통상정보연구 제8권 제4호 (2006년 12월 25일)
논문투고일자 : 2006. 10. 21
게재확정일자 : 2006. 11. 22

A Study on the Identification between Shipowner and Charterer to Sue for the Liability of Transportation

- Focused on English and Canadian Common Law -

정성훈(Sung-Hoon Jung)
건국대학교 경영관광대학 조교수

목 차

Abstract

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. The "carrier" could be the shipowner or the charterer or both. 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. The shipowner is almost always liable as a carrier under Common law provided there is no demise charter of the ship. The more recent case law, however, suggests that in the usual situation both the charterer and shipowner 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. An alternative method by which the charterer can avoid liability is to insert and 'Identity of Carrier' clause in the bill of lading.

Key Words : Charterer, Shipowner, Carrier, Bill of Lading, Liability of Transportation

Ⅰ. 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 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.

Ⅱ. Liability of the Shipowner

The shipowner is almost always liable as a carrier under Common law provided there is no demise charter of the ship.[1] In normal circumstances, since, despite the existence of the charterparty, the shipowner remains responsible for the management of the ship and the master signs any bills which are issued as his agent. This rule remains generally applicable even though the particular contract of carriage has been

1) *Paterson Steamships Ltd. v Aluminum Co.* of Canada [1951] SCR 852, p.860.

arranged by the chaterer and even though the bills of lading have been issued in his name. The right of the charterer to issue such bills of lading is dependent on an express term in the charter normally drafted to the following effect:

'The Captain(although appointed by the owner) shall be under the order and directions of the charterers as regards employment and agency;..... the Captain.... to sign the bills of lading as presented in conformity with mate's or tally clerk's receipts..... All bills of lading shall be without prejudice to this charter.'[2)]

Any bills presented by the charterer and signed by the master under the authority of such a clause will be binding on the shipowner. He will be regarded by law as the carrier for purposes of the resultant not even necessary to present such bills to the master for signature. The shipowner will be bound even though the bills are signed by the charterer himself, proving that the indicates on the bill that he is signing n behalf of the master and owner.[3)]

A similar result will also follow where the bills are signed to like effect by the charterer's agents.[4)] Finally, there is the situation where the head charter authorises sub-letting. In such an event, 'by necessary implication the head charter authorised the charterer in the case of such sub-letting to put the sub-charterer in the same position as to signature of the bills of lading as the charterer was under the head charter, i.e. to authorise the sub sub-charterer to require the master to sign bills of lading, or to sign them himself.'[5)]

To what extent are limits attached to the authority of the charterer to bind the shipowner by the issue of such bill of lading? Where the charterer is given the right, as in the New York Produce Exchange form already cited, to present bills for signature by the master 'without prejudice to this charterparty' then 'it is for the charterer, not the owner, to decide on the form of the bill of lading, always providing that the bill of lading does ot encroach on the rights conferred on the owner by the charterparty.'[6)] So, in the case from which this quotation is taken, the shipowner could not insist, before signature, on the inclusion in the bill of an additional clause clarifying his right to a lien over the cargo. Experience would suggest that there are few occasions on which the master can refuse to sign bills presented by the charterer, although there is authority for the view that he is entitled to do so where the terms of the bill are 'manifestly inconsistent with the charterparty'[7)] Nevertheless there are few examples in the cases of successfrul reliance on this principle, and shipowners have been unable to resist the inclusion in the bill of inter alia, a demise clause

2) NYPE charter clause 8.

3) *Tillmans v. Knutsford* [1908] A.C. p.406.

4) *The Berkshire*[1974] 1 Lloyd's Rep. 185 at p.188 per Brandon J. Expressly followed in the Australian case of *LEP International v. Atlanttrafic Express*[1987] 10 N.S.W.L.R.614. N.B. In each case the authority in the employment and agency clause to submit bills of lading for signature will be accompanied by an undertaking to indemnify for any additional liability resulting from such signature.

5) *The Virkfrost*[1980] 1 Lolyd's Rep. 560 at p.567 per Browne LJ.

6) Mustill J in *Gulf Steel v. Al Khalifa Shipping Co.*[1980] 2 Lloyd's Rep. 261, at p.265.

7) Lord Halsbury in *Kruger v. Moel Tryfan Ship Co*. [1907] A.C. 272 at p.278.

or a jurisdiction clause which differed from its counterpart in the charterparty. On the other hand, the shipowner would presumably be entitled to object if the bill named ports outside trading limits specified in the charterparty or if the bill referred to goods known not to have been shipped.[8] The shipowner would, however, be bound if such a bill were signed by the master and issued to a third party who took in good faith and without knowledge of the lack of authority.[9]

The rule applicable is stated by Channel J. in Wehner v Dene Steam Shipping Co., 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.[10] In the case of Canastrand Industries v The “Lara S”, 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.[11]

Ⅲ. Liability of the Charterer

So far we have concentrated on the more common situation where the shipowner is the carrier, but it is frequently the intention of the parties that the charterer should fill this role. Even where the contract of carriage is governed by th Hague/Visby Rules it is possible for the carrier to be either the shipowner or the charterer.[12] Thus the charterparty itself may provide that the master is authorised to sign bills 'as agent on behalf of the charterers' in which event the charterer will clearly be bound. Alternatively the charterer will be regarded as the carrier where he contracts as principal, negotiating the contract of carriage in his own name and issuing his own bills of lading. He may also be caught where he merely signs the bills of lading without indicating that he is acting as the agent of the master and owners.[13] Everything will depend on the terms of the bill of lading and the construction of the documents as a whole.

Even in the situation where the charterer is apparently a party to the bill of lading he may still seek to transfer contractual liability to the shipowner. One method of achieving this object is to include a demise clause in the bill of lading, of which the following is a typical example:

---

8) Cf *The Garbis*[1982] 1 Lloyd's Rep. 283 where master required to sign bills in a specified form.
9) Compare the position where such a bill had been signed by the charterer himself 'as agent on behalf of the shipowner',
10) *Wehner v Dene Steam Shipping Co*., [1905] 2 K.B. 92 at p. 98
11) *Canastrand Industries v The "Lara S"*, [1993] 2 F.C. 553.
12) Hague/Visby Rule, Art Ⅰ(a).
13) *Gadsden v. Australian Coastal Shipping Commission*[1977] 1 N.S.W.L.R. 575.

'If the ship is not owned or chartered by demise to the company or line by whom this bil of lading is issued (as may be the case notwithstanding anything which appears to the contrary) the Bills of Lading shall take effect as a contract with the Owner or demise charterer, as the case may be, as principal made 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.'

In essence the clause amounts to an express term in the contract of carriage to the effect that the party issuing the bill is not liable unless he is either the owner of the vessel or a charterer by demise. Unfortunately the clause fails to reveal whether or not he falls within one or other of these categories with the result that the holder of the bill is in doubt as to the identity of the party with whom he is contracting. Tetley argues that such ambiguity is undesirable when the claimant has only a limited period in which to institute proceedings under the Hague/Visby Rules, while it contradicts the impression created by the presence of the charterer's name at the head of the bill of lading.[14] Many jurisdictions refuse to give effect to such a clause while in others it is strictly construed.[15]

Its value has, however, been recognised by the High Court in the case of The Berkshire,[16] where effect was given to a demise clause included in a bill of lading issued by a sub-charterer. Brandon J commented

'I see no reason not to give effect to the demise clause in accordance with its terms... it follows that the bill of lading is, by its express terms, intended to take effect as a contract between the shipowner and the shippers made on behalf of the shipowners by ocean wide as agents only.... All the demise clause does is to spell out in unequivocal terms that the bill of lading is intended to be a shipowner's bill of lading... In my view, so far from being an extraordinary clause, it is an entirely usual and ordinary one.'

Nor does it apparently offered Art.Ⅲ rule 8 of the Hague/Visby Rules which renders null and void any attempt to exclude carrier liability as prescribed by the Rules. The clause is acceptable since rather than seeking to exclude liability, its aim is merely to indentify the party liable under the Rules.

Ⅳ. Liability under Canadian Common Law

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

14) Marine Cargo Claim, pp.248-51. See also UNCTAD: Report on Bills of Lading, pp.32-33.
15) *Andersons (Pacific) Trading co. v. Karlander* [1980] 2 N.S.W.L.R. 870.
16) *The Berkshire*[1974] 1 Lloyd's Rep. 185 at p.188

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,[17] and Aris Steamship Co. v Associated Metals and Minerals Corp.,[18] 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:[19]

'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, 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:[20]

'...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[21], and CN Marine Inc. v Carling O'Keefe Breweries.[22] 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

17) *Patterson Steamships Limited v Aluminum Co.* of Canada, [1951] S.C.R. 852.
18) *Aris Steamship Co. v Associated Metals and Minerals Corp.*, [1980] 110 DLR (3d) 1.
19) *Patterson Steamships Limited v Aluminum Co.* of Canada, *op.cit.*, at pp. 854-855
20) *Aris Steamship Co. v Associated Metals and Minerals Corp., op cit.,* at p. 5
21) *Cormorant Bulk Carriers Inc. v Canficorp* [1984] 54 NR 66.
22) *CN Marine Inc. v Carling O'Keefe Breweries* [1990] 1 F.C. 483.

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:[23)]

'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.[24)] 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

23) *ibid.,* at p. 501
24) *Lantic Sugar Ltd. v Blue Tower Trading Corp.,* [1993] F.C.J. No. 1120.

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".[25] 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" as 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,[26] 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.

---

25) *Canastrand Industries Ltd. v. the "Lara S",* [1993] 2 F.C.R. 553, affirmed [1994] F.C.J No. 1652.
26) *Farr Inc. v Tourloti Compania Naviera S.A.,* [1985] F.C.J. No. 602.

Ⅴ. 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.

An alternative method by which the charterer can avoid liability is to insert and 'Identity of Carrier' clause in the bill of lading. A tipical example of such a clause is the following:

'The contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein and it is, therefore, agreed that the said shipowner alone 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.'[27)]

Such a clause has much the same effect as a demise clause, but is perhaps more acceptable in that it removes any ambiguity by clearly designating the shipowner as the carrier.

Reference

- Books & Articles -

Alderton,P.M., Sea transport, Thomas Reed Publication Ltd, 1984.

Bes J., Chartering and Shipping Terms, London : Barker Howard Ltd., 1975.

Conlinebill, clause 17.

Hague/Visby Rule, Art Ⅰ(a).

Hughes,A.D. Casebook on Carriage of Goods by Sea, Blackstone Press, 1994.

McLaughlin, Jr.・Chester B., "The Evolution of the Ocean Bill of Lading", Yale Law Journal, Vol.35.

Mitchelhill, Alan, Bills of Lading-Law and practice, Chapman and Hall, 1982.

Mocatta, Alan Abraham, Mustill, Michael J., Scrutton on Charterparties and Bill of Lading, 19th ed.,

27) See Conlinebill, clause 17.

Sweet&Maxwell, 1984.

NYPE charter clause 8.

Payne, William · Ivamy, E.R.Hardy, Payne and Ivamy's Carriage of Goods by Sea 12th ed., London: Butterworth & Co., Ltd., 1985.

Wiliam Tetley, Marine Cargo Claim, 3rd edition, BLAIS, 1998.

Wilson, John, Carriage of Goods by Sea, London: Pitman Publishing, 1993.

- CASES -

Andersons (Pacific) Trading co. v. Karlander [1980] 2 N.S.W.L.R. 870.

Aris Steamship Co. v Associated Metals and Minerals Corp., [1980] 110 DLR (3d) 1.

Cormorant Bulk Carriers Inc. v Canficorp [1984] 54 NR 66.

CN Marine Inc. v Carling O'Keefe Breweries [1990] 1 F.C. 483.

Canastrand Industries v The “Lara S”, [1993]

Gadsden v. Australian Coastal Shipping Commission[1977] 1 N.S.W.L.R. 575.

Gulf Steel v. Al Khalifa Shipping Co.[1980] 2 Lloyd's Rep. 261,

Farr Inc. v Tourloti Compania Naviera S.A., [1985] F.C.J. No. 602.

Kruger v. Moel Tryfan Ship Co. [1907] A.C. 272

Lantic Sugar Ltd. v Blue Tower Trading Corp., [1993] F.C.J. No. 1120.

Paterson Steamships Ltd. v Aluminum Co. of Canada [1951] S.C.R 852,

The Berkshire[1974] 1 Lloyd's Rep. 185

The Virkfrost[1980] 1 Lolyd's Rep. 560

Tillmans v. Knutsford [1908] A.C.

Wehner v Dene Steam Shipping Co., [1905] 2 K.B. 92