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CHARTER PARTIES AND BILLS OF LADING*

ROMAN T. KEENAN**

I. INTRODUCTION

The topic Charter Parties and Bills of Lading generally is regarded as the duller field in Admiralty. These documents seem rather dead when contrasted to the crash of collision cases or the rough and tumble of personal injuries or the drama of a ship disaster and subsequent limitation of liability proceedings.

Yet Charter Parties and Bills of Lading embody every major concept of Admiralty Law and to understand or interpret a charter party or bill of lading one must be at least familiar with the fundamentals of Admiralty and Maritime Law. Each clause and at times each phrase which appears in these documents has a special meaning, a term of art backed by a history of some ship or cargo disaster and subsequent litigation.

II. CHARTER PARTY

A Charter Party or Charter is defined as a specific contract by which the owner of a ship lets the whole or principal part to another person for the conveyance of goods on a particular voyage to one or more places or until the expiration of a specified time.¹

In short the charter party is the mere hiring of a ship. When a ship owner agrees to carry goods by water and receives freight the contract is called a contract of affreightment² rather than a charter party.

While it is possible to have a charter party of less than the entire ship, as a general rule a charter party deals with the full reach of a ship while a contract of affreightment deals with carriage of goods forming only part of the cargo and coming under a bill of lading.

The basic rules of law as applied to contracts are also used in determining the validity of a charter. Generally, the law of the locality wherein the contract was made determines what law governs the interpretations of the charter unless strong circumstances to the contrary are shown.³

*[Editor's note: This article is adapted from an address given during the seminar *Law and Practice of Admiralty on the Great Lakes* conducted at Marquette University Law School, November, 1958.]

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¹ The New York, 93 Fed. 495, 497 (E.D.N.Y. 1899); *Vandewater v. Mills*, 19 U.S. (How.) 82, 91 (1856).

² *BALLENTINE, LAW DICTIONARY WITH PRONUNCIATIONS* 280 (1930); see also 24 R. C. L. 1092 (1919).

³ See *Manchester Liners V. Virginia Carolina Chemical Co.*, 194 Fed. 463

Charter Parties are highly standardized and are grouped into three main classifications:

- A. Voyage,
- B. Time,
- C. Demise or Bare Boat.

A. *Voyage Charter*

Here, the ship is hired to carry a full cargo on a single voyage. The ship remains under the control of the owner as to manning and navigation.

B. *Time Charter*

Here again, the ship is manned and navigated by the owner but her capacity is let to the charterer for a specified time. The time charter permits the charterer to have tonnage under his control for a fixed period of time without undertaking long term financial commitments of a ship owner or the responsibilities of ship management and navigation.

Sometimes the voyage and time form is combined as "one round trip to South America of about eight weeks." Under such a form, it has been held that the provision as to time controls.⁴

C. *The Demise or Bare Boat Charter*

Here, the charterer becomes in effect the owner *pro hac vice* by taking over the ship completely — mans, victuals and provisions her — assumes the responsibility of her navigation and her upkeep. Having complete control, the bare boat charterer also has the rather heavy responsibilities of an owner.

The most important distinction between the bare boat and the time and voyage charters is that the demise charterer is regarded as the owner *pro hac vice* and as such qualifies as an owner for the benefit of the limitation of liability statutes whereas the time and voyage charterers do not.⁵

The test to distinguish a demise charter from a voyage or time charter is control. If the owner retains control over the ship, merely carrying goods designated by the charterer, the charter is not a demise. If the charterer controls the vessel and the master and crew are his, the charter is a demise.⁶

In short, demise is for the *vessel*, the other charter parties are for the *use* of the vessel. But the problem of distinction is not particularly

(E.D.N.C. 1912); *cf.* *Liverpool Steam Co. v. Phoenix Insurance Co.*, 129 U.S. 397 (1899).

⁴ *The Helios*, 115 Fed. 705 (2d Cir. 1902).

⁵ *The Atlas No. 7*, 42 F. 2d 480 (S.D.N.Y. 1930); *contrast* *Stewart v. United States Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676 (E.D.N.Y. 1920); *Du Pont De Nemours & Co., Inc. v. Bentley*, 19 F. 2d 354 (2d Cir. 1927).

⁶ *U.S. v. Shea*, 152 U.S. 178 (1894). See also GILMORE AND BLACK, *THE LAW OF ADMIRALTY* §4-21 (1957).

acute, since in actual practice the charter party usually specifies which type it is by express stipulation.

Because of the highly specialized field of charter party law — most of the charter parties provide for arbitration. Thus, construction of a charter does not come before a court too frequently. But if suit is necessary, generally a breach of a charter is within admiralty jurisdiction.⁷

For most breaches, the remedy is *in personam* and a suit in ordinary law courts may also be brought under the "saving to suitors" clause. Some breaches (damage to cargo) create maritime liens with a remedy *in rem* in admiralty only.⁸

There are no statutes in this country or in most of the maritime nations which regulate the terms of charter parties as, for example, the terms of bills of lading are regulated by the Carriage of Goods by Sea Act,⁹ since the bargaining power of the owner and the potential charterer is about equal. Over the years, however, particular forms of charter parties have evolved to meet special trades and special areas and are generally the result of negotiations between interests involved in that particular trade. On the Great Lakes, the owners and the potential charterer generally draft special forms to meet their particular needs and desires. A charter party contains many words of art and phrases with special construction so that an accurate interpretation of a charter party must depend upon extensive knowledge of the subject and experience in the field.

For example, assume a time charter calls for the hire of a ship for three months from the time of delivery. There is no "about" three months, merely the unqualified "three months." A clause further down in the charter reads "Hire to continue unless ship lost until the time of her redelivery." In a style case, the ship was delivered and proceeded on her voyage but due to delays for which the charterer was not responsible, the flat period of three months expired prior to loading the return cargo. The ship was loaded under charterer's orders and the redelivery was made almost three months after the expiration of the three months called for in the time charter. In other words, charterer had the use of the ship for a six month period when the charter called for a three month period.

The owner claimed the difference between the market rate which had risen and the charter rate for this seemingly extra three months. The court held, however, that whether the word "about" is used in qualifying the time period or not, the ship need not be redelivered on the precise day on which the charter by its terms expires and that since

⁷ *Morewood v. Enequist*, 64 U.S. (How.) 491 (1859).

⁸ *The Saturnus*, 250 Fed. 407 (2d Cir. 1918).

⁹ 46 U.S.C.A. §§1300-1315.

the voyage on which the ship was sent was reasonable and could have been completed within the charter period except for delays not caused by charterer, there was no breach.¹⁰

A clause calling for the carriage of "lawful cargo" only has been held not to prevent the loading of contraband.¹¹

Charters commonly call for a safe port or safe berth "always afloat." A port to be safe must be without danger from physical and political causes, not only when the ship is ordered to it but also when the ship arrives. Thus, the charterer has to have access to information concerning the political situation as well as the navigational aspects of a potential port or become liable to the owner for any damage in case the ship goes to an unsafe port—provided the master had no prior knowledge that the port was unsafe.¹² Similarly, the ordering of a ship to a foul berth renders the charterer liable for any ensuing damage to the ship.¹³

In these troubled times it is common for extra clauses designating particular areas of the world as being "unsafe" or unsafe in the event war is declared. A recent case of interest held that the hostilities between Egypt and England and France over the Suez constituted a "war," if not in the international law sense, at least as understood by the maritime industry and thus gave the owner a valid excuse for cancelling a time charter party.¹⁴

A clause calling for the owner to pay for insurance on the ship protects the owner only and not the charterer. Thus, the underwriters of the owner can successfully sue a demise charterer for collision damage to the chartered ship.¹⁵

The charter often contains a breakdown clause, or what is known as "cesser of hire" or "off charter hire" clause. Commonly, the clauses relieve the charterer from paying hire in the event of loss of time exceeding 24 hours resulting from a deficiency of men or stores, breakdown of machinery, stranding, fire or damage preventing the working of the ship.

Extreme care must be used in drafting such a clause since if a loss of time occurs from some cause not specifically mentioned, the hire will not cease. Thus, when a ship is delayed by quarantine regulations or a 'restraint of prices' not mentioned in this clause, the hire runs on against the charter even though the charterer has for the period lost the use of the ship.¹⁶

¹⁰ *Straits of Dover S.S. Co. v. Munson*, 95 Fed. 690 (S.D.N.Y. 1899).

¹¹ *Atlantic Fruit Co. v. Solari*, 238 Fed. 217 (S.D.N.Y. 1916).

¹² *Crisp v. U.S. and Australasia S.S. Co.*, 124 Fed. 748 (S.D.N.Y. 1903).

¹³ *Merritt v. Sprague*, 191 Fed. 627 (D.Maine 1911).

¹⁴ *Navios Corp. v. The Ulysses II*, 161 F. Supp. 932 (D.Md. 1958).

¹⁵ *The Barnstable*, 181 U.S. 464 (1901).

¹⁶ *Clyde Commercial S.S. Co. v. West India S.S. Co.*, 169 Fed. 275 (2d Cir. 1909).

Statements made as to the ship, her characteristics, speed, cargo capacity, classification, etc., or her position and situation such as "now in London, about to sail to New York," are generally regarded as warranties and charterer is entitled to avoid the charter or sue for its breach if such warranties are broken by the owner. Thus, if the charter states the ship is to proceed to the port of loading with "all possible dispatch" and all possible dispatch is not used by the ship, the warranty is breached and the charterer can avoid the contract.

Charters other than demise generally contain a deviation clause which is an outgrowth of the former harsh doctrine of marine insurance law that insurance coverage was lost when the ship deviated or departed from the voyage which is the normal route of sailing between the loading and discharging ports as defined by geography and by trade customs.

Without a deviation clause — which also appears in the bill of lading in some form or other — the ship, if deviating, breaches the charter. Thus, a typical deviation clause contains the rather confusing language that the ship is free "to proceed to, and/or stay at, any ports or places whatsoever, although in a contrary direction to or out of, or beyond the route of said port of discharge, once or oftener, in any order, backwards or forwards***".

While the charter may not mention "seaworthiness" of the chartered ship, the general maritime law reads into every charter a warranty of seaworthiness roughly equivalent to that pertaining to the carriage of goods by public carrier.¹⁷

This implied warranty of seaworthiness can of course be by express stipulation waived by the parties to the charter. Many charters in meeting this problem of liability of the owner to charterer incorporate by reference either the Carriage of Goods by Sea Act or the Harter Act, or both, as a measure of the liability of the owner to the charterer. These statutes will be discussed below.

Before coming to the topic of Bills of Lading which pertains to Carriage of Goods by Sea Act and the Harter Act, the important legal elements of a charter party are briefly reviewed.^{17a}

There are three classes of charter parties — the Voyage, the Time, and the Demise or BareBoat. The test to distinguish a demise charter is control. If the charterer has full control so the ship is his and he is owner *pro hac vice*, the charter is a demise. Otherwise, it is a voyage or time or combination thereof.

The charter party is generally highly specialized by area and by trade.

¹⁷ *Work v. Leathers*, 97 U.S. 379 (1878); *New England S.S. Co. v. Howard*, 130 F. 2d 354 (2d Cir. 1942).

^{17a} For an analysis of charter parties, see GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, Ch. IV (1957).

On the Great Lakes, one may find a charter party—bare boat—for a 10 year period—on a single sheet of legal sized paper—containing, however, many terms of art peculiar to the admiralty and maritime profession, or another charter for some number of years on half a hundred sheets with every detail spelled out, each charter involving millions of dollars worth of ships.

The same principles apply, regardless of the size or value of the ship—be it a rowboat or modern bulk freighter.

Extreme care must be exercised in covering all features of the charter party—whether one is called upon to render an opinion as to the merit of a proposed charter or to draft one to cover his client's interests. Each word must be evaluated and considered. In addition, the following general categories must be reviewed:

- (1) The relative advantages and disadvantages of time, voyage and bare boat charter;
- (2) The statements concerning the ship, her characteristics, position and situation—which may be implied if not express warranties;
- (3) The time and place of delivery and redelivery whether measured by time or voyage;
- (4) Provisions concerning safe ports and berths;
- (5) Liability as between owner and charterer for damage to goods or to the ship;
- (6) Warranty of seaworthiness of the ship, express or implied;
- (7) Deviation;
- (8) Payment of hire and cesser of hire;
- (9) Responsibilities of owner and charterer as to loading, unloading and demurrage;
- (10) The creation of liens both by the owner for freight and on the ship by the action of the charterer;
- (11) The type of bill of lading to be issued and by whom—the owner or charterer;
- (12) The so-called cesser clause by which the non-bare boat charterer attempts to be relieved of liability to cargo upon the cargo being shipped and freight paid;
- (13) The effect of the incorporation of the terms of the charter into the bill of lading from the viewpoint of the owner, charterer and the shipper;
- (14) The provisions for general average, or the so-called *Jason* clause, usually making York-Antwerp Rules applicable.
- (15) Strikes, war, ice, frustration and related problems which threaten the venture embodied in the charter.

III. BILLS OF LADING

As mentioned previously, a charter party concerns the hiring of a ship and its entire cargo capacity to carry goods by water. The carriage of goods of less than full cargo capacity is accomplished generally by a contract of affreightment, thus calling into play the role of bills of lading.

Some confusion arises because a bill of lading commonly serves three purposes:

1. An acknowledgment by the carrier that it has received the goods.
2. A contract of carriage.
3. A negotiable instrument.

Emphasis is placed primarily on the bill of lading's second purpose — a contract of carriage.

On the Great Lakes, the vast majority of bulk shipments are handled under standard bills of lading which differ radically from the so-called ocean bill of lading. On the Great Lakes the bulk carriers do not hold themselves out as transporting cargo for the general public and regard themselves as private carriers. The package freighters, now a familiar sight and with the approaching seaway to be a more frequent force on the Lakes, are common carriers transporting cargo for the general public.

Thus, the American bulk cargo carriers use a short bill of lading with some seven or eight clauses. The package cargo carriers, usually of foreign flag on the Lakes, employ a much larger form — with voluminous clauses covering an entire legal size sheet in fine print.

Two forms used for the bulk cargoes on the Great Lakes are the American Form 1942 "Lake Bill of Lading for Bulk Cargoes Other than Grain and Seed" used primarily for the shipment of iron ore, stone and coal, and the American Form 1936 "Lake Grain Bill of Lading" which also has a special contract for the private storage of grain and/or seed printed on its back.

Both forms make reference to the Carriage of Goods by Sea Act but provide for certain additional exemptions over and above those contained in the Act for the benefit of the carrier.

Bulk liquid cargo such as oil and gasoline are frequently transported on the Great Lakes under charter parties which also refer to the Harter Act and Carriage of Goods by Sea Act and can be regarded as a special form of bill of lading. Bills of lading, if issued for such cargoes, are expressly made subject to the terms of the charter party.

The bills of lading for so-called package freight — carried on foreign flag vessels exclusively on the Great Lakes — likewise make reference to the U. S. Carriage of Goods by Sea Act.

Accordingly, to understand bills of lading used on the Great Lakes—and for that matter bills of lading used in the carriage of goods in United States commerce generally—the Harter Act and the Carriage of Goods by Sea Act must be considered.

The main problem in studying a bill of lading is simple—who bears the loss when goods are damaged or lost—the carrier or the shipper?

The general maritime law made the public water carrier an absolute insurer of the safe arrival of goods unless loss or damage was caused by act of God, public enemy or authority, inherent vice of the goods or fault of the shipper.¹⁸

To prove his case, the shipper merely had to show receipt of goods in good order and non-delivery or delivery in bad order. The carrier had to pay unless it could prove one of the exceptions—act of God, public enemy or authority, inherent vice or shipper's fault—was the exclusive cause of the loss or damage. Thus, the carrier's liability was a specie of liability without fault.¹⁹

When bills of lading came into general use, the carrier, to escape the harsh rule of the admiralty law, started to exempt itself from liability through many exception clauses in the bills of lading, so that over the years the carrier's position was reversed. Instead of liability without fault, the carrier enjoyed so many exceptions that it became virtually exempt from liability even for its own negligence.

Foreign courts generally upheld clauses releasing the carrier from its own negligence. American courts however held such clauses invalid as against public policy.²⁰

Since at the turn of the century, foreign carriers dominated the carriage of goods, such extreme exception clauses in foreign bills of lading adversely affected American commerce. This situation led to the enactment of the Harter Act of 1893.²¹

The only prior act of interest in this field is the Fire Statute of 1851²² by which a carrier is not liable for damage to cargo caused by fire aboard the ship unless caused by its design or neglect. The Harter Act, a compromise between the interests of the carrier and of the shipper, was later embodied in principle in the Hague Rules which dealt with the uniform worldwide treatment of the carrier-shipper relation under ocean bills of lading. In 1936, after United States adhered to the convention on Hague Rules, Congress passed the Carriage of Goods by Sea Act²³ which in the main follows the Hague Rules.

¹⁸ *Propellor Niagara v. Cordes*, 62 U.S. (How.) 7 (1858).

¹⁹ See the famous case of *Clark v. Barnwell*, 53 U.S. (How.) 130 (1851).

²⁰ *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397 (1899).

²¹ Now 46 U.S.C.A. §§190-196.

²² Now 46 U.S.C.A. §182.

²³ 45 U.S.C.A. §§1300-1315, hereinafter referred to as *Cogsa*.

Accordingly, we come to the role of the Harter Act and the Carriage of Goods by Sea Act which in important part has supplanted the Harter Act.

First considered are the respective coverages of both Acts.

(A) Cosga applies only in foreign commerce and from the time when the goods are loaded on to the time when they are discharged from the ship, i.e., 'Tackle to tackle.'

Harter applies both to foreign and to domestic water carriage under bills of lading—to all "coastwise" trade—and to the period, even in foreign trade, during which the carrier has custody, before the goods are loaded and after they are unloaded.

(B) Under Cosga, by "coastwise option" clause, the bill of lading may stipulate for coverage by it rather than Harter in domestic voyages but there is no provision for stipulating out of Harter and into Cosga for the period prior to loading and between discharge and delivery.

(C) Cosga permits variation out of its terms but only to increase the carrier's liabilities.

(D) The acts proceed on different theories. Cosga sets forth a limited code of rules governing the responsibilities and liabilities as between the issuer and holder of a bill of lading with respect to damage or loss of the covered goods.

(E) Harter lays down no positive rules of law but forbids certain exemption stipulations to apply to the bill of lading. It does grant certain immunities from liabilities as a matter of law.

Harter does not eliminate the warranty of seaworthiness but merely permits the carrier to contract out of the general maritime law's absolute warranty into the warranty to exercise due diligence. Failure to so contract in the bill of lading renders the carrier liable for damage caused by unseaworthiness even though due diligence had been exercised.²⁴

Cosga, however, uses the direct approach and eliminates the absolute warranty and substitutes the warranty of due diligence.

The Harter Act's general effect is to make the carrier liable for fault or failure in the proper loading, stowage, custody, care or proper delivery of goods and to make unlawful any agreement whereby the carrier's obligations to make the ship seaworthy or to carefully handle, stow, care for and deliver the goods are weakened or avoided. The Act also provides for a bill of lading to be issued describing the goods and for penalties for its violation.

In turn, the carrier is exempted from liability for losses or damage due to faults or errors in management or navigation provided due diligence has been used to make the ship seaworthy.

²⁴The *Carib Prince*, 170 U.S. 655 (1898).

Seaworthiness is a term of art which one will frequently encounter in any admiralty work but perhaps the best and shortest test of seaworthiness is “. . . whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. . . .”²⁵

The benefits of the Harter Act were largely dissipated as far as the carrier was concerned with the decision of the United States Supreme Court in *The Isis*,²⁶ holding that the clause requiring the carrier to exercise due diligence to make the ship seaworthy means seaworthy in all respects and that the carrier is liable regardless of any causal connection between the unseaworthy element on the ship and the accident. Moreover, the burden of proving due diligence rests on the carrier.²⁷

This situation led to the passage of the Carriage of Goods by Sea Act of 1936 which is the United States' attempt to insure uniformity and standardization of bills of lading among the maritime nations of the world.

Like the Harter Act the Act requires the carrier to use due diligence to make the ship seaworthy, to properly load, care for and discharge cargo and to issue appropriate bills of lading. The carrier, however, receives more liberal benefits than given by Harter since his exemptions such as perils of the sea, and errors in management or navigation are not conditioned on his having used due diligence to make the ship seaworthy.

The carrier's first duty is that:²⁸

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to —

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;
- (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Note that this section cuts down the warranty of seaworthiness to an obligation to use due diligence to make the ship seaworthy.

Thus, where lack of due diligence to render the ship seaworthy causes a loss, the cargo interests can recover. The Harter Act attains the same result but in a different way, by prohibiting the contracting away of the obligation to use due diligence to make the ship seaworthy.²⁹ Under this section, however, the carrier can contract out the warrant of seaworthiness and reduce it to the obligation to use due diligence, thereby getting the same result as under Cogs. You must

²⁵ *The Silva*, 171 U.S. 462, 464 (1898).

²⁶ 290 U.S. 333 (1933).

²⁷ *The Friesland*, 104 Fed. 99 (S.D.N.Y. 1900).

²⁸ 46 U.S.C.A. §1303(1).

²⁹ 46 U.S.C.A. §191.

remember, as stated before, under Harter, as construed in *The Isis*,³⁰ there need not be a causal connection between the unseaworthiness and the accident whereas under Cogsa, such a causal relationship must exist before cargo can recover.

§1303 (2) of Cogsa provides:

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

§1304 (2) sets forth the so-called "uncontrollable causes of loss" for which the carrier shall not be held liable. These include:

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (b) Fire, unless caused by the actual fault or privity of the carrier;
- (c) Perils, dangers, and accidents of the sea or other navigable waters;
- (d) Act of God;
- (e) Act of war;
- (f) Act of public enemies;
- (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
- (h) Quarantine restrictions;
- (i) Act or omission of the shipper or owner of the goods, his agent or representative;
- (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
- (k) Riots and civil commotions;
- (l) Saving or attempting to save life or property at sea;
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (n) Insufficiency of packing;
- (o) Insufficiency or inadequacy of marks;
- (p) Latent defects not discoverable by due diligence; . . .

The most important is the navigation and management of the ship exemption.

Cogsa also provides for reasonable deviation, limitation of liability on cargo value unless specially declared, general average, and prohibits benefit of insurance in favor of the carrier clauses, clauses exempting the carrier from liability otherwise than in the Act and discrimination between competing shippers.

Now, some of the terms used in bills of lading will be examined. One must keep in mind the excepted causes of damage to cargo enumerated in Cogsa.

³⁰ 290 U.S. 333 (1933).

Fire— This exception is derived from the Fire Statute of 1851.³¹ To hold the carrier liable for fire damage the design or neglect must be personal to the carrier; he must have "actual fault or privity." The negligence of the master or crew is not sufficient or imputed to the carrier.³²

Perils of the sea— This is defined as a fortuitous action of the elements at sea of such force as to overcome the usual precautions of good seamanship or a staunch ship.³³ In order to establish a peril of the sea it has been held that the ship must establish its freedom from negligence.³⁴

Act of God— This is occurrence wholly without human intervention; again human negligence as a contributing force defeats any claim for exemption by Act of God.³⁵

Overwhelming human force— These include acts of war, public enemies and authority, restraint of princes, quarantines, riots and civil commotion, strikes and lockouts, etc.

Fault of Shipper or Defect in Cargo— These include wastage, breakage or other loss or damage arising from inherent vice, quality or defect in the goods, insufficiency of marking and packing and latent defects.

Omnibus exception— This clause means that the carrier is not responsible for any loss or damage to cargo resulting from any cause arising without his actual fault or privity or without the fault of his agents and servants. The burden of proof is, however, on the carrier to show neither his fault or privity nor that of his servants contributed to the loss.^{35a}

Deviation— This is commonly understood as a departure from the intended voyage.

Despite the complex deviation clause in most standard bills of lading permitting the ship to proceed backwards or forwards, in any order, etc.— courts have construed an unreasonable departure from the normal course of the voyage as a deviation and improper carriage of goods.³⁶ Cogsa permits a "reasonable deviation."³⁷

The Clause Paramount— Cogsa requires that an outboard bill of lading contain the so-called clause paramount that the bill is controlled by the Act. This is to prevent the shipment to a non-Cogsa country which might apply its own law if Cogsa is not mentioned in the bill

³¹ 46 U.S.C.A. §182.

³² Walker v. The Western Transportation Co., 70 U.S. (Wall.) 150 (1866).

³³ The Frey, 106 Fed. 319 (2d Cir. 1901).

³⁴ Clark v. Barnwell, 53 U.S. (How.) 130 (1851); Wessels v. The Asturias, 126 F. 2d 999 (2d Cir. 1942).

³⁵ Gans S.S. Line v. Wilhelmssen, 275 Fed. 254 (2d Cir. 1921).

^{35a} The West Kyska, 155 F. 2d 687 (5th Cir. 1946).

³⁶ Grace and Co. v. Toyo et al., 7 F. 2d 889 (N.D. Cal. 1925).

³⁷ 46 U.S.C.A. §1304(4)

of lading. The scheme to avoid Cogsa is of course defeated if the carrier can be sued in the United States for the law is settled that United States law and statutes apply notwithstanding any stipulations in a bill of lading that the contract shall be governed by the law of the ship's flag.³⁸

Valuation and Claims—Cogsa sets a maximum of \$500 recovery on any package or customary freight unit unless value is declared. What is a package or customary freight unit is at times a difficult problem. A tractor, for example, was treated by the court as separate units of 40 cubic feet valued at \$500 each.³⁹

Suit for cargo damage under Cogsa must be brought within one year from date of actual or intended delivery of goods. The giving of notice or presentation of claim is by the Act unnecessary to the filing of suit.

General average—Cogsa does not prohibit any lawful provisions regarding general average. Thus the bills of lading generally provide for general average according to some set of rules, commonly the York-Antwerp.

Benefit of insurance—The clauses giving the carrier the benefit of cargo's insurance are now prohibited where Cogsa applies but may appear in bills of lading of private carriers or in carriage not covered by Cogsa.

The conflict between carrier and shipped as to who bears the loss when goods are damaged or lost has not been solved by the Harter Act or the Carriage of Goods by Sea Act. Both acts contain two sets of polarities which are highly productive of litigation. The first set is between the concept of care and custody and negligent navigation and management. The second set is between due diligence to make seaworthy and the negligent navigation and management. The importance of the polarities is apparent since the carrier escapes liability for errors of navigation and management but pays for failure to perform his obligations of care and custody and to use due diligence to make the ship seaworthy.

There are no set rules to cover all situations to determine whether the cargo loss was caused by one or the other of the polarities. As the United States Supreme Court stated in the leading case of *The Germanic*,⁴⁰ when a case falls under two different sections of the Act, here, section one, care and custody and section three, error in navigation and management of the Harter Act, which section is to govern

³⁸ *Knott v. Botany Mills*, 179 U.S. 69 (1900); *The Silvia*, 171 U.S. 462 (1898); *The Chattahoochee*, 173 U.S. 540 (1899).

³⁹ *Middle East Agency, Inc., v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y. 1949).

⁴⁰ 196 U.S. 589 (1905).

must be determined by the primary nature and object of the acts which cause the loss.

The Germanic involved a foreign ship which arrived at New York heavily iced due to unusual gales. While being unloaded at the dock, she suddenly rolled over and sank, damaging the cargo remaining in her. Cargo claimed negligence in unloading under the Harter Act. The carrier claimed the exemption from liability for errors in navigation and management. The court, through Justice Holmes, held for cargo on the ground that hurried and unwise unloading brought the center of gravity of the ship five inches above its metacenter, thereby causing the ship to be unstable and roll over.

Thousands of cases can be cited to illustrate the conceptual conflict of care and custody vs. navigation and management and due diligence to render seaworthy vs. navigation and management. The most that can be said with safety is that close questions will be resolved in favor of cargo.

In *International Navigation Co. v. Farr & Bailey Mfg. Co.*,⁴¹ a port hole was left uncovered when the ship sailed, permitting water to enter and damage cargo en route. The carrier was held liable on the basis of failure to use due diligence to make the ship seaworthy.

This case should be compared with *The Silvia*.⁴² The crew left the port hole open for ventilation and later carelessly forgot to close it when the weather became rough. Water came in through the port hole and damaged cargo. This was held to be an error of navigation or management and the carrier was not liable.

The results obtained in these two cases show the difficulties of separation of the concepts of care and custody, due diligence and navigation and management. The difference appears to be in the crew's intentions regarding the port holes. In the *International* case the crew intended to close the port hole but failed to do so properly. In *The Silvia*, the crew intended to leave the port hole open and then carelessly forgot to close them.

On the Great Lakes the famous *Sargent*⁴³ case illustrates the polarity under the Carriage of Goods by Sea Act of due diligence versus errors of navigation and management. The *Sargent* left Duluth in December with a cargo of storage grain shipped under a bill of lading referring to Cogsa. The mate had failed to close an uninsulated water line which then froze and broke, damaging the cargo. Judge Tuttle, a famous admiralty judge, held carrier liable for lack of due diligence to make the ship seaworthy, finding the line had been frozen prior to the ship's departure and the water line should have been in-

⁴¹ 181 U.S. 218 (1901).

⁴² 171 U.S. 462 (1898).

⁴³ *Spencer Kellogg and Sons, Inc., v. Great Lakes Transit Corp.*, 32 F. Supp. 520 (E.D. Mich. 1940).

sulated as far as cargo — wheat — was concerned.

The court also considered the polarities of care and custody vs. navigation and management and applied the test of intent. Since, if the line had been closed, the purpose would have been to prevent its freezing and bursting water into the cargo known to be highly susceptible to water damage, the failure to so close the line was negligent care and custody. In fact, the captain of the ship testified that had the line been closed, the purpose would have been to prevent damage to the cargo, rather than to the ship. Thus, the carrier was liable under due diligence and care and custody.

The Sargent also points out that seaworthiness is a relative term. What is seaworthy for a ship carrying non-perishable cargoes such as ore or coal may not be seaworthy for the same ship carrying a perishable cargo.

Knott v. Botany Mills,⁴⁴ also contrasts care and custody with navigation and management under the Harter Act. The shipper contended that drainage from wet sugar damaging wool when the ship was trimmed down by the head constituted negligent care and custody. The carrier just as strongly contended it was an error in navigation or management in so trimming the ship. The court favored the shipper and found negligent care and custody.

Another area of conflict is the concept of deviation, which, in general, avoids the contract — the bill of lading — and remits the parties to their rights and duties under the maritime law — i.e., the carrier is an insurer. The doctrine of deviation proceeds on the theory that a deviation creates a different voyage not intended by the contract of carriage. Since there is no bill of lading for the new voyage, Harter and Cogsa do not apply.

There are two general classes of deviation — geographical and contractual. If the ship deviates in its voyage beyond the "reasonable" deviation permitted in Cogsa or a reasonable deviation clause in the bill of lading, the carrier becomes an absolute insurer of cargo.⁴⁵

In the well-known *Streamor Briton*⁴⁶ case the carrier successfully contended it was not a deviation to stop at Lime Island en route to take on additional fuel. However, other cases have held that insufficient fuel for the intended voyage constitutes unseaworthiness rendering the carrier liable.

Contractual deviation may consist of unreasonable delay, or stowage of cargo on deck in absence of an agreement permitting it.

⁴⁴ 179 U.S. 69 (1900).

⁴⁵ *The Willdomino*, 272 U.S. 718 (1927); *St. Johns Corp. v. Companhia Geral et al.*, 263 U.S. 119 (1923); *The Citta di Messina*, 169 Fed. 472 (1909); *The Sarnia*, 278 Fed. 459 (2d Cir. 1921).

⁴⁶ *Spencer Kellogg & Sons v. Buckeye S.S. Co.*, 70 F. 2d 146 (6th Cir. 1934). See also *Hostetter v. Park*, 137 U.S. 30 (1890).

Cases can be multiplied endlessly but it is well to keep in mind the general proposition that the carrier has the burden of proving the damage was not caused or contributed to by his fault; that he used due diligence, and that the damage was caused by some exempted event such as peril of sea, act of God or error in navigation or management.⁴⁷

If cargo damage is due to two causes, one covered by an exemption and the other not, the carrier has the burden of proving how much was caused by the exempted peril. Otherwise, he is held liable for the whole damage.⁴⁸

IV. CONCLUSION

Only a bare outline of the fundamentals of charter parties and bills of lading⁴⁹ has been presented. The writer hopes that some of the terms and clauses used in these documents are somewhat clarified through his efforts.

Sooner or later the admiralty lawyer will probably be called upon to deal with the problems of charter parties and bills of lading—whether it be the use of a small yacht for the summer or a shipment of thousands of dollars worth of goods. The fundamentals are the same—the application and interpretation depend upon the mood of courts in the last analysis.

⁴⁷ *The Folmina*, 212 U.S. 354 (1909).

⁴⁸ *Schnell v. Vallescura*, 293 U.S. 296 (1934).

⁴⁹ For a more exhaustive treatment of bills of lading, see GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, Ch. III (1957).