WHO IS CARRIER? Shipowner or Charterer

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IMPORTANT NOTE: READERS ARE CAUTIONED THAT THE LAW ON THIS ISSUE HAS RECENTLY UNDERGONE SIGNIFICANT CHANGES. AS A RESULT OF RECENT DEVELOPMENTS IT IS NOW MUCH LESS LIKELY THAT A TIME CHARTERER WILL BE HELD TO BE A CARRIER. REVIEW THE CASES SUMMARIES UNDER CARRIAGE OF GOODS.

THE NATURE OF THE PROBLEM

In all cargo cases one of the first things the person handling the claim must do is decide who is potentially liable as a carrier of the goods. This issue arises because bills of lading often do not identify the carrier

(usually they merely say ABC Line and sometimes even this is lacking) and the Hague and Hague Visby Rules do not specifically define who the carrier is. The Rules merely provide that the term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper."

This is not a particularly clear or exhaustive definition. Under this definition the "carrier" could be the owner or the charterer or both. The use of the word "includes" also implies the carrier could be some other person who is neither owner or charterer.

This is not just an issue that concerns lawyers. It is something that should be of concern to everyone involved with cargo claims. The answer to the question, Who is the carrier?, determines who should be put on notice of a claim and from whom suit time extensions should be obtained. More than one otherwise good cargo claim has been defeated by reason that a suit time extension was obtained from the wrong person.

Where the carrying vessel is not under charter and the bill of lading is on the vessel owner's form, the "carrier" will almost certainly be the vessel owner and the balance of this paper can be ignored. However, where the carrying vessel is under charter and/or the bill of lading is on someone else's form (or is signed by or on behalf of someone other than the owner) there

will be an issue as to who is liable as the carrier.

THE GENERAL RULE

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

LIABILITY OF THE SHIPOWNER

The shipowner is almost always liable as a carrier under Anglo-Canadian law provided there is no demise charter of the ship. In Paterson Steamships Ltd. v Aluminum Co. of Canada [1951] SCR 852, Locke J. said at p.860:

> The rule applicable is stated by Channel J. in Wehner v Dene Steam Shipping Co. [1905] 2 K.B. 92 at p. 98, as being that in ordinary cases, where the charter-party does not amount to a demise of the ship and possession remains with the owner, the contract is

made not with the charterer but with the owner.

In the case of Canastrand Industries v The "Lara S", [1993] 2 F.C. 553,affirmed on appeal, Madame Justice Reed said it was "clear" and that there was "no doubt" that under Canadian Law the shipowner was liable as a carrier where the ship is not under demise charter.

LIABILITY OF THE CHARTERER

Where a ship is under demise charter it is equally clear that the demise charterer is liable as carrier. Where a ship is under a Time or voyage charter, however, the situation is less clear. At times the shipowner has been held liable and at other times the charterer has been liable. The earlier cases seem to indicate that in the usual case under a time charter the shipowner will be the carrier. The more recent cases, however, indicate that the carrier will usually be the charterer if not both the charterer and owner.

Patterson Steamships Limited v Aluminum Co. of Canada, [1951] S.C.R. 852, and Aris Steamship Co. v Associated Metals and Minerals Corp., (1980) 110 DLR (3d) 1, are examples of the earlier cases where the Supreme Court of Canada held that the shipowners were liable as carriers. Although there is dicta in

these cases that indicate the charterer might under some circumstances be liable as a carrier, the overall implication of the judgments is that this will rarely be the case where the bills of lading are signed by the Master. In Paterson Rand J. said at p. 854:

> Under such a charter (a time charter), and in the absence of an undertaking on the part of the charterer, the owner remains the carrier for the shipper, and in issuing the bills of lading the captain acts as his agent.

Further, at p. 855 he said:

> It was pointed out that the question of the person undertaking the carriage of the goods for the shipper was one of fact: but that in the normal practice under a time charter, that undertaking was by the captain for the owner. (emphasis added)

In Aris Steamship Ritchie J. said at p. 5:

> ...both the captain and the charterer were acting as agents for the owner in fulfilling the terms of the contract evidenced by the bill of lading.

The Federal Court of Appeal subsequently considered this issue in Cormorant Bulk Carriers Inc. v Canficorp (1984) 54 NR 66, and CN Marine Inc. v Carling O'Keefe Breweries [1990] 1 F.C. 483. In Cormorant the Court of Appeal held that the charterer was the carrier notwithstanding the presence of a demise clause (a clause stipulating the shipowner is the carrier) in the bill of lading. Some of the important facts that led the court to this conclusion were: the booking note identified the charterer as carrier (although it also contained a demise clause); " freight" was payable to the charterer; the charterer's name was prominently displayed on the bill of lading; the time charterer which was on the NYPE form assigned certain responsibilities to the charterer which are normally carried out by the "carrier"; and the bill of lading was signed for the Master and "for and on behalf of" the charterer.

In CN Marine Inc. v Carling O'Keefe, supra, the Federal Court of Appeal again held that the time charterer was a carrier and again it came to this conclusion notwithstanding the existence of a demise clause in the bill of lading. The important factors which led the court to this conclusion were: the bill of lading was signed by the time charterer's agent and this signature was stated to be on behalf the time charterer not the Master; the shipper was not aware of the name of the vessel that would be carrying the cargo and the space on the bill of lading for identifying the ship had been left blank; the time charterer was

itself a vessel owner; and the time charterer acted in part as a carrier in the loading and stowing of the cargo.

A point that was argued but not finally decided in CN Marine Inc. v Carling O'Keefe is whether there can be more than one carrier, i.e.. can both the charterer and owner be liable as carriers. On this point Mr. Justice Stone said at p. 501:

> As I have already decided that the time charterer contracted for the carriage of the goods in its personal capacity rather than as agent for the shipowners, I do not see how the latter could be viewed under that contract as a "carrier", for it is plain from Article 1(a) of the Hague Rules that the owner or charterer of a ship can be a "carrier" only if he "enters into a contract of carriage with a shipper". If so then their liability as a carrier would have to rest on some other footing. It is unnecessary and, perhaps, even undesirable to say anything more on the point for purposes of this appeal. 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.

The Federal Court of Appeal again considered the issue of the identity of the carrier in Lantic Sugar Ltd. v Blue Tower Trading Corp., [1993] F.C.J. No. 1120. This was an unusual case in which the time charterer had an ongoing contractual relationship with the shipper whereby it agreed to nominate vessels for the carriage of sugar. The contract specifically recognized that the cargo might be carried in ships under charter as happened in this case. The bill of lading was signed by the Master. There was no evidence that the Master was authorized by the time charterer to sign the bill of Lading and no evidence that the time charterer participated in any way with the issuing of the bill of lading. Under these circumstances the Court of Appeal relied on the presumption that in signing the bills of lading the Master acted on behalf of the vessel owner only.

The Court of Appeal in Lantic Sugar again made reference to the issue of whether both owners and charterers could be liable as carriers but did not decide the point. Mr. Justice MacGuigan referred to what he called the Tetley position (that carriage of goods is a joint enterprise and owners and charterers should be jointly and severally liable as carriers) and said:

In the case at bar the appellant did not argue the latest position of Professor Tetley and went only so far as to argue that owners and charterers "frequently" undertake to share the responsibilities of a carrier within the meaning of COGWA. In any event, despite the possible merits from the policy point of view of treating owners and charterers alike, the Tetley position was not argued before us, and the law, as established by this Court to this point, makes the question of who is a carrier a question of fact dependent upon the documents and circumstances in a particular case.

The joint and several liability of owners and charterers was specifically addressed in Canastrand Industries Ltd. v. the "Lara S", [1993] 2 F.C.R. 553, affirmed [1994] F.C.J No. 1652. In this case the bill of lading was on the Charterer's form and had at the top the charterer's business style "Kimberly Line". The bill of lading was signed "Kimberly Line" by the charterer's port agent "For the Master". The port agent had written authorization from the Master to sign the bills of lading on his behalf. On these facts the trial Judge found the charterer was in fact a contracting party to the bill of lading and liable as a carrier. She further found that under Canadian law because the vessel was not under time charter and the bills of lading were signed on behalf the Master that the shipowner was liable as a carrier. (She also found that a third company related to the charterer who made the

booking arrangements and also carried on business under the style "Kimberly Line "was a carrier.) She referred to Professor Tetley's thesis that both the charterer and owner should be jointly liable as carriers and said:

> 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 liable with the charterer for damage arising out of inadequate stowage.

Both the shipowner and the charterer appealed the Trial Judge's finding that they were liable as carriers. The judgment however was affirmed by

the Court of Appeal who in very brief written reasons said:

> We agree with the reasons for judgment delivered by the Trial Judge, Madame Justice Barbara Reed, and with the way she disposed of the case. We are in particular satisfied that her conclusions of facts were supported by ample evidence and that she did not misdirect herself in law.

The basic facts in The "Lara S" are not uncommon in carriage of goods cases where a vessel is under time charter. In such cases it is very common for the time charterer to book the cargo and to issue the bill of lading on its own form but on behalf of the master. When this practice is followed the holding in The "Lara S" would dictate that both the time charterer and the owner are jointly liable as carriers.

Farr Inc. v Tourloti Compania Naviera S.A., [1985] F.C.J. No. 602, is a case with facts very similar to The "Lara S" in which it was also held that both the owner and the charterer were liable as carriers.

CONCLUSION

Where the carrying vessel is not under charter the shipowner will invariably be liable as the "carrier" for loss or damage to cargo.

Where the carrying vessel is under a demise charter, the demise charterer will be liable as the "carrier".

Where the carrying vessel is under a time charter the earlier cases tend to suggest that the "carrier" is the shipowner, however, the more recent case law suggests that in the usual situation both the charterer and owner will be liable. Accordingly, both the owner and charterer should be put on notice of any claim and, in the event an extension of suit time is required, the extension should be obtained from both.