The Demise of the Demise Clause?

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Two recent Federal Court of Canada decisions, one by the Trial Division in 1997 and the other by the Appeal Division in 1998, have seemingly rehabilitated in Canadian maritime law the "demise clause" and related "identity of carrier clause" in bills of lading governed by the Hague Rules or the Hague/Visby Rules. The clauses—which some earlier Canadian decisions had struck down—in effect relieve the time or voyage charterer of a ship from the obligations of a "carrier" under the Rules by simply declaring that the charterer is only an agent of the shipowner—the sole carrier—and this even where the charterer in fact issues the bill of lading, collects the freight, and performs most or all of the duties of a carrier under the contract of carriage evidenced by the bill.

In this article, the author reviews the case law in England, Canada, and other Commonwealth countries—where the clause has often been upheld—and the United States—where it is increasingly rejected—as well as the jurisprudence of civilian jurisdictions—where the clause is generally regarded as invalid.

The author restates his many reasons for opposing the clause as an outmoded and invalid non-responsibility provision, incompatible with the public order character of the Hague Rules and the Hague/Visby Rules, and no longer required in modern shipping. He calls for the final deathknell of the clause to be sounded, either by a Supreme Court of Canada decision or by the adoption by the federal Parliament of the 1978 Hamburg Rules, which properly recognize the joint and several liability of the shipowner and the time or voyage charterer in the carriage of goods by sea.

Deux décisions récentes de la Cour fédérale du Canada, l'une rendue par la cour de première instance en 1997 et l'autre par la cour d'appel en 1998, semblent avoir réaffirmé la validité en droit maritime canadien de la «clause de dévolution» et de la clause semblable dite de «l'identité du transporteur» dans les connaissements régis par les Règles de La Haye ou par les Règles de La Haye/Visby. Ces clauses qui avaient déjà été jugées nulles par quelques arrêts de jurisprudence canadiens antérieurs ont pour objet de décharger l'affréteur à temps ou l'affréteur au voyage des obligations que les Règles susmentionnées imposent au transporteur des marchandises par mer, en stipulant tout simplement que l'affréteur n'est qu'un mandataire de l'armateur, demeurant le seul et unique transporteur, même si c'est bien l'affréteur qui émet le connaissement, perçoit le fret et exécute, en tout ou en partie, les obligations du transporteur en vertu du contrat de transport visé par le connaissement.

Dans cet article, l'auteur revoit la jurisprudence concernant la clause de dévolution (et la clause de l'identité du transporteur) des tribunaux de l'Angleterre, du Canada et d'autres pays du Commonwealth, où la validité de telles clauses a souvent été défendue. Il s'attarde aussi à plusieurs décisions américaines dont la plupart tendent de plus en plus à traiter ces stipulations comme inadmissibles. Il étudie finalement la jurisprudence de certains pays de droit civil, où ces clauses sont en général réputées nulles.

L'auteur réitère les nombreuses raisons qui expliquent son opposition à la clause. Pour lui, il s'agit d'une disposition de non-responsabilité tout à fait démodée, invalide et incompatible avec le caractère d'ordre public des Règles de La Haye et des Règles de La Haye/Visby. L'auteur préconise le rejet définitif de la clause au Canada, que ce soit par un arrêt de la Cour suprême ou par l'adoption par le Parlement fédéral des Règles de Hambourg de 1978.

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Introduction: The Demise Clause is not Dead

Years ago, I believed that the demise clause (and its cousin, the identity-of-carrier clause) was dead. Recently, however, it has risen from the ashes in two Canadian judgments which seem to be quite flawed.

The demise clause in bills of lading for the carriage of goods by sea stipulates that if the ship is not owned or chartered by demise to the company issuing the bill, then the contract evidenced by the bill is solely with the owner or demise charterer, and that the party issuing the bill of lading (usually the time or voyage charterer) is merely an agent and has "no personal liability whatsoever" in respect of the contract. The identity-of-carrier clause, although more direct, is to the same effect. It declares that, under the contract evidenced by the bill, the carrier is the shipowner and the time or voyage charterer who issues the bill is only the agent, with no liability.

Such clauses restrict the rights of suit of the shipper or consignee of lost or damaged cargo, permitting them to take an action in contract against the *shipowner* only, even though it is the *charterer* who has concluded the contract of carriage, collected the freight, and perfomed many or most of the duties of a "carrier" under the Hague Rules[1] or the Hague/Visby Rules.[2] The cargo claimant is thus forced to sue the shipowner, who is often an obscure company of uncertain solvency in a remote, foreign location.

Earlier Canadian decisions, as well as many foreign judgments, held the demise and identity-of-carrier clauses invalid, or at least inoperative in respect of the cargo claimant. Recently, however, the Federal Court of Canada in *Union Carbide* v. *Fednav Ltd.*[3] and in *Jiang Sheng Co.* v. *Great Tempo S.A.*[4] have decided that the identity-of-carrier clause prohibits suits against the voyage or time charterer who issues the bill of lading, even on its own bill of lading form, unless the claimant can show other evidence that the charterer assumed the responsibilities of a "carrier".

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[1] *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (also known as the 1924 Brussels Convention), adopted at Brussels, 25 August 1924 [hereinafter Hague Rules], reproduced in the official French text in W. Tetley (with asistance of B.G. McDonough & E.B. Nixon), *Marine Cargo Claims*, 3d ed. (Montreal: Yvon Blais, 1988) at 1111-20, and the English translation at 1121-29 [hereinafter *Marine Cargo Claims*].

[2] These refer to the Hague Rules of 1924, as amended by the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (also known as the 1968 Brussels Protocol), adopted at Brussels, 23 February 1968, and as further amended by the *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968)* (also known as the 1979 Brussels Protocol, "S.D.R. Protocol") [hereinafter Protocols, denoting the amending protocols], adopted at Brussels, 21 December 1979 [hereinafter Hague/Visby Rules, denoting the Hague Rules in their amended form], the texts of which Protocols are reproduced in English in *Marine Cargo Claims*, *ibid.* at 1132-38 and 1139-43, respectively.

[3] (1997), 131 F.T.R. 241, 1998 AMC 429 (F.C.T.D.) [hereinafter *Union Carbide*].

[4] [1998] 3 F.C. 418, 225 N.R. 140 (C.A.) [hereinafter *Jian Sheng*], leave to appeal to S.C.C. refused with costs without reasons [1998] S.C.C.A. No. 287, online: QL (SCCA).

This position marks a regrettable return to an "anything goes", *laissez-faire* attitude toward the carriage of goods by sea under bills of lading, and one which directly contravenes the letter and the spirit of the Hague Rules, Hague/Visby Rules, and Hamburg Rules,[5] as well as general principles of maritime law.

I. The Plan and Purpose of this Article

This article will first illustrate the typical wording of demise and identity-of-carrier clauses in contemporary bills of lading and will outline three major arguments against their validity.

Second, the treatment of the clauses by the courts of the United States, the United Kingdom, and other British Commonwealth countries, including Canada, will be reviewed, as well as the jurisprudence and doctrinal writings with respect to the clauses in civilian European nations, principally France, Belgium, and the Netherlands.

The recent Canadian decisions in *Union Carbide* and *Jian Sheng* will then be analyzed in detail, after which six arguments for invalidating the clauses concerned will be set forth. The potential disadvantages of the clauses to carriers will be touched upon, as well as their declining relevance to shipping law today.

Finally, the author will anticipate the likely future demise of the demise clause, by national legislation—such as that of the Netherlands and the Nordic countries—or by the general adoption of the Hamburg Rules (now in force in some twenty-five states) or amendments to the Hague/Visby Rules.

II. The Wording of the Demise/Identity-of-Carrier Clause

The demise clause states that the voyage or time charterer who issues the bill of lading is not a party to the contract of carriage and is thus not a "carrier" within the meaning of the relevant national legislation or international conventions.[6] The demise clause customarily reads as follows:

> If the Ship 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 anything that appears to the contrary) the Bill of Lading shall take effect as a contract with the Owner or demise charterer as the case may be as principal made

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[5] *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, UN GAOR, 31st Sess., Supp. No. 39, UN Doc. A/CONF.89/13 [hereinafter Hamburg Rules], reproduced in *Marine Cargo Claims*, *supra* note 1 at 1143-65.

[6] "Carrier" is defined in the Hague Rules, *supra* note 1, art. 1(a); the Hague/Visby Rules, *supra* note 2, art. 1(a); and in the 1936 U.S. *Carriage of Goods by Sea Act*, 46 U.S.C. Appx. § 1300-1315 (1970), s. 1(a) [hereinafter U.S. *COGSA*] (see also *Maritime Cargo Claims*, *ibid.* at 1199). The Hamburg Rules, *ibid.*, art. 1(1), (2), define both "carrier" and "actual carrier".

> through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof.[7]

The identity-of-carrier clause merely declares that the shipowner is the carrier and that the time or voyage charterer is but an agent. It typically reads as follows:

> The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or the bailee of the goods shipped hereunder, all limitations of and exoneration from, liability provided for by law or by this Bill of Lading shall be available to such other.
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> It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage nor as Carrier nor bailee of the goods.[8]

III. The Arguments in Brief

Why should the identity-of-carrier clause (and the demise clause) be invalid protections for the time or voyage charterer and why should both the owner and the charterer together be held responsible under the contract of carriage evidenced by the bill of lading? In brief, three arguments can be put forward.

First, the identity-of-carrier clause contradicts the appearance of the charterer's name at the head of the bill of lading. It contradicts the fact that the charterer advertises the liner trade it is conducting, charges and collects freight for its own account, and does not pay that freight to the shipowner. Rather, the charterer has a different contract with the shipowner (the charterparty) and pays hire to the shipowner, irrespective of the bill of lading freight it collects.

Second, the charterer ordinarily carries out many of the obligatory responsibilities of the "carrier" under the Hague/Visby Rules, including supervising the loading, stowing, and discharging of the cargo, directing the ship's voyage, and deciding on its ports of call.

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[7] This was the clause in *The Berkshire*, [1974] I Lloyd's Rep. 185 (Q.B.D. (Adm. D.)) at 187, similar to the clause in *Apex (Trinidad) Oilfields* v. *Lunham & Moore Shipping*, [1962] 2 Lloyd's Rep. 203 at 205 (Ex. Ct. of Can.), online LEXIS (ENGGEN/CASES) [hereinafter *The Wychwood*].

[8] This was the clause at issue in *Jian Sheng*, *supra* note 4, F.C. at 434, N.R. at 149. The identity-of-carrier clause, often referred to in bills of lading as an "agency clause", is less ambiguous than the demise clause inasmuch as it does not contain the "if" at the beginning of the provision. The identity-of-carrier clause nevertheless should be regarded as invalid for all the same reasons as the demise clause.

Third, in particular, article 3(8) of the Hague and Hague/Visby Rules prohibits non-responsibility clauses.[9] Identity-of-carrier and demise clauses are not-too-subtle non-responsibility clauses.

IV. The Demise/Identity-of-Carrier Clause: Invalid Non-Responsibility Provisions

By inserting such clauses in bills of lading, time and voyage charterers purport to deny any liability under the contract of carriage, despite their involvement in the loading, discharging, and trimming of the cargo, in choosing the ship's route, in hiring the stevedores and ships' agents, and in many other facets of the ship's operation—*e.g.* paying for bunkering, port fees, and pilotage charges—not to mention their collection of the freight for the carriage. Such clauses are effectively non-responsibility clauses which contravene the mandatory, public order nature of the Hague Rules, the Hague/Visby Rules, as well as national statutes such as the U.S. *COGSA*,[10] all of which stipulate that any clauses relieving or lessening the liability of the carrier in a contract of carriage otherwise than as permitted by the Rules themselves shall be null and void and of no effect.[11] The Hamburg Rules, for their part, also prohibit any stipulation in a bill of lading which "derogates", directly or indirectly, from the provisions of the Convention.[12]

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[9] Hague Rules, *supra* note 1, art. 3(8) and Hague/Visby Rules, *supra* note 2, art. 3(8) provide:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

[10] *Supra* note 6.

[11] See Hague Rules, *supra* note 1, art. 3(8); Hague/Visby Rules, *supra* note 2, art. 3(8); and U.S. *COGSA*, *ibid.*, s. 3(8). See also arts. 2034 and 2070 of the *Civil Code of Quebec* ("C.C.Q.") (in force as of January 1, 1994). However, note that the constitutionality of the C.C.Q.'s provisions on maritime transport is dubious after the Supreme Court of Canada's decision in *Miida Electronics Inc.* v. *Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 at 779, 28 D.L.R. (4th) 641 at 660, in which it was held that maritime law is federal law, uniform across Canada, and not the law of any province, thus leaving little scope for the application of provincial legislation in this sphere. See also W. Tetley, "A Definition of Canadian Maritime Law" (1996) 30 U.B.C. L. Rev. 137; G. Lefebvre, "L'uniformisation du droit maritime canadien aux dépens du droit civil québecois : Lorsque l'infidélité se propage de la Cour suprême à la Cour d'appel du Québec" (1997) 31 R.J.T. 577; and W. Tetley, *Maritime Liens and Claims*, 2d ed. (Montreal: Yvon Blais, 1998) at 44-53. Sce also the strong reaffirmation by the Supreme Court of Canada of the exclusively federal character of "Canadian maritime law" in *Ordon Estate* v. *Grail*, [1998] 3 S.C.R. 437 at 486, 166 D.L.R. (4th) 193 at 226.

[12] Hamburg Rules, *supra* note 5, art. 23(1) provides:

> Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of

This position has been generally accepted by the courts of continental and civilian European countries, which have rightly viewed such clauses with suspicion as illegal attempts by charterers to avoid their liability and evade the mandatory application of the international conventions.[13]

It has been previously argued that the carriage of goods by sea is in reality a joint venture between vessel owners and charterers.[14] The enterprise is "joint" in the sense that both shipowner and charterer have various actual and legal responsibilities under the contract of carriage and under the Hague and Hague/Visby Rules, so that their liability is mandatorily joint and several.[15] Simply stated, these responsibilities cannot be contracted out of, by virtue of article 3(8) of the Hague and Hague/Visby Rules.[16]

This interpretation of a joint venture was accepted by Reed J. in *Canastrand Industries* v. *Lara S (The)*.[17] That issue was not appealed to the Federal Court of Appeal.[18] Thus, it was thought that Canadian maritime law had witnessed the demise of the demise and identity-of-carrier clauses, and that such terms in bills of lading had been recognized in Canada for what they really are: illegal attempts at avoiding imperative provisions of the law.

Regrettably, however, the decisions of the Federal Court of Canada in *Union Carbide* and *Jian Sheng* seem to have rehabilitated the demise and identity-of-carrier clauses in Canadian maritime law, and have generally rejected the concept of joint and several liability between shipowners and charterers, with certain exceptions. This has been to the prejudice of shippers' and consignees' rights, and to the detriment of Canadian maritime law and the uniformity of international maritime law. Both decisions are unfortunately imbued with the concept that there can be only one "carrier" under the Hague and Hague/Visby Rules, even though the definition of that term in article 1(a) of both Rules clearly provides that "carrier" *includes* the owner or the charterer who enters into a contract of carriage with a shipper. Such a definition is obviously open-ended, permitting the conclusion that *both* the owner and the charterer may *jointly* be the "carrier" *de jure*, as their present *de facto* division of labour in the carriage operation suggests them to be.

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such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.

[13] See the discussion at Part V.D., below.

[14] *Marine Cargo Claims*, *supra* note 1 at 242.

[15] "Joint and several" liability is referred to as "solidary" liability in the civil law. See art. 1200 of the *Civil Code of France*; and art. 1523 C.C.Q.

[16] For the text of art. 3(8), see *supra* note 9.

[17] [1993] 2 F.C. 553 at 586-67, 60 F.T.R. 1 at 23-24 (T.D.) [hereinafter *The Lara S*], aff'd (1994), 176 N.R. 31 (F.C.A.), online: QL (FCJ).

[18] The shipowner's and charterer's joint and several liability has been expressly incorporated in the Hamburg Rules, *supra* note 5, at art. 10.3, which also stipulates at art. 10.1 that both the "carrier" and the "actual carrier" are liable under the bill of lading to the extent that performance of the carriage or a part thereof has been entrusted to an actual carrier. The Hamburg Rules have been annexed as Schedule 2 to the *Carriage of Goods by Water Act*, S.C. 1993, c. 21, but are not yet in force in Canada.

V. The Demise/Identity-of-Carrier Clause: Previous Decisions

In order to understand *Union Carbide* and *Jian Sheng*, it is appropriate to look at earlier decisions regarding the question in the United States, the United Kingdom, the British Commonwealth, the European continent, and Canada.

A. United States Decisions

As long ago as 1876, the United States Supreme Court in *Bank of Kentucky* v. *Adams Express*,[19] a carriage of goods by rail case, held that the defendant express company was indeed a common carrier, notwithstanding the inclusion of a non-responsibility clause in its bill of lading which effectively reduced its liability to that of an ordinary bailee for hire. Although uttered in a rail carriage case, the condemnation of the relevant provision by Strong J. remains very pertinent to the validity (or invalidity) of the demise clause in maritime transportation:

> We have already remarked, the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers. ... It is not to be presumed the parties intended to make a contract which the law does not allow.[20]

The demise (or identity-of-carrier) clause has been both invalidated and upheld by American courts of the various circuits. The cases which have given it effect, however, have generally done so without ruling on its validity, because that issue does not seem to have been pleaded. Moreover, these decisions really turn, not on the wording of the clause, but on other factors.

Yeramex International v. *S.S. Tendo*[21] involved what was in fact a reverse identity-of-carrier clause, declaring the time charterer, rather than the shipowner, to be the carrier. The United States Court of Appeals, Fourth Circuit, decided that the charterer was indeed the carrier, partly because of the clear terms of the clause, but primarily because the time charterer, under its charterparty, had assumed exclusive responsibility for the handling of the cargo and the issuance of the bills of lading. Although the charterer's agent had signed the bill "for the master", the charterer was found to have been without authority to bind the shipowner *in personam*, particularly because an indemnification clause in the charter required the charterer to indemnify the owner for any consequences arising out of the signature of bills of lading by the master or agents

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[19] 93 U.S. 174, 23 L. Ed. 872 (1876) [hereinafter *Adams Express*].

[20] *Ibid.*, U.S. at 180-81, L. Ed at 875. This decision was among the authorities invoked in striking down the demise clause in *Blanchard Lumber* v. *S.S. Anthony II*, 259 F. Supp. 857, 1967 AMC 103, [1966] 2 Lloyd's Rep. 437 (S.D.N.Y. 1966) [hereinafter *Blanchard Lumber*].

[21] 595 F.2d 943, 1979 AMC 1282 (4th Cir. 1979) [hereinafter *Yeramex*].

on the charterer's instructions.[22] The decision is therefore of little or no authority on the validity of the identity-of-carrier clause because (i) the clause concerned was a reverse identity clause, (ii) the issue of the validity of the provision was not addressed by the Court, and (iii) the ruling that the charterer was the carrier was founded primarily on the charterparty, not the bill of lading.

Daval Investors v. *M/V Kamtin*[23] featured the standard identity-of-carrier clause, purporting to make the shipowner the carrier. The bill of lading was issued by the master of the time-chartered ship which was operating under a voyage sub-charter. The District Court held that, because of the clause, the plaintiff cargo consignee was "reasonably led to believe that Stateville [the shipowner] was a party to the bill of lading."[24] However, the decision that the shipowner was the carrier was founded principally on the terms of the charterparty.[25] Once again, the validity of the identity clause in the bill of lading does not appear to have been challenged, but to have been merely assumed, while the decision as to the carrier's identity rests on other grounds.

In *Damodar Bulk Carriers* v. *People's Insurance Co. of China*,[26] cargo interests sued the vessel, its owner, and its sub-charterers for damages to their cargo of wood pulp. The bill of lading contained a demise clause, and the charterer who had issued the bill of lading invoked the clause in denying its liability under the contract of carriage. The Ninth Circuit noted that the demise clause had been invalidated by a district court in *Epstein* v. *United States*,[27] but observed that it had found no circuit court authority on the question. There was no need to decide the validity issue, however, because the Court held that the defendants were not liable in any event, the plaintiff having failed to prove that the cargo fire damage had been caused by the alleged unseaworthiness of the vessel or that the carrier had been negligent in stowing the goods.[28] *Damodar*'s passing reference to the demise clause is therefore pure *obiter dictum*, and it neither upholds nor strikes down the clause.

An American court has also upheld an identity-of-carrier clause when it was invoked by the subrogee of the consignee to hold the shipowner liable, and not by the

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[22] *Ibid.*, F.2d at 947-48, AMC at 1288-89. The Court held that, in this case, all authority conferred by the charterparty provisions on the master for bills of lading issued by the time charterer flowed, in fact, from the time charterer to the master, rather than from the master—as traditional agent of the owner—to the time charterer: see *ibid.*, F.2d at 948, AMC at 1289.

[23] 1995 AMC 151 (N.D. Fla. 1993).

[24] *Ibid.* at 157.

[25] The Court held that because there was no indemnification clause as in *Yeramex*, *supra* note 21, and because a rider clause in the time charterparty authorized the charterers or their agents to sign bills of lading on the master's behalf, the charterers were authorized to bind the shipowner by signing the bills. In consequence, the master must have had the same authority where he personally signed the bills: see *ibid.* at 156.

[26] 903 F.2d 675, 1990 AMC 1544 (9th Cir. 1990) [hereinafter *Damodar*].

[27] *Ibid.*, F.2d. at 682, AMC at 1554, citing *Epstein* v. *United States*, 86 F. Supp. 740 at 742-43, 1949 AMC 1598 at 1601 (S.D.N.Y. 1949) [hereinafter *Epstein*].

[28] *Supra* note 26, F.2d at 686-87, 688, AMC at 1562, 1564.

time charterer in order to evade its mandatory liability under the U.S. *COGSA*.[29] This is an appropriate application of the *contra proferentem* rule of construction.

The American decisions holding the demise clause invalid have been more persuasive. In *Epstein*, the charterer's claim that the contract was between the shipper and owner was ruled "disingenuous" by the Southern District of New York.[30] The Court decided that the demise clause was "obviously a fraud on the shipper and conveys a false warranty of authority to contract"[31] and constitutes a "clear violation" of section 3(8) of the U.S. *COGSA*.[32]

Some seventeen years later, the demise clause was also held invalid with respect to the charterer under section 1 of the *Harter Act*[33] in *Blanchard Lumber*,[34] another Southern District of New York decision which cited *Adams Express*,[35] as well as *Epstein*.[36] That decision also held that the clause served to make the owner liable.[37]

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[29] *Recovery Services International* v. *The S/S Tatiana L*, 1988 AMC 788 (S.D.N.Y. 1986), online: LEXIS (NY/NYMEGA) [hereinafter *Tatiana L*]. See also M. Wilford, T. Coghlin & J.D. Kimball, *Time Charters*, 4th ed. (London: Lloyd's of London, 1995) at 346-47. For a similar conclusion in a French case, see the decision of the Cour d'appel de Versailles, 20 March 1995, DMF 1995.813 [hereinafter *The Soufflot*].

[30] *Supra* note 27, F. Supp. at 743, AMC at 1601.

[31] *Ibid.*

[32] *Ibid.*

[33] 46 U.S.C. Appx. § 190-96 (1970). *Harter Act*, s. 1, being 46 U.S.C. Appx. § 190 (1970), provides:

> It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

The clause is thus similar to the prohibition of the Hague Rules, *supra* note 1, art. 3(8); the Hague/Visby Rules, *supra* note 2, art. 3(8); and the U.S. *COGSA*, *supra* note 6, s. 3(8), rendering null and void and of no effect any clause, covenant, or agreement in a contract of carriage relieving or lessening the liability of the carrier otherwise than as permitted by the Rules or the U.S. *COGSA*.

[34] *Supra* note 20. See generally R.W. Pritchett, "The Demise Clause in American Courts" [1980] LMCLQ 387 at 394.

[35] *Supra* note 19, cited in *Blanchard Lumber*, *ibid.*, F. Supp. at 866, AMC at 116, Lloyd's Rep. at 444.

[36] *Supra* note 27, cited in *Blanchard Lumber*, *ibid.*, F. Supp. at 865, AMC at 116, Lloyd's Rep. at 444.

[37] *Blanchard Lumber*, *ibid.*, F. Supp. at 869, AMC at 121, Lloyd's Rep. at 447.

More recently, the Fifth Circuit in *Thyssen Steel* v. *M/V Kavo Yerakas*[38] held that the demise clause is invalid under section 3(8) of the U.S. *COGSA* as an attempt to avoid or lessen the carrier's liability.

In *Transatlantic Marine Claims Agency* v. *M/V OOCL Inspiration*,[39] the Court—despite a (reverse) identity-of-carrier clause in the bill of lading naming the charterer as the carrier—held that the shipowner was also a carrier, because another clause in the bill of lading included the "owner(s)" in its definition of "carrier".[40] The Court did not, however, declare the identity-of-carrier clause invalid; it merely denied its purported effect in the particular case.

The foregoing case law shows that virtually all American courts that have confronted squarely the issue of the acceptability of demise and identity-of-carrier clauses have determined them to be unlawful attempts to circumvent the mandatory rules on the liability of the carrier of goods by sea, contrary to the U.S. *COGSA*. At the very least, they have refused to give effect to such clauses to the extent that they purport to exclude either the shipowner or the charterer from the status of "carrier". By comparison, the decisions giving effect to such contract terms have generally done so without the issue of validity having been pleaded or addressed, and have really based their holdings on other grounds. In consequence, it is accurate to state that the weight of American legal authority is against the validity of the demise clause and the identity-of-carrier clause.

Many American decisions, in cases not involving the demise or identity-of-carrier clause, have also held that there may be more than one *COGSA* carrier in a carriage of goods by sea contract, and on this basis have held one or more charterers to be "carriers", either alone or jointly with the shipowner, even where they have had no involvement with the bill of lading, on the grounds that they have performed some of the carrier's duties.[41] This approach to identifying the carrier is sometimes referred to

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[38] 50 F.3d 1349 at 1353, 1995 AMC 2317 at 2322 (5th Cir. 1995) [hereinafter *Thyssen Steel*], on remand to 911 F. Supp. 263, 1996 AMC 1469 (S.D. Tex. 1996). Similar bill of lading clauses illegally relieving or lessening the carrier's liability are the "freight earned" clause and the "both-to-blame" clause, held unlawful in *Amoco Transport* v. *S/S Mason Lykes*, 768 F.2d 659 at 663, n. 4, 1986 AMC 563 at 567-68, n. 4 (5th Cir. 1985).

[39] 137 F.3d 94, 1998 AMC 1327 (2d Cir. 1998).

[40] *Ibid.*, F.3d at 102, AMC at 1336. See also *Union Steel America Co.* v. *M/V Sanko Spruce*, 14 F. Supp.2d 682 at 685, 1999 AMC 344 at 347 (D. N.J. 1998), where the Court similarly disregarded an identity-of-carrier clause, naming the shipowner as carrier, in order to hold liable the time charterer who had issued and signed the bill of lading as "carrier" and collected the freight.

[41] See *e.g. Gans S.S. Line* v. *Wilhelmsen*, 275 F. 254 (2d Cir. 1921), online: LEXIS (GENFED/MEGA), cert. denied *Barber & Co.* v. *Wilhelmsen*, 257 U.S. 655, 66 L. Ed. 424 (1921) (owner, time charterer, and voyage charterer held to be "carriers" under a bill of lading signed by the voyage charterer with the authority of the master); *Aljassim* v. *S.S. South Star*, 323 F. Supp. 918, 1971 AMC 1703 (S.D.N.Y. 1971) (owner and time charterer held liable under a bill of lading signed by the owner's master); *Nichimen Co.* v. *M.V. Farland*, 462 F.2d 319, 1972 AMC 1573 (2d Cir. 1972) (owner and time charterer held liable to cargo under a bill of lading issued by the time charterer on behalf of the master); and *Trans-Amazonica Iquitos* v. *Georgia Steamship Co.*, 335 F. Supp. 935 (S.D. Ga.

in the United States as the "practical approach", as opposed to the "agency approach", which focuses on who issued and signed the bill of lading, on whose form, and by whose authority. In *Joo Seng Hong Kong Co.* v. *S.S. Unibulkfir*, the Southern District of New York held:

> [T]he statutory language of COGSA itself supports a broad definition of the term "carrier". The statute seems to have been deliberately drawn so as not to limit the term to a party to the bill of lading or contract of carriage [46 U.S.C. § 1301(a)]. The liability section in particular appears broad enough to include any number of different parties involved in the shipment and handling of the goods [see 46 U.S.C. § 1302]. A charterer of a vessel certainly seems to be encompassed within the statutory term, and it would also seem to fit squarely within the common usage 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.[42]

This "practical approach" to carrier identification is a common-sense solution whereby any party which *in fact* acts as a carrier in a maritime transportation operation should be treated as a "carrier" *by the law* governing that operation.[43] In effect, the American "practical approach" is what has been called my "joint venture theory" of carriage of goods by sea under charterparties.

B. United Kingdom Decisions

The courts of the United Kingdom have been, and continue to be, much more accepting of the demise and identity-of-carrier clauses than the courts of the United States.

1971), online: LEXIS (GENFED/MEGA) (time and voyage charterers held liable on a bill of lading issued by the master, an employee of shipowner; the bill of lading was printed on the voyage charterer's form).

[42] 483 F. Supp. 43 at 46-47 (S.D.N.Y. 1979), online: LEXIS (GENFED/MEGA). See also *Hyundai* v. *Hull Insurance Proceeds of M/V Vulca*, 800 F. Supp. 124 at 130, 1993 AMC 434 at 442 (D. N.J. 1992) [hereinafter *Hyundai*]:

> [E]ven 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 the cargo and the plaintiff makes a minimal showing that the defendant's actions contributed to the cargo loss.

See also *Samsung America* v. *M/T Fort Producer*, 798 F. Supp. 184 at 187, 1993 AMC 29 at 32 (S.D.N.Y. 1992); and *TradeArbed* v. *M/V Agia Sophia*, 1997 AMC 2838 at 2840 (D. N.J. 1997), online: LEXIS (GENFED/MEGA) [hereinafter *TradeArbed*]; *Duferco Steel, Inc.* v. *M/V Festivity*, 1999 AMC 1186 at 1187 (S.D. N.Y. 1998). Some courts, however, have doubted the correctness of this liberal view: see *Thyssen Steel*, *supra* note 38; F.3d at 1353, AMC at 2322, insisting on the need for privity of contract.

[43] This "practical approach" to identifying all the carriers involved is also supported by American maritime legal authors: see T.J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed. (St. Paul, Minn.: West, 1994) vol. 2 at 186-87, s. 11-7, who refers to the approach as "manifestly correct".

In *The Berkshire*,[44] where only the shipowner, and not the charterer, was sued under a bill of lading containing a demise clause, Brandon J. found that the owner alone was responsible because "the contract contained in or evidenced by the bill of lading purports to be a contract between the shippers and the shipowners, and not one between the shippers and the charterers."[45]

The words "and not one between the shippers and the charterers" are clearly an *obiter dictum*, as the charterers were not sued and were not parties to the action. Later on, Brandon J. stated the true *ratio decidendi* of the judgment: "[T]he bill of lading contained or evidenced a contract between the shippers and the shipowners, and it follows that the receivers are entitled, by virtue of s. 1 of the *Bills of Lading Act*, 1855 to sue the shipowners upon such a contract."[46]

Thus, the Court held that consignees could sue the shipowner under a charterer's "for the master" bill of lading. This raises the question: could the consignees also have sued the charterers because the charterer's name appeared at the top of the bill of lading and because the charterers issued the bill of lading? This would appear to be the case, particularly if the consignees had established the role that the charterers had played in the past as a carrier under the bill of lading and the Hague Rules, *i.e.*, in the loading, discharging, and directing of the ship, etc.

Nevertheless, *The Berkshire* remains *the* authoritative decision in the United Kingdom, as well as in most British Commonwealth jurisdictions, on the validity of demise and identity-of-carrier clauses, and has been followed in England in *NGO Chew Hong Edible Oil Pte. Ltd.* v. *Scindia Steam Navigation Co. (The Jalamohan)*[47] where, as in *The Berkshire*, the charterer was not a party to the suit. More recently in *M.B. Pyramid Sound N.V.* v. *Briese Schiffahrts G.M.B.H. (The Ines)*,[48] the identity-of-

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[44] *Supra* note 7.

[45] *Ibid.* at 188.

[46] *Ibid.* at 189.

[47] (1987), [1988] 1 Lloyd's Rep. 443 at 450 (Q.B.D. (Com. Ct.)), online: LEXIS (ENGGEN/CASES) [hereinafter *The Jalamohan*], where Hirst J. stated:

> Whatever the position may be in other jurisdictions, I reject the suggestion, based on the quotation from Professor Tetley, that under English law there is anything anomalous about demise clauses. As the quotation above from *The Berkshire* shows, this argument was presented to and rejected by Mr. Justice Brandon in that case.

See also F.M.B. Reynolds, Case Comment on *The Jalamohan* [1988] LMCLQ 285. See also *W. & R. Fletcher (New Zealand) Ltd.* v. *Sigurd Haavik Alesjeselsleap (The Vikfrost)* (1979), [1980] 1 Lloyd's Rep. 560 (C.A.), online: LEXIS (ENGGEN/CASES) [hereinafter *The Vikfrost*], leave to appeal to H.L. refused; and *Pacol Ltd.* v. *Trade Lines Ltd. (The Henrik Sif)*, [1982] 1 Lloyd's Rep. 456 at 458 (Q.B.D. (Com. Ct.)), online: LEXIS (ENGGEN/CASES), where the demise clause was accepted as valid without discussion. See also R. Goode, *Commercial Law*, 2d ed. (London: Penguin, 1995) at 1053-54.

[48] [1995] 2 Lloyd's Rep. 144 (Q.B.D. (Com. Ct.)), online: LEXIS (ENGGEN/CASES) [hereinafter *The Ines*]. Here, the shipper sued the shipowner and the time charterer for the alleged misdelivery of a shipment of telephones from Antwerp to St. Petersburg. When the vessel arrived in St. Petersburg, the cargo was discharged and delivered to the notify party, the master not having insisted on the presenta-

carrier clause was also given effect, but without any consideration of its validity, where it confirmed the conclusion arising from the signature of the bill of lading by an agent of the ship that the shipowner was the carrier. These are examples of "bad law", or decisions based on *obiter dicta*, which judges and lawyers should not recognize.

In the 1998 decision of *Sunrise Maritime Inc.* v. *Uvisco Ltd. (The Hector)*,[49] the Commercial Court decided against giving effect to an identity-of-carrier clause, but without commenting on its validity. The plaintiff shipowners sued for a declaration that they were not bound toward the defendant voyage sub-charterer to deliver a cargo under a bill of lading issued by an associated company of the sub-charterer "for and on behalf of the master." The bill included a standard identity-of-carrier clause, identical in wording to the clause in *Jian Sheng*.[50] The owners nevertheless argued that the bill was, in fact, a charterer's bill of an intermediary time charterer, U.S. Express Lines, a company in financial difficulty which was not a party to the action. They argued that, in any event, the bill's issuance had not been authorized by them as owners, particularly because it was not in conformity with the mate's receipts and was antedated, contrary to the requirements of the applicable charterparty and letter of authority from the master.

Although the signature of the bill for the master and the identity-of-carrier clause would normally have supported the holding that the shipowner was bound by the contract of carriage,[51] in this case, the bill also contained a typed stipulation on its face, specifying that the "carrier" was "U.S. Express Lines" (the time charterer). Rix J. therefore concluded:

> Although the master may be the servant of the owners, and cl. 17 [says] that the owners are the carriers, the only party which is identified expressly by name in the bill of lading as the carrier is [U.S. Express Lines]. ... I conclude, therefore, that as a matter of construction, the bill of lading contract is with [U.S. Express Lines], not the owners.[52]

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tion of an original bill of lading. The bill of lading contained an identity-of-carrier clause and stated that the charterer signed only as agents "for the carrier", but also had the charterer's name in large capital letters on both sides of all bills of lading. The shipowners denied liability, claiming that the time charterers, also defendants to the action, were in fact the contracting carrier. Clarke J. followed *The Berkshire* and gave effect to the identity-of-carrier clause, finding that the contract of carriage was between the shipper and the shipowner, and that the charterer was merely the owner's agent (*ibid.* at 149). The shipper's claim in contract thus succeeded against the shipowner, and its claim in bailment against the charterer failed, the Court holding that the bailment to the charterers came to an end when the goods were delivered to the owners (*ibid.* at 156).

[49] [1998] 2 Lloyd's Rep. 287 (Q.B.D. (Com. Ct.)), online: LEXIS (ENGGEN/CASES) [hereinafter *The Hector*].

[50] See *supra* note 8 and accompanying text.

[51] *The Hector*, *supra* note 49 at 293-94. See also *The Rewia*, [1991] 2 Lloyd's Rep. 325 at 333, 336 (C.A.), online: LEXIS (ENGGEN/CASES) (regarding signature for the master); and *The Ines*, *supra* note 48 at 149 (regarding demise/identity-of-carrier clauses).

[52] *The Hector*, *ibid.* at 294-96.

Other circumstances of the case also supported the same view as to the true carrier's identity.

The Hector is interesting because it is the only United Kingdom decision in which a bill of lading containing an identity-of-carrier clause has been held to be a charterer's bill,[53] but the judgment makes no reference to the *validity* of the clause, as opposed to its *effectiveness*. Nor does *The Hector* consider the possibility that there may be more than one "carrier" under the Hague or Hague/Visby Rules. The demise clause thus remains valid in principle and applicable (except on rare occasion) in the United Kingdom.

C. British Commonwealth Decisions

Two Australian state courts have expressly considered the validity of demise or identity-of-carrier clauses. In *Kaleej International Pty.* v. *Gulf Shipping Lines*,[54] the shipper of a cargo of frozen lamb sued the shipowner and time charterer[55] for misdelivery after the buyer mistakenly received the goods without ever having paid for them, the shipping documents having been returned to the shipper by its bank while the goods were in transit. The time charterer, whose agent had signed the bill of lading for the master, pleaded the demise clause in defence, claiming that it was not a party to the contract of carriage, although both its logo and its name were printed on the bill.

The New South Wales Court of Appeal found that "[t]here is a general, although not invariable, rule that, certainly where the shipper is ignorant of the charter ... a master who signs, or whose agent signs, the bill of lading, contracts with the shipper on behalf of the ship owner."[56] Samuels J.A. then upheld the demise clause, dismissing the argument that the bill was plainly a charterer's bill which showed that the charterer had undertaken liability as carrier. He held that the demise clause itself was "an indication that this was intended to be an owner's bill of lading."[57]

Although stating that the argument against the validity of the clause based on article 3(8) of the Hague Rules[58] did not need to be dealt with, Samuels J.A. nevertheless held (in what may be described as a conscious *obiter dictum*):

> The short answer to the proposition advanced by the appellant is that the demise clause does not relieve the carrier from liability but defines who the car-

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[53] See A. Waldron, "Owner's or Charterer's Bill of Lading? The Mystery Deepens" [1999] LMCLQ 1 at 2.

[54] [1986] 6 N.S.W.L.R. 569 (C.A.) [hereinafter *The Sun Diamond Voyage 19*].

[55] In fact, another party, Raya International Line S.A., whose role in the events is not exactly clear, was also sued.

[56] *The Sun Diamond Voyage 19*, *supra* note 54 at 572.

[57] *Ibid.* at 573.

[58] At the time, the Rules were annexed as a schedule to the *Sea Carriage of Goods Act 1924* (Cth. Aus.) No. 22 of 1924.

> rier is. Once that work is done the carrier remains in all respects liable to such obligations as the rules entail or permit.[59]

This case fails to explain how a charterer who acted as a *de facto* carrier was able to sidestep the responsibilities of a "carrier" under the mandatory international regime by simply declaring in its bill of lading that it was not the *de jure* carrier.

In *Anderson's (Pacific) Trading* v. *Karlander New Guinea Line*,[60] the consignee of a shipment of frozen goods sued the time charterer in contract and bailment for damages relating to the defrosted state of the goods upon arrival. The bill of lading contained a demise clause and was signed for the time charterer's managing agent "as agents only". The Court rejected the defendant's argument that identification of the vessel in the bill of lading constitutes sufficient disclosure of the shipowner's identity, because a vessel has its own identity and third parties may ascertain its owner by consulting Lloyd's Registry of Shipping.[61] The Court properly held that, because the time charterer had failed to disclose the fact of its agency and the identity of its principal (the shipowner), the charterer could not invoke the demise clause in order to escape liability under the bill of lading. It is noteworthy, however, that the Court only held the demise clause *ineffective vis-à-vis* the consignee, expressly stating that it need not determine the *validity* of such clauses in general.[62]

The demise clause has been applied by the Court of Appeal of Singapore in *Cascade Shipping* v. *Eka Jaya Agencies*.[63] Karthigesu J. found that the demise clause merely confirms the common law rule

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[59] *The Sun Diamond Voyage 19*, *supra* note 54 at 574.

[60] [1980] 2 N.S.W.L.R. 870 (Sup. Ct.) [hereinafter *The Golden Swan*]. See also F.M.B. Reynolds, Case Comment on *The Golden Swan* [1982] J.B.L. 116.

[61] The defendant relied on an American case, *Valkenburg, K.-G.* v. *S.S. Henry Denny*, 295 F.2d 330, 1961 AMC 2221 (7th Cir. 1961) [hereinafter cited to AMC], where the plaintiff sued the vessel *in rem*, and the shipowner, the managers of the vessel, and a husbandry agent *in personam*. The husbandry agent raised an objection that the libel failed to state a sufficient cause of action against it, as it acted solely as agent for the vessel. The Court held that the naming of the vessel in the bill of lading sufficiently discloses the identity of the principal and does not obligate the agent as a principal under the doctrine of the undisclosed principal (*ibid.* at 2224). It further found that the identity accorded by maritime law to a ship as a person also charges those who deal in maritime commerce with the knowledge as to the ownership and operation of a named ship which accepted maritime publications, such as Lloyd's Registry of Shipping, would disclose. To the same effect, see *Getty Oil Co.* v. *Norse Management Co.*, 711 F. Supp. 175 at 177 (S.D.N.Y. 1989), online: LEXIS (GENFED/MEGA); *O'Sullivan* v. *Hardy Machinery*, 1993 AMC 2242 at 2245-46 (S.D.N.Y. 1993), online: LEXIS (GENFED/MEGA); and the Case Comment at (1993) 1 Mar. L. Prac. 209.

[62] *The Golden Swan*, *supra* note 60 at 876. Hunt J. did, however, note my view, as expressed in *Marine Cargo Claims*, *supra* note 1 at 88, that the demise clause is misleading, anomalous, and invalid. He also observed that the necessity for the clause had "largely been removed in the United Kingdom by the *Merchant Shipping (Liability of Shipowners and Others) Act*" (*The Golden Swan*, *ibid.* at 872).

[63] [1993] 1 S.L.R. 980 (C.A.), online: LEXIS (COMCAS/SMBCAS) [hereinafter *The Grace Liberty II*].

> that the contract contained in a bill of lading issued by the charterer under the authority contained in a charterparty which does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, is a contract between the shipowner and the shipper.[64]

The Berkshire[65] and *The Vikfrost*[66] were invoked as authorities on the point.[67]

An anomaly about the decision in *The Grace Liberty II*[68]—indeed in most judgments recognizing the demise or identity-of-carrier clause—is the holding that the shipowner has no *automatic* right to collect freight from the shipper, even though it is the sole carrier under its contract with the shipper, according to the clause. This right to collect freight, which Karthigesu J. held to be "derogated" to the charterer under the charterparty, could only be "divested" upon notice being given by the shipowner to the charterer *and* the shipper, and then only if that notice intercepted the receipt of the bill of lading freight by the charterer or his agent.[69] The Court of Appeal agreed with the following statement made by Chao Hick Tin J. at first instance:

> In my judgment, this entire arrangement is more consistent with there being an implied understanding that notwithstanding the existence of cl. 4 [the demise or "agency" clause] in the bill of lading, *the freight due under such a bill of lading belongs to the charterers* unless the shipowners intervene and demand that payment be made to them or demand that the charterers' agents receive payment on their behalf.[70]

The conclusion implicit in cases such as *The Grace Liberty II* is that time charterers have rights—*i.e.*, the right under an "implied understanding" with the shipowner to collect freight directly from the shipper for their own account—but do not have corresponding obligations or responsibilities under the Hague or Hague/Visby Rules, because the demise or identity-of-carrier clause shelters them from any such liability. Such a conclusion seems not only unjust, but also appears to be a questionable interpretation of the public order nature of the Rules.

The foregoing Australian and Singapore decisions do not clearly maintain that the demise clause is valid with reference to article 3(8) of the Hague and Hague/Visby Rules. The holding in *The Sun Diamond Voyage 19*[71] that the clause does not offend article 3(8) is arguably *obiter dictum*. The Court gave effect to the clause on other

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[64] *Ibid.* at 990, relying on *Wehner* v. *Dene Shipping*, [1905] 2 K.B. 92 [hereinafter *Wehner*]. See also *The Grace Liberty II*, *ibid.* at 993: "The demise clause is really no more than a confirmation of the common law rule that the bill of lading issued pursuant to a time-charterparty is intended to be a shipowner's bill of lading."

[65] *Supra* note 7.

[66] *Supra* note 47.

[67] *The Grace Liberty II*, *supra* note 63 at 990.

[68] *Ibid.*

[69] *Ibid.* at 988.

[70] *Ibid.* at 989 [emphasis added], citing to the trial decision at [1992] 1 S.L.R. 197 at 203 (H.C.), online: LEXIS (COMCAS/SMBCAS).

[71] *Supra* note 54.

grounds. Conversely, in *The Golden Swan*,[72] the Court decided that the clause was ineffective, while declining, however, to rule on its validity under article 3(8). The Singapore Court of Appeal in *The Grace Liberty II* gave effect to the clause, presumably taking its validity for granted, although that issue does not seem to have been pleaded. Inasmuch as two of these three decisions—invoking English authority—admitted the provision as a proper identification of the carrier, it may be said that these Commonwealth jurisdictions generally follow the United Kingdom in giving effect to the demise/identity-of-carrier clause.

D. Continental European Decisions and Authors

In continental Europe, the demise and identity-of-carrier clauses have never been admired, have rarely been upheld, and are more and more suspect. This is particularly true since the 1957 *International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships*,[73] which allows a charterer to benefit from the limitation of liability along with the shipowner.

In France, the demise and identity-of-carrier clauses are, in general, without effect when they are invoked by a party in order to evade or deny liability. French doctrine, generally viewed as more important than the jurisprudence as a source of the civil law, has rarely endorsed the validity of such clauses and has more often treated them with contempt.[74] French courts have also in the past, as a general rule, refused to apply the demise or identity-of-carrier clause *vis-à-vis* third parties (*e.g.* shippers and consignees).[75]

More recently, French courts have reaffirmed the invalidity or *inopposabilité*[76] of demise and identity-of-carrier clauses as against third-party acquirers of the cargo,[77] as

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[72] *Supra* note 60.

[73] 10 October 1957, in force 31 May 1968, art. 6(2) [hereinafter 1957 *Limitation Convention*]. This Convention can be found in Comité Maritime International, *Handbook of Maritime Conventions* (New York: Matthew Bender & Co., 1998) at doc. 8; and in Schoenbaum, *supra* note 43, vol. 3 at 912.

[74] See R. Rodière, *Traité général de droit maritime : Affrètements et transports*, t. 2 (Paris: Dalloz, 1968) at para. 698 (and the supplement to that work—updated until 10 June 1978—also at para. 698) who dismisses the identity-of-carrier clause (which he identifies with the demise clause) as not deserving respect because of its ambiguity. Rodière does opine, however, that the identity-of-carrier clause can be useful provided that it precisely and unambiguously identifies the carrier, which it rarely if ever in fact does. See also A. Chao, "Réflexions sur la 'Identity of Carrier Clause'" DMF 1967.12, where the demise clause and the identity-of-carrier clause are discussed. See also M. Rèmond-Gouilloud, *Droit maritime*, 2d ed. (Paris: Pedone, 1993) at 349, para. 535.

[75] See the cases referred to in *Marine Cargo Claims*, *supra* note I at 255, n. 123; and Rodière, *ibid.*

[76] "*Opposabilité*" is a French civilian term that may be translated as the "setting up of rights." See generally arts. 2941ff. C.C.Q. Therefore, *inopposabilité* may be translated as one party's inability to set up rights against another, usually a stranger to the first party's contract. See also the definition of "*inopposabilité*" in *Vocabulaire juridique*, 6th ed. (Paris: Presses Universitaires de France, 1996).

well as against the shipowner.[78] In *The Soufflot*,[79] the Court held that the cargo claimant could rely on the identity-of-carrier clause designating the shipowner as the carrier because the bills of lading did not mention the identity of the carrier. Thus, the identity-of-carrier clause was upheld because it was not being invoked by the time charterer in an effort to avoid its mandatory liability, but rather by the consignee seeking to have the shipowner held liable.[80] When, however, the time charterer attempts to deny its liability as a "carrier" by invoking the identity-of-carrier clause, the clause will be invalid when the bill of lading designates the shipowner as the carrier without naming him.[81]

In Belgium,[82] the Brussels Court of Appeal found the identity-of-carrier clause to be "inopposable" to third-party acquirers of the cargo,[83] as well as to the shipowner.[84]

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[77] Paris, 29 September 1988, DMF 1990.381 (Annot. R. Achard) [hereinafter *The Tini-P*], commentary by P. Bonassies, DMF 1991.92, No. 54, confirmed by the *Cour de cassation* in an unpublished decision of 12 June 1990. In *The Tini-P*, the purchaser of a cargo of wood pulp which arrived damaged in Algeria, seized the vessel in that country. The time charterer paid a sum of $355,000 to release the vessel and in turn sued the ship broker who booked the vessel as well as the sub- or voyage charterer. The time charterer invoked an identity-of-carrier clause in denying its liability as a carrier, and the Court rnled that the time charterer could not avail itself of the identity-of-carrier clause as against the holder of the bill of lading, which mentioned neither the name nor the address of the vessel owner.

[78] Aix-en-Provence, 21 June 1989, B.T. 1990.255, commentary by P. Bonassies, DMF 1991.92, No. 54, where the consignee of a shipment of frozen shrimp sued the time charterer, who in turn sued the shipowner, for damages arising out of the defrosted state of the cargo. The Court held that the time charterer could not "oppose" the clause to the shipowner, as the charterparty provided for the transfer of control over the management and navigation of the vessel to the time charterer. Moreover, the bill of lading was signed by the time charterer, and not by the shipowner or the master.

[79] *Supra* note 29, commentary by P. Bonassies, DMF 1996.131, No. 52. This decision applied a principle laid down by the *Cour de cassation* in its decision of 21 July 1987 in *The Vomar*, DMF 1987.573, commentary by P. Bonassies, DMF 1988.141, holding that where the bill of lading identified neither the shipowner nor the charterer, and where the charterparty was neither reproduced in, nor scheduled to, the bill, the cargo consignee could sue the shipowner.

[80] For a similar conclusion in an American case, see *Tatiana L*, *supra* note 29.

[81] Paris, 25 March 1993, DMF 1994.504 (Annot. Y. Tassel) [hereinafter *The Arno*], commentary by P. Bonassies, DMF 1995.181, No. 50. In his comment on *The Arno*, Tassel states that the Court did not rule on the validity of identity-of-carrier clauses in general, but rather held that the charterer was merely a carrier on the facts of the case. Tassel is of the view that the idenity-of-carrier clause is actually valid under French law, provided three conditions are met: (i) the clause must be included in the bill of lading; (ii) the charterparty must be referred to in the bill of lading; and (iii) the lessor (*i.e.*, the shipowner or demise charterer) must be sufficiently identified in the bill of lading. In *The Arno*, writes Tassel, it was the absence of the last condition that denied the time charterer the right to invoke the clause.

[82] See generally A.G. Vaes, "The Identity of the Hague Rule Carrier" [1968] J.P.A. 403 at 409-14.

[83] Brussels, 1 March 1963, J.P.A. 1963.329 (also known as *The Ferdia*) (identity-of-carrier clause found *inopposable* against a third-party holder of the bill of lading, and thus, the voyage charterer who issued the bill of lading was bound by the bill). See also Brussels, 13 March 1970, ETL. 1970.398 (also known as *The Rialto*) (identity-of-carrier clause held to be void when the charterer is-

On the other hand, the Commercial Court of Antwerp has upheld the identity-of-carrier clause when a bill of lading was issued by the voyage charterer which named neither the charterer nor the shipowner.[85]

In the Netherlands, the identity-of-carrier clause has been held to be invalid on the ground that it does not allow the court having proper jurisdiction to be determined[86] and it therefore violates article 17 of the 1968 *Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*,[87] while in Germany,[88] a demise clause (really an identity-of-carrier clause) was held to be invalid because the time charterer did not have written authority to bind the owner.[89]

E. Canadian Decisions Before 1997

A number of relatively early Canadian decisions held the demise or identity-of-carrier clause valid as against the shipper. These decisions include *The Wychwood*,[90] *Delano Corp. of America* v. *Saguenay Terminals*,[91] *Grace Kennedy & Co.* v. *Canada*

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sued a bill of lading in its own name; the voyage charterer and the captain were liable *in solidum* to third-party holders of the bill).

[84] Brussels, 21 November 1963, J.P.A. 1964.9 (also known as *The Renata Schroeder*).

[85] Trib. com. Antwerp, 18 December 1962, J.P.A. 1962.367 (the Court held that there existed no *lien de droit* between the third-party holder of the bill of lading and the shipowner, notwithstanding the identity-of-carrier clause naming the shipowner as the carrier, because the management of the vessel had passed to the voyage charterer under the charterparty).

[86] *Hof's Gravenhage*, 22 April 1997, ETL 1998.263.

[87] [1978] O.J. L. 304/36. This Convention was originally adopted at Brussels on September 27, 1968.

[88] At the time, the Federal Republic of Germany.

[89] *Oberlandesgericht Hamburg*, 22 May 1969, ETL 1970.1362. Other German decisions dealing with the identity-of-carrier clause are summarized by M. Schölch, "Jurisprudence maritime de la République fédérale d'Allemagne" DMF 1977.116 at 117-19, who states that, in principle, such clauses could be upheld in German law, so long as they state with sufficient certainty who will be liable on the bill of lading, and provided the shipowner gives a "*procuratio*" (power of attorney) authorizing the charterer to contract as his agent. See also H.G. Röhreke, "The Identity-of-Carrier Problem in German Law" in *In Memoriam Demetrios Markianos* (Athens, 1988) at 55-61. For more recent German decisions declaring the identity of carrier clause ineffective to shield the charterer from liability, see Dr. Johannes Trappe, "Chronique de jurisprudence allemande" DMF 1991.743 at 744-46. On the validity of such clauses in Japanese law, see R. Margolis, "Validity of the Demise Clause under Japanese Law and the Consequences for Enforcement Abroad of Claims under Japanese Bills of Lading" [1993] LMCLQ 164.

[90] *Supra* note 7 at 206, where the Exchequer Court of Canada upheld the demise clause and found that there existed no *lien de droit* between the plaintiff consignee and the defendant time charterer. The Court found that the booking note and the bill of lading contained two entirely distinct contracts, and that, while the charterer was a party to the booking note contract, it was not a party to the contract evidenced by the bill of lading.

[91] [1965] 2 Ex. C.R. 313 at 319-20, online QL (CJ), where the Exchequer Court of Canada upheld the demise clause and found that there was no privity of contract between the plaintiff cargo interest and the defendant time charterer.

Jamaica Line,[92] *West India Trading Co.* v. *Saguenay Shipping*,[93] *Atlantic Traders* v. *Saguenay Shipping*,[94] and *Weyerhaeuser Co.* v. *Anglo Canadian Shipping*.[95] Most of these judgments, however, have invoked the Supreme Court of Canada's decision in *Paterson*[96] and *Aris Steamship* v. *Associated Metals & Minerals*,[97] neither of which involved a demise or identity-of-carrier clause, and which merely held that, *as a general rule*, the owner is the sole carrier where the bill of lading is signed by or for the master.[98] Most of them have also erroneously relied on the *obiter dictum* of Brandon J. in

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[92] [1967] 1 Lloyd's Rep. 336 at 338 (Qc. Sup. Ct.) [hereinafter *The Schürbek*], where the Court upheld both *The Wychwood*, *supra* note 7, as well as the demise clause. The plaintiff's claim in contract against the time charterer under the *Civil Code of Lower Canada* was thus dismissed. However, the time charterer was still held liable to the plaintiff in delict (tort) as a "carrier", jointly and severally with the owner.

[93] [1975] R.P. 403 at 407 (Sup. Ct.) [hereinafter *The Sunima*], where the shippers sued the shipowner, the time charterer, and the ship chartering broker for damages to a cargo of dried fish carried from Halifax to San Juan. All of the bills of lading covering the shipment contained demise clauses and the one bill in question was signed in Halifax. The shipowner raised a declinatory exception under art. 68 of Quebec's *Code of Civil Procedure*, arguing that the Quebec Superior Court lacked jurisdiction over it, as its head office was located in Oslo, Norway. With respect to the time charterer, the Court held that it was "clearly" acting as an agent for the shipowner. It did, however, find that the shipowner could be sued in Quebec as the existence of a debt owed by the shipowner constituted seizable property located within the province of Quebec. Thus, the shipowner's declinatory exception was rejected.

[94] (1979), 38 N.S.R. (2d) 1, 69 A.P.R. 1 (S.C. (T.D.)), where the plaintiff sued the time charterer in contract and tort for damages alleged to have arisen out of its inability to sell a portion of a shipment of potatoes. Both short and long form bills of lading contained standard demise clauses. The Court upheld the demise clause and found that the time charterer could only have been acting as agent for the shipowner, and that where the charter is not by demise, the contract of carriage is between the shipper and shipowner. The Court relied heavily on the Supreme Court of Canada's decision in *Paterson Steamships* v. *Aluminum Co. of Canada* (1951), [1951] S.C.R. 852 at 854, [1952] 1 D.L.R. 241 at 243 [hereinafter *Paterson*], which, as discussed in the text accompanying note 96, below, did not actually rule on the validity of the demise clause, as there was no such clause included in the bills of lading.

[95] (1984), 16 F.T.R. 294, [1985] ETL 309 (T.D.) [hereinafter *The M.S. Liberian Statesman*], where the Court dismissed the cargo interests' action against the time charterer. The bill of lading contained an identity-of-carrier clause, and the Court, in an example of true circular reasoning, stated: "Nor, (since the defendants are and were not carriers), can the above cited demise clause be held to be null, void or of no effect" (*ibid.*, F.T.R. at 303, ETL at 321). Note that although the Court refers to the clause as a demise clause, it is in fact an identity-of-carrier clause.

[96] *Supra* note 94.

[97] [1980] 2 S.C.R. 322 at 328, 110 D.L.R. (3d) 1 at 5, 1980 AMC 2288 at 2293 [hereinafter *Aris*], where the Court held that the shipowner alone was liable as carrier to the plaintiff cargo interests, the charterer and master both being the owner's agents. See also *Lantic Sugar* v. *Blue Tower Trading* (1993), 163 N.R. 191 at 196, [1994] ETL 286 at 293 (F.C.A.), where the Federal Court of Appeal similarly found that absent any specific clause in the bill of lading, the master signs the bill as the vessel owner's agent. Therefore, the owner and not the time charterer was the carrier. However, the bills of lading did not contain a demise or identity-of-carrier clause, and thus the Court made no ruling on the validity of such clauses.

The Berkshire[99] to the effect that the bill of lading, in such cases, does not evince a contract between the shippers and the charterers. *Paterson* and *The Berkshire* are *not*, however, authority as to the charterer's lack of status as a carrier, *because the charterer was not a defendant to the action in those cases.* In *Aris*, the charterer was sued but took no part in the appeal proceedings.

These erroneous Canadian decisions also misrepresent or ignore the theory of the undisclosed principal and treat the ambiguous "if" of the demise clause as sufficient disclosure of the principal's identity. Moreover, they assume incorrectly that the *name* of the owner has been disclosed and that the disclosure was made at the *time* of the contract.

Before the decisions rendered by the Federal Court, Trial Division in *Union Carbide*,[100] and the Federal Court of Appeal in *Jian Sheng*,[101] the demise or identity-of-carrier clause had been expressly invalidated, or its purported effect denied, in one

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[98] *Paterson*, *supra* note 94, S.C.R. at 861, D.L.R. at 256. Locke J. relied on the statement made by Channell J. in *Wehner*, *supra* note 64 at 98: "*In ordinary cases*, where the charterparty does not amount to a demise of the ship, and where possession of the ship is not given up to the charterer, the rule is that the contract contained in the bill of lading is made, not with the charterer, but with the owner" [emphasis added]. See also S.C. Boyd, A.S. Burrows & D. Foxton, eds., *Scrutton on Charterparties and Bills of Lading*, 20th ed. (London: Sweet & Maxwell, 1996) at 80. One should, however, take note of two important facts in *Wehner*: (i) it is a pre-Hague Rules case where art. 3(8) did not enter into the question; and (ii) the action was one for money had and received involving a dispute between sub-charterers and the shipowner as to the right to recover freight to set off hire due, and thus did not involve claims of shippers or consignees against the "carrier". In any event, the rule stated in *Wehner* that the contract of carriage is made with the shipowner and not the charterer may clearly be rebutted in particular circumstances. In *Hiram Walker & Sons Ltd.* v. *Dover Navigation Co.* (1949), 83 Ll. L. Rep. 84 (K.B.D.), online: LEXIS (ENGGEN/CASES) [hereinafter *Hiram Walker*], a case which *did* involve cargo interests claiming against the shipowner and time charterer, and which was governed by the Hague Rules, Lynskey J. stated that the carrier's identity is a question of fact depending upon all the documents and any other relevant evidence, including oral testimony. Moreover, Lynskey J. found: "There is no rule of law which says that the contract of carriage is made with the shipowner, or made with the master on behalf of the shipowner. It is a pure question of fact" (*Hiram Walker*, *ibid.* at 90). See also *Wilston Steamship Company* v. *Andrew Weir & Co., Ltd.* (1925), 22 Ll. L. Rep. 521 at 522, 31 Com. Cas. 111 (K.B.D.); and *The Venezuela*, [1980] 1 Lloyd's Rep. 393 at 395 (Q.B.D. (Adm. Ct.)), online: LEXIS (ENGGEN/CASES) expounding the same view. See also *The Rewia*, *supra* note 51 at 333, Leggatt L.J.: "[A] bill of lading signed for the master cannot be a charterers' bill *unless the contract was made with the charterers alone, and the person signing has authority to sign, and does sign, on behalf of the charterers and not the owners*" [emphasis added]; and *The Hector*, *supra* note 49 at 295, Rix J.:

> In this case, there is nothing on the face of the bill to say who the owners (and therefore the carrier) are, save for the clause stipulating that [U.S. Express Lines, the time charterers] are the carrier. That, therefore, becomes the critical provision. *The Veneuela* was dealt with by *The Rewia* ... on the basis that it was a straightforward case. *At the very least it shows that a signature for the master is not determinative* [emphasis added].

[99] *Supra* note 7.

[100] *Supra* note 3.

[101] *Supra* note 4.

older Canadian decision and in two more recent judgments. The clause was also seriously questioned in *The Lara S.*[102]

In *Canadian Klockner* v. *D/S A/S Flint (The Mica)*,[103] the Federal Court faced the issue directly and declared the identity-of-carrier clause invalid. The plaintiff had sued both the vessel owner and the charterer. The charterer argued it was not a carrier by virtue of the demise clause, and the owner declared that it had not extended the time for suit, although the charterer had. The Court held the identity-of-carrier clause null and void as an exculpatory clause purporting to relieve the carrier from liability in violation of article 3(8) of the Hague Rules.[104] The Court therefore allowed suit against the charterer who had extended the suit time.

The Federal Court of Appeal in *Canficorp* v. *Cormorant Bulk-Carriers*,[105] found that the charterer was a carrier, despite the presence of an identity-of-carrier clause in the bill of lading. The facts of this case differed from most other cases involving demise or identity-of-carrier clauses, in that it was the *time charterer* who sued the *shipper* to recover under an indemnity agreement and it was the shipper who invoked the identity-of-carrier clause in denying that the time charterer was a party to the contract of carriage. The Court found that the contract of carriage was not contained solely in the bill of lading, but was also evidenced by the booking note.[106] Moreover, the time charterer's name appeared prominently on the bill of lading, on which no mention was made of the shipowner. Finally, the identity-of-carrier clause was not determinative of the issue of the carrier's identity, because the time charterer undertook actual responsibilities under the contract of carriage, thereby being in substance a "carrier".[107] This is a proper and just ruling, because neither the shipper nor the charterer should be able to avoid their obligations by invoking a disingenuous clause. What's sauce for the goose is sauce for the gander!

Similarly, in *Carling O'Keefe Breweries* v. *C.N. Marine*[108] the Federal Court of Appeal affirmed a decision rendered by the Trial Division,[109] which concluded that the

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[102] *Supra* note 17.

[103] [1973] F.C. 988, [1973] 2 Lloyd's Rep. 478 (T.D.), rev'd by consent [1975] 2 Lloyd's Rep. 371 (F.C.A.).

[104] *Ibid.*, F.C. at 1000, Lloyd's Rep. at 484. The Court relied on pp. 52-54 of the 1st ed. (1965) of *Marine Cargo Claims*, *supra* note 1. During the appeal hearing, the case was settled under peculiar circumstances. The defendant carrier, intent on a recorded judgment, paid the claim and costs and the claimant accepted the terse consent judgment. The appeal judgment is therefore not authority for the proposition that the demise or identity-of-carrier clause is valid under modern Canadian maritime law.

[105] (1984), 54 N.R. 66, 1985 AMC 1444 (F.C.A.).

[106] *Ibid.*, N.R. at 74, AMC at 1455.

[107] *Ibid.* N.R. at 74-75, AMC at 1456: "Of some significance is the fact that the respondent loaded and discharged the goods."

[108] [1990] 1 F.C. 483, 104 N.R. 166 (C.A.) [hereinafter *The Newfoundland Coast*]. See F.M.B. Reynolds, Case Comment on *The Newfoundland Coast* [1990] LMCLQ 494.

[109] [1987] 2 F.C. 107 at 116-17, 1987 AMC 954 at 961-62 (F.C.T.D.). See F.M.B. Reynolds, "The Demise Clause and the Hague Rules" [1987] LMCLQ 259.

time charterer was the "carrier" under the contract of carriage, in spite of the demise clause. The Federal Court of Appeal dismissed the appeal, citing the following reasons:

(1) The Supreme Court's *dicta* in *Paterson* and *Aris* only "favoured" the validity of demise clauses[110] in "ordinary cases" and, citing *Samuel, Samuel & Co.* v. *West Hartlepool Steam Navigation Company*,[111] one must not lay down a hard and fast rule to determine who undertook to act as "carrier".[112]

(2) The vessel was not named in the bill of lading:

> Had "the ship" been named in the bill of lading it might well have been arguable that the time charterer would then have acted "as agent only" for her owners. That is not the case here. The words "agent", "agency" and "as agent only" in the vacuum that was thus created can have no legal effect when, at the time the bill of lading was issued, the only principal existing within its contemplation was the time charterer itself.[113]

(3) The time charterer, having signed the bill of lading as a principal, was a "carrier" under the Hague Rules, and the demise clause was invalid as a non-responsibility clause under article 3(8).[114]

(4) The shipowner was not a "carrier". This was an unnecessary finding for the Court to have made, however, as Stone J.A. acknowledged: "The shipowners are not represented before us so that the question of their liability as such is not raised. Moreover, they are, for practical purposes, judgment proof and the ship has been lost at sea."[115]

In *The Lara S*,[116] a bill of lading was issued covering a shipment of twine from Cabedelo, Brazil to Milwaukee and Toronto. The consignee and purchaser of the goods sued the shipowner and time charterer, alleging that the cargo was damaged upon arrival. The bill of lading contained an identity-of-carrier clause, as well as conflicting paramountcy clauses, one of which designated the U.S. *COGSA* as the applicable law, the other designating the Canadian incorporation of the Hague Rules. Reed J. of the Federal Court held that the U.S. *COGSA* was the properly applicable law to the dispute. However, the judge rejected the defendant's expert witness' opinion as to the state of American law and, therefore, applied Canadian law to the entire matter.[117]

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[110] See *supra* note 98.

[111] (1906), 11 Com. Cas. 115.

[112] *The Newfoundland Coast*, *supra* note 108, F.C. at 497, N.R. at 175.

[113] *Ibid.*, F.C. at 499-500, N.R. at 176.

[114] *Ibid.*, F.C. at 500-501, N.R. at 177, Stone J.A. agreeing with the *ratio decidendi* of Martin J., the trial judge.

[115] *Ibid.*, F.C. at 501, N.R. at 177.

[116] *Supra* note 17.

[117] *Ibid.*, F.C. at 600, F.T.R. at 32.

Reed J. endorsed my view that the charterer(s) and shipowners should be held jointly and severally (solidarily) liable in Canadian maritime law because the carriage of goods by sea is effectively a joint venture:

> The logic of holding both the shipowner and the 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[118] liable with the charterer for damage arising out of inadequate stowage.[119]

VI. Recent Canadian Decisions Upholding the Demise/Identity-of-Carrier Clause

In *Union Carbide*[120] and *Jian Sheng*,[121] the Federal Court of Canada reopened the Pandora's box of demise and identity-of-carrier clauses. It is thus no surprise that both decisions have sought to distinguish *The Lara S* on its facts or to downplay Reed J.'s endorsement of the notion of the joint venture (and thus joint and several liability) between charterers and shipowners. Neither is it surprising that both decisions have roundly rejected what they have termed my "theory" of the joint venture for being "unsound".

A. Union Carbide *v.* Fednav Ltd.

In *Union Carbide*, the plaintiffs—the shipper and consignees of a cargo of synthetic resin carried under bills of lading from Montreal to Bangkok and Manila—sued the time charterer, Fednav Ltd., for damage sustained to the cargo. The plaintiffs also named the Liberian shipowner, Bona Maritime Corp., as a defendant, as well as the vessel, THE HUDSON BAY. However, because notice was never served upon either

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[118] It would appear that an error was committed in using the word "jointly" instead of "jointly and severally". This statement was made directly after a quotation from *Marine Cargo Claims*, *supra* note 1 at 242, where the joint venture between charterers and shipowners and their consequent joint and several liability was referred to. Moreover, the French version of the judgment reads: "Dans un tel cas, il semble tout à fait juste de tenir le eapitaine et, par conséquent, son employeur, le propriétaire du navire, *solidairement* responsables avec l'affréteur des avaries qui découlent d'un arrimage inadéquat" [emphasis added]. Finally, the conclusion of the judgment states: "A judgment will issue finding the defendants *jointly and severally* liable to pay the plaintiff damages" (*ibid.*, F.C. at 618, F.T.R. at 44 [emphasis added]).

[119] *Ibid.*, F.C. at 587, F.T.R. at 24.

[120] *Supra* note 3.

[121] *Supra* note 4.

the owner or the ship, Nadon J. ordered that neither of them were defendants to the action.[122]

The time charterer invoked an identity-of-carrier clause in defence to disclaim liability. Clause 26 of the charterparty between the defendant and the shipowner stated: "Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers." Nadon J. found that "unless there is a clear undertaking by the time charterer that he will carry the shipper's goods, the shipowner is the carrier,"[123] and that in the present case, the defendant time charterer made no such undertaking to carry the plaintiffs' goods. He further held that the booking note issued by the time charterer did not evidence an undertaking that the time charterer will carry the shipper's cargo.[124]

Nadon J. upheld the identity-of-carrier clause as binding upon the shipowner (without, however, giving any express reasons as to why it should bind shippers and consignees), and that on the facts of this case, and absent an express undertaking by the time charterer, "the bills of lading issued on January 5, 1979, are *without doubt*, owners' bills of lading."[125] The judge also ruled that the clause referring to the "carrier" was entirely unambiguous, and referred to the person with whom the shipper had entered into the contract of carriage, *i.e.*, the shipowner.

With respect to article 1(a) of the Hague and Hague/Visby Rules—which defines the "carrier" as *including* the owner or the charterer who enters into a contract of carriage with a shipper—Nadon J. expressly rejected what he called my "theory" of the joint venture (and thus joint and several liability) between the shipowner and the charterer, previously endorsed by Reed J. in *The Lara S*, as being unsound.[126] He held that "there cannot be a joint venture between owners and charterers unless there has been a meeting of the minds between the parties to the joint venture."[127] He reasoned that the "or" found at article 1(a) of the Hague Rules must be read disjunctively, so that when the shipowner is liable under a bill of lading, the charterer cannot also be held liable, and vice versa.[128]

The result of the case is that Nadon J., having later also found the time charterer not to be liable in tort to the plaintiffs, dismissed the action. Nowhere in Nadon J.'s

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[122] *Supra* note 3, F.T.R. at 247, AMC at 434.

[123] *Ibid.*, F.T.R. at 258, AMC at 449.

[124] *Ibid.*, F.T.R. at 262, AMC at 455.

[125] *Ibid.*, F.T.R. at 266, AMC at 460 [emphasis added].

[126] *Ibid.*, F.T.R. at 264, AMC at 457: "I cannot accept the soundness of this view."

[127] *Ibid.* Nadon J.'s rejection of the "joint venture" theory was accepted and applied by Blais J. in *Voest-Alpine Stahl Linz GmbH* v. *Federal Pacific Ltd.*, Fed. Ct. of Can. Tr. Div., no. T-1296-95, 31 August 1999 (not yet reported), despite the fact that the shipowner and time charterer were companies effectively owned and operated by the same entity.

[128] *Ibid.*, F.T.R. at 264-65, AMC at 458. One American court has reached the identical conclusion under the U.S. *COGSA*: see *Glynwed Steels* v. *Great Lakes and European Lines*, 1979 AMC 1290 (N.D. Ill. 1978), online: LEXIS (GENFED/MEGA). See, however, various other American decisions at *supra* notes 41, 42, holding that both the shipowner *and* the charterer may be the "carrier".

judgment, however, is mention even made of article 3(8) of the Hague/Visby Rules, the mandatory character of those Rules, or of public order, which lay at the heart of the judgment rendered by Reed J. in *The Lara S*, as well as many of the other decisions discussed above.

B. Jian Sheng Co. *v.* Great Tempo S.A.

In *Jian Sheng*, the plaintiff/appellant was the notify party on a bill of lading issued under a contract of carriage of lumber transported from Nanaimo, British Columbia to Taichung, Taiwan. The shipper was not a party to these proceedings. A substantial portion of the cargo carried on deck was lost or damaged at sea. The notify party sued the shipowner, the charterer, and all others interested in the ship TRANS ASPIRATION. The defendant, Great Tempo S.A., a Panamanian company, was the owner of the vessel, but was controlled out of Hong Kong by the Wah Tung Shipping Agency. The defendant shipowner alleged that the vessel was chartered to Sinotrans (Bermuda) Ltd., and the space on the vessel was reserved under a booking note issued by Sinotrans (Canada) Inc., a company based in British Columbia. Sinotrans (Canada) Inc. also issued the bill of lading. Sinotrans (Bermuda) Ltd., the apparent charterer, was not named as a defendant to the action by the plaintiff. The bill of lading was signed for the master by Sinotrans (Canada) Inc. "as agents for Carrier: Trans Aspiration."

There were three clauses at issue in the various documents of carriage. First was an arbitration clause in the booking note issued by Sinotrans, stipulating that any dispute arising in connection with the booking note shall be referred to arbitration in Vancouver. The booking note also contained a paramountcy clause. At first instance,[129] Prothonotary Hargrave found that the booking note could not bind the plaintiff notify party, as it had not been a party to that contract.[130] That finding was upheld by Tremblay-Lamer J. on appeal to the Federal Court, Trial Division,[131] and was not appealed to the Federal Court of Appeal. Secondly, a standard identity-of-carrier clause figured in the bill of lading,[132] providing that the contract of carriage was between the Mer-

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[129] (1997), 129 F.T.R. 55.

[130] *Ibid.* at 59.

[131] (1997), 132 F.T.R. 166 (F.C. (T.D.)), online QL (FCJ).

[132] Identical to the one at issue in *Union Carbide*. Clause 17 of the Conline Bill, as reproduced at *Jian Sheng*, *supra* note 4, F.C. at 434, N.R. at 149, reads:

> The Contract evidenced by this Bill of Lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of and exonerations from, liability provided for by law or by this Bill of Lading shall be available to such other.
>
> It is further understood and agreed that as the Line, Company or Agents who has executed this Bill of Lading for and on behalf of the Master is not a principal in the trans-

chant—*i.e.*, the owner or other interested parties in the cargo—and the owner of the vessel. Finally, there was a jurisdiction clause in the bill which stipulated that any dispute arising under the bill of lading shall be decided in the country where the carrier has its principal place of business.[133]

At first instance, Hargrave upheld my so-called "theory" of the shipowner and charterer being jointly and severally liable, notwithstanding any identity or demise clauses.[134] Consequently, he found that the jurisdiction clause was void for uncertainty and he refused the defendant's motion to stay the proceedings on the grounds of *forum non conveniens*.[135]

Tremblay-Lamer J. of the Federal Court, Trial Division, reversed Hargrave's decision, refusing a stay of the proceedings in Canada and gave effect to the identity clause in the bill of lading (without discussing its validity), thereby rejecting the view of the shipowner's and charterer's joint and several liability.[136] She agreed with Nadon J. in *Union Carbide* that there could be "no joint venture between the owner of a vessel and its charterer unless there is an express undertaking on the charterer's part to this effect."[137] Consequently, the judge found that Great Tempo S.A., the shipowner, was the sole carrier under the bill of lading.[138] Therefore, Tremblay-Lamer J. held that the jurisdiction clause was not void for uncertainty because the time charterer could not be considered a carrier and because she was satisfied that the defendants had

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action, said Line, Company or Agents shall not be under any liability arising out of the contract of carriage nor as Carrier nor bailee of the goods.

[133] Clause 3, the jurisdiction clause, reproduced in *Jian Sheng*, *ibid.*, F.C. at 424, N.R. at 142, reads: "Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein." Note that hidden in the jurisdiction clause was also a choice of law clause. None of the decisions even mentioned this choice of law clause nor considered the legal conundrum of having to interpret the validity of the bill of lading, including the identity-of-carrier clause, according to the law of the jurisdiction where the carrier has its principal place of business. Of course, *renvoi* is excluded in Quebec civil law by art. 3080 C.C.Q., and characterization is to be made by the *lex fori* under art. 3078 C.C.Q.; but is it also excluded by federal conflicts rules, whatever they may be? Moreover, can one even say with certainty that determining the validity of the identity-of-carrier clause constitutes a question of *la qualification* (characterization) for the purposes of private international law? This vicious cycle results from a misguided presumption that such identity clauses are valid; thus, the jurisdicton clause too is valid, as there may only be one carrier, and consequently, so too is the choice of law clause valid.

A better view is that one determines the validity of the identity-of-carrier clause under the relevant international conventions, *i.e.*, the Hague Rules, the Hague/Visby Rules, and the Hamburg Rules. If one concludes that such clauses are in principle invalid as non-responsibility clauses, then the jurisdiction/choice of law clause in question would also fail for lack of certainty, as there may now be more than one defendant carrier.

[134] *Supra* note 129 at 57.

[135] *Ibid.* at 60.

[136] *Supra* note 131 at 171. Tremblay-Lamer J. (*ibid.* at 171-72) cited *Paterson*, *supra* note 94; *Aris*, *supra* note 97; and *Union Carbide*, *supra* note 3.

[137] *Supra* note 131 at 173.

[138] *Ibid.* at 171, 173.

made a *prima facie* case that the shipowner's principal place of business was in Hong Kong.[139] A stay of proceedings in favour of suit being taken in that jurisdiction was accordingly granted.[140]

The case went before the Federal Court of Appeal on the issue of the certainty and validity of the jurisdiction clause. However, in order to determine whether or not the jurisdiction clause was sufficiently unambiguous, the Court also needed to revisit the issue of the carrier's identity, thereby involving a consideration of the identity-of-carrier clause. The unanimous judgment was written by Décary J.A.

Décary J.A. held first that the jurisdiction clause in question was unambiguous, and that it "means precisely what it says."[141] The determination of the carrier's principal place of business was found to be a question of fact to be decided by considering the circumstances of the case, and the identity of the carrier was to be determined by the terms of the contract.[142] The judge stated that jurisdiction clauses of this type were "standard" and "have been applied for ages in the industry and by the courts."[143] Therefore, "[s]uch is the law freely adhered to by the parties. It is too late in the day to question a practice that has acquired its letters patent of nobility in anglo-canadian law and usage."[144]

That jurisdiction (or demise/identity-of-carrier) clauses are truly "freely adhered to by the parties" is questionable, because the bill of lading including such clauses is usually signed by only one party and is often issued only after the ship has left the port with plaintiff's cargo.

Décary J.A. had no trouble in concluding that the jurisdiction clause in question was not, in principle, invalid for uncertainty, and that it should be applied as "the law of the parties, the law of the trade, the law of the land and the law of anglo-canadian courts."[145] Noting, however, that the clause, although valid in principle, could nevertheless be void for uncertainty in the circumstances of the case, Décary J.A. then undertook an analysis of the identity of the carrier, in order to determine if the carrier was identified with sufficient clarity to permit effect to be given to the jurisdiction clause in this case.

Examining the identity of the carrier, Décary J.A. first held that in shipowners' bills of lading, there is a presumption that the shipowner is the carrier, while in charterers' bills of lading, the presumption is that the demise charterer is the carrier. Another party may be the carrier only where those presumptions are rebutted by evidence that that party "has actually assumed the role of carrier under the contract of

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[139] *Ibid.* at 174.
[140] *Ibid.* at 175.
[141] *Supra* note 4, F.C. at 424, N.R. at 142.
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*, F.C. at 425, N.R. at 143.
[145] *Ibid.*, F.C. at 426, N.R. at 144.

carriage with the shipper."[146] Responding to the appellant's suggestion that there could be more than one carrier, he considered the "implicit joint venture" theory of carriage by sea and subscribed to the view of that concept expressed by Nadon J. in *Union Carbide*:

> The implicit joint venture concept is in my respectful view incompatible with the gist of the decisions of the Supreme Court in *Paterson S.S.* and in *Aris Steamship* and 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.[147]

Décary J.A. stated that, on a careful reading of *The Lara S*,[148] it appeared that the Federal Court of Appeal, in its decision upholding Reed J.'s judgment, "did not address the issue of implicit joint venture and a careful perusal of the voluminous factums filed by counsel has persuaded me that the issue had not been raised as such in the appeal."[149] *The Lara S* could not therefore be seen as an endorsement of my comments with respect to carriage by sea being a joint venture. While there might be cases where a shipowner and a charterer would actually decide to carry on a joint venture or partnership, in those cases the joint venture or the partnership would assume the role of the carrier.[150] This is the same argument made by Nadon J. in *Union Carbide*,[151] and repeated by Tremblay-Lamer J.,[152] that there cannot be a joint venture between shipowner and charterer absent an express agreement between them to that effect.

Later in the decision, Décary J.A. upheld Tremblay-Lamer J.'s rejection of "Professor Tetley's joint venture principle," and futher declared:

> [I]n 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 page 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 "agents for the ship" rather than the words "agents for the shipowner" is enough to displace the presumption.[153]

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[146] *Ibid.*, F.C. at 428-29, N.R. at 145.
[147] *Ibid.*, F.C. at 430, N.R. at 146.
[148] *Supra* note 17.
[149] *Supra* note 4, F.C. at 430, N.R. 140 at 146.
[150] *Ibid.*
[151] *Supra* note 3, F.T.R. at 264, AMC at 457.
[152] *Supra* note 131 at 173.
[153] *Supra* note 4, F.C. at 437-38, N.R. at 151.

The identity-of-carrier clause was therefore applied at face value, without any real consideration of its validity in principle. Décary J.A. then observed: "In view of the conclusion I have reached with respect to the principal place of business issue, however, I need not make a definite finding as to the identity of the carrier in the circumstances of the case."[154] Thus, in effect, Décary J.A.'s holding as to the carrier being the shipowner, his uncritical acceptance of the identity-of-carrier clause, and his repudiation of my "theory" of joint venture were in fact only *obiter dicta.* His decision certainly cannot be taken as a *final* vindication of the demise/identity-of-carrier clause in Canadian maritime law.

In the end, the jurisdiction clause was upheld, both in principle and in the circumstances of the case at bar. The Court of Appeal found, however, that the shipowner had failed to establish that its principal place of business was in fact located in Hong Kong. In consequence, the jurisdiction clause was ruled valid but "inapplicable", and the Court reversed the ruling of Tremblay-Lamer J. granting a stay to permit proceedings in Hong Kong, and restored the order of Hargrave denying the stay.[155] The Supreme Court of Canada refused leave to appeal the Federal Court of Appeal's decision, without reasons.[156]

It should be noted that neither the Union Carbide nor the Jian Sheng judgments ever mention art. 3(8) of the Hague/Visby Rules and that the Rules are of public order and are mandatorily applicable to anyone who acts as a carrier. Nor do they counter any of the arguments in Part VII, below.

VII. Six Reasons for the Invalidity of the Demise/Identity-of-Carrier Clause

There are many reasons why the demise/identity-of-carrier clause is invalid when invoked by the charterer as against the shipper, the consignee, or any other party with an interest to sue on the goods. What follows are some of them.

First, principles of the law of agency should not be controlling in identifying the carrier in the carriage of goods by sea because of the joint venture character of that undertaking. This position has been adopted by at least two American decisions,[157] and by one leading American scholar:[158]

> The identification of the carrier issue comes up primarily as a threshold problem of who can be sued on the bill of lading by cargo interests. *Agency princi-*

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[154] *Ibid.*, F.C. at 438, N.R. at 151.

[155] *Ibid.*, F.C. at 438-40, N.R. at 151-52.

[156] [1998] S.C.C.A. No. 287, online: QL (SCCA).

[157] See *TradeArbed, supra* note 42, where the Court found that a practical test should be used to determine *COGSA* carriers, being those entities involved and engaged in the actual transport of goods and that agency law principles are inapplicable; and *Hyundai, supra* note 42. See also other decisions cited at *supra* note 42.

[158] Schoenbaum, *supra* note 43, vol. 2 at 42-43, s. 10-9, and 184-88, s. 11-7.

> *ples are inappropriate to resolve the matter at this stage.* The tangle of relationships between the parties is unclear, and the bill of lading was no doubt issued without significant negotiations between the shipper and any other party. The doctrine that all parties involved in the carriage of goods are COGSA carriers eliminates the initial skirmishing over the identity of the carrier issue and brings all relevant parties before the court where the ultimate allocation of responsibility for the loss can be ascertained.[159]

Second, even if the principles of the law of agency *do* apply in determining who is the carrier, the time or voyage charterer, contrary to the indications on the bill of lading that it acts as "agents" or "as agents only", is neither in fact nor in law the agent of the shipowner.

Many of the hallmarks of the legal relationship of agency are absent from the charterer-shipowner relationship—*e.g.* the agent owes his principal fiduciary duties,[160] must keep his personal property separate from that of his principal,[161] is bound to pay over or account for money he has received to the use of his principal at the latter's request,[162] and, though entitled to a fair remuneration,[163] should not make a secret profit or acquire a benefit for himself out of the underlying transaction.[164] In the charterer-shipowner relationship, however, one would be hard-pressed to identify any actual fiduciary duties owed by the charterer to the shipowner. Moreover, if the time charterer is the owner's agent, then it should only be entitled to collect freight from third parties (shippers and consignees) *on behalf* of the shipowner, and *not in its own name.*

In *The Grace Liberty II*,[165] where the Singapore Court of Appeal upheld the identity-of-carrier clause as mere confirmation of the common law rule that the charterer acts as agent for the shipowner, the Court also found that the charterer, and *not* the shipowner, was entitled to collect freight, notwithstanding its own rul-

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[159] *Ibid.* at 187 [emphasis added].

[160] See F.M.B. Reynolds, ed., *Bowstead and Reynolds on Agency*, 16th ed. (London: Sweet & Maxwell, 1996) at 196, art. 45, para. 6-037 [hereinafter *Bowstead*]: "[I]t is submitted that the fact that an agent in the strictest sense of the word has a power to alter his principal's legal position makes it appropriate and salutary to regard the fiduciary duty as a typical feature of the paradigm agency relationship." See also G.H.L. Fridman, The *Law of Agency*, 7th ed. (Toronto: Butterworths, 1996) at 174-75 where the author states that, irrespective of the source of the agency relationship, "a complex of duties," "equitable in character" attaches to the agent "once the relationship of principal and agent exists." See also B.S. Markesinis & R.J.C. Munday, *An Outline of the Law of Agency*, 3d ed. (London: Butterworths, 1992) at c. 3.

[161] *Bowstead, ibid.* at 253, art. 51, para. 6-088; Fridman, *ibid.* at 173-74; and Markesinis & Munday, *ibid.* at 121-22.

[162] *Bowstead, ibid.* at 259, art. 51, para. 6-097; Fridman, *ibid.* at 173; and Markesinis & Munday, *ibid.*

[163] *Bowstead, ibid.* at 277, art. 57, para. 7-004 (regarding reasonable remuneration) and at 325, art. 64, para. 7-056 (regarding reimbursement of expenses and indemnity for liability); Fridman, *ibid.* at 189; and Markesinis & Munday, *ibid.* at 123ff.

[164] *Bowstead, ibid.* at 239, art. 49, para. 6-078; Fridman, *ibid.* at 181; and Markesinis & Munday, *ibid.* at 116-21.

[165] *Supra* note 63.

ing that the owner was the sole contracting carrier. The Court justified this conclusion on the basis that the charterparty "derogated" the right to collect freight to the charterer under an "implied agreement" with the shipowner.[166] As already stated, this decision leads to the questionable and unjust proposition that time (and possibly also voyage) charterers can enjoy the rights and benefits of carriers under the Hague/Visby Rules, without assuming any of the correlative obligations and responsibilities.

Third, the demise/identity-of-carrier clause also contradicts the appearance of the charterer's name on the head of the bill of lading and contradicts the carrier's public notices of availability of the vessel and the booking note. The bill of lading, as is commonly recognized, is only the "best evidence" of the contract of carriage as against the shipper or other party who contracted with the carrier; it is not the contract *per se*.[167] The contract is really the bill of lading, the booking note, the tariff, and the advertisements taken together, which are all issued by the charterer. Oral and written communications between the carrier and the party contracting with him may also be taken into account, as well as, in some cases, the customs of the port.

Fourth, in most cases, the owner and the charterer share the duties of a carrier. The charterer is usually responsible for loading and discharging (and any deviations), while the owner is responsible for the care of the cargo during the voyage. In other words, performance of the duties of the carrier under the Hague and Hague/Visby Rules really entails a joint venture between owner and charterer, who together act as the "carrier". They should, therefore, be seen as jointly and severally (or "solidarily") liable to third parties, a reality incompatible with the demise clause. Reed J. fully endorsed this view in *The Lara S*, and one can only speculate as to why and how the Federal Court could have ignored or minimized that endorsement as it did in *Union Carbide* and in *Jian Sheng*.

Fifth, joint and several, or "solidary", liability is generally found in a mandatory provision of a law that is "of public order"—*i.e.*, a law which cannot be contracted out of. This is usually set out in civil codes,[168] statutes,[169] and rules of civil

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[166] *Ibid.* at 988.

[167] See *The Ardennes* (1950), [1951] 1 K.B. 55 at 59, [1950] 2 All E.R. 517 at 519-20, 84 Ll. L. Rep. 340 at 344; and *Cho Yang Shipping Co.* v. *Coral (UK) Ltd.*, [1997] 2 Lloyd's Rep. 641 at 643 (C.A.), online: LEXIS (ENGGEN/CASES).

[168] See *e.g.* art. 2118 C.C.Q. which stipulates that, in a contract of enterprise—namely, a contract of construction or other such contract—the architect, engineer, contractor, and sub-contractor (with respect to the work performed by him) are all jointly and severally, or "solidarily", liable to the client for loss of the work occurring within five years after its completion. This could be called a "joint venture" to build an immovable, and there need not be a "meeting of the minds" to that effect in order for these parties to be held jointly and severally liable. They are thus solidarily liable by operation of the law, and this provision must be considered as being of public order.

[169] See *e.g.* Ontario's *Construction Lien Act*, R.S.O. 1990, c. C-30, s. 13(3) which states that certain corporate trustees found to be liable or admitting liability in respect of statutory obligations under the statute will be jointly and severally liable.

procedure. We fail to see the logic in the statement made by Nadon J. that there cannot be a joint venture or joint and several liability between two or more debtors unless there has been a "meeting of the minds" to that effect. Any agreement between a charterer and shipowner that there would *not* be joint and several liability between them—which is the effect of upholding the demise clause—should not be *opposable* to third parties, such as shippers and consignees. The shipper (who frequently is unaware that the time charterer is not the shipowner) should be able to sue the charterer alone for the entire amount of its provable damages because the bill of lading is usually issued on the charterer's form, the charterer undertakes actual responsibilities under the contract of carriage, and because the charterer profits from the underlying transaction. The time charterer always has the option of seeking contribution and indemnity from the shipowner.[170]

According to the reasoning in *Union Carbide* and *Jian Sheng*, the shipper or consignee will simply be out of luck should it suffer damages and the shipowner is insolvent or has gone bankrupt, because the demise or identity-of-carrier clause was "freely adhered to by the parties."[171] This finding shifts the risk of the shipowner's insolvency or untraceability from the charterer to the third-party shipper or consignee and, in effect, allows 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.

Sixth and finally, the effect of the demise and identity-of-carrier clauses is that the time (and possibly the voyage) charterer may avoid its liability under the contract of carriage merely by declaring itself in the bill of lading to be the shipowner's agent and not the carrier. Article 3(8) of the Hague/Visby Rules specifically prohibits a party from relieving or lessening its liability under a contract of carriage except as permitted by the convention itself. Because the Hague/Visby Rules are of public order, the demise and identity-of-carrier clauses are null and void inasmuch as they constitute illegal attempts by charterers to limit or exclude their liability contrary to the Rules.

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[170] See Schoenbaum, *supra* note 43, vol. 2 at 188:

> The burden of ascertaining the relationships of the various charterers and owners *inter se* should fall upon the charterers and owners. Second, the responsibilities and duties of the owners and charterers *inter se* may be determined in the context of indemnification and contribution pursuant to the terms of the charter party. Clauses in a charter party that identify the carrier or that apportion the losses incurred to third parties should not control the ability of the third party to recover, but there is no reason why they should not be given effect as between the charterer and the owner.

[171] We are not alone in questioning the accuracy of the statement that all bills of lading are "freely adhered to" by the parties. Schoenbaum, *ibid.* at 187, obviously agrees: "The tangle of relationships between the parties is unclear, *and the bill of lading was no doubt issued without significant negotiations between the shipper and any other party*" [emphasis added].

VIII. Disadvantages for the Carrier Resulting From the Demise/ Identity-of-Carrier Clause

The demise/identity-of-carrier clause is not always beneficial to the charterer. For example, because it declares that the charterer is only the agent of the owner, the freight could be paid directly to the vessel owner, while the charterer could be precluded from retaining cargo or claiming a lien on cargo for freight.[172]

Since the clause purports to make the charterer purely an agent of the shipowner, writs or other originating processes directed at the owner could be validly served on the charterer. In *Maritime Insurance* v. *The Gretafield*,[173] for example, cargo interests sued the vessel and its owner. The writ was served on the charterer. When the owner objected to such service on the ground that the charterer was not its agent, cargo interests moved to add the charterer as defendant. The Court dismissed the motion, relying on the demise clause. The Court added that if a motion were made to have the service of the writ set aside, the motion would be dismissed because the conduct of the charterer, as well as the heading of the bill of lading, gave the plaintiff ample justification to believe that the charterer was the agent of the owner and hence authorized to receive service on the owner's behalf.[174] As to costs, the Court noted:

> [U]nder the circumstances of this case where I believe defendants are attempting to raise a technical issue for the purpose of avoiding a settlement or litigation of the issue on the merits by the proper parties thereto who have full knowledge of the claim and are capable of dealing with same, no costs will be allowed to defendants on dismissal of plaintiff's motion.[175]

Finally, the identity-of-carrier clause specifically names the owner as carrier, something not necessarily beneficial to the owner.[176] *The Berkshire*,[177] *Paterson*,[178] and *Blanchard Lumber*[179] are all examples of shipowners being held liable as carrier, to their chagrin.

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[172] See *The Okehampton*, [1913] P. 54, rev'd [1913] P. 173, 110 L.T. 130 (C.A.), referred to in *The Venezuela*, *supra* note 98 at 395. See, however, *The Grace Liberty II*, *supra* note 63, where the Singapore Court of Appeal held that, despite the demise clause which purported to make the charterer the agent of the shipowner, the charterer still had the right to collect freight.

[173] [1973] F.C. 281 (T.D.), online: QL (CJ) [hereinafter *The Gretafield*]. See also R. Colinvaux, ed., *Carver's Carriage by Sea*, 13th ed. (London: Stevens & Sons, 1982) at 527, s. 715 where the benefit of the demise clause to the charterer is questioned.

[174] *The Gretafield*, *ibid.* at 283.

[175] *Ibid.* at 284.

[176] *The Vikfrost*, *supra* note 47. See also Trib. com. Paris, 13 February 1973, DMF 1973.681.

[177] *Supra* note 7 at 189.

[178] *Supra* note 94.

[179] *Supra* note 20, F. Supp. at 869, Lloyd's Rep. at 447.

IX. Is the Demise/Identity-of-Carrier Clause Necessary Today?

Historically, the demise clause was included in bills of lading in the United Kingdom[180] and in the United States[181] because only shipowners and, in the United States, demise charterers—to the exclusion of time and voyage charterers—were able to benefit from the statutory limitation of shipowners' liability. Thus, when a time or voyage charterer engaged its liability, it did so to an unlimited extent.

Whether such clauses were just or valid is now a moot point, because today charterers in most jurisdictions may limit their liability under the 1957 *Limitation Convention*[182] and the 1976 *Convention on Limitation of Liability for Maritime Claims*,[183] as well as under national legislation, such as the United Kingdom's *Merchant Shipping Act 1995*[184] and the *Canada Shipping Act*.[185] Thus, charterers may no longer claim that they require the demise clause as insulation against possibily unlimited liability, except under American law,[186] where in any event, the demise and identity-of-carrier clauses have been usually invalidated as incompatible with the U.S. *COGSA*.

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[180] For a good review of the history of the demise clause and why it came to be inserted in bills of lading in the United Kingdom, see *The Sun Diamond Voyage 19*, *supra* note 54. See also Lord Roskill, "The Demise Clause" (1990) 106 L.Q. Rev. 403, discussed more fully at *infra* note 209.

[181] Schoenbaum, *supra* note 43, vol. 2 at 54-55, s. 10-11.

[182] *Supra* note 73.

[183] 19 November 1976, in force 1 December 1986, art. 1(2) [hereinafter 1976 *Limitation Convention*]. The Convention may be found in Comité Maritime International, *supra* note 73 at doc. 28, and in Schoenbaum, *supra* note 43, vol. 3 at 922.

[184] (U.K.), 1995, c. 21, s. 185 and Schedule 7, Part 1, giving force of law in the United Kingdom to the 1976 *Limitation Convention*, *ibid.* Art. 1(2) of the Convention extends the right to limit liability to charterers and operators: see Boyd, Burrows & Foxton, *supra* note 98 at 82, n. 92.

[185] R.S.C. 1985, c. S-9, as am. by *An Act to amend the Canada Shipping Act (Maritime Liability)*, S.C. 1998, c. 6, s. 2 (in force 10 August 1998), s. 576 (definition of "shipowner") and art. 1(2) of Schedule 6, Part 1, being the 1976 *Limitation Convention*, *ibid.*, as amended by its 1996 Protocol adopted at London, on May 2, 1996 (not yet in force), which Schedule was added to the *Canada Shipping Act* by *An Act to amend the Canada Shipping Act (Maritime Liability)*.

[186] The United States *Limitation of Shipowners' Liability Act of 1851*, 46 U.S.C. Appx. § 181-189. In particular, § 186 only allows vessel owners and demise charterers, but not time or voyage charterers nor operators, to limit their liability in limitation proceedings. See *e.g. Diamond Steamship Transportation* v. *Peoples Savings Bank and Trust*, 152 F.2d 916 at 921, 1946 AMC 128 at 136 (4th Cir. 1945); and *Jones & Laughlin Steel* v. *Vang*, 73 F.2d 88 at 91, 1934 AMC 1303 at 1308 (3d Cir. 1934), cert. denied 249 U.S. 735 (1935).

X. The Future Demise of the Demise/Identity-of-Carrier Clause?

A. *The 1978 Hamburg Rules*

The Hamburg Rules[187] have solved the problem of the demise/identity-of-carrier clause. Article 1(1) defines "carrier" (*i.e.*, contracting carrier) to mean "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper." Article 1(2) defines "actual carrier" to mean "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 entrusted." Article 10(1) makes the carrier liable for the entire carriage, even where the performance of the carriage or part of it has been entrusted to an actual carrier. Under article 10(2), the actual carrier is liable for the carriage he actually performs. By article 10(4), where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several. Under article 15(1)(c), the bill of lading must also name the carrier and his principal place of business.[188]

Article 14(2) of the Hamburg Rules also provides 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. The Hamburg Rules thus establish a rebuttable presumption that the contracting carrier (often the time or voyage charterer who issues the bill) is bound under a bill of lading signed by the master or for him by an authorized person. This weakens the traditional concept underlying the demise and identity-of-carrier clauses, that a bill of lading signed by or for the master binds only the shipowner and not the charterer. Moreover, where the shipowner issues the bill as the contracting carrier, the time or voyage charterer would still be jointly and severally liable together with the owner under the Hamburg Rules, to the extent to which the charterer performs at least part of the duties of carriage as an "actual carrier". Under article 23(1), the Hamburg Rules also prohibit stipulations in any contract of carriage which derogate, directly or indirectly, from its provisions.

B. *The 1991* Civil Code of the Netherlands

The recently enacted Book 8 of the *Civil Code of the Netherlands* (*i.e.*, the *Burgerlijk Wetboek*) on "Means of Traffic and Transport"[189] provides an interesting

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[187] *Supra* note 5.

[188] See also art. 23A(i) of the Uniform Customs and Practice for Documentary Credits, 1993 Revision, being Publication No. 500 of the International Chamber of Commerce ("UCP 500"), effective January 1, 1994. Art. 23A(i) of UCP 500 requires that ocean bills of lading covering port-to-port shipments identify the carrier on their face and that such bills be signed by either the identified carrier, the master, or a named agent of the carrier or of the master.

[189] Most of the provisions of Book 8 are in force as of April 1, 1991. An excellent trilingual (Dutch, French, and English) edition of Book 8 has been published: see P.P.C. Haanappel & E. Mackaay, eds., *New Netherlands Civil Code, Book 8: Means of Traffic and Transport* (The Hague: Kluwer, 1995).

and effective solution to the the problem of the demise and identity-of-carrier clauses. The first two paragraphs of article 461 in Book 8 provide:

> (1) Without prejudice to the remaining paragraphs of this article, the person who signed the bill of lading, the person for whom another person signed, as well as the person whose form was used for the bill of lading are deemed to be carriers under the bill of lading.
>
> (2) If the captain signed the bill of lading or another person for him, that time- or voyage-charterer who is the carrier in the last contract in the chain of contracts of operation as referred to in Section 1 of Title 5, is deemed to be the carrier under the bill of lading in addition to the persons mentioned in the first paragraph. If the vessel has been leased under a bare-boat charter, the last bare-boat charterer too is deemed to be the carrier under the bill of lading, in addition to this possible time- or voyage-charterer. If the vessel has not been leased under a bare-boat charter, the shipowner too is deemed to be carrier under the bill of lading, in addition to this possible time- or voyage-charterer.

Paragraph 5 of article 461 stipulates that any derogation from this article is null. Furthermore, article 442 provides that if in applying article 461 several persons must be considered as "carrier" under the bill of lading, they are "solidarily" (*i.e.*, jointly and severally) liable to the holder of the bill of lading.

Article 442 on carriage of goods by sea thus incorporates the notion of joint and several liability between the "carrier" and the "actual carrier" as found in the Hamburg Rules.[190] Article 461 goes even further, however, in stipulating that any person who signs a bill of lading, or whose form is used in issuing it, is deemed to be a carrier, and that a time or voyage charterer who is the last party in a chain of contracts will also be deemed to be a carrier. Thus, there may clearly be more than one carrier, and any derogation from these provisions will be invalidated under paragraph 5 of article 461. To the extent that the demise or identity-of-carrier clause purports to deny that the charterer is a carrier—in particular when included in a bill of lading issued on the time or voyage charterer's own form—it will hence be invalid under Dutch law.

C. *Canada's 1993* Carriage of Goods by Water Act

Canada adopted the Hague/Visby Rules and the Hamburg Rules in 1993, but did not put the latter into force.[191] On or before December 31, 1999 (and every five years thereafter), the federal Minister of Transport must consider whether the Hamburg Rules should replace the Hague/Visby Rules in Canada and must report to both Houses of Parliament the results of that consideration. The Parliamentary committee on trans-

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[190] *Supra* note 5, art. 10(4).

[191] The Hague/Visby Rules are annexed as Schedule 1 to the *Carriage of Goods by Water Act*, *supra* note 18. The Hamburg Rules are annexed as Schedule 2 to the Act. S. 3(b) of the Act provides that the Hague/Visby Rules may be replaced by the Hamburg Rules "at a later date." Part 2 of the Act (ss. 8-10), which provides that the Hamburg Rules will be in force in Canada, is not itself in force in Canada, and thus Parliament has not yet acted to replace the Hague/Visby Rules with the Hamburg Rules.

port is to review the Minister's report and report to the House of Commons on the advisability of the replacement.[192] The discussion should be interesting.

If the courts of Canada cannot recognize that a bill of lading for goods laden aboard a chartered vessel normally evidences a contract of carriage between the shipper of those goods and *both* the shipowner *and* the charterer, and that an identity of carrier or demise clause in the bill amounts to a thinly disguised non-responsibility clause repugnant to the Hague/Visby Rules, then Canada should adopt the Hamburg Rules, where the identity of all the carriers involved is clearly recognized and their resulting joint and several liability is expressly established, without any "escape hatch" being tolerated.

D. The 1994 Nordic Maritime Code

The Nordic countries—Denmark, Finland, Norway, and Sweden—adopted a common Maritime Code which came into force on October 1, 1994.[193] This "Nordic Maritime Code" contains a mixture of Hague/Visby and Hamburg provisions. In respect of the identity of the carrier, the Code, much like the Hamburg Rules, defines "carrier" (*i.e.*, contracting carrier) as the party who concludes the contract of carriage of goods by sea with the shipper, and "actual carrier" (or "subcarrier") as the party who has been entrusted by the carrier to perform the carriage or part of it.[194] The carrier remains responsible for the whole of the carriage, even where it is performed wholly or partly by an actual carrier.[195] The actual carrier is liable for the part of the carriage performed by him.[196] Where both the carrier and the actual carrier are liable, their liability is joint and several.[197] Moreover, the bill of lading must identify the carrier and his principal place of business.[198]

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[192] *Carriage of Goods by Water Act*, *ibid.*, ss. 4, 5. A similar five-year review of the advisability of replacing the Hague/Visby Rules with the Hamburg Rules is to be conducted in Australia under s. 2A of its *Carriage of Goods by Sea Act 1991* (Cth. Aus.) No. 160 of 1991, as am. by *Carriage of Goods by Sea Amendment Act 1997* (Cth. Aus.) No. 123 of 1997, Schedule 1, s. 2.

[193] The structure of the Finnish and Swedish versions of the Code are identical, with the provisions divided into chapters and sections. The carriage of goods by sea is treated in Chapter 13, ss. 1-61. The Danish and Norwegian versions of the Code are identical, with the provisons divided into sections. The carriage of goods by sea is treated at ss. 251-311 inclusive. A bilingual Swedish/English version of the Swedish Maritime Code was published by Juristförlaget at Stockholm in 1995.

[194] Finnish & Swedish Maritime Codes, c. 13, s. 1, and Danish & Norwegian Maritime Codes, s. 251, which provisions are similar to the Hamburg Rules, *supra* note 5, art. 1(1), 1(2), respectively.

[195] Finnish & Swedish Maritime Codes, c. 13, s. 35 (first para.), and Danish & Norwegian Maritime Codes, s. 285 (first para.), which provisions are similar to the Hamburg Rules, *ibid.*, art. 10(1).

[196] Finnish & Swedish Maritime Codes, c. 13, s. 36 (first para.), and Danish & Norwegian Maritime Codes, s. 286 (first para.), which provisions are similar to the Hamburg Rules, *ibid.*, art. 10(2).

[197] Finnish & Swedish Martime Codes, c. 13, s. 37 (first para.), and Danish & Norwegian Maritime Codes, s. 287 (first para.), which provisions are similar to the Hamburg Rules, *ibid.*, art. 10(4).

[198] Finnish & Swedish Maritime Codes, c. 13, s. 46 (first para., subpara. 3), and Danish & Norwegian Maritime Codes, s. 296 (first para., subpara. 3), which provisions are similar to the Hamburg Rules, *ibid.*, art. 15(1)(c).

Like article 14(2) of the Hamburg Rules, the Nordic Maritime Code also provides that a bill of lading signed by the master of the carrying vessel is deemed to have been signed on behalf of the carrier.[199] Thus, where a bill of lading is signed by the master, or for him by a duly authorized party, there is a rebuttable presumption that the carrier (*i.e.*, the contracting carrier) is bound. There is no longer any presumption that because the master is the employee of the shipowner, the bill of lading signed by or for the master binds only the owner.[200] The contracting carrier will frequently be the time or voyage charterer who issues the bill. He will therefore be deemed bound by virtue of the master's signature on the bill. The fact that the master is the owner's employee will not be effective in rebutting that presumption.[201] Even if the bill is issued by the shipowner, however, the time or voyage charterer would probably qualify as an "actual carrier" by virtue of the actual duties he performs in respect of the carriage operations, and would therefore be liable jointly and severally with the shipowner. The Nordic Maritime Code also renders void any provision in a contract of carriage to the extent that it diverges from the Code's provisions on carriage of goods.[202]

E. The 1999 Draft United States Senate COGSA

The proposed *Carriage of Goods by Sea Act of 1999*, under consideration by the United States Senate as a potential replacement for the U.S. *COGSA* of 1936,[203] also provides definitions for "contracting carrier"[204] and "performing carrier".[205] A third type of carrier, the "ocean carrier", is also defined to mean a performing carrier that

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[199] Finnish & Swedish Maritime Codes, c. 13, s. 45, and Danish & Norwegian Maritime Codes, s. 295.

[200] The interpretation that a bill of lading signed for or on behalf of the master binds only the shipowner was laid down by the Norwegian Supreme Court in 1955 in *The Lysaker*, N.M. Cases 1955.81 and by the Swedish Supreme Court in 1960 in *The Lulu*, N.M. Cases 1960.349. The signature of the bill ceased to be decisive as to the carrier's identity under amendments made to the former Nordic Maritime Code in the 1970s and 1980s, giving effect to the Hague/Visby Rules. The identity-of-carrier clause, which confirms the interpretation given in *The Lysaker* and *The Lulu*, was in fact held null and void by the Maritime and Commercial Court of Denmark in *The Anthony Rainbow*, N.M. Cases 1992.132, although the Danish Supreme Court did not deal with the point on appeal. See H. Honka, "Who is the Carrier? Old Question, New Solutions" in *8th Axel Ax:son Johnson Colloquium on Maritime Law, Hässelby, Sweden, 28-30 September 1977* (Stockholm: Swedish Maritime Law Association, 1998) 70 at 73, 75. Honka points out that the "Hamburg-based rule" of the 1994 Nordic Maritime Code that the bill of lading signed by the master is signed for the carrier, would result in a different decision were *The Lysaker* and *The Lulu* to be decided today (*ibid.* at 78).

[201] Honka, *ibid.* at 78.

[202] Finnish & Swedish Maritime Codes, c. 13, s. 4 (first para.), and Danish & Norwegian Maritime Codes, s. 254 (first para.).

[203] The draft *Carriage of Goods by Sea Act of 1999* referred to here is the sixth redraft by the United States Senate (dated September 24, 1999) of a proposed new law which was approved by the United States Maritime Law Association at its Annual General Meeting in May 1996 [hereinafter Draft Senate *COGSA* 1999].

[204] Draft Senate *COGSA* 1999, *ibid.*, s. 2(a)(2).

[205] *Ibid.*, s. 2(a)(3), although this definition is arguably too wide.

owns, operates, or charters a ship used in the carriage of goods by sea.[206] Section 5(b) provides for the responsibilities and liability of contracting carriers, and section 5(c), for that of performing carriers. Unfortunately, however, their joint and several liability is not expressly stipulated as it is under the Hamburg Rules and the Nordic Maritime Code.

Section 7(h)(1) prohibits any clause in a contract of carriage relieving a carrier or ship from liability or reducing such lialbility otherwise than as provided in the Act, and declaring such a provision "unenforceable as contrary to public policy." Demise and identity-of-carrier clauses would probably fall afoul of section 7(h)(1) of the Draft Senate *COGSA* of 1999, as drafted, as they have in most decisions rendered under the existing section 3(8) of U.S. *COGSA* of 1936.

Conclusion

The conclusion of the foregoing analysis is that the demise clause was a World War II era provision, designed to protect the charterer who could not limit its liability under American law,[207] the 1924 *Limitation Convention*,[208] or United Kingdom law.[209] With the 1957 and 1976 *Limitation Conventions*, which protect charterers, however, the demise clause is no longer necessary. Today the clause is purely a subterfuge of charterer/carriers who use it as a non-responsibility clause, despite their role and du-

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[206] *Ibid.*, s. 2(a)(4).

[207] See the United States *Limitation of Shipowners' Liability Act of 1851*, *supra* note 186, § 183(a)ff. See generally W. Tetley, *International Conflict of Laws: Common, Civil and Maritime* (Cowansville, Qc.: Yvon Blais, 1994) at 517-18.

[208] *International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Vessels*, 25 August 1924, 120 L.N.T.S. 123, adopted at Brussels, and in force 2 June 1931. The Convention can be found in Comité Maritime International, *supra* note 73 at doc. 7.

[209] On the particular circumstances in which the demise clause was first drafted in England during World War II to address the problem of time charterers of ships under the "Liner Requisition Scheme" being unable to limit their liability, see Lord Roskill, *supra* note 180 at 406:

> But as so often happens, once a clause appears in a bill of lading there seems to be no rule against perpetuities which prevents its continued appearance long after it has ceased to serve any useful purpose. So far as I am aware, the clause is still there. It is quite unnecessary and has been unnecessary ever since 1958, as *Scrutton* points out.

See also F.M.B. Reynolds, "Time Charterparties: Is the Owner the Carrier?" [1990] II Diritto Marittimo 1083 at 1092, who also notes that the demise clause "appears to be obsolete." The clause became unnecessary in the United Kingdom with the enactment of the *Merchant Shipping (Liability of Shipowners and Others) Act*, 1958 (U.K.), 6 & 7 Eliz. II, c. 62, giving effect to the 1957 *Limitation Convention*, *supra* note 73, which extended the right to limit liability to all types of charterers, including time charterers. The clause remains unnecessary under the 1976 *Limitation Convention*, *supra* note 183, which now has the force of law in the United Kingdom pursuant to the *Merchant Shipping Act 1995*, *supra* note 184, s. 185, Schedule 7, Part I, and which also permits all charterers to limit their liability.

ties as *de facto* carriers under the Hague and Hague/Visby Rules and the public order character of those Rules.

The recent Canadian decisions upholding the clause are lamentable regressions to a *laissez-faire* attitude which, in the name of freedom of contract, in effect permits the evasion of the mandatory international regime of carriage of goods by sea which Canada adopted in 1993, *i.e.*, the Hague/Visby Rules. The decisions also assume that there can be only one carrier under the law and that that person is the person who, on his own bill of lading contract, says he is the only carrier.

It is to be hoped that the Supreme Court of Canada will have the occasion to sound the final death-knell of the demise/identity of carrier clause, or else that the Parliament of Canada will take the initiative of giving effect to the Hamburg Rules in Canada, thus establishing once and for all the joint and several liability of both shipowners and time and voyage charterers for the carriage of goods by water under Canadian maritime law.[210]

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[210] The demise and identity-of-carrier clauses were unnecessary from the time Canada enacted legislation based on the 1957 *Limitation Convention, ibid.*, and they remain unnecessary now that Canada has enacted the 1976 *Limitation Convention, ibid.*, by the *Act to amend the Canada Shipping Act (Maritime Liability)*, the relevant portion of which came into force in Canada on August 10, 1998: see *supra* note 185.