the purchase price, as evidenced by

finance. It is not issued in sets and the receiver is able to take delivery of the goods merely by establishing his identity. The original sea waybill need not be produced. Further, since it is not a bill of lading the Hague Rules and the Hague-Visby Rules do not apply to it.' per Prakash J in *Voss Peer v APL Co Pte Ltd* (2002) 3 SLR 176, 186 (HC Singapore).

⁵³⁴ In Debattista *Sale of Goods Carried by Sea* (2nd Ed) p 43 § 2-43 it is suggested that since UK COGSA 1992 applies to received for shipment bills of lading and the statute follows common law, the presentation requirement applies equally to multimodal transport documents (*Arg e contr*). Standardised documents such as the FBL expressly mention the requirement on their face. Under both the Bills of Lading Act 1855 and COGSA 1992 the transfer of 'rights of suit' includes 'the contractual right as against the carrier to demand delivery against presentation of the bill of lading and hence the right to possess', cf *East West Corp v DKBS 1912* (2002) 2 *Lloyd's Rep* 182 (QBD(Comm)). Without the presentation of the bill of lading the carrier is not only entitled, but obliged to refuse delivery or otherwise will be in breach of contract, cf Millett LJ in *Kuwait Petroleum Corp v I&D Oil Carriers Ltd (The Houda)* (1994) 2 *Lloyd's Rep* 541, 556, approving Diplock J in *Barclays Bank v Commissioners of Customs & Excise* (1963) 1 *Lloyd's Rep* 81,89; Todd 'The bill of lading and delivery: the common law actions' (2006) *LMCLQ* 539, 541 and 545.

⁵³⁵ *The Houda* (*supra*) p 556; *Barclays Bank v Commissioners of Customs & Excise* (*supra*) p 89; *The Sormovskiy 3068* (1994) 2 *Lloyd's Rep* 266.

⁵³⁶ Todd 'The bill of lading and delivery: the common law actions' (2006) *LMCLQ* 539, 540.

⁵³⁷ *Id* at p 541.

⁵³⁸ *Ibid*.

⁵³⁹ (2000) 1 *Lloyd's Rep* 211 (CA).

⁵⁴⁰ (2007) HKEC 1266 (HK CA 13 July 2007), *certiorari* granted (2008) HKEC 825 (CFA 28 Apr 2008).

⁵⁴¹ 'One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order.'

the contract between Carewins and Artist Fashion, which stated that the bills of lading would be sent after payment has been made.

Failure to require presentation of an original bill of lading prior to the release of the cargo might vitiate the carrier's P&I Club cover as contrary to the principles of mutual-ity.⁵⁴² It is normally excluded from the freight forwarder's liability insurance policy as well.⁵⁴³

§ 3 Conclusion

Like an ocean bill of lading is the key to the floating warehouse, a forwarder's document is the key to the determination of its contractual obligations. Where generic multimodal transport documents are used, courts will hold the forwarder responsible as contracting carrier. The determination has a more unpredictable outcome if the courts have to rely on inferences and the conduct of the parties, because the parties have not catered for a regulation or - more likely - the document contains contradicting terms or contradicts with underlying facts. The qualification of a forwarder as an agent or as contracting carrier certainly creates a new difficulty, but is not an unknown problem. The question 'Who is carrier?' equally occurs between a charterer and a ship owner. The established criteria set out in *The Starsin* serve well in the construction of a transport document. Looking at the flow of profit and the presentation of the forwarder from an objective shipper's point of view are fair and reliable principles to determine the intent of the parties.

A contracting carrier acts as principal in every relation and is therefore liable to the shipper as carrier and to the performing carrier as shipper. In jurisdictions where the MTO or NVOCC is qualified as agent of the shipper in relation to the performing carrier, the shipper can sue both parties, but is also exposed to direct claims of the actual carrier.

The forwarder in its classic function should be judged by forwarder law and not the law applicable to carriers, since these players fulfil different obligations. Under the applicable agency law the contractual relationship is established between the actual carrier and the shipper. Where the forwarder merely undertakes to arrange for a contractual agreement between others against payment of a fee, it would be unreasonable to provide the shipper with an additional defendant liable for the duties of the carrier.

The risk of damages must be allocated where it can be best controlled and insured. In cases where the shipper contracts via the agency of the forwarder, the latter will not even be able to insure the cargo and unless so authorized by the shipper has no con-

⁵⁴² Girvin 'Bills of Lading and Straight Bills of Lading: Principles and Practice' *JBL* 2006, Jan, 86, 92 nn 48- 50 .

⁵⁴³ Barratt 'Forwarder liable for Delivery without presentation of Straight Bills' 16 Nov 2008 *Forwarderlaw.com*.

trol over it. Furthermore he has no contractual rights against the carrier and will not receive the profit of a carrier.

True, the amount of profit does not determine the contractual duties of a party. However, to sue a forwarding agent - as the 'last man standing' - for carrier liabilities, is comparable to the attempt of cargo owners to sue classification societies, where cargo is lost due to the unseaworthiness of the carrying vessel, for their representations made to the vessel owner. While in these cases classification societies were mostly exempted for lack of proximity, it has been seen that (especially in civil law countries) class can be held (jointly and severally) liable. The argument of the defense, too, was that classification societies usually get paid a small fee for their services, which was out of proportion to the exposure to the possible liability, from which the inference could be drawn that classification societies do not intend to guarantee seaworthiness in offering their services.

The best way to avoid unwanted liability is to draft transport documents very clearly. The rule that a forwarder acts as agent for the shipper has become the exception in the context of multimodal transport, which is why forwarders should expressly and unambiguously communicate that they merely arrange for carriage as agents, if so intended. From case law, the use of hybrid documents such as the BIFA house bill appears to be highly problematic. It is generally alleged that a forwarder wants to make profit like a carrier, but only be liable as forwarding agent and thus uses misleading forms, including contradicting terms. The forwarders' argument that shippers basically want to save on insurance costs, and if the cargo is damaged turn to the forwarder 'as the insurer of the goods', or hide behind the forwarder to avoid their obligations as shipper towards the carrier seems equally true, given the amount of cases in which the forwarder was the alleged carrier or shipper. With respect to the latter a forwarder as agent of the (undisclosed) shipper can also be liable like a contracting carrier towards the performing carrier for shipper's obligations, as shipper of record or via a merchant clause. In contrast, recourse actions are limited, since a forwarding agent has no contract with the carrier.

Cargo interest faces a multitude of difficulties in arranging for the carriage of their goods. In the era of containerised transport and door-to-door carriage it has become more convenient for shippers and consignees to contract with only one person, the multimodal transport operator. The shipper hires a forwarder, because the shipper is not familiar with (sea) carriage and a MTO can bundle the services of other logistics providers into one multi-service offer. The synergy effect further saves costs for all sides.

However, the problem with establishing a cargo claim where something goes wrong remains. The shipper still must establish the identity of the liable person, has the burden of proving the point of damage and in international carriage might have to sue in a foreign jurisdiction. Thus, the understandable desire for legal predictability is multiplied where the identity of the liable person is further blurred by the interposition of an additional party - often another entity that tries to avoid liability for the fulfilment of duties

that are clearly owed under the contract. The suggestion to 'sue all' where the identity is unclear is known from claims against charterers and the ship owners. Since those litigations only produce legal costs, it should be the goal of all parties to set out clear terms.

A house bill of lading cannot fulfil the function of an ocean bill and is therefore merely evidence of the contract of agency and not of a contract of carriage. The FBL can be used as a negotiable document and will serve comparable to a ocean bill of lading at least for the sea carriage. On the other hand, if it would be a bill of lading in the sense of Hague-Visby, the UNCTAD/ICC Rules time bar could be invalid, to the detriment of the contracting carrier. Since title to sue in most countries is given by statutory acceptance of a MTD as a document of title, there is no real need to seek for customary acceptance under common law. Furthermore a ship cannot be sued in *rem* under a MTD, even if it was accepted as a bill of lading.

In segmented transportation a claimant further has to identify the point of damage to know whom to sue and to determine what law will be applied for different legs and the transshipment stages. The point of damage problem is shifted onto the MTO via the UNCTAD/ICC Rules. Therefore back-to-back liability is very important for an MTO, who pays for the negligence of the actual carrier. In turn, Himalaya clauses are necessary for the protection for sub-carriers and others engaged in the fulfillment of the duties owed by the MTO to the shipper. Himalaya clauses, though an exception to the principle of privity of contract, actually keep the contractual relations and the distribution of the risk as envisaged by the parties. Since the contracting carrier is fully liable to the shipper, direct claims against sub-contractors should be unnecessary. It is rather a civil law idea to make all carriers severally and jointly liable. One of the critic points which equally counts for the Hamburg rules is that - where a party seeks to contract with one person only - not two should be liable. The MTO is not an additional defendant, but a substitute as defendant. There is no reason to put the shipper in a better position than he would have been in if he would have contracted with the ocean carrier directly. The right remains to hold the actual carrier liable in tort for breach of a duty it owes to everyone and not just its contractual partner. But where he fulfills duties that are owed by the contractual carrier, the sub-contractor should be protected as if he had contracted himself or in other words the shipper should not be allowed to claim for more than he would have gotten from the contracting party. With respect to the applicable law NVOCC's operating in the US will have to await judicial clarification whether the Carmack Amendment is mandatory for import on through bills of lading. Until then they should give shippers the chance to opt for full Carmack liability to make sure the sub-contracting railway can via the Himalaya clause rely on COGSA limitations in the NVOCC bill of lading.

It is imminent to the position of an intermediary to be assailable from more than one side. However, as long as the contractual relations are precisely determined, the forwarder is certainly not exposed to liability he did not want to undertake. The shipper in

turn will either be able to sue the forwarder as forwarding agent - and in this constellation the actual carrier as contracting carrier - or the forwarder as contracting carrier.

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