Bills of Lading and Authority to Issue - QT TRADING, L.P. V. M/V SAGA MORUS,
The United States Fifth Circuit Court of Appeals

The decision of the U.S. Fifth Circuit Court of Appeals on May 11, 2011, in QT Trading, L.P. v. M/V Saga Morus, is significant because the Fifth Circuit held that when a sub-charterer issues bills of lading to a shipper, and exceeds its authority by failing to sign the bills in accordance with the shipmaster's instructions, or otherwise fails to sign them "by authority of the master," a shipper cannot bring an *in personam*[1] claim against the vessel's owner and head-charterer under the Carriage of Goods by Sea Act (hereinafter "COGSA")[2] despite substantial cargo damage.[3] As a result of the sub-charterer's agent's failure to abide by the instructions and prior authority granted by the vessel owner and head charterer, in respect to properly clausing the bills of lading to indicate any pre-shipment damage, the Fifth Circuit dismissed the *in personam* claims against the vessel owner and head charterer and permitted the shipper to assert its claims only against the sub-charterer who issued the bills.[4] In this case, however, the sub-charterer filed separately for bankruptcy protection, and the refuge of those proceedings effectively left the shipper altogether without a remedy for its cargo damage.[5]

The Fifth Circuit's decision is not a new rule. Instead, as examined below, the Fifth Circuit merely restated the basic principles that vessel owners, charterers, and cargo

[1] Under U.S. law, *in personam* and *in rem* actions may arise from the same claim, and may be brought separately or in the same suit. *See* Supplemental Admiralty Rule C(1)(b). The *in personam* action is filed against the owner or charterer personally. *See Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984). **"**An *in rem* action, on the other hand, is filed against the *res*, the vessel; and a maritime lien on the vessel is a prerequisite to an action *in rem*." *Id.*
[2] *See* 46 U.S.C. § 30701 note. In 2006, Congress re-codified the entire text of COGSA into a single "note" that follows the text of 46 U.S.C. § 30701. Hence COGSA is cited as "46 U.S.C. § 30701 note." Citations to COGSA are hereinafter made to the individual sections of COGSA within the note, *e.g.* "COGSA § 1."
[3] *QT Trading*, [3] 2011 U.S. App. LEXIS 9619 at *15.
[4] *See id.* at *15.
[5] *See id.* at *5-6; *see also infra* FN 31, discussing ramifications of sub-charterer's bankruptcy proceedings.

interests must, at all times exercise prudent document control, and each must know the extent of a party's authority to issue a bill of lading.[6] It is perhaps noteworthy that while not applicable to the case, the latter point may have been decided differently if the claim had been decided on English law principles. Whether that might have been the case is discussed in an article by Eduardo Prim of MFB solicitors in an article at [link to article] on the Steamship Mutual website.

A. Summary of Relevant Facts in *QT Trading*.

The vessel in question was the M/V SAGA MORUS, a 200-meter general cargo ship flagged in Hong Kong (the "vessel").[7] The Defendant Attic Forest AS ("Attic") owned the vessel.[8] The Defendant Saga Forest Carriers International AS ("Saga") chartered the vessel from Attic.[9] Daewoo Logistics Corp. ("Daewoo") subchartered the vessel for two years from Saga (pursuant to the "Saga-Daewoo Charter Party").[10] Defendant Patt Manfield & Co., Ltd. ("Patt") was the vessel's technical manager, employing the officers and crew and operating the ship according to the charterer's instructions.[11]

The Saga-Daewoo Charter Party contained three relevant provisions. The first required Daewoo to "load, stow, trim, secure and discharge the cargo at their expense

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[6] The precedent, discussed *infra*, dates to at least 1921 and has served to exonerate vessel owners and head charterers for liability for cargo damage in cases where sub-charterers have improperly signed or otherwise wrongly issued the bills of lading. *See, e.g., Thyssen Steel Co. v. M/V KAVO YERAKAS*, 50 F.3d 1349, 1351 (5th Cir. 1995); *Pac. Employers Ins. Co. v. M/V GLORIA*, 767 F.2d 229, 236-7 (5th Cir. 1985); *Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE*, 1997 U.S. Dist. LEXIS 13102, at *10 (E.D. La. 1997); *Mahroos v. S/S TATIANA L*, No.86-CV-6706, 1988 A.M.C. 757, 760 (S.D.N.Y. 1988); *Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1015 (2nd Cir. 1972); *Tuscaloosa Steel Corp. v. M/V NAIMO*, 1993 A.M.C. 622 (S.D.N.Y. 1992); *The Poznan*, 276 F. 418, 432 (S.D.N.Y. 1921).

[7] *See QT Trading, L.P.*, 2011 U.S. App. LEXIS 9619, at *2.

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.* at *3.

under the supervision of the Captain…."[12] The second provided that the master would, if requested by Daewoo, "sign Bills of Lading for cargo as presented, **in conformity with Mate's and Tally Clerk's receipts**."[13] Lastly, the Saga-Daewoo Charter Party authorized Daewoo, or its agents, to sign bills of lading on behalf of the master, or Saga, so long as the bills of lading were consistent "with the Mate's or Tally Clerk's receipts…."[14] In the event that Daewoo failed to incorporate the Mate's Receipts in any bills of lading it issued, Daewoo was "to accept all consequences that might result from…**signing Bills of Lading not adhering to the remarks in Mate's or Tally Clerk's receipts**."[15]

In March 2008, the Plaintiff, QT Trading L.P. ("QT"), purchased 800 bundles of steel pipe from a Chinese company.[16] The pipe seller contracted with Daewoo to ship the pipe from Dalian, China to Houston, Texas.[17] The master authorized Daewoo and its agents to sign bills of lading on his behalf, with the condition that Daewoo was to ensure "that the original Bills of Lading are **issued in strict conformity with the Mate's Receipts, i.e., all remarks of quantity and condition which are contained in the Mate's Receipts must be entered on the Bills of Lading prior to signing**."[18]

At the load port, the vessel owners' P&I Club engaged an independent cargo surveyor to inspect the pipe and issue a "Preshipment Cargo Condition Report" (the "Preshipment Report") to the ship's master.[19] The surveyor noted extensive pre-load damage to the pipe bundles in the Preshipment Report. At the same time, the shipper

[12] *See id.* at *2.
[13] *See id.* (Emphasis added).
[14] *See id.* at *2-3.
[15] *See id.* (Emphasis added).
[16] *See id.* at *5.
[17] *See id.*
[18] *See id.* at *3. (Emphasis added).
[19] *See id.* at *3-4.

issued certain documents called a "Shipping Order," which all parties agreed were, in fact, the Mate's Receipts.[20] Notations on the Mate's Receipts described the cargo as having been loaded "clean on board" the vessel, but also incorporated the findings of the Preshipment Report by noting "as per P&I surveyor report."[21]

Daewoo's agent signed the bills of lading in China, but, contrary to the requirements of Saga-Daewoo Charter Party, failed to make any note on the bills of lading to incorporate the Mate's Receipts.[22] The agent wrote only that the cargo was loaded "clean on board", thereby certifying in effect that the cargo was free of damage.[23] The bills were signed "As Agent For The Carrier Daewoo Logistics Corp."[24] There was no reference to the vessel's master, Attic, Saga, or Patt.[25] When the vessel arrived at Houston, QT's attending surveyor reported the cargo being "discharged in a damaged and non-conforming condition," including surface rust on some bundles and other damage due to "rough, careless, and/or improper handling" and "faulty stowage."[26]

QT filed suit in the United States District Court for the Southern District of Texas, asserting claims for cargo damage *in personam*, against Attic as vessel owners, Saga as head charterers, Daewoo as sub-charterers, and Patt as technical managers, and *in rem* against the vessel.[27] QT sought relief under COGSA,[28] as the controlling law for the shipment from China to the United States, and for negligent bailment, under the general

[20] *See id.* at *4.
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] *See id.*
[26] *See id.*
[27] *See id.* at *5 (dismissing the *in rem* action filed against the vessel, as the controlling forum selection clause required such action be filed in Hong Kong).
[28] 46 U.S.C. § 30701 note.

maritime law of the United States.[29] Early on in the litigation, the District Court dismissed Daewoo from the case when Daewoo filed separately for bankruptcy protection.[30]

The District Court also dismissed the claims against Attic and Patt, on the basis that QT could not prove privity of contract with either. The District Court dismissed the claims against Saga on grounds that Daewoo exceeded its authority under the Saga-Daewoo Charter Party by issuing the bills of lading without incorporating the Mate's Receipts. QT appealed the dismissal of all defendants to the U.S. Fifth Circuit Court of Appeals, and for the reasons set forth below, the Fifth Circuit affirmed.[31]

B. Application of COGSA in *QT Trading*.

COGSA is the statutory regime governing the common carriage[32] of goods to or from the United States by sea.[33] COGSA imposes on ocean carriers a duty to "properly

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[29] *See QT Trading, L.P.*, 2011 U.S. App. LEXIS 9619, at *5.

[30] *See id.* at *5-6. Of course, had Daewoo not filed for bankruptcy protection, QT's claims against it would have continued for two reasons. First, unlike Attic, Saga and Patt, Daewoo's agent issued the bills of lading for Daewoo, which established privity of contract between QT and Daewoo, and which defined Daewoo as the liable "carrier" under COGSA, discussed *infra* at Section B. Secondly, unlike Attic, Saga, and Patt, Daewoo could not raise the defense of "exceeding authority" when its own agent issued the bills of lading on Daewoo's behalf. Accordingly, but for the bankruptcy, Daewoo would have remained a viable defendant in QT's case. *Id.* at *6-15. Theoretically, to maintain its claims against Daewoo after dismissal, QT could have intervened in Daewoo's bankruptcy action to assert its claims against Daewoo and, if it prevailed, to collect its damages from the proceeds of the bankruptcy estate. However, QT's intervention would have been impractical because, even if it proved its claims in that very different forum, the claims would be unsecured. As an unsecured creditor, QT would be limited to collecting whatever proceeds remained, if any, after all of Daewoo's secured creditors were paid in full, and then those remaining proceeds would themselves be divided, *pro rata*, among the unsecured creditors, including QT. As a practical matter, there are rarely any proceeds remaining to be so divided by unsecured creditors in any bankruptcy proceeding. Thus, the Daewoo bankruptcy, as a practical matter, effectively precluded QT's assertion of claims against Daewoo.

[31] *See id.*

[32] Private carriage, where a party hires an entire ship, is another matter, and such an arrangement is not governed by statute unless the parties so incorporate it by contract. As a result, parties to a private charter are free to allocate the risks and responsibilities associated with the private carriage of goods. Thus, in private charter parties, "the responsibility for cargo loss falls on the [party] who agreed to perform the duty involved." *Nissho-Iwai Co. v. M/T Stolt Lion*, 617 F.2d 907, 914 (2nd Cir. 1980). "Congress declined to enact a statute regulating the terms of charter parties because it has generally considered the bargaining power of charterers and vessel owners to be merely equal, unlike the edge in bargaining power held by vessel owners and charterers over cargo owners." *Nissho-Iwai Co.*, 617 F.2d at 914.

and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried,"[34] and "forbids a [carrier] from contracting out of liability for improper stowage of cargo." [35]

Under COGSA, the cargo owner claiming damage may recover, *in personam*, only from the statutory "carrier"[36] of the goods.[37] The Fifth Circuit Court of Appeals has expressly held that, "to recover under COGSA, the cargo owner must establish that the vessel owner or charterer executed a contract of carriage with the cargo owner" and was thereby the COGSA "carrier."[38] The vessel itself may be liable *in rem*. [39]

The shipper may establish its privity of contract with a vessel owner, and therefore its entitlement to assert a claim under COGSA, by showing "the charterer's

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[33] COGSA is the United States' incorporation of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (commonly referred to as "the Hague Rules"). *See Man Ferrostaal, Inc. v. M/V Akili*, 2011 U.S. Dist. LEXIS 6336, *5 (S.D.N.Y. 2011). The Hague Rules are nearly identical to COGSA, except for newer amendments that allow a higher recovery per package in cargo claims. *See Kreta Shipping, S.A. v. Preussag Intern. Steel Corp.*, 192 F.3d 41, 46 (2nd Cir. 1999).

[34] COGSA § 3(2).

[35] *See Assoc. Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47, 50 (2nd Cir. 1992) ("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 connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect." COGSA § 3(8)).

[36] COGSA defines a "carrier" as "the owner or the charterer who enters into a contract of carriage with a shipper," and provides that a "contract of carriage" applies only to those contracts "covered by a bill of lading or any similar document of title." COGSA § 1.

[37] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *8 (citing *Thyssen Steel Co. v. M/V KAVO YERAKAS*, 50 F.3d 1349, 1351 (5th Cir. 1995)).

[38] *See Thyssen*, 50 F.3d at 1351 (citing *Pac. Employers Ins. Co. v. M/V GLORIA*, 767 F.2d 229, 236-7 (5th Cir. 1985)).

[39] When issued as part of a shipment of public carriage, the bill of lading makes a vessel carrying the referenced cargo liable *in rem* for any damage incurred. *See Romano v. W. India Fruit & S.S. Co.*, 151 F.2d 727, 730 (5th Cir. 1945). To hold the vessel liable *in rem*, the shipper need not have privity of contract with the ship's owners. *See Demsey & Assoc., Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2nd Cir. 1972). "Every claim for cargo damage creates a maritime lien against the ship which may be enforced … *in rem*." *Id.* However, the bill of lading in question must be issued by a charterer, and not by a mere Non-Vessel Operating Common Carrier (NVOCC) or similar unauthorized third person. *See Ins. Co. of N. Am. v. S/S Am. Argosy*, 732 F.2d 299, 303 (2nd Cir. 1984); *See also supra* FN 2, defining "*in personam*" and "*in rem*" claims.

authority to bind the vessel owner by signing the bill of lading 'for the master.'"[40] Thus if a charterer's bill of lading is to bind the vessel owner, and thereby confer the status of "carrier" on the owner under COGSA, the charterer must have authority to sign the bill of lading "for the master," and the master must have authority to sign bills of lading for the owner.[41] As set forth in the *QT Trading* decision, the scope and extent of this authority is critical, and, when a charterer exceeds its authority granted by a charter party, cargo interests may be precluded from asserting *in personam* claims against the vessel's owner.

C. The Fifth Circuit Upholds Dismissal of QT Claims.

The Fifth Circuit affirmed the dismissal of the claims against Attic and Patt with little discussion,[42] finding that, because Daewoo had no contract with either defendant, there was no evidence that either Attic or Patt was a party to the bills of lading, or that either had authorized Daewoo to sign bills of lading on their behalf.[43] While a shipper may rely on a charter party to support a claim based on the authority of the charterer to sign on behalf of the master and the master's authority to bind the vessel owner, QT had no such claim against Attic or Patt because Daewoo's charter party was with Saga, alone.[44] Therefore, the *QT* Court held that Attic and Patt were not "carriers" subject to liability under COGSA.[45]

1. To Implicate Owners, One Must Sign for the Master.

While Daewoo had a charter party with Saga, the Fifth Circuit held that the decision to dismiss the claims against Saga was supported by the language of the

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[40] *QT Trading*, 2011 U.S. App. LEXIS 9619, *8 (quoting *Thyssen*, 50 F.3d at 1352; and citing *Pac. Employers*, 767 F.2d at 236).
[41] *See id.* (citing *Pac. Employers*, 767 F.2d at 237; and *EAC Timberlane*, 745 F.2d at 719).
[42] *See id.* at *9-10.
[43] *See id.*
[44] *See id.*
[45] *See id.*

contract, which expressly required that bills of lading issued on Saga's behalf incorporate the Mate's Receipts.[46] Relying on the Saga-Daewoo Charter Party, QT proved that Daewoo's agent had authority to sign on behalf of the master, and that the master was authorized to sign the bills of lading on behalf of Saga.[47] However, the court held that QT's argument that Saga was a COGSA "carrier" failed for two reasons, the first of which related to how the bills of lading were signed.[48] Daewoo's agent wrote on the bills of lading that he signed only for "Daewoo," not "by authority of the master," and not "for Saga."[49] Because they were not signed for the master, the bills of lading could not bind Saga as a "carrier" subject to liability under COGSA.[50] The court contrasted Saga's exoneration with its holding in *Pacific Employers*,[51] where it held a shipowner liable as a COGSA carrier because the charterer's agent had written on the bills of lading that he had signed them "by authority of the master," thereby implicating the vessel owners.[52]

The basis for the Fifth Circuit's decision is also well established in the federal maritime courts of New York. In a case of nearly identical facts and outcome, the United States District Court for the Southern District of New York held that "[i]n general, a shipowner is not personally liable for a bill of lading issued by a charterer which does not indicate the name of the owner and which is not signed by or for the master."[53]

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[46] *See id.* at *10-11.
[47] *See id.* at *10.
[48] The second reason related to Daewoo's failure to incorporate the Mate's Receipts. *See id.* at *15, discussed *infra* at § 2.
[49] *See id*. at *11.
[50] *See id.* at *11.
[51] *See Pac.* Employers, 767 F.2d at 237.
[52] *See id.* (citing *Pac. Employers*, 767 F.2d at 237-38; and *Thyssen*, 50 F.3d at 1352 n.3 (noting that bills of lading were signed "for the master")).
[53] *Mahroos v. S/S TATIANA L*, No.86-CV-6706, 1988 A.M.C. 757, 760 (S.D.N.Y. 1988) (exonerating owner where charterer exceeded authority by issuing bills of lading without incorporating Mate's Receipts that noted pre-load damage to rice cargo); *see also Demsey*, 461 F.2d at 1015 ("Because…[the owner] did not authorize [the charterer's] agent to issue the bills of lading, [the owner] is not liable *in personam*" for damage to cargo). In fact, Judge Learned Hand reached the same conclusion ninety years ago. In *The*

2. Daewoo Exceeded Its Authority under the Relevant Charter Party with Saga.

The Fifth Circuit further held that even if Daewoo's agent had implicated Saga by signing for the master, the signature would have been without effect because the agent exceeded the authority granted by the Saga-Daewoo Charter Party, which required Daewoo and its agents to sign the bills in conformity with the Mate's Receipts.[54] The Saga-Daewoo Charter Party expressly required Daewoo to "accept all consequences that might result from [Daewoo] and/or their agents signing Bills of Lading not adhering to the remarks in Mate's or Tally Clerk's receipts."[55] Because Daewoo's agent signed the bills of lading only as "clean on board," it failed to incorporate or reference the Mate's Receipts, which themselves incorporated the Preshipment Report that noted substantial pre-shipment damage to the cargo.[56] "The fact that Daewoo failed to sign the bills of lading in accordance with the Mate's Receipts is sufficient, standing alone, to establish [that] Daewoo exceeded its authority."[57]

In sum, when "the signing party exceeds its authority in signing bills of lading not in accordance with the master's instructions, the owner cannot be held liable as a COGSA carrier."[58] As a result the *QT* Court dismissed the COGSA claim against Saga, and QT's only remedy was against Daewoo, as the sole "carrier" as defined by COGSA.[59]

Poznan, 276 F. 418, 432 (S.D.N.Y. 1921), Judge Hand wrote that a vessel's owner "was not liable under the bills of lading because these did not purport to bind it," instead the bills of lading were "issued in the name of the charterer." *Id.*

[54] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *15.

[55] *See id.* at *2-3.

[56] *See id.* at *4.

[57] *See id.* at *15.

[58] *See id.* at *13. (citing *Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE*, 1997 U.S. Dist. LEXIS 13102, at *10 (E.D. La. 1997) (dismissing claims against shipowner where charterer exceeded authority by signing bills of lading not in accordance with Mate's Receipts, when required to do so by shipmaster's instructions)); *see also Tuscaloosa Steel Corp. v. M/V NAIMO*, 1993 A.M.C. 622 (S.D.N.Y. 1992) (same)).

[59] *See id.* at *14-15.

Daewoo, of course, had already been dismissed upon filing for bankruptcy protection, and QT was left without a remedy under COGSA.

3. Lack of Exclusive Possession Vitiates Bailment Claim.

As a common law cause of action, a party alleging breach of bailment is not constrained by the statutory language of COGSA and its definition of "carrier." The *QT* Court nevertheless disposed of the bailment claim against Saga because it could not be shown that Saga ever had "exclusive possession" of the cargo.[60] Under the general maritime law of the United States, a claim of bailment arises when (1) "delivery to the bailee is complete" and (2) the bailee "has **exclusive** possession of the bailed property, even as against the property owner."[61]

QT argued that, because Daewoo acted as an agent for Saga during shipping, Saga retained exclusive possession of the cargo and the ensuing damage amounted to Saga's breach of bailment.[62] As in *Thyssen*,[63] however, the Fifth Circuit rejected the claim because the bills of lading and the Saga-Daewoo charter party provided that the vessel owners and charterers both had possession of the cargo.[64] The Saga-Daewoo Charter Party expressly required Daewoo, not Saga, to load, stow, secure, and discharge the cargo.[65] With Daewoo in charge of loading and stowage, it could not be said that Saga ever had exclusive possession of the cargo.[66] The court also found that Daewoo's agent

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[60] *See id.* at *15-16.
[61] *See id.* at *16; *see also Thyssen*, 50 F.3d at 1354-55 (citing *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 588 (5th Cir. 1983)).
[62] *See id.* at *15-16.
[63] *See Thyssen*, 50 F.3d 1349.
[64] *See QT Trading*, 2011 U.S. App. LEXIS 9619, *16-17.
[65] *See id.* at *17.
[66] *See id.*

signed the bills of lading on behalf of "Daewoo," not Saga, further undermining any claim that Saga had exclusive possession.[67]

Therefore, the U.S. Fifth Circuit Court of Appeals affirmed the district court decision in its entirety, dismissing the COGSA and bailment claims against the vessel owners, the head charterer, and the technical manager. The court held that QT's remedy was against Daewoo, alone, and Daewoo had already been dismissed from the action upon filing for bankruptcy. The result left QT without a remedy, short of pursuing its *in rem* claim against the vessel in Hong Kong.

D. The Unaddressed Issue of "Apparent Authority."

The English solicitor Eduardo Prim analyzed the decision by the U.S. Fifth Circuit Court of Appeals in *QT Trading, L.P. v. M/V Saga Morus*, 2011 U.S. App. LEXIS 9619 (5th Cir. 2011) to compare how the case might have been decided in the United Kingdom: www.simsl.com/SagaMorusMFB0811.pdf. Mr. Prim notes that in the UK, a charterer who signs bills of lading "for the master" of the vessel has the apparent authority to do so, even if the bills are non-conforming, and may thereby bind the vessel owner to be liable to the shipper, in the event of cargo damage. In the UK, the charterers' apparent authority is codified in the law. Specifically, Section 4 of the (UK) Carriage of Goods by Sea Act 1992 which provides that:

> *A bill of lading which (a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and (b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading,*

[67] *See id.* This ruling is in accord with decisions of other U.S. courts. *See Man Ferrostaal, Inc*., 2011 U.S. Dist. LEXIS 6336 at *27 (S.D.N.Y. 2011) (exonerating vessel owners as COGSA carriers where charterers issued bills of lading in their own name only, and dismissing bailment claim, as well, on grounds that where "a charterer has taken responsibility for stowage of cargo onboard a ship, the ship owner does not have exclusive possession of the property and so cannot be held liable as a bailee").

> *shall in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipments of the goods, or as the case may be, of their receipt for shipment.*

The *QT Trading* Court did not discuss apparent authority. *QT Trading*, 2011 U.S. App. LEXIS 9619. The United States version of COGSA is also silent on an agent's apparent authority to bind a shipowner. *See* 46 U.S.C. § 30701 note. However, there is case law in support of the argument that an agent may have the apparent authority to bind a shipowner, and the inquiry is factually specific.

Generally, most courts have not distinguished between actual and apparent authority, and have spoken in general terms of "authority." For example, the U.S. District Court for the Northern District of Ohio held that, "[f]or a contract to attach to a shipowner *via* a bill of lading signed on behalf of the master, the person signing the bill of lading must have 'authority to sign on behalf of the master,' and the master must have the 'authority to bind [the shipowner].'" *Fortis Corporate Ins., S.A. v. Viken Ship Mgmt. A.S.*, 481 F. Supp. 2d 862, 868 (N.D. Ohio 2007) (brackets in original) (quoting *Pac. Employers Ins. Co., v. M/V Gloria*, 767 F.2d 229, 237 (5th Cir. 1985); (citing *Nichimen Co. V. M.V. Farland*, 462 F.2d 319, 328-29 (2nd Cir. 1972)).

The United States Fifth Circuit Court of Appeals, which decided the *QT Trading* case, has on occasion addressed the issue, again without distinguishing between an agent's actual and apparent authority. *See Pac. Employers*, 767 F.2d at 237. The *Pac. Employers* Court examined cases from its own circuit (on the U.S. Gulf Coast), as well as from the Second Circuit Court of Appeals in New York, and held that:

> Generally, when a bill of lading is signed by the charterer or its agent "for the master" with the authority of the shipowner, this binds the shipowner and places

> the shipowner within the provisions of COGSA. *E.g., Gans S.S. Line v. Wilhelmsen (The Themis)*, 275 F. 254, 262 (2nd Cir. 1921); *Tube Products of India v. S.S. Rio Grande*, 334 F. Supp. 1039, 1041 1971 (S.D.N.Y. 1971); *see generally* BAUER, RESPONSIBILITIES OF OWNER AND CHARTERER TO THIRD PARTIES -- CONSEQUENCES UNDER TIME AND VOYAGE CHARTERS, 49 TUL. L. REV. 995, 997-1001 (1975). When, however, a bill of lading is signed by the charterer or its agent "for the master" but without the authority of the shipowner, the shipowner is not personally bound and does not by virtue of the charterer's signature become a COGSA carrier. *E.g., Associated Metals and Minerals Corp. v. S.S. Portoria*, 484 F.2d 460, 462 (5th Cir. 1973); *Demsey & Associates, Inc. v. S.S. Sea Star*, 461 F.2d 1009, 1015 (2nd Cir. 1972).

In *QT Trading*, of course, the Fifth Circuit held that, even if Daewoo's agent had signed the bill of lading "for the master," the signature would have been without effect because Daewoo's agent exceeded his express authority by having failed to incorporate the Mate's Receipts. The *QT Trading* Court explained as follows:

> A cargo owner may only recover under COGSA from the "carrier" of goods. *See Thyssen Steel Co. v. M/V KAVO YERAKAS*, 50 F.3d 1349, 1351 (5th Cir. 1995). COGSA defines a "carrier" as "the owner or the charterer who enters into a contract of carriage with a shipper," and notes that a "contract of carriage" applies only to those contracts "covered by a bill of lading or any similar document of title." COGSA § 1. A contract of carriage with an owner need not be direct; it may also be established **"by virtue of the charterer's authority to bind the vessel owner by signing the bill of lading 'for the master**." *Thyssen*, 50 F.3d at 1352 (citing *Pac.* Employers, 767 F.2d at 236). Thus, in order to bind the owner and confer COGSA carrier status, the charterer must have authority to sign the bill of lading "for the Master," and the Master must have authority to sign bills of lading for the shipowner. *See Pac. Emp'rs*, 767 F.2d at 237 (citing *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 719 (1st Cir. 1984)). QT has the burden to prove that Defendants were parties to the contracts. *Thyssen*, 50 F.3d at 1352 (citing Assoc. Metals, 484 F.2d at 462.
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> …even if the language of the signature were not determinative, [Head Charterer] Saga is not a COGSA carrier because Daewoo's agent exceeded the authority granted to it by the Master by failing to sign the Bills of Lading in conformity with the Mate's Receipts. Both the Charter Party and the Captain's authorizations to sign on his behalf granted Daewoo and its agent only the authority to sign the Bills of Lading in conformity with the Mate's Receipts. The Charter Party even explicitly notes that "Charterers accept all consequences that might result from

> Charterers and/or their agents signing Bills of Lading not adhering to the remarks in Mate's or Tally Clerk's receipts." Because Daewoo's agent signed the Bills of Lading as "clean on board," it failed to incorporate or reference the Mate's Receipts, which themselves incorporated the Preshipment Report by noting "as per P&I surveyor report."
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> While this Court has yet to address this situation, other courts have found that when the signing party exceeds its authority in signing bills of lading not in accordance with the Master's instructions, the owner cannot be held liable as a COGSA carrier. See *Cargill Ferrous Int'l v. M/V SUKARAWAN NAREE*, No. 96-CV-1705, 1997 U.S. Dist. LEXIS 13102, 1997 WL 537992, at *4 (E.D. La. Aug. 26, 1997) (holding that charterer exceeded its authority in signing bills of lading not in accordance with Mate's Receipts when required to do so by the Master's instructions and therefore the shipowner was not liable as a COGSA carrier); *Tuscaloosa Steel Corp. v. M/V NAIMO*, No. 90-CV-2194, 1992 WL 477117, at *3 (S.D.N.Y. 1992) (same). We find this reasoning persuasive and hold that Daewoo's agent exceeded his authority by failing to sign the Bills of Lading in conformance with the explicit requirements of the Charter Party and of the Master. *QT Trading*, 2011 U.S. App. LEXIS 9619 at *8-13 (5th Cir. 2011).

It seems plausible that, as a shipper perhaps unaware of the contracts between sub-charterer Daewoo, head-charterer Saga, and vessel owner Attic, QT could reasonably have believed that Daewoo's agent had the apparent authority to bind the vessel owner to the liability provisions of COGSA, as applying to the bill of lading. Nevertheless, the court did not discuss apparent authority.

However, the Fifth Circuit has addressed apparent authority in the past. In general, the agent's authority must be evidenced by the actions of the principal, such as the ship's master, and not by the agent himself. *See, e.g., Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1111-1112 (5th Cir. Tex. 1985); *See also Yeramex International v. S. S. Tendo*, 595 F.2d 943, 946 (4th Cir. Va. 1979).

In *Cactus Pipe,* the Fifth Circuit held that "[m]aritime law embraces the principles of agency." *Cactus Pipe*, 756 F.2d at 1111 (citing *West India Industries, Inc. v. Vance &*

Sons AMC-Jeep, 671 F.2d 1384 (5th Cir.1982)). However, in that case, the shipper "introduced no evidence of any actual authority of an agent to issue the bills of lading on behalf of the vessel owner.…Nor was apparent authority established." *Id.* (internal citations omitted). "Apparent authority is created as to a third person by conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to the act done on his behalf by the person purporting to act for him." *Id.* (citing Restatement (Second) Of Agency § 27). "Apparent authority is distinguished from actual authority because it is the manifestation of the principal to the third person rather than to the agent that is controlling." *Id.* The Court continued:

> In this case there are no facts which could reasonably lead [Shipper] or the holder of the bills of lading to believe that they were issued on the vessel owner's behalf. Our analysis is based upon the premise that for apparent authority to exist there must be some manifestation (whether an act or an omission) of the principal that causes the third person to believe that the agent is authorized to act for him or the principal should realize that his conduct is likely to create such a belief. [Shipper] has not pointed to any facts sufficiently supporting some manifestation by the vessel owner to [Shipper] justifying reliance. Here, the bills of lading were issued by [Agent of Charterer]. Furthermore, there was no evidence that the vessel owner authorized [Agent] to issue bills of lading or that the vessel owner approved the form or contents. An agent cannot confer authority upon himself….While agents are often successful in creating an appearance of authority by their own acts and statements, such an appearance does not create apparent authority. We thus can find no sufficient basis to conclude that [Shipper] or the holder of the bills of lading reasonably relied on some manifestation by [Vessel Owner] to justify a belief that the bills of lading were issued on [Vessel Owner's] behalf. *Id.* (Internal quotations and citations omitted).

The Fourth Circuit Court of Appeals, which covers Maryland through the Carolinas in the Southeastern United States, reached a similar result in *Yeramex International v. S. S. Tendo*, 595 F.2d 943 (4th Cir. 1979), in which it held that apparent authority was a valid argument, but that there was no proof of it such that the vessel

owner could be bound. In *Yeramex*, the charterer, MCL, dealt with third party shippers in soliciting contracts of carriage. *Id.* at 946. MCL solicited the contracts in its own name, and held itself out for all purposes as the principal contracting party. *Id.* MCL, not the master, issued the bills of lading. *Id.* The terms clearly defined MCL as the principal contracting party and disclaimed any personal liability of the owner as an undisclosed contracting party. *Id.* "Other than the signature caption 'For the Master' which standing alone has an ambiguous meaning in modern-day commerce, plaintiff points to no fact which could reasonably lead parties relying on the terms of the charterer's bill of lading to believe that it was issued on the owner's behalf as a COGSA carrier." *Id.* "Therefore," the court concluded, "no liability *in personam* can lie against the [vessel] owner for MCL's bill of lading."

Thus, in *QT Trading*, the shipper would likely have had a stronger argument if Saga or Attic had solicited the contract of carriage, or if Daewoo's agent had issued the bills of lading on standard forms created by Saga or Attic, and which bore the names of Saga or Attic. The entire transaction, however, occurred through Daewoo and its agent (who, in any event, failed to sign the bill "for the Master"). Absent any demonstration of apparent authority, as indicated by Saga or Attic, it appears that QT had, at best, a very weak argument in support of head-charterer's or owner's liability based on the apparent authority of Daewoo's agent to bind the head-charterer or owner.

III. Conclusion

The facts of this case were unique in that all defendants were dismissed. Ordinarily, the sub-charterer who issued the bill of lading would have remained in the litigation but had been dismissed upon filing for bankruptcy protection. Having said that

the holding of the Fifth Circuit Court of Appeals is clearly not a new rule.[68] If the manner and style by which the bills of lading were signed had been different, it is likely that the District Court would have denied the defendants' motions for summary judgment.

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[68] *See supra* FN 7. It should also be noted that the outcome of this case would likely have been the same under the proposed "Rotterdam Rules." Subject to certain defenses, the United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), holds only the "carrier" and the "performing parties" who accomplish a shipment under the carrier's "supervision or control," liable to the shipper for cargo damage. *See*: Rotterdam Rules at Article 17 ¶ 1 (liability of "carrier"), Article 18 (liability of carrier's servants), and Article 1 ¶ 6(a) (defining "performing party"). The Rotterdam Rules define the "carrier" as "a person that enters into a contract of carriage with a shipper." *See id.* at Article 1, ¶ 5. To be liable to a shipper for cargo damage, the "carrier" must be identified by name and address on the bill of lading or similar "transport document." *See id.* at Article 36 ¶ (2)(b).
The only instances in which the vessel owner would be liable are those cases in which (a) the owner itself is named as the "carrier" on the bill of lading (whether by issuing the bill of lading itself or by authorizing the charterer to issue the bill of lading in the owner's name), *See id.* at Article 17 ¶ 1; or (b) regardless of the identity of the "carrier," the cause of the cargo damage was an unseaworthy vessel, s*ee id.* at Article 17 ¶ 5(a); or (c) the bill of lading failed to identify any carrier by name and address, in which case liability would revert to the vessel owner, *See id.* at Article 37 ¶ 2. In the latter case, where the bill of lading is blank, the vessel owner will be exonerated if it could (a) show that the vessel was under bareboat charter, and (b) supply the name and address of the bareboat charterer to the shipper, in which case the bareboat charterer would be the default "carrier". *See id.*
Thus, the outcome of the *QT Trading* case would likely be the same under the Rotterdam Rules because sub-charterer Daewoo, alone, was the statutory "carrier" named on the bills of lading, and Attic, Saga and Patt were not carriers. Neither were they "performing parties," subject to liability under the Rotterdam Rules, because it could not be said that Attic, Saga and Patt were servants working under Daewoo's "supervision or control" to accomplish the shipment. *See id*. at Article 1, ¶ 6(a). (It should be noted that the Rotterdam Rules do not yet apply. The United Nations adopted the Rotterdam Rules in 2008, with 23 nations joining, of which one, Spain, has ratified the Rules to date. The Rotterdam Rules will become effective among the ratifying nations once 20 nations have ratified them. As of June 2011, the United States has signed but not ratified the Rotterdam Rules. Accordingly, the Rotterdam Rules are not yet effective anywhere, including the United States, wherein COGSA remains the controlling statute).