Journal of Maritime Law & Commerce, Vol. 47, No. 4, October, 2016

The Joint and Several Liability of "Merchants" Under Maritime Bills of Lading

Richard L. Kilpatrick, Jr.*

I
INTRODUCTION

When a loss arises out of the carriage of goods by sea, the litigation that follows is often characterized by cargo interests suing the carrier and the carrier defending itself by relying on various provisions contained in the bills of lading serving as the contract of carriage.[1] In such cases, these carriers, whether they are vessel operating common carriers (VOCCs) or non-vessel operating common carriers (NVOCCs), regularly invoke bill of lading clauses that contain limitations of liability, contractual time bars, favorable choice of law or forum selection provisions, and other protective mechanisms. Carrier bills of lading, however, are not purely defensive instruments. Along with clauses designed to shield the carrier from liability, carrier bills of lading also regularly contain clauses that provide the carrier with affirmative rights of action against various parties, including cargo interests.[2]

---

*Assistant Professor of Business Law, Northeastern Illinois University, College of Business and Management, Chicago, Illinois.

[1]See generally Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, § 7–11 (5th ed. 2011) (discussing the uses and functions of the bill of lading as a contract of carriage).

[2]See infra section II discussing particular bill of lading provisions assigning affirmative obligations to cargo interests.

The business arrangements underlying contemporary maritime shipments are often quite complex and may involve multiple modes of transit and layers of commercial players. Thus, when a carrier itself suffers loss in connection with the carriage of goods, it faces a difficult challenge in selecting the most efficient defendants to pursue in litigation. Understanding that the shipping industry's inherent complexity and transnational nature may limit the feasibility of recovery against some defendants, modern carrier bills of lading regularly contain clauses collectively defining liable cargo interests as a broad class of "Merchants."[3] These so-called "Merchant clauses" may be referenced, often in conjunction with other clauses, as carriers seek to assign joint and several liability to shippers, cargo owners, consignees, and others with a present or future interest in the goods being transported.

Despite the regular inclusion of these Merchant clauses in modern bills of lading, case law in the United States analyzing their effect is only beginning to surface.[4] Thus, to some extent, the efficacy of Merchant clauses in facilitating actions brought by carriers remains in question.[5] Recognizing that this uncertainty has real commercial consequences, this Article provides an overview of the carrier uses of bill of lading provisions assigning joint and several liability to Merchants and explores the key legal issues that litigants and courts must resolve when determining when and whether carriers may rely on these Merchant clauses to recover for their losses.

---

[3]See e.g. Maersk Line, *Terms for Carriage* (last visited August 31, 2016), http://terms.maerskline.com/carriage, Clause 1 ("'Merchant' includes the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such Person.").

[4]This may be at least partially attributable to a general decline in common carriage litigation in the United States in recent years. See Philip Lempriere, *Developments in the Law of Common Carriage in Foreign Trade: Where Have All the Cases Gone?* 27 U.S.F. MAR. L.J. 197 (2014).

[5]Industry observers have also discussed recent cases analyzing the role of Merchant clauses in facilitating carrier defenses. See Michael J. Ryan, *Merchant? Maybe,* THE MARITIME LAW ASSOCIATION OF THE UNITED STATES: THE MLA REPORT, Doc. No. 813, 18044–18053 (Spring 2014).

II
CARRIERS ASSIGNING LIABILITY TO CARGO INTERESTS THROUGH THE TERMS OF THEIR BILLS OF LADING

For any entity undertaking responsibility as a carrier, there are a variety of risks connected to moving the cargo, some of which are clearly understood at the outset of the carriage and others that are less easily anticipated. Despite the great variety of risks inherent in such undertakings, carriers nevertheless seek to capture these possibilities through meticulously drafted terms reflected in their bills of lading. This section first explores some of the circumstances in which a carrier might suffer loss that would justify bringing a lawsuit against cargo interests, such as shippers, consignees, and cargo owners. Then it turns to particular language used in modern bills of lading as carriers attempt to capture these liability scenarios by assigning joint and several liability through Merchant clauses.

A. Contemplating Liability Scenarios Against Cargo Interests

Perhaps the most obvious risk that a carrier bears in relation to the carriage is the possibility of non-payment for freight. When a common carrier issues a bill of lading, this serves as evidence of the contract of carriage and reflects an obligation of the carrier to transport the goods received and in exchange the carrier is owed payment for facilitating the movement of the cargo under the applicable transportation rates.[6] If for any reason freight goes unpaid or underpaid after the carrier has performed under the contract, the carrier has grounds to pursue legal recourse to recover the payment it is owed.

Defining the scope of the freight owed to the carrier, however, is not always straightforward. The concept of freight could exceed the originally contracted rate for the transportation of the cargo by also including other charges that arise in connection with the

---

[6]See Thomas J. Schoenbaum, supra note 1, at § 7–11.

carriage, such as duties, taxes, or other routine expenses levied during the voyage. For example, if port authorities assess charges or engage in inspections of the cargo that requires repackaging, there may be costs arising out of these normal commercial activities that are at least initially borne by the carrier.

These charges may increase if the shipper (or some other party with an interest in the cargo) fails to properly furnish accurate documentation when originally booking the shipment with the carrier. For instance, if the shipment particulars are inaccurate when space was booked on the carrier's vessel, such as a misrepresentation of the weight of the goods, the carrier would be justified to assess additional charges as a corrective measure.

Misrepresentation of shipping particulars could also cause other types of carrier losses. If, for example, the nature of the goods is not properly declared or if the shipment does not comply with customs regulations regarding marking of the goods, these goods may be subject to additional inspection and even seizure by port authorities. This could give rise to costs such as examining, measuring, and repackaging the goods, but could also create losses in the form of fines or warehousing costs. Crucially, improperly documented goods could also cause expensive delays that could generate a carrier right to pursue detention or demurrage.[7]

Another type of carrier loss that could be attributable to cargo interests is the failure to timely take delivery of the cargo. After the carrier has completed the voyage and the goods have arrived at the port of discharge, the carrier may suffer losses if the shipment is not promptly claimed. If, for any reason, cargo interests abandon the cargo, the carrier may suffer losses in the form of arranging warehousing of the goods, reselling the goods at auction, or destroying the goods. Again, the expensive delays that result could also justify additional charges.

Carriers bear perhaps a more complex and open-ended form of risk when the cargo has the propensity to cause physical damage

---

[7]See Saul Sorkin, GOODS IN TRANSIT, Chapter 25 (discussing detention and demurrage arising in common carriage).

to other interests. Cargo that is known to be inherently noxious, hazardous, and flammable brings enhanced risk, including the potential to create catastrophic events that may cause damage to the vessel, third party cargo, environmental pollution, personal injury, or even death.[8] Moreover, if dangerous goods have been improperly declared, labeled or packaged, this could result in further destruction. Even if transporting dangerous cargo does not result in such a devastating event, cargo that is or has become too dangerous to transport may also give rise to carrier losses if special efforts are made to safely offload or destroy the cargo in order to prevent or mitigate losses.

Many forms of cargo can also become dangerous under unfortunate circumstances.[9] Cargo containing latent dangers thus also gives rise to liability risks. For example, if seemingly innocuous goods are shipped with excessive moisture in the container, this could not only contaminate the cargo itself with mold or rust, but could also cause damage to the vessel or third party cargo. Again, here the carrier may initially bear the costs of offloading, salvaging or destroying the cargo, cleaning the vessel, or covering for other related losses.

Other liability scenarios involving cargo interests could arise if carrier-owned intermodal containers are damaged, carrier rights to contribution in general average are assessed, and, of course, litigation costs and attorneys' fees are incurred. While articulating the full scope of circumstances that might give rise to carrier actions against cargo interests is a complex and perhaps impossible proposition, modern bills of lading nonetheless seek to capture these circumstances through broadly drafted language contemplating routine types of disputes.

B. Applying Joint and Several Liability to a Class of "Merchants"

For each possible carrier loss, the bill of lading serves as a mechanism for carriers to shift the burden over to parties willing

---

[8]See generally Robert Force, *Shipment of Dangerous Goods by Sea*, 31 TUL. MAR. L. J. 315 (2007).

[9]Id.

to assume the risk by contract. Determining how to shift this burden, and who to shift it to, is the challenge. While traditionally the shipping industry was characterized by shippers contracting directly with carriers for the transportation of cargo to be delivered to named consignees, modern commercial practices are often more sophisticated. Today, in the age of multimodalism, the commercial arrangements underlying a given shipment are subject to a much wider variation of possibilities.[10]

For example, in the multimodal context, the "shipper" or the "consignee" listed on the bill of lading may actually have no ownership interest in the cargo itself and may instead be acting as an intermediary or subcontractor on behalf of other entities. Depending on the commercial terms of the underlying sales contract, a cargo owner may contract with a third-party transportation intermediary, freight forwarder, or logistics provider to book transportation needs by way of an NVOCC or a VOCC. That carrier may further subcontract the actual carriage to other carriers, and those entities may also engage in subcontracting, sometimes even using intermediaries themselves. The cargo itself may then be sold during transit by transferring the rights to the cargo under a negotiable bill of lading. As a result, multiple layers of shippers, cargo owners, agents, brokers, intermediaries, carriers, subcontractors, and cargo transport facilitators of all sorts may be involved in any given transaction. Since the possibilities are open-ended, the transactions vary widely and each shipment must be analyzed on its own fact-specific basis.

These complex arrangements create legal uncertainty regarding who is responsible for the cargo being shipped. Critical questions arise: Who owns the cargo? Who was in control of the cargo for declaring, packing, labeling, and processing purposes? And crucially, who is bound by the terms of the bills of lading issued by the carrier? In answering these questions, when a carrier suffers loss that arises in connection with the carriage, carriers

---

[10]For an overview of the legal framework surrounding multimodal transportation processes see generally Thomas J. Schoenbaum, supra note 1, § 10.

seeking a remedy may be forced to untangle a web of business arrangements, commercial documents, and other information of legal consequence. Modern bills of lading seek to simplify this process by essentially designating any party with an interest in the cargo a Merchant with joint and several liability for contractual undertakings.

For a carrier to effectively assign joint and several liability to Merchants, it normally involves at least two clauses in the bill of lading. First, the bill of lading would need to contain a clause defining the "Merchant" as a class of cargo interests, which may include the shipper, consignee, cargo owner and others. Paired with this Merchant definition, other clauses in the bill of lading would then specifically assign responsibilities, obligations, or warranties jointly and severally to this class of Merchants.

Below are a few excerpts of bill of lading terms that serve as an illustration of the ways Merchant clauses function. This sample language is derived from the "BL Standard Terms & Conditions" used by the Swiss company Mediterranean Shipping Line, S.A., a major common carrier regularly operating in United States ports (hereinafter "the MSC Bill of Lading").[11] Mediterranean Shipping Line publishes these terms on its website and also includes them on the back of its standard bill of lading issued during common carriage.

The purposes of referring to the MSC Bill of Lading terms as a sample in this Article are three fold: First, the MSC Bill of Lading terms have recently been litigated by courts in the United States, so there is a sense of familiarity and relevance to these particular provisions.[12] Second, at least one of the courts interpreting the language of the MSC Bill of Lading in the United States has noted that it is a particularly clear contract, which again makes it useful

---

[11]Mediterranean Shipping Company, *BL Standard Terms and Conditions*, available at https://www.msc.com/nga/contract-of-carriage/bl-standard-terms-conditions (hereinafter "the MSC Bill of Lading").

[12]See e.g. Mediterranean Shipping Company (USA) Inc. v. American Cargo Shipping Lines, Inc., 2014 U.S. Dist. LEXIS 126747 (S.D.N.Y. 2014); Mediterranean Shipping Company (USA) Inc. v. TJD International, Inc., 2015 U.S. Dist. LEXIS 16018 (S.D.N.Y. 2015); Mediterranean Shipping, Co. v. Best Tire Recycling, Inc., 2015 U.S. Dist. LEXIS 149793, 2015 AMC 2828 (S.D.N.Y. 2015).

for illustrative purposes.[13] Finally, this author finds the MSC Bill of Lading to effectively demonstrate the interplay between various bill of lading clauses placing liability on Merchants. Note that similar provisions are contained in the bill of lading terms of other major common carriers regularly operating in United States ports, including, but not limited to Maersk Line, CMA-CGM, Hapag-Lloyd, and APL, among others.[14]

In Clause 1, the MSC Bill of Lading defines "Merchant" as follows:

> Merchant: includes the Shipper, Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owning, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person.[15]

Paired with this definition of Merchant, the MSC Bill of Lading contains other provisions that assign affirmative obligations to that same class of entities. In Clause 2, the MSC Bill of Lading explicitly references this joint and several liability applied to all Merchants:

> [t]he contract evidenced by this Bill of Lading is between the Carrier and the Merchant. Person defined as "Merchant" is jointly and severally liable towards the Carrier for all the various

---

[13]See Mediterranean Shipping Company (USA) Inc. v. Cargo Inc., 46 F. Supp.3d 294, 298, 2014 AMC 1713 (S.D.N.Y. 2014) ("This case requires the Court to interpret a clear contract . . . Based on the clear contractual terms, plaintiff is entitled to payment of demurrage by defendant . . . ").

[14]See Maersk Line, *Terms for Carriage* (last visited August 31, 2016), http://terms.maerskline.com/carriage; CMA CGM, *Bill of Lading CMA CGM Terms and Conditions* (last visited August 31, 2016), https://www.cma-cgm.com/static/eCommerce/Attachments/CMACGM-Terms-and-Conditions-2016-08.pdf; Hapag-Lloyd, *Bill of Lading Terms and Conditions* (last visited August 31, 2016), https://www.hapag-lloyd.com/content/dam/website/downloads/pdf/Bill_of_Lading_Terms_ and_Conditions_LV_06-16.pdf; American President Lines, *APL Terms and Conditions* (last visited August 31, 2016), https://www.apl.com/wps/wcm/connect/14e2bb44-9023-4acc-a3d0-6a3c202bd60d/APL_BillofLading_TermsConditions.pdf?MOD=AJPERES&CVID=lqx.SX5&CVID=lqx.SX5&CVID=l8CJwga.

[15]MSC Bill of Lading at Clause 1.

undertakings, responsibilities and liabilities of the Merchant under or in connection with this Bill of Lading . . . [16]

The MSC Bill of Lading then proceeds to outline more specific obligations assumed by the Merchant. In Clause 11, the MSC Bill of Lading assigns Merchants with the obligation to pack the cargo properly and provides the carrier with a right of action for damages resulting from a breach of this warranty. The provision reads in relevant part:

> The Merchant shall inspect the Container for suitability for carriage of the Goods before packing it. The Merchant's use of the Container shall be prima facie evidence of its being sound and suitable for use.
>
> . . .
>
> The Merchant shall indemnify the Carrier against any loss, damage, liability or expense whatsoever and howsoever arising . . . including but not limited to damage to Container, other cargo and the Vessel.[17]

Under a section containing the sub-heading "Description of Goods and Merchant's Responsibilities" in Clause 14, the MSC Bill of Lading assigns an obligation to provide accurate shipping particulars. It reads:

> The Merchant warrants to the Carrier that the particulars relating to the Goods as set out on the front hereof have been checked by or on behalf of the Merchant on receipt of this Bill of Lading and that such particulars . . . are adequate and correct.
>
> . . .
>
> [t]he Merchant shall comply with all regulations or requirements of customs, port and other authorities, and shall bear and pay all

---

[16]Id. at Clause 2.
[17]Id. at Clause 11.

> duties, taxes, fines, imposts, expenses or losses . . . incurred or suffered by reason thereof, or by reason of any illegal, incorrect or insufficient declaration, marking, numbering or addressing of the Goods, and shall indemnify the Carrier in respect thereof, including reasonable legal expenses and costs.
>
> . . .
>
> If by order of the authorities at any place, Goods are detained and/or seized and/or a Container has to be opened for the Goods to be inspected for any reason whatsoever . . . The Carrier shall be entitled to recover from the Merchant all charges, fines, costs, losses and expenses, including reasonable legal expenses and costs resulting from such action, including . . . detention, demurrage and storage charges . . . [18]

Regarding dangerous or hazardous goods, Clause 15 of the MSC Bill of Lading further assigns indemnity obligations to Merchants. It provides:

> The Merchant shall be fully liable for and shall indemnify, hold harmless and defend the Carrier, its servants, agents and subcontractors and any third party for all loss, damage, delay, personal injury, death or expenses including fines and penalties, and all reasonable legal expenses and costs caused to the Carrier, the Vessel, any cargo, and other property, whether on board or ashore, arising from such [dangerous or hazardous] Goods . . . [19]

Regarding freight and charges, in Clause 16, the MSC Bill of Lading reads: "[e]very Person defined as "Merchant" in Clause 1 shall be jointly and severally liable to the Carrier for the payment of all Freight and charges . . . "[20] The scope of the charges is additionally defined under Clause 1 to include . . . "costs and expenses whatsoever payable to the Carrier in accordance with

---

[18]Id. at Clause 14.
[19]Id. at Clause 15.
[20]Id. at Clause 16.

the applicable Tariff and this Bill of Lading, including storage, per diem and demurrage."[21]

Other provisions in the MSC Bill of Lading assign further affirmative obligations to the Merchant, including liability for abandoning the goods, liability for failing to timely take delivery of the goods, and liability for general average, among others.[22] Through each of these clauses, the MSC Bill of Lading illustrates the ways in which carriers may assign obligations, responsibility and liability to an entire class of cargo interests. By defining Merchants broadly to capture a variety of actors and by linking this class of entities to affirmative obligations, the MSC bill of lading contemplates an assortment of liability scenarios and designates a class of actors jointly and severally liable if they arise.

This approach to contract drafting is now used widely in the global shipping industry. Nonetheless, defendants sued under Merchant clauses have recently pushed back in litigation by relying on a number of arguments questioning the enforceability of such terms. An overview of recent United States case law exploring these issues is presented below.

III
UNITED STATES COURTS ADDRESSING THE ENFORCEABILITY OF MERCHANT CLAUSES IN MARITIME BILLS OF LADING

There are relatively few cases in the United States addressing bill of lading clauses imposing liability on classes of Merchants, but in recent years some cases have emerged to present an analysis of the key issues related to their enforcement. While some courts have enforced the plain terms of Merchant clauses without going into a detailed analysis of their enforceability,[23]

---

[21]Id. at Clause 1.

[22]Id. at Clause 19, Clause 20, and Clause 22, respectively.

[23]See e.g. Mediterranean Shipping Co. (USA) Inc. v. TJD International, Inc., 2015 U.S. Dist. LEXIS 16018 (S.D.N.Y. 2015) (granting default judgment to carrier by

others have responded to a variety of arguments testing their limits. These courts have primarily focused on three compelling arguments from defendants: First, some defendants alleged to be captured under broadly drafted Merchant clauses have raised the issue that the liability assigned to them violates the statutory restrictions imposed by the Carriage of Goods by Sea Act (COGSA). Second, defendants have also focused on a lack of privity between themselves and the carrier issuing the bill of lading, essentially arguing that they are not bound by the agreement intended to capture them as Merchants. Finally, defendants have also focused on their commercial roles, which they argue differ from the roles that allegedly assign liability to them under the Merchant clause.

A. COGSA's Impact on Merchant Liability Under Bills of Lading

The concept that cargo interests may be held liable to a carrier for losses caused by the cargo is not novel.[24] Historically, it was understood that shippers owed carriers an implied warranty of fitness of the goods for carriage.[25] In cases involving dangerous cargo, it was the shipper who bore liability if both the carrier and the shipper were unaware of defects in the cargo that caused damage to the vessel or to third parties.[26] In such cases, if the shipper did not provide the carrier with notice of the dangers of the cargo, even if the shipper did not know about the dangers, the carrier could hold the shipper liable under a breach of warranty theory automatically arising under the general maritime law.[27]

This common law shipper liability rule was ultimately displaced by the International Convention for the Unification of

---

applying its bill of lading terms obliging the Merchant to pay demurrage and attorneys' fees); CMA CGM S.A. v. Azap Motors Inc., 2015 U.S. Dist. LEXIS 173788 (E.D. Va.) (granting summary judgment to the carrier by applying its tariff terms obliging the defendant Merchant to pay demurrage, detention and other charges).

[24]David L Maloof and James P. Krauzlis, *Shipper's Potential Liabilities in Transit*, 5 TUL. MAR. L. J. 175 (1980).

[25]Id. at 179.

[26]Id.

[27]Id.

Certain Rules of Law Relating to Bills of Lading (the "Hague Rules").[28] The Hague Rules were implemented domestically nearly verbatim under COGSA and are now recognized as reflecting early twentieth century attempts at establishing an international consensus on the liability allocation to govern the relationships between shippers and carriers.[29]

Despite this effort to generate uniformity, COGSA nonetheless conveys a tension between the desire to continue making shippers liable for losses caused by the shipment of particularly dangerous cargo and the policy choice to require shipper knowledge for liability to attach in other scenarios.[30] For instance, COGSA §1304(6) provides that the shipper of flammable, explosive, or dangerous goods "shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment."[31] In apparent conflict, COGSA §1304(3) prevents a shipper from being responsible "for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants."[32] Thus, COGSA appears to assign strict liability to the shipper in circumstances involving dangerous cargo while requiring shipper negligence in other circumstances.[33]

The question of defining statutory liability allocation between shippers and carriers under COGSA is distinct from the question of whether COGSA bars carriers from imposing liability on shippers and other cargo interests through the terms of their bills of lading. Other COGSA provisions, however, at least tangentially address this separate issue. In response to the

---

[28]See Senator Linie GMBH & Co. KG v. Sunway Line, Inc., 291 F. 3d 145, 148, 2002 AMC 1217 (2d Cir. 2002).

[29]Id. at 158–159. United States Supreme Court Justice Sotomayor, then writing for the Second Circuit, remarked, "COGSA legislators appear to have been more intent on preserving the international consensus embodied in the language of the Hague Rules, and getting carriers and shippers to agree to that language, than on codifying particular rules of general maritime law as expressed in U.S. Case law." Id. at 159.

[30]See id. at 154-158.

[31]Former 46 U.S.C.S. app. §1304(6) (revised 46 U.S.C. § 30701 note).

[32]Former 46 U.S.C.S. app. §1304(3) (revised 46 U.S.C. § 30701 note).

[33]See Robert Force, SHIPMENT OF DANGEROUS GOODS BY SEA, supra note 8.

historical practice of carriers abusing their superior bargaining position by exculpating themselves from damage caused by their own negligence, COGSA limits freedom of contract principles in this regard.[34] Namely, COGSA §1303(8) renders void bill of lading provisions "relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure" in its duties and obligations.[35]

COGSA §1303(8), however, does not clearly address whether this provision is intended to have implications for bill of lading provisions that assign shippers (or others) with affirmative obligations. Thus, there is some degree of uncertainty in how far COGSA might influence judicial interpretation of bill of lading provisions that affirmatively assign liability to classes of Merchants.

At least one court in the United States has found an indemnity obligation placed on a broad class of cargo interests through the terms of a bill of lading violates the COGSA prohibition on assigning liability to shippers without fault. In the 1984 case *Excel Shipping Corp. v. Seatrain International S.A.*, the owner of a vessel sued a consignee for indemnity over damage to the vessel and third-party cargo allegedly caused by the negligent stowage of "giant off-the-road tires."[36] The shipowner relied on a clause in its bill of lading which provided, "'the shipper, the consignee and the goods, jointly and severally, shall be liable for, and shall indemnify [the time charterer] and the ship against damages caused by cargo tendered for carriage."[37]

The Eastern District of New York held that this bill of lading provision was unenforceable against the consignee because it conflicted with COGSA §1304(3) prohibiting shipper liability for damage sustained by the carrier without the fault of the shipper.[38]

---

[34]See Robert Force, ADMIRALTY AND MARITIME LAW, FEDERAL JUDICIAL CENTER, at 52–53 (2004).

[35]Former 46 U.S.C.S. app. § 1303(8) (revised 46 U.S.C. § 30701 note).

[36]Excel Shipping Corp. v. Seatrain International S.A., 584 F. Supp. 734, 737, 1986 AMC 1587 (E.D.N.Y. 1984).

[37]584 F. Supp. 747.

[38]Id.

Interpreting this provision broadly for the proposition that COGSA "requires that a carrier prove actual fault or neglect on the part of the shipper in order to recover damages or be indemnified," the court found the bill of lading provision imposing liability unenforceable not only against a shipper but also against the consignee defendant.[39]

The carrier raised the argument that the consignee defendant was not a "shipper" granted such protection under the plain language of COGSA §1304(3), but the court found this distinction to be "patently unreasonable."[40] Instead, the court reasoned, enforcing a contractual indemnity obligation against the consignee but refusing to do so against a shipper would "thwart the statutory design [of COGSA] and would have the anomalous result of creating a greater scope of liability for a consignee having no active participation in the shipment of goods than for the shipper itself."[41] Articulating the broad rule that "[f]ault is a prerequisite for recovery under COGSA," the court refused to give effect to the bill of lading provision against the consignee.[42]

A more recent case out of the Northern District of California and the Ninth Circuit Court of Appeals provides perhaps a more modern approach to the question of the enforceability of Merchant indemnity clauses under the COGSA framework. In *APL Co. PTE. LTD. v. UK Aerosols LTD.*, the district court granted summary judgment in favor a Singaporean ocean carrier which had invoked Merchant indemnity clauses contained in its bill of lading against several parties involved in a shipment of hair spray and mousse products.[43] The carrier sued the U.K.-based shipper, the U.S.-based consignee and the U.S.-based purchasing agent alleging $700,000 in damages after the shipment of hair products leaked out one of the containers en route from Turkey to

---

[39]Id. at 747–748.
[40]Id. at 748.
[41]Id.
[42]Id. at 747.
[43]APL Co. PTE. Ltd. v. UK Aerosols Ltd., 2006 U.S. Dist. LEXIS 70704, 2006 AMC 2409 (N.D. Cal. 2006)

California and caused damage to the vessel in the form of assessing, cleaning, removing and disposal costs.[44]

The carrier relied on bill of lading terms which provided a right of action in indemnity against any "Merchants" defined by the bill of lading as "Shipper, Consignee, Receiver of the Bill of Lading, Owner of the cargo or Person entitled to possession of the cargo or having a present or future interest in the Goods and the servants or agents of any of these."[45] The bill of lading further assigned joint and several indemnity obligations to these Merchants for any losses arising or resulting from inaccuracies of shipping particulars or arising out of dangerous goods.[46] Both the consignee and purchasing agent raised the issue that the Merchant indemnity clauses were unenforceable because they contractually assigned liability without fault, which they argued violated COGSA §1304(3), and impermissibly lowered carrier liability below the standards articulated in COGSA §1303(8).[47]

Addressing the COGSA §1303(8) argument, the district court first recognized that while freedom of contract principles and general maritime law practice support the enforcement of indemnity agreements, COGSA does prohibit the lessening of carrier liability below statutory standards.[48] However, in analyzing the language of the clauses at issue, the district court found that the provisions did not impermissibly shift liability for carrier negligence away from the carrier and instead interpreted these clauses as contractually extending the shipper's liability to other parties defined under the Merchant clause.[49] Adopting this view, the district court found no conflict with the provisions at issue and COGSA §1303(8).[50]

Regarding COGSA §1304(3), the district court found that the provision "addresses only the liability of the shipper and not the

---

[44]2006 U.S. Dist. LEXIS 70704 at *3.

[45]Id.

[46]Id. at *4–5. Note the U.K.-based shipper did not respond to the complaint and a default judgment was entered against it. Id.

[47]Id.

[48]Id. at *9–10.

[49]Id. at *11–13.

[50]Id.

liability of other parties" such as consignees.[51] Here, the District Court explicitly criticized the broad reading of COGSA espoused in *Excel Shipping*, noting that it is "the sole case that supports defendants' reading of COGSA."[52] Declining to adopt the rule that contract liability can only be imposed on a party by demonstrating that party was negligent, the district court found instead that to do so would not only misinterpret the language of COGSA, but would also "eviscerate the norm of freedom of contract and prohibit almost any form of indemnity in Bills of Lading."[53]

Addressing the concern raised in *Excel Shipping* that a narrow reading of COGSA §1304(3) could cause consignees to be exposed to greater liability than shippers, the district court found that "[t]his form of liability shifting is typical of routine indemnification arrangements which occur as a matter of course in admiralty."[54] Thus, ultimately, the district court reasoned that "[h]ad the drafters of COGSA intended to eliminate the practice of indemnification in admiralty contracts generally, the text of COGSA would have specified such a principle."[55]

On appeal, the Ninth Circuit agreed that the consignee and the purchasing agent were not "shippers" as understood under COGSA §1304(3) and therefore they were not beneficiaries to the statutory protection afforded to those particular commercial actors.[56] The Ninth Circuit analyzed the defendants' argument that the term "shipper" should be construed broadly, but, like the district court, found that the COGSA statutory construction favored a more narrow interpretation of the term.[57] It recognized that a "'shipper' is a party separate and distinct from other parties

---

[51]Id. at 14–15.
[52]Id.
[53]Id. at *15–17.
[54]Id. at 17–18.
[55]Id.
[56]APL Co. Pte. Ltd. v. UK Aerosols Ltd., 583 F.3d 947, 950, 2009 AMC 2234 (9th Cir 2009).
[57]Id. at 952.

to a bill of lading, including, in this case, the owners of the goods and those who have a future interest in the goods."[58]

To bolster its reasoning for this narrow interpretation, the Ninth Circuit further recognized that various other provisions in COGSA also distinguish between shippers and other parties and therefore chose to apply the presumption that "Congress acts intentionally and purposely in the disparate inclusion or exclusion" of particular statutory language.[59] Since Congress used the term "shipper" to describe a particular commercial actor in some parts of COGSA but "holder" of the bill of lading to describe a distinct type of commercial actor in other parts of COGSA, the Ninth Circuit reasoned that Congress intended for these parties to be treated differently throughout the statute.[60] Therefore, the Ninth Circuit concluded that section §1304(3) was only intended to provide protection to the COGSA "shipper" and not to other parties to the bill of lading, such as those "holders" (like consignees) who eventually endorse the bill.[61] It further justified this conclusion by focusing on COGSA's policy goals, which it framed as being primarily concerned with providing uniformity and predictability in allocating risks between carriers and shippers.[62]

The Ninth Circuit also focused on the unique role of the shipper and the ways in which those responsibilities are different than other parties to a bill of lading.[63] It found that the shipper is the party responsible for providing the particulars to the shipment and noted that COGSA §1303(5) even imposes indemnity obligations only on the shipper (and not other actors) if inaccuracies in performing that function result in damages to the carrier.[64] This role, the Ninth Circuit reasoned, is not shared by

---

[58]Id.
[59]Id.
[60]Id.
[61]Id.
[62]Id. at 952–953.
[63]Id. at 953.
[64]Id. COGSA §1303(5) reads in relevant part, "[t]he shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of the shipment of the marks, number, quantity and weight, as furnished by him." Id.

other parties and instead the shipper alone as "the entity that ships the goods" is ultimately "the party most able to verify the specifics of the shipment."[65] The Ninth Circuit reasoned that if Congress had intended all parties to the bill of lading, such as consignees, to be included in the statutory definition of "shipper," it would not have included a separate provision in the same statute ensuring that the carrier maintains its responsibility toward parties to the bill of lading "other than the shipper."[66] Thus, the Ninth Circuit concluded that the consignee and purchasing agent were not COGSA shippers and were therefore not afforded the statutory protections intended for those separate entities.[67]

Addressing the defendants' alternative argument that the indemnity provision at issue violated COGSA §1303(8) by lowering the liability of the carrier below what is statutorily permissible, the Ninth Circuit agreed with the district court that it did not.[68] It reasoned that the bill of lading provision at issue is not relevant to the protections contained in that section of COGSA because it did not impose strict liability on any party.[69] Instead, in order for liability to attach under the Merchant indemnity clause, "a person or entity other than the carrier (most likely the shipper) must have acted negligently or packed the container in a manner that would cause damage."[70] Consequently, since the clause implicitly required some kind of negligence

---

[65]Id.

[66]Id. The Ninth Circuit explored this issue by focusing on the language in COGSA §1303(5), which provides, "[t]he right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper."

[67]Id. Note that the defendants also advocated for the use of the broader definition of "shipper" contained in the Shipping Act of 1984, but the court rejected this approach and held that there is "no indication Congress intended to merge the definition of "shipper" from the Shipping Act into COGSA." Id.

[68]Id. COGSA §1303(8) reads in relevant part: "[a]ny clause...in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

[69]Id.

[70]Id.

committed by a party other than the carrier, and since the clause specifically exempted the shipper from liability stemming from carrier negligence, it "does not impermissibly lessen [the carrier's] liability" and is therefore consistent with COGSA requirements.[71]

The Ninth Circuit did not explicitly criticize *Excel Shipping*, and instead distinguished the bill of lading clause at issue from the clause found unenforceable in that case.[72] The Ninth Circuit noted that under the clause at issue, parties cannot be held liable for the negligence of the carrier in packing and shipping the goods which it said was in clear contrast to bill of lading provisions like the one in *Excel Shipping*, which impose liability on shippers and other parties "for acts caused by *any* party."[73] Having found that none of the clauses at issue violated COGSA, the Ninth Circuit applied the plain reading of the bill of lading against the defendants.[74] Since both the consignee and the purchasing agent fell within the definition of "Merchant" under the terms of the bill of lading and since all Merchants jointly and severally owed indemnity, both were contractually obligated to indemnify the carrier without proof of any fault on their account.[75]

Another case out of the Southern District of New York lends support to the position that COGSA §1304(3) does not prevent a carrier from enforcing bill of lading provisions assigning joint and several liability for carrier losses to a class of Merchants. In *MTS Logistics, Inc. v. Stone Tile Direct, LLC*, an NVOCC sued a U.S.-based importer of natural stone to recover survey fees and demurrage and vessel detention charges related to a misstatement of the weight of the cargo.[76] The importer was listed as both the consignee and the "notify party" on the NVOCC bill of lading, placing it within the bill of lading's definition of "Merchant."[77]

---

[71]Id.
[72]Id.
[73]Id. (Italics in original).
[74]Id.
[75]Id.
[76]MTS Logistics, Inc. v. Stone Tile Direct, LLC, 2012 U.S. Dist. LEXIS 42121 at *7, 2012 AMC 1653 (S.D.N.Y. 2012).
[77]2012 U.S. Dist. LEXIS 42121 at *7.

The Bill of lading further included a clause that provided Merchants "shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under the Bill of Lading."[78] The responsibilities of the Merchant under the bill of lading included, "warrant[ing] to the Carrier that the description [and particulars of the Goods set out on the face hereof] . . . including, but not limited to, weight, content, measurement, quantity, quality, condition, marks, numbers and values are correct."[79] The bill of lading further obliged Merchants to "indemnify the Carrier against all loss, damage, fines and expenses arising or resulting from the inaccuracies in, or inadequacy of, such particulars, and/or arising from any other clause in connection with the goods for which the Carrier is not responsible."[80]

Like the litigants in the previous cases, the consignee argued that the bill of lading provision at issue violated COGSA §1304(3) because it imposed liability without fault.[81] To support its argument, the consignee relied on the expansive reading of COGSA protections articulated in *Excel Shipping*.[82] Adopting the reasoning of the Ninth Circuit in *UK Aerosols*, the court rejected this argument and instead found that the bill of lading provision at issue was different than the clause in *Excel Shipping*, because it did not explicitly exempt the shipper from liability stemming from the carrier's negligence.[83] Instead, the court found the provision at issue was permissible under COGSA because it only imposed indemnity obligations on Merchants for damages "for which the Carrier is *not* responsible" rather than exculpating the carrier from liability caused by the carrier's own negligence.[84] Even though the court drew the inference that the Turkish shipper and not the U.S.-based consignee was found to be the party likely

---

[78]Id.
[79]Id. at *7–8.
[80]Id.
[81]Id. at *8.
[82]Id.
[83]Id.
[84]Id. (Italics in original).

to be negligent, the court found the consignee liable since the bill of lading terms bound the consignee to indemnify the carrier irrespective of fault.[85]

B. Privity Issues Relating to Merchant Liability Under Bills of Lading

Rather than evaluating COGSA restrictions on the enforceability of Merchant clauses, other courts have focused their analysis on whether defendants agreed to be bound by the terms of the contracts that allegedly assign them affirmative obligations. Addressing such arguments, these courts have been tasked with determining under what factual circumstances a contractual relationship arises in which the carrier can assert a cause of action against a defendant by relying on the Merchant clause.

In *In Re M/V Rickmers Genoa Litigation*, a vessel owner sued a U.S.-based consignee for damages allegedly caused by the cargo after an explosion and fire occurred on the vessel following a collision at sea.[86] The cargo at issue was a chemical mixture used in steelmaking that possessed "unusual fire and explosion hazards."[87] The vessel owner sued under various theories, including breach of contract based on the terms of two bills of lading issued during the transaction.[88]

The bill of lading issued by the vessel owner included a provision, which read, "Merchant shall indemnify the Carrier against all claims, losses, damages or expenses arising in consequence of the Carriage of [dangerous] Goods."[89] "Merchant" was defined broadly under the bill of lading as, "the Shipper, Holder, Consignee, Receiver of the Goods or of this Bill of Lading, any Person owning or entitled to the possession of the Goods or this Bill of Lading and anyone acting on behalf of any

---

[85]Id.

[86]In Re M/V Rickmers Genoa Litigation, 622 F. Supp. 2d 56, 58, 2009 AMC 609 (S.D.N.Y. 2009).

[87]622 F. Supp. 2d at 60.

[88]Id. at 70.

[89]Id. at 71.

such persons."[90] The vessel owner also alleged a breach of contract theory under a similar provision contained in a separate bill of lading issued by the China-based shipper's NVOCC.[91]

The consignee argued that even if it did fall within the definition of "Merchant" in the bills of lading, it could not be held liable under either bill because it was not a party to those contracts.[92] Addressing this argument, the court recognized that even if the cargo owner did not accept the bills of lading when they were issued, it could still be bound either by independently demonstrating a willingness to be bound by the contracts or through an agency relationship.[93] Finding that the consignee had not independently agreed to be bound by the bills of lading, the court focused on two different agency possibilities.

Relying on the principles articulated in the Restatement of Agency, the court found that the consignee could be bound by the bill of lading agreed between the China-based shipper's NVOCC and the vessel owner if the consignee demonstrated the power to control that party's conduct when it entered into the agreement.[94] Applying this traditional agency analysis, the court found an issue of fact remained as to whether such an agency relationship existed.[95]

Briefly addressing a second possibility that the consignee could be bound to the bill of lading through a non-traditional agency relationship automatically arising between the consignee and the China-based shipper, the court found that it could not.[96] This argument was based on an expansive reading of the seminal

---

[90]Id.

[91]Id. at 70–71.

[92]Id. at 71.

[93]Id. at 72. Note that the court also found the consignee was not bound by the bill of lading as a third-party beneficiary of the contracts, reasoning, "[the defendant] as the cargo purchaser and ultimate consignee, may certainly have been an intended third-party beneficiary, that status alone is insufficient to warrant a finding that [the defendant] was bound to comply with the Merchant's obligations as described in both bills of lading." Id. at 72–73.

[94]Id. at 73–74.

[95]Id. at 72–73.

[96]Id. at 73–74.

Supreme Court case *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, which found that an ocean transport intermediary, such as an NVOCC, could bind a consignee to the terms of a downstream bill of lading by independently agreeing to limitations of liability contained in that contract.[97] The court rejected this argument that "limited agency" principles articulated in *Kirby* could bind a cargo owner to bill of lading provisions other than limitations of liability.[98] Instead, in a footnote, the court found that expanding this principle could "expose consignees to potentially limitless liability for the conduct and contracts of their consignors."[99] Instead, the court determined that "agency theories of liability must be considered on a case-by-case basis and should not be assumed."[100] Thus, despite the consignee apparently falling within the language of the Merchant clauses contained in the bills of lading, the court found that a lack of privity between the consignee and the parties issuing the bills of lading could prevent the vessel owner from establishing a cause of action against the consignee by relying on those bills of lading.[101]

Another case out of the Northern District of Illinois and Seventh Circuit Court of Appeals explores these privity issues more comprehensively. In *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.*, a Japanese ocean carrier sued a U.S.-based consignee for contractual indemnity, alleging a shipment of extremely heavy steel molds used to manufacture tackle boxes fell through the floor of the intermodal container and caused a train derailment due to improper packing of the molds at the time of the

---

[97]Id.; See also Norfolk S. Ry. v. James N. Kirby, 543 U.S. 14, 2004 AMC 2705 (2004).

[98]622 F. Supp. 2d at 73.

[99]Id.

[100]Id.

[101]Id. See also APL Co. Pte. Ltd. v. Kemira Water Solutions, Inc., 890 F. Supp. 2d 360, 369 (S.D.N.Y. 2012) (finding the consignee defendant was not liable for damage to the carrier's vessel under a Merchant clause contained in the carrier's bill of lading because it never agreed to its terms and did not authorize the shipper to act as its agent when agreeing to those terms).

shipment.[102] The train derailment destroyed the ocean carrier's intermodal container and caused extensive damage to third-party cargo and rail infrastructure.[103] For its breach of contract theories, the carrier relied on provisions contained both in its bill of lading and a through bill of lading issued by the consignee's NVOCC.[104]

Under provisions contained in the carrier's bill of lading, the consignee was included among the class of "Merchants" that had contractually warranted that the cargo was packed properly and "suitable for carriage."[105] The bill of lading further provided that in the case of a breach of this safe packing warranty, "Merchant shall be liable for loss of or damage to any property . . . and shall indemnify and hold Carrier harmless."[106] Despite this clear language assigning liability to the consignee, the district court and the Seventh Circuit agreed that the consignee could not be liable under the terms of the ocean carrier's bill of lading because it had never agreed to be bound by that bill of lading.[107]

The ocean carrier argued in the Seventh Circuit that despite this lack of privity the consignee could still be bound to the Merchant warranty contained in its bill of lading by recognizing a "limited agency" relationship between the consignee and its NVOCC.[108] The ocean carrier again based this argument on an expansive reading of *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*[109] While the Seventh Circuit recognized the "congruence" between the policy rationale underpinning the *Kirby* limited agency rule and the argument for enforcing the Merchant packing warranty at issue against the consignee, it ultimately rejected the broad reading of the principle and instead restrictively held that it "must acknowledge the very limited

---

[102]Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 696 F.3d 647, 650, 2012 AMC 2611 (7th Cir. 2012).
[103]696 F.3d at 650.
[104]Id. at 650–651.
[105]Id. at 651.
[106]Id.
[107]Id. at 652–656.
[108]Id. at 653.
[109]Id. at 654.

circumstance in which the Supreme Court has recognized the non-traditional agency relationship."[110]

Interestingly, in attempts to draw a line between bill of lading clauses that could be binding on consignees through *Kirby* limited agency principles and those that could not, the Seventh Circuit explicitly distinguished between offensive and defensive clauses contained in bills of lading.[111] The Seventh Circuit reasoned that the Supreme Court in *Kirby* only recognized limited agency relationships in situations in which the carrier attempts to limit its liability for cargo loss to the value negotiated with the intermediary.[112] In contrast, the Seventh Circuit reasoned that in the case before it the ocean carrier attempted to use its bill of lading "as a sword to obtain indemnification and damages from [the consignee] rather than a shield to avoid liability."[113] Thus, even though the consignee was captured among the class of Merchants described in the carrier bill of lading as owing warranties and corresponding indemnity to the carrier, the Seventh Circuit held that the NVOCC did not have the authority to bind the consignee to offensive clauses under *Kirby* limited agency principles.[114]

The Seventh Circuit, however, found that the cargo owner could still be held liable under a similar provision contained in the separate through bill of lading issued by the NVOCC, as long as the consignee was in privity with that party.[115] Based on this determination, the Seventh Circuit overturned the district court's grant of summary judgment in favor of the consignee and remanded the case to determine whether the consignee was a party to the NVOCC's bill of lading.[116] On remand, the District Court held that the consignee was bound by the NVOCC's through bill of lading and therefore the ocean carrier could rely on

---

[110]Id. at 654.
[111]Id. at 654–655.
[112]Id. at 654.
[113]Id.
[114]Id. at 654–655.
[115]Id. at 656–657.
[116]Id.

provisions in this bill of lading by way of a "Himalaya" clause, which allowed downstream carriers to invoke its provisions.[117] Among the clauses contained in that bill of lading was a similar Merchant warranty, which obliged the consignee to indemnify the carrier for losses caused by improper packing.[118]

At trial on the merits, the court found that the ocean carrier did not carry its burden in proving the train derailment was actually caused by improper packing.[119] Instead the court held the derailment was likely caused by a defect in the intermodal container owned by the carrier.[120] Thus, despite the fact that the consignee was bound by the Merchant packing warranty contained in the NVOCC bill of lading, the carrier failed to prove that it actually breached that warranty.[121]

C. The Commercial Role of the Defendant and its Impact on Merchant Liability Under Bills of Lading

Determining the scope of liability under Merchant clauses in bills of lading can be a convoluted proposition when it is unclear what roles the various parties played in a transaction. Consequently, some defendants have sought to avoid liability under Merchant clauses by raising arguments focusing on their roles in the transaction. Instead of acknowledging liability based on their alleged commercial role, these defendants have instead focused on the facts surrounding the transaction, which, they argue, places them outside the scope of the Merchant clause. Addressing these arguments, courts have explored complicated factual scenarios to determine whether liability should attach.

---

[117]Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 2013 U.S. Dist. LEXIS 101118, 2014 AMC 438 (N.D. Ill. 2013).

[118]2013 U.S. Dist. LEXIS 101118 at *16–20.

[119]Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 2013 U.S. Dist. LEXIS 181046 (N.D. Ill. 2013).

[120]2013 U.S. Dist. LEXIS 181046 at *32–34.

[121]Note that in its post-trial brief, the consignee for the first time raised the argument that COGSA §1304(3) prevents a carrier from being able to assign liability to a party who had no fault. Unlike the court in UK Aerosols and others, which comprehensively dismantled such arguments, the district court ignored the arguments altogether. Id.

In *EIMSKIP v. Mayflower Int'l, Ltd.*, an Icelandic ocean carrier sued two defendants captured under the terms of a Merchant clause in its bill of lading to recover unpaid freight relating to shipments of frozen herring from Massachusetts to Estonia.[122] The carrier alleged the party listed on the bill of lading as "shipper" and the party acting as the "buyer" of the cargo were both Merchants jointly and severally liable to the carrier for the unpaid freight invoice.[123] While the defendants argued they were not liable for the unpaid freight because they were acting as agents for others with an interest in the cargo, the court rejected this argument and ruled in favor of the carrier.[124]

First, although the court found the Merchant clause at issue was not particularly clear on who was obligated to pay freight, it held that the shipper could be liable for the freight as a matter of law.[125] The court pointed out that while the Merchant clause obliged Merchants to indemnify the carrier against its costs in exercising its rights under the bill of lading, "nowhere on the bill of lading does it specify when, or by whom, the payment should be made."[126] Since the bill of lading was not clear on who owed freight, the court turned to the general maritime law to find that there is a rebuttable presumption that the shipper is primarily liable for freight charges.[127]

However, the district court also found that the other defendant acting as the buyer in the transaction assumed primary liability for freight because through course of dealing it had made promises both to the carrier and to the shipper to assume such liability.[128] Additionally, since the bill of lading held both parties jointly and severally liable as Merchants "to defend, indemnify and hold harmless the Carrier against all and any cost incurred by the Carrier in exercising its right to collect freight charges" the

---

[122]EIMSKIP v. Mayflower Int'l, Ltd., 338 F. Supp. 2d 191, 2004 AMC 1904 (D. Mass 2004).

[123]Id. at 192–194.

[124]Id.

[125]Id. at 197–198.

[126]Id. at fn 6.

[127]Id. at 197–198.

[128]Id.

district court held that both defendants were contractually liable for the carrier's attorneys' fees and costs.[129] Thus, the court found that the buyer was primarily liable to the carrier for the unpaid freight and litigation costs, but that in the event that carrier could not collect from the buyer, the carrier could collect from the shipper.[130]

The buyer appealed to the First Circuit Court of Appeals essentially arguing that since it was neither the shipper nor the consignee listed on the bill of lading it could not be held liable for freight.[131] The First Circuit rejected these arguments as a misinterpretation of basic principles of contract law as applied in maritime matters, which allow a party to be held liable for agreements it makes orally.[132] Interestingly, however, regarding the district court's award of attorneys' fees and costs, the First Circuit pointed out that while the Merchant clause assigning this obligation "probably" did apply to the buyer who orally agreed to pay freight, it "arguably is not binding on someone who was not (in some fashion) a party to the bill of lading or otherwise accepted the obligation."[133] However, since the buyer did not raise this issue on appeal and therefore forfeited the argument, the First Circuit declined to analyze whether the buyer was "implicitly a party to the bill of lading" or "whether [the buyer's] separate promises to pay for the shipments incorporated counsel fees as well as freight."[134] Instead, it simply affirmed the judgment of the district court.[135]

Another argument that has been raised by defendants is that the mere designation as a party falling within the definition of

---

[129]Id.

[130]Id.

[131]EIMSKIP v. Atlantic Fish Market, Inc., 417 F.3d 72, 75, 2005 AMC 1817 (1st Cir. 2015). Note that the defendant also raised the issue that imposing obligations for consignees to pay freight violated COGSA §1303. The First Circuit rejected this argument as a misinterpretation of the statute, noting that COGSA does not regulate the collection of freight charges. 417 F.3d at 75.

[132]Id. at 76.

[133]Id. at 78.

[134]Id.

[135]Id.

Merchant under the bill of lading should not make it jointly and severally liable if that designation is not consistent with its actual function in the transaction. In *OOCL (USA) Corp. v. Transco Shipping Corp.*, an ocean carrier sued an ocean transport intermediary for demurrage, detention, and other charges relating to a failure to timely unload cargo from the vessel.[136] The ocean transport intermediary was listed on the ocean carrier's bill of lading as "consignee" and "notify party" and the bill of lading contained terms that defined "Merchant" to include the consignee.[137] The bill of lading further assigned Merchants joint and several liability "for all freight and charges" including demurrage and detention.[138]

Despite the fact that the ocean transport intermediary was listed on the bill of lading as the consignee, apparently it was not the true buyer of the cargo and instead was acting on another party's behalf.[139] When the cargo arrived at the destination port, the ocean transport intermediary listed as the consignee endorsed the bill of lading and tried to notify the actual buyer that the cargo had arrived.[140] The true buyer had apparently gone out of business prior to the arrival of the cargo and consequently the cargo remained unclaimed on the ocean carrier's vessel accruing demurrage and detention fees.[141] Seeking recovery of these charges, the ocean carrier filed a breach of contract action under its bill of lading against the ocean transport intermediary.[142]

The ocean transport intermediary claimed that its designation as a consignee on the bill of lading was insufficient to make it liable for demurrage and detention because it never actually accepted or demanded delivery of the cargo.[143] Essentially, this argument was based on the idea that even though the defendant

---

[136]OOCL (USA) Corp. v. Transco Shipping Corp., 2015 U.S. Dist. LEXIS 29954 at *2–3, 2015 AMC 903 (S.D.N.Y. 2015).

[137]2015 U.S. Dist. LEXIS 29954 at *2–3.

[138]Id.

[139]Id. at *3–4.

[140]Id.

[141]Id.

[142]Id.

[143]Id. at *10.

was listed on the bill of lading as a consignee, it did not act like a consignee in the sense that it did not actually make demand for the cargo. The court rejected this argument, reasoning that "whether a party accepted or demanded delivery is irrelevant to an analysis of whether a party is liable for demurrage and detention fees when, as here, a contract expressly provides that a party is liable."[144] Instead, the court found that a mere designation as a consignee and the endorsement of the bill of lading can bind that party with joint and several liability by contract, no matter whether the party actually demanded delivery of the cargo.[145]

Applying the plain language of the bill of lading, the court then found that the ocean transport intermediary listed as consignee on the bill of lading and included within the bill of lading definition of Merchant could be held liable for freight charges, including demurrage and detention.[146] After a separate trial over outstanding issues of fact relating to the damages, the court found the ocean transport intermediary listed on the bill of lading as consignee liable for over $57,000 in demurrage and detention fees, plus attorneys' fees and costs.[147]

Similarly, in *Mediterranean Shipping, Co. v. Best Tire Recycling, Inc.*, the court held a Puerto Rico-based party listed on the bill of lading as "shipper" was jointly and severally liable for freight charges, including storage and demurrage, under Merchant clauses contained in the ocean carrier's bill of lading.[148] In that case, after 40 containers of used tires allegedly arrived late, the Vietnam-based consignee refused to accept the cargo transported by the ocean carrier from Puerto Rico to Vietnam.[149] This caused the carrier to incur substantial losses for demurrage, storage, and the unpaid freight balance. The ocean carrier sued the Puerto

---

[144]Id.

[145]Id.

[146]Id.

[147]OOCL (USA) Corp. v. Transco Shipping Corp., 2015 U.S. Dist. LEXIS 171466, at *23-24 (S.D.N.Y. 2015).

[148]Mediterranean Shipping, Co. v. Best Tire Recycling, Inc., 2015 U.S. Dist. LEXIS 149793 at *7–8, 2015 AMC 2828 (S.D.N.Y. 2015).

[149]2015 U.S. Dist. LEXIS 149793 at *7.

Rico-based shipper under the Merchant clauses contained in its bill of lading.[150]

The defendant argued that even though it was listed on the bill of lading as the shipper, it could not be held liable under the Merchant clauses because it had never signed the bill of lading, never negotiated the shipping rates, and unlike a typical shipper it did not have an "economic interest" in the shipment.[151] The court rejected these arguments and instead reasoned that even though the defendant allegedly used a subcontractor to book the actual shipment with the ocean carrier, under the terms of the bill of lading it became primarily liable for the freight charges and that "signature or express consent was not required for it to be bound . . . ."[152] Applying the terms of the bill of lading, the court granted summary judgment to the carrier, awarding it over $460,000, plus attorney's fees and costs.[153]

Defendants in other cases have sought to avoid liability under Merchant clauses by essentially arguing that when agreeing to the terms of the bill of lading they were actually acting as agents for a disclosed principal and therefore were not bound by the terms under basic contract law doctrines. In *CMA-GGM (Canada) Inc. v. World Shippers Consultants, Ltd.*, an ocean carrier sued a freight forwarder for unpaid freight relying on its terms and conditions that were incorporated into a "booking confirmation" issued at the time the freight forwarder booked the shipment.[154] The booking confirmation included language that indicated the customer named in the booking confirmation "agrees to all the terms and conditions of the carrier's issued long form bill of lading" and also provided the website address to the carrier terms and conditions.[155] The bill of lading terms and conditions defined Merchant to include "anyone acting on behalf of" the shipper and

---

[150]Id.

[151]Id. at *11–12.

[152]Id.

[153]Id. at *18.

[154]CMA-CGM (Canada) Inc. v. World Shippers Consultants, Ltd., 921 F. Supp. 2d 1, 2013 LEXIS 9746 at 2–3 (E.D.N.Y. 2013)

[155]921 F. Supp. 2d at 3–4.

further assigned the Merchant with joint and several liability for unpaid freight.[156]

The freight forwarder argued that since it was acting on behalf of the shipper when it booked the shipment with the carrier, it could not itself be bound in contract because it was a mere agent acting on behalf of a disclosed principal.[157] The Eastern District of New York rejected this argument and instead found that since the identity of the shipper was not initially disclosed at the time of the booking, the freight forwarder, by receiving the booking confirmation, independently agreed to be bound by its terms.[158] Even though the true identity of the shipper was eventually disclosed to the carrier, the court found, "such identification did not transform [the freight forwarder] from the status of an agent working for an undisclosed principal at the time of the booking confirmations, to that of an agent working for a disclosed principal at the time the shipments took place."[159] Thus, despite the fact that the freight forwarder was not the true shipper, since the freight forwarder was bound by the terms incorporated into the booking confirmation which defined liability to apply to a broader class of Merchants, the court found the freight forwarder liable for the unpaid freight.[160]

A case in the Southern District of New York considered a similar argument raised by the defendant but reached a different result. In *Mediterranean Shipping Co. (USA) Inc. v. American Cargo Shipping Lines, Inc.*, an ocean carrier sued an NVOCC for over $240,000 in demurrage and other charges related to cargo that was not picked up on time after being delivered to the

---

[156]Id. at 4.
[157]Id. at 2.
[158]Id. at 7–8.
[159]Id.
[160]Id. See also Nippon Yusen Kaisha v. FIL Lines USA Inc., 977 F. Supp. 2d 343, 350–51, 2014 AMC 553 (S.D.N.Y. 2013) (granting summary judgment to the carrier for unpaid freight and rejecting the consignee's argument that it was not liable under the Merchant clause because it was acting as an agent for a disclosed principal when agreeing to the terms).

destination port.[161] The ocean carrier relied on the terms and conditions contained in its bill of lading, which assigned liability for demurrage and other charges to Merchants under a definition that included "the Shipper . . . or anyone acting on behalf of this Person."[162] The NVOCC booked the shipment and was identified in a booking confirmation as the shipper. The booking confirmations included language that read, "Please be informed that MSC has implemented the use of a new [bill of lading] format. We suggest that you read the terms and conditions since some of the clauses have been changed."[163] On the bills of lading that were later issued in the same transaction, the NVOCC was identified as an agent acting on behalf of a named shipper.[164]

The NVOCC moved to dismiss the case taking the position that the complaint was deficient.[165] The NVOCC argued that it was not bound by the terms and conditions referenced in the booking confirmations or in the bills of lading because it was acting on behalf of a disclosed principal and that the plaintiff did not demonstrate that it falls within the definition of Merchant.[166] Surprisingly, the court agreed with the NVOCC and dismissed the complaint.[167] It reasoned the booking confirmations in the case before it were distinguishable from the one at issue in *World Shippers* because they did not explicitly incorporate the bill of lading terms and conditions and thus the NVOCC did not independently agree to be bound by the carrier's terms on that basis.[168] Furthermore, the court agreed that the NVOCC was not bound by the bills of lading that were later issued because the NVOCC "was acting as an agent for a disclosed principal" at the time the bills of lading were issued.[169] Additionally, the court held

---

[161]Mediterranean Shipping Co. (USA) Inc. v. American Cargo Shipping Lines, Inc., 2014 U.S. Dist. Lexis 126747 (S.D.N.Y. 2014).

[162]Id. at *3–4.

[163]Id. at *5.

[164]Id. at *6.

[165]Id. at *1.

[166]Id. at *9–22.

[167]Id.

[168]Id. at *10–18.

[169]Id. at *18

that the complaint did not "plausibly allege" that the NVOCC is a Merchant under the terms of the bill of lading and therefore dismissed the complaint.[170]

IV
CONCLUSION

Merchant clauses assigning joint and several liability for affirmative obligations owed to carriers are now ubiquitous in contemporary maritime bills of lading. Recent case law responding to a variety of arguments raised by defendants sued under such clauses provides much-needed guidance regarding their enforceability. While these arguments have required extended analysis of complicated commercial arrangements, nuanced contract and agency law principles, and maritime law statutes, the current state of the law appears to favor enforcement of Merchant clauses, so long as the defendant being sued under the bill of lading is actually bound by its terms.

Defendants seeking to avoid obligations under Merchant clauses by relying on restrictions imposed by COGSA have primarily focused their arguments on COGSA §1304(3), which prevents a shipper from being held responsible for losses that are not caused by their own negligence.[171] These defendants have sought protection under this COGSA fault requirement by advocating for a broad reading of the term "shipper" to

---

[170]Id. at *18–23. Other defendants have sought to place themselves outside the scope of Merchant clauses by relying on INCOTERMS reflected in the underlying sales contracts that designate the time in which title to the cargo passes. See e.g. Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co., 2013 U.S. Dist. LEXIS 101118, 2014 AMC 438 (N.D. Ill. 2013) (rejecting the defendant's argument that it was not a cargo owner subject to the Merchant clause because the terms of the underlying sales contract allegedly passed title to the cargo to the consignee at the time of delivery rather than at the time of shipment).

[171]While defendants have also raised the argument that COGSA §1303(8) preventing carriers from exculpating themselves for liability caused by their own fault should be used as a basis for invalidating clauses imposing joint and several liability on Merchants, courts have generally been unwilling to apply such a reading. See e.g. UK Aerosols, supra note 56.

encapsulate other cargo interests, such as consignees, purchasing agents, and shipping intermediaries. With the exception of *Excel Shipping*, however, the majority of courts addressing this argument have rejected it as inconsistent with COGSA's statutory design.[172]

While these courts are probably correct to find that COGSA §1304(3) does not prohibit imposing liability without fault on actors other than the true shipper, the court in *Excel Shipping* convincingly pointed out that a strict reading of this COGSA limitation does create a peculiar result. It appears that in applying COGSA §1304(3) to Merchant clause cases, a true shipper is afforded protection from bill of lading terms that impose liability on Merchants without fault, while other actors with perhaps less involvement in the shipping transactions (and presumably less control over loss prevention) cannot benefit from that same provision.[173] Despite this curious result, most courts appear to recognize the need to interpret COGSA as written and therefore are not prepared to expand its application on equitable grounds alone.[174] This judicial restraint indicates the understanding that while the shipping industry has been revolutionized since the time COGSA was enacted, it is the job of lawmakers, not the courts, to respond to commercial changes by creating new legal rules.

Defendants' arguments hinging on the facts surrounding the transaction are much more likely to gain legal traction. Cases exploring these scenarios show that even if a defendant falls within the scope of the Merchant clause and under its plain terms would appear to owe obligations to the carrier, courts are unwilling to enforce bill of lading provisions against a defendant who did not consent to be bound.[175] Nevertheless, carriers have had some success in demonstrating that a defendant is bound by a

---

[172]See e.g. MTS Logistics, supra note 76.

[173]See Excel Shipping, supra note 36, at *748 (Reasoning that to enforce the bill of lading provisions at issue "would have the anomalous result of creating a greater scope of liability for a consignee having no active participation in the shipment of goods than for the shipper itself.")

[174]See e.g. UK Aerosols, supra note 56.

[175]See e.g. Plano Molding Co, supra note 102.

Merchant clause even if it did not receive the bill of lading when it was issued, particularly in situations where the defendant filed suit under the terms of the bill of lading and thereby independently consented to be bound by all of its terms.[176] Other carriers have been successful in demonstrating independent assent to the carrier's terms and conditions at the time the shipment was booked by incorporating the bill of lading terms through a booking confirmation.[177]

Courts have also recognized that at least in theory parties could be held liable to the terms of bills of lading agreed by an intermediary either through traditional agency principles or even limited agency principles. Traditional agency principles, however, are fact-intensive and require a showing that a principal authorized an agent to act on its behalf and exhibited control over the agent when it agreed to the bill of lading terms. Limited agency, although arising automatically, is even less likely to produce a finding that the Merchant is bound by affirmative obligations contained in a bill of lading agreed by an intermediary. The Supreme Court in *Kirby* made statements appearing to restrict the limited agency principle's application only to cases in which an intermediary agrees to a carrier's limitations of liability.[178] Nonetheless, a trend in the lower courts has recently shown an expansion of these limited agency principles to apply to provisions such as forum selection clauses, covenants not to sue, and other defensive clauses.[179] To date, however, it appears no court has gone so far as to find a cargo

---

[176]See In Re M/V Rickmers, supra note 86, at 72 (noting "[s]ome courts have held that when a third-party who falls within a Merchant Clause sues on a bill of lading, the third-party in effect accepts the bill of lading and becomes a party to the contract.").

[177]See e.g. World Shippers Consultants, supra note 154, at 7–8.

[178]See Kirby, supra note 97, at 34 (2004) (holding limited agency " . . . requires treating [the intermediary] as the cargo owner's agent for a single, limited purpose: when [the intermediary] contracts with subsequent carriers for limitation on liability.").

[179]For a comprehensive discussion of this trend, see Richard L. Kilpatrick, Jr. *How Limited is 'Limited Agency'? Lower Courts Rock the Boat by Broadly Applying the Supreme Court's Narrow Kirby Guidelines for Interpreting Bills of Lading*, 40 TUL. MAR. L. J. 52–102 (2015).

interest bound by affirmative obligations through the application of limited agency principles.[180]

In cases in which it is indisputable that the defendant agreed to the terms of the bill of lading, the commercial role of the defendant is likely to be crucial in determining whether contract liability attaches. Since Merchant clauses inherently define classes of cargo interests by referencing commercial roles, it is the carrier's burden to demonstrate facts placing the defendant within that role during the transaction at issue. Naturally, at the same time the defendant is likely to focus on facts suggesting it falls outside the intended scope of the Merchant clause. Furthermore, if a defendant has acted on behalf of another party at the time it agreed to the bill of lading, the defendant may raise the argument that it acted as an agent of a disclosed principal and is therefore not bound in contract.[181] Whether the terms of the bill of lading are able to circumvent this agency concept by making agents part of the contractually-defined class of Merchants is a question that courts may still need to resolve.[182] These arguments relying on the factual complexities of the transactions may at least allow a defendant to survive a carrier's motion for summary judgment based on the language of the Merchant clause because the liability determination could require the court to engage in an analysis of the full evidentiary record.[183]

Moving forward, carriers are likely to continue embracing Merchant clauses as a mechanism to expand the possibilities of recovery. In doing so, carriers must be aware that simply issuing a

---

[180]Instead, as previously noted, the Seventh Circuit has refused to expand the application of limited agency to Merchant clauses. See Plano Molding Co, supra note 102.

[181]See e.g. World Shippers Consultants supra note 154; American Cargo, supra note 161.

[182]See American Cargo, supra note 161, at fn. 5 ("The Court notes that the World Shippers holding was bolstered by the definition of 'Merchant,' which encompassed agents of the shipper. . . . Plaintiff has not plausibly alleged that the same is true here.")

[183]See e.g. American Cargo, supra note 161, at fn. 10 ("Without the benefit of a full evidentiary record identifying the various participants in the larger transaction—and their relationships to one another—the Court would be unable to make a definitive determination as to whether [the defendant] falls outside the definition of 'Merchant.'").

bill of lading containing such clauses does not necessarily provide grounds to pursue contract-based actions against all of the parties captured under the language of the clause. The carrier must first show that the party it intends to pursue in litigation is actually bound by the bill of lading and then be prepared to respond to the above arguments raised by shippers, consignees, cargo owners and other cargo interests falling within the class of Merchants. Despite these challenges, when carriers draft the terms of their bills of lading, recent case law indicates they have the opportunity to not only garner defenses to avoid liability if sued but also to generate causes of action that facilitate their own recovery. Ultimately, it appears that despite recent concerns over the enforceability of Merchant clauses, carriers can be confident that freedom of contract principles in maritime matters still carry the day.