

CHARTERED VESSELS:
IDENTIFYING CULPABLE PARTIES

CHRISTOPHER RALEIGH, ESQUIRE
COZEN AND O'CONNOR
16th Floor, 45 Broadway Atrium
New York, New York 10006
(212) 509-9400
craleigh@cozen.com

Atlanta, GA
Charlotte, NC
Cherry Hill, NJ
Chicago, IL
Columbia, SC
Dallas, TX
Los Angeles, CA
New York, NY
Newark, NJ
Philadelphia, PA
San Diego, CA
Seattle, WA
W. Conshohocken, PA
Westmont, NJ

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Cargoes transported aboard chartered vessels typically involve a series of charter parties running down a chain consisting of an owner, time charterer, voyage charterer and, sometimes, one or more sub-charterers. In most instances, the bill of lading which represents title to the goods is negotiated, leaving the ultimate cargo owner with little or no idea as to who it should look to in the event the shipment is lost or damaged. Even after the owner, charterer and sub-charterers have been identified, the question becomes who, among the several contractors involved, is responsible for loss and damage to the cargo?

In Rem Liability Of The Vessel

The immediate answer is that the vessel is always liable *in rem* regardless of who issued the bill of lading or entered into the contract of carriage. This principal is based on the rationale that the vessel, by setting sail with cargo on board, has “ratified” a bill of lading which covers that cargo, even though the bill of lading was neither issued nor authorized by its Master. *Demsey & Assoc. v. S.S. SEA STAR*, 461 F.2d 1009, (2d Cir., 1972); *British West Indies Produce, Inc. v. S.S. ATLANTIC CLIPPER*, 353 F.Supp. 548, (S.D.N.Y., 1973); *UNICEF v. S.S. NORDSTERN*, 251 F.Supp. 833 (S.D.N.Y., 1966); *Cavcar Company v. M.V SUZDAL*, 723 F.2d 1096 (3d Cir., 1983).

However, the fact that the vessel is liable *in rem* may not be a practical solution for cargo interests if the vessel is beyond the Court’s jurisdiction. In *Tuscaloosa Steel v. Naimo*, 1993 AMC 622 (S.D.N.Y. 1992), the Court dismissed the *in rem* claim where the plaintiff was unable to arrest the vessel during the two year period the action had been pending. See also, *Crispin v. S/S Jowood*, 1973 A.M.C. 2623 (S.D.N.Y., 1973), in which the *in rem* claim was dismissed when the vessel was not arrested within ten months after the complaint was filed; and, *Mahroos v. S/S Tatiana L*, 1988 AMC 757 (S.D.N.Y. , 1986) (*in rem* claim dismissed eight months after complaint filed where no arrest has been effected). In *Associated Metals & Minerals Corp. v. S.S. PORTORIA*, 484 F.2d 460 (5th Cir., 1973), the Fifth Circuit held that it was error for

the trial court to enter judgment on the plaintiff's *in rem* claim where the vessel was never arrested and the owner did not waive attachment of its vessel.

Of course, the existence of an *in rem* claim is absolutely no consolation to the cargo owner where the vessel has sunk or is a constructive total loss. Given this situation, or the inability of cargo interests to perfect an *in rem* claim through arrest of the vessel, it is necessary to look to other viable parties who participated in the transport.

IN PERSONAM LIABILITY OF THE OWNER

The case law has recognized two bases on which the owner could be held liable: (1) as a "carrier" under the U.S. Carriage of Goods By Sea Act, 46 USC §1300 et seq.; and, (2) as a bailee under federal bailment law.

Imposing Carrier Liability Upon The Owner

As defined in COGSA, "(t)he term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper." 46 USC §1301 (a).

A layman may find it difficult to believe that the owner of a ship which has sailed away with his cargo could be anything but a carrier, particularly since most of the bills of lading are signed "For the Master." Nevertheless, the owner is not always found to be a carrier.

Generally, the owner will only be found to be a carrier if the bill of lading has been issued on its behalf pursuant to its authority, *American Industries Corp. v. M.V. MARGARITE*, 1982 AMC 2167 (S.D.N.Y. 1980). A good discussion of a situation where an owner was found not to be liable *in personam* under a time-charterer's bill of lading is found in *Yeramex International v. S.S. TENDO, et al.*, 595 F.2d 943 (4th Cir., 1979). In *Yeramex*, the vessel was time chartered to Maritime Container Lines, Inc., which used the owner's vessels to carry containerized cargoes booked by MCL. The charter party, a New York Produce Exchange form, provided that the owner was responsible for all matters relating to crewing and navigating the vessel and that the charterer, MCL, was responsible for all matters relating to the loading and stowing of cargo. The charter party provided that the captain was to sign bills of lading or

authorize the charterers to sign bills of lading. MCL's bill of lading forms were issued to cover the cargo in suit and were signed by MCL "For the Master." The Court found that MCL was a carrier but noted, due to the fact that MCL was out of business, that plaintiff sought to impose a carrier's liability upon the owner. After finding that all responsibility for cargo operations rested with the charterer, the court held that authority for the issuance of bills of lading flowed from MCL and not from the owner:

"The applicable charter provisions setting forth the masters' authority show that MCL assumed exclusive responsibility for handling of cargo and for issuance of bills of lading. In particular, we think all authority conferred by these provisions upon the vessels' masters for bills of lading issued by MCL was authority which flowed, in fact, from MCL as principal to the masters as its agents, rather than as authority granted to MCL from the masters as the traditional personal agents of the owner."

The owner was accordingly found not to be a carrier. Similarly, in *UNICEF v.*

S.S. NORDSTERN supra, the Court found that the owner was not liable *in personam* for a deviation where the charterer directed the discharge of cargo at a port other than that called for in a bill of lading that was not signed by or for the captain:

"The provision in the charter party in the present case, providing for the master's signature on bills of lading, should not, it seems to us, affect the outcome when the bill of lading was not executed by the master. No one was here misled. The libellant well knew that it was dealing with a time charterer. It accepted a bill of lading from the charterer, obtaining neither the owner's bill nor that of the master."

In *Associated Metals & Minerals Corp. v. S.S. PORTORIA, supra*, the Fifth Circuit held the trial court's finding of *in personam* liability on the part of the owner to be error. In that case, the bill of lading contained the clause "signed as per authority of the Master" however there was no evidence that the owner granted authority to the voyage charterer to sign the bill of lading on its behalf:

"It would seem self-evident that it was cargo's burden to show that the owner was a party to the contract between cargo and the voyage charterer and its failure so to do establishes that cargo never relied upon the owner to perform the contract of carriage, but relied exclusively upon the voyage charterer to insure the proper carriage of goods."

Finally, even if the charterer is authorized to issue bills of lading on behalf of the owner, the issuance of bills of lading contrary to the terms of the charter party will not bind the

owner. In *Tuscaloosa Steel v. Naimo*, *supra*, the charterer's agent issued clean bills of lading which were inconsistent with mate's receipts that recorded damage to the shipment. The owner was accordingly found not to be bound by them:

“Since Strachan, the charterer's agent, omitted the rust damage on the cargo indicated in the Mate's receipts from the bills of lading, it acted outside the scope of its authority when it issued the bills of lading on behalf of the Master. Consequently, the bills of lading are not binding on the shipowners.”

Owner's Liability As A Bailee

Avoiding the status of a carrier however does not necessarily get the owner completely off the hook. An owner which had possession of the plaintiff's cargo can still have exposure as a bailee under federal bailment law, *Tuscaloosa Steel v. Naimo*, *supra*; *Nichiman Co. v. M.V. FARLAND*, 462 F.2d 319 (2d Cir. 1972); *Office of Supply v. NAFTOPOROS*, 1987 AMC 697 (S.D.N.Y., 1982). Under federal bailment law, the plaintiff makes out its *prima facie* case by proving receipt of the goods by the owner in good order and condition and delivery in a damaged condition. The burden then shifts to the bailee to demonstrate how the damage occurred and, that it did not arise out of the bailee's negligence or that the bailee met the requisite standard of care in its handling of the goods. It has been held that delivery of rusted steel to a vessel owner, which has been deemed to be a bailee, does not preclude the plaintiff from attempting to prove that the shipment was damaged further as a result of the owner's negligence, *Tuscaloosa Steel v. Naimo*, *supra*. However, as a practical matter, the plaintiff carries a much heavier burden of proof when attempting to establish the liability of an owner which has avoided the status of a COGSA carrier.

IN PERSONAM LIABILITY OF CHARTERER

Historically, charterers have avoided the liability associated with carrier status by demonstrating that they had nothing to do with the issuance of the bill of lading or handling of the cargo at issue. In *Agroexport v. JORDANKA NIKOLOVA*, 1983 AMC 1219 (S.D.N.Y., 1983), the Court dismissed the complaint against the time charterer where there was no such evidence:

“No evidence has been offered that (charterer) participated in any activity relating to the actual movement of the cargo.

Moreover, plaintiff alleges specifically that the damage was caused by a defective hatch cover. (Charterer) has established on this motion that it had nothing to do with the hatches; indeed, apart from the husbanding duties performed for it by Connor, (charterer) was not involved with any aspect of the ship’s operation. Under these circumstances, the policy in favor of creating a broad class of defendants for cargo plaintiffs to sue under COGSA must give way to the need to protect from further participation in cargo litigation parties with no involvement in either the bill of lading or the conduct alleged to have caused the cargo loss.”

In *Thyssen Steel Corporation v. S.S. ADONIS*, 364 F. Supp. 1332 (S.D.N.Y., 1973), the time charterer was held not to be a carrier where the bills of lading were issued by an agent of the voyage charterer. See also, *Yasuda Fire & Mar. v. INDIAN CITY*, 1981 AMC 1451 (M.D. Fla., 1981), in which the complaint against the time charterer was dismissed based on the court’s findings that the bills of lading were issued by the voyage charterer on its own forms, the time charterer did not control or operate the vessel and had no connection with the transportation or handling of the cargo.

There have been other decisions which appear to support a broadening of the liability net. *Joo Seng Hong Kong v. S.S. UNIBULKFIR*, 483 F.Supp. 43 (S.D.N.Y., 1979) (characterized by the Court as *Joo Seng I*) and *Joo Seng Hong Kong v. S.S. UNIBULKFIR*, 493 F.Supp. 35 (S.D.N.Y., 1980). In *Joo Seng I*, the voyage charterer moved to stay plaintiff’s suit against it on the grounds that its sales contract with the plaintiff, under which the cargo was sold to it, called for arbitration. In denying the motion, Judge Sand spent surprisingly little time studying the question of whether the voyage charterer issued the bill of lading and found that it was a carrier based upon the following “policy” analysis:

“...there is strong statutory support for treating, except in exceptional situations (footnote omitted), all owners and charterers involved in the carriage of the goods at issue as COGSA carriers who are potentially liable to cargo interests under the bill of lading. As indicated above, the statutory language of COGSA itself supports a broad definition of the term ‘carrier.’

* * * *

The practical result of treating all charterers and owners as carriers would be consistent with COGSA’s purpose of alleviating the Congressionally perceived imbalance of

bargaining power between carriers and cargo interests. (citations omitted) Such an approach would enable cargo plaintiffs to bring suit under COGSA against all those most closely involved with the 'loading, handling, stowage', etc. of goods transported by sea; it would also eliminate initial skirmishing between the parties over the identity of the COGSA carrier or carriers and facilitate more consistent judicial decision making."

In the second *Joo Seng* decision, Judge Sand was confronted with a motion by the time charterer which sought dismissal on the grounds that it was not a carrier. Given the principal he articulated in *Joo Seng I*, it is not surprising that the Judge denied the motion. Ironically, the same decision treated with a second motion to dismiss by the voyage charterer on the grounds that the COGSA claim against it, which Judge Sand recognized in *Joo Seng I*, was time barred under COGSA's one year statute of limitations - the Judge granted the motion and dismissed the complaint against the voyage charterer.

The rationale in *Joo Seng I*, was cited by the district court in *Samsung America, Inc. v. M/T FORT PRODUCER*, 798 F. Supp. 184 (S.D.N.Y., 1992) as an authority it relied upon in reaching its decision to grant summary judgment in favor of the cargo owner against the charterer. Another district court decision, *Hyundai Corp. v. Hull Ins. Proceeds of M/V VULCA*, 800 F. Supp. 124 (D.N.J., 1992) specifically recognized the *Joo Seng I* rationale as a basis for imposing liability upon a charterer, even if it did not issue the bill of lading:

"But in the alternative, even if the defendant is not a party to the bill of lading, that party may still be a carrier under COGSA if the plaintiff shows that the defendant was involved in some way in the issuance of the bill of lading or the loading of cargo and the plaintiff makes a minimal showing that the defendant's actions contributed to the lost cargo."

The court, citing the existence of issues of fact, went on to deny the voyage charterer's motion for summary judgment seeking dismissal on the grounds that it was not a carrier.

A subsequent decision from the New Jersey District Court dealing with the question of whether a particular defendant was a carrier, cited to *Hyundai, supra*, but relied upon the more traditional analysis of determining whether the party issued a bill of lading. *West Africa Trading & Shipping Company, Inc. v. London International Group, Inc.*, 1996 AMC 1905 (D.N.J. 1996). A more recent case out of the same district, cited with approval the broader test

discussed in *Hyundai, supra* and *Joo Seng I. See, Tradearbed, Inc. v. M.V AGIA SOPHIA*, 1997 AMC 2838 (D.N.J. 1997):

“...an alternative ‘practical test’ has been developed, which delineates COGSA carriers as those entities (1) ‘involved in the transportation of the relevant cargo and (2) engaged in actions that wound up causing the loss of cargo.’ (citations omitted)”

It must be emphasized that the aforementioned decisions involved motions for summary judgment which were decided at the district court level. It accordingly remains to be seen whether the more liberal test articulated in *Joo Seng I*, and *Hyundai, supra*, will withstand the scrutiny of an appellate review. Nevertheless, the principal advanced in these cases represents an alternate means to reach a viable defendant when the *in rem* claim against the vessel can not be perfected and one or more of the defendants in the charter party “chain” are found to be judgment proof.

NVOCC LIABILITY

The nonvessel operating common carrier (“NVOCC”) holds itself out to be a common carrier by water which does not operate the vessels by which the ocean transportation is provided. It arranges for transportation of the cargo, in its own name, by ocean carriers but, as to the NVOCC’s own customers, it assumes the liability of a common carrier. 46 C.F.R. §510.2 (l). The role of the NVOCC was described as follows in *Insurance Co. of North America v. S/S AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir., 1984):

“NVOCCs operate as middlemen; they arrange for relatively small shipments to be picked up from shippers, consolidate the smaller parcels, and ship them via a carrier or several carriers. They do not, however, own or charter the ships that actually carry the cargo.”

Since the NVOCC is a carrier which, in most cases has issued a bill of lading to the cargo underwriter’s assured, it is one of the parties to which claim is presented when cargo is damaged. As a practical matter, the NVOCC’s perception of its role as a “middleman” will usually result in the generation of a form letter which directs the claimant to the ocean carrier that performed the transportation. While some ocean carriers have refused to deal with such claimants

on the grounds that it lacks privity, this response has not been favored by the courts. In *Orion Insurance Company v. M/V HUMACAO*, 1994 AMC 1922 (S.D.N.Y. 1994), the carrier moved to dismiss on the grounds that its “customer” was the NVOCC and not the cargo claimant. This argument was rejected by the court:

“Failing to recognize the role of NVOCCs in the shipping industry, defendant argues that, because it contracted with (the NVOCC) rather than (the cargo plaintiff), there is no privity of contract on which to premise liability under these circumstances. Within the shipping industry, NVOCCs operate as ‘middlemen’ by retrieving relatively small shipments from different shippers, and consolidating the resulting load for shipment by a carrier or carriers. (citations omitted) In short, the NVOCC is a common carrier with respect to the shippers who employ its services, but with respect to the vessel and her owner, the NVOCC is deemed an agent of the shipper. (citations omitted)

* * * *

Therefore, under the law of agency, defendant is bound by the PRMM bill it executed with (the NVOCC), an agent acting on behalf of plaintiff.”

Notably, the court having found that the ocean carrier had privity with the cargo owner, it went on to enforce a \$500 package limitation in the ocean carrier’s bill of lading against the cargo owner. Assuming the package limitation is a potential defense to the ocean carrier, the NVOCC bill of lading should be studied to determine whether it is also susceptible to a limitation defense. Assuming the NVOCC is a viable entity, or has liability insurance, the absence of a limitation defense in the NVOCC bill of lading would warrant pursuing the claim against the NVOCC rather than the ocean carrier.

Finally, in the NVOCC context, the present state of the law is that the ship’s sailing does not constitute a ratification of the bill of lading issued by the NVOCC to its customer. See, *AMERICAN ARGOSY*, *supra*, in which the Second Circuit stated: “In our view the doctrine of ship-ratification does not extend beyond the charter-party relationship.”