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Freight Forwarders' House Bills of Lading — Myth, Facts and Hope

*Dr Simone Lamont-Black**

This paper examines the commercial and legal role and capacity of freight forwarders and the status of the house bills of lading that they issue. It analyses the historical treatment of house bills of lading, investigates national legislative regimes on freight forwarding and discusses sector-specific standard terms and conditions and documents designed to produce clarity on this issue. The paper closely analyses the role of freight forwarders' bills of lading in recent cases. It concludes that the profession of the freight forwarder has greatly developed since the notion of the freight forwarder's house bill being only a receipt for the goods was framed. This conception was rooted in a time when forwarders traditionally acted only as agents for their customer but did not engage in the business of carriage of goods themselves. Nowadays this approach has changed, and many forwarders act as carriers. Transport documentation has developed in line with forwarders' business activities. It is now time for law and lawyers to embrace this step instead of hindering the clarity that business practice has sought to create.

Keywords: Freight forwarder, house bill of lading, agent, principal, carrier, document of title, receipt for goods

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1 Introduction

The matter of freight forwarders' 'house bills of lading' has come to the forefront once again with the recent Australian decisions in *Cro Travel v ACFM*.¹ The difficulties in the case arose as the freight forwarder issued so-called house bills of lading, which were made out to the order of the shipper, alongside negotiable bills of lading issued by the ocean carrier to the shipper. The case discusses a number of authorities on house bills of lading, which reveal the need to recall relevant industry practice and development in the area of freight forwarding. The term 'house bills' has been widely used and in shipping practice seems no longer to be understood in the narrow sense in which it was initially coined. Traditionally the freight forwarder acted as an agent for the shipper arranging for the shipment of the goods.² It is submitted that the oft-quoted statement that house bills of lading are not bills of lading and at the most only a receipt, stems from this time. Business practice has developed greatly since and therefore such a narrow view is no longer appropriate.

The facts of *Cro Travel v ACFM* were as follows: ASH, an exporter of sheepskins and cowhides, sold goods to China and arranged shipment by engaging the defendant freight forwarder 'Freight Solutions', later renamed to 'Cro Travel'. To purchase the goods ASH took out finance with ACFM, the claimant. As security, ASH was required to deposit the original bills of lading with the claimant. For this purpose, the defendant issued house bills of lading 'for banking purposes' in negotiable form 'to order' and stamped 'ORIGINAL' to ASH, who passed them to the claimant. The bills were issued in the defendant's own name but signed for the carrier 'as agents only', even though the defendant had no authority to do so. When ASH defaulted on payment the claimant found that the bills were ineffective in obtaining possession of the

¹ *Australia Capital Financial Management Pty Limited v Freight Solutions (Vic) Pty Limited* [2017] NSWDC 279 (*ACFM v Freight Solutions*) and upheld on appeal in *Cro Travel Pty Ltd v Australia Capital Financial Management Pty Ltd* [2018] NSWCA 153 (*Cro Travel v ACFM*). For a discussion of the case in context of the earlier decisions see D Goodwin, 'Banking on the House: Freight Forwarder Bills of Lading and the *Cro* Case' (2018) 32 ANZ Mar LJ 10 ff.

² See J Ramberg, 'Unification of the Law of International Freight Forwarding' (1998) 3 Unif Law Rev 5; W Tetley, *Marine Cargo Claims* (4th edn, Les Éditions Yvon Blais 2008) Ch 33, 1694; T Schoenbaum, *Admiralty and Maritime Law* (4th edn, Thomson West 2008), §10-7, p 607; P Cain, 'Complexity, Confusion and the Multifaceted Legal Roles of the International Freight Forwarder' (2014) 14 Macquarie LJ 25, 28; B Eder et al, *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) para 4-051.

goods as the goods had already been delivered to unidentified receivers against the liner bills of lading that had been issued by the ocean carrier.

The claimant sued the defendant freight forwarder for damages arising from: (1) the defendant's misleading or deceptive conduct under Australian Consumer Law;³ and (2) breach of warranty of authority. The claimant succeeded on both causes of action at first instance and also on appeal. Of particular interest here is that the case examined the nature of house bills of lading and decided that by the defendant freight forwarder's conduct the claimant could be misled to thinking that he had obtained security in the form of the house bills. However, in the discussion a number of citations were made, referring to house bills of lading being only receipts for goods at most. This paper aims to set these comments into context and investigate whether they still hold true.

As a starting point, this paper therefore first considers the development of the business of freight forwarding and its perception in law throughout this development. This is set into context against the developments of freight forwarding standard terms and conditions and specific documents for the use by the freight forwarder. This then allows a consideration of the role of the forwarder in the light of the documentation he issued. This will assist to form a view of the validity and consequences of the documents so issued. It is argued that the documentation cannot be interpreted and validated based on an outdated view of the freight forwarder as forwarding agent, but the status of the forwarder in the particular case must be determined. Nowadays, a number of national laws and standard terms consider the freight forwarder as a contracting carrier, especially where he issues documents indicating his carrier role. A forwarder must be held to the documents he puts into circulation, rather than, as and when convenient to avoid liability, being successful in pleading his documents — against their wording — can only be taken as receipts due an alleged agency role. Transport documents

³ See Competition and Consumer Act 2010 (Cth) (CCA 2010), s 131 and Australian Consumer Law 2010 (Cth) (ACL) as set out in Sch 2 to the CCA 2010, s 18. The CCA 2010 with the ACL incorporates the rules and principles formerly set out in the Trade Practices Act 1974 (Cth) (TPA), case-law and commentary to which therefore remains relevant and binding. As to the duty not to engage in misleading conduct (ACL, s 18, formerly TPA, s 52) in the context of maritime contracts, see K Lewins, 'Corporate morality and commercial maritime contracts: considering the impact of the Trade Practices Act 1974 (Australia), s 52 on carriage of goods by sea' [2004] LMCLQ 197 ff.

are essential elements used in trade finance and tendered in letters of credit transactions,⁴ which has been described as the 'life-blood of international commerce',⁵ so that their face-value as conforming documents must not be undermined by permitting arguments to the effect that the forwarder issued the document in a different role to that purported in the document.

2 Freight forwarding business

The traditional role of the freight forwarder, then mostly called a forwarding agent, was typically only to arrange for transportation, consolidate shipments (where appropriate), pay freight charges, arrange insurance and effect packing, warehousing and customs clearance.⁶ The agency role of this line of business was famously summarised by Goddard LJ in *Pisani v Brown, Jenkinson & Co*:

[Forwarders] are willing to forward goods for you or to book you to the uttermost ends of the earth. They do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent. They are simply undertaking to get somebody to do the work, and as long as they exercise reasonable care in choosing the person to do the work they have performed their contract.⁷

⁴ The ICC Uniform Customs and Practice for Documentary Credits (UCP) accept forwarders' bills providing they are issued by or on behalf of the (contractual) carrier. See UCP 600, art 14(l) with arts 19–24; and the former UCP 500, arts 26 and 30.

⁵ *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146, 155 (Kerr J).

⁶ See Ramberg, 'Unification' (n 2); Ramberg, 'Freight forwarder law', in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law held on the Occasion of the Fortieth Session of the Commission, Vienna, 9-12 July 2007* (United Nations 2011) 257 (available online at <https://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf>); Tetley, *Marine Cargo Claims* (n 2) Ch 33, 1694–95; DJ Hill, *Freight Forwarding* (Stevens & Sons 1972) para 22 f; S Girvin, *Carriage of Goods by Sea* (2nd edn, Oxford University Press 2011) para 3.15; I Carr, 'International Multimodal transport — United Kingdom' [1998] Int TLR 99; Cain, 'Complexity' (n 2) 28; and see *Scrutton* (n 2) para 4-051 f; R De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para 1.25.

⁷ *CA Pisani & Co Ltd v Brown, Jenkinson & Co* (1939) 64 Ll LR 340, 342. In *Pisani* the defendants were shippers' agents in London who also carried on the business of ship's agents and ship's brokerage; their activities were described as that of forwarding goods on or of booking them to a destination, but not of undertaking to carry the goods themselves or by their agents.

Equally, Rowlatt J expressed this view in *Jones v European & General Express Company Ltd* as follows:

It must be clearly understood that a forwarding agent is not a carrier. *He does not obtain possession of the goods and he does not undertake to deliver them.* All he does is to act as agent and make the necessary arrangements, so far as is necessary, between the ship and the railway or anything else. His liability depends upon his failing to carry out the duties I have just described.⁸

More detail regarding the normal duties of such a forwarding agent was provided by Devlin J in *Heskell v Continental Express Ltd*:

... to ascertain the date and place of sailing, obtain a space allocation if that is required, and prepare the bill of lading. The different shipping lines have their own forms of bill of lading which can be obtained from stationers in the city, and it is the duty of the forwarding agent to put in the necessary particulars and to send the draft stamped to the loading broker. ... After shipment he collects the completed bill of lading and sends it to the shipper.⁹

Seemingly on this basis of categorising the freight forwarder as agent, decisions of the time mostly suggested that freight forwarder's documents were receipts or contained an agreement for forwarding only. In *A Gagniere & Co v The Eastern Company of Warehouses Insurance and Transport of Goods with Advances Ltd*,¹⁰ Roche J disposed quickly of the claim against the defendant forwarder as carriers under a bill of lading. He found it not to embody

⁸ *Jones v European & General Express Company Ltd* (1920) 4 LI LR 127. Emphasis added. The latter was a case concerning negligence claims against forwarders as shipping and insurance agents, which in this context discussed the forwarder's duties and distinguished the forwarder from a carrier.

⁹ *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1037.

¹⁰ See eg *A Gagniere & Co v The Eastern Company of Warehouses Insurance and transport of Goods with Advances Ltd* (1921) 7 LI LR 188, 189: 'The first claim is a claim that the defendants were liable upon the document of carriage. I call it the document of carriage because that is a neutral term. It is in form a bill of lading. The plaintiffs relied upon the fact that it is unqualified by any exception, such as restraint of princes or matters of that sort. It is so unqualified, in my opinion, just because it is not a bill of lading and does not embody, in spite of its form, an undertaking by the defendants of any absolute character to carry the goods anywhere. Construed properly, as a whole, it is a contract to arrange for the forwarding of the goods on the terms usual for each part of the transit as between owners of goods and owners of steamships or lines of railway.' The main case thereafter concerned the cover under the insurance provided by the defendant. It was this insurance part that was subject to appeal and was affirmed at (1921) 8 LI L Rep 365 (CA).

an undertaking of any absolute character to transport the goods and thus construed it as a contract to arrange for the forwarding of the goods. Also in *Emilio Clot & Co v Compagnie Commerciale Du Nord Société Anonyme*¹¹ the forwarder's document was held not to be a bill of lading, as was required under the CIF sales contract.¹² The document issued by the forwarder had only stated that he undertook to forward the goods to destination and that these had been received in good order and condition for shipment. The same document furthermore included a clause that, having so forwarded the goods, he was not under any responsibility whatsoever, which in Bailhache J's view was significant.

These were therefore decisions that did not discount the fact that a bill of lading issued by a freight forwarder could be a bill of lading. Instead, they looked to the freight forwarder's undertaking as established in the transport document and his role, drawing the conclusion that it was not a 'true' bill of lading that had been intended.

In harmony with this finding are therefore decisions within the same timeframe, holding the forwarder to be a carrier based on the bill of lading issued by him. The decisions suggested that what was necessary was a close analysis of the document, the relationship between the parties and the responsibilities undertaken. According to Bankes LJ, with whom Warrington LJ and Scrutton LJ concurred:

When the documents are looked into it appears to me plain that although the defendants describe themselves as forwarding agents, and although they disclaim any personal responsibility for any mishap on the voyage due to acts of any person employed by them they, in fact, did accept the position of issuing the through Bill of Lading for the goods with all responsibilities attaching to that position, subject, of course, to the protection which they afforded themselves by the exceptions.

In these circumstances it appears to me that this is not a case of principal and agent at all. It is a case of two independent contracting parties, one of whom described themselves as

¹¹ *Emilio Clot & Co v Compagnie Commerciale Du Nord Société Anonyme* (1929) 8 LI LR 380.

¹² The bank that paid against these documents should not have done so. The problem was that the licence for shipment of the goods expired before the goods were ready and they thus were never shipped. Instead, after running up warehouse costs, they were sold. The defendant seller had to return the price, as consideration for the moneys paid had failed.

forwarding agents, but although in certain circumstances and/or occasions they might act as mere agents, in this case they did not act or purport to act as mere agents, carrying out their principal's instructions. They were required to undertake the position of principal. It was an essential condition of their obtaining this business that they should themselves issue a through Bill of Lading, and by issuing a through Bill of Lading they made manifest the fact in reference to this particular transaction that they were an independent contracting party.¹³

A further example of such an analysis of the role and responsibilities undertaken as seen from the transport document and the surrounding circumstances is also provided in *Landauer & Co v Smits & Co*.¹⁴ Goods were delivered without production of a bill of lading and the defendant was sued for conversion of goods. He pleaded that he was only a forwarder and not a carrier and therefore was not liable for the misdelivery. According to Roche J:

The question is what responsibility did they take. A forwarding agent may take more or may take less responsibility. He always takes some; as a rule he takes more. It may be only an obligation to use due care in making proper contracts with regard to the forwarding of goods. It may be a great deal more. He may choose to contract to arrange for the whole carriage, and incidentally he may make for the person for whom he acts contracts with the shipowner and other persons of which the customer may avail himself. The forwarding agent may also act as a carrying contractor, to use a very apt and appropriate phrase which is used in this Bill of Lading.¹⁵

Differentiation of the capacity in which the forwarder acted, whether as agent or as principal incurring carrier duties, has been a reoccurring theme in the English courts, and increasingly so. This is illustrated in Fig 1. Over time, forwarders expanded their services and particularly since the dawn of containerisation freight forwarders acted more and more as carriers.¹⁶ As summarised in *Bowstead & Reynolds on Agency*:

¹³ *Troy v The Eastern Company of Warehouses, Insurance & Transport of Goods with Advances (of Petrograd)* (1921) 8 LI LR 17, 19, CA. The plaintiffs sought to recover amounts paid for freight. Due to delays, the consignee collected the goods at an intermediate place resulting in the last leg of the journey never being performed. The forwarder pleaded successfully that it was advance freight and thus not returnable.

¹⁴ *Landauer & Co v Smits & Co* (1921) 6 LI LR 577.

¹⁵ *Ibid*, 579.

¹⁶ Ramberg, 'Freight forwarder law' (n 6) 261; Ramberg, 'Unification' (n 2) 6; R De Wit, *Multimodal Transport: Carrier Liability and Documentation* (LLP 1995) para 1.26 and Cain, 'Complexity' (n 2) 27.

Although in 1920 it was said that a forwarding agent was not a carrier, and in 1965 it was said that the interpretation under which the freight forwarder was a carrier as opposed to an agent was exceptional, this seems no longer to be so.¹⁷

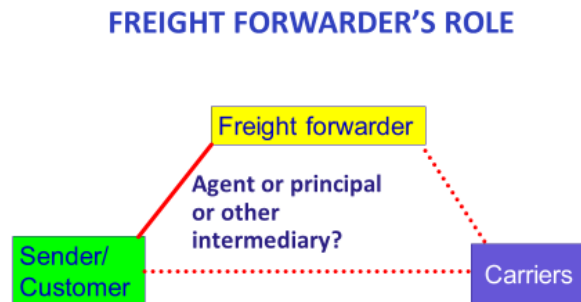


Fig 1: The conceptual role of the freight forwarder

Nowadays, freight forwarding is a profession that offers a wide variety of services, including all manner of services for and surrounding unimodal or multimodal carriage of goods.¹⁸ This, to some extent, has also found recognition in national laws, whether by statute or case-law, freight forwarders' documents and standard terms and conditions.

¹⁷ PG Watts (ed), *Bowstead & Reynolds on Agency* (21st edn, Sweet & Maxwell 2018), para 9-024 and see also more broadly on the topic F Reynolds, 'The Liability of Freight Forwarders', Ch 14 in B Soyer and A Tettenborn (eds), *Carriage of Goods by Land, Sea and Air: Unimodal and Multimodal Transport in the 21st Century* (Informa Law by Routledge 2014).

¹⁸ In the words of the World Organisation for Freight Forwarders, the International Federation of Freight Forwarders Associations (FIATA) and the Regional Body for Europe, the European Association for Forwarding, Transport, Logistics and Customs Services (CLECLAT) freight forwarding and logistics services comprise of:

... services of any kind relating to the carriage (performed by single mode or multimodal transport means), consolidation, storage, handling, packing or distribution of the goods as well as ancillary and advisory services in connection therewith, including but not limited to Customs and fiscal matters, declaring the goods for official purposes, procuring insurance of the goods and collecting or procuring payment or documents relating to the goods. Freight Forwarding Services also include logistical services with modern information and communication technology in connection with the carriage, handling or storage of the goods, and de facto total supply chain management. These services can be tailored to meet the flexible application of the services provided.

3 National laws

Only a few countries have laws which are designed to deal with the business of freight forwarding. Those that do represent different conceptual approaches.¹⁹ They range from a highly regulated profession to unregulated²⁰ provision of services, all the while under different legal concepts, ranging from providing services as a mere commission agent, to intermediary, to a service provider guaranteeing successful carriage, to classifying the forwarder as service provider with full carrier liability and/or contracting carrier.²¹ Where legal systems allow flexibility, the rules against which the freight forwarder is measured depend on the capacity in which he is deemed to have contracted.

English law and much of the Common Law world approaches this area from the principle of freedom of contract.²² While initially the forwarder was seen as an agent for the customer, case-law now suggests that the capacity in which the forwarder acts must be determined by contract interpretation, taking the entire factual matrix into account, and thus taking a close look at the agreement in light of the relationship and performance as a whole. The determination of the forwarder's role will usually come down to a distinction between his acting as agent or as principal, although in principle also a third form is possible, that of indirect representation of the forwarder for his customer. However, Mance J, as he then was, suggested that clear evidence would be required regarding the assumption of such a role.²³ Indeed such a form is more common in Continental law where, as a corollary, the commission agent has specific duties to ensure that the customer is not left without recourse.²⁴

¹⁹ See also UNECE Working Party on Intermodal Transport and Logistics: Survey of Freight Forwarders Market ECE/TRANS/WP.24/2014/3, para 18 (Note of Secretariat) with responses to survey in ECE/TRANS/WP.24/2016/5 and ECE/TRANS/WP.24/2016/8 and for an overview over national laws on freight forwarding see Ramberg, 'Freight forwarder law' (n 6) 265.

²⁰ Unregulated beyond what is required in general for the provision of services.

²¹ For a detailed discussion and analysis see F Smeele, 'Legal conceptualisations of the freight forwarder: some comparative reflections on the disunified law of forwarding', Ch 2 in S Lamont-Black, DR Thomas (eds), *Current issues in freight forwarding: law and logistics* (Lawtext Publishing Ltd 2017) and more broadly see Ramberg, 'Freight forwarder law' (n 6) 258ff.

²² Albeit, where applicable, within the limits of unfair contract terms legislation (Unfair Contract Terms Act 1977 (UK), but see the rather limited application for carriage of goods by ship and hovercraft (Sch 1, paras 2 and 3)) and consumer law (Consumer Rights Act 2015 (UK), especially Part 1, Ch 4 (Services) and Part 2 (Unfair Terms)).

²³ *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669, 673–74 (Mance J); *Bowstead & Reynolds* (n 17) para 9-024 and see Reynolds, 'The Liability of Freight Forwarders' (n 17) 253, 259 f.

²⁴ See also Reynolds, 'The Liability of Freight Forwarders' (n 17) 257.

Various factors have been identified by case-law and in literature to aid the categorisation. These include:²⁵

- the usual course of business of the forwarder and how he portrays his business, whether he holds himself out to act as agent only or as a carrier; for example, whether he markets his own sea freight services as NVOCC;
- the course of any prior dealings of the parties with each other and the manner of past performance;
- the terms of the particular contract including the nature of the instructions given, for example whether they were for carriage or to arrange carriage and the terms and conditions used;
- any description used or adopted by the parties in relation to the forwarder's role;
- the nature and basis of charging his customer, such as whether the forwarder could make a profit via an all-in fee arrangement or whether he was accounting for the individual services procured while adding a commission for his services;
- the interaction between the forwarder and his customer during the performance of the contract, such as whether the customer is kept informed of the actual shipping arrangements and the contractual terms under which the forwarder contracted with any actual carrier;

²⁵ See the summary of criteria in *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep 669, 674 (Mance J) as approved by the Court of Appeal in *Lukoil-Kalingradmorneft plc v Tata Ltd* (No 2) [1999] 2 Lloyd's Rep 129, 137 and *Royal & Sun Alliance Plc v MK Digital* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110 [53] (Rix LJ) and applied eg in *Mar-Train Heavy Haulage Ltd v Shipping.DK Chartering A/S (t/a Frank & Tobiesen A/S)* [2014] EWHC 355 (Comm), [2014] 2 WLUK 635 [28 ff] and *Granville Oil & Chemicals Ltd v Davies Turner & Co Ltd* [2002] 10 WLUK 5 [58 ff] (reversed on appeal on other grounds). From other Common Law jurisdictions see eg from Hong Kong *Vastfame Camera Ltd Birkhardt Globistics* [2005] 4 HKC 117; from Singapore *Ocean Projects Inc v Ultratech Pte Ltd* [1994] SGCA 64; from New Zealand *EMI (New Zealand) Ltd v WM Holyman & Sons Pty Ltd* [1976] 2 NZLR 566 (CA); and from Australia *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (The Ocean Trader)* (1993) 113 ALR 677 (FCA) and *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745. And see DA Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd edn, Informa 2012) para 2.67 ff; P Bugden and S Lamont-Black, *Goods in Transit* (4th edn, Sweet & Maxwell 2018) para 15-037; W Tetley, *Marine Cargo Claims* (n 2) Ch 33, 1694, 1696 ff; and Hill, *Freight Forwarders* (n 2) paras 66 ff. See also W Leung, 'The Dual Role of the Freight Forwarder: *Vastfame Camera Ltd v Birkart Globistics Ltd*, 2005 High Court of Hong Kong 117, Stone J, 5 October 2005; 2005 AMC 2864 (High Court of Hong Kong, 2005)' 38 (2007) J Mar L & Com 97 ff (especially 99–101).

- the manner of performance by the forwarder, whether the forwarder ever took possession of the goods; whether carriage is (part) performed by the forwarder; whether he owns vehicles or vessels; the forwarder's relationship with any actual performer(s) of the services;
- the nature and terms of any carriage document issued for the transportation by whom and in whose name, to whom and at what time:
 - between the forwarder and his customer; or
 - between the actual performer and the forwarder or the forwarder's customer.
 Examples of this include the issuance of a CMR consignment note by the driver after the relevant contract was made, or that of an ocean bill of lading by the ocean carrier to the forwarder as shipper, or that of a multimodal bill of lading by the forwarder to his customer.

Classification is simplified under **Dutch law**, which provides a clear rule that the freight forwarder generally is a mere intermediary, who makes contracts on behalf of his customer, the principal.²⁶ Only where the freight forwarder himself carries, will he be deemed to also be the carrier. However, the role of an intermediary brings with it a duty to disclose all relevant information and documentation in case the goods are lost, damaged or delayed, in order to enable his principal to take action against the carrier. Should the freight forwarder fail to do so, he is liable as if he had been the carrier as well as for damages due to his breach of duty.²⁷ However the Dutch code also contains mandatory provisions for contracts of carriage of goods in general, and for combined carriage of goods more specifically,²⁸ to which a forwarder who contracts as carrier must adhere.

Under **German law**, while the general principle is based on an intermediary role,²⁹ in practice far more relevant are the special provisions governing the freight forwarder's activity. These

²⁶ See the codification of the rules on the freight forwarding contract new Dutch Civil Code (DCC), arts 8:60–8:73.

²⁷ DCC, art 8:63. Note, the provisions imposing liability 'as a carrier' on the freight forwarder are mandatory.

²⁸ See DCC, arts 8:20–8:32 and 8:40–8:52.

²⁹ The general rule provides that a freight forwarder is obliged to arrange for the dispatch of the goods, usually in his own name, but for account of the customer, unless specifically authorised to act in the name of the customer. The freight forwarder chooses the route, means of transport, selects the performing enterprises and, where necessary, secures any claims for damages for his customer. See HGB (German Commercial Code), § 454: For an English translation of the German transport law provisions of the HGB see the website

concern the freight forwarder contracting either on: (a) a fixed cost basis; or (b) for consolidation of cargo; or (c) where performing carriage himself.³⁰ In these cases the freight forwarder is treated in German law as carrier and is liable as a carrier under the relevant rules for the performance of the carriage in addition to any other duties he may have agreed to provide.³¹

Nordic countries have no specific legal codification of the forwarder's role, but a trend can be observed that courts are quite proactive in finding forwarders to be carriers where they may be deemed to have undertaken a carriage commitment.³²

Somewhat differently in France, **French law** knows on the one hand the *transitaire*, who is only acting as agent for the customer in facilitating operations auxiliary to the transportation of the goods and according to clear instruction by his customer.³³ On the other hand is the *commissionnaire de transport*, who must have a licence and owes his customer a personal non-delegable duty for the proper organisation and planning of the movement of the goods and selection of appropriate subcontractors. Furthermore, the *commissionnaire de transport* is guarantor for the services provided by his sub-contractors and is liable for the performance to the same extent as his sub-contractors.³⁴ Thus, as Rix LJ summarized:³⁵ '... unlike an English freight forwarding agent, who prima facie contracts only as an agent so far as the actual carriage is concerned, the French *commissionnaire de transport* is an agent who contracts with personal liability throughout.' His liability is set out in a statutory standard contract, but the parties can agree to other terms.³⁶

of the Deutsche Gesellschaft für Transportrecht, Hamburg (German Association for Transport Law): for 'freight business' see <<http://transportrecht.org/wp-content/uploads/HGB4Buch2013DGTren.pdf>>; and for the sections on 'maritime trade' see <http://transportrecht.org/wp-content/uploads/HGB_5_Buch_Uebersetzung_DGTR_2015_05_11.pdf>.

³⁰ See Schmidt/Herber, *Münchener Kommentar zum Handelsgesetzbuch, Band 7, §§ 407-619 Transportrecht* (3rd edn, Verlag CH Beck 2014) § 458 HGB, para 3, § 459 HGB, para 1, § 460 HGB, para 4 (Bydlinski).

³¹ HGB, §§ 458–460.

³² See A Mikkelsen, L Lundsby Wessel, 'From Chameleon to Carrier, A Freight Forwarder's Journey over 50 Years from a Nordic Perspective' [2015] ETL 415, 439.

³³ See I Bon-Garcin, M Bernadet and Y Reinhard, *Droit des Transports* (Dalloz 2010) 324 and 606 ff.

³⁴ Thus allowing back-to-back recovery.

³⁵ *Royal & Sun Alliance Plc v MK Digital* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep 110 [32] (Rix LJ).

³⁶ In principle, this allows the *commissionnaire* to contract out of or reduce his liability as envisaged by the statutory form contract.

As illustrated in Fig 2, different laws therefore categorise the role and legal capacity of the freight forwarder, at least as a starting point, at opposite ends as to whether he entered into the contract in a carrier role or an agency role. They may also differ with respect to the liability that attaches to such a role. Thus, in the absence of clear contracting, taking into account all of the elements, the status, rights and liabilities of the parties can be open to painstaking interpretation and protracted court or arbitration proceedings.

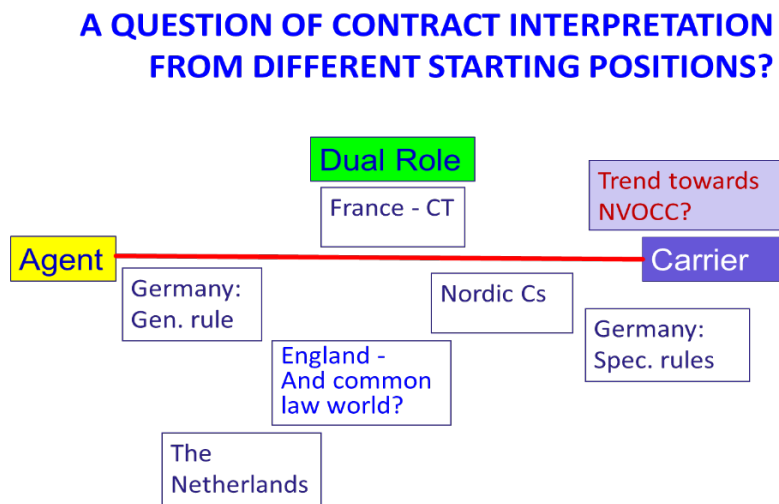


Fig 2: National law approaches to the capacity/role of the freight forwarder

4 Sector-specific standard terms and conditions to add clarity

To limit such need for interpretation and litigation via use of effective standard contract terms, FIATA has developed the FIATA Model Rules for Freight Forwarding Services.³⁷ These have been used by national freight forwarding associations to develop their standard terms and conditions or have, at least, acted as a model with respect to a desirable level of liability.³⁸

The rules aim to set out:

³⁷ With its first version of 1997 and current version of 2007.

³⁸ See Ramberg, 'Unification' (n 2) 9–11 and J Ramberg, 'The Future of International Unification of Transport Law' (2001) 41 *Scandinavian Studies in Law* 453–54.

- a) when the freight forwarder acts as carrier, such as when performing the carriage himself or when he has made an express or implied undertaking, by issuing his own transport document or otherwise, that he is assuming carrier liability; and
- b) when he is acting as principal for other services.³⁹

The Rules then provide rules on performance of the duties and liability accordingly.⁴⁰

Numerous freight forwarding standard terms and conditions (STCs) have been modelled, to a larger or lesser extent, on the FIATA Rules, while taking into account the peculiarities of the relevant national law. Some have been negotiated by freight forwarders and shippers associations together, aiming at an acceptable balance between the different interests. An example are those of the Nordic countries, with the most recent NSAB 2015 (the General Conditions of the Nordic Associations of Freight Forwarders) and of Germany with the ADSp 2017 (the German Freight Forwarder's Standard Terms and Conditions). In the Netherlands the Dutch Forwarding Conditions, FENEX 2018 (the General Conditions of the Netherlands

³⁹ FIATA MODEL RULES, CL 7.1—7.2: THE FREIGHT FORWARDER'S LIABILITY AS PRINCIPAL (emphasis added):

7.1. The Freight Forwarder's liability as Carrier:

The Freight Forwarder is subject to liability as principal not only *when he actually performs* the carriage *himself* by his own means of transport (performing Carrier), *but also if, by issuing his own transport document or otherwise, he has made an express or implied undertaking to assume Carrier liability (contracting Carrier)*. However, the Freight Forwarder shall *not be deemed liable as Carrier* if the Customer has received a transport document issued by a person other than the Freight Forwarder *and* does not within a reasonable time maintain that the Freight Forwarder is nevertheless liable as Carrier.

7.2. The Freight Forwarder's liability as principal for *other services*:

With respect to services other than carriage of goods such as, but not limited to, storage, handling, packing or distribution of the Goods, as well as ancillary services in connection therewith, the Freight Forwarder shall be liable as principal:

1. when such services have been *performed by himself* using his own facilities or employees or
2. if he has made an *express or implied undertaking to assume liability as principal*.

⁴⁰ According to the Model Rules, as principal he is liable for the services of third parties he uses in the performance of the contract of carriage or other services and his liability is aligned to relevant laws governing the mode of transport or other services as well as any other conditions agreed. Absent specific instructions or agreement, the Rules provide the freight forwarder with freedom of choice of means, route and procedure for handling, stowage, storage and transportation of the goods. When the freight forwarder is not acting as principal the Rules require him to exercise due diligence and to take reasonable measures in the performance of his services with ensuing liability for breach of his duty to care for services provided, but he is not liable for third parties. Limitation is set at 2 SDRs unless the freight forwarder recovers a higher amount from the person for whom he is liable, although this limit will not apply where mandatory carriage laws apply. (See Rules 5, 6, 7 and 8 read with 7.3 of the FIATA Model Rules.) The overall limit of liability has deliberately been left open for insertion of an appropriate amount as per country in which the Rules are to be used. (See J Ramberg, 'Unification' (n 2) 9–10).

Association for Forwarding and Logistics) apply, in Britain the BIFA STCs 2017 (British International Freight Association Standard Terms and Condition) are in use, in Ireland the ILFA 2018 (the Irish International Freight Association (Standard Trading Conditions and Warehousing Conditions)), and in Singapore the Singapore Logistics Association STCs 2004, to name but a few. Another example are the 2018 Model STCs,⁴¹ which are provided by AFIF (the Australian Federation of International Forwarders) to its members for incorporation into their individual STCs, whether in part or as a whole.

The distinction of the capacity of carrier /principal or as agent has generally found recognition in these STCs in a manner that mirrors and complements the rules provided by the national law. Therefore, we can observe that:

- a) English standard industry terms do nothing to limit this freedom or clarify the position of the freight forwarder at the time of contracting.⁴² This is in line with the position under **English law** which affords full freedom of contract to the parties. The legal position being similar in **Australian law**,⁴³ the Australian Model Standard Trading

⁴¹ The AFIF STCs in their most recent April 2018 edition.

⁴² See the British International Freight Association Standard Terms and Conditions (BIFA STCs) 2017, cl 4(A); although within the limits imposed by cl 6(B) that where the freight forwarder acting as agent does not provide evidence of any contracts procured for the customer within 14 days of notice given to him, he is deemed to have contracted as principal for the performance of the service. See BIFA 2017, cls 4–6 (emphasis added):

4 (A) Subject to clauses 11 and 12 below, the Company shall be entitled to procure any or all of the services *as an agent, or, to provide those services as a principal.*

(B) The Company reserves to itself full liberty as to the means, route and procedure to be followed in the performance of any service provided in the course of business undertaken subject to these conditions.

5 *When the Company contracts as a principal for any services, it shall have full liberty to perform such services itself, or, to subcontract on any terms whatsoever, the whole or any part of such services.*

6 (A) When the Company *acts as an agent on behalf of* the Customer, the Company shall be entitled, and the Customer hereby expressly authorises the Company, to enter into all and any contracts on behalf of the Customer as may be necessary or desirable to fulfil the Customer's instructions, and whether such contracts are subject to the trading conditions of the parties with whom such contracts are made, or otherwise.

(B) The Company shall, within 14 days' notice given by the Customer, provide evidence of any contract entered into as agent for the Customer. Insofar as the Company may be in default of the obligation to provide such evidence, it shall be deemed to have contracted with the Customer as a principal for the performance of the Customer's instructions.

⁴³ Where common law applies as amended by the CCA 2010 with its Sch 2 (as incorporated via s 131 of the Act) setting out the ACL. By the latter, Australian unfair terms legislation and certain guarantees under the ACL are applicable to certain business transactions (see ACL, ss 18, 20, 21, 23–28 and 60–68) and thus can be relevant for the business of freight forwarding, although transport contracts are usually excluded from such regulation (ACL, ss 28 and 63).

Conditions only clarify that the company is not a common carrier⁴⁴ but do no more to assist any classification.

- b) Although rooted in the common law, the **Singapore** Logistics Association's STCs are more explicit in providing carrier liability when the forwarder is himself carrying, when he is contracting as MTO (multimodal transport operator) or by expressly agreeing in writing to act as principal. However, the STCs also aim at negating some of the common law criteria in being effective, without more, as an indicator of carrier capacity and treats the taking out of a transport document in the name of the customer with another carrier as indication of the forwarder acting as agent only.⁴⁵
- c) In the **Nordic countries**, the NSAB 2015, with increased clarity and giving effect to relevant case-law,⁴⁶ sets out that the freight forwarder is taken to act as principal unless he is not undertaking to perform services in his own name or account and is furthermore clearly specifying to the customer that he acts only as intermediary.⁴⁷

⁴⁴ Drawn up by the Australian Federation of International Forwarders (AFIF) for its members; see cl 2.

⁴⁵ Singapore Logistics Association (SLA) — STC 2004, cls 3–4 (emphasis added):

3. *All Services are provided by the Company as agents except* in one or more of the following circumstances where the Company acts as principal:
- (a) where the Company *performs any carriage*, handling or storage of Goods *but only to the extent that* the carriage is performed by the Company itself or its servants and the Goods are in the actual custody and control of the Company or its servants;
 - (b) where the Company *contracts with its Customers as a Multimodal Transport Operator*; or
 - (c) to the extent that the Company *expressly agrees in writing* to act as a principal.
4. Without prejudice to the generality of Clause 3,
- (a) the charging by the Company of an inclusive price for any Services shall not in itself determine that the Company is acting as an agent or a principal in respect of such Services;
 - (b) the supplying by the Company of their own or leased equipment and/or facilities, shall not in itself determine that the Company is acting as an agent or a principal in respect of such Services;
 - (c) the Company *acts as an agent where the Company procures the issue of a bill of lading or other document evidencing a contract of carriage between a person, other than the Company, and the Customer or Owner*; and
 - (d) the Company acts as an agent and never as a principal when providing Services in respect of or relating to customs requirements, taxes, licences, consular documents, certificates of origin, inspection, certificates and other services similar or incidental thereto.

⁴⁶ See NSAB 2015, §3 B and C; and for the former version see NSAB 2000, §2 A.

⁴⁷ Nordic Countries (Denmark, Finland, Norway, Sweden) — NSAB 2015, § 3 (emphasis added):

B. The freight forwarder as contracting party

- 1) In accordance with §§ 2 and 15-21, the freight forwarder will be *responsible as a contracting party for all services undertaken* by the freight forwarder excluding instances under section 3 C below. The freight forwarder is furthermore responsible for other contracting parties that the freight forwarder has engaged to perform or carry the contract on behalf of the freight forwarder.

2) ...

C. The freight forwarder as intermediary

Noteworthy is that the NSAB are jointly agreed between the stakeholders of both sides, the freight forwarders and shippers,⁴⁸ rather than being imposed unilaterally by the freight forwarders' organisation.⁴⁹

- d) In Germany the ADSp 2017,⁵⁰ also jointly negotiated, do not contain any provisions on the matter as it is firmly set out in the domestic law that the forwarder is liable as carrier when self-performing, when consolidating cargo or when contracting on a fixed price basis.⁵¹

We can therefore conclude this part with the observation that most national laws accept that there are situations in which the freight forwarder is acting or is deemed to be *acting as contracting carrier*. The country-specific forwarding conditions also provide for the possibility that the freight forwarder *acts as contracting carrier* and those that go into such detail as including the issuing of a transport document use this as clear indication that a carrier role is intended between the parties as set out in the transport document. Thus, where the freight forwarder issues his 'house' bill of lading as principal, whether unimodal or multimodal,⁵² he is deemed to be contracting as carrier and taking on a carrier role,⁵³ whether or not he is indeed performing the transportation himself. Where he is simply passing on a document enshrining a relationship between his customer as shipper and another carrier, this is taken as indication that he is acting as an intermediary only.⁵⁴

Notwithstanding article 3 B.1 above, the freight forwarder can in accordance with §§ 22 – 24 below, undertake services – or parts of services – as intermediary, *if the freight forwarder does not undertake such services in his own name or on his own account and on the condition that the freight forwarder specifies to the customer that the services are undertaken solely as intermediary*. As intermediary, the freight forwarder is not responsible for parties other than his own employees.

⁴⁸ See Preamble to NSAB 2015 and NSAB 2000; and see H Th Jantzen, T Fomsgaard, 'The freight forwarder's legal position in the Nordic countries in light of the standard terms NSAB 2015', Ch 16 in S Lamont-Black, D R Thomas (eds), *Current issues in freight forwarding* (n 29) 331, 333.

⁴⁹ As seems to be the case in the UK with BIFA Terms.

⁵⁰ See D Neufang, H Valder, S Lamont-Black (trs) 'The German Freight Forwarder's Standard Terms and Conditions: Jointly recommended contract terms once more', ch 15 in S Lamont-Black, D R Thomas (eds), *Current issues in freight forwarding* (n 29) 320, 328 and (2017) IHT (Tijdschrift voor Internationale Handel en Transportrecht) 318, 326.

⁵¹ See HGB, §§ 458–460, 466, resulting in the German standard terms, the ADSp, cl 22.1 to only refer to the liability as per statute.

⁵² And providing it is in a form of a bill of lading or transport document in contrast to a mere receipt, which should not be called a bill of lading.

⁵³ See FIATA ML, cl 71; SLA-STC 2004, cl 3(b); NSAB 2000, §2A(1) and see the later NSAB 2015, § 3 B now going even further and assuming the role of a contracting party unless the intermediary role is clarified.

⁵⁴ See SLA-STC 2004, cl 4(c).

5 Sector-specific documents

To facilitate the transactions of its members via the use of appropriate documentation, FIATA⁵⁵ has developed a number of documents. These aim, on the one hand, to demarcate the cornerstones of the freight forwarding contract and, where necessary, to act as a receipt for the goods, while on the other hand, to incorporate appropriate standard terms and conditions into the contract.⁵⁶ FIATA members can obtain the relevant documents from their country-specific freight forwarder organisations.⁵⁷

The documents recommended for use by the forwarder, in their latest 1992 iteration, are:

- FIATA FCR (Forwarder's Certificate of Receipt)
- FIATA FCT (Forwarder's Certificate of Transport)
- FWR (FIATA Warehouse Receipt)
- FBL (negotiable FIATA Multimodal Transport Bill of Lading)
- FWB (non-negotiable FIATA Multimodal Transport Waybill)
- FFI (FIATA Forwarding Instructions).

Each of these documents works in conjunction with standard terms and conditions. Insofar as the transport documents of the FIATA FBL and FWB are concerned they have detailed (universal) standard terms and conditions printed on the reverse side, while the other documents, such as the FCT, FCR or FWR are to be used together with the relevant country specific standard terms and conditions issued by the forwarder's national freight forwarder organisation.⁵⁸

⁵⁵ See n 18.

⁵⁶ Hereafter also STCs.

⁵⁷ A list of the issuing country organisations is posted on the FIATA website via the link at <<https://fiata.com/about-fiata/fiata-documents.html>>.

⁵⁸ The British International Freight Association (BIFA) is the relevant freight forwarder organization in the UK — its standard terms and conditions are known as the BIFA STCs and their latest edition is from 2017. The Australian Federation of International Forwarders (AFIF) offers the AFIF 2018 (Model STCs) for its members and the Singapore Logistics Association the SLA STC 2004.

Already in 1971 FIATA introduced the FIATA Combined Transport Bill of Lading, the predecessor of the 1992 FBL, which incorporated carrier capacity explicitly in its terms. This was in contrast to the then FIATA Receipt for Transport, which could be used to only accept receipt of the goods if an agency role was preferred. The forms were based on the developments at the time to create and harmonise rules for multimodal transport.⁵⁹

The documents of FBL and FWB make clear that these are documents issued by the freight forwarder as carrier, indeed as multimodal transport operator (MTO). Indeed, the definition section of FBL states that:

‘Freight Forwarder’ means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.

This is further supported by clause 2.1a), which states:

By issuance of this FBL the Freight Forwarder a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL.

And clause 6.1, which sets out the freight forwarder liability, underlines this further:

The responsibility of the Freight Forwarder for the goods under these conditions cover the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

In contrast, the FIATA FCT shows clearly that no carrier liability is accepted, but that the forwarder engages a carrier only as agent for the customer. This is specifically set out on the face of the FCT in the lower third of the document:

⁵⁹ See UNCTAD Secretariat Report of 25 June 2001 ‘Implementation of Multimodal Transport Rules’, UNCTAD/SDTE/TLB/2, paras 16–40.

1. The undersigned are authorized to enter into contracts with carriers and others involved in the execution of the transport subject to the latter's usual terms and conditions.
2. The undersigned do not act as Carriers but as Forwarders. In consequence they are only responsible for the careful selection of third parties ...

The FCR is only a receipt for the goods and sets out binary instructions to either hold the goods at the disposal of the consignee, or to forward them to the consignee. It states on its face that the forwarder has assumed control of the consignment in external apparent good order and condition (or as otherwise stated thereon). This document is usually used when the seller needs to show to the buyer, for example under an ex works contract, that the goods have been handed over to the forwarder and are thus at the disposal of the buyer.

Separately, the Baltic and International Maritime Council (BIMCO)⁶⁰ has also developed transport documents designed to facilitate first combined and later multimodal transport, both in negotiable and non-negotiable forms. These, in their current version, are the BIMCO's MULTIDOC (Multimodal Transport Bill of Lading) and BIMCO's COMBICONBILL (Combined Transport Bill of Lading).⁶¹ They are intended to be used by a carrier for combined transport⁶² or multimodal transport, in which case the carrier is called the Multimodal Transport Operator. In this regard MULTIDOC 2016 provides in its definitions cl 2 (emphasis added):

Multimodal Transport Operator (MTO) means the person named on the face hereof who concludes a Multimodal Transport Contract and assumes responsibility for the performance thereof *as a Carrier*.

The FIATA FBL and the BIMCO MULTIDOC Bill of Lading have been developed according to, and incorporate, the UNCTAD/ICC Rules for Multimodal Transport Bills of Lading of 1992 (ICC

⁶⁰ Registered in Denmark.

⁶¹ Both in the initial 1995 and the revised 2016 form. See also the 1977 COMBIDOC, based on the previous ICC Rules for a Combined Transport Document 1975 (UNCTAD Secretariat Report of 25 June 2001 'Implementation of Multimodal Transport Rules', UNCTAD/SDTE/TLB/2, paras 29–30 and fn 20).

⁶² Although they are also capable of being used for only one mode of transport.

Publication 481).⁶³ BIMCO's COMBICONBILL, by comparison, applies general liability of the carrier for the goods while in his care, from receipt until delivery of the goods.⁶⁴

When the freight forwarder carefully considers which document to use and selects a FIATA FBL or a MULTIDOC, can one negate this indication of the freight forwarder's intentions in the clear form of the document simply by suggesting that the document was issued by a freight forwarder and thus, as a 'house bill of lading', it cannot be a carrier's document and indeed a valid bill of lading? It is submitted that this cannot be correct; one would require considerably more evidence to counteract the clear indication of such a document as to the status of a carrier. This has also been generally confirmed by more recent case-law from several Common Law jurisdictions.

THE FREIGHT FORWARDER / LOGISTICS PROVIDER AS PRINCIPAL

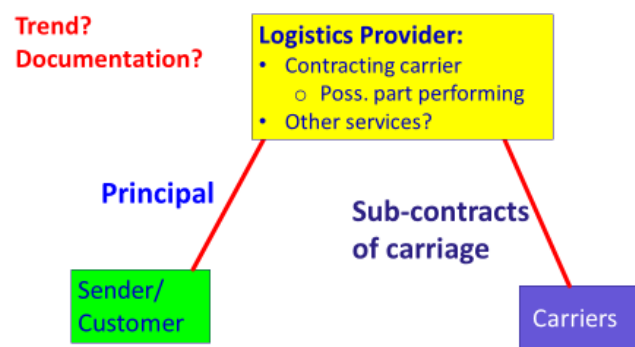


Fig 3: Documentation as an indication of the freight forwarder's role as contracting carrier

⁶³ The UNCTAD/ICC Rules for Multimodal Transport Documents, and so also the FIATA FBL and the BIMCO MULTIDOC, provide for liability based on presumed fault, although for sea carriage include the nautical fault and fire on board exclusions, as well as the other Hague-Visby Rules exclusions from liability. This is coupled with a network system for limitation of liability providing for sea limits in principle and for road limits if no sea or inland waterway transport was involved, but this system is overridden in case of localised damage by a mandatory transport convention or national law. On the UNCTAD/ICC Rules in the context of harmonisation see M Faghfour, 'International Regulation of Liability for Multimodal Transport – In search of Uniformity' (2006) 5 WMU Journal of International Maritime Affairs 95, 99–100.

⁶⁴ However, there are a number of defences for causes that originated outside the carriers' sphere of responsibility or could not be avoided. Furthermore, the liability system gives way to a greater degree where the loss or damage occurs during a carriage stage that would have been governed by a mandatory regime had a separate contract been made for the stage, referring not only to the monetary limits of liability, but to the full system of liability of this overriding mandatory regime.

6 The role of documents in recent cases

Indeed, as can be seen looking through the development of freight forwarding rules⁶⁵ and case-law, freight forwarders themselves have not helped the classification, blowing hot and cold depending on what suited their position after the dispute had arisen. Here a few more recent examples in case-law where on the specific facts either carrier or intermediary capacities were affirmed.

In the **Hong Kong** case of *Vastfame Camera Ltd Birkhardt Globistics*,⁶⁶ the freight forwarder, in his own name, issued order through bills of lading to his customer as shipper and including the buyer as notify party. The forwarder's agent in France delivered the goods without presentation of the bill of lading. In order to escape a claim for misdelivery, the forwarder argued that the document issued was not a proper bill of lading since he was a freight forwarder only and the terms and condition on the reverse of the bill of lading pointed out that he was not contracting as a carrier but only as an agent. The court did not accept this argument, referring to The House of Lords in *The Starsin*,⁶⁷ where equally clear and unambiguous statements on the face of the bill prevailed over contradictory terms and conditions on the reverse side.⁶⁸

The status of the freight forwarder as contracting carrier based on the waybills issued for the journey was also confirmed in the **New Zealand** case of *Emery Air Freight v Nerine Nurseries*.⁶⁹ The NZ freight forwarder carried flower bulbs by road to the airport and then sub-contracted air carriage to an international freight company who, in turn, sub-contracted to two air

⁶⁵ See on Model Rules on freight forwarding and the UNCITRAL Draft Convention on Contracts of Agency for Forwarding Agents, Ramberg, 'The Future' (n 38) and UNCTAD Secretariat Report of 25 June 2001 'Implementation of Multimodal Transport Rules', UNCTAD/SDTE/TLB/2, paras 16–18 and 29–30 for Uniform Rules and related transport documents.

⁶⁶ *Vastfame Camera Ltd Birkhardt Globistics* [2005] 4 HKC 117. On the criteria in deciding under English law who is a principal or agent see also Leung, 'The Dual Role of the Freight Forwarder' (n 25) 97 ff (especially 99–101).

⁶⁷ *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2004] 1 AC 715.

⁶⁸ Furthermore, the exemption clause did not protect the forwarder from liability for misdelivery; it had to be construed strictly and was not clear enough to cover breach of an obligation considered to be fundamental to the importance to the contract.

⁶⁹ *Emery Air Freight Corporation v Nerine Nurseries Ltd* [1997] 3 NZLR 723 (CA), leading judgment by Blanchard J on this point confirming the unreported decision of the High Court Wellington, AP 144/94, 10 February 1995.

carriers for successive legs. The goods were damaged while in charge of the second air carrier. The freight forwarder issued his own air waybill which had been called a 'house waybill' to his customer as shipper and the international freight company issued an air waybill with the New Zealand freight forwarder as shipper. The cargo owner and customer of the New Zealand freight forwarder had sued the international freight company as carrier because the New Zealand forwarder had gone into receivership. The action was unsuccessful. It was held that the customer's contract of carriage had been only with the New Zealand forwarder, who had sub-contracted the air carriage. The forwarder's air waybill allowed the forwarder to 'entrust the goods to and to employ the services of Third Parties subject to the latter's contractual term and conditions ... in the performance of its duties'. This was seen as entirely consistent with performance as a contracting carrier, even where the waybill issued had provision for entering a master waybill number. No master waybill had in fact been issued.⁷⁰

In *Ocean Projects Inc v Ultratech Pte Ltd*⁷¹ the **Singapore** Court of Appeal also upheld the freight forwarding contract as a bill of lading contract by the NVOCC as carrier with cargo. The freight forwarder had issued his own house bills of lading, which had been tendered under a letter of credit as the required clean bills of lading marked freight prepaid. The freight forwarder in turn took out bills of lading as shipper with the ocean carrier. The freight forwarder became insolvent without having paid freight; the ocean carrier offloaded the goods before destination and held them at an interim place. The ocean carrier then tried unsuccessfully to exercise a lien over the cargo for the unpaid freight. The court held that no contract existed between the ocean carrier and the cargo owner. Instead both of them had separate contracts with the freight forwarder as principal. Since there was no privity of contract there was no contractual lien and, since the goods had not been transported to destination, a common law lien did not exist either. The forwarder's house bill of lading had been an effective carrier's bill of lading and no further contract was required towards the customer.

⁷⁰ Ibid 732.

⁷¹ *Ocean Projects Inc v Ultratech Pte Ltd* [1994] SGCA 64, [1994] 2 SLR(R) 245.

A different documentary scenario played out in the **Singapore** case of *Abani Trading Pte Ltd v BNP Paribas*,⁷² where a freight forwarder issued bills of lading as agent for the carrier. These bills of lading were negotiated via a letter of credit, which called for a full set of clean onboard bills of lading, and explicitly stated that forwarders' bills of lading were unacceptable. The applicant held the bank liable for wrongly accepting the relevant bills of lading as they had been forwarder's bills. A set of further bills of lading with a later shipment date emerged so that the applicant had to accept a lower price from his sub-buyers. The court investigated the nature of the bill of lading issued by the forwarder as agent for the carrier and decided that it was a carrier's bill of lading, rather than a forwarder's bill; thus, the bank had not breached its duties.

Similarly, in the **Australian** case of *Cro Travel v ACFM*,⁷³ the freight forwarder had issued bills of lading as agent for the ocean carrier and thus misled the financier to accept them as security. No authority had been given by the ocean carrier to the freight forwarder and indeed separate ocean bills of lading had been issued by the ocean carrier to the shipper. When the financier tried to enforce his security, he found that the bills he had received were ineffective. It was held that the freight forwarder had engaged in misleading and deceptive conduct under the Australian Consumer Law and that he had breached his warranty of authority. The financier's damages claim was upheld. Expert statements had been taken and the experts of both sides had agreed that under usual practice where negotiable house bills of lading were issued to the shipper, three copies would be stamped 'original' and they would either be negotiated through the banking system or released to the consignee after payment for the goods. On presentation of these house bills of lading to the freight forwarder or his agent at destination, the latter would then present the ocean bill of lading to the carrier who would issue a delivery order. The delivery order would then be used to collect the goods at the terminal. It certainly was not usual practice for a forwarder to issue house bills as agent for a named carrier, without authority of the carrier.⁷⁴ Indeed, the freight forwarder in his own

⁷² *Abani Trading Pte Ltd v BNP Paribas* [2014] SGHC 111, [2014] 3 SLR 909, [2014] 2 Lloyd's Rep 617.

⁷³ *ACFM v Freight Solutions* [2017] NSWDC 279 and upheld on appeal in *Cro Travel v ACFM* [2018] NSWCA 153.

⁷⁴ *ACFM v Freight Solutions* [2017] NSWDC 279 [87] and on appeal *Cro Travel v ACFM* [2018] NSWCA 153 [63]:

- 2) The usual practice when a negotiable house bill is used by a freight forwarder is:
 - a) The freight forwarder names the consignee as 'to order' in the house bill of lading;

words had described the bills as: ‘House Bills ... only for banking purposes’ and that they were ‘not recognized by the Shipping Line as they are not Liner Bills’.⁷⁵ Giving effect to the evidence that the house bills could be endorsed and negotiated through the banking channel, the judge, as confirmed by the Court of Appeal, proceeded to find that, if the house bills had been the only original negotiable bills of lading, the financier in the particular case would have had a right to continued possession of the bills of lading (as pledgee of the bills) and thus could have prevented any other party from taking delivery of the goods, until he was paid.⁷⁶ Thus, the breach of warranty of authority had caused the loss. Furthermore, the misleading deceptive conduct was the putting into circulation two sets of bills of lading for the same goods and parties, which caused the financier to accept the ‘house’ bills of lading as security under the assumption that it controlled the right to take delivery of the goods.⁷⁷ The court thus accepted that the house bills of lading were capable to produce the same legal effect as bills of lading.

While there had been conflicting **Australian** decisions on the status of freight forwarders’ bills of lading in *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (The Ocean Trader)*⁷⁸ and *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)*⁷⁹ it is submitted

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- b) Three copies of the house bill of lading are stamped “original” and handed by the freight forwarder to the shipper, together with 3 non-negotiable copies.
 - c) The 3 original house bills of lading are then endorsed by the seller/shipper and either negotiated through the banking system or released to the consignee after paying for the goods.
 - d) The buyer/consignee then presents one of the “original” copies of the house bill of lading to the freight forwarder or the freight forwarders [sic] agent in China.
 - e) The freight forwarder or its agent then presents the original ocean bill of lading to the ocean carrier, who issues a delivery order to the party presenting the ocean bill of lading.
 - f) The delivery order is then used to collect the goods at the terminal.
 - 3) There was no commercial utility in issuing a house bill of lading in identical terms to the ocean bill of lading. One commercial reason for using house bills of lading in a trade of this kind was if the defendant wanted their agent to collect charges at the destination and/or handle the customs clearance.
 - 4) The use of 3 original and 3 copies of a bill of lading was an indication that the house bill of lading was a negotiable document.
 - 5) The practice of signing a house bill of lading ‘as agent only’ for a named ocean carrier, without authority for [sic] the carrier, is not standard practice in the freight forwarding industry.

⁷⁵ *ACFM v Freight Solutions* [2017] NSWDC 279 [88].

⁷⁶ *ACFM v Freight Solutions* [2017] NSWDC 279 [97], [154] [168] and *Cro Travel v ACFM* [2018] NSWCA 153 [265].

⁷⁷ *Cro Travel v ACFM* [2018] NSWCA 153 [123], [139] and [151].

⁷⁸ *Comalco Aluminium Ltd v Mogal Freight Services Pty Ltd (The Ocean Trader)* (1993) 113 ALR 677 (FCA).

⁷⁹ *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745.

that the latter turns on the very specific facts which may have enticed the court to find a solution to apply the terms of the bill of lading closest to the activity of the stevedores to the case.⁸⁰ *The Ocean Trader*, by comparison, gives straight-forward effect to the freight forwarder's bill of lading and, it is submitted, represents the better approach.

Thus, overall, it may be seen that the case-law accepts the different functions that freight forwarders' bills of lading can play and acknowledges that the issuance of house bills of lading has a relevant legal part to play. Indeed, we find recognition of this in *Scrutton*⁸¹ where it is also suggested that a criterion for treating a forwarding agent as a principal with the liability of a carrier is that he issues his own 'house bill of lading'. While in a different chapter *Scrutton*⁸² suggests that a house bill of lading is not a bill of lading and at most a receipt for the goods, this contains the important clarification that this concerns only the case that a forwarding agent was acting solely in the capacity of an agent to arrange carriage. It is submitted that this is an essential qualification without which the statement would seem outdated in the light of the case-law and practice and development of the forwarding business. The latter statement in *Scrutton* therefore says nothing about the quality of a freight forwarder's house bill of lading which is issued in his capacity as carrier in form of a bill of lading, multimodal or otherwise. Indeed, in practice, the development of documents could be observed to ensure that such distinction could easily be seen.

Similarly, while the Australian shipping law authority of *Davies and Dickey*,⁸³ when explaining the role of the forwarder, sets out the view that a house bill of lading is not a true bill of lading, this is qualified for the scenario of the forwarder acting merely as agent only. The Joint Report

⁸⁰ For a discussion see M Davies, 'The Exocet Finds a New Target, or Fear and Loathing for Freight Forwarders and Other Carriers by Sea' [1993] ABLR 20 ff and M Davies, 'Australian Maritime Law Decisions 1993' [1994] LMCLQ YB 407, 40 9ff.

⁸¹ *Scrutton* (n 2) para 4-053 with reference to *Troy v The Eastern Company of Warehouses, Insurance & Transport of Goods with Advances (of Petrograd)* (1921) (8) LI L Rep 17, 19 and *Landauer & Co v Smits & Co* (1921) 6 LI LR 577, 579.

⁸² *Scrutton* (n 2) para 18-019 nevertheless still contains the statement that a house bill is not a bill of lading, but at most a receipt for the goods, with reference to the cases cited above of *A Gagniere & Co v The Eastern Company of Warehouses Insurance and Transport of Goods with Advances Ltd* (1921) 7 LI LR 188, 189 (note that the suggested affirmation by the Court of Appeal (at (1921) 8 LI L Rep 365) does not relate to the house bill of lading issue but only to the insurance aspect of the case); with further reference to *Emilio Clot & Co v Compagnie Commerciale Du Nord Société Anonyme* (1929) 8 LI LR 380 and *Carrington Slipways Pty Ltd v Patrick Operations Pty Ltd (The Cape Comorin)* (1991) 24 NSWLR 745.

⁸³ M Davies and A Dickey, *Shipping Law* (4th edn, Thompson Reuters Australia 2016) para 12.840.

of the English and Scottish Law Commissions which culminated in the UK Carriage of Goods by Sea Act 1992, clarified that it would not attempt a definition of the bill of lading as this would necessarily be elaborate and counterproductive. It referred to the use of the term for documents which were not bills of lading properly so called such as a house bill of lading which, with reference to the then text of *Schmitthoff's Export Trade*, would be no more than a merchant's delivery order.⁸⁴ However, looking at the authority underlying the comment it can be seen that this one is also from an era before the container revolution and the more radical changes to the forwarding business and its documents. These comments and categorisation thus seem no longer to provide an accurate reflection of the situation and legal nature of the document without closer investigation of the context in the light of the changes of the profession and the documents in use as set out above. This seems to be accepted broadly by maritime nations: where an intermediary issues a FIATA bill of lading, he is recognised as principal or carrier.⁸⁵

That a closer look at the documents is essential is also confirmed by the House of Lords decision of *The Rafaela S*,⁸⁶ which gave explicitly credit to the terms of the 'bill of lading' for the categorisation of the document. In this case a straight bill of lading was accepted as a similar document of title under the Hague-Visby Rules due to the requirement of presentation. A forwarder's bill of lading on FIATA or BIMCO forms requires surrender of the document to obtain delivery from the Forwarder or MTO and it is he who explicitly takes on the liability of a carrier under the document.

The fact that the freight forwarder may not himself carry, or may sub-contract parts of the voyage, is no more problematic than when a charterer issues his own bills of lading. Neither of them is in immediate possession of the goods, which are carried by the shipowner and his crew. However, both have contractual relationships with the shipowner or carrier with the

⁸⁴ *Rights of Suit in Respect of Carriage of Good by Sea* (Law Com No 196, Scot Law Com No 130, 1991) [246–49], especially [2.50].

⁸⁵ See Brief of Professors F Berlingieri (Italy), P Delbecque (France), S Derrington (Australia), R De Wit (Belgium), T Fujita (Japan), H Honka (Finland), In Hyeon Kim (Korea), D Moran Bovi (Spain), P Myburgh (New Zealand), F Reynolds (England), J Schelin (Sweden) and G van der Ziel (The Netherlands) as Amici Curiae in Support of the Respondents in *Norfolk Southern Railway Company v James N Kirby Pty Limited*, in the Supreme Court of the United States (No 02-1028) at IV. See also Glass, *Freight Forwarding and Multimodal Transport Contracts* (n 25) para 2.76.

⁸⁶ *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11, [2005] 2 AC 423.

ability to influence activities and give directions, whether at the time of contracting or throughout. A time charterer who signs bills of lading in his own name, thereby clearly indicating that the carriage contract is entered into with him, was held to be in constructive possession of the goods, allowing him to sue the cargo owner for freight.⁸⁷ And it is not the projection of constructive possession that powers the bill of lading as document of title?⁸⁸

It is thus submitted that a freight forwarder's bill of lading clearly indicating carrier capacity must be treated as such and have the same legal consequences as any other such bill of lading. There may be further complications in that it may be a multimodal bill of lading or a received for shipment bill of lading only. Indeed, it is likely to be a received for shipment bill of lading only, rather than a shipped bill, but could possibly be annotated with the details of shipment. As a multimodal document the shipment annotation would, however, not be capable of capturing all details regarding shipment of each mode, as it would typically be handed over earlier at the start of the first leg.

However, these documents are broadly accepted in mercantile practice, such that the CIP Incoterm is geared towards them, while the UCP allows for their tender under a letter of credit.⁸⁹ It has therefore been argued with increasing support that they should also fall within the Carriage of Goods by Sea Acts of 1992 (UK) and fulfil the function of a document of title.⁹⁰ It seems that commercial expectation is that the documents do what they say they do,⁹¹ and it might be argued that it is telling that there is hardly any litigation on this issue.

⁸⁷ *The Okehampton* [1913] P 173; [1913] 7 WLUK 113 (CA), where it was held that a time-charterer was held to be in constructive possession of the goods for which he had signed bills of lading and this was held sufficient for him, as contractual carrier performing with a hired vessel, to be entitled to bring action for freight.

⁸⁸ See also Glass, *Freight Forwarding and Multimodal Transport Contracts* (n 25) para 2.90.

⁸⁹ See UCP 600, art 19.

⁹⁰ DR Thomas, 'International Sale Contracts and Multimodal Transport Documents: Two Issues of Significance', in Soyer and Tettenborn (eds), *Carriage of Goods by Sea, Land and Air* (n 17) 145 ff; M Bridge, *Benjamin's Sale of Goods* (10th edn, Sweet & Maxwell 2017) para 21-083; G Treitel and F Reynolds (eds) *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) paras 8-084–8-092, especially 8-088; R Aikens, R Lord and M Bools, *Bills of Lading* (2nd edn, Informa 2016) paras 11.34–11.50, especially 11.40 and 11.49; and see Ozdel 'Multimodal Transport Documents in International Sale of Goods' [2012] ICCLR 238.

⁹¹ See also M Davies, 'Australian maritime law decisions 1993' [1994] LMCLQ 407, 412.

Drawing on the development of the law and relevant cases it is suggested that the comment house bills are at the most receipts for the goods must be read in the light of the capacity in which the freight forwarder engages. It is argued that this can only be so, where the house bill (whatever this is to be) is issued by an agent in his capacity as agent only. Where the agent, however, is so unclear as to issue a bill of lading promising to act as a carrier then this ought to affect directly the capacity in which he is engaged. Thus, a bill of lading issued by a freight forwarder, even if said to be a 'house bill', should be taken as the document which it professes to be. If it is a FIATA FBL or a MULTIDOC it is clearly a carrier's document and objectively promises that the forwarder acts as carrier, whether this is his actual subjective choice, and should be able to be relied on accordingly.

Indeed, the Nordic freight forwarder conditions — after case-law strongly steering in this direction — have taken the freight forwarder's modern activity to be so predominantly that of a carrier, that this is taken to be the default position.⁹² Nowadays freight forwarding organisations have worked hard to create clarity by developing documents that are capable of showing the relevant legal interactions between the parties in different freight forwarding contexts. Surely, if these documents are used clearly indicating a certain capacity on the part of the forwarder, this should be an acceptable choice that is respected and upheld by the courts?

In recognition, German law has explicitly enshrined the document of title function for the multimodal transport bill of lading by statute to avoid discussion on whether it could fit into the *numerus clausus* of documents with such function.⁹³ However, as with the statutory

⁹² Unless clear wording highlights to their customer that a particular service is performed as intermediary only. See § 3.C NSAB 2015 'The freight forwarder as intermediary' reads: 'Notwithstanding article 3 B.1 above, the freight forwarder can in accordance with §§ 22–24 below, undertake services — or parts of services — as intermediary, if the freight forwarder does not undertake such services in his own name or on his own account and on the condition that the freight forwarder specifies to the customer that the services are undertaken solely as intermediary. As intermediary, the freight forwarder is not responsible for parties other than his own employees.'

⁹³ The bill of lading function of the consignment bill (HGB §448) applies via §452 HGB also for the multimodal bill of lading; see also Schmidt/Herber, *Münchener Kommentar zum Handelsgesetzbuch* (n 30) HGB §452d paras 50-2. And see an analysis of the validity of the clauses of the FIATA FBL under German law by M Hoffmann, 'FIATA Multimodal Transport Bill of Lading und deutsches Recht' [2000] *TranspR* 243 including at 245 an examination of the clauses providing for transferability and negotiability of the FBL with the conclusion that they are indeed acceptable under German law. HGB §§408 ff *Frachtbrief* (enshrining the

regime for multimodal transport, this is aligned to the legal provisions relating to the freight business⁹⁴ rather than the provisions on maritime law.⁹⁵

7 Conclusion

The profession of the freight forwarder has greatly developed since the notion of the freight forwarder's house bill being only a receipt for the goods was framed. This comment is rooted in the time when forwarders traditionally acted only as agents for their customer but did not engage in the business of carriage of goods themselves. Nowadays this approach has changed and many forwarders act — at some point or another — as a carrier, either as a NVOCC or by the performance of part of the carriage by their own means and the sub-contracting of others. Transport documentation has developed in line with the business activities. It is now time for law and lawyers to embrace this step instead of hindering the clarity that business practice has sought to create.

particulars of carriage of the goods) — v HGB §§443 ff Ladeschein (which is issued enshrining the obligation to deliver the goods).

⁹⁴ HGB, §§407 ff.

⁹⁵ See Schmidt/Herber, *Münchener Kommentar zum Handelsgesetzbuch* (n 30) HGB §443 para 35 ff (Herber), esp paras 54 Pff on the differences. See also Ramming, *Hamburger Handbuch: Multimodaler Transport* (CH Beck 2011) §26: Der Multimodal-Ladeschein paras 763 ff.