

Carriage of Goods by Sea

The Starsin-case.

Professor Tetley's "Third Alternative"

Introduction

In Holland we have an old proverb, which says: “*een goede schipper legt zijn schip voor twee ankers*” (an experienced master casts his ship by two anchors), this proverb would support Tetley’ theory but is Tetley right according to today’ interpretations of the relevant laws?

The Facts of the Starsin-case¹

The bulkcarrier “the Starsin”, owned by Agrosin Private Ltd., was on demise charterer² by Oreandae Shipping Ltd.

In October 1995, Continental Shipping Ltd. (“CPS”) time chartered³ the Starsin from Agrosin Ltd.

In November and December 1995, “the Starsin” loaded consignments of plywood and timber from three different ports in Malaysia for discharging at Antwerp (B) and Avonmouth (UK). On arrival, damage was found to the cargo by damp conditions during

¹ Homburg Houtimport B.V. v. Agrosin Private Ltd. and others (The Starsin), [2003] 1 Lloyd’s Rep. 571; 2003 AMC 913; [2003] 2 All ER 785 (House of Lords: Lord Bingham of Cornhill, Lord Steyn, Lord Hoffmann, Lord Hobhouse of Woodborough, Lord Millett).

² Shipping Law, by J. Hare, pag.580; the demise charterer hires the entire ship from her legal owner, usually for an extended period not less than a year, without the provision of master, officers and crew. The demise charterer takes possession and control of vessel ‘bare boat’.

³ Hire contract for a fixed time period. According to Berman J.; time charter is a contract *sui generis*. The Time Charterer has commercial control over the ship but the nautical control remains with the shipowners.

shipping. In its judgement the Commercial Court determined that 15% of the damage was attributable to rain prior to shipment and that the balance of the damage to condensation caused by negligent stowage was for the responsibility of the carrier. The claimants were the consignees to whom the bill of lading had been endorsed. The bills of lading were on the CPS form and were signed by agents on behalf of CPS “as the carrier”. The bills of lading contained a clause to identify the carrier (clause 33)⁴ and a demise clause (clause 35)⁵. The cargo claimants undertook legal action against the time charterer but as CPS subsequently became insolvent; the ship owners had to take CPS’ place in the cargo claim. At first the claimants started proceedings against the ship owners, because the bill of lading contained a demise clause, and after failing, in tort. The ship owners contended that they were the contractual carrier.

The Nature of the problem

A legal claim has to be undertaken by against the debtor of it. In case one addresses the wrong party, the claim can become void and the creditor will be held liable for the costs of the legal procedure. Therefore it is for the creditor of the utmost importance to clearly know the identity of the debtor⁶ (read carrier).

The uncertainty about the identity of the carrier under the bill of lading⁷, such as in the case of a demise-clause, is linked to the organisational complexity of international trade relations and shipping as well as to the inevitable loss of information when the creditor on a later

⁴ Clause 33, the identify of the carrier:

“the contract evidenced by this bill of lading is between the merchant and the owner of the vessel...and...the ship owner shall be liable for any damage ...arising out of the contract of carriage.”

⁵ Clause 35, the demise clause :

“if the ocean vessel is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding that which appears to the contrary) this bill of lading shall take effect only as a contract of carriage with the owner...as principal made trough the agency of the said company or line who act solely as agent and shall be under no personal liability whatsoever.”

⁶ Prof. Arthur S. Hartkamp & Marianne M.M. Tillema, *Contract Law in the Netherlands*, Kluwer, The Hague, 1995.

⁷ *Maritime Cargo claims*, Tetley, Chapter 9, Bills of lading, in consequence, are better described as standard form contracts, rather than pure contracts of adhesion.

A bill of lading is not merely a contract of carriage of goods but also a receipt and a document of title as well. A bill of lading in certain circumstances may only be a receipt or it may only be a receipt and a document of title. The bill of lading is a tripartite contract: involving the shipper, the carrier and the consignee. It is a three-purpose document: a contract of carriage, a receipt, and a document of title. It is really not the contract of carriage but the best evidence of the contract. Under the common law the bill of lading contract still requires an offer, an acceptance and a consideration. Under the civil law there must be: two parties, a legal object, consent and a cause.

stage enters into the legal relationship from which he derives his right of legal action. This in cohesion with the (sometimes vague) distinct between the legal ownership and the economical exploitation of a vessel in the shipping industry as well as the great diversity of functions that play an important role in the world of shipping.

This even more so, where the right of legal action has been easily transferable through out a document of title, such as the bill of lading.

The owner of the vessel for example does not have to operate the vessel personally, nor does his ownership of the vessel has to imply that he has a contractual relationship with the shipper or that the shipowner has assumed obligations under a bill of lading.

Neither can contractual parties fully rely on content of the signed bill of lading as these maybe incomplete and incorrect. This results in great uncertainty on the side of the cargo claimants which is even more aggravated by the time pressure imposed one year time-bar⁸ to commence legal action against (the assumed) carrier(s).

In his "Joint Venture"- theory Tetley concludes that, "*The House of Lords in the Starsin-case missed an important opportunity to explore and affirm that the charterer and the shipowner are both the carrier.*"

This essay will focus on the problem of the identity of the carrier under the bill of lading, in other words, who can be held liable for the agreed performance in the bill of lading, the problems which occur when the carrier is identified and on the viability of Tetley' third alternative theory.

⁸ Article 3 (6) the Hague-Visby Rules (HVR)

The conclusions of the House of Lords in the Starsin-case

The crucial issue before the House of Lords was, “whether CPS or the shipowners were the carriers under the bills of lading⁹?”

The positive outcome (for the shipowners) of this issue, led automatically to the following questions: “If the shipowners were not the contractual carriers, can the shipowners benefit from the protection of the Himalaya clause¹⁰? and could the shipowners be sued by the cargo claimants in tort (or any other theory of liability)? “

Firstly I will address the main issue before the House of Lords, subsequently I will reflect on the question of shipowners’ protection under the Himalaya-clause and cargo claimants’ title to sue.

In their judgements in the *Starsin-case*, the House of Lords came to the following conclusion: the House of Lords held that the printed identity of carrier and demise clauses on the reverse of the bills were overridden by the words which had been added in the signature box on the front. These, it was said, would have indicated to a shipper or transferee of the bill that CPS, the charterers, were the contractual carriers. In the words of Lord Hobhouse, the typed or stamped words in the signature box "demonstrate a special agreement" by which the parties had agreed that "inconsistent clauses will be overridden".

The House of Lords had difficulty in accepting that the holder of the bill should have to read all the conditions on the back of the bill to discover with whom the contract of carriage was made; especially in this case where the front of the bill of lading clearly identified the "carrier".

⁹ This is the general issue because it is often difficult to clearly identify the carrier (frequently the bill of lading merely mentions ‘XYZ’- line and sometimes this even is missing) and Article 1 of the Hague-Visby Rules give a very vague definition who the carrier is.

¹⁰ case of *Adler v. Dickson (The Himalaya)*, [1954] 2 Lloyd’s Rep. 267, [1955] 1 Q.B. 158 (C.A.); the clause in particular allows third parties to enjoy the package limitation and the one-year delay for suit of the Hague Rules.

In reaching their conclusion the House of Lords relied on the common business sense and aspects of the bill of lading¹¹.

By agreeing to adopt the business approach, the House of Lords placed more importance to the face of the bill of lading than the small printed wording on the back side of the bill of lading¹², because this approach is in line with the international banking practices.¹³

The House of Lords concluded that the bills were charterers' bills. Since they were not the contractual carriers, the shipowners could not be liable for any breach of the contract of carriage. Consequently it must be considered whether the shipowners would have protection from liability in tort under the Himalaya clause.

¹¹ Lord Bingham: "*business sense will be given to business documents*" and that the courts "*must seek effect to the contract as intended, so as not frustrate the reasonable expectations of businessmen*"

¹² See Lord Steyn, paragraph 46: "Professor Debattista, "Is the end in sight for chartering demise clauses?", *Lloyds List*, Wednesday 21 February 2001, p 5) rightly warned that the effect of the judgment of the majority (of the Court of Appeal) would be to create traps for the unwary; commercial certainty and honesty is promoted by giving greater effect to the front of the bill of lading."

¹³ See Lord Bingham, paragraph 16: "The ICC's Position Paper No 4 reiterates that the name of the carrier must appear as such on the front of the bill and that banks will not examine the contents of the terms and conditions of carriage. In *Documentary Credits*, 3rd ed (2001), pp 175-176, Jack, Malek and Quest confirm, citing *National Bank of Egypt v Hannevig's Bank* (1919) 3 LDAB 213 and *British Imex Industries Ltd v Midland Bank Ltd* [1958] 1 QB 542, that the general practice of banks is not to examine the small print on the back of the bill. It is of course true, as Mr Milligan pointed out, that these provisions govern relations between issuing bank and beneficiary, not shipper or consignee and carrier. But it would be very surprising, and also (in my opinion) very unsatisfactory, if a practice accepted in one field were not accepted in another so closely related."

The identity of the Carrier & the Demise-clause

”The issue of the identity of the "carrier" is a question of fact. The question to ask in each case is who undertook or agreed to carry and deliver the goods. The answer to this question will largely depend on the facts”¹⁴

According to Dutch Law:

Like many other European nations our Maritime Law provisions have been derived from the Hague-Visby Rules. Equal to the HVR, the Dutch provisions are primarily focused to protect the holder of the bill of lading against uncertainties which could arise from the bill of lading. The Dutch Act on International Private Law pertaining to Carriage by Sea of 1993 indicates that the question of which party an action should be pursued against, should be looked at in accordance with the law of the country of contractually agreed discharge, irrespective of a conceivable choice of law that the parties may have made contractually¹⁵.

Therefore if Dutch national law applies it will produce some interesting results. Article 461 of Book 8 of the Dutch Civil Code (DCC) defines who can be regarded as carrier under a bill of lading. It states that the party who signed the bill of lading (or on whose behalf the bill of lading was signed) and/ or the party whose form was used for the bill of lading, is to be regarded as the carrier.

The article also identifies other carriers, Article 461 (2) and (3) recognizes plural carriers. Even if the master signs the bill of lading on behalf of a third party, than the shipowners as the (last) demise charterer are liable in addition to this possible time- or voyage-charterer. Furthermore under Dutch Law, the holder of the bill of lading with a cargo claim has the opportunity to start an action *in rem*¹⁶, even if the ship does not belong to the debtor's fortune¹⁷. These actions should be treated as additional¹⁸ and not leading like in the

¹⁴ Quote from Christopher J. Giaschi.

¹⁵ Strikwerda, *De Overeenkomst in het IPR*, 1995, pag. 75

¹⁶ Article 217 Book 8 DCC

¹⁷ By this possibility of arrest, which, in a unorthodox manner, transfers the risk of insolvency of the carrier under the bill of lading from the holder of the bill of lading to the shipowner. See the *Ufuk*-case, Hoge Raad, 2 April 1993 & the *Kapitan Anistratzenko*-case, The High Court of The Hague, 8 June 1993.

¹⁸ *Toelichting & Commentaar op Burgerlijk Wetboek*, Dokter, (1994a), page 270v. & *Ufuk* -case before the ‘Hoge Raad’, 2 April 1993, NJ 1994, 650

Hamburg Rules¹⁹

Frequently, more than one party can simultaneously be regarded as a carrier, and Article 442 of the DCC, explicitly states that they shall all be jointly liable *vis-à-vis* the holder of bill of lading.

For a demise clause to be upheld when it points towards a demise charterer, the identity of that demise charterer must come from the bill of lading itself. Thus the classic demise clause is generally held to be void²⁰ under Dutch Law, whilst an Identity of Carrier (IOC) clause²¹ specifically naming the owner (as in the Conline bills of lading) is generally held to be valid.

In conclusion, the emphasis in Dutch Maritime Law lies within the (trade) interest of the transferability of the bill of lading, the third party must be able to rely on its clear contents (third party protection) therefore the unclear demise clause is void under Dutch Maritime Law.

¹⁹ Hamburg Rules, Article 10.

²⁰ Contrary to Dutch Law, under English Law the demise clause is valid, see *The Berkshire* [1974] 1 Lloyd's Rep 185

²¹ Demise- and Identity of Carrier clause are similar; the IoC clause merely declares that the shipowner is the carrier and that the time or voyage charterer is but an agent

Dutch Law v. Tetley:

In Tetley's third alternative, he views carriage of goods by the sea as a joint venture, in this way all involved parties, can be held liable under, with the vessel performed, contract of carriage²².

And although Dutch Law recognises plural carriers, its origin is not consistent with Tetley's opinion. Article 461 book 8 DCC focuses on the content of the bill of lading (and the involved party's commitment from it) instead of a party's actual involvement in the performance of the contract of carriage. But also the possibility of Article 461(3) Book 8 DCC, to exclusively nominate the shipowner as the carrier under the bill of lading and by doing so exclude plural carriers under the bill of lading concurs with Tetley's concept of "joint liability" of the charterer and the shipowner.

Identity of the Carrier according to International conventions

Hague/Visby Rules:

Article 1(a) HVR states: "Carrier" includes the owner *or* the charterer who enters into a contract of carriage with a shipper. This definition of the carrier in the HVR is not very clear or comprehensive and suggests that there can only be one carrier under the bill of lading. This is even confirmed by the use of the words '*who enters*'. Tetley however is of the opinion that '*or*' could also imply *or both*. And even the use of the word '*includes*' in Article 1 HVR could imply that the carrier could be some other person who is neither owner nor charterer.

The HVR assume that the contractual carrier is the person who enters into contract of carriage with the shipper, and therefore liable under the bill of lading.²³

Although this reliance on the underlying contract of carriage in regard to the commercial transferability of the bill of lading is far from ideal²⁴.

²² The contract of carriage is usually deemed to be the bill of lading but, as has been pointed out on numerous occasions the bill of lading is a one-sided document and is only excellent evidence of the contract. The real contract of carriage is the offer, the arrangements for shipment, the advertisements of the carrier, the booking note, the acceptance of the shipper, the statements of agents, etc., as well as the bill of lading itself, all taken together.

²³ Article 1(b) & 3 HVR

²⁴ A third party holder of the bill of lading will have knowledge of the provision in the underlying contract of carriage

HVR v. Tetley:

Tetley' interpretation of Article 1(a) HVR is dissentient; according to Tetley' third alternative "carriage of goods by sea can be characterized as a joint venture between the shipowners and the charterers, because they share the responsibilities of a carrier under the HVR, which cannot be contracted out of in virtue of Article 3(8) HVR. As a result of the shared responsibilities, the carrier and the charterer should be held jointly and severally responsible as carriers".²⁵

This would even mean that without a contractual relation with the shipper, one could be identified as the carrier under the bill of lading, like a demise clause would suggest. Wouldn't this mean infringement of the doctrine of Privity of contract (of Carriage)?²⁶

And even so, isn't the demise clause, commonly used by the charterer to avoid their responsibility as the contractual carrier under the HVR?

Besides, the use of the demise clause is no longer necessary, as the 1957 and 1976 Limitation Conventions, will protect charterers and shipowners.²⁷

The back side of the 'global limitation of liability' medal for the shipowner is however that they can't presume total immunity, as it is, that they are making money of the carriage in the case he is paid freight or as charter hire.

Furthermore, Tetley' joint venture theory assumes a certain value to facts which cannot be extracted from the bill of lading, such as the responsibilities of the shipowner and the charterer under the charterparty and the actual course of things during the carriage of the goods. These wary situations will create even more difficulties for a third party, who acquires the bill of lading at a later stage, to identify the carrier.

In conclusion, to my view Tetley' theory seems to pass by on the fact that the carrier under Article 1 (a) HVR is a carrier under the bill of lading, furthermore I find it difficult to accept that Tetley simply ignores the passage "the owner or the shipowner who enters in contract of carriage with a shipper".

²⁵ See Marine Cargo Claims, 4th ed., by W. Tetley, Chapter 10

²⁶ By abolishing the Privity-rule like in The United Kingdom, were the *Contracts (Rights of Third Parties) Act 1999* has been adopted

²⁷ Cleton (1990) page 33, the global limitation of liability under the Convention on Limitation of Liability for Maritime Claims, London, 1976 has been extended to all charterers and carriers.

Although it must be said, that in case of insolvency of the contractual carrier, like in Starsin-case, Tetley' joint venture theory will provide the cargoclaimants with a safety net for their claim.

Hamburg Rules:

Article 1

1. "Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.

2. "Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted²⁸.

As set out above, the Hamburg Rules (HR), in contrary to the HVR, contains two concepts of "carrier". However, similar to the HVR the HR assume too that the contractual carrier is liable under the bill of lading, but they also create an additional liability of the *actual carrier* i.e. the person to whom the contractual carrier has entrusted with the actual performance of the carriage or a part of it. If the carrier and the actual carrier are not united in one person than the sole responsibility of the carrier is the final result of the carriage.

To prevent that the carrier would contract out his liability or that of his actual carrier under the contract of carriage, the HR contain a provision under which the carrier can not safeguard himself of any form of liability.²⁹

Similar to Dutch Maritime Law, the underlying contract of carriage and not the bill of lading, will determine the identity of the carrier under the bill of lading.

To protect third party holders of the bill of lading, the carrier has the obligation to include his name and principal place of business³⁰ in the bill of lading. The actual carrier is only liable for the carriage he actually performs.³¹

²⁸ I merely would like to point out that the concept of the actual carrier is much criticized by authors in Maritime Law; for example by professor Claringbould, "*the persona of actual carrier shift risks and uncertainties from the cargo to the shipping interests in a rather arbitrary and unbalanced way. In addition, the protection thus realised extends further than the endangered interests can justify, yet not far enough to protect them adequately either*"

²⁹ Article 10(1) HR

³⁰ Article 15(1,c) HR

³¹ Article 10 (2) HR

The HR also provide that where both the carrier and the actual carrier are liable, their liability is joint and several and that a bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.³²

In conclusion, based on Common Law the House of Lords unanimously concluded that, although the bill of lading contented a demise clause³³, the shipowner was not the contractual carrier and that CPS was the contractual carrier and the foregoing text. One could simply distil the effect of the Starsin-case on the demise clause; by their judgement the House of Lords placed in the existence of the demise clause in front of the firing-quad.

The Himalaya-clause

Next to the demise clause on the back of the bill of lading, the bill of lading contained another exemption clause, provision nr.5,³⁴ better known as the Himalaya clause.³⁵

A Himalaya clause in a bill of lading is designed to create contractual relations between the shipper and any third parties whom the carrier may employ to discharge his obligations. It does so without infringing the English doctrines of Privity³⁶ of contract and consideration,

³² Article 10 (4) HR

³³ According to Lord Roskill (The Demise clause by Roskill, 1990, page 406.) the demise clause was developed during the Second World War at a time when it became necessary for the British government to requisition vessels under government control ('the Liner Requisition Scheme'). At that time there was the Merchant Shipping Act, which was effective until 1958, that only a shipowner or the demise charterer could limit their liability for loses. (Sections 502 & 503 of the Merchant Shipping Act 1894). As the British Government gained control over these bad maintained vessels through timecharterparties and because the financial risks had to be covered by the Treasury, it became necessary for the government to limit their liability. By designing the demise clause in the Bill of Lading, the carrier liability was transferred from the British Government to shipowner or the bareboat charterer of the vessel who could limit their liability under Merchant Shipping Act.

³⁴ [1]It is hereby expressly agreed that no servant or agent of the carrier including every independent contractor from time to time employed by the carrier shall in any circumstance whatsoever be under any liability whatsoever to the shipper, for any loss or damage or delay of whatsoever kind arising or resulting directly from any neglect or default on his part or acting in the course of or in connection with his employment and, [2] without prejudice to the generality of the provisions in this Bill of Lading, every exception, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier [acting as aforesaid and for the purpose of all the foregoing provisions of this clause, the carrier] is or shall be deemed to be acting on behalf of or for the benefit of all persons who are or might be his servants or agents including every independent contractor from time to time employed by the carrier and

³⁵ After the decision in *Adler v Dickson* -case (The Himalaya), [1955] 1 QB 158.

³⁶ in this regard see Tetley: *"The civil law has never had trouble with the concept of two parties benefiting a third party, because of the ancient principles found in the stipulation for another, although the stipulation for*

which, until the Contracts (Rights of Third Parties) Act 1999, prevented third parties from claiming benefits under contracts.³⁷

The Himalaya clause is a provision of the bills of lading, throughout the 'Paramount clause' the HVR apply on the provisions of the bill of lading, this includes Article 3 (8) HVR

In the Starsin-case the House of Lords stated in their judgement, on the basis that the bills of lading are charterers' bills, that CPS was the contractual carrier under the contract of carriage.

Herewith the Lords pointed out that the shipowners are to be regarded as a third party.

The crucial question herein was if a third party may benefit from the terms of contract covered by a bill of lading to which it is not a party?

The shipowners performed the carriage as subcontractors of CPS and therefore shipowners are entitled to the protection of provisions of the Himalaya clause in the bill of lading as independent contractors.

another may not exactly fit the Himalaya clause. The common law, in the last century, has experimented with various theories to benefit third parties, but the most effective method has been legislation, as found in the Hamburg Rules at arts. 1(2), 4 and 10, and by such statutes as the U.K.'s Contracts (Rights of Third Parties) Act 1999"

³⁷ See Lord Hoffmann in the Starsin-case

Referring to the above the shipowners sought protection against the claims from the cargo owners. By making use of this “shield” in the bill of lading, the shipowners acknowledged and accepted that the HVR applied to the bill of lading. In consequence the Himalaya clause will only protect the shipowners to the same extent that CPS, the contractual carriers, were themselves protected by the bill of lading provisions. Since CPS, by effect of Article 3(8) HVR, would not be exempt from liability, it followed that, the shipowners as independent contractors, could not be exempt either. So by reasoning of Article 3(8) of the HVR the ‘exemption shield’ in the first part of the Himalaya clause was brought down, leaving the shipowners only to rely on the second part. This gave the shipowners the ability to rely upon the HVR exemptions, but these provided no defence to the claim in this case, namely damage caused by for negligent stowage.

In conclusion, the effect of the Starsin-case in regard to use of Himalaya-clauses, is that shipowners, regarded as independent contractors, who are not a party to the contract of carriage may still rely on its provisions, but by doing so, they have to consider that the immunity from liability that the Himalaya clause confers third parties (i.e. independent contractors) is not waterproof by the invalidating effect of Article 3 (8) HVR.

Besides my conclusion I would refer to Lord Wilberforce’ concluding opinion in the ‘The Eurymedon’-case, [1975] AC 154: *“It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight”*.

Conclusion

As a former ‘cargo claim attorney’³⁸, Tetley’ -second nature- is to search for the ‘deepest pockets’ and who is fairly easy traceable through ship registers and P&I clubs. In case of, the shipowners in return can rely on their indemnity clause to take recourse against the charterer. The Starsin-case also give ground to joint venture theory by that the holder of the bill of lading or third party holders should be protected from a possible insolvency of the contractual carrier. On these grounds Tetley’s “Third Alternative” theory makes good sense.

³⁸ Tetley’ website: How to become a maritime lawyer without even trying , How to join the Laurier club without even trying & How to keep clients without even trying.

The contracting carrier should be properly identified in the bill of lading as for instance is required by Article 15 of the HR. So legal action shouldn't always be forced upon and focus on the shipowner, who may not be either the contracting or the performing carrier, although it must be stated that the shipowner knows who the identity of the charterer, and that the charter party contains provisions which protect the shipowner in the case a suit has been filled against the shipowner. But these provisions are limited and the shipper should be held responsible if they accept a deficient bill of lading, although third parties under a the bill of lading should be protected and therefore there should be clear uniform rules to confirm a bill of lading and for the provisions mentioned on the back of the bill of lading; nevertheless they should have the obligation to investigate the contractual relations of the underlying contract of carriage.

In my view Tetley 'Third Alternative' is logical from a cargo claimant's point of view and knowing Tetley's fondness of mixed (and mixing) jurisdictions³⁹, Tetley's 'Third Alternative' is a obvious Civil Law (Hamburg Rules) solution to a Common Law (HVR and demise clause) problem. I would suggest to make it obligatory clearly to identify the carrier and to make it clear that in the absence of such clear identification, the shipowner is deemed to be the carrier, as he knows who the charterer and he will have the right of recourse/subrogated against the charterer. Consequently the demise clause or the Identity of Carrier clause should be banned from the bill of lading.

A possible solution might be a rule that unless another name appears in the bill of lading, the contracting carrier will be absolutely deemed to be the carrier. (Prof. Berlingiere, CMI, 1997) Or like Prof. Bonassies suggested that the shipowner should bare some kind of responsibility there for the shipowner should be presumed liable in accordance with the following provision: 'if neither the contracting carrier nor the actual carrier is actual is clearly identified in the bill of lading, the shipowner (as "*legal*") shall be deemed to be contractual carrier unless he proves that he has lawfully entrusted the entire operation to an other person'

³⁹ Chapter 3, paragraph 8 of Mixed jurisdictions: common law vs civil law (codified and uncoded) by William Tetley, Q.C.