Receipts Unknown – Bills of lading after the *Saga Explorer*

Charles Debattista

The Speaker:

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Receipts Unknown –

Bills of lading after the *Saga Explorer*

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I  The Background in the Hague-Visby Rules

[a]  a virtuous circle of articles

   III.4 sentence 2  the estoppel

   III.3  the right to a receipt

   III.3 proviso  the right to say nothing re quantity

   III.5  the indemnity re quantity

[b]  the brakes on the circle

   The III.3 proviso  *would Carrier say nothing?*  Blank cheque

   The III.3 right  *would shipper demand?*  *Shipper as seller/ l/c beneficiary*

[c]  the result

   W&Q clauses

   Re-defining “apparent good order & condition” – Retla clauses

II  *The Saga Explorer*

The decision – *Retla didn’t protect the carrier*

*Why on the merits?*

- on the facts, the whiff of fraud – cf BL and surveyors’ report

- And perhaps, carrier going for bust and proving too much? “*Retla applies to all rust of whatever severity*”?

*How in law?*

- Heavily influenced by North American writings – Tetley & Sturley – based essentially on art III.8 of the Hague Rules, the “line in the sand” article, present also in the Hague-Visby Rules

But

[a]  issues of representation and breach elided – see para 7 of the judgment for “the main issue in the case…” – indeed not even a mention of Article II – where’s the breach?

[b]  this elision has the effect of bringing III.8 into play – but III.8 not about representations: it is targeted at promises, i.e. terms of the contract – and the description box with its qualifications (Retla, w&Q, stc…) is not a term.

[c]  the crucial issue therefore becomes, as a matter of policy:

   *should III.8 be used against qualifications to the description box?*
HC lost sight of a crucial difference between Hague and Hague-Visby Rules which should have made North American writings less influential in the decision than they were:

In the US, there is no second sentence to III.4, no estoppel binding the carrier to the description box;
carrier has same evidential playing field with receiver as he has with shipper; everything therefore depends on who has the better evidence of what was shipped;
in the context of a system where receiver and carrier share a level playing field, it makes sense that carrier should not de-stabilise the position through Retla.

In English law, there is a second sentence to III.4, no estoppel binding the carrier to the description box;
carrier is disadvantaged vis-à-vis the receiver in that the description box is conclusive against him as to what was shipped: he can produce no other evidence as to the state of the goods on shipment;
in the context of a system of evidential imbalance, it makes sense that the carrier should protect himself through definitions of “apparent good order and condition” to exclude matters of which he should not be held to be professionally aware – because it is not his trade.

III Consequence of the Saga Explorer

- Could be cast into the wilderness of distinction – on the facts, cf survey/BL, applies to discount Retla where there is fraud – see paras 19 and 20 of the judgment.
- More dangerously for carriers, a door has been opened for III.8 to affect the description box, Retla, stc, w&q, fraud or no fraud.
- Effect – a greater tendency to clause, carriers wanting to protect themselves, but then causing shippers difficulties with buyers and banks, and disputes between Owners and shipper/charterers – whom does this help? A pro-cargo decision ends up hurting cargo in any event.

IV Solutions?
Crucial difficulty here is that cargo is trying to solve a trade problem through carriage.

• Who knows the commodity best? Traders or carriers?
• Who wants to make sure that the goods are shipped
  [a] “on spec” as opposed to
  [b] “in apparent good order and condition”?

Traders or carriers?
• Who is best equipped to make that judgment?
• Which contract best equipped to make provision for such a judgment?

Sale contract or carriage contract?
• How? Pre-shipment inspection clauses in the sale contract,
  if survey sent to buyer before shipment, buyer can reject immediately if CIF and refuse to ship if FOB;
  if survey reaches buyer after taking up documents and after vessel arrives, sale remedies: remember that representation in BL as to apparent good order and
condition does not bind buyer through waiver because the ambit of survey goes to trade spec, not apparent order and condition.

- A trade problem solved through the trading contract
- Post- *Saga Explorer*, we have a trade problem with a carriage solution causing more problems than it solves.
- But what of carrier: should he go scot free? Different avenue to the same result in the *Saga Explorer* – if fraud, as here, remedy in fraudulent misrepresentation: advantage – no III.8 and defences like duress....
Hague-Visby Rules

Article I

Definitions

In these Rules the following expressions have the meanings hereby assigned to them respectively, that is to say,

(a) "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

(b) "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;

(c) "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried;

(d) "ship" means any vessel used for the carriage of goods by water;

(e) "carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

Article II

Risks

Subject to the provisions of Article VI, under every contract of carriage of goods by water the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

Article III

Responsibilities and Liabilities

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

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

3. After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things

(a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(c) the apparent order and condition of the goods:

Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c).

However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.
In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

6. *bis* An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

7. After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.

*Article IV*

**Rights and Immunities**

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

   
   
   (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

   
   (b) fire, unless caused by the actual fault or privity of the carrier;
Neutral Citation Number: [2012] EWHC 3124 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 November 2012

Before:
The Hon. Mr Justice Simon

Between

Claimants

(1) BREFFKA & HEHNKE GMBH & CO KG
(2) KURT ORBAN PARTNERS
(3) ARCHER PIPE COMPANY
(4) KELLY PIPE COMPANY LLC
(5) CERES PIPE & METAL INC
(6) PIONEER PIPE
(7) PUGET SOUND PIPE & SUPPLY
(8) MASTER HALCO MANUFACTURING CO.
(9) RJB WHOLESALE INC

and

Defendants

(1) NAVIRE SHIPPING CO. LTD
(2) SAGA SHIPHOLDING (NORWAY) AS
(3) SAGA FOREST CARRIERS INTERNATIONAL AS

Mr Robert Thomas QC (instructed by Clyde & Co) for the Claimants
Mr Sudhanshu Swaroop (instructed by Swinnerton Moore LLP) for the Defendants

Hearing dates: 8-11 and 15 October 2012

Judgment
Mr Justice Simon:

Introduction

1. This claim arises from the carriage of a consignment of steel pipes on the M/V ‘Saga Explorer’ from Ulsan in Korea to ports on the West Coast of North America (Los Angeles, San Francisco and Vancouver, WA) between September and October 2008; and which it is claimed were found damaged on arrival.

2. The relevant contracts of carriage were 13 Bills of Lading signed by Orion Shipping Co Ltd ‘as agent’; naming the ‘Shipper’ as Nexteel Co Ltd of Korea and the ‘Consignee’ and ‘Notify Party’ as the 2nd Claimant (‘KOP’).

3. The Bills of Lading were dated 25 September 2008 and contained a description of the goods:

   E.R.W Steel Pipes
   Spec: ASTM A53B/ASME SA53B
   ...
   Details are as per attached rider

   The Bills of Lading included the following words on the front of the printed form:

   SHIPPED in apparent good order and condition, weight, measures, marks, numbers, quality, contents, and value unknown, for carriage to the Port of Discharge ... to be delivered in the like good order and condition at the aforesaid Port unto Consignees or their Assigns ... In accepting this Bill of Lading, the Merchant expressly accepts and agrees to all its stipulations on both pages, whether written, printed, stamped or otherwise incorporated as fully as if they were all signed by the Merchant. One original Bill of Lading must be surrendered in exchange for the Goods or delivery order.

4. In addition the Bills of Lading included a RETLA Clause.

   RETLA CLAUSE: If the Goods as described by the Merchant are iron, steel, metal or timber products, the phrase ‘apparent good order and condition’ set out in the preceding paragraph does not mean the Goods were received in the case of iron, steel or metal products, free of visible rust or moisture or in the case of timber products free from warpage, breakage, chipping, moisture, split or broken ends, stains, decay or discoloration. Nor does the Carrier warrant the accuracy of any piece count provided by the Merchant or the adequacy of any banding or securing. If the Merchant so requests, a substitute Bill of Lading will be issued omitting this definition and setting forth any notations which may appear on the mate’s or tally clerk’s receipt.
The attached rider contained details (including the length and weight of the bundles of steel pipes) and the reverse of the Bills of Lading contained ‘Terms and Conditions’ which included an English Jurisdiction clause and an applicable US General Paramount Clause incorporating the US Carriage of Goods by Sea Act 1936 (‘COGSA’).

The 1st Defendants are the Registered Owners, the 2nd Defendants are the Demise Charterers and the 3rd Defendants are the Time Charterers of the vessel. It is agreed between the parties that any claim for damage to the cargo lies only against the 3rd Defendants and it is convenient to refer to them as the Owners.

The main issue in the case relates to the nature of the representation as to the condition of the pipes on shipment, whether it was relied on and what damage flows from any breach.

A second issue arises as to the entitlement of the 1st Claimant (B&H) to sue and recover damages. It is common ground that KOP is the only one of the 2nd to 9th Claimant that can be said to be a party to any contract contained in or evidenced by the Bills of Lading: it was the named consignee and the Bills of Lading were not negotiable. KOP was indemnified against their loss by their German Insurers, who at all times acted through and by B&H. B&H claims against the Owners on the basis that it satisfies the conditions of a ‘Procedural Agency’ under German law, being authorised to bring a claim in its own name on behalf of the Insurers. This gives rise to an issue of German law, on which evidence was called.

There was also an issue as to whether, even if it had title to sue, B&H brought suit within the one-year time limit provided by s.3(6) of the COGSA or the relevant provisions of the Hague/Hague Visby Rules. By the conclusion of the hearing that was no longer an issue.

The facts in outline

A load port survey was carried out by Korea Surveyors and Adjusters Co. Ltd (‘KOSAC’), whose report was dated 25 September 2008. This report noted that the cargo was,

in apparent good order & condition with the following damage/exception.

There then followed 16 pages of what was described as ‘Damage/Exception Prior to Loading’. This consisted of descriptions of the steel as ‘partly rust stained’, and variations of this description, ‘wetted before shipment by rain and partly rust stained and slightly scratched on surface’, ‘wetted before shipment by rain and partly rust stained in white oxidation on surface.’

The survey also noted:

All of the above damages/exceptions were acknowledged by the vessel’s master and duly noted/appended to the relevant Mate’s Receipt.
13. Attachment No.1 of the Survey Report (also dated 25 September) was a Recommendation Letter to the Master signed by the KOSAC Surveyor and the Chief Officer as follows,

As a result of the survey, we found that all the shipments loaded on board the vessel to be in apparent good order & condition except the shipments mentioned on the ‘Cargo Damage/Exception List’ attached hereto.

With regard to the noted damages/exceptions to the shipments, we recommend that they shall be claused in or appended to the relevant Mate’s Receipt and Bills of Lading.

14. The Mate’s Receipts issued in respect of the cargo and signed by the Chief Officer contained a short form of Retla Clause (omitting reference to timber products) which was printed prominently:

The term ‘apparent good order and condition’ when used in this Bill of Lading with reference to iron, steel or metal products does not mean that the goods when received, were free of visible rust or moisture. If the shipper so requests, a substitute Bill of Lading will be issued omitting the above definition and setting forth any notations which may appear on the mates’ or tally clerks’ receipts.

and noted the receipt on board

Condition of Cargo as per Survey Report.

The Survey Report was identified as the KOSAC report.

15. The terms of a Booking Note dated 12 September which was signed by Nexteel (as shippers) and Orion Shipping, Co, Ltd (the Owners’ Shipping Agents) for the Carrier, included a term as to the form of the Bills of Lading to be issued,

3. Bills of Lading: Carrier’s B/L to be issued as per Mate’s Receipt and the terms condition and exceptions contained in the reverse side of the B/L are deemed fully incorporated in this Booking Note as if they were all signed by the Shipper.

16. As already noted, although the Mate’s Receipt contained the reservation that the cargo was received in the condition as noted in the KOSAC report, the Bills of Lading contained no such reservation. The reason why they were not claused was explained in §15 of the witness by Mr Jinsoo Kim, the General Manager of the Operations and Commercial Department of Orion Shipping Co. Ltd.

The shippers in this case, Nexteel, did not demand or request any bill of lading showing ‘notations’. Instead Nexteel (having seen the KOSAC Report) requested that the Bills be issued unclaused against LOIs. I read the Mate’s Receipts and the KOSAC Report (including the section headed
‘Damage/Exception found Prior to Lading’), which I compared with what was stated in the RETLA clause and (on that basis) I considered there was no need to clause the Bills. Accordingly I agreed to Nexteel’s request and proceeded to sign the Bills. It was certainly not my intention to mislead anybody.

17. The Letters of Indemnity referred to by Mr Kim, dated 25 September and headed ‘Letter of Indemnity for Issuance of Clean Bills of Lading’, were addressed to the Owners. After noting the ‘exceptions to the cargo’s apparent condition observed prior to shipment’ as noted on the Mate’s Receipt ‘per surveyor’s cargo exception’, the details of which were set out, the letters continued,

but we hereby request you to issue ‘clean’ bills of lading without making any remarks on the bill as to the cargo damaged condition whatsoever and to deliver the said cargo accordingly against production of a least one original bill of lading

In consideration of your complying with our above request, we hereby agree as follows:

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of complying with our request.

2. In the event of any proceedings being commenced against you or any of your servants or agents, in connection with our request aforesaid, to provide you or them on demand with sufficient funds to defend the same.

18. The indemnity was stated to be governed and construed according to English Law, and was reinforced by undertakings to put up bail if the vessel were arrested at the suit of cargo interest, and to submit to the Jurisdiction of the High Court in London.

19. In his oral evidence Mr Kim elaborated on his description of comparing the KOSAC Report and the Mate’s Receipts with what was stated in the RETLA Clause. For reasons which will become apparent later in this judgment (in summary, the difficulties in construing the RETLA clause), I consider that if this had been the basis for the decision not to clause the Bills of Lading, it would have been, at the very least, highly unsatisfactory. However, I do not accept Mr Kim’s evidence.

20. His explanation was rather less clear than it had been in his carefully crafted witness statement. Even making full allowance for the fact that he was giving evidence through an interpreter, his explanation for why, if this were so, he had asked Nexteel to provide a Letter of Indemnity was unsatisfactory. Eventually he explained it was out of caution, ‘as a last resort’. In my judgment he was not frank in this evidence. The very much more likely explanation is that Nexteel realised that if the Bills of Lading were clauses they would not be paid and persuaded Mr Kim that Owners should issue clean bills of lading in exchange for the Letter of Indemnity.
21. It was on this basis that the Owners issued, among others, the 13 Bills of Lading with which this case is concerned, identified as consignments A-M.

22. The vessel arrived at the three discharge ports (Los Angeles, San Francisco and Vancouver) during the course of October 2008. Here, and in subsequent surveys, the cargo was found to be rusted to a greater or lesser extent. Subject to the other issues in the case there was a measure of agreement as to the loss and damage caused to the receiver, as a result of the rust contamination.

23. Mr Matt Orban of KOP gave evidence about KOP’s contracts with Nexteel for the supply of steel pipes. Although the written terms provided for payment by Letter of Credit against the presentation of documents, including ‘Clean On Board Bills of Lading’, the practice was different. KOP made cash deposits available to Nexteel in order to relieve its cash-flow problems; and cash was released by KOP’s logistic department on receipt of clean on board Bills of Lading and invoices. Although Mr Swaroop argued that crucial evidence was missing as to what had happened in relation to the 13 Bills of Lading, I am not persuaded that this is right. In any event I will return to the issue under the heading of ‘Reliance.’

The nature of the cargo at the load port

24. Some degree of visible, but superficial, rust is likely to occur on the surfaces of steel cargo, unless specially manufactured or specially treated. At one end of the scale this will be without significance. Oxidation is a normal consequence of the exposure to the atmosphere, and it would cause widespread interference with international trade if such visible rust were to result in the clashing of bills of lading. At the other end of the scale will be cargoes where the rust is deep, difficult to remove and, when removed, may reveal uneven pitting to the surface.

25. The particular difficulties in describing surface oxidation between these extremes became apparent when the experts gave evidence in this case.


... rust is a long and gradual process of surface oxidation which may start as soon as a piece of steel is produced and end with its total structural degradation. Simply describing steel cargo as ‘rusty’ when shipped is little help in defending a claim for severe corrosion. Conversely, shippers invariably refuse to accept that recently manufactured steel with traces of oxidation should be described as ‘rusty’.

To help matters, the International Group of P&I clubs put out a circular on 28 February 1964 specifying 27 clauses which could be used to described the degree of rust on steel cargo or its steel packing (see Appendix V). Ranging from ‘partly rust stained’ to ‘rust with pitting’, these are in use throughout the shipping community.
27. There were two problems with this approach. First, as noted in the Guide, the International Group clauses were not accepted as an international standard. Secondly there was a lack of detailed guidance as to the interpretation of the terms. Thus the clauses included (6) partly rust stained, (7) partly rusty and (13) rusty. These broad descriptions may, at least when taken together, provide a means of distinguishing between different degrees of rust, but this is an area in which views may honestly differ as to the correct description when looking at a consignment.

28. The North of England P&I club publication attempted to deal with the second problem by adding illustrative descriptions. Thus:

6. Partly rust stained

Fine powdery rust covering less than 75 per cent of the surface. Light tan to light brown in colour and easily removed by rubbing, scraping or wire brushing to reveal a smooth steel surface …

7. Partly rusty

Brown to heavy deep brown rust covering less that 75 per cent of the surface. Slightly uneven and dull steel surface when removed by wire brushing. Remainder of the surface may be ‘rust stained’ or ‘partly rust stained’.

…

13. Rusty

Brown to heavy deep brown rust which, when removed by wire brushing, reveals an uneven and dull steel surface.

29. These descriptions were recommendations and did not provide immutable definitions of surface appearance. In addition, even when applied, they might not solve the problem of differences of opinion. Thus the experts in this case, when invited to comment on some of the photographs were unable to agree on how the rust should be described using the North of England P&I Club definitions.

30. These are matters which need to be borne in mind when considering some of the issues which arise in this case.

The nature of the Owner’s representation

31. Under s.3(3)(c) of US COGSA, after shipment of the cargo on board the vessel the Master (or his agent) is bound on demand to issue to the shipper a bill of lading showing ‘the apparent order and condition of the goods’.

32. Before he can do that the Master (or his agent) must form an honest and reasonable, non-expert view of the cargo as he sees it and, in particular, as to its apparent order and condition. The Master may ask for expert advice from a surveyor but ultimately it will be a matter of his own judgement on the appearance of the cargo being loaded. See for example The David Agmashenebeli [2002] EWHC 104 (Comm), [2003] 1

33. The Bills of Lading in the present case contained a statement on their face that the cargo was shipped ‘in apparent good order and condition’. If there had been no RETLA clause, this would amount to a representation of fact which could be relied on as reflecting the reasonable judgement of a reasonably competent and observant master; see The David Agmeshenebeli (above) at 106 and Carver, Bills of Lading, 3rd Ed. §2-006.

34. In the case of Tokio Marine & Fire Insurance Company Ltd v Retla Steamship Company [1970] 2 Lloyd’s Rep 91 (US 9th Circuit CA), the Court was concerned with construing provisions as to the apparent good order and condition of the cargo and a Rust clause in the following terms:

The term ‘apparent good order and condition’ when used in this Bill of Lading with reference to iron, steel or metal products does not mean that the goods when received, were free of visible rust or moisture. If the shipper so requests, a substitute Bill of Lading will be issued omitting the above definition and setting forth any notations which may appear on the mates’ or tally clerks’ receipts.

35. These are the words used under the heading ‘Retla Clause’ in the Mate’s Receipts in the present case, although the wording of the RETLA clause in the present case is slightly different.

36. In the Tokio Marine case there was rust and wetness which was described in the Mate’s receipts as ‘heavy rusty’, ‘white rusty’, ‘rusty’, ‘heavy flaky rust’ and ‘wet before loading.’ The US 9th Circuit, having referred to the Privy Council case of Canada and Dominion Sugar Company Ltd v. Canadian National Steamships Ltd [1947] AC 46, held (p.95-96) held that,

... the bills of lading here, ‘read fairly as a whole’, show that the term ‘good order and condition’ was qualified by the clause defining the term with respect to iron, steel or metal products.

37. This part of the reasoning is uncontroversial. The conclusion of the Court is more debateable. Having referred to the fact that the Rust clause appeared boldly and capitalised on the bill of lading and to the shippers’ express right to request substitute bills setting out any notations in the Mate’s receipts; the Court found that there was no affirmative representation by the owners that the pipe was free of rust or moisture when it was received by the carrier. In summary, all surface rust of whatever degree was excluded from the representation of apparent good order and condition.

38. Mr Swaroop (for the Owners) submitted that English law should follow the Tokio Marine case in holding that the RETLA clause was not limited to rust which was in some sense, ‘minor’ or ‘superficial.’ He drew attention to the inherent ambiguity and uncertainty of such terms; and referred to Scrutton on Charterparties where he submitted the case was cited with approval.
39. In the 21st edition, the editors noted (at Article 63):

The practice is now developing of including in the bill of lading a definition of ‘good order and condition’ which makes it clear that the representation does not imply that the cargo is free from the type of defect which commonly affects the cargo in question, e.g. rust (metal goods) or moisture (timber). There appears to be no reason why these clauses should not be valid: and they do not appear to offend the Hague-Visby Rules.

In the 22nd edition, the editors reframed their view of the law in Article 77 at 8-031,

... wording may clarify (and restrict) the representation being made. Thus, a bill of lading may attest to the apparent good order and condition while including a definition of ‘good order and condition’ which makes it clear that the representation does not import that the cargo is free from certain defects, often a type of defect that commonly affects the cargo in question, e.g. rust (metal goods) or moisture (timber).

In each of the two editions there is a foot-note reference to the Tokio Marine case.

40. For B&H Mr Thomas QC submitted that the RETLA clause did not render the words ‘apparent good order and condition’ meaningless. The provisions should be read together and each provision given proper effect. To the extent that the RETLA clause was designed to except from liability it should be read restrictively, see for example Aikens and Bools, Bills of Lading, 2006 at §4.30 and Attorney-General of Ceylon v. Scindia Steam Navigation Co.Ltd [1962] AC 60 at 74.

41. He argued that the RETLA clause only excludes (surface) rust which is likely to be found in any normal cargo and which would not detract from its overall quality and affect its merchantability.

42. There would seem to be a number of problems with this formulation, for example: what is the degree of ‘surface rust’ which falls outside the representation, what is a ‘normal’ cargo of steel and why is merchantability relevant to the representation by the Master of the carrying vessel?

43. I have come to the following conclusions as to the proper construction of the two provisions in the Bills of Lading.

44. (1) The RETLA clause can and should be construed as a legitimate clarification of what was to be understood by the representation as to the appearance of the steel cargo upon shipment. It should not be construed as a contradiction of the representation as to the cargo’s good order and condition, but as a qualification that there was an appearance of rust and moisture of a type which may be expected to appear on any cargo of steel: superficial oxidation caused by atmospheric conditions. The exclusion of ‘visible rust or moisture’ from the representation as to the good order and condition is thus directed to superficial appearance of a cargo which is difficult, if not impossible, to avoid. It is likely to form the basis of a determination as to whether there has been a further deterioration due to inherent quality of the goods
on shipment under s.4(2)(m) of US COGSA, or Article 4(2)(m) of the Hague-Visby Rules.

45. (2) It follows that I reject the Owner’s argument, based on the facts of the decision in the Tokio Marine case, that the RETLA clause applies to all rust of whatever severity.

46. First, because such a construction would rob the representation as to the good order and condition of the steel cargo on shipment of all effect.

47. Secondly, because of what appears to be a misapprehension as to the nature of the trade. One of the grounds for the decision in the Tokio Marine case was that the Rust clause provided that it was always open to the shipper to call for a substitute bill of lading showing the true condition of the cargo as set out in the Mate’s Receipt, (see p.961 of the report). However, the objection to this part of the reasoning is that it is highly unlikely that a shipper of cargo would ask for a claused bill of lading reflecting the terms of a Mate’s Receipt: rather the contrary, as the present case reveals. The matter has been put in clear and emphatic terms by Professor Michael F Sturley in an article in the ‘Journal of Maritime Law and Commerce’ (April 2000) pages 245-248.

Some courts, led by the Ninth Circuit in Tokio Marine & Fire Insurance Co. v Retla Steamship Co., have nevertheless permitted carriers to include standard clauses in their bills of lading that essentially disclaim all responsibility for the required statement. Although COGSA § 3(8) explicitly prohibits any clause lessening a carrier’s liability ‘otherwise than as provided in this Act’, ‘rust clauses’ have been justified on the ground that that the shipper had the option of demanding a different bill of lading that did not contain the offending clause. In practice, such a demand would be unlikely, for the typical effect of a rust clause is to permit a seller to ship rusty steel to its customer while still obtaining the ‘clean’ bill of lading that enable it to be paid under a letter of credit.

…

Permitting the carrier to escape liability for the statement of apparent order and condition undermines the Hague Rules’ goal of protecting the bill of lading as a commercial document on which third parties can rely. Indeed, one of the principal abuses that the Hague Rules were intended to correct was the carriers’ use of ‘reservation clauses’ to exonerate themselves from responsibility for the description of the goods. Thus the rules required the bill of lading (if one were issued) to include the specified information without reservation unless the exception (found in the proviso to COGSA § 3(3)) applied. A carrier’s use of a reservation clause when the exception did not apply would be ‘null and void’ under COGSA § 3(8).

…
The phrase ‘on demand of the shipper,’ upon which the *Retla* court relied so heavily, does not alter the carrier’s obligation to include the information required by COGSA § 3(3) wherever it does issue a bill of lading.


49. (3) If the *Tokio Marine* case had been consistently followed since 1970 the advantages of giving similar effect to mercantile clauses in different jurisdictions might have been a reason for following it now. However, although the researches of counsel have not been exhaustive, Professor Sturley’s article suggests that the decision has not been consistently followed; and this impression is reinforced by a bulletin issued by the UK P&I Club (221-11/01). After referring to the reason why US Courts have upheld the Retla Clause, the bulletin continues.

However, there remains a risk to Members using such clauses as, whilst some courts in the United States may have upheld the clause, other U.S. courts and courts in other jurisdictions have not. The only safe means of avoiding claims arising from pre-shipment damage is to ensure that the bill of lading is claused to reflect the apparent order and condition of the goods at the time of loading. Failure to properly describe the condition of the cargo leaves the carrier open to allegations of being a party to a misrepresentation, particularly from third-party purchasers of the cargo who have only contracted to do so based on a bill of lading and who have not been shown any pre-shipment survey by the sellers.

The final sentence is both accurate and pertinent.

**Application to the present case**


> Honest commerce requires that those who put important documents, like bills of lading, into circulation do so only where the bill of lading, as far as they know, represents the true facts.

51. It is clear that all parties considered that the Bills of Lading should have been claused in the form of the Mate’s Receipts up to the point when Mr Kim decided that clean Bills of Lading should be signed and a Letter of Indemnity issued ‘in consideration’ of Owners complying with Nexteel’s request.

52. The KOSAC report and the Mate’s Receipts described the appearance and condition of the cargo; and this was not reasonably and honestly represented by the Bills of
Lading as signed. I do not accept the evidence of Dr Kirby that this cargo was shipped in a normal and unexceptional condition for this type of cargo, or otherwise fell within the RETLA Clause. Those who saw the cargo being loaded plainly did not regard the condition as normal and unexceptional. The sole photograph taken of the cargo which is the subject of this claim, and the photographs of other similar cargo described by the KOSAC surveyor as ‘partly rust stained’, does not support this conclusion.

53. In any event, there is no good reason to assume that the term ‘partly rust stained’ was being used to describe ‘fine powdery rust’, which is the definition for the description of ‘partly rust stained’ in the North of England P&I club publication. I accept Mr Meacock’s view that this cargo should have been (at a minimum) described as ‘rust spotted’ or ‘partly heavily rusted’. The latter is not a description which appears in the North of England P&I Club publication. As already noted, the carriage of this type of cargo is bedevilled by difficulties of observation, definition and interpretation.

54. In addition it is now common ground that that there was no significant deterioration of cargo during the sea passage from South Korea to the US Pacific ports. It is therefore material that none of the numerous surveyors who attended on discharge or soon after (including those appointed on behalf of Owners) considered that the damage to the cargo carried under the Bills of Lading was ‘normal’ or ‘to be expected’. On the contrary, they noted extensive oxidation, described as ‘moderate to severe’ and ‘severely oxidised.’ Cullen Maritime Service Inc, who attended on behalf of the Owners during discharge in October 2008 found ‘heavily rusted condition’ and ‘rust to ‘varied degrees”, including ‘in heavily rusted condition in stow prior to discharge.’ These observations were made in relation to cargos which had been notified to have been shipped in apparent good order and condition.

55. The decision to issue and sign clean Bills of Lading involved false representations by the Owners which were known to be untrue and intended to be relied on. What occurred was not an ‘honest and reasonable non-expert view of the cargo as it appeared,’ but a deceitful calculation made on behalf of the Owners by their authorised agent at the request of the Shippers and to the prejudice of those who would rely on the contents of the Bills of Lading.

Reliance

56. In view of my conclusion that the representation in the Bills of Lading was fraudulent, a presumption arises that the innocent party (in this case the holder of the Bills of Lading, KOP) was influenced by it. It is open to the fraudulent party to rebut this presumption; but, despite the points made by Mr Swaroop, I have concluded that the Owners have failed to do so. Contrary to his submissions, there was nothing ambiguous about the representation in the Bills of Lading.

57. I accept Mr Orban’s evidence that his company relied on the representations in the Bills of Ladings to their detriment by taking up the bills and sending them to their discharge port agents and taking delivery of the cargo pursuant to their terms. It is inherently unlikely that they would have done so if they had been clausd. The position about payment is less certain, in part because of the specific arrangements for giving credit to Nexteel and in part because Mr Orban was not directly involved in the particular transaction, and the person who was had left the company. However on
balance I accept Mr Orban’s evidence that they would not have credited monies against the relevant Nexteel invoices and would have rejected the cargo and the Bills of Lading if they had been aware that the Bills of Lading materially misrepresented the apparent order and condition of the cargo. This was not, in his view, cargo which was either sound or acceptable, nor was it cargo which was simply suffering from minor damage. At the very least KOP would have insisted on another survey of the cargo before accepting it.

**Damage and Damages**

58. The Owners submitted first, that nothing stated in the KOSAC Report affected the value of the cargo, and secondly, no extra costs would have been incurred in reconditioning the cargo.

59. Both of these points depend largely on the view I take of the evidence of the experts: Mr Meacock (for B&H); Dr Kirby (for the Owners). It is sufficient to say that where there was a difference between them, I preferred the evidence of the former. Although he was undoubtedly well-qualified as a metallurgist, Dr Kirby lacked Mr Meacock’s practical experience of carrying and surveying steel cargos. I was also troubled by Dr Kirby’s tendency to take on the role of advocate and to argue points which were not properly points for an expert. I found the way in which he dealt with the appearance of rust on 3 particular photographs to be particularly troubling, and undermined my confidence in his evidence.

60. I therefore accept the evidence of Mr Meacock in relation to KOP’s loss, which is consistent with the views I have set out above.

61. On this basis the calculation of loss is agreed at US$430,996.19, with an overall loss when surveyor’s fees are included of US$458,655.69.

**Title to Sue**

62. The final issue is whether B&H is entitled to recover damages in these proceedings in its own name.

63. B&H advanced its claim on the basis that the cargo was insured by German insurers under a policy governed by German law, issued by B&H ‘for and on behalf of participating underwriters with special authority’. The underwriters paid a claim under the policy in respect of the cargo damage to KOP, and there was an assignment of the cause of action to the underwriters.

64. B&H is a German insurance agent, which has acted on behalf of German insurers since at least 1926 pursuant to various agreements. These have included an Authorisation (2 November 1925) between B&H and Hamburger Allgemeine Versicherungs AC and a General Agency/Pool Contract (1 March 1926), by which a number of insurers agreed to follow the lead of Hamburger Allgemeine Versicherungs AC in respect of B&H’s agency. These agreements were followed by various addenda and letters (including a letter of authority dated 24 March 1984) in which new or substituted insurers were added to the Pool and variations of the agreement with B&H were made. By these agreements, governed by German law, B&H was authorised to issue policies and collect premiums.
The first issue which arises is whether and, if so, to what extent B&H is entitled to bring proceedings in its own name (albeit on behalf of insurers). The answer is provided by the terms of the 2 November 1925 Authorisation which gave authority to B&H (among other things) to ‘settle claims, and conduct proceedings (Prozesse zu führen) ... and to safeguard and to represent the interests of [insurers].’ It was not in significant dispute that B&H was authorised by underwriters to bring proceedings in their own name. B&H adduced evidence from Rene Inhetpanhuis, the Executive Officer and Head of the Marine Insurance department at B&H, of a long standing and settled practice going back to 1925 in which B&H acted for underwriters, bringing claims in its own name on their behalf. I therefore conclude that, as a matter of German substantive law, B&H was entitled to bring proceedings in its own name.

The second issue is whether the claims of B&H (on behalf of insurers) would be admitted by a German court as a matter of German procedural law. However, as Mr Thomas pointed out, procedural matters are for the lex fori, which (in general) declines to apply foreign procedural rules. On this basis he submitted that B&H’s substantive right to bring proceedings had been established and no further issue as to the procedural requirements of German law arises.

I agree. However, since I heard evidence on the procedural issue, I will summarise my conclusions on the matter shortly and (since this is a matter of German Procedural law which has not been decided) diffidently.

By the time of the trial the point of difference on this issue had narrowed to whether the conditions for a Prozesstandschaft (Procedural Agency) under German law had been satisfied; and in particular, whether B&H had a ‘legal interest worthy of protection.’

Each party called an expert on German law: Ralf Matthiae (for B&H) and Christoph Zarth (for the Owners). Both gave helpful evidence on the issue. In summary it was common ground that

i) There was no general test in German law to determine whether an agent had a ‘legal interest worthy of protection.’

ii) One well-established class of Procedural Agent was an Assekuradeur. An Assekuradeur is a Procedural Agent (a) based in Hamburg or Bremen, (b) which refers to itself as Assekuradeur when doing business, and (c) is registered as such.

Mr Matthiae was unable to point to any German judicial decision in which B&H had been recognised as a Procedural Agent and recognised that B&H could not be registered as an Assekuradeur since it was based in Dusseldorf. However, in his view, an analogy could properly be drawn between the position of B&H and the position of an Assekuradeur.

In Mr Zarth’s opinion no such analogy could be drawn, and B&H’s contractual rights did not provide sufficient ‘legal interest worthy of protection’. In his view if Mr Matthiae’s opinion were correct the potential class of Procedural Agent would be so large as to render the concept of Procedural Agent meaningless. It would cover any insurance agent, who received premium and paid claims.
There are four matters of common, or substantially common, ground. First, as already noted, the issue of whether a party has a ‘legal interest worthy of protection’ entitling it to sue in its own name is regarded as a procedural issue as a matter of German law. Secondly, there is no general test for what constitutes a ‘sufficient’ interest for these purposes. Thirdly, the categories of cases where it can be shown are not closed. Fourthly, the status of ‘Procedural Agent’ is not confined to those who are Assekuradeur due to their place of business and registration.

If, as appeared to be the position, B&H had acted on the basis set out in the Pool Contract and agency agreements, by bringing proceedings in their own name on behalf of insurers, it seems likely that they would have acquired ‘an interest worthy of protection’, which was of a different quality to the normal interest of an insurance agent. This would be particularly so, if such status had been explicitly or tacitly accepted by German or other courts. On these hypotheses I understood Mr Zarth to agree that B&H had an ‘interest worthy of protection.’

Mr Zarth’s concern, as I understood it, was that the German Court would draw a stark line between those who were registered as Assekuradeur and those who were not. The former were in anomalous position for historical reasons, but this did not justify extending the anomaly. Mr Zarth’s argument did not, however, meet the objection that neither public registration nor a seat in Bremen and Hamburg is a pre-requisite for being a Procedural Agent.

Although I do not consider that the position to be as clear as Mr Thomas submitted, I accept on balance that the claims of B&H would be admitted on the basis of a Procedural Agency, as a consequence of both their function and the length of time that they have carried out such functions.

**Conclusion**

It follows that the B&H is entitled to Judgment in the principal sum of US$458,655.69.
Charles Debattista

Call: 1978 (Malta)
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Formerly Professor of Commercial Law at the University of Southampton (to 2011)
MA University of Oxford (1983)
BA (Hons) (Juris), University of Oxford, Rhodes Scholar,
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Charles Debattista specialises in all areas of dry shipping law and related aspects of international trade, including:

- Bills of Lading
- Charterparties
- International Sale Contracts, both of commodities and of goods
- Letters of Credit
- International Bank Guarantees

His work falls into five categories:

- He accepts appointments as an arbitrator, whether as party-appointed, chairman of tribunals, or sole Arbitrator.
- He takes instructions to represent parties before arbitral tribunals.
- He takes instructions to give Opinions and advice on any of the above areas.
- Charles provides expert Opinions on English law for foreign courts, among which most recently courts in Switzerland, Panama and the USA.
- Charles has been heavily involved in the drafting of international trade rules, having chaired the drafting groups for Incoterms 2010 and 2000 and having been a consultee for the UCP600.

Arbitration

Charles has been arbitrating since 2002, under LMAA, ICC, GAFTA and FOSFA Rules; he also takes appointments in ad hoc references. Charles has recently become a member of the panel of arbitrators in the Singapore Chamber of Maritime Arbitration.

Since 2002, Charles has either decided or appeared in 150 references, ranging from small values to USD30m. He has had several of his Awards approved on reference up to the Courts, among which most recently:

- **Soufflet Negoce v Bunge** [2011] 1 Lloyd’s Rep 531 on the readiness of the vessel in fob sales.
- **The Darya Radhe** [2009] 2 Lloyd’s Rep 175 on dangerous goods in the carriage of goods by sea.
- **Sanhe Hope v Toepfer** [2008] 1 Lloyds Rep 458 on the measure of damages in sale contracts.

Examples of Recent Arbitrations:

As so much of Charles’s work is involved with confidential arbitrations, it is impossible to give party names as examples of recent work. Recent cases in which he has either arbitrated or represented parties include, however, disputes relating to the following:

- Performance of ship management and ship supply contracts.
Whether a charterparty had been concluded.

Duties regarding dangerous goods.

The effect of a certificate final clause in a sale contract for the sale of a metal commodity.

Liability for demurrage as between seller and buyer.

The effect of force majeure clauses in sale contracts.

The failure to open a letter of credit within the stipulated time.

Examples of Recent Opinions:

Recent Opinions have related to:

- Demurrage when incurred in a war zone.
- The identity of the carrier in cargo claims.
- The effect of undated bills of lading.
- An insurance company’s title to sue a carrier under COGSA 1992.
- Fraud in letters of credit and bank guarantees.
- The duty of disclosure in insurance contracts.
- The effect of the FCA Incoterm on the transfer of risk.
- The effect of “certificate final” clauses in an international sale of bio-fuels.
- The effect of a “shipping tolerance” in an international sale of coal.

Publications:

Charles has written prolifically in his areas of expertise, concentrating in particular on the complex relationships between charterparties and bills of lading and the underlying contracts of sale and letters of credit. His writing has frequently been cited in courts in the UK and abroad, most recently in:

**Profindo Pte Ltd v Abani Trading Pte Ltd** 2013 SGHC 10, Court of Appeal, Singapore


**The Mercini Lady** [2009] 2 Lloyd’s Rep 679 on certificate final clauses.

**The Rafaela S** [2005] 1 Lloyd’s Rep 347 on straight bills of lading.

**The Starsin** [2003] 1 Lloyd’s Rep 371 on the identity of the carrier in cargo claims.

**Uco Bank v Golden Shore Transportation** [2005] SGCA 42, Singapore Court of Appeals, on the endorsement of bills of lading.

Major publications include:

- **Ship Sales and the Singapore Sale Form** [with F. Lorenzon], Lexis-Nexis, 2013
- **Maritime Law**, Sweet and Maxwell, 2011, co-author
- **Transfer of Property in International Sales** (ICC-Paris, 2010), co-author
- **The Rotterdam Rules: A Practical Annotation**, Informa 2009, co-author
- **Halsbury’s Laws of England**, vol. 43(2), Shipping and Navigation, 1997, with Hardy Ivamy
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