The identification of the contractual carrier under a bill of lading was discussed in the recent cases of The “Hector”¹, The “Flecha”², and The “Starsin”³ (This issue and these cases were discussed in previous articles under the same title published in “Sea Venture” Vol s 18 and 19).

All three cases dealt with substantially similar bills of lading but only in The “Flecha” was the bill of lading held to be an owners bill of lading. However, The “Starsin” has now come before the Court of Appeal. On a majority decision, the bill of lading was held to be an owners bill of lading. The dissenting decision was given by Rix LJ, who also decided that the bill of lading in The “Hector” was a charters bill of lading.

What now are the general principles for determining the identity of the contractual carrier under a bill of lading?

The short, albeit not particularly helpful, answer is to construe all relevant clauses of the bill of lading as a whole. Of particular relevance is the signature at the foot of the bill of lading, any logos on its face, as well as any representations as to the identity of the contractual carrier either on the face or reverse of the bill of lading. Unfortunately, though, these clauses are often in conflict.

In The “Starsin” the bills of lading were signed by agents “As agents for the carrier Continental Pacific Shipping”. Continental’s logo was on the face of the bill of lading. On the reverse the carrier was defined “as the party on whose behalf the bill of lading has been signed”. In addition there were Identity of Carrier and Demise clauses which provided respectively—

“The contract evidenced by the bill of lading is between the merchant and the owner of the vessel named herein… and it is therefore agreed the said shipowner only shall have liability for any damage or loss… It being the general desire of the foregoing, it is adjudged that any other is the carrier… limitation of, and exonerations from liabilities provided for by law or by this Bill of Lading shall be available to such other. It is further understood and agreed that as a line, company or agent who has executed this Bill of Lading for and on behalf of the Master is not a principal… and… shall not be under any liabilities arising out of the contract…”

“If the ocean vessel is not owned or chartered by demise to the company or line by whom this Bill of Lading is issued (as may be the case notwithstanding anything that appeared to the contrary). The Bills of Lading shall take effect only as a contract of carriage with the owner or demise chartered as the case may be as principal through the agency of the said company or line…”

Rix LJ, in both The “Starsin” and “Hector”¹, took the view that provided the charterer is clearly described and signs itself on the face of the bill of lading as the carrier there is no reason why that charterer, not being the vessel owner, cannot be the contractual carrier. As to any contact between such a signature and the identity of carrier clause this merely emphasizes that the “contract evidenced by the bill of lading is with the owner” if the charterer issues the bill of lading “on behalf of the master”. When signed for or on behalf of some party other than the master the identity of carrier clause, which at first glance points to the shipowner as the contractual carrier, did not apply. Such a construction of the identity of Carrier clause gives effect to the express recognition in the clause that a party other than the shipowner can be the carrier under the bill of lading and avoids any conflict with the signature on the face of the bill of lading. Further, and reflecting commercial considerations, the decision whether to contract as principal under the bill of lading with personal liability to perform the contract of carriage is left open to a charterer with authority to issue bills of lading.

As to the demise clause, Rix LJ agreed with Colman J at first instance in The “Starsin”, that its influence was limited to circumstances in which the charterer did not want to accept liability as principal under the bill of lading. Where a charterer signs the bill of lading as carrier the demise clause did not apply.

This reasoning gives considerable weight to the construction of the signature of the bill of lading (Universal Steam Navigation v McKelvie)⁴, as well as to the definition on the reverse of the bill of lading identifying the carrier as the “party on whose behalf this bill of lading has been signed” (The “Ines”)⁵. It also reflects the influence of the Uniform Customs and Practice for Documentary Credits code (UCP500) adopted in 1994. These rules are designed to simplify documentary credits. Article 23 provides that an ocean bill of lading should identify the carrier, the signatory and capacity in which a person signs a bill of lading. As a result, bills of lading generally are signed with information designed to assist holders of bills of lading to identify the contractual carrier representing the receipt for shipment of goods from a glance at the face of the bill rather than a review of often poorly drafted clauses buried on the reverse of the bill of lading.

Unfortunately, the majority of the Court of Appeal did not agree with Rix LJ. They took the view that the identity of carrier and demise clauses should be construed together and that, in particular, the demise clause was intended to cover some situation which was not already covered by the identity of carrier clause.

In view of the clarity of the words “… notwithstanding anything that appeared to the contrary…” of the demise clause, the majority of the Court of Appeal decided that when construing the bill of lading as a whole, the description of the carrier in the signature box on the face of the bill of lading had to yield to the opening words of the demise clause which identified the carrier as the shipowner. Therefore, apparent conflict between written or typed words on the face of the bill of lading and a printed demise clause on the reverse of the bill of lading was resolved in favour of the printed clause.

As a result, cargo interests selling, buying or pledging goods on the security of a bill of lading should be wary of bills of lading proclaiming on their face X to be the carrier when a demise clause licks on the reverse holding out the possibility that some other person may be the contractual carrier. Absent a demise clause, cargo interests faced with a bill of lading with a clear banner logo and signature on the face of the bill, as in The “Hector”, identifying some party other than the shipowner as carrier probably are on safer grounds. But the only safe rule when seeking to identify the contractual carrier is that all of the clauses, logos and signatures of a bill of lading must be construed as a whole. This can only lead to continuing uncertainty, particularly where poorly drafted demise clauses take priority over clearly described signatures on the face of the bill of lading.

The reasoning of the majority of the Court of Appeal in The “Starsin” may be further criticised for the importance attached to demise clauses, not only from the perspective of overriding the parties’ typed or written intentions, but also when the origin and purpose of the demise clause is considered. The demise clause was created at a time when a time charterer, who was party to a bill of lading contract as carrier, was not entitled to limit his liability. The clauses were designed to ensure charterers issuing bills of lading avoiding being held liable as carriers. However, English law has for some time allowed time charterers the right to limit (Section 3 of the Merchant Shipping (Liabilities of Shipowners and Others) Act 1998).
It is difficult to see why a charterer, who intends to contract as a carrier by clear words on the face of the bill of lading, should be precluded from doing so by the existence of a demise clause buried on the reverse of the bill of lading. Further, the commercial reality for most cargo interests shipping goods is that, in all probability, they would believe that the party with whom they contracted when booking the cargo for carriage, and from whom they receive a bill of lading signed as the carrier, to be the contractual carrier. This is likely to be the vessel charterer, not the shipowner, and this is particularly so if or when the charterer’s name or insignia are on the vessel.

Therefore, it is questionable whether a demise clause should be allowed to have the influence it has been given by the majority of the Court of Appeal in The "Starship". It is unlikely this is the end of the issue. Indeed, in giving his dissenting judgment in The "Starship", Rix LJ was dismissive of the reasoning in The "Fletcher": "...I do not think, for all that it was dealing with the self same form of bill of lading [as in The "Starship"] that its reasoning should be particularly influential". It may be that guidelines for construing the identity of a contractual carrier will only be resolved finally by the House of Lords.

1 [1998] 2 Lloyd’s Rep. 283
2 [1999] 1 Lloyd’s Rep. 612
3 [1999] 2 Lloyd’s Rep. 65
4 In the "Hector" there was no demise clause on the reverse of the bill of lading.
5 (1923) (AC) 429. A House of Lords decision providing that, just as a party may sign a charterparty or other commercial contract in a way which indicates that he does not accept personal liability, conversely he may do so in a way that represents that he does accept personal liability,
6 (1995) 2 Lloyd's Rep. 114. "One has to read the document as a whole and seek to determine whether it was the intention of the parties that the charterers or owners should undertake responsibility for carriage of the goods" Clarke J p618