THE IDENTITY OF THE CARRIER IN CANADIAN MARITIME LAW

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A Practical Statement of the Issue

A Canadian importer purchases a shipment of widgets on an F.O.B. Antwerp basis such that under its contract of sale, it has the responsibility for making arrangements to have those widgets brought to Canada.

The importer remembers that not long ago, a salesperson from Cut Rate Container Lines - a Canadian multimodal shipping company whose advertisements have appeared for years in various domestic and international shipping periodicals - had paid a sales call on him during which that salesperson extolled the virtue of Cut Rate's full service "door to door" shipping service and boasted about the company's modern fleet, specifically designed for Cut Rate's liner service across the North Atlantic and into the Great Lakes. The importer also recalls having been taken to Cut Rate's terminal at the Port of Montreal, where Cut Rate's insignia was prominently displayed around the facility and on the smokestacks of the vessels docked there, and having visited Cut Rate's corporate offices, located on several floors in a modern office tower in downtown Montreal where photographs and models of Cut Rate's vessels were on display in the reception area.

Fortified in the belief that it would be placing its goods in the hands of a reliable domestic carrier, the importer picks up the phone and makes a booking for the carriage of

the widgets on board the next westbound voyage to Montreal of the MV CUT RATE CANADA, a ship regularly operated by Cut Rate in its liner service.

A container, bearing Cut Rate's livery, is spotted by Cut Rate at the supplier's premises in Belgium. Once loaded, the container is delivered by a road carrier, hired and paid for by Cut Rate, to its terminal at Antwerp where that container is loaded aboard the MV CUT RATE CANADA by stevedores hired, paid for and supervised by Cut Rate.

The importer eventually receives an invoice, bearing Cut Rate's corporate logo, directing that the freight charges be paid by way of a cheque drawn to the order of "Cut Rate Container Line." After the freight charges are paid, Cut Rate's operations department calls to advise that the original bills of lading that the importer will need to surrender to Cut Rate in order to take delivery of the widgets are available for pick up. The importer inspects the bills of lading, stamped "freight pre-paid," and sees that Cut Rate's logo appears prominently on its face and that the document was issued by Cut Rate's agent at Antwerp, Cut Rate Shipping NV. The bill of lading furthermore instructs the importer to contact Cut Rate's operations department to apply for delivery of the cargo. Believing that its shipment is in Cut Rate's good hands, the importer does not bother to read the fine print on the back of the bill of lading.

Concerned that its shipment arrive in Montreal on a timely basis and in good order, the importer maintains daily contact with Cut Rate's operations department in Montreal who assures that all is well and that Cut Rate has the goods safely in hand. Eventually the

importer receives a notice from Cut Rate - transmitted from its Montreal fax number - advising the goods have arrived and will be delivered to its warehouse before week's end. Stevedores paid for and supervised by Cut Rate discharge the container from the MV CUT RATE CANADA and place it in storage at Cut Rate's Montreal terminal pending delivery.

Eventually, a truck painted in Cut Rate's colours and bearing its logo, delivers the container to the importer's warehouse.

To the importer's dismay, when the container doors are opened, the widgets are discovered to be soaking wet. Inspection of the container reveals that is riddled with holes and is corroded. The importer later learns that seawater had washed into the hold of the vessel in which the container had been stowed because the hatchcovers on the much vaunted MV CUT RATE CANADA were leaky as sieves.

The widgets turn out to be a total loss and the importer therefore files a claim for the damage with Cut Rate's claims department. The importer is mystified when it receives a letter from the manager of Cut Rate's claims manager denying liability for the damage on the grounds that Cut Rate was not the carrier of the widgets and instead referring the importer to a company called Overboard Shipholdings SA for redress.

Faced with this odd situation, the importer contacts his attorney in order to ascertain its rights and to launch a lawsuit against the carrier, who the importer understandably

believed was Cut Rate. To the importer's astonishment, counsel advises that the contract of carriage for the widgets evidenced by the bill of lading was not, in fact, made with Cut Rate but with Overboard, a Panamanian company, with an "office" in Piraeus. It turns out that Overboard is the owner of the MV CUT RATE CANADA and had time-chartered the vessel on a long term basis to Cut Rate. Moreover, Overboard has no employees, its sole asset is the MV CUT RATE CANADA, and its business is "managed" by a London based company that is in fact part of the Cut Rate group of companies.

How is this possible the importer wonders? After all, the only party the importer ever dealt with was Cut Rate. The booking was made with Cut Rate and the freight was paid to that party. All the paperwork the importer ever received in connection with the carriage of the goods was printed with Cut Rate's corporate logo. The importer had never heard of Overboard and would never have dealt with that company because it had no idea whom Overboard was much less whether it could be trusted with the goods. On the other hand, it was Cut Rate's years of experience, its advertising and representations about the safety and reliability of its liner service and the ships plying that trade, and Cut Rate's reputation in shipping and importing circles generally, that induced the importer to do business with it.

Counsel points to the fine print on the back of the bill of lading, which contains the following clause, which the importer reads with disbelief:

> "If the ship is not owned or chartered by demise to the company or line by whom this bill of lading is issued, the bill of lading shall take effect as a contract with the Owner or demise charterer as the case may as principal made through the agency of the said company or line who acts as agent only and shall be under no personal liability whatsoever in respect thereof"

The importer cannot believe that Cut Rate can escape liability on the basis of this clause; for him it is equivalent to General Motors' denying liability for a defective car on the basis that it built and sold that car as agent only for the Canadian Auto Workers' Union!

The fact of the matter is, however, that the practise of inserting so called "demise" or "identity of carrier" clauses into bills of lading and contracts of affreightment has become a widespread one. Such clauses are invoked by vessel charterers to deny their status as a "carrier" and to avoid liability for the carrier's obligations under the contract of carriage. It is a practise that has, by and large, received the sanction of courts in a number of important maritime jurisdictions, and this notwithstanding the fact that the party invoking the protection of that clause is often the party who, from an operational and financial point of view, is the one fulfilling the obligations of the carrier in relation to the goods, for example, by advertising space aboard the vessel, collecting freight, issuing the bill of lading, determining the vessel's ports of call and supervising or performing the loading, stowage, discharge and delivery of cargo. Moreover, such clauses have been upheld notwithstanding that they can be fairly viewed as attempts to circumvent provisions of the Hague and Hague/Visby Rules that prohibit bill of lading clauses that limit or exclude carrier liability otherwise than as permitted in the Rules.

The Treatment of the Demise/Identity of Carrier Clause in Canadian Law

Demise/identity of carrier clauses have received varying judicial treatment in Canada. Earlier on, Canadian courts were fairly consistent in upholding the validity of such clauses (See, for example, *Atlantic Trader's Ltd. v Saguenay Shipping Ltd.*, (1979) 38 N.S.R. (2d) 1 (N.S.S.C.T.D.), *Weyerhaeuser Canada Ltd. et al v Anglo Canadian Shipping Company et al*, (1988) 16 F.T.R. 294 (F.C.T.D.), *Farr Inc. v Tourloti Compania Naviera S.A.*, (T-5847-80, Pinard J., judgment dated July 3, 1985 F.C.T.D., aff'd A-645-85 judgment dated May 30, 1989 (F.C.A.)), *Paterson Steamship Ltd. v Aluminum Co. of Canada Ltd.*, (1951) S.C.R. 852 and *Aris Steamship Co. v Associated Metals & Minerals Corporation*, (1980) 2 S.C.R. 322).

There was, however, an evolution of sorts in the manner in which Canadian courts dealt with demise clauses. In 1993 the Federal Court of Canada had the occasion to deal with the validity of demise/identity of carrier clause in *Canastrand Industries Ltd. v The Lara S*, (1993) 2 F.C. 553 (F.C.T.D.) (affirmed at (1994) 176 N.R. 31 (F.C.A.)), which involved the consideration of a bill of lading issued for a consignment of twine shipped from Brazil to Canada. The cargo receiver sued both the vessel owner and the time charterer for the damage. The time charterer sought to escape liability on the strength, inter alia, of an identity of carrier clause contained in the bill of lading. Speaking for the Court, Madame Justice Reed refused to apply the identity of carrier clause, holding that:

> "The logic of holding both the shipowner and charterer liable as carriers seems entirely

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

Madame Justice Reed's decision came on the heels of two earlier decisions of the Federal Court of Appeal in which a charterer was held to be a carrier in spite of the fact that the bills of lading in question contained identity of carrier clauses. In the first of these decisions, rendered in *Canficorp v Cormorant Bulk Carriers*, (1984) 54 N.R. 66, the time charterer, whose name appeared on the bill of lading, sued the shipper to enforce an indemnity given in respect of the contract of carriage. In that instance the shipper attempted to invoke the identity of carrier clause in support of its argument that the time charterer was not a party to the contract of carriage and therefore, prohibited from seeking the enforcement of the indemnity. The Court ruled that the clause was invalid because the time charterer assumed the responsibilities of the carrier both under the bill of lading and the booking note, which together formed the contract of carriage. In coming to this conclusion the Court noted that the charterer "acquired a large measure of control over the vessel's movements and the cargo carried" and observed:

> "Of some significance is the fact that the respondent loaded and discharged the goods. The responsibilities rested upon the "carrier" under Article III, Rule 2, of the schedule to the **Carriage of Goods by Water Act**."

Likewise, in *Carling O'Keefe Breweries v C.N. Marine*, (1990) 1 F.C. 483, the Federal Court of Appeal treated a time charterer as the carrier notwithstanding the presence of a demise clause in the contract of carriage, largely because the name of the vessel did not appear in the bill of lading and because the time charterer had signed the bill of lading as a carrier. From a juridical point of view, the Court treated the clause as a non-responsibility clause within the intendment of article 3(8) of the Hague/Visby Rules and ruled that it was invalid:

> "Having concluded the time charterer accepted to act as "carrier", the Trial Judge decided that clause 18 was null and void and of no effect as between the shipper and the time charterer because, contrary to Article III, Rule 8 of *Hague Rules*, it purported to relieve the time charterer of duties and responsibilities to "properly and carefully...stow...the goods carried" required by Article III, Rule 2. I entirely agree."

Commencing in 1997, however, the Federal Court of Canada did an about face upholding the validity of demise/identity of carrier clauses. The first of these decisions was rendered by Mr. Justice Marc Nadon in *Union Carbide Corp. et al v Fednav Ltd. et al*, (1998) 131 F.T.R. 241. In that case, cargo interests sued for damage to a cargo of synthetic resin carried from Montreal to ports in the Far East. The action was directed against Fednav Ltd., the Montreal based time charterer of the vessel THE HUDSON BAY, as well as the ship's Liberian owners. For procedural reasons, the trial proceeded, sixteen years after the action had been filed, against the charterer only.

Fednav defended the action, arguing that the demise clause contained in the bill of lading that it had issued for the cargo relieved it from liability. On Mr. Justice Nadon's view of the facts, the charterer had not given an undertaking to the owners of the cargo to carry the cargo. Absent such an undertaking, the shipowner is the carrier, not the charterer. His Lordship also disputed Madame Justice Reed's theory of the charterer's and vessel owner's joint and several liability for the carriage and safekeeping of the cargo holding that:

> "Madame Justice Reed seems to have accepted Professor Tetley's theory that where goods are loaded on a time chartered ship the owners of that ship and the time charterers are engaged in a joint venture insofar as the carriage of the goods is concerned. I cannot accept the soundness of the view. Firstly, such a conclusion defies the decisions of the Supreme Court in **Paterson Steamships** and **Aris Steamship.** Secondly, there cannot be joint venture between owners and charterers unless there has been a meeting of the minds to the joint venture. Can it be said that, in entering into a time charter party in the New York Produce Exchange form, as is the case here, the owners and the charterers have agreed to jointly carry the goods loaded on the ship? In my view, it cannot be so said... "

Accordingly, Mr. Justice Nadon dismissed cargo interests' action against Fednav.

In *Jian Sheng Co. v Great Tempo S.A.*, (1998) 3 F.C. 418, the Federal Court of Appeal dealt with the validity of an identity of carrier clause in the context of its consideration of the enforceability of a jurisdiction clause which disposed that disputes arising under the bill of lading contract were to be adjudicated in the country where the "carrier" had its principal place of business. The case involved the loss overboard of lumber shipped from

British Columbia to Taiwan aboard the TRANS ASPIRATION. The consignee of the cargo sued both the owners and the charterers of the TRANS ASPIRATION. The bill of lading contained a clause that provided that the contract of carriage was made between the owners and those interested in the cargo and the owners of the TRANS ASPIRATION.

At trial, Madame Justice Tremblay-Lamer held that the shipowner was the only carrier of the cargo and gave effect to the identity of carrier clause. In so doing, she repeated the view expressed by Mr. Justice Nadon in the Union Carbide case, holding that there was no:

> "joint venture between the owner of the vessel and its charterer unless there is an express undertaking on the charterer's part to this effect."

Speaking for the Federal Court of Appeal, Mr. Justice Decary appeared to reject the suggestion that there could be more than one carrier and held, endorsing Mr. Justice Nadon's judgment in the Union Carbide case, that:

> "The implicit joint venture concept is in my respectful view incompatible with the gist of the decisions of this Court in *Cormorant* and in *Carling O'Keefe*. The concept has been found "unsound" by Nadon J. in *Union Carbide* at page 264 and I entirely agree with his reasons for reaching that conclusion."

Further on Mr. Justice Decary held that:

> "...in view of the identity of carrier clause (also referred to as a demise clause) in the bill of

> lading, one could be hard pressed to conclude that as against the appellant consignee, the bill of lading could be anything but an owners' bill of lading. This clause indicates in unequivocal terms that the bill of lading is intended to be a shipowners' bill of lading and that the contract evidenced by the bill of lading is one between the owner of the cargo and the owner of the vessel (see *The Berkshire*, (1974) 1 Lloyd's Rep. 185 (Q.B.)(Adm. Ct.) at p.188, Brandon J. and *union Carbide*, at page 261, Nadon J.) That clause in effect establishes a rebuttable presumption that the shipowner is the carrier (see P. Todd, *Modern Bills of Lading*, 2nd ed. (Oxford:Blackwell Law, 1990) at page 96 ff) and I am not convinced that, as against a consignee, the fact of using the words "agent for the ship" rather than the words "agent for the shipowner" is enough to displace the presumption."

Leave to appeal the decision of the Federal Court of Appeal was denied by the Supreme Court of Canada.

More recently, the validity of the demise clause was upheld by Mr. Justice Blais of the Federal Court of Canada in the as yet unreported decision in *Voest-Alpine Stahl Linz GmbH v The "Federal St. Clair" et al* (T-1296-95, August 31, 1999). The case dealt primarily with the burden of proof in cargo claims and whether or not the cargo had sustained damage during transport. The question of who the carrier was, and in particular whether the time charterer of the vessel was liable together with the vessel owner for the cargo damage, was also in issue. Mr. Justice Blais' view of the parties' respective duties in that regard was expressed as follows:

> "It is this Court's understanding that the usual role of the charterer is only to find space on a vessel. Once the time charterer has booked space on a vessel it finds cargo and asks the carrier or the owner of the vessel to carry the cargo. Then, the carrier or the owner issues a bill of lading which becomes the contract of carriage between cargo interests and the carrier."

Mr. Justice Blais also found that there was no specific undertaking by the time charterer to act as a carrier of the goods and the action against it was dismissed:

> "There is no specific undertaking in the case at bar, and based on the theory of joint venture as delimited by Mr. Justice Nadon, and based on the documents namely the bill of lading and the time charter, and the circumstances of this case...I reject the plaintiffs' argument and find that the carrier identified as Federal Pacific was not engaged in a joint venture with the time charterer Fednav International for the delivery of the cargo."

The net effect of the *Union Carbide, Jian Sheng* and *Voest Alpine* decisions has been the validation, for the time being at least, of the demise/identity of carrier clause in Canadian maritime law. However, the position is not without its critics, some of whom view the identity of carrier clause as a judicial sleight of hand that obscures reality and allows charterers to avoid legal obligations that should otherwise be theirs by virtue of their being, for all practical purposes, carriers under the Hague and Hague/Visby Rules.

For example, Professor Tetley in his recent article, *The Demise of the Demise Clause?*, (1999) 44 McGill L.J. 807 expresses the view that there "are many reasons why the

demise/identity of carrier clause is invalid when invoked by the charterer.." and he levels the following criticisms of the two decisions:

1) Neither case mention article 3(8) of the Hague/Visby Rules, which are compulsorily applicable to any party that acts as a carrier. Clauses that permit a party from escaping liability merely by declaring itself in the bill of lading to be an agent of the shipowner, rather than a carrier, should be declared null and void as they constitute "illegal attempts by charterers to limit or exclude their liability contrary to the Rules."

2) The demise/identity of carrier clause is at variance with the commercial reality of the shipping industry in that they "contradict the appearance of the charterer's name on the head of the bill of lading and contradict the carrier's public notices of availability of the vessel..." Moreover, the reality is that in most instances, the charterer and shipowner, together share the duties and perform the obligations of the carrier. They should, therefore, be considered jointly and severally liable to the cargo owners.

3) The principles of the law of agency should not determine who is or is not a carrier, given that "...many of the hallmarks of the legal relationship of agency are absent from the charterer-shipowner relationship..."

4) The risk of the shipowners' financial demise is unreasonably transferred from the charterer to the cargo owner thereby allowing "... the charterer to engage in virtually

risk-free commercial transactions. It may sue to recover freight due, but it may not be sued, because of its claim to be an "agent only" of the shipowner."

These criticisms are not without their merit and they express a point of view shared in some circles within the Canadian maritime bar. Given that most charterers carry extensive insurance for cargo related liabilities, demise or identity of carrier clauses cannot be justified for reasons of financial or business policy, on the basis that they are needed for the protection of a vulnerable sector of the shipping industry. Demise and identity of carrier clauses clearly obscure the reality that in many instances, charterers are, in all respects the carrier, carrying out most if not all of the financial and operational duties normally assumed by a carrier, including issuing the bill of lading and collecting the freight, directing the ship's voyage and loading, discharging and delivering cargo. The assumption of these duties, it can be argued, gives rise to at least an implied undertaking of carriage on the charterer's part. It must be said that demise and identity of carrier clauses are "unjust" in that their enforcement permits charterers to sidestep legal obligations that should normally be coextensive with the activities they carry on.

Nonetheless, the issue of who constitutes the carrier under Canadian Maritime Law will remain as defined in the *Union Carbide* and *Jian Sheng* decisions until the Supreme Court of Canada has the final judicial word on point or until such time as Parliament enacts the Hamburg Rules. These Rules, once enacted, broaden the scope of who will be considered a carrier by defining the concept as including "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper"

and by imposing legal duties on the "actual carrier," defined in the Rules as including "any person to whom the performance of the carriage of the goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted." The "carrier" under the Rules is liable for the entire carriage even where all or part of it has been sub-contracted to the "actual carrier," who, together with the "carrier" would be jointly and severally liable for the carriage that it actually performs. To the extent, therefore, that a charterer performs the duties of an "actual carrier," it will be jointly and severally liable with the vessel owner under the Hamburg Rules.