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University of Oslo

The Liability of Intermediaries in Shipping Under English Law

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1. INTRODUCTION

1.1 A Multimodal Transport Culture

The swift growth of international trade in recent decades has necessitated an efficient transport service equipped to cope with our contemporary commercial demands. In order to facilitate this, modern-day infrastructure and transport systems have allowed for the inter-linking of transport modes. With the widespread use of containers in cargo transport from the 1950s and onwards, the transport industry boomed as cargo handling was effectively standardised and transshipment made easier than ever before¹. This had significantly contributed to the emergence of so-called 'multimodal' (or door-to-door) transport, whereby the transportation of goods would no longer be considered as several separate legs of transport but a single chain of connected phases with the use of various modes of transport in order to bring the cargo directly from its point of origin to its final destination. The United Nations Conference on Trade and Development (UNCTAD) defined multimodal transport as "[...] the door-to-door movement of goods under the responsibility of a single transport operator"² thus clearly demonstrating the international recognition of such a modern-day trade culture.

Further developments, along with those aforementioned, aided the evolution of multimodal transport. In particular, carriers emerged with single transport documents that govern the entire transportation of goods³; instead of contracting with several separate parties in order to establish a complete transport system, one who wished to have goods transported across international borders and across multiple modes of

¹ Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (2010), p.2

² Ibid

³ Carr, *International Trade Law* (2014), p.374

transport need only contract with a single carrier who would take on the responsibility of the entire transport operation himself. Having multimodal services did not only achieve practical benefits such as time-saving, cost-saving and general technical efficiency; it was also legally practical for contracting parties, because having a single contract to govern the entire transport chain eliminated the cumbersome situation created by having several separate transport documents for each individual leg of transport⁴. The question of which party to sue for damage or loss of cargo or delay was made much simpler for the cargo owner who may directly pursue his original contracting carrier, instead of pursuing one of the, perhaps, many different performing carriers involved in the entire operation⁵. Many commercial parties emerged willing to step into the role as contractual carrier, being responsible for the entire transport operation, not least because of the financial benefit of being able to charge for entire freight earned as opposed to just commission on a freight charge⁶.

In addition to the emergence of multimodal carriers, a thriving market for intermediaries has since developed internationally and now freight forwarders as important players in the transport industry provide a wide range of services to its customers, of which the actual carriage service may feature as just one of many. While the freight forwarder might be considered a legal identity distinct from that of a conventional carrier, his role is inherently multimodal since he oversees the entire transport journey, contracting and/or sub-contracting for each part of the carriage and generally taking care of all other intermediate matters, such as storage between stages

⁴ Hoeks, *Multimodal Transport Law: The Law Applicable to the Multimodal Contract for the Carriage of Goods* (2010), p.4

⁵ Ibid p.81

⁶ Ibid, p.54

of transport and customs clearance. Such intermediaries have therefore become vital cogs in the multimodal transport system and their existence ensures a smooth course of cargo transport from door to door.

Whilst providing many practical benefits for the transport industry, there are however legal difficulties to contend with as a result of this multimodal transport culture.

Initially it must be mentioned that while an operator may inherently be exposed to the aforementioned 'carrier' liability as established by the various international carriage conventions, the complex make-up of a multimodal carriage contract does not sit well with the application of such legislation.

1.2 Legal Issues

Of particular interest in this study are the legal difficulties encountered when considering the role of intermediaries within the multimodal transport industry, especially where they do not take on the wholesale role of 'carrier' but merely operate as 'agent' for their customers. The distinction can be significant, because the respective roles are governed by completely separate liability regimes. A carrier's liability is primarily based on the various international conventions that mandatorily govern international carriage contracts and liability would generally be assessed with regard to the damage or loss to goods or delay of delivery. An agent's liability on the other hand is governed by national agency law and would thus depend on whichever country's law is to apply to the given agency contract; an agent's liability is based generally on the

agent's fiduciary duty owed to the consignor and whether or not he had acted negligently in that duty⁷.

At this stage it suffices to say that freight forwarders have been found in certain cases to shoulder the liability of a carrier, the basis for which depends on a number of factors – especially (but certainly not limited to) the terms of the contract between the intermediary and his customer. There are particular freight forwarder standard contract terms, for example, that shall also be explored in terms of how they purport to govern the forwarder's liability.

1.3 Structure of the Thesis

The important question to be answered here is therefore: Under what circumstances would an intermediary be found to have taken on the role as carrier or as agent? In particular, under what circumstances would an intermediary be found liable as a carrier, as opposed to an agent?

I shall start by setting out in greater detail the legal context within which the aforementioned legal issue arises. This will include a brief outline of what characterises a carrier within the multimodal shipping industry and a clarification of the legal framework for international multimodal carriage in place at the present time. There shall be a particular focus on the Convention on the Contract for the Carriage of Goods by Road (CMR), and on how it is incorporated into English legislation. I will then continue by outlining the characteristics of intermediaries and their role in the multimodal transport context, depending on their legal capacity. I shall then critically

⁷ Carr, *Op. cit.* 3, p. 377

analyse the distinction between intermediaries acting as carrier and/or as agent and elaborate on the legal significance of each. There shall be critical and in-depth analysis of a number of English case law examples which bear significance in determining the area of law in question. In particular a number of factors of influence in determining the role of an intermediary shall be identified and the evidence from the case studies assessed in detail in relation to these factors.

1.4.Demarcation

Due to the limited extent of this study, a number of limitations to the content shall be made. First of all, the study shall be limited to international multimodal transport issues, in lieu of domestic law. This means that, while it is appreciated that specific carriage law may apply at a national level, the focus will only be on that which concerns international carriage contracts. As a further sub-demarcation here, the focus of the study shall be centered on cases in which the CMR Convention shall be applicable. Thus English case law examples to be featured in this study shall only concern the extent to which the freight forwarders are found liable as CMR carrier. As a result of the international focus of this piece, the particularities of agency liability shall not feature, only where intermediaries would be found liable as an agent instead of carrier. The case examples looked at in this piece shall only be English court cases, thus limiting the perspective to the English legal system. The study shall also focus on the type of liability arising from loss or damage or delay to cargo, and would therefore exclude any other types of liability that might be imposed on a forwarder. Finally, despite there being a multimodal perspective to the study, there shall nonetheless be no discussions featured here as to the definition of multimodal carriage and the multimodal transport agenda.

1.5 Motivation for Thesis

The main motivation for writing this thesis was my particular interest in the entire transport operation from A to B. Throughout the maritime law degree, one would focus primarily upon the sea leg stage of transport in an international transport contract, and I had thus a desire to improve my knowledge on what inevitably laid before and after that stage, the foreseeable road carriage stages in order to bring the goods to the port of loading and also those arrangements to bring the goods from the port of discharge and beyond. International shipping involving a sea stage is inherently reliant on other modes of transport to give one a complete picture, as opposed to the incompleteness of starting somewhere in the middle and halting before the end. Personally, the writing of this thesis rather completes the picture and thus improves my understanding.

1.6 Clarification of Terminology

Firstly, it is accepted that there is no legally founded definition of the term ‘international multimodal transport’⁸. Any reference to this shall be merely for introducing the legal context and not in order to broach a discussion about the true meaning of those words.

Secondly the terms “intermediary” and “freight forwarder” are used interchangeably throughout the thesis and do not highlight any particular distinction; it is only chapter 3.1. within which any form of distinction between the two words is made, but in general the two are not considered mutually exclusive terms for the purposes of this study.

⁸ Hoeks, Op. cit. 1, p. 6

Thirdly the terms “principal” and “carrier” shall be used interchangeably throughout the study and no particular distinction is to be drawn between the two.

The pronoun ‘he’ is used in its all-inclusive sense to describe any person or body corporate.

2. THE LEGAL CONTEXT

2.1 International Carriage Law: The Legal Framework

Before trade had become such a multimodal affair, the international legal framework had since developed to cater for separate modes of transport, thereby leading to the creation of various separate unimodal regimes for each mode. Now that the transport industry has innovated to effectively connect these phases, there has been the call for a uniform regime that accommodates for this technological advancement. The UN’s proposed Multimodal Transport Convention in 1980 (MTC)⁹, though failing to be ratified by the requisite number of states, laid down what would be considered the groundwork for the multimodal transport agenda in defining multimodal transport¹⁰; the MTC defined international multimodal transport as:

...the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which goods

⁹ The United Nations Convention on International Multimodal Transport of Goods 1980 (MTC)

¹⁰ Hoeks, Op. cit. 1, p. 6

are taken over by the multimodal transport operator to a place designated for delivery situated in another country.¹¹

This provided a rather complex description of what can be considered multimodal transport, appearing to exclude contracts whereby an MTO does not 'take over' the goods. Glass merely defined it as "...the linking of two or more transport modes under a contractual arrangement which either envisages or permits such a link."¹² As such, it may be seen as a broader, more encompassing contractual arrangement within which freight forwarders and other intermediaries may also feature.

Assuming that the MTC's more limited definition is the correct one, the criteria for an existing multimodal carriage is nevertheless not so stringent; it is merely reliant on a single contract concluded with a carrier to carry goods from one country to another using at least two different transport modes. It would appear to follow that the party who takes charge of the goods as such under the contract takes on the responsibility of carriage and thus, in essence, the liability of a carrier under international carriage law¹³.

As was clarified above however, attempts to create a sufficiently ratified uniform legal instrument such as the MTC had not found success. The closest form of harmonisation may be found in the incorporation of certain contract forms such as those drafted by UNCTAD and the International Chamber of Commerce¹⁴ and those drafted by various freight associations such as the British International Freight Association's contract

¹¹ Op. cit. 9, Article 1

¹² Glass, *Freight Forwarding and Multimodal Transport Contracts* (2012), p.1

¹³ Hoeks, Op. cit. 1, p. 6

¹⁴ UNCTAD, *UNCTAD/ICC Rules for Multimodal Transport Documents*,

clauses (BIFA)¹⁵ and the International Federation of Freight Forwarders Association (FIATA)¹⁶. Of course such rules are only effective once incorporated into a given carriage contract between consignor and freight forwarder and so what generally remains is a patchwork of unimodal regimes to cover the bases of a multimodal transport contract¹⁷. Thus the myriad of international carriage of goods conventions ratified and incorporated into the English legal system shall be of significance to a given carrier's legal position.

For example, The Hague-Visby Rules¹⁸ governing the international carriage of goods by sea had been incorporated into UK legislation via the Carriage of Goods by Sea Act (COGSA) in 1971¹⁹; as long as the applicability criteria is satisfied, a person's liability for loss in relation to a sea carriage contract shall be governed by the provisions of the Hague-Visby Convention²⁰. The UN Convention on the Contract for the Carriage of Goods by Road (CMR), was given the force of law in the UK by virtue of Article 1 of the Carriage of Goods by Road Act (COGRA)²¹ 1965.

2.2. Assessment of Liability

2.2.1. Carrier liability

While there may be slight differences in terms of the basis and extent of carrier liability amongst the different unimodal carriage conventions, certain identifiable principles

¹⁵ BIFA, *BIFA Standard Trading Conditions*

¹⁶ FIATA, *FIATA Model Rules for Freight Forwarding Services*

¹⁷ Carr, Op. cit. 3, p. 375

¹⁸ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968

¹⁹ COGSA 1971, s. 1(2)

²⁰ The Hague-Visby Rules, Article 2

²¹ COGRA 1965, Article 1

remain relatively uniform, one of which being that the carrier shall shoulder a general liability for the loss or damage to the goods which they agreed to carry²². As stated before, the application of the CMR shall be the sole focus of this study as regards an intermediary's potential carrier liability. According to Article 17(1) CMR: "The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery...". Thus as long as the goods have been lost or partly damaged during the carrier's period of responsibility, he would be prima facie liable to cover such loss or damage.

2.2.2. Agent liability

Agency liability however is assessed differently. Firstly their responsibilities are distinct from that of a carrier's. A pure agent would not take it upon himself to carry goods, but merely contracts to appoint those who do carry on behalf of his principal. Without the applicability of international carriage law, the legal position of an agent would be scrutinised under the domestic law to which he is subject. Under English law, an agent is assessed in terms of his express or implied authority bestowed upon him²³ and also on whether he exercised reasonable skill and care in performing his duties²⁴. As such he would be responsible only to the extent that he acted reasonably in exercising his authority to "appoint persons who are capable and competent to perform the tasks"²⁵. Consequently, he would be found liable only to the extent that he failed in his fiduciary duty owed his client to appoint the right people for the job. Thus under English law a

²² Article 2 of Hague-Visby Rules; Article 23(1) of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail; Article 18(1) of the Convention for the Unification of Certain Rules for International Carriage by Air

²³ *Cunliffe Owen v Teather and Greenwood* [1967] 3 All ER 561

²⁴ Carr, Op. cit 11, p. 379

²⁵ Ibid, p. 380

principal may claim damages from his agent for negligence in carrying out his contract, but the amount of damages would not be assessed in terms of the value of goods²⁶. The level of financial liability attached to an agent would therefore be far below that attached to a carrier.

2.3. The Contractual Framework

Traditionally the parties to a carriage contract include the so-called 'consignor', who is normally the cargo owner, and a carrier or carriers, who are responsible for transportation of the cargo²⁷. The recipient party to whom the goods shall be delivered is referred to as the 'consignee'. A consignor may require his goods to be transported across separate transport modes in order to reach its intended destination and, when this is the case, he would have a choice to make. He may decide on the one hand to contract with separate carriers, one for each mode of transport involved in the entire carriage operation. Any intermediary matters such as storage between transport modes, intermediary services and customs clearance shall also be dealt with by the consignor or whomever is obligated under the contract to take care of such matters. However, the consignor may alternatively contract with a single operator who promises to carry his goods for the whole journey, and he himself would make any necessary intermediary arrangements in order to carry out that promise. It is highly unlikely that the carrier or operator in question is able to carry the goods across each and every leg of transport himself, especially where the logistics of the operation require the utilisation of a sea or air carriage stage. It is then inevitable that more than one carrier shall have to be involved in the entire transport operation and the one with whom the consignor

²⁶ Ibid

²⁷ Hoeks, Op. cit. 1, p. 50

originally contracted would most likely have to sub-contract certain stages of the transport to other carriers.

In the international transport market as it exists today it is also common that the consignor contracts with a single party who does not actually perform any carriage obligations but then sub-contracts carriage to several sub-carriers who actually perform the carriage; it is customary to sub-contract a carrier for each leg of transportation. For example, the first leg of transport may be subcontracted to a trucking company who would transport cargo by road from the consignor's warehouse to a port of loading. A second company may then be sub-contracted with in order to carry out the subsequent sea leg of the carriage via ship from port to port. Finally, a separate trucking company may be hired for a second road leg to carry the cargo from the discharge port to the address of the consignee. The originally contracted carrier is often identified as the 'contractual carrier', and the sub-contracted carriers are identified as the 'actual' or 'performing carrier'²⁸.

The consignee, though not direct party to the contract of carriage, would normally have a statutory right under the terms of the consignment note for the transport in question; this generally being in accordance with the provisions of the applicable international carriage convention. Article 13(1) CMR, for example, provides that where goods are lost or not delivered within the given time: "the consignee shall be entitled to enforce his own name against the carrier any rights arising from the contract of carriage." Thus, irrespective of any lack in privity of contract on the part of the consignee, he would nevertheless have an unqualified right of action against the carrier for such loss; this

²⁸ Hoeks, *Op. cit.* 1, p. 7

position was upheld for the benefit of the consignee in English court decisions concerning CMR carriage²⁹.

3. INTERMEDIARIES

3.1 What is an intermediary?

As a starting point for the purposes of this study, an intermediary in international goods carriage is someone who contracts (just as a carrier does) with a consignor carriage of his goods and proceeds to sub-contract some or all of the separate legs of transport to other undertakings, as well as taking care of any an intermediary matters such as customs clearance and so on. There are different types of intermediaries in the shipping industry. Of primary interest is the 'freight forwarder' and other auxiliaries are considered merely a species of the forwarder³⁰. While there were many carriers who took it upon themselves to provide multimodal services under a single contract to its customers, a flurry of freight forwarders also occupied the multimodal transport market, offering a variety of services under their standard form contracts, such as those offered by BIFA³¹ which encompass both brokerage and intermediary services on the one hand and carriage services on the other. It would thus remain much to the discretion of the forwarder as to whether he would present himself contractually as mere intermediary in the transaction or to adopt the title of carrier. His liability may thus depend on his choice of role in the circumstances.

²⁹ *Aqualon v Vallana Shipping* [1994] 1 Lloyd's Rep 669, p. 677; *Texas Instruments v Nason* [1991] 1 Lloyd's Rep 146, p. 149

³⁰ Hoeks, Op. cit. 1, p. 50

³¹ Op. cit. 15

Another form of intermediary worth mentioning is the so-called Non-vessel operating common carrier (NVOCC). They are, as their name suggests, undertakings in the maritime transport industry which do not themselves own or operate their own vessels but sub-contract the entire carriage obligations to others who then perform the contract. They do nevertheless withhold their status as carrier and as such take on the full carriage liability they contracted for. Alternatively, they may be called 'indirect' or 'paper' carriers, highlighting their retained carrier status³². The term NVOCC is given statutory definition in US law under the Shipping Act 1984, but no legal definition exists elsewhere. While this is the case, it may be said that the inclusion of the word 'common carrier' might refer to those carriers of the same name which exist in common law systems³³. Hoeks described NVOCCs as "true common carrier transportation service providers" who "furnish complete service to a final destination under their own care and custody"³⁴. Glass recognised NVOCCs as non-shipowning intermediaries who undertake responsibility as a carrier³⁵.

Thus, though the forwarder and NVOCC are both intermediaries who may provide carriage services, a forwarder's legal position as carrier appears more open to question. In contrast, the NVOCC generally accepts his role as carrier and thus the resultant liability for the loss or damage to goods during a given transport operation; this despite the fact that under no circumstances does the NVOCC perform any segment of carriage. It is the situations in which a freight forwarder is found to be liable as such that form the basis of this study.

³² Hoeks, *Op. cit.* 1, p. 58

³³ *Ibid*

³⁴ *Ibid*, p. 59

³⁵ Glass, *Op. cit.* 12, p. 10

3.2. The Traditional Role of the Freight Forwarder

When contracting with a freight forwarder, the consignor of goods will have two possibilities:

- (a) He may contract for the freight forwarder to undertake carriage of his goods, in which case the freight forwarder would undoubtedly adopt the capacity of 'carrier'; or
- (b) He may contract for the freight forwarder to *arrange* for his goods to be carried by another party, in which case the freight forwarder may decide in the contract to act as either principle for the carriage or as forwarding agent for the consignor.

It has been widely recognised in the reality of modern day transport that freight forwarders generally do not undertake any carriage obligations pursuant to their contract with the consignor³⁶. In the English court judgment of *Jones v European General Express* freight forwarders were described as persons who: "do not undertake to carry you, and they are not undertaking to do it either themselves or by their agent" and "as long as they exercise reasonable care in choosing the person to do the work they have performed their contract."³⁷ The forwarder would often make arrangements pursuant to the fulfillment of the overarching carriage obligation; to this minimal degree of *arranging* for carriage as opposed to undertaking the carriage himself, one might argue that he is not acting as carrier in relation to the transaction. He is free, nevertheless, to conclude the contract using either his name or the name of the cargo-interests. In using his own name, he would make himself privy to the carriage contract and thus elect himself as principal. The presupposed forwarding agent may therefore be considered to

³⁶ Clarke *CMR* 2003, p. 18-19; Glass 2004, p. 1

³⁷ [1920] 4 Lloyd's Rep 127

be openly taking on the role of carrier in such circumstances and therefore bearing the responsibilities and liabilities of a carrier as such.

Alternatively, the forwarder may assume the role of carrier by the way in which he conducts himself in relation to other contracting parties; if he takes on such obligations identifiable with those of a carrier, his business conduct may dictate his legal position as carrier without the need for any written assurance of this; he could thus possess inherent carrier liability accordingly. There are further additional factors to account for which might also indicate that a forwarder is acting as a carrier and not merely as an agent within the context of a particular carriage arrangement.

3.4. Relevant factors

In his judgment of *Aqualon v Vallana Shipping*, Mance J identified five significant factors to refer to as guidance for determining the legal position of an intermediary involved in a carriage arrangement:

- the terms of the particular contract;
- any descriptions used or adopted of the parties;
- the course of dealings;
- the nature and basis of charging; and
- the nature and terms of any consignment note issued³⁸.

Carr also added that, in lieu of an express indication by the freight forwarder of his capacity, there are a number of other decisive factors to consider; as well as those listed by Mance J, she stated that also of importance are:

³⁸ [1994] 1 Lloyd's Rep 669, p. 674

- The type of transport document (particularly in the case of sea transport, the type of bill of lading issued);
- The language used by the consignor and forwarder;
- The extent and frequency of communication between the consignor and forwarder; and
- The usual capacity of the forwarder – i.e. whether the forwarder normally provides services as agent or principal³⁹.

As regards the type of transport document, only cases in which standard documentation for international road carriage shall be focused upon, thus rendering a further demarcation for the purposes of this study. The assessment shall therefore be limited to incidents where a CMR consignment note is issued for carriage.

In essence, the language used and extent of communications between consignor and forwarder may be categorised as correspondence between the parties, which shall be referred to as an additional factor alongside those provided by Mance J. As for the usual capacity of the forwarder, this may be regarded as a part of the general course of dealing of the parties and shall be a consideration as such in the case assessment process.

4. Case Studies: Principal or Agent?

The distinction between the principal and agent role is important and has significant implications on the extent of liability an intermediary may be exposed to. As a starting

³⁹ Carr, *Op. cit.* 3, p. 376-377

point, in a contract between the consignor and freight forwarder which states that the agreement is for the forwarder to *arrange* for the movement of the consignor's goods, a traditional agency role would generally be discerned and thus liability assessed only to the extent of that which belongs to an agent. Nevertheless, it is important to further clarify at this point that, although a so-called forwarder may not himself perform the carriage obligation, that would not in of itself unconditionally render him non-carrier in a given carriage scenario, even if the agreement was for *arrangement* of carriage. As previously mentioned, if one party who contracts to carry goods and then sub-contracts with another party who actually performs the carriage service, the former may yet be considered 'carrier' under one of the potentially applicable international carriage Conventions. In particular, the Convention on the Contract for the International Carriage of Goods by Road⁴⁰ (CMR) accommodates for this very circumstance, stating in Article 3, that: "For the purposes of this Convention the carrier shall be responsible for the acts and omissions of his agents and servants and of other persons of whose services he makes use for the performance of the carriage."

The CMR therefore provides a somewhat wide definition for those found liable as 'carrier', imposing a responsibility on a mere contractor whom shall be found liable for the loss caused by those he contracts with to perform the carriage. Megaw LJ affirms this position in the Court of Appeal, holding in the case of *Ulster-Swift*⁴¹ that a party may still be found to have acted as carrier even if subcontracting the performance of the entire carriage to another party, referring to the all-encompassing wording of the CMR's

⁴⁰ United Nations, *Convention on the Contract for the International Carriage of Goods by Road (CMR)* - (Geneva, 19 May 1956) United Nations (UN)

⁴¹ *Ulster-Swift Ltd and Pigs Marketing Board v Taunton Meat Haulage Ltd and Franssen Transport N.V.*, (C.A.) [1977] 1 Lloyd's Rep 346

Article 3 as stated above⁴². Megaw's position is also reaffirmed and referred to in subsequent English court decisions⁴³. Thus, despite there being an agreement to *arrange* to move goods, a forwarder may still be considered a contractual carrier and thus liable as carrier if circumstances dictate so, even if the forwarder goes so far as to state that he is acting "as agent only"; the circumstances would in that case have to strongly indicate otherwise.

4.1. *Aqualon v Vallana Shipping*⁴⁴

The English decision of *Aqualon* was one such case in which the role-playing of an intermediary in carriage was thoroughly discussed. The case involved the plaintiffs Aqualon BV (the consignors) and Aqualon UK (the consignees) who were two corporate bodies belonging to the same group of companies. Both shall nevertheless be referred to as one set of plaintiffs (AQ). AQ agreed with Dutch company Nilsson International BV (NL) that NL would move their consignment of 893 bags of natrosol hydroxyethylcellulose from the Netherlands to the UK. The basis for charging was agreed upon as an 'all-in price' which was to cover the entire transport operation on both road and sea to reach its final destination in Warrington, England. As was customary, NL would engage English road hauliers E. W. Taylor & Co. (Forwarding) Ltd (TL) to provide trailers for the transport, and Dutch hauliers Joka BV (JK) to take TL's trailers to AQ's Dutch factory for loading the goods and transporting the trailers on a ferry booked for carriage; the booking for this particular carriage was made by NL with Olau Line (UK) Ltd. (OL) who operated the arranged ferry ro-ro transport from Vlissingen ferry terminal in the Netherlands to Sheerness in the UK. TL also instructed

⁴² Ibid, p. 359

⁴³ [1981] 1 Lloyd's Rep 192, p. 195, [1986] 1 Lloyd's Rep 49, p. 50

⁴⁴ [1994] 1 Lloyd's Rep 669

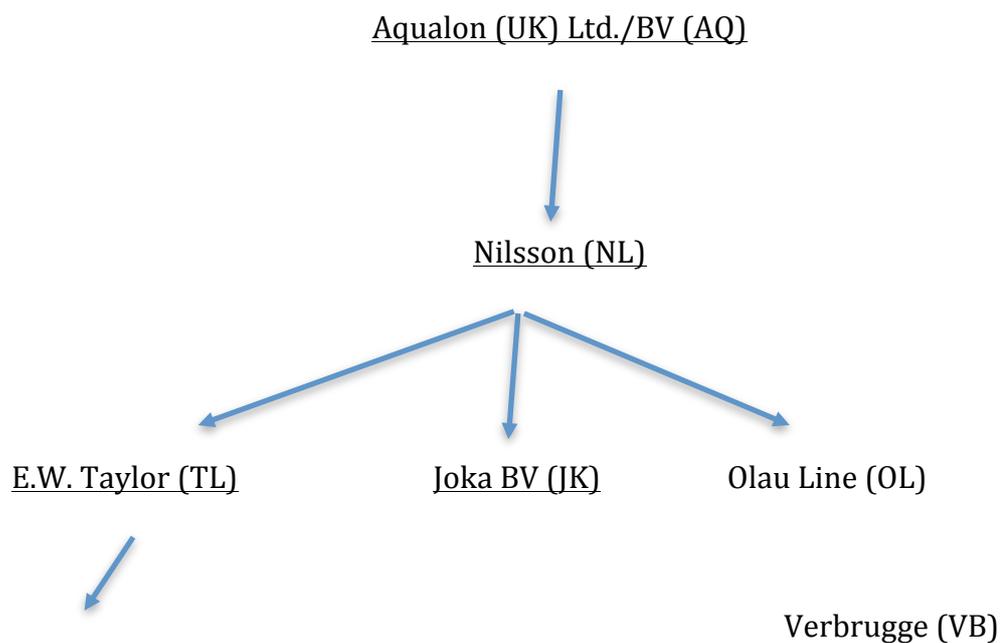
English company Mike Taylor Haulage (MT) to receive the trailer and goods from the UK port in Sheerness to deliver to its final destination in Warrington.

AQ would produce a consignment (or CMR) note naming NL as the carrier. The CMR note was issued in 4 parts, the top copy being left with AQ and the other 3 with the goods. On collection, JK would sign the notes and call around at NL's premises in the vicinity of Vlissingen ferry terminal so that they may check the undercopies. But, as was customary for NL but allegedly not to the knowledge of AQ, NL would also frequently alter the notes it received at its offices at a later date, deleting its name from the relevant box and replacing it with TL's name, followed by adding its stamp which stated that they were "Agents"; it did not send AQ any photocopies of the notes thus amended. A third party company called Verbrugge dM Terminals (VB) were used by TL for their consolidated account with OL; consequently, OL would bill TL for the ferry booking, TL would bill VB, and finally VB would bill NL for the carriage of goods.

On this particular occasion, AQ as per usual practice drew up the CMR note on 7th December 1990, identifying NL as the carrier. JK picked up the trailer from the ferry terminal and then received the goods at AQ's Dutch warehouse. On receiving the goods, JK's driver signed the CMR note, leaving the top copy with AQ and taking the remaining copies to NL, who then deleted their name from the carrier box and substituted it with "E.W. Taylor, Sheerness". Finally they stamped the note in the box marked "sender's instructions" with the words "Nilsson International BV Vlissingen Holland (As Agents Only)". AQ was then told by NL on 11th December 1990 that while in transit on board the ferry, the goods were damaged at sea during a storm. The goods were thus taken to MT's premises in Borough Green, only part of which were delivered to Warrington, the

rest being sold as salvage. AQ consequently claimed damages from NL for loss and/or damage to the goods. Nilsson however argued that they acted only as forwarder throughout the carriage operation, not as carrier, and could thus not be found liable as such.

Diagram: showing contractual relationship between the parties



Mike Taylor Haulage

The case of *Aqualon*, as can be seen in the above diagram, is testament to just how complex the nature of contractual relations may sometimes appear, given the sheer number of different parties engaged in the whole transport operation. There are at least two discernible contract levels in this case. Firstly a contract existed between AQ and NL, whereby NL had agreed to move the plaintiffs' goods from Netherlands to the UK. The plaintiffs were both the original consignor and consignee in this case, when contracting for carriage with NL. NL were allegedly contractual carriers, who then sub-contracted on the stages of carriage, along with instructing English hauliers TL who

provided the trailer for transport operations. NL thus contracted with Dutch hauliers JK to perform the first transport leg from the warehouse to the port and also with OL for the sea leg from port to port. TL also arranged with MT onward domestic road carriage from the UK port to the final UK destination.

As an example of how the CMR would govern international road carriage cases, I shall note the relevant articles of the CMR which provide the basis for the plaintiffs' claim against NL. The provisions which establish the applicability of the Convention and the basis for liability in a given road carriage contract are general and would be referred to in any such case, thus they do not bear repeating again in further case studies of this thesis. Other specific CMR provisions shall also be referred to, as well as other cases, where necessary and where significant points are raised. One might also wonder why it is in this particular case that the CMR would apply, since the damage to the goods occurred on the sea leg of the transport operation. It would thus seem *prima facie* that an international sea carriage convention be applicable to the carriage arrangement. Thus the applicability instead of the international road carriage Convention is of legal significance here and is worth clarifying.

4.1.1. Applicability of the CMR

Article 1 CMR states that the Convention applies to carriage of goods contracts by road in vehicles for reward, as long as the place of taking over goods and the place designated for delivery specified in the contract are situated in two different countries, one of which being a country party to the Convention. Of particular importance here is Article 2, which further adds that, where said vehicle is carried over part of the journey by sea and the goods are not unloaded from the vehicle, the CMR shall still apply to the

entire carriage operation from A to B. Article 34 provides that, “If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.” Finally Article 36 allows action to be brought against either the ‘first carrier’, ‘last carrier’, or the carrier who performed the leg of carriage during which the event causing loss, damage, or delay occurred.

In the relevant case, the CMR clearly encompasses AQ and NL's road carriage contract for reward, being that the place of collection of the AQ's goods (Zwijndrecht, Netherlands) and the place designated for delivery (Warrington, UK) are situated in two different countries, both of which are party to the Convention⁴⁵. Furthermore, notwithstanding the fact that the goods were damaged on a ferry at sea, this particular case concerned a trailer of goods taken by a vehicle on a ro-ro ferry carriage route, on which the goods were not unloaded from the vehicle, and as such are governed by the terms of the CMR by virtue of its Article 2.

Whether NL would be found liable as carrier towards AQ depends on whether their contract with the plaintiffs is considered a contract of carriage governed by the CMR and not merely an agency contract. AQ had a single contract with NL upon which the entire carriage of their goods was agreed. Articles 34 and 36 provides a broad scope for

⁴⁵ United Nations, *United Nations Treaty Collection: Chapter XI Transport and Communications, B. Road Traffic, 11. Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 19 May 1956*
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-11&chapter=11&lang=en
Last Accessed: 23/02/2016

'carriers' responsible for the carriage, and NL, though not performing the carriage, may at least be considered the first carrier in the circumstances, who would therefore be liable to AQ for the partial loss of the goods under Article 17(1) CMR. The legal issue is therefore whether NL could be found to have taken on the role of carrier given the circumstances, despite NL claiming that it only acted as agent in procuring the carriage of AQ's goods. If this could be established, NL would consequently be exposed to general carrier liability for cargo damage according to the CMR. If NL would on the other hand be regarded as AQ's forwarding agent, they could be found liable only to the extent that they failed in its fiduciary duty owed to AQ as their client.

4.1.2. The consignment note

By virtue of Article 4, a carriage contract subject to the CMR convention is confirmed in the making out of the consignment, or CMR, note. Article 9 furthers this point by stating that the note shall be prima facie evidence of the making of the carriage contract. Article 5 specifies that such a note shall be made out in three original copies to be signed by the sender and the carrier; it also states that a sender or carrier may instead use a stamp in place of a signature if the law of the country in which the consignment note has been made out permits it. Article 6(3) adds that either party may enter in the note "any other particulars which they may deem useful"; Article 7(2) provides that the addition of such particulars would be deemed to have been made on behalf of the sender, unless proved otherwise.

In the case of AQ and NL, a CMR note was indeed made out by AQ, and in doing so confirmed the making of a carriage contract subject to the CMR convention, by virtue of article 4. They made out the note naming NL as the carrier. JK's driver signed the note

on behalf of NL being the 'carrier' as appeared in note. The three copies of the note left to accompany the goods had then been duly stamped by NL, such conduct being qualified by the terms of Article 5 allowing the stamping of the note by the carrier in place of a signature, granted that the law of the UK (where the CMR note was made out) permits such conduct. It would therefore seem to be, at least at face value, an above-board transaction amounting to a carriage contract between both AQ and NL subject to the CMR and one in which NL plays the part of carrier. What must be disputed, however, is whether NL's purpose of stamping the note, to avail itself of its identity as carrier in the operation and state itself as agents, is permissible under UK law and Article 5.

If the aforementioned paragraphs of Article 6 and 7 were to apply in an accommodative way, NL's stamp in the 'Sender's Instructions' box of the CMR note certifying that it acted "As Agents Only" may have amounted to the addition of useful particulars made on behalf of AQ and may thus have its desired binding effect for the benefit NL. If, on the other hand, it is proved otherwise, NL's conduct would consequently not have the intended effect of availing NL of the responsibility and liability attached to its originally presumed role as carrier under the carriage contract.

Mance J himself stressed the importance of AQ's awareness of NL's modification to the note⁴⁶. He specifically referred to the witness testimony submitted by Mr. Versteeg, logistics supervisor of the plaintiffs' Dutch company and Mr. Roest, co-founder and co-director of NL. Mr. Versteeg stated that NL had not told AQ during the course of dealing that they were incorrectly naming NL as carrier in the making out of the consignment

⁴⁶ Ibid, p. 675

notes⁴⁷. Mr. Roest on the other hand insisted that in general conversations between himself (or others of NL) and AQ, it had been mentioned several times that AQ were making out the CMR notes incorrectly and that they had to continuously alter them as a result. It was also Mr. Roest's belief that AQ would have been aware of NL's practice of regularly altering undercopies of the notes, since it would have to examine an undercopy so altered in the event of a damage claim. Mance J however was not satisfied that AQ were adequately notified by NL of any issues had with the way they made out the CMR notes, being of the opinion that, had they been so alerted, NL would have taken further action when AQ would continue to make out the notes continuing to NL as carrier⁴⁸. He went further by stating, even if AQ were to see an undercopy of the altered note in the context of a damage claim, that: "I don't consider that the mere sight of such a note in such a context would have or did put Aqualon BV on notice that Nilsson was systematically rejecting any role or responsibility as a CMR carrier."⁴⁹

Mance J considered the fact that NL had, by contrast, absolute knowledge of the way in which the CMR notes were being made out. He referred to the fact that the defendants were aware that AQ named NL as carrier in the note, which was then signed by the driver of JK in a way which indicated an understanding on the part of the plaintiffs that NL was the CMR carrier. The process which followed was that the undercopies of the note, not left with AQ, were taken to NL whereby they were modified and left with the goods and out of sight of the plaintiffs as consignors or consignees. Mance highlighted the provision in Article 9 CMR which stated that the note shall be prima facie evidence of the making of the contract, suggesting that if this were the case, it should also be

⁴⁷ Ibid, p. 674

⁴⁸ Ibid, p. 675

⁴⁹ Ibid

“prima facie evidence of the identity of the carrier entering into the contract when this is stated on the face of the note.”⁵⁰ The fact was that NL did nothing to inform AQ that it rejected its presumed role of carrier, which Mance J stated had the obvious effect of NL continuing to appear to AQ as accepting responsibility as carrier⁵¹. It was thus held that, NL’s alteration to the CMR note would not be legally binding, as AQ could not have been adequately informed of NL’s alterations. Instead NL’s reliance on the note’s original form is legitimised by the fact that it had been made out and signed by JK’s driver, thus providing proof of the acceptance of NL’s identity as carrier, which NL were considered to have acquiesced to since it had not adequately sought to clarify it and bring it to the knowledge of the plaintiffs.

4.1.3. Course of dealing

Mance J listed the course of any dealings as an important factor to determine the role undertaken by an intermediary in transport. He described such to include: “the manner of performance – at least in so far as it throws light on the way in which the parties understood their relationship; thus whether or not the contracting party informed the goodsowner of or identified the actual arrangements made for carriage...”⁵².

Additionally, Carr clarifies that the usual role taken on by the forwarder is of importance when considering whether or not said forwarder intended to act as carrier or agent in a given transaction.

Witness testimony for both the plaintiffs and NL was referred to in order to form a picture of dealings between the two. NL was a company founded by two partners and

⁵⁰ Ibid, p. 676

⁵¹ Ibid

⁵² Ibid, p. 674

had a relatively small staff of some 15-16 people. A Mr. Den Boef, co-founder of NL with Mr. Roest, had represented the company in negotiation proceedings which then led to the beginning of business relations with the plaintiffs.

As was stated before, the instant transaction followed the same pattern of almost all previous transactions between the two undertakings. It was accepted that NL never made it clear throughout its business relations with AQ that it proposed to act merely as agent or pure forwarder without responsibility in the event that something went wrong during the carriage; it was rather AQ's belief that NL was accepting goods as CMR carrier, the CMR notes being made out by AQ accordingly. It was Mr. Versteeg's recollection that during the first two years of business relations with NL, he was unaware that the defendants did not own their own trailers; even if he was aware, it was contended, and accepted by Mance J, that it would not have changed his understanding about the agreement he believed was reached between the two parties, that NL was to play the role of CMR carrier in their transactions.

Of particular significance as regards the course of dealing was the aforementioned issue of AQ's making out of the CMR note naming NL as carrier and NL's systematic modification of the note to state that they acted as agents only. As explained above, Mance J was of the opinion that throughout their business dealings, the plaintiffs were not adequately notified of NL's rejection of its role as carrier and were thus able to rely, as they legitimately did in past transactions, on the assumption that NL were acting as CMR carriers⁵³.

⁵³ Ibid, p. 676

4.1.4. Description

Any description used or adopted by the parties in relation to the contracting party's role was also listed by Mance J to be a determinative factor for establishing a forwarder's legal position⁵⁴. Thus it is whether the description of itself adopted by NL indicated that its role was either that of agent or carrier. There is little if anything that can be derived from this case as regards description of NL and its adopted role. A form of description of NL's invoices may be inferred from they writing at the foot of their invoices:

"International Forwarding – Groupage Services – Warehousing"⁵⁵. There is however no particular attention given to this by Mance J and indeed the wording is too vague to treat as conclusive evidence and does not openly exclude the possibility of carriage services being undertaken by the defendants.

Nor can any specific indication as to role be derived from the extensive list of conditions in NL's invoices to the plaintiffs. This included, amongst carriage contract and forwarding agents' conditions, those related to ship agents' and shipbrokers' operations, stevedores' operations, chartering, and warehouse operations⁵⁶. Whilst not excluding the possibility of any form of role-adoption on the part of NL, any form of description to be inferred here regarding NL's intended role would be far too vague. Furthermore, the all-encompassing list of conditions had historically been put together from the outset of NL's existence, when it was (and perhaps still is) speculative what the true purpose of the undertaking was; Mr. Roest himself submitted that the broad spectrum of activities referred to on the invoices was clearly prepared so as to be ready "in case something

⁵⁴ Ibid, p. 674

⁵⁵ Ibid, p.672

⁵⁶ Ibid

like that came up”⁵⁷. Thus such evidence was not treated as adequate support for indicating an intended role either way by NL. It is clear in this case that the factor of description is not lent so much weight. It shall nevertheless feature, perhaps more significantly, in further case studies.

4.1.5. The terms of the particular contract

Mance J stated that the terms of the contract, which include the nature of the instructions given and also any governing conditions, may also be a factor of influence over whether or not a party took on the role as either carrier or agent⁵⁸. Thus incorporation of standard terms of contract for freight forwarders, such as those of BIFA and FIATA, as mentioned above, may be a significant indication as to the role adopted. Of importance here are the General Conditions of the Dutch Forwarding Agents’ Organizations (FENEX conditions). As stated above, NL’s invoices to the plaintiffs refer to a long list of conditions to apply, the FENEX conditions being identified as those applying to their forwarding agents’ operations⁵⁹. Arguing against the plaintiffs’ claim that they were not made aware of NL’s intention to act solely as agents, NL’s Mr. Roest made the point that throughout their business relations, AQ did not ever question the fact that, as stated in every invoice, the company were trading on FENEX terms; this he argued “must give rise to a presumption of a course of dealing on those terms and no other.”⁶⁰

⁵⁷ Ibid, p. 676

⁵⁸ Ibid, p. 674

⁵⁹ Ibid, p. 672

⁶⁰ Ibid, p. 675

Mance J, in addressing Mr. Roest's submission, referred to Article 1 of the conditions, which states that they apply to all forwarding agents' operations and activities, including those not specifically part of forwarding work. Paragraph 2 of the same article continues by stating: "The latter operations and activities, such as those of...carriers...shall also be governed by the conditions..."⁶¹. He noted that many of the activities referred to in the invoices, such as those of ship agents', stevedores and warehousemen, were not actually activities which NL ever undertook. Nevertheless, he also referred to Hobhouse J's judgment in the case of *Elektronska*, in which he stated that forwarding agents act in very many capacities, including contracting for carriage as principals⁶². Mance J said that Article 1 of the conditions as cited above confirms that such is the understanding of the freight forwarder industry in which NL conducted its business, whereby a catalogue of services may be provided including carriage service. Thus he held: "There is in the FENEX conditions nothing inconsistent with Aqualon BV's case that Nilsson accepted responsibility for delivery as a CMR carrier..."⁶³. Although the FENEX conditions primarily govern the activities of forwarders, there doesn't appear to be any exclusion of other activities that might also be governed by the conditions; to the contrary, Article 1 appears to readily accept the application of the conditions on other activities, of which includes carrier activities. Evidently, the applicability of the FENEX conditions do not pose an obstacle in necessarily finding the defendants responsible, thus potentially liable as carrier in the circumstances.

⁶¹ Ibid, p. 675-676

⁶² [1986] 1 Lloyd's Rep 49, p. 52

⁶³ Op. cit 44, p. 676

4.1.6. Charging

Finally, Mance J identified the nature and basis of charging as a significant factor determining the role adopted by an intermediary in a carriage arrangement. In particular, he stated that an all-in fee charge, in which the contractor would have open to him the opportunity to make a form of marginal profit from the carriage contract, would provide fair indication that the contracting party intended to act as principal carrier⁶⁴. It was AQ's submission that NL undertook responsibility as carrier for an all-in rate for the carriage undertaken via road from Zwijndrecht in the Netherlands, to Warrington in the UK⁶⁵. Mance J lent support for Mr. Versteeg's submission for the plaintiffs that negotiations with NL for their services were primarily concerned with the level of charge to be imposed for deliveries, taking place on the understanding that NL were taking on personal responsibility for the road carriage deliveries to England⁶⁶. In the end, Mance J did not go into extensive detail about the charging agreement between AQ and NL. He stated that, along with the terms of the invoices, the admission from both sides that NL made an all-in charge pointed convincingly towards NL accepting personal responsibility as carrier, rather than towards any other role in the circumstances⁶⁷. While not claiming that the factor of charging alone indisputably indicated a carrier role being adopted by NL, he at least considers the all-in charge as a factual element which contributes to the finding of such a conclusion, but an element which perhaps relies on further indicators in support of a carrier role.

⁶⁴ Ibid, p. 674

⁶⁵ Ibid, p. 673

⁶⁶ Ibid, p. 674

⁶⁷ Ibid, p. 676

In consideration of all the evidence related to his five critical factors, Mance J reached the conclusion that NL acted as principal CMR carriers in the international road carriage arrangement, and as such were liable to AQ for the loss of goods during the carriage operation, according to the provisions of the Convention. With Mance J's criteria in mind, it will be useful to refer to further English cases relevant to the issue of establishing an intermediary's role as either carrier or agent.

4.2. *Texas Instruments v Nason (Europe) Ltd*⁶⁸

The case of *Texas Instruments v Nason* serves as another good example of how complex the contractual make-up of certain carriage arrangements can prove to be. The case involved plaintiffs who were two companies of the same group. The second plaintiffs Texas Instruments Semiconduttori Italia S.p.A (TISIS) were an Italian company who sold 3401 kilos of machine calculators to the first plaintiffs, English company Texas Instruments Ltd (TIL). TISIS contracted for the carriage of the consignment to England with the fourth defendants Continentaltir SRL (Deft 4). In turn, Deft 4 then corresponded with its agents in England, who were the first defendants Nason (Europe) Ltd (Deft 1). Deft 1 then contracted with second defendants Biss International Transport Ltd (Deft 2), who then sub-contracted with third defendants Narradine Ltd (Deft 3) for the use of its lorry service. Deft 2 also contracted with a third party for the lease of a trailer for the transport operation. The lorry driver employed by Deft 3, Mr Edwards, carried the trailer of goods as far as Ramsgate, where it was held up at Customs and released the next day. On its release, Mr. Edwards telephoned his employer Mr. de Friez who instructed him to leave the trailer of goods unattended in a public car park in Rainham, in the East End of London, in spite of Mr. Edwards

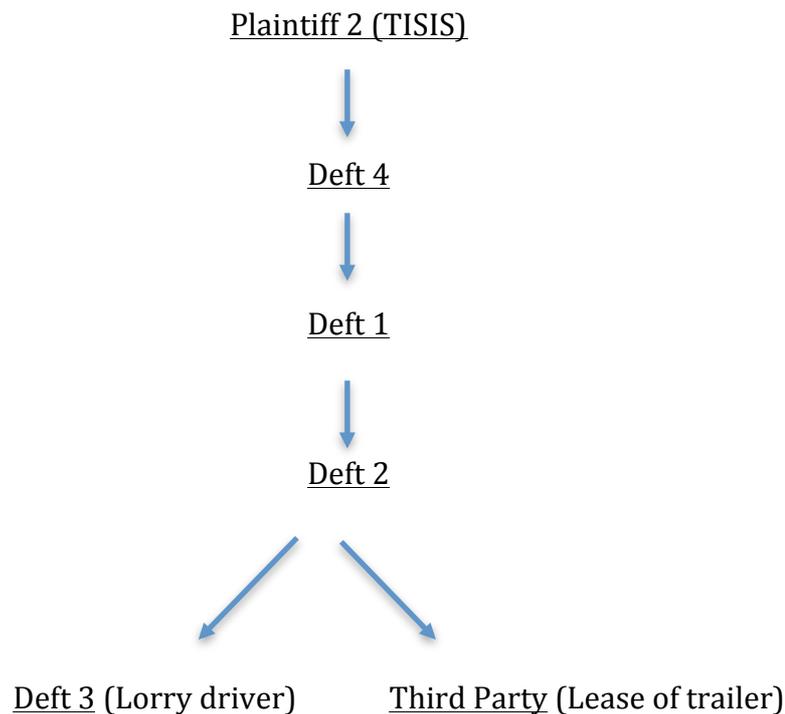
⁶⁸ [1991] 1 Lloyd's Rep 146

expressing his concerns for the trailer's safety in doing so. Following his superior's instructions, Mr. Edwards left the goods in the car park between 4 and 6-7pm. The goods were later found stolen and the plaintiffs claimed against the defendants for the loss. In particular, the plaintiffs sought judgment against Deft 2, claiming that they acted as 'first carrier' according to the terminology of Article 36 CMR⁶⁹. Alternatively the plaintiffs claimed that Deft 2 was liable either as the 'last' or 'performing carrier' as provided by Articles 34 and 36 CMR. Deft 2 however submitted that it did not act as any sort of carrier in the transaction, claiming instead that either Deft 4 or Deft 1 acted as first carrier and Deft 3 were the last or performing carrier.

There are several potential parties to consider within the contractual arrangement, of which only one (Deft 3) actually performed the carriage. Defts 1, 2 and 4 were only involved contractually, but as aforementioned, a contractual party may be found to have acted as carrier without taking on the carriage obligation himself. It would thus be helpful to look at a breakdown of the contract levels in order to identify who the potential carriers involved might be:

⁶⁹ Ibid, p. 147

Diagram: showing contractual relationship between the parties



4.2.1 Consignment note

Tudor Evans J stated that, following from the language of Article 9(1), it shall be presumed that the CMR note correctly evidences the contract of carriage as to its terms, the parties and their roles in the contract's performance⁷⁰.

The relevant CMR note provided that the "transporter" (meaning carrier) was Deft 2. Mr. Edwards, the lorry driver for Deft 3, signed and stamped the words "p. Biss", identifying Deft 2 in the relevant field as the carrier. Mr. Edwards stated that he was authorised to have done so on behalf of Deft 2⁷¹. Deft 2 however disagreed, arguing against the admissibility of the CMR note as evidence; in support it referred to Hobhouse J's judgment in *Elektronska*, in which it was stated that, though providing highly relevant

⁷⁰ Ibid, p. 149

⁷¹ Ibid, p. 150

evidence, the CMR note was not conclusive; that, in that particular case, the quality of evidence in the note was low because it came into existence only after the contract had been made and because the relevant boxes were filled in by the driver “who could not have appreciated the legal and factual position”⁷². Thus it was submitted by Deft 2’s counsel that the same circumstances in the relevant case existed here, that in particular, Mr. Edwards in signing for the Deft 2 on the note “could not have had knowledge of the contractual arrangements...”⁷³ Tudor Evans, nevertheless, stated that he did not believe Hobhouse intended to hold that, simply because the CMR note was made after the contract was made, that it rendered its evidence as automatically inadmissible. He also accepted that Mr. Edwards was reliable when he said he signed the note on behalf of Deft 2 and when he considered himself authorised to do so. Thus Tudor Evans J held that it appeared on the CMR note that Deft 2 were principal carriers in the contract of carriage, and nothing appeared to contradict this⁷⁴.

4.2.2. Correspondence with loss adjuster

Further evidence upon which the plaintiffs relied was correspondence between Deft 2 and their loss adjuster. In his writ to Deft 1, Mr. Gowing stated that they did not dispute liability attaching to Deft 2 as principal carriers under the CMR, as well as Deft 3 as sub-contracted carrier. Tudor Evans J was also satisfied that Mr. Bush, being responsible as transport manager for Deft 2, had authority to instruct the loss adjusters, who admitted to Deft 1 a liability on the part of Deft 2:

⁷² [1984] 1 Lloyd’s Rep 49, p. 51

⁷³ Op. cit. 68, p. 150

⁷⁴ Ibid

“we have not disputed that a liability appears to attach to Biss International Transport [Deft 2] as principal carriers concerned under the applicable C.M.R. Convention.⁷⁵” Thus based on the evidence of the consignment note and the evidence in the correspondence between Deft 2’s loss adjuster and Deft 1, Tudor Evans was satisfied in holding that Deft 2 were the first carrier.

4.2.3. Terms of contract; description

In its alternative claim that Defendant 4 was liable as first carrier, Deft 2 relied on written evidence that Deft 4 intended to act as carrier for the plaintiffs. In a letter written by TISIS’ international operations manager Mr. Tiberti, he stated: “I was entrusted with making the arrangements” and “In respect of the delivery...I called through a transport order. My signature is on the document...It confirms the agreement of [Deft 4] concerning a transfer of...our goods...It is left up to [Deft 4] as to how they would affect the carriage.”⁷⁶ It would thus appear to indicate an acceptance, at least on the part of the plaintiffs, that Deft 4 entered into the agreement to act as principal in the carriage arrangement and to sub-contract on the performance of their carriage obligation where they saw fit.

Tudor Evans however believed that such words used in Mr. Tiberti’s letter were too ambiguous, especially in the use of the word “transfer”, and that it might mean Deft 4 intended to be carrier or simply that they would make arrangements for a carrier. He did nevertheless emphasise that it was left to Deft 4 as to how to affect carriage⁷⁷.

⁷⁵ Ibid

⁷⁶ Ibid, p. 151

⁷⁷ Ibid

Deft 2 relied upon further written evidence in the form of a telex message sent by Deft 4 quoting for the carriage of goods, referring to Deft 1 as their London agents. Deft 2 also referred to a document passing between TISIS and Deft 4 which was an order “for the provision of carriage”, Deft 4 being named as “the provider” of the carriage. However, Tudor Evans J however refuted this, stating that once again the wording was ambiguous and did not lead one to the conclusion that Deft 4 was irrefutably the carrier⁷⁸.

4.2.4. Charging

Deft 2 also claimed that Deft 4’s charging of TISIS of a flat rate provided conclusive evidence of them acting as carriers⁷⁹; that had they been mere agents of TISIS, the basis of charging would have been charges incurred plus a percentage of commission. Tudor Evans J recognized Hobhouse in *Elektronska* stressing the importance the method of charging had on the role of the defendant. Nevertheless, he stated that, though there is force in Deft 2’s arguments based on the all-in charging of Deft 4, this factor cannot be assessed in isolation of other potentially significant factors in play⁸⁰, such as that of the CMR note and written evidence of Deft 2’s loss adjuster as mentioned above, indicating that Deft 2 was first carrier.

4.2.5. Course of dealing

The way in which Deft 2 conducted business for the plaintiffs in the transaction may also have had an effect on the role they were perceived to have taken on, particularly with regard to the fact the Deft 2 had leased from a third party the trailer used to haul the plaintiffs’ goods. It was believed that Deft 2 leased the trailer for its use specifically

⁷⁸ Ibid

⁷⁹ Ibid, p. 152

⁸⁰ Ibid

for business with the plaintiffs, for the specific journey to transport their goods.

According to Deft 2's company secretary Mr. Varney, the company owned six trailers at the time and leased them out when necessary; it was inferred here that all six were already in use. By using a trailer in pursuance of the plaintiffs' contract, it was thought to be further evidence that Deft 2 acted as first carrier in actively taking part in the carriage. Deft 2 however argued that the trailer was sub-let to Deft 3 who actually carried, inferring that it took no part in the carriage itself. Tudor Evans however disputed this argument, remarking that, as pleaded, the trailer was leased by it from the third party, to which it admitted in its defence⁸¹. There was also a great lack of evidence to prove the contrary.

Furthermore, Mr. Edwards for Deft 3 stated that, in addition to arranging for the trailer, Deft 2 also provided the funding for the entire carriage operation; this including the cost of diesel, road tolls⁸². It was also Deft 2 who booked the ferry for the sea carriage leg of the transport. In addition to all of this, it was also clear from evidence given by Mr. Edwards that he looked to Deft 2's transport manager Mr. Bush for instructions and ultimate authority on any issues encountered; According to Tudor Evans J, Mr. Edwards was of the opinion: "Mr. Bush was controlling everything" and that he would contact him "if anything went wrong"⁸³.

Thus a rather proactive role taken on by Deft 2, in its personal undertaking of the trailer-leasing and ferry-booking, in its extensive funding cover and in its clear and

⁸¹ Ibid, p.152

⁸² Ibid

⁸³ Ibid

accepted authority in operations, appeared to suggest that it adopted a principal role, as opposed to the more distanced and hands-off approach of an agent in transactions.

4.2.6. Description

Another alternative argument submitted by counsel for Deft 2 was that Deft 1 was the first carrier. In support of this contention, they relied on general evidence from Mr Varney, who suggested that Deft 1 in their dealings with Deft 2 did not inform them of the fact that they were acting on behalf of someone else. It may therefore follow that Deft 1 had not intended on acting as agents for Deft 4, otherwise they would have disclosed their identity to Deft 2 in the process of dealing with them⁸⁴. In effect, Deft 1 would be presenting themselves as carriers, appearing to deal personally with transport arrangement matters presumably on behalf of its own carriage contract with the plaintiffs.

Tudor Evans J was however quick to dismiss this argument due to its lack of strength in evidence; it was only via the word of Mr. Varney that Deft 2 sought to argue that Deft 1 omitted to disclose the identity of someone else. In truth, it was Mr. Bush of Deft 2 who dealt intimately with the relevant transaction; had evidence instead been provided by him, Tudor Evans J admitted it would have been more convincing an argument⁸⁵.

In actual fact, evidence from Mr. Varney suggested that Deft 1 rather acted as freight forwarders in the transaction. It was stated that they had so described themselves on their writing paper. They stated in a letter to Deft 2 that they received communications

⁸⁴ Ibid

⁸⁵ Ibid

“from our principals”, presumably referring to the plaintiffs⁸⁶. Tudor Evans J thus concluded that Deft 2 were indeed the first carriers as all the evidence appeared to suggest and that they were probably instructed by Deft 1, acting on the instructions of Deft 4. Furthermore, it was clear to him that Deft 1 was merely the agent of Deft 4, based on the evidence in the documentation and there was no significant proof to the contrary. Even so, the judge concludes that: if I were wrong that the second defendants were the first carrier, there is, in my judgment, ample evidence that they were the last or performing carrier.”⁸⁷, thus making Deft 2 liable as carrier by virtue of Articles 34 and 36 CMR. It was held to have been at the very least a joint effort, with a considerable contribution of efforts and acceptance of authority attaching to Deft 2, as was particularly seen in its course of dealing in the transaction.

4.3. *Elektronska v Transped*⁸⁸

The plaintiffs Elektronska Industrija Oour TVA (EI) were consignors of 1100 cartons of TV sets that were to be carried from their factory in Nis, Yugoslavia to the consignees premises in Newport, South Wales. As in the aforementioned case of Texas Instruments⁸⁹, there were a number of contract levels concerning the carriage arrangement and it is therefore necessary to ascertain the legal identity of each defendant concerned. The plaintiffs first contacted their agents, the first defendant Transped Oour Kintinentalna Spedicna (TR), who then telephoned the third defendant known as Pro-Motor (PM). PM then contacted the third defendant G.L.M. Transport Ltd (GLM) via telex to arrange with them the transport of the consignment; a rate of £800

⁸⁶ Ibid, p. 153

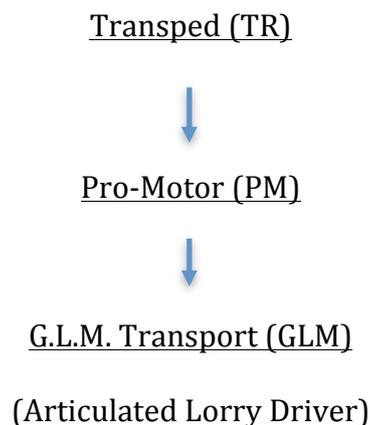
⁸⁷ Ibid

⁸⁸ [1984] 1 Lloyd's Rep 49

⁸⁹ [1991] 1 Lloyd's Rep 146

for the carriage was agreed. On 11th October 1977, the driver of an articulated lorry for GLM, a Mr Welford, collected the goods from EL's factory in Nis and drove through Austria in order to get to the UK. En route, Welford went off-road where the goods were spilled and damaged. The loss due to the accident was estimated at £9600, of which the plaintiffs claimed against the defendants; in particular they claimed against PM for the damage under CMR Convention as enacted by COGRA 1965, arguing that PM acted as carrier throughout the transaction and were thus liable as such. Their contention is that both TR and PM contracted as principals in their respective contracts. PM however refute the claim, stating that they acted solely as agents, both in its contract with TR and in its contract with GLM.

Diagram: showing contractual relationship between the parties



GLM had clearly acted as performing carriers who would be liable to the plaintiffs for the loss or damage of the goods, but judgment by default against them could not be satisfied due to GLM having no assets to pursue.

Thus the issue regarding the plaintiffs claim against the defendants would be:

- a) Whether TR acted as principal/carrier in their contract with PM; and
- b) Whether PM acted as principal/carrier in contracting with TR and GLM.

The different factors relevant to the respective defendants' roles shall be looked at in turn.

4.3.1. Consignment note

The CMR note was partly filled in by Transped and partly by Mr Welford, the articulated lorry driver for GLM. The note directed that the 'Carrier' box be filled in by the carrier and there was also a box providing for the "signature and stamp of the carrier" to be printed. Mr Welford filled in the 'Carrier' box himself with the name of his employer GLM and signed himself in the latter box when goods were collected. The box requiring the charge for the carriage was left blank.

It was explained above that Tudor Evans in *Texas Instruments* considered the nature and terms of the CMR note as crucial evidence in deciding whether or not the defendants acted as carriers in the transaction. Hobhouse J however in this case, while recognising the CMR note to be "highly relevant evidence", refused to treat it as conclusive⁹⁰. He observed that the CMR note came into existence after both contracts were made and, as such, would lower its evidential value in the case⁹¹. He went further by noting that the relevant boxes were filled in by the driver, "who was unlikely to be giving his mind to the legal or antecedent factual position even if he was aware of it"⁹²

4.3.2. Communications between TR and PM

TR contacted PM via telephone; the correspondence was between a Mr Bukulic for TR from Belgrade and Yugoslav national Mrs Suntesic working for PM in Kent. In Mr

⁹⁰ [1986] 1 Lloyd's Rep 49, p. 50

⁹¹ Ibid, p. 51

⁹² Ibid

Bukulic's statement, he described the usual course of dealings between TR and PM to be that of contracting for PM to transport the goods, as opposed to merely contracting for PM to arrange the transport. He claims that, though he does not remember much of the details of the particular contract at issue, there was no reason to presume that the contract differed from the usual way in which TR dealt with PM in such contracts⁹³. He further stated: "As far as I know the company Pro-Motor Forwarding used in practice to entrust certain arrangements in favour of someone else, though some of the arrangements were done by the company itself."⁹⁴ Mr Bukulic in a second statement claimed that, though no record exists as to the charge agreed between TR and PM, for this type of transport, a fixed rate would have been agreed upon on a lump-sum basis. Hobhouse therefore accepted that, based on Mr Bukulic's statement, TR could correctly assume that in this particular contract, as well as was usually the case with such contracts between TR and PM, PM had agreed to transport the goods, rather than *arrange* to transport, despite PM occasionally contracting as agents in other cases.

4.3.3. Communications between PM and GLM

PM contacted GLM via telex, followed by further communications between the two confirming the terms of the transport arrangement and a rate of £800. Hobhouse J states that within such communications it was not agreed that PM were acting as agents only, rather that the terms indicated more that they were contracting with GLM as principals, particularly being that a fixed price of £800 was stated and agreed upon for the carriage. This being the case, Hobhouse states that no such evidence exists

⁹³ Ibid

⁹⁴ Ibid

supporting the view that PM were intending to act solely as agents of the plaintiffs in their contract with GLM⁹⁵.

4.3.4. Description

The company PM was originally an international haulage business but had then established a freight forwarding division, hiring two employees from an international freight forwarders firm to run it. The division was given the name “Pro-Motor Forwarding”, but remained a part of the original company as the same entity. The division was described on its notepaper as “specialized trading services” and then later “...full load and groupage service specialists to Yugoslavia – full loads to all European countries.”⁹⁶ The company also claimed that its use of the words “forwarders” or “forwarding” in their business was purposed to indicate that they acted as forwarding agents, and thus that they intended to conduct business as agents, not principals or carriers. Hobhouse J however expresses his skepticism with this view, noting that from the early case of *Jones v European General Express Co. Ltd*⁹⁷ and proceeding court cases whereby a forwarding agent’s role had to be assessed, such agents so-called had been found to have acted as principals and sometimes agents; that forwarding agents act in various capacities of which includes acting as principals in certain circumstances, irrespective of whether they present themselves as “forwarding agents”. In this vein, Hobhouse holds that, on the evidence, both TR and PM did indeed perform activities as principal carriers on occasion and thus any such description otherwise of their business carried little if any weight; he stated: “In the present case the description which the defendants chose to give themselves certainly did not carry any implication, let alone a

⁹⁵ Ibid, p. 52

⁹⁶ Ibid

⁹⁷ (1920) 25 Com. Cas. 296

clear one, that they were not prepared to make contracts for carriage as principals.”⁹⁸ therefore discrediting any arguments as to either company purporting to present and generally conduct itself as agents.

4.3.5. Standard Trading Conditions

The defendants contracted using the Institute of Freight Forwarders 1974 standard trading conditions, which they did not rely upon as evidence in the case. The plaintiffs on the other hand argued that these conditions accommodate for finding the defendants liable as carrier, in that they “clearly contemplate a potential liability of the defendants inter alia as...carriers”⁹⁹ In affirmation of the plaintiffs case, Hobhouse J stated that this reinforced their conclusion that there was nothing in evidence to exclude the possibility of the defendants contracting as principals¹⁰⁰.

4.3.6. Charging

As was stated above, Mr Bukulic was of the belief that the contract between TR and PM would have been on a fixed rate basis. It was certainly the case that PM agreed with GLM for the latter to perform the carriage on a fixed rate of £800. It was also clear on the evidence that, though the defendants did occasionally perform agency services for which they charged their principal commission plus disbursements, it was more common in carriage of goods by road arrangements for PM to agree different freight rates with the actual carrier and with the goods’ owner; of which they made a profit by way of the difference between the freight rates agreed with the two parties. Hobhouse J noted that this sort of arrangement is characteristic of a contract and sub-contract

⁹⁸ [1986] 1 Lloyd’s Rep 49, p. 52

⁹⁹ Ibid

¹⁰⁰ Ibid

arrangement between a principal carrier and sub-carrier, thus clear evidence to the contrary would have to be presented in order to rebut this presumption and to prove an agency relationship existed¹⁰¹.

4.3.7. Previous course of dealing re invoicing and charging

Furthermore, the way in which PM had previously invoiced for such carriages provided further evidence that it intended to deal with its customers as principal. For example, in a similar transaction also involving carriage of TV sets from Nis to Newport, PM invoiced TR in July 1977 at a fixed rate of £850. This time however, PM performed the carriage of goods on one of its lorries and the fixed rate charged to TR undoubtedly constituted PM's own charge for carrying the goods. Two further consignments were invoiced to TR by PM in the same way as before at a rate of £850, only this time using lorries owned by different companies. Each lorry owner was paid £780, turning over a gross profit for PM of £70 for each transaction. Neither invoice indicated whatsoever an agency role adopted by PM in the carriage arrangement. A PM representative of the company's forwarding division stated that a similar freight would have been charged and invoiced to TR in the same way had there been no accident in the present case¹⁰². The rate of £800 agreed with GLM it is said would once again have given PM a profit turnover for the carriage.

It was clear from previous dealings between PM with TR that, though TR occasionally acted as carrier themselves, PM normally conducted business by contracting to carry goods then deciding later whether to sub-contract the carriage onto someone else. It

¹⁰¹ Ibid

¹⁰² Ibid, p. 53

was the opinion of Hobhouse J that this was also the case regarding the particular transaction at issue; whether or not PM would perform the carriage itself depended on convenience and whether they had a spare lorry of their own to use, otherwise they would sub-contract for the use of another company's lorry. The court thus concluded on the evidence that PM contracted as principals in the carriage and would be found to be liable to the plaintiffs as carriers under the CMR as a result¹⁰³.

4.4. *Tetroc v Cross-Con (International) Ltd.*¹⁰⁴

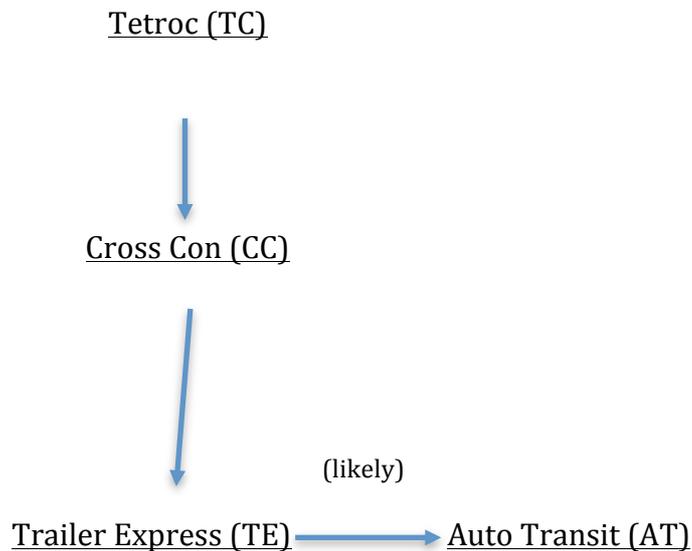
The plaintiffs in the case *Tetroc Ltd. (TC)* were buyers of machinery and tools that bought four machines from manufacturers in Copenhagen, Denmark around December 1973. TC arranged carriage with the defendants *Cross-Con (International) Ltd. (CC)* to move the machines from the manufacturers' premises in Copenhagen to various destinations in the UK. CC then instructed *Trailer Express Ltd. (TE)* to perform the carriage. Once packaged and prepared for pick-up, the machines were collected on 7th December by Danish company *Auto Transit Trailer Express AB (AT)* and loaded onto the trailer of one of their articulated lorries. The trailer and machines were then loaded on board the ferry *Tor Orlandia* for the sea transport leg of the journey; loading was completed on 7th December 1973. The vessel arrived at Immingham port where the trailer and goods were rolled off and were cleared through customs on 17th December. The trailer and goods however disappeared and then found at a Swedish port quay. Thereafter they were then shipped back to Immingham, where they arrived 10th January 1974. The goods were found to be in a damaged condition, mainly by rusting. The plaintiffs then claimed against CC for damage to the goods, which CC refuted; the

¹⁰³ Ibid

¹⁰⁴ [1981] 1 Lloyd's Rep 192

defendants argued that they contracted with TC as forwarding agents, from which they had arranged a contract of carriage with TE on behalf of TC.

Diagram: showing contractual relationship between the parties



Both TE and AT performed the actual carriage, but it is not entirely clear who contracted with AT in the case, though Martin J stated that it seemed probable that they were instructed by TE¹⁰⁵.

There was evidently no dispute as to the applicability of the CMR to the carriage. Article 3 was cited by Martin J, which, as was stated above, opens the scope of liability as a CMR carrier to include the acts and omissions of those whom the carrier makes use for the performance of the carriage. This position was reaffirmed by Megaw J in *Ulster-Swift*, to which Martin J also refers in his judgment¹⁰⁶. Thus CC would, if found to have contracted as carrier in the transaction, be liable for the damage to the goods occurring during the

¹⁰⁵ Ibid, p. 196

¹⁰⁶ Ibid, p. 195

performance of carriage by TE and AT. The relevant issue was therefore in what capacity CC contracted with TE on behalf of the plaintiffs; whether they contracted as principal or carrier as recognised by Article 1(1) CMR, or whether they acted as mere agents for the plaintiffs when entering into contracts with others for the performance of carriage.

4.4.1. Charging

There was a previous transaction between TC and CC, in which the carriage was once again performed by TE. TE were described as “the carriers”, though Martin J maintained that this does not mean that CC were not also CMR carriers themselves¹⁰⁷. CC sent a telex to TE asking for a quote for shipping the machines from Copenhagen to various UK destinations. TE responded via telex stating “door to door £360 plus 6 per cent bunker subcharge”. CC then proposed a quote of £420 plus 6 per cent bunker charge to the plaintiffs, which was an all-in figure for moving the machines from Denmark to their destinations; £431 had been charged for freight and ancillary charged and invoiced to the plaintiffs. TC claimed that in such a case where an all-in charge was invoiced to them, it indicated that the defendants were acting as principals, as opposed to the situation where TE’s price had been set out on the invoice with commission added on.¹⁰⁸ CC’s manager however stated that charge would have included an agency fee and services charge¹⁰⁹, more consistent with a charge given by a forwarding agent. He agreed in cross examination that the buyer of the plaintiffs wanted a total charge, that being an all-in figure; he stated: “...We did not give him a breakdown of how that figure was made up. We would simply have given a price, our own price, with no reference to the

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Ibid, p. 198

quotation from Trailer Express. I would not have considered what our legal status was.”¹¹⁰

In support of the plaintiffs’ argument, Martin J, refers to the European case of *Chanflow, Furnace and Ackworth*¹¹¹ where it was decided that he who undertook a carriage arrangement for an all-in payment to carry out the contract with a ferry trailer from door to door the complete transport from the Netherlands to England was held to be a CMR carrier; that the use of a third party who actually executed the transport would not make the initial contracting party simply a forwarding agent who would be excused of the overarching liability as carrier¹¹². Martin J however expressed the need to take caution when considering European decisions and merely relies on the case as mere guidance and not conclusive support¹¹³. In this case it is therefore difficult, when considering the factor of charging in isolation, to ascertain the legal position of the defendants; there is no clear presumption that can be made on such evidence as to how CC intended to contract with the plaintiffs.

4.4.2. Previous correspondence

Further evidence is provided in the form of letters from TC to CC enclosing copies of the Danish manufacturers’ invoices, giving instructions to CC for delivery. One perhaps significant sentence reads: “Will you kindly arrange onward transport to...” followed by details of an English customer. The defendants argued that using the word “arrange” would demonstrate a particular instruction given to an agent rather than to a principal.

¹¹⁰ Ibid

¹¹¹ 1972 E.T.C. 865

¹¹² Ibid, p. 865; [1981] 1 Lloyd’s Rep 192, p. 195

¹¹³ [1981] 1 Lloyd’s Rep 192, p. 195

As aforementioned, a forwarding agent of transport traditionally arranges for the transport of goods, rather than acting on instructions to transport himself; an instruction to arrange transport might elude to TC contracting for CC to act on their behalf as agents in the transaction. Martin J did not however treat this wording as clear evidence of such a relationship, stating that the word is vague and to instruct one to arrange for transport might mean either arranging for other people to affect onward carriage or make arrangements to perform the carriage himself, and can therefore not be considered conclusive evidence¹¹⁴. It would therefore appear, based on all the evidence on previous course of dealings and previous correspondence, that CC intended to act as principal in the carriage arrangement and the fact that CC were instructed to arrange transport would not in of itself indicate otherwise.

4.4.3. Consignment note

As Article 4 CMR states, the contract of carriage shall be confirmed with the making out of a consignment note, though also that it does not affect the validity of a contract of carriage that should nonetheless be subject to the Convention. The CMR note was made out by AT, on which their stamp is printed and also a description of themselves as “carriers”. CC argued that their own name was not inserted as carriers. Martin J admitted that the consignment note demonstrated no evidence as to CC being carrier in the transaction, actually setting out AT as carriers, that AT were in fact carriers by virtue of the fact that they actually performed carriage in the loading of goods at the manufacturers’ factory in Copenhagen and moving them to the ship.

4.4.4. Description

¹¹⁴ Ibid, p. 196

On the letterhead of a letter from the defendants to TE, CC describe themselves as: “UK International Freight Forwarders. European Container Trailer Services.”¹¹⁵, though no words such as “forwarding agent” or any other such description were used. Martin J nevertheless concedes that the term “freight forwarders” is occasionally used to describe a forwarding agent¹¹⁶. Furthermore, CC on three occasions refer to TC as “our principles” and one other occasion as “our customers”, which may appear to indicate that the defendants treated themselves as subordinates of the plaintiffs, that they acted on behalf of the plaintiffs as agents in the carriage arrangement. Martin J however expresses his skepticism with holding outright such an opinion; he states: “I do not think that the writer of that letter was really considering the legal relationship between the plaintiffs and the defendants, but was seeking to describe without naming them the concern which had instructed the defendants.”¹¹⁷ The description of the defendants and their relationship with the plaintiffs does not therefore provide clear proof as to an agency role adopted and accepted by the parties.

4.4.5. Correspondence between the plaintiffs and defendants

A buyer at the time for TC wrote a letter to CC, attempting to make clear the contractual responsibility of the defendants for any third parties whom they instructed to assist in the transaction and thus qualifying their right to take any future claim directly against the CC. Furthermore it is stated in the letter: “We as importers look to you as the experts regarding the actual transportation arrangements and you as a service sell your expertise in this particular field.” He goes on further by stating that any direct correspondence had with TE is purely by chance and force of circumstances, that TC

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Ibid

would otherwise not expect to deal directly with such third parties¹¹⁸. Based on this the plaintiffs therefore appear to treat the defendants as responsible parties in every sense, considering the fact that they regard CC as the experts in the transport arrangement who were expected to render their service.

A letter was also sent from the defendants' insurance brokers to CC advising them to refer TC to Tor Line Ltd., presumably the owners or operators of the *Tor Orlandia* vessel which the goods were carried on. In the letter the brokers stated that the defendants operate under the CMR conditions to Tor Line, and indeed it was seen at the end of their note-paper in their letter to TE that CC admit that their trading conditions include the "CMR where applicable"¹¹⁹.

In a further letter sent by the defendants referring the plaintiffs to Tor Line, the CC admitted that their insurance brokers suggested that all parties involved in the carriage, including the defendants themselves, are covered by the CMR conditions. The defendants however wrote a follow-up letter to the plaintiffs, stating that they would not have a justifiable claim against them since plaintiffs had intervened by directly instructing the subcontractors themselves, though as was alleged in the letter of the plaintiffs' buyer, any direct contact with TE was by pure chance and they would not normally be expected to resort to such dealings with third parties.

There is therefore clear discord between the plaintiffs and defendants as to the true nature of contractual relations. On the one hand it was the belief of the TC that they had

¹¹⁸ Ibid, p. 197

¹¹⁹ Ibid, p. 196

entered into a contract of carriage with CC, whom they regarded as carriage experts entrusted with the responsibility of the carriage irrespective of any third party arrangements made by them in pursuance of the contract. On the other hand, CC believed they contracted merely as agents on behalf of the plaintiffs, especially given that TC had corresponded directly with the performing carriers in the transaction.

4.4.6. Course of dealing of the plaintiffs and defendants

It was explained that the plaintiff company was a small outfit, of which only five worked on the administrative side. They started doing business with the sellers in Copenhagen in 1967, three years after TC was founded in 1964. Evidence was presented in the case from the managing director of TC; he stated: "...We first knew of the involvement of Trailer Express when we tried to find out about the non-delivery of machines."¹²⁰ He continued by stating that the company were looking to contract with parties to carry goods from door to door and that the company had previously contracted with a one-man haulier who collected and delivered goods himself using his own lorry; Martin J stated his belief that this was particularly the kind of service that he wanted from the defendants¹²¹, that based on this evidence, he believed that TC's managing director intended to deal with CC as principals, since the plaintiff company was a small company with a small office staff that did not want to deal with the problems of transport and other intermediary matters. They would simply want someone to pick up and deliver the goods for them.

¹²⁰ Ibid, p. 197

¹²¹ Ibid

On the other hand, one of the defendants' managers believed his company acted throughout their relations with the plaintiffs as agents. He stated that he was engaged as a forwarding agent and employed by CC, arranging shipping to and from various destinations around the world; he made no distinction between "forwarders" and "forwarding agents"¹²². He also highlighted previous transactions between his company and the plaintiffs, describing how CC normally carried out business for them. He remarked that CC would merely arrange for the movement of TC's goods, dealing with customs clearance, checking over of documents, checking with the shipping company involved that goods arrived, keeping TC continuously informed about what was going on in the transaction. He also said that they always used TE for the carriage and that their name would appear on the forms required by TC for the transfer of currency at the Bank of England. Dealing with a representative of the plaintiffs, he could not remember exactly the agreement on price in the relevant transaction, but he does state that he would have contacted TE to ask for their price and to instruct them to collect from Copenhagen and deliver the goods to the UK. As regards charging as clarified above, an all-in figure written to the plaintiffs was £420 plus 6 per cent for bunkering, of which CC's manager stated would have included an agency fee and services charge. He did however also agree that the defendants had one vehicle which was at the relevant time being used for another job¹²³.

Based on all the evidence regarding CC's course of dealing, Martin J takes an opposing view to the defendants' contention that they acted purely as agents. In particular, he notes that, though CC's managing director stated that they would "continually keep the

¹²² Ibid

¹²³ Ibid, p. 198

plaintiffs informed of what the current position was”, CC did not tell TC what arrangements they made on their behalf, neither in writing nor orally¹²⁴. Martin J finally concluded that the defendants had in fact contracted as principals and that they were carriers within the meaning of the CMR; that they may therefore be found liable under the Convention for damage to the goods as such¹²⁵.

5. EVALUATION

In evaluation of the evidence presented in the above case studies, it should be said initially that, isolated, there is no factor that appears to prove absolutely conclusive for whether an intermediary is found to have acted as either carrier or agent. All that can be derived from the above is that there are perhaps stronger indicators than others, and also that the way in which the some of the factors interact is particularly interesting.

The nature and terms of the consignment note appears to be a significant factor, serving as valuable guidance in defining the way in which the parties understood their contractual relationship. After all, it was held in both the *Aqualon* and *Texas* cases that the governing provisions of the CMR give the CMR note statutory authority, not only in respect of evidencing the existence of the carriage contract, but also of the parties to it. So if a note is made out naming an intermediary as carrier, and signed on its behalf, it shall stand as firm proof that said intermediary was mutually understood to be acting as carrier in the arrangement. It would then require strong indication to the contrary in order to prove that it intended to act instead as agent; it was not enough in *Aqualon* that

¹²⁴ Ibid

¹²⁵ Ibid

the defendants altered the notes to name themselves “as agents only” after the document had been made out and signed – there must be strong proof that the consignor or consignee were informed and agreed to such alteration. Nevertheless, evidence of the consignment of note indicating a particular role can be rebutted and indeed Hobhouse J in *Elektronska*, as was stated above, refused to accept the terms of the consignment note as conclusive evidence, considering the fact that it was only made out post contract, and signed by somebody who did not foresee the legal implications of giving authority to the note as such. It would thus fall upon other evidence giving rise to additional significant factors in order to determine the intermediary’s true legal position.

Another strong indicator as seen in the above cases is the nature and basis of charging. It is abundantly clear that English court judges regard an all-inclusive charge, especially that which envisions a profit-making agenda in offsetting the charges of one invoice from another, as a definite indicator of an intermediary’s intention to act as principal and carrier in the transaction. One policy consideration the English courts may appear to be advocating here is a principle of not allowing freight forwarders a scheme of being able to profit as a carrier, while sidestepping a carrier’s responsibility and liability. In essence it would mean that an intermediary may of course contract as principal in a transaction if he so wishes and sub-contract carriage, giving him the chance to profit as a principal as opposed to a mere charge of commission as an agent, but he must also accept the risk of exposure to liability as a carrier towards the goodsowner, if goods are lost or damaged. Hobhouse J in *Elektronska* upheld this principal in his judgment, where he stated: “They [Pro-Motor] were enjoying the advantages of a principal contractor – for example, the freedom to make a profit themselves. They must accept the corollary of

liability.”¹²⁶ It is of course in the interest of any business to keep risk low and make as high a profit as it can, better still if can make a profit whilst accepting little if any of the risk involved. Thus it would only seem natural that a forwarder might attempt to run a lucrative business by accepting the title of carrier in order to claim a profitable freight rate from his carriage contracts, and on the other hand only accepting the minimal responsibility of an agent when things go wrong. But it would only seem logical and naturally fair in the circumstances to not allow such an outcome; one should be expected to take on the equivalent financial responsibility for the return one expects to make in a given transaction.

The factors of description and the terms of contract are highlighted as influential over the intermediary’s legal position. However, their overall significance should not be too over-exaggerated since they do depend heavily on other factors in play. Descriptions regarding the intermediary and his business conduct and the standard terms upon which the parties contracted do truthfully enough offer at the very least a subtle indication as to the type of services and role the forwarder intends to adopt in general when conducting its business. However, as noted, descriptions prove to be vague and inconclusive of the intended role of a forwarder. Furthermore, with regard to specific standard terms of contract agreed upon, while some may be recognised as contract terms especial to that of a mere forwarding agent, it is clear that many such standard terms actually leave open the possibility of the forwarder being found liable as carrier. As seen in *Aqualon*, the agreed upon FENEX conditions accommodated for carrier liability. The 1974 Institute of Freight Forwarders standard trading conditions as seen in *Elektronska* also allowed for imposing carrier liability. Even the major freight

¹²⁶ [1986] 1 Lloyd’s Rep 49, p. 53

forwarder industry membership body in the UK that is BIFA¹²⁷ published standard conditions which provide that the forwarder be entitled to contract as principal¹²⁸. The FIATA Model Rules for Freight Forwarding Services also provides for a freight forwarder's potential liability as principal, as well as agent¹²⁹.

Further still, the course of dealing of the parties, while providing an important context in which to assess the relevant carriage arrangements, would nevertheless remain subject to the particular circumstances of the case. The extent to which this plays a decisive role would be in strengthening the argument that the way in which business was conducted in the past was the way in which it was conducted in the particular contract, and as such should follow the same consistent pattern as before. As long as the understanding the parties had of their business relationship followed suit with the current transaction, there would be nothing inherently inconsistent with finding that the same course of business as before should be inferred.

The way in which these three factors shall be assessed should therefore be whether they allow for the possibility of finding that the intermediary contracted as principal and thus finding potential liability as such. In essence:

- as long as the description remains non-specific and open enough;
- as long as the terms of contract (or indeed written instructions of the parties) do not expressly exclude the possibility of contracting as principal; and
- as long as the course of dealing of the parties do not suggest an inconsistent pattern to the current circumstances,

¹²⁷ Carr, Op. cit. 3, p. 380

¹²⁸ BIFA Standard Trading Conditions 2005A, Article 4(A)

¹²⁹ FIATA Model Rules for Freight Forwarding Services, Article 7

then there would appear to be no obstacles for finding that the forwarder accepted the responsibility and liability as a principal. These factors would effectively take on a rather passive stance in the assessment of the factors as a whole. As long as they do not disprove the adoption of a principal role, other more compelling factors such as the makeup of the consignment note and method of charging are not prevented from having combined conclusive effect.

6. CONCLUSION

6.1. When will an intermediary be considered a principal or agent?

On the evaluation of the case studies above, it is difficult to land on a definitive conclusion, considering the fact that each case produces a unique set of circumstances and evidence from which to infer a forwarder's adopted role. So when must a judge decide whether an intermediary acted as principal carrier and when must he decide that he acted as agent? Martin J in *Tetroc*¹³⁰ in making his conclusion as to the liability of the defendants referred to the judgments of Bean J in *Hair & Skin Trading Co. Ltd. v Norman Air Freight Carriers and World Transport Agencies Ltd.*¹³¹ which I am of the opinion serves as the definitive guideline for this question; Bean stated: "...when a Judge has to decide whether a party is acting as a principal or an agent, it is very much a matter of impression, what impression the evidence forms."¹³² In the same vein, Hobhouse J stated in *Eletronska* that:

¹³⁰ [1981] 1 Lloyd's Rep 192, p. 198

¹³¹ [1974] 1 Lloyd's Rep. 443

¹³² *Ibid*, p. 445

It is a recurrent and familiar problem to have to decide, in any individual case, how a forwarding agent was acting in a given transaction. To carry on the business of “agent” is not the same as saying that you are contracting in the capacity of agent for a principal¹³³

It would therefore be concluded that deciding whether or not an intermediary acted as principal or agent would depend entirely on the individual circumstances of the case at hand; that, though certain factors as identified by Mance J, for example, provide some form of guidance in doing so, it remains an open issue with each separate case providing only a suggestion to the approach one might take when deciding on the issue of whether the intermediary in question was liable as a carrier or agent.

6.2. A hybrid theory

As Mance J had done so in *Aqualon*, it may be possible for the court to consider the possibility of finding an intermediary to have taken on a role between that of a carrier and a simple forwarding agent. It had been the main contention of the defendants in the case that it acted throughout the transaction with the plaintiffs as forwarder, but without necessarily undertaking to act as agent either¹³⁴. Glass had also foreseen the possibility when he stated that in between a pure agency role and a principal role commensurate with full responsibility as a carrier “some shifting between these extremes may be possible.”¹³⁵

¹³³ [1986] 1 Lloyd’s Rep 49, p. 52

¹³⁴ [1994] 1 Lloyd’s Rep 669, p. 673

¹³⁵ Glass, Op. cit. 12, p. 10

In his judgment on this theory, Mance J, though accepting the possibility of contracting to take on such an intermediate role between the two extremes, suggested that such was an unlikely circumstance and would require compelling evidence that such was the intention of the parties to contract for such an arrangement¹³⁶. In the respective case, such an argument was dismissed by Mance J, since it potentially left the goodsowner without a contract under which to sue for the damage¹³⁷. Though it was not accepted here, it may be food for thought in future cases involving intermediary role-playing to come and it is possible that finding for either principal or agency liability for a forwarder may not be an continuous issue where there's the possibility of finding a middle ground.

¹³⁶ Op. cit. 134, p. 673-674

¹³⁷ Ibid, p. 674

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